Case No: C20CL033

IN THE COUNTY COURT AT CENTRAL LONDON

THOMAS MORE BUILDING
RCJ
STRAND
WC2A 2LL

Date: 19/08/2016

Before :

HIS HONOUR JUDGE HAND QC

- -

Between :

SAI Ventures Limited	**Claimant**
- and -	
Compar Properties Limited	**Defendant**

- -

Howard Smith of counsel (instructed by **Carter Lemons Cameron Solicitors**) for the **Claimant**

Nicholas Isaac of counsel (instructed under the direct public access scheme) for the **Defendant**

Hearing dates: 22nd June 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HAND QC

HHJ HAND QC:

Introduction

1. This is an appeal pursuant to section 10(17) of the **Party Wall etc. Act 1996** ("the Act"). The Respondent, Compar Properties Ltd, is the Building Owner ("BO") of 41 Pitfield Street, Shoreditch, London and has been represented by Mr Isaac of counsel. The Appellant, SAI Ventures Ltd, is the Adjoining Owner ("AO") of 43 Pitfield Street, Shoreditch and has been represented by Mr Smith of counsel. The fundamental issue is when, and in what circumstances, a notice under section 3(1) of the Act and/or section 6(5) of the Act must be given by the BO to the AO? Because of developments since these proceedings were commenced this issue is, however, effectively moot and the real practical significance of the appeal to the parties is as to costs.

The factual history

2. I understand that in respect of the current development of 41 Pitfield Street there has been a previous action and before then there may have been earlier difficulties when 43 Pitfield Street was being developed. I know almost nothing of this previous history and therefore it would be wrong to speculate as to whether it accounts for the bilateral lack of co-operation which seems to me to have characterised the events with which I am concerned.

3. For my purposes the factual background to this appeal starts with a notice given by the BO pursuant to section 3(1) of the Act on 2 July 2015. That notice, which is at page 38 of the appeal bundle, describes in six numbered paragraphs the works which the BO proposes to carry out in relation to the party wall. Mr Smith pointed out that neither in that description nor in the various drawings, which were appended to the notice, was any mention made of either underpinning the party wall or extending it downwards beneath its present footings. The proposed structural plan at page 39 identified that the basement area was "*TBC following investigation ground floor slab*".

4. A second notice, this time pursuant to section 6(5) of the Act, was given by the BO on 1 October 2015 (see page 47 of the appeal bundle). The notice states that the BO does not intend "*… TO UNDERPIN OR OTHERWISE STRENGTHEN IN ORDER TO SAFEGUARD THE FOUNDATIONS OF YOUR BUILDING*" and the work is described as being:

> "**To excavate for and construct a contiguous bored pile wall for a new basement; the contiguous bored piles to be to a depth of at least 4.5m below existing ground floor level.**"

The accompanying proposed Basement Plan (see page 48 of the appeal bundle), repeated the same phraseology of the earlier plan of "*TBC following investigation ground floor slab*" in relation to the basement and under the heading "Basement Works Methodology" stated:

> "**the front building already has an existing basement area, therefore the basement works methodology is applicable to the rear building only.**"

So what was now being proposed was an extended basement area. The plan at the top of the same page and the section A – A drawn on the same page show the new basement walls inset

a distance of just under a metre[1] from the face of the party wall on the AO's side. In other words, they do not form a downward extension of the existing party wall.

5. But by 16 December 2015, the date of the "*Typical Cross Section*" at page 79 of the appeal bundle, a different scheme was being proposed. This new drawing shows new basement walls supported on "*mass concrete party wall foundations*" and comprising an "*RC retaining wall*", which extends downwards below the existing party wall, which is connected to it by "*75mm min. 1:3 hand-damp cement, dry packed well-rammed between underside of existing foundation and top of RC retaining wall*". In other words the proposal was that the existing party wall would now sit on top of a reinforced concrete retaining wall, which itself stood on the "*mass concrete party wall foundations*".

