Case No: C20CL098

In the COUNTY COURT at CENTRAL LONDON

Strand
London
WC2A 2LL

5th April 2017

B E F O R E:

HIS HONOUR JUDGE BAILEY

Edward H Whybrow & Co Ltd Appellant

v

(1) William Huw James (2) Vivienne James Respondents

Judgment (approved)

Mr Howard Smith – counsel for the appellant
Mr Nicholas Isaac – counsel for the respondents

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1. **His Honour Judge Bailey :** This appeal concerns a party wall award in respect of works which were carried out at 137-139 St John's Hill, London, SW11, which we have called 139. This property is owned by the Respondents. The Appellant and adjoining owner owns 141 St John's Hill. 139 and 141 are adjoining properties, separated by a party wall.

2. 139 comprises commercial premises on the ground floor, with residential accommodation above. 141 comprises commercial premises on the ground floor and on the first and second floors at the front. From this part of the premises the business of a wine merchant is carried out. At the rear of 141, there are two, two-bedroom flats above the ground floor.

3. There is an unfortunate history between the two adjacent owners. The Appellant carried out development works to 141 in 2011. The Respondents objected to the planning authority when planning permission was sought. Then, in August 2011, after permission was granted and the Appellant began carrying out their works, the Respondents issued proceedings in the Kingston County Court. By these proceedings, the Respondents sought an injunction and damages to restrain the use of scaffolding, erected by the Appellant's contractors, for the performance of the works. The Appellant admitted that there had been a trespass, but denied that the Respondents had suffered any loss or damage in consequence. The Respondents also complained that the Appellant's gutter and fascia board trespassed over their side of the boundary.

4. The proceedings were eventually settled by a Tomlin Order, approved by the court in 2013. This Order settled the boundary between the two properties as recorded in a drawing prepared by Mr Michael Osborn FRICS, who was then, as in these proceedings, acting for the Respondents. A copy of that drawing appears at page 149 of the bundle. By the terms of the Consent Order, the Appellant in these proceedings, the Defendants in the Kingston County Court proceedings, agreed (1) that by 4th October 2013, or such further date agreed by the parties, they would move such part of the gutter and roof on the Appellant' mansard lying along the side of the Respondents' property and marked Z on the photographs, to on or within the boundary as identified from appendix 2 – that is the drawing to which I have already referred – and (2) that the boundary would be determined in accordance with an exercise which was set out in appendix 3 to the Order.

5. The work which the Appellant agreed to carry out was indeed done and was signed off by Mr Osborn on 21st August 2013. In a very short letter, addressed to the Appellant company, Mr Osborn wrote:

> "Dear Sirs, **Boundary between 141 and 139 St John's Hill, London, SW4** [we must excuse that error] having inspected 29th July 2013, I confirm that the works have been carried out, in accordance with the court order (reference given) and there are no further outstanding issues in this respect."

6. That letter, as I have observed, was sent by Mr Osborn, by post and also by email to the Appellant company. It is reasonable to suppose, but it is not clear from the documents in the appeal bundle, that at the same time Mr Osborn informed the Respondents that the work had been done. But it may not have been the case. It is unfortunately the

position that either the Respondents were not informed, or that alternatively they were, but overlooked whatever communication Mr Osborn sent them, informing them that the Appellant had done what was required of them.

7. Whatever the position the Respondents had a sense of grievance, although one may note in passing they did nothing about it, and it is apparent from the skeleton argument served on their behalf at the start of this appeal that they held the view that at least some of the difficulties encountered in their own works were the result of the Appellant' failure to comply with the Consent Order. Meanwhile, on 24th September 2012, the Respondents obtained planning permission to develop the rear of 139. It is this development that leads to the award in the present appeal.

8. On 16th April 2014, the Respondents, as building owner, served a notice on the Appellant as adjoining owner under section 3 of the Party Wall etc Act 1996. The notice was served by Mr Osborn, under cover of a letter which helpfully explains in less formal terms than the notice what the notice is about and the options available to the Respondents. The formal party structure notice referred to section 2(2), paragraphs (a), (h) and (k) of the 1996 Act. The works proposed are described as:

> "Raise the party wall at first and second floor; remove overhanging projections as required; any other necessary works incidental, in connection with the party structure, with the adjoining owners' premises."

