

Neutral Citation Number: [2008] EWHC 2005 (TCC)

Case No: HT 05 – 132

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

St Dunstan's House  
133–137 Fetter Lane  
London, EC4A 1HD

Date: 30 July 2008

**Before :**

**HIS HONOUR JUDGE TOULMIN CMG QC**

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**Between :**

**RODRIGUES**

**Claimant**

**– and –**

**SOKAL**

**Defendant**

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**Ashitey Ollennu** (instructed by **Charles Ete & Co Solicitors**) for the **Claimants**  
**Peter Knox QC** and **Thomas Roe** (instructed by **Kapoor & Co**) for the **Defendant**

Hearing dates: 26 June 2008  
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**JUDGMENT**

**His Honour Judge Toulmin CMG QC:**

1. This has been a difficult action for both parties. In the course of the procedure the parties have attempted to resolve their differences without success. At this hearing I have to determine a preliminary issue which I will set out after referring to some of the background of the case.
2. The Claimants own a semi-detached property at No.1 Manor Mount, Forest Hill, London SE23 3PY (No.1). The Defendant bought the other half of the building, No.1 Manor Mount (No.3) in December 2003.
3. The Defendant started to develop No.1 into flats and on 15 May 2004 he served a notice on the Claimants that he intended to exercise various rights under the Party Wall etc Act 1996. Shortly before this, in about March or April 2004, the Claimants allege that, without notice to them, the Defendant started a programme to convert No.3 into four self-contained flats and to erect a coach house in the grounds. The

programme is alleged to have involved very substantial structural works which started before 15 May 2004.

4. The Claimants allege that under sections 2 and 6 of the Party Wall etc Act 1996 they should have been notified in advance of the works. This was not done. They claim that this has important consequences in relation to the preliminary issue because the Defendant is not protected, so they say, by the exclusive Party Wall procedure in respect of acts done before the Party Wall Notice was served.
5. Under the Party Wall procedure each party appointed a surveyor, and those surveyors appointed a third surveyor, Mr Graham North, MRICS.
6. The Claimants issued these proceedings by a claim form dated 12 May 2005, although many of the issues were identical to those which were to be determined under the Party Wall procedure. In these circumstances I stayed these proceedings until the Party Wall process, which turned out to be lengthy, was completed.
7. The last of a series of awards, and the one with which I am most concerned, was made by Mr North on 1 June 2007.
8. After a further period, during which the parties attempted to resolve their differences, on 18 April 2008 I ordered the parties to formulate a preliminary issue in relation to the effect of Mr North's award of 1 June 2007 on these proceedings.
9. The parties, very helpfully, have formulated the issue as follows:

"Whether given the terms of the award of Mr North dated 1 June 2007 under the Party Wall etc Act 1996 ("the award") and the provisions of s.10(16) of that Act, the claimants are entitled to pursue their claims under item Nos. 11(1) and 17, 11(1)(a) and 17, 11(2) and 17, 11(3)(a), 11(6), 11(8), 12(1) and 12(2) of their Scott Schedule dated 1 December 2005."
10. Before addressing the preliminary issue I should set out a little more of the background.
11. In the Particulars of Claim the Claimants allege:

"1. The structural integrity of their property (No.1) has been threatened by the following factors associated with the the Defendant's works"

There follows a list of nine items which relate to very significant structural work, interference with the existing surface water drainage system, the removal of trees and

the subjection of the whole structure to prolonged and sustained vibration in the course of the construction works.

- (2) Significant alleged actual damage to No.1 as set out in paragraph 12 of the Particulars of Claim.
  - (3) In paragraph 13 the Claimants say that the attribution of the damage is a matter for expert evidence and they will rely on expert evidence from Mark Whittingham Associates Ltd.
  - (4) Under paragraph 14 of the Particulars of Claim the Claimants allege that as at the dates of the Particulars of Claim, there was a real and substantial risk of further movement to No.1 leading to further damage and that it would probably be necessary to provide for strengthening to the structure of No.3 so as to reduce the risk of further movement.
12. By paragraph 15 of the Particulars of Claim the Claimants sought a mandatory order that the Defendant carry out necessary remedial works.
13. By paragraph 17 of the Particulars of Claim, the Claimants claim damages for interference with their right of support. This includes a claim for the cost of putting right the structural damage to No.1 and the cost of the re-plastering and redecoration that would follow after the structural work.
14. The Scott Schedule dated 1 October 2005 and the Amended Schedule dated 1 December 2005 gave particulars of these alleged defects.
15. The Defendant claims that the paragraphs in the Scott Schedule, to which I have referred, have already been adjudicated on by Mr North in his report dated 1 June 2007 and that therefore I should find for him on the preliminary issue.
16. Before dealing with the preliminary issue in detail I should set out the rest of the procedure relating to Mr North's award. Initially, the Claimants gave notice that they would appeal to the County Court against the award, as they were entitled to do. Having entered an appeal, they then withdrew it and on 24 August 2007, the County Court made an order that "the appeal be withdrawn".
17. Instead, having received Mr North's award, on 12 August 2007, Mr Rodrigues wrote to Mr North asking him to review the award. Mr North responded on 14 August 2007 by saying that if Mr Trimming, the Claimant's nominated surveyor, wished to write to him with evidence which might persuade him to reconsider his award, he should do so.