6. This drawing was sent by the Respondent's surveyor, Mr Richard Staig, to the Appellant's surveyor, Mr Michael Wallis, as an attachment to an e-mail sent at 10.26 a.m. on 29 December 2015 (see page 102 of the appeal bundle). The pertinent part of the e-mail reads as follows:

> "**In accordance with the directions of the Third Surveyor, please find attached the revised proposal for the construction of a reinforced concrete wall founded on a mass concrete foundation beneath the existing party wall, for your consideration.**"

Mr Wallis replied by e-mail at 11.02 a.m. (see page 103 of the appeal bundle); the second sentence of the reply is of considerable importance to Mr Isaac's argument and so I will quote it in full:

> "**Although you have previously confirmed the building owner will meet the reasonable cost of a checking engineer in view of your e-mail can you again kindly confirm again that the building owner will meet the fees of Mr Martin Redston. Once I have this confirmation I will forward the proposed details of the foundation works for his comments.**"

This meeting of the fees was confirmed by Mr Staig in an e-mail timed at 11.59 a.m. the same day (see page 104 of the appeal bundle). At 6.31 p.m. Mr Wallis wrote to his "*checking engineer*" (see page 105 of the appeal bundle) asking for his "*comments on the scheme in respect to possible effects on the adjoining property.*" The engineer replied at 12.52 p.m. on 31 December 2015 that he would go through the details early the following week (see page 106 of the appeal bundle).

7. Before he had done so, however, Mr Wallis sent him a further e-mail on 4 January 2016 at 8.24 a.m. setting out in 11 numbered paragraphs what he described as "*one or two comments*" (see page 107 of the appeal bundle). In that e-mail at paragraph 1 he used the expression "*underpinning*", something that he repeated in an e-mail on 8 January 2016 to the AO's letting agent (see page 110 of the appeal bundle) describing the proposed works as "*a new scheme to underpin the party wall*". There was correspondence between the two surveyors over the next 48 hours but it dealt with matters not relevant to this appeal, save that it serves to illustrate the somewhat strained relationship between them. The next development of significance was an e-mail from Mr Wallis to Mr Staig timed at 6.59 p.m. on 10 January 2016 (see page 122 of the

[1] I have estimated this in a fairly crude fashion from the drawing, which I should mention also reveals that the party walls are somewhat irregular in alignment, something confirmed by the later drawing at page 79 of the appeal bundle.

appeal bundle). This too deals largely with matters not germane to the present proceedings but it ends with the pertinent question:

> "**Can you please confirm if it is your intention to serve party structure notices to cover these proposed works.**"

8. Mr Staig replied just over an hour later in an e-mail timed at 8.04 p.m. (see page 123 of the appeal bundle). In the second paragraph he complained that he had not yet received any comment on the "*structural proposals*" and in the last sentence, presumably in answer to the query set out above, he said:

> "**A Party Structure Notice was issued 25 May, 2015; are you suggesting this is invalid**?"

Irrespective as to whether that date is accurate[2], it is clear Mr Staig was asserting that there was no need for any further Notice and the following day (11 January) in an e-mail timed at 12.11 p.m. (see page 125 of the appeal bundle) he asserted this again in the following terms:

> "**There are 2nr criteria under which Section 6 Notices need to be served; Notice under Section 6 has been served and the implications of the foundation works are being considered as a whole, not just those elements within 3 m.**
>
> **The Party Structure Notice served is a valid document.**"

A little later that day Mr Wallis clarified his position by saying "*it may be for the courts to decide*" and that he was not sure he had "*received the notice confirming the intention to raise the party wall or to raise it downwards which may be applicable in this instance*" (see page 127 of the appeal bundle). Mr Staig responded in an e-mail timed at 10.35 a.m. on 12 January 2016 (see page 128 of the appeal bundle):

> "**A party Structure Notice has been served and this amendment to the works is design development. I will get legal opinion as to whether raising has to be specifically included or is the initial service and dispute sufficient.**"