The notice also contains the formal parts required by the 1996 Act.

9. The Respondents appointed Mr Michael Osborn as their party wall surveyor; the Appellant appointed Ms Faye Galligan as its party wall surveyor. Mr Osborn and Ms Galligan made an award permitting the carrying out of the works, on a date which is not given in the award, but which is stated in the index in the bundle to be 7th October 2014. This award permitted the Respondents to raise the party wall, remove the overhanging projections as required, carry out the incidental connection works and to do so at the sole cost of the Respondents. The award contained a schedule of documents, being the plans in respect of which the award was made. Clause 1(d) of the award providing that "the drawings listed and attached to the document register signed by the two surveyors forms part of the award". I would venture the criticism that these drawings were neither as detailed, nor as comprehensive as they might have been, or perhaps as they should have been. With a competent contractor and goodwill on both sides, lack of detail is rarely of importance. Difficulties and uncertainties may be overcome. However, without goodwill and with a contractor who, at least in connection with works affecting 141, has not demonstrated a high level of competence or concern, the result, all too often, is litigation.

10. The Respondents commenced work. It is a complaint of the Appellant that they began their works before they were authorised to do so and that plays its part in the subsequent dealings between the parties. Nevertheless, nothing turns on the fact that works began before they should have done.

11. The Appellant has, however, more substantive complaints. These are that in the course of the works the Respondents' contractors cut back parts of the building on 141 in order to raise the height of the party wall and that they created a "roof bridge", spanning

between the roof of 139 and the roof of 141, not shown, or at least not shown to the extent that it is constructed, on any of the drawings. Accordingly, that work amounted to a trespass. The Appellant further complain that the Respondents obstructed the opening of a Velux window in the mansard roof of number 141. This was a window which was required to provide necessary ventilation to the room from which it opened. Finally, the Appellant complained that the Respondents' contractors allowed the eaves and gutter of the raised party wall to overhang and thereby caused a trespass on 141.

12. The Appellant further complains that the work carried out was poor and defective and, in the event, was not completed. By way of example, the Appellant points to the cutting back of the building on number 141, which was carried out carelessly, causing unnecessary damage. There are photographs showing that there was, it would seem, a generally careless approach to the cutting back of timbers. The Appellant complains that the Respondents' contractors failed to provide adequate weather protection; this resulted in water penetration and damage to the interior of 141, when a gap immediately adjacent to the party wall opened up. The Appellant complains that the Respondents' contractors created a box gutter, using roofing felt rather than lead, which had been specified.

13. The majority of the Respondents' works were completed in late 2014, or early 2015. That is the evidence of Mr Osborn, who states at paragraph 20 of his statement that:

> "The works were completed to the property apart from the external facing of the wall at 141, and the alterations to the roofing box gutter, etc, in order to provide drainage."

14. The failure of the Respondents to complete the works is attributed, on the Respondents' side, to a lack of cooperation by the Appellant. Mr Osborn says, at paragraph 21 of his statement, that:

> "At various points from about October 2014, the Respondents requested access to complete the works, but the response from the Appellant was that they would not allow access, in view of the alleged trespass, arising from the construction of the roof and the top of the party wall. The matter had been placed in the hands of solicitors and cooperation was not forthcoming."

15. The details of the dispute at this stage of the works are of no particular relevance; it is sufficient to note that there was a degree of correspondence which gave rise to little, if any, effective progress.

16. By late 2015, the two party wall surveyors agreed to meet on site to decide what works were required to complete the Respondents' works and what was required to remedy the damage which had occurred. They also considered the costs of the necessary remedial work. As a result of the party wall surveyors' meeting and discussions between them, Ms Galligan produced a schedule of works on 1st February 2016. This schedule contained nine items, each of which was costed. In giving oral evidence, Ms Galligan explained that she had obtained the costings from a local contractor. She did not explain and was not asked to explain who the contractor was, what the basis of the costings was, and what preliminaries and access requirements had been included, if any, in the figures given by the contractor which she used for her costings.