18. Mr North did not hear from Mr Trimming, despite the fact that the Claimants had received an expert report from Mr Whittingham dated 18 July 2007 on which they now seek to rely.
19. On 21 November 2007 the Defendants' solicitors wrote to Mr North asking him to say whether he had reached a final award on Party Wall issues. Mr North replied on 22 November 2007 saying that Mr Trimming had not been in touch with him and that "in the circumstances I stand by my award".
20. In June 2008, R J Trimming and Associates purported to serve a 9<sup>th</sup> Addendum to the Party Wall Award. No-one has referred to this document in the proceedings before me, although the document is in the trial bundle. Mr Trimming was not called to give evidence. The 9<sup>th</sup> Addendum was served immediately before this hearing and months after Mr North had made it clear that he had finalised his award. I therefore disregard it.
21. I turn now to Mr North's award, which I must set out in some detail. Mr North said that he had received comprehensive correspondence from the two nominated structural surveyors, Mr Trimming and Mr Varcoe (for the Defendant) and that he inspected No.1 on 24 January 2007 accompanied by his advising structural engineer and by the two structural engineers nominated by the parties (and Mr Trimming's assistant, Mr Lewis).
22. The first paragraph of the award is clear and unequivocal:

"1. I have not been provided with any definitive evidence from Mr Trimming (or Mr Lewis) to suggest that the Building Owner's works have caused the party wall to be unstable. Since my first award dated 10 October 2005 when I stated that I did not consider the cracking reported to me by Mr Trimming had arisen from the Building Owner's works, I have not received evidence from Mr Trimming to suggest that further cracking, sticking of doors or windows etc. has arisen."
23. Mr North went on to note that:

"The Local Authority has not issued a Dangerous Structure Notice in respect of the Party Wall and I am not aware of any other outstanding Notices issued by the Local Authority's Building Control Department to support Mr Trimming's view that the construction at No.3 is suspect."
24. The report went on:

"With regard to the floor ties, I am unable to confirm that all the ties have been installed properly as I have not inspected

them but I am assured by the Building Owner's Surveyor, Mr Varcoe × that he did inspect all of the ties and was satisfied that they were adequate."

25. Mr North went on in later sub-paragraphs of paragraph 1 of his report to say that "In my view the ties which I inspected were adequate", and that "I have no reason to doubt that Mr Varcoe inspected the ties and was satisfied that they are adequate".

"In view of the length of time which has elapsed from when the Building Owner's works have been completed and the lack of evidence concerning any damage or movement to the adjoining Owner's building, unless the adjoining Owner's surveyor can demonstrate that the adjoining Owner's building or structures have been adversely affected by the works at 3 Manor Mount, the adjoining Owner's surveyor's demand for the building at 3 Manor Mount to be modified should cease."

26. For completeness I should refer to paragraph 2 of Mr North's report, although it is not strictly relevant to these preliminary issues. It is clear from this paragraph that adequate support had not, at the time of his award, been provided to the chimney breast and chimney stack to the party wall by means of steel beams. However paragraph 4 of Mr North's award makes it clear that Mr Sokal has completed the underpinning works which he was required to undertake.

### **The Law**

27. The Party Wall etc Act 1996 set up a system for resolving disputes in respect of party walls and excavation and construction in proximity to certain buildings or structures.

28. Section 1(8) provides that:

"Where any dispute arises under this section between the building owner and any adjoining owner or occupier it is to be determined in accordance with section 10."

29. The scheme of the Act is to set out in sections 1–9 the rights and obligations of building owners, adjoining owners and adjoining occupiers. There is no dispute that the works undertaken by the Defendant come within the Act, nor that a dispute has arisen in relation to works encompassed by the Act.