If there had been a tentative note in the emails from Mr Wallis up to this point it had disappeared by 20 January 2016 in an e-mail timed at 5.59 p.m. (see page 130 of the appeal bundle) when he said:

> "**… hopefully once the scheme is agreed and we have received the notices we can move forward to agree an award.**"

9. Mr Staig's reaction was to write to the third surveyor, Mr Alistair Redler, asking him to enter into an Award with Mr Staig pursuant to section 10(11) of the Act (see page 133 of the appeal bundle). The reaction of Mr Wallis was to write to Mr Redler on 2 February, 2016 by e-mail timed at 5.25 p.m. informing him that he did not believe there was any dispute in existence that could justify the involvement of the third surveyor, that notices had not been

[2] On 11 January 2016 in an e-mail timed at 10.29 a.m. Mr Wallis took issue with the date.

served and that he was more than willing to agree an award once notices were served and he had been provided with the necessary information (see page 144 of the appeal bundle).

10. As is apparent from an e-mail that he sent to Mr Redler at 6.23 p.m. the same day (see page 145 of the appeal bundle) Mr Staig believed that Mr Wallis was dragging his feet deliberately against the background that works had been due to commence on 1 February 2016 and on 4 February 2016 in an e-mail timed at 8.54 a.m. Mr Staig submitted a draft award to the Third Surveyor, Mr Redler (see page 155 of the appeal bundle). This e-mail was copied to Mr Wallis. He replied in an e-mail timed at 3.01 p.m. the same day insisting on what he referred to as "*adhering to the party wall act*" and complaining that "*no notice has been served for the underpinning works so this must be omitted from any award*" (see page 161 of the appeal bundle). Four days later on 8 February 2016 in the e-mail timed at 1.37 p.m. (see page 171 of the appeal bundle) he said the following:

> "**… neither the draft award you appear to be preparing with Mr Redler nor this award appears to specify the exact extent of the works, for instance it makes reference to your notice served under section 6(1) but I do not believe this is still applicable and your notice under section 2 only relates to cutting pockets into the party wall and cutting away projections. If this award relates to the underpinning obviously we cannot agree any award until notices have been served. Although I am still awaiting existing any proposed drawings I note on the engineers drawings you appear to be raising the party wall so similarly a notice would be required for these works.**"

Later that day at 9.47 p.m. (see page 175 of the appeal bundle) he sent another e-mail to Mr Staig and Mr Redler suggesting that the disagreement could be resolved by the service of notices "*under section 2 to cover the proposed works, i.e. underpinning the party wall and raising party wall both up and down*", that the awards could be signed shortly after his return from holiday[3] but that failure to agree would mean the parties would "*be tied up with legal argument for weeks on end, the work will not be able to start for months, and the legal costs will be enormous and disproportionate to the costs I am suggesting today.*"

The issues before the court and the scope of the Appeal

11. The parties did not agree and on 25 February 2016 Mr Staig and Mr Redler signed what has been called at this hearing the "Principal Award" (see pages 74 to 95 of the appeal bundle) as well as a second award, which has been called at this hearing the Associate Award" (see pages 96 to 99 of the appeal bundle). To all intents and purposes the Associate Award entitles the BO to carry out the works described in the Principal Award. The issue on Ground 1 is whether what Mr Staig calls "*design development*" requires a further Notice to be issued?

12. The result of the two awards has been this appeal. But as I said above at paragraph 2 of this judgment the dispute itself has been compromised and I believe the consequence of that compromise has been that the work has proceeded. Unfortunately the costs of these proceedings were not the subject of the compromise agreement and so it remains necessary for me to decide the issues on this appeal as the first step to resolving the dispute between the parties as to who should bear the cost.