17. During the course of their discussion, a disagreement arose between the two party wall surveyors and, accordingly, a referral was made to Mr Alistair Redler, the third surveyor. That resulted in an award, dated 12th July 2016. It is not clear quite what the difficulties were between the surveyors; the only direct evidence from either of them is that of Mr Osborn, who, at paragraph 25 of his statement simply says that he and Ms Galligan were unable to reach an agreement. This rather uncertain background to the reference to Mr Redler is repeated in the description which Mr Redler himself gives of the difference. He wrote:

> "I have received a submission from Ms Galligan, made on behalf of the adjoining owner, relating to the adjoining owner's concern that works undertaken are in breach of the Party Wall Award, inadequate, and have caused damage. Ms Galligan and Mr Osborn are not in dispute over a number of items of damage that they agree have been caused and that they are in the process of agreeing compensation for. I have therefore been asked to make a determination only on the following."

18. He then sets out four separate decisions which constitute his award. These must be considered, but as I have indicated it is by no means clear how it was that the specific points that Mr Redler determined were arrived at, nor exactly what was hoped to be achieved by their determination. The first decision is in the following terms:

> "(1). I award that the raised party wall appears to be in accordance with the award drawings and is therefore a lawful structure under the Party Wall Act."

Given that at the meeting Mr Redler held with the two party wall surveyors, at which Mr Redler records that both surveyors confirmed to him that they considered the wall had been raised in accordance with the award drawings, that award is by no means surprising.

19. "(2). I award that the rear high level box gutter and weathering abutment detail is not in accordance with the Party Wall Award and is not an appropriate detail. This must be constructed in accordance with the award drawings or otherwise, only as agreed between the owners, or awarded by appointed surveyors. The fixing of the roofing felt to the mansard slate slope constitutes damage to the adjoining owner's property, that the building owners are obliged to repair."
That speaks for itself.

20.

> "(3). I award that the adjoining owner is entitled to undertake their own remedial works to form the lead box gutter and renew the slates on the mansard slope and for the reasonable cost of doing so to be reimbursed by the building owners."

21. That award was made necessary because it appeared to Mr Redler that it was Mr Osborn's contention that this was work which the building owner was entitled to do. As the reason for that third aspect of his award, Mr Redler explains that:

> "The Party Wall Act does not give a right to the building owner to complete the works awarded, rather it allows an adjoining owner to require that compensation be paid in lieu of the building owners undertaking works for repair, as a result of works carried out under section 2."

22. Mr Redler states:

> "I consider that the inadequate box gutter detail and the felt fixed to the roof slates constitutes damage directly to the property of the adjoining owner and the adjoining owner is therefore entitled to a compensation order to rectify those defects itself."

23. The fourth and final award, other than fees, is as follows:

> "(4). I award that the building owners are not obliged to undertake any remedial works or pay compensation for the obstruction caused to the Velux roof window."

24. That award is of some importance, as will appear. Mr Redler gives reasons for that award. He makes the point that the Velux window had been constructed for only a period of two years, no easement had therefore attached to it, and he makes observations as to the adjoining owner having placed the window where it did, describing this as "a lack of foresight". I would observe that there is scope for some disagreement as to the validity of the reasoning for that award, but the award itself is perfectly plain and was made on 12th July 2016; that award was not appealed.

25. On receipt of that award, Mr Osborn and Ms Galligan then proceeded to make the award, dated 11th August 2016, which is the subject of this appeal. It is an award clearly based on the schedule prepared by Ms Galligan, on 1st February 2016. The schedule was attached to the award, signed by both surveyors, and clause 1(b) provides that it forms part of the award.

26. It is not necessary to rehearse the entire schedule, but it may be noted that the award provides that items 1, 2 and 3 of the schedule of works were to be carried out by the building owner. These are items of work which, on their face, involve remedying and completing the original party wall works and naturally fell to be carried out by the building owner. However, items 4, 6, 7, 8 and 9 were to be completed by the adjoining owner. Item 5 is omitted; that is the item relating to the Velux window. The original schedule and indeed the schedule as attached to the award, noted the need for a new roof light to be fitted by the adjoining owners, to comply with Building Regulations as to ventilation. That work had already been carried out by the Appellant, in the sum of £3,800, plus VAT. However, as a result of Mr Redler's award, the party wall surveyors, perfectly properly, proceeded upon the basis that it could not be the subject of their award.