30. I turn to the mechanism in the Act for dispute resolution. Section 10 is concerned with the resolution of such disputes and sections 11–14 with the cost of any relevant work.

31. Section 10(1) to 10(10) of the 1996 Act sets out the machinery for the appointment of surveyors. Section 10(11) empowers either of the surveyors appointed by the parties to call upon the third surveyor to determine the disputed matters and make the necessary award.
32. Section 10(16) provides that the award shall be conclusive and shall not except as provided in this section be questioned in any court.
33. Section 10(17) provides the only method of appeal:

"Either of the parties to a dispute may, within the period of fourteen days, beginning with the day on which an award is made under this section is served on him, appeal to the County Court against the award ×"
34. I come now to the Scott Schedule setting out the particulars which the Defendant is seeking to have struck out. The Defendant's case is that the particulars which he seeks to have struck out are particulars of paragraph 11 of the Particulars of Claim, namely the allegation that the structural integrity of No.1 has been threatened by the following factors associated with the Defendant's works set out in the Scott Schedule and particulars of paragraph 12 of the Particulars of Claim which alleges actual damage.
35. The first two particulars of paragraph 11 relate to the removal of parts of the internal wall and chimney breasts in No.3. The third item relates to the removal of the rear ground window to No.3. The fourth and fifth items relate to the lowering of ground levels around No.3 by approximately 1.8 metres at the rear and by approximately 0.5 metres at the front. The sixth item relates to the alleged excessive notching of floor joints to accommodate internal service ducts, pipes and cables. The eighth item relates to the removal of trees, leading to altered levels of water absorption from the ground.
36. The remaining two sub-paragraphs which the Defendant is seeking to strike out relate to actual damage. The first is the allegation that the party wall leans towards No.3 by about 1 degree from the vertical. The second is the allegation that the flank wall leans in by about 1.6 degrees on the second floor. This allegation was made because the party wall and the flank wall at No.3 are tied to each other. It is said that removal of restraint to the party wall caused this damage to the flank wall.

### **The Defendant's Case**

37. The Defendant contend that each of these items in the Scott schedule is a particular of paragraphs 11 or 12 in the Particulars of Claim that "the structural integrity of No.1 has been threatened" and that "there is actual damage to No.1 as follows ×"

38. The Defendant contends that the Party Wall etc Act renders Mr North's Award conclusive and precludes any further litigation which seeks to question it (other than the right of appeal to the County Court). The Defendant further contends that the relevant particulars relate to complaints that the party wall has been made unstable by the Defendants' works.
39. The Defendant contends that for this court to make such a finding would be inconsistent with Mr North's Award, the effect of which was to find that the Defendant had not caused the party wall to be unstable or affected its structural stability.
40. Equally, the damage alleged in the particulars to paragraph 12(1) and 12(2) of the Particulars of Claim is inconsistent with the Award in relation to paragraph 12(1) because it is contrary to Mr North's finding that the Defendant has not caused any damage to the party wall, and in relation to paragraph 12(2) because the allegation of actual damage to the flank wall alleged to have occurred only as a consequence of the alleged movement to the party wall to which it is tied, is also inconsistent with Mr North's Award.

### **The Claimant's Case**

41. For the Claimant, Mr Ollennu relies principally on a skeleton argument of Mr Gavin Hamilton dated 21 November 1997 and reiterated in the Claimant's note dated 17 April 2008 in which Mr Hamilton makes the following submissions:
  1. A Party Wall Award does not relieve a building owner from liability in nuisance or interference with rights of support for works undertaken before the date of the award - see *Louis v Sadiq* [1997] 1 EGLR 136.
  2. Where the evidence establishes that the Defendant has not in fact complied with an award he cannot claim immunity from tortious liability based upon the supposition that he has complied with the award.
  3. On the issue of causation of damage, a court can properly take a reasonably robust approach where the damage to the adjoining owner's property is of the sort one would expect to result from the building owner's work - see Chadwick LJ in *Road Runner Properties Ltd v Dean* [2004] 1 EGLR 73 at paragraphs 28–29.
42. Mr Ollennu also submits that Mr North's opinions are cautiously expressed and do not amount to conclusive findings. He says that I should take into account Mr Whittingham's evidence. He asks me to consider the matters on the basis that this is a strike-out application, when the task I must perform is to decide preliminary issues. I

must consider whether I can properly take this evidence into account in deciding the preliminary issues and, if I can, whether I should do so.