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[3] He had given notice that he was taking a holiday from 10 February, 2016 onwards; I am not sure as to the period of the proposed holiday (see pages 133 and 134A of the appeal bundle)

13. Before the dispute was compromised the appeal was the subject of case management by His Honour Judge Bailey, who gave directions on 31 May 2016 (see page 33 to 35 of the appeal bundle). He ordered that the first ground of the appeal, namely whether, in the absence of new notices having been served, the Act gave Mr Staig and Mr Redler jurisdiction to make the two awards, be dealt with as a preliminary issue. Accordingly, Ground 1 was listed to be heard as a preliminary point with a time estimate of one day At the hearing before me the parties were hopeful that there might be time for the court to deal with Ground 2, namely that the making of the two awards was attended by "*a serious irregularity*" because the AO had not been given any, or any sufficient, opportunity to make representations about the two awards as a result of its surveyor, Mr Wallis, having been, in effect, excluded from the detailed correspondence between Mr Staig and the engineer providing him with advice. As it turned out, time did not permit the development of argument relating to Ground 2. I was given to understand by Mr Isaac that the decision of the court on Ground 1 might mean the court would not have to decide Ground 2. Also, as a result of the compromise, Ground 3 has been rendered otiose and it is common ground, therefore, that I need not address it at any stage.

The Appellant's submissions

14. Mr Smith's submissions were that the BO had been obliged to serve both a section 3 and a section 6 notice in respect of the proposed new works. There was no disagreement about the previous section 3 and section 6 notices and therefore the two awards made on 25 February 2016 did not relate to any dispute under the Act with the result that Mr Staig and Mr Redler had no power under the Act to make the two purported awards in February 2016.

15. By section 2(2)(a) of the Act the BO had a right "*…to underpin, thicken or raise a party structure…*" but before doing so was obliged by section 3(1) of the Act to "*… serve on any adjoining owner a notice…referred to as a "party structure notice"…*" and by section 3(1)(b) the parties structure notice must state "*the nature and the particulars of the proposed work*". Section 4 provides a counter notice procedure. These provisions are all couched in mandatory terms. Moreover unless the AO indicates consent to the BO's structure notice and/or the BO indicates consent to the AO's counter notice, by section 5 of the Act a dispute is deemed to arise between the parties. Mr Smith submitted the structure of the statute emphasises that a dispute only arises out of the terms of a party structure notice or a counter notice.

16. A similar but not identical statutory framework exists in relation to section 6 of the Act. This applies where a BO proposes excavation or building works within 3 metres "*from a part of the building or structure of an adjoining owner*" and also in other more complicated circumstances which it is not necessary for me to discuss in the context of the present appeal. Section 6(3) provides that a BO may:

> "**…underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner so far as may be necessary.**"

and will be obliged to do so if the AO requires it. Section 6(5) of the Act provides that the BO must serve:

> **"… a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundation of the building or structure of the adjoining owner.**"

and that notice must be accompanied by plans and drawings giving details of the size and depth of excavations (see section 6(6) of the Act). When the AO has been served with a notice,

and unless a notice indicating consent on the part of the AO is served within 14 days of the service of the section 6(5) notice, a dispute is deemed to have arisen (see section 6(7) of the Act).

17. Mr Smith submitted that neither the section 3 notice served in July 2015 nor the section 6 notice served in October 2015 made any reference to underpinning, excavation or extension of the existing basement. He referred me to a decision made by Her Honour Judge Hazel Marshall QC in the Central London County Court, **Manu v Euroview Estates Ltd** [2008] 1EGLR 165. In that case the learned judge decided underpinning a party wall structure fell within the provisions of section 2(2)(a) and section 3 of the Act (see paragraph 96 of the judgment) and other work proposed in that case fell within section 6. Mr Smith accepted the case of **Manu** was fact specific but submitted precisely the same analysis applied in this case. The underpinning of the party wall was work permitted by section 2 and required a notice under section 3. The other work associated with the extension of the basement was work to which section 6 applied and required a notice under section 6(5).