27. Clause 3 of the award is in the following terms, that:

> "Upon the signing of this further award, the adjoining owner shall pay the adjoining owner's surveyor's fee of £1200 plus VAT and the building owner shall pay the building owner's surveyor's fee of £850 plus VAT, in connection with the preparation of this further award."

28. There is then a further provision that the building owner should pay 50% of Mr Redler's fee to the adjoining owner; that is the fee arising on the making of Mr Redler's award.

29. The grounds of appeal brought by the Appellant were widely drawn. That is perfectly permissible under the current Civil Procedure Rules. It has been the subject of some comment by counsel for the Respondent, that the appeal, as pursued in this hearing, has been somewhat of a moving target and that it was not clear, until shortly before the

hearing, quite what it was that the Appellant would be seeking to obtain by way of a modified award from the court. I am not, at least for now, concerned with how the parties have arrived at the present position. I recognise that the matters advanced before me have been drawn from a much wider canvas, but I will restrict my consideration to the individual points themselves.

30. The first matter raised by Mr Howard Smith for the Appellant is the issue of the roof bridge. This bridge, which appears on a number of the photographs, shows a very simple structure; a board covered by felt, which stretches – bridges indeed – between 139 and 141, draining onto 141, to prevent water falling down between the outside of the raised party wall, forming the new construction of 139 and the existing dormer roof arrangement on 141. There are two elements of concern here. First, the extent of the bridge and secondly, issues of workmanship.

31. The argument on this aspect of the appeal has been made more difficult, I am tempted to say bedevilled, by the lack of clarity in the original award; the absence of a set of drawings clearly setting out all that was authorised by that original award. While it is difficult to see from the material available that any roof bridge was authorised originally. It is plainly important that both properties are protected from rainwater ingress and it is certainly in the interests of 141 to have an effective rain barrier. The matter has been considered by reference to the plan which appears at page 260(a) of the bundle, the plan which shows the roof arrangements at 141, comprising two sloping mansards and a vertical blind dormer, as it has been described. This plan has numbering 1, 2, 3, 4 and 5. These numbers do not match the three sections of the roof, the two sloping mansards, the right hand one containing a roof light, and the blind dormer, but it is common ground that the roof bridge, at present, extends over the first two sections of the roof, working from left to right on plan 260(a).

32. Whatever the true position of the original award, the Appellant is prepared to accept a roof bridge, but as to the first section only; that is the section that appears essentially between figures 1 and 2 on the plan. The Appellant is not prepared to accept any more extensive roof bridge and it argues, without contradiction, that it is entitled to require the second section, that is the section over the blind dormer, to be taken down and that the roof of 139 should be rebuilt with a new waterproofing detail. This, as I have indicated, is not opposed by the Respondents.

33. It is a feature of the Appellant's position that the workmanship demonstrated by the Respondents' contractors in the construction to date has shown a marked dissimilarity between the competence with which the works at 139 have been constructed and the absence of such competence, whenever the contractor's works concerned 141. This is a matter of some importance for the Appellant, as will appear.

34. So far as the roof bridge is concerned, the workmanship is quite evidently appalling. The photographs show, and the joint experts' comments demonstrate, that the quality of construction employed in the erection of the roof bridge is quite unacceptable by whatever standards might be employed.

35. I should take this opportunity, in case I forget later, to observe that the parties called two very competent experts, who were of great assistance to the court; Mr Stuart Birrell of Murray Birrell, Chartered Surveyors, for the Appellant and Mr Michael Kemp of

Cardoe Martin, for the Respondents. In their joint report, they say as regards item 4 in the schedule, that is the bridge felt repair, where the schedule says:

> "Inadequate, non-standard, mineral felt roof; damage lead flashings; gutter removed not reinstated; no flashing to rear elevation wall; no flashing between adjoining properties; works required to supply and lay new mineral felt roof in accordance with current codes of practice; replace lead flashings, including gutter, and install new flashings missing."