43. Mr Ollennu also contends that the fact that there has been no challenge to the Award on appeal means that it does not preclude a court in other proceedings deciding the same point in issue on other evidence which goes to that point.
44. Finally, Mr Ollennu contends that

"There is no authority on the scope of s.10(16) that requires it [the court] to restrict any claim based on the circumstances as are outlined by the facts of this particular case."
45. Mr Ollennu cites the case of *Louis v Sadiq* [1997] 1 EGLR 1996. The case involves a consideration of the predecessor to the Party Wall etc Act 1996, namely the London Building Acts (Amendment) Act 1939.
46. The case related to a two-storey end of terrace house in North London owned by Mr Sadiq and his neighbours, Mr and Mrs Louis.
47. In August 1988 Mr Sadiq began what proved to be works of demolition and reconstruction involving the whole house. The garden wall was demolished. Then the rear wall was partly rebuilt. The flank wall was demolished and also partly rebuilt. The front wall was also demolished. This interfered with the party wall as the demolition at the rear had done, and damage was also caused to the structure of Mr and Mrs Louis's house, including cracks in the front wall.
48. On 14 October 1988, after this work had been carried out, Mr and Mrs Louis applied for and obtained an injunction restraining Mr Sadiq from carrying out any works of demolition until he had complied with the 1939 Act. Mr Sadiq was ordered to shore up the front elevation of Mr and Mrs Louis's property at the junction of the party wall and make good any damage which had been caused.
49. The statutory notice was given in December 1988 and the final award under the 1939 Act was made in October 1991.
50. Mr and Mrs Louis claimed damages for the losses which they had suffered. This included damages for being unable to sell the property, in the special circumstances that they planned to move to Guadeloupe in July 1988, but were unable to sell their property. When they were eventually able to sell the property, the property market had slumped and the building costs in Guadeloupe had risen dramatically.
51. On advice, Mr and Mrs Louis abandoned their claim for diminution of the value of the London property but maintained claims for special damage in relation to



mortgage interest which they had to pay from the date when the property was sold to the date of trial. They also claimed special damages for the cost of building in Guadeloupe and general damages for nuisance. The latter claim was not the subject of the appeal.

52. The County Court judge found for the Claimants. Mr Sadiq appealed on the ground that he had no liability at common law because these rights were excluded by the 1939 Act.
53. Evans LJ gave the lead judgment. He endorsed McCardie J's resolution of the tension between the common law and statute in *Selby v Whitbread & Co* [1917] 1 KB 735 at 752, where McCardie J said that:

"An examination of the code shows that common law rights are dealt with in a revolutionary manner. The two sets of rights × are quite inconsistent with one another. The plaintiff's common law rights are subject to the defendant's statutory rights. A new series of respective obligations have been introduced, the common law was seen to be insufficient for the adjustment of modern complex conditions. Hence I think the Act × is not in addition to but in substitution for the common law for matters which fall within the Act. It is a governing and exhaustive code and the common law is, by implication, repealed."

54. In *Louis v Sadiq* Evans LJ said in relation to the scheme in the 1939 Act:

"So the statutory scheme is clear. The building owner has certain express rights but these can only be exercised (i) with the adjoining owner's written consent or (ii) in accordance with a valid award by the surveyor or surveyors appointed under s.55."

55. After reviewing the previous authorities, Evans LJ said this:

"The adjoining owner's common law rights are supplanted when the statute is invoked which can have the effect of safeguarding the building owner from common law liabilities when he complies with the statutory procedures × But if he commits an actionable nuisance without giving notice and without obtaining consent he cannot rely upon a statutory defence under procedures with which *ex hypothesi* he has failed to comply. If he does then give notice he will in due course acquire statutory authority for whatever works are approved or agreed but in my judgment this does not relieve him from liability for the continuing nuisance which he has unlawfully committed until such time as, and to the extent that such authority is obtained. "

56. Later in his judgment Evans LJ said that in the circumstances of that case:

"So it cannot be said in my judgment that the works which created the nuisance were subsequently authorised whether by agreement or by surveyors under the statutory procedure."

57. My understanding of the law is that until such time as the Party Wall etc Act 1996 is invoked and either the building owner has obtained consent or acquires a statutory authority under the s.10 procedure, the building owner cannot rely upon a statutory defence under procedures with which "*ex hypothesi*" he has failed to comply. If the building owner subsequently obtains authority for building works which were started without authority, that authority abates the common law rights from the time of the subsequent consent or when the Party Wall etc Act procedure was successfully invoked. If the works were never or would never subsequently have been authorised, the common law rights continue.