18. He rejected the argument put forward on behalf of the Respondent by Mr Isaac that the parties were protected by the fact that surveyors had been appointed as a result of the notices given in July 2015 and October 2015 and that further notices and further appointments were totally unnecessary. He also rejected the alternative argument put forward by Mr Isaac that the conduct of Mr Wallis in January and February 2016 amounted to a waiver and/or an estoppel.

19. As to the former, he submitted that there was no room for any gloss on the statutory scheme. Its requirements were clear. Where there was a new scheme or a significant change to an old scheme then the Act required a new notice. The Respondent's argument sought to replace the statutory scheme with a pragmatic approach based on the non-statutory and undefined concept of "*design development*" but the fact that there was already a surveyor appointed did not provide the protection to the AO, which Mr Isaac relied upon. If there was no notice giving particulars of the works then the AO was not protected at all even though a surveyor had been appointed as a result of the previous notice. The case of **Manu** demonstrated that the Court supports a strict approach. There, although the notice showed the size of the structure, it did not specify the depth of excavation and at paragraph 105 of her judgment HHJ Marshall said the following:

> "**The purpose of section 6(6) is to give an adjoining owner notice of excavation works that might affect the stability of its building and to enable the adjoining owner to decide whether it sees a risk in this regard that means that it should invoke its rights under section 6(3). The notice is therefore required to convey necessary information which is the "site and depth of any excavation", sufficiently to enable that assessment to be made.**"

Moreover at paragraph 108 she rejected the kind of pragmatic approach being advocated by Mr Isaac. In **Manu** it was being argued that although the depth of excavation had not been given it was a simple matter to scale it from the drawing. HHJ Marshall said this about practical simplicity:

> "**However, the fact that it was easy, as a practical matter, to supply the deficiencies in the notice does not mean that the notice can be regarded as being valid; it just means that the recipients have been helpful and cooperative and had not sought to take the point.**"

20. Mr Smith also relied on the judgment of Brightman J, as he then was, in **Gyle-Thompson v Wall Street (Properties) Ltd** [1974] 1 WLR 123, submitting that this authority also supported a strict interpretation approach to the Act. The Act under consideration in **Gyle-Thompson** was the **London Building Acts (Amendment) Act 1939** but it was accepted by Mr Isaac that the comments of Brightman J apply also to the 1996 Act. At page 130E-H the learned judge made the following comments (probably obiter dictum):

> "**My conclusions on the above two issues are sufficient to dispose of this case. There are, however, certain matters of procedure which were very fully argued before me, and I think it is desirable that I should touch briefly upon them. The procedural objection is not always meritorious. One's instinctive approach to such an objection tends to be unsympathetic. Mr Hart, for the plaintiffs, though voicing these procedural objections, made it plain that he did not place them in the forefront of this case. However, I take the view that the procedural objections in the present case do not deserve to be diffidently approached, for this reason. Section 46 et seq of the Act of 1939 give a building owner a statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests. The position of the adjoining owner whose proprietary rights are being compulsorily affected, is intended to be safeguarded by the surveyors appointed pursuant to the procedure laid down by the Act. The surveyors are in a quasi-judicial position with statutory powers and responsibilities. It therefore seems to me important that the steps laid down by the Act should be scrupulously followed throughout and shortcuts are not desirable. I am not concerned with any question of the extent to which an irregularity is capable of being waived or cured by estoppel.**"

21. Finally, Mr Smith relied upon the opinion of the authors set out in paragraph 13.3 of Chapter 13 of the third edition of **Party Walls Law and Practice** by Bickford-Smith and Sydenham as to the amendment of notices under the Act. There the following appears:

> "**The Act makes no provision for amendment of notices. It is considered that no amendment is possible, unless both parties concur in treating the amendment as included in the original notice. But the surveyors ought to give notices a reasonably liberal construction, so as to avoid delay and expense arising from the need to serve fresh notices.**"

22. As to the alternative point, namely waiver and/or estoppel, Mr Smith accepted that a further passage from the judgment in the case of **Manu** comprising paragraphs 112 to 118 was of significance. I do not propose to set out all seven paragraphs and I hope the following summary suffices.