36. The joint expert report states:

> "We agree that the description of the remedial work is fairly stated. However, we have been shown photographs of the now concealed framing timbers between this area of the felt roof and, unless strengthening works were undertaken after the photographs were taken, which seems to both of us to be highly unlikely, we believe that the remedial work will extend to reconstruction of the decking as well as re-felting this area. The description of this work in the schedule attached to the second award …" (of course they mean the second party wall surveyor's award) "… does not allow for works to the structure beneath the felt. The figure agreed by the two surveyors for rectification work is £1,930. This figure is too high for felt replacement work alone and, although not specifically referred to, we think some other work must be included here. This may be the cost of access scaffold or some allowance for reconstruction of the timber support deck. It is our own judgment, taking into account quantity surveying advice, that a fair figure for this work would be £2,400 plus VAT, with an additional £1,300 plus VAT for access requirements."

37. That is the first matter in which the Appellant seek the award to be modified. Namely that the description of the works on the schedule should coincide with the brief, but sufficient, description in the joint experts' report.

38. The Respondents wish to argue that while they do not contest the poor quality of the work and the need for a more improved specification for the remedial works to be carried out, they contend it is not open to the Appellant to pursue this line of appeal. The contention is that the first of the four awards made by Alistair Redler in his award precludes any further relief in this respect being sought by the Appellant. I will deal with that argument when I deal with the second point advanced by the Appellant, that of the overhanging eaves. There is a helpful photograph showing the trespass which these overhanging eaves, which is contended to have been committed, at page 494 in the second bundle.

39. Mr Nicholas Isaac, for the Respondents, accepts (sensibly) that the detail of the construction demonstrated in photograph 494 differs from the detail authorised in the award – no overhanging eaves are there authorised. However, while it would otherwise be the case that the Respondents would have to carry out the necessary remedial works, or pay compensation to the Appellant for carrying out those works, Mr Isaac argues that it is not open to them in this appeal to seek that relief. The point arises, as I have indicated, on the first of the decisions made by Mr Redler in his award, where he says:

> "I award that the raised party wall appears to be in accordance with the award drawings and is therefore a lawful structure under the Party Wall Act."

40. Mr Isaac makes the point that this decision was made after the construction of the roof bridge and the eaves. Accordingly, he suggests, that on a proper construction, "the raised party wall" means the entire wall, including the roof bridge and the eaves. He relies, of course, on section 10(16) of the Party Wall etc Act 1996, which provides:

> "The award shall be conclusive and shall not, except as provided by this section, be questioned in any court."

41. The "provision" in the section is section 10(17) which permits an appeal to the county court only if it is brought within the period of fourteen days, beginning with the day on which the award is served on the party appealing. The decision made by Mr Redler is that the raised party wall "appears to be in accordance with the award drawings". Whatever criticism one may have of the award drawings, Mr Smith makes the point that they show no eaves; they certainly show no bridge, and that Mr Redler, a well-known surveyor, could not possibly have thought that the bridge and the eaves were part of the award drawings. They are plainly not there. Accordingly, Mr Smith invites the decision to be construed literally, that the raised party wall is indeed "the wall", it does not include the bridge or the eaves. Mr Smith argues that it is really inconceivable that it should be construed in any other way. I entirely agree.

42. Under the heading "Other Works", Mr Smith makes points on a number of the items as part of his appeal. Items 1 to 3 are, of course, as I have indicated, matters for the Respondents to carry out. Item number 4 I have dealt with, it being the roof bridge and associated works.

43. Item number 5 is the Velux window. Mr Smith argues that it is open to the Appellant to claim the £3,800 plus VAT which the Appellant has already expended in putting in a new roof light, so as to provide sufficient ventilation to enable the relevant room to be habitable. This is a claim brought under section 7(2) of the Act.

> "The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work excluded in pursuance of the Act."

44. The problem is this. The Velux window which was installed on the right hand section of mansard roof, as appears in plan 260(a), when constructed could be opened fully, because there was no impediment to it doing so. Now that the Respondents have built up the party wall the window cannot open as much as 30 degrees. That poses this difficulty, namely that until it is open as much as 30 degrees it will not allow sufficient ventilation into the room into which it is fixed for the purposes of the Building Regulations.

45. The Respondents' response is that this matter has been dealt with by Mr Redler, in item 4 of his award:

> "I award that the building owners are not obliged to undertake any remedial works or pay compensation for the obstruction caused to the Velux roof window."