58. I now repeat the preliminary issue which I have to decide, which is whether, given the terms of Mr North's Award dated 1 June 2007 and the provisions of s.10(16) of the Act, the Claimants are entitled to pursue various claims set out in the Scott Schedule dated 1 December 2005.

59. S.10(16) provides that in relation to the matters referred, the award shall be conclusive. This means that the award is conclusive in relation to the findings set out in the award for the period from 15 May 2004.

60. So far as is material, Mr North found:

(1) the Defendant has not caused damage to the party wall, either before or after the commencement of the Party Wall procedure;

(2) the Defendant has not at any time caused the party wall to be unstable or affected its structural stability;

(3) the Defendant has not at any time caused cracking or sticking of doors or windows;

(4) the Defendant has installed adequate ties;

(5) the Claimants have no basis for demanding of the Defendant that he should modify the building in No.3.

61. In relation to the contentions of the Claimant, I find first that there was nothing tentative about these findings, at least after 22 November 2007 when they were

confirmed in writing. The argument that, because there has been no challenge to the award by way of appeal to the Court of Appeal, means that other courts can decide the same point on other evidence is simply unsustainable. S.10(17) of the 1996 Act is explicit on this point.

62. I also find that Mr North's findings relate to works carried on before 15 May 2004 as well as works carried on after that date.
63. In *Louis v Sadiq* the Court of Appeal held that the works carried out in that case could never have been approved retrospectively. The works in this case were approved. The common law rights of the Claimants were therefore abated from 15 May 2004.
64. The Claimants argue that this may be conclusive from 15 May 2004, but it is not conclusive in relation to works carried out before that date.
65. Mr North's findings relate to building works carried out both before and after the referral date, since his conclusions relate to all the works which were carried out. These findings were made after the most extensive investigation following the procedure laid down by the Act. Mr Ollennu says that these findings are not conclusive in relation to work carried out before 15 May 2007. In my view, they are. The Party Wall etc Act procedure is intended to supersede the common law procedure. Mr North's Award includes not only the overall findings but also the facts which he finds insofar as they relate to issues common to the time both before and after the procedure was invoked.
66. There may be a separate issue in relation to temporary disruption which may have occurred between the time when the nuisance was created and the commencement of the Party Wall procedure.
67. If I am wrong about my main finding that Mr North's award is conclusive, I am in the position where, on the hearing of a preliminary issue, Mr Whittingham has not been called to give evidence or be cross-examined.
68. I have been referred nevertheless to Mr Whittingham's report prepared on behalf of Mr and Mrs Rodrigues. It is dated 18 July 2007, with an addendum dated 22 May 2008. The report relies on evidence from Mr and Mrs Rodrigues as to damage which is alleged to have occurred before 15 May 2004. Again, neither Mr nor Mrs Rodrigues have given oral evidence before me.
69. Mr Whittingham's schedule to his report relates to an earlier report and to damage as at 1 September 2004. These matters must have been put before Mr North by Mr Trimming, the Rodrigues's surveyor. The 2007 report sets out some alleged cracking between September 2004 and the date of the report in July 2007. Some of the

problems identified by Mr Whittingham relate to the need for underpinning works which Mr Sokal was required to, and did, undertake. Some of the matters set out in Mr Whittingham's main report relate to other matters which are not the subject of the preliminary issue.

70. I note that in Mr North's third Award of 1 June 2007 he noted that he had not been provided with any evidence to suggest that the building owner's work had caused the party wall to be unstable or that the structural stability of the party wall had been affected. Mr Whittingham's report could have been considered by Mr North if Mr Trimming had referred it to Mr North at a time when Mr North invited Mr Trimming to provide him with evidence which might persuade him to reconsider his Award. This did not happen. In these circumstances, even if I have to take Mr Whittingham's report into account, (contrary to my primary finding) I reject his conclusions insofar as they conflict with the findings of Mr North's award.
71. I gratefully adopt the findings in Mr North's award, which I have already set out.
72. I therefore find for the Defendant on the preliminary issue and conclude that the Claimants are not entitled to pursue their claims under items Nos. 11(1) and (17), 11(1)(a) and 17, 11(2) and 17, 11(3), 11(3)(a), 11(6) and 11(8). These are the particulars of the allegation of paragraph 11 of the Particulars of Claim that the "structural integrity of No.1 has been threatened". Similarly, I conclude that the claims in the Scott schedule relating to items 12(1) and 12(2) cannot be pursued. These alleged actual damage when Mr North found none.