23. At paragraph 113 HHJ Marshall concluded that a party wall surveyor has mixed functions, partly as an independent expert and partly as the agent of the appointing owner. In the latter capacity it was possible for the surveyor to waive procedural formalities on behalf of the appointing owner and/or to create an estoppel preventing the appointing owner from subsequently asserting procedural irregularity. On the facts of **Manu** she concluded that the surveyor's conduct did amount to a waiver for three reasons.

24. Firstly, the Act provided a speedy process of dispute resolution so as to enable "*urgent building works to be done*" and so (see paragraph 114):

> "**It will therefore not take much for a party to be taken to have waived the right to rely upon some deficiency in the notice**";

secondly, not taking a point immediately but keeping it back for some five months "*when it could be deployed more effectively to bring pressure in his negotiations*" was "*not an attitude that a reasonable party on the other side would expect to encounter*" (see paragraph 115); thirdly, "*the natural reaction of most professionals*" would be "*to find out missing information… and waive the original defect by getting on with the job*" (see paragraph 116). All of this, however, (see paragraph 118):

> "**…did not mean that professionals can afford to relax their standards when drafting notices in accordance with the 1996 Act requirements. The notice in this case was, in my judgment, inadequate. The mere fact that professionals in this area are usually willing to be practical and cure the problems of a deficient notice by asking for more information does not mean that the statutory requirements of a valid notice are to be interpreted as being less exacting than they are. Professionals preparing party wall notices must be duly careful and thorough so as to provide the information that the 1996 Act lays down, and the fact that, in practice, such points may not be taken is no excuse for being lax about that.**"

25. Mr Smith acknowledged that the above passage from the judgment in **Manu** does provide support for the concept of waiver and/or estoppel in relation to deficiencies in a 1996 Act notice but he submitted that it could not help the Respondent in this case. The factual matrix here was entirely different. **Manu** deals with deficiency in a notice whereas the instant case raises the question of whether a new notice should be served and in relation to that aspect of his functions Mr Wallis was not acting as an agent for the AO but as an independent expert.

26. Moreover, it was important to understand the principle upon which that passage in **Manu** was founded. In his submission this was more likely an equitable waiver than a common-law waiver but this taxonomy did not matter because the difference between the two concepts was of no real practical significance in the instant case. Consideration of paragraphs 4 – 082 to 4 – 105 of the latest edition of **Chitty on Contract** established that for there to be a waiver there would have to be a clear and unequivocal promise. This can arise out of the conduct of a party but it cannot arise out of mere inactivity. Such a promise has to be relied upon by the other party, it has to be inequitable to go back on it and it is likely to suspensive rather than extinctive.

27. So, whether one looked at it as a matter of principle or considered it on the facts of the instant case, there was no waiver and/or estoppel arising out of the correspondence passing between Mr Staig, Mr Wallis and Mr Redler from 29 December 2015 to 10 February 2016. This was so even if Mr Smith was wrong to suggest that Mr Wallis was acting as an independent expert and, in fact, had been acting as the agent of the AO. The period under consideration included the Christmas and New Year holiday and the point had been taken by 10 January 2016. Therefore, the delay in question was about 12 days. In that period there was nothing that could be characterised as a clear and unequivocal representation. Mr Wallis has been consistent in his attitude throughout and had never committed the AO to anything.

28. In summary, because no notices have been served dealing with the new design there could be no dispute within the meaning of sections 10(1) and 10(10) of the Act and so no basis for making any award in February 2016. Furthermore, the purported awards made in February 2016 were declared to have been made pursuant to section 10(11) of the Act and as such were obviously defective. The awards had clearly been made jointly by Mr Staig and the third surveyor, Mr Redler. They had plainly not been made by Mr Redller alone, as a result of him being called upon "*determine the disputed matters*" and to "*make the necessary award*" (see section 10(11) of the Act).