46. The Appellant's argument is simply this. Although the party wall prevents the opening of the Velux window, the window, as installed, could open to its furthest extent from 141, that is at a horizontal level, wholly within the boundary of the property of 141.

That is true. When constructed, it would open horizontally, in a plane directly above part of the party wall, but at no stage did it protrude beyond the boundary level. On this analysis, although the Respondents are entitled by the award to raise the party wall, because in doing so they necessarily obstructed the opening of the window, that gives rise to a claim in damages by the adjoining owner.

47. Mr Redler, in his award, as I have already indicated, was concerned as to easements and generally with matters which do not immediately appear to the court to be useful material for consideration. But, insofar as Mr Redler did, or may have considered the question of trespass, he did so, submits Mr Smith, on the basis that the party wall was 230 millimetres in width. The evidence as to the precise amount that the window projected when horizontal is not entirely certain. It is, of course, understandable that now that the party wall has been raised, it cannot be done by simple sight measurement, it has to be done by calculation. The expert evidence was that there would have been a projection of some 10 to 15 millimetres from the bottom of the window. On the incorrect basis that the party wall was 230 millimetres wide, any calculation carried out by Mr Redler would suggest that the window could not extend to its full 15 millimetres, because taking half the wall and proceeding on the basis that the boundary line is in the exact middle of the award, there would only be 130 millimetres available for the window to open.

48. However, consideration of the plan agreed between the parties and attached to the Tomlin Order indicates that the party wall is in fact 290 millimetres wide. That would give 145 millimetres available to the Appellant, to open its window within its boundary and it would need only 130 millimetres of those for the window to open. Accordingly, argues Mr Smith, there was an error to the extent that Mr Redler did carry out the trespassing exercise and accordingly the Appellant is entitled to damages.

49. Mr Isaac argues that whatever the reasoning and whether there was in fact error in considering the possibility of trespass by the 141 window when fully opened over the land of 139, it is simply not open to the Appellant to go behind the unappealed award of Mr Redler, which provided that the building owners were not entitled either to undertake remedial works or pay compensation for obstruction caused to the Velux roof window. Mr Smith's response is that he is not seeking compensation for obstruction to the window, rather compensation for loss of ventilation, caused by the wall.

50. The distinction between compensation for an obstruction and compensation for loss of ventilation resulting from the obstruction is ingenious, but no more than that. The loss of ventilation is a direct result of the obstruction. Accordingly, further consideration as to precisely how it was that Mr Redler arrived at his reasoning becomes irrelevant. Mr Redler has made an award, it may be that it was made on an incorrect basis, but the time for appealing the award has long since passed. Accordingly no claim may be pursued in this appeal in relation to the Velux window.

51. Items 6 to 8, the rear extension slate roof, rear dormer roof and rear extension box gutter, are not in issue as to the description of the defect, nor the specification by the party wall surveyors of the remedial works. But two points arise; one, perhaps minor, but it should be dealt with to be comprehensive. This relates to the figures which have been provided by the party wall surveyors for the cost of carrying out the work. I must here refer back to item 4, that is the cost of the roof bridge and associated works. As

appears from the section of the joint expert report, the experts agreed that the figure of £1,930 for the cost of rectification work, was taking all the matters into consideration too low; the cost they agreed should be £3,700 plus VAT.

52. It is apparent that the experts jointly consider it perfectly possible that the contractor who gave Ms Galligan figures was not looking at the entirety of the work necessary and was simply quoting for felt replacement work alone. Be that as it may, to the extent that the award of this court involves modifying the figures of cost for the works in reliance on the joint experts report figure, the court would increase the figure of £1,930 to £3,700.

53. The court does so despite the objection of Mr Isaac. Mr Isaac makes the point that the party wall surveyors have reached figures; other surveyors have reached their figures. The court should not simply substitute the experts' joint figure for the party wall surveyors' figure; it must be demonstrated that there is an error with the party wall surveyors' figures. There he is correct. An appeal is an appeal. Despite the width of the court's discretion, the court must always bear in mind that qualified professionals have put their mind to the matters included in their award and amending professionals' figures must be done for good reason. In the event the experts have provided a good reason for amending the figure at 4.