The Respondent's submissions

29. Mr Isaac submitted that the Act should be interpreted in a way that enabled the parties to get on with building works. Therefore, it should not be interpreted in a way that allowed for obstruction and delay. He accepted that section 7(5) of the Act prevented deviation from "*plans, sections and particulars*" but these were "*such… as may be agreed between the owners (or surveyors acting on their behalf) or in the event of dispute determined in accordance with section 10.*" But, that apart there must be room for the parties to change plans etc. and if they could not agree about proposed changes then an award had to be made. This was exactly what has happened here. Mr Smith's analysis was a recipe for delay and an enemy to the efficient progress of building works and, thus, the antithesis of the intention of the Act.

30. Variations after a valid notice has been served are a recurrent, if not inevitable, feature of building works. In the instant case it was not, and could not be, argued that the notices served in July and October 2015 were invalid. What was proposed initially in July amounted to a relatively limited amount of building work utilising an existing basement. In October the proposal was modified to include a relatively modest extension of the existing basement. All that was proposed by Mr Staig's e-mail of 29 December 2015 and the attached drawings was a different and arguably better solution to the structural integrity of the extension with a small increase in floor area. This was properly called a "*design development*" because it was a change in the design. If every time a change in design occurred, the law required a further notice to be issued then the Act would cease to be a practical solution operated by practical men on a daily basis and would become an unnecessarily and unduly formalistic process.

31. Mr Isaac accepted that the new design was different to the old design but if such a difference was unacceptable then the AO was protected by the ability to disagree and require an award to be made pursuant to section 10 of the Act. This is exactly what had happened in the instant case.

32. Alternatively, Mr Isaac argued for a rigorous doctrine of waiver in the context of the Act. He submitted this approach was supported by the authority of HHJ Marshall's decision in **Manu**. The kind of prevarication, which Mr Wallis had indulged in this case, should not be sanctioned by the Court. If objection is to be taken it must be taken straight away and in his response timed at 11.02 a.m. on 29 December 2015 Mr Wallis had not taken issue with this new design nor had he called then for a notice. He has asked only for confirmation that the AO would pay the costs of his engineer. This alone, Mr Isaac submitted, amounted to waiver and, if consideration was necessary, when the AO having subsequently agreed to pay the fees, this amounted to consideration.

33. Moreover, by sending the documents to his checking engineer Mr Wallis must be taken to have accepted that henceforth the matter would be dealt with by an award made under section 10, if the parties could not reach agreement about the proposed new design. This was an implied representation upon which the AO had relied and this remained the position until the e-mail of 10 January 2016 from Mr Wallis asked for confirmation from the AO that a notice would be served. But, in the light of the previous position adopted by Mr Wallis, that e-mail should be construed as amounting only to a statement about the formality of serving a notice and should not be understood as enabling the BO to stop the works from proceeding pending the service of the notice. There had been a waiver and accordingly it was unreasonable for the BO to seek to change position later.

34. It was not the Appellant's case that the formal requirements of a notice, for instance as to the length of the notice period, could be modified by agreement and cooperation between the parties. Mr Wallis was insisting on full compliance. His e-mail of 8 February 2016 imposed no less than seven conditions and was sent on the basis that he was about to depart for two weeks' holiday with the result that the project would be delayed for eight weeks. This was the antithesis of the kind of cooperation between surveyors envisaged by HHJ Marshall in **Manu**.

35. As to the reference in the awards to section 10(11) of the Act, that was plainly an error in the recitals to the awards. But also it was clearly a typographical error to which the concept of "*correction of mistakes by construction*" plainly applied (see paragraphs 22 to 25 of the opinion of Lord Hoffmann in **Chartbrook Ltd v Persimmon Homes Ltd** [2009] UKHL 38; [2009] 1 AC 1101 at 1114B – H). Here it was "*clear that something has gone wrong with the language*" and that it was "*clear what a reasonable person would have understood the parties to have meant*" (see paragraph 25 of **Chartbrook**).

Discussion and conclusion

36. So far as this last point is concerned, I accept the submission made by Mr Isaac. This was an award made by two surveyors in combination and not an award made by a third surveyor as a result of reference to him by the other surveyors or the parties. Accordingly the award was clearly made pursuant to section 10(10) of the Act and the reference to section 10(11) in the relevant recital is plainly erroneous and should be construed as a reference to section 10(10).

37. But, attractively though they were put, I cannot accept either his main submission on statutory interpretation or his alternative submission on waiver. His answer to the question of statutory interpretation, namely as to whether a notice is required in the context of a statute, which HHJ Marshall in **Manu** regarded as having the purpose of facilitating "*getting on with the job*", has the merit of pragmatism but to my mind it ignores what the learned judge herself says about the statute at paragraph 118 of her judgment (see above at paragraph 25 of this judgment).

38. I would not wish to reach a conclusion which inhibited the need for the statute to be applied with common sense and with the purpose of enabling the parties to resolve disputes quickly, thus facilitating "*getting on with the job*" but, as it seems to me, the learned judge recognised that before considering the purpose of the statute one must interpret the language according to its meaning. I take the view that the new design put forward in December 2015 clearly involved underpinning the party wall, something which the BO had the right to do pursuant to section 2(2) of the Act. He had not previously indicated that he intended to exercise that right by giving a notice under section 3(1) of the Act. The language of that subsection is mandatory and in order to be able to exercise his right lawfully it seems to me a matter of straightforward statutory interpretation to conclude that he had to give a notice. The same analysis applies to section 6.

39. It is one thing to say that defects in the notice might be capable of waiver but an entirely different thing to say that the notice is not required. In my view the statute compelled the BO to serve a new notice and the waiver analysis of HHJ Marshall in **Manu** cannot be applied to circumstances where a notice is required.

40. The alternative argument of waiver fails on a simple factual analysis. Perhaps, there was some factual basis for thinking that Mr Wallis was dragging his feet but to be fair to him he

was not responsible for the timing of events commencing on 29 December 2015, which is a notoriously difficult time of year at which to get things moving because of the disruption caused by the festive season and New Year celebrations. It is perhaps unfortunate that he went on holiday just over a month later but, again, that is not an unusual feature of the time of year and the evidence does not begin to support the implicit suggestion that he was employing delaying tactics in order to be obstructive.

41. Therefore I do not think there is any factual background of the kind which faced HHJ Marshall in **Manu**. She was able to conclude that the delay and timing was a part of a deliberate negotiating strategy and it seems to me that much of her conclusion was influenced by that view of the facts. In this case although the professional relationship between the surveyors was clearly not a good one there is nothing like the deliberate tactical situation, which was found to exist in **Manu**.

42. Even more importantly I take the view that there is no evidence of any kind of promise of forbearance or relaxation to be found in the correspondence from Mr Wallis. Nor does it seem to me that any conduct on his part could give rise to any kind of implicit promise of forbearance or relaxation. I do not think he was obliged to take an immediate decision upon receipt of the new design and I do not think any analysis as to whether he was an independent expert or acting as an agent makes any difference to that position. Indicating that he wished to pass the material to his checking engineer, asking for the cost of that process to be paid by the BO and saying nothing about the requirement of a new notice until 10 January 2016 in my judgment cannot amount to any form of waiver, either at common law or in equity. Whether as agent or independent expert it seems to me perfectly reasonable, especially at the time of year that these events occurred, for Mr Wallis to reflect upon the matter. In reality, making allowance for statutory holidays, the delay was just over a working week and the failure to make a clear statement of his position, irrespective as to whether he was acting as an agent or independent expert, until the end of that period cannot amount to a waiver.

43. Consequently I reject Mr Isaac's primary argument on statutory interpretation and his alternative position on waiver and the appeal must be allowed on ground 1. No doubt counsel will let me know how they wish to proceed in relation to Ground 2 and any ancillary applications.