54. When it comes to the figures at 6 to 8, the experts in their joint report have arrived at a slightly lower figure. The three items as a total in the party wall surveyors' award of £2,916, the joint experts suggest £2,420, is a fair figure. There is no particular reason given for the variation in the figure. It might appear simply that the contractor consulted by Ms Galligan was a little on the high side. Following the logic of Mr Isaac's submissions, it might seem appropriate to leave the party wall figures as they are. However, the court would be a little uneasy with taking the experts' joint figures in one part of the schedule, but not doing so in other parts of the schedule. Realistically, I consider the court ought to stick with the joint experts' figures for items 6 to 8, to the extent, I must add, that it is relevant to do so.

55. The question of relevance arises in this way. The Appellant, having, as Mr Whybrow perfectly candidly accepted in the course of his evidence, originally been of the view that they wanted to instruct their own contractors to carry out the works, have decided that they would prefer the Respondents to do the work. This change of heart, as I see it, arises from the fact that, although the work which the contractors did in respect of 141 was not of good quality, they now appreciate that for 139 the contractors have performed well. There is a degree of faith involved here that they would perform well at 141 in the future, but ultimately says the Appellant, it is a matter for the Appellant. Although it did indicate a desire to carry out the works itself, the Appellant has now changed its mind and it wants the building owners to carry out the work.

56. The fact that there is a choice open to the adjoining owner in this regard appears from section 11(8). This provides that:

> "Where the building owner is required to make good damage under this Act, the adjoining owner has a right to require that the expenses of such making good be determined in accordance with section 10 and paid to him in lieu of the carrying out of work to make the damage good."

57. Plainly the Act proceeds upon the basis that it is for the building owner to make good the damage. That is the primary position, but the adjoining owner has the ability to require that he gets compensation and does the work himself.

58. The obligation to "make good damage" as in section 11(8) arises in respect of works carried out under section 2(2) of the Act in section 2(3) and 2(5) of the Act. Section 2(3) provides that:

> "Where work mentioned in paragraph (a) of sub-section (2) is not necessarily on account of defect, or want of repair of the structural wall concerned, the right falling under that paragraph is exercisable (a) subject to making good all damage occasioned by the work to the adjoining premises, or internal furnishings and decorations."

59. Also under section 2(5):

> "Any right falling within section 2(f), (g) or (h), is exercisable, subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations."

60. Sub-sections (3) to (6) all relate to a right being exercisable under sub-section (2)(ii) subject to making good all damage occasioned by the work.

61. Accordingly, there is a right in the adjoining owner to require the building owner to make good the damage, or at his choice, obtain compensation and do the work himself. There is no doubt, as I have stated, that the Appellant's original view was that it wished to carry out the work itself. It was only a short time before the commencement of this hearing that the Appellant informed the Respondents that it had changed its mind and wanted the Respondents to carry out the work. The Respondents, it may be said, are reluctant to do so; they are concerned, given the background to this matter, that carrying out the works themselves, obviously via their contractors, is an exercise which is fraught with the danger. They are concerned that there will be difficulties and problems arising in the works, and that these difficulties and problems will result in complaints and possibly claims from the Appellant against them.

62. Mr Smith argues that the Appellant is entitled, nevertheless, to insist on the basic provision of the Act to be followed and the court should require the Respondents to carry out the work. Not so, argues Mr Isaac. There was a choice available to the Appellant. It has elected to proceed down the route of compensation; it may not now change its mind and proceed upon the route of requiring the Respondents to make good the damage.

63. The question of election and holding a party to an election once made is described by the Editors of Halsbury as "concepts closely related to estoppel". It is a concept generally given the title "approbation and reprobation"; it being a principle of the common law as well as of equity that a person may not approbate and reprobate. Having made an election a party is estopped from changing his position and going back on his decision. It was a matter that was given careful consideration by the House of Lords in the case of *United Australian Ltd v Barclays Bank Ltd [1941] AC 1.* This was a case arising out of an action on a converted cheque; the Appellant, United Australian Ltd, brought action initially against the party guilty of the conversion, but having

commenced proceedings, the company decided that the converters were not worth pursuing. Accordingly that action was discontinued, and they brought a second action against the bank for wrongly paying out on the cheque.

64. Plainly, therefore, this was a set of facts involving a tort by the converters and the primary concerns of their Lordships was to consider whether the innocent party, United Australian Ltd, had waived the tort and so could not proceed in contract against the bank. It is a case of interest in that the authorities dealing with waiver of a tort, some of considerable antiquity, involved the fiction of contracts being made between the Plaintiff and the tortfeasor, in order to overcome procedural difficulties. Interesting though the raising of fictions undoubtedly is, it is wholly irrelevant to the present proceedings, but the section of his judgment which concludes Lord Atkin's consideration of this aspect of the law is worth repeating:

> "These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared, should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred."

65. Having thus dealt with waiving of the tort, Lord Atkin moves on to the question of election, which he describes as a supposed application of election; it being stated in some authorities that a Plaintiff has "elected" to waive a tort. At page 29 Lord Atkin:

> "It seems to me that in this respect, it is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one, you could not claim on the other. Real actions have long disappeared and subject to the difficulty of including two causes of action in one writ, which has now also disappeared, there has not been and there certainly is not now any compulsion to choose between alternative remedies. You may put them in the same writ, or you may put one in first and then amend and add or substitute another."

66. He then cites a passage from Lord Esher's judgment in *Kelly v Metropolitan Railway Co [1895] 1 QB 944,* and continues:

> "On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that when, with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency, no longer his to choose. Instances are the right of a principal dealing with an agent, would an undisclosed principal choose the liability of the agent or principal? The right of a landlord, where forfeiture of a lease has been committed, to exact the forfeiture or to treat the former tenant as still tenant, and the like? To those cases, the statement of Lord Blackburn in *Scarf v Jardine [1882] 7 AC 345,* at 360 applies. *'Where a man has an option to choose one or other of two inconsistent things, when once he has made his election, it cannot be retracted*.' In a later passage, Lord Blackburn speaks of a man choosing between two remedies, but it is plain he is speaking of remedies in respect of inconsistent things, as stated above. The case was one where the Plaintiff had a right of recourse against two former partners, or against two new partners, but obviously not against both. Lord Blackburn quotes (inaudible) case, which was a plain case of inconsistent rights, the question of waiver of a forfeiture. I therefore think that on a question of alternative remedies, no

> question of election arises until one or other claim has been brought to judgment. Up to that stage, the Plaintiff may pursue both remedies together, or pursuing one, may amend and pursue the other. But he can take judgment only for the one and his cause of action on both will then be merged in the one."

67. That was a passage relied on by Lord Denning in *Slough Estates Ltd v Slough Borough Council [1969] 2 Ch 305*, where Lord Denning makes clear that:

> "Once it is plain that the person who has choice, has the necessary knowledge, for clearly no man can be held to a choice if he does not know he has one, then it is the conduct which matters and not the intention. "

68. Mr Smith has referred me also to a more recent authority *Oliver Ashworth Holdings Ltd v Ballard (Kent) Ltd [2000] Ch 12*, a decision of the Court of Appeal, the main judgment being given by Walker LJ, as he then was, but with all due respect to the Learned Judge, his judgment is a reiteration of the law established by the House of Lords and casts no new light on the matter.

69. It is necessary, of course, to transfer these statements of principle to the Party Wall Act procedure. It seems to me abundantly plain that while the adjoining owner has a choice, this is a choice of remedy, not right, and that no question of election arises until, in Party Wall Act terms, an award is made. Once an award is made, then the adjoining owner's option to choose the other remedy merges into the award, and it is lost. That is common ground, as I understand it, between counsel and I have little doubt as to its correctness.

70. There is equally no doubt that the award that was made by the party wall surveyors was an award in respect of items 4 to 8 of the schedule. This was an award of compensation, not an award requiring the building owners to carry out the work. It was suggested by Mr Isaac that, on the award being made, the Appellant lost its right to elect for the building owner to make good the damage, as opposed to rescission. It is lost on the making of the award and the subsequent appealing of the award cannot alter that position.

71. Section 10(17) of the Party Wall etc Act provides that:

> "Either of the parties to the dispute may, within the period of 14 days, beginning with the day on which an award made under this section is served on him, an appeal to the County Court against the award and the County Court may (a) rescind the award or modify it in such manner as the court thinks fit; and (b) make such orders for costs as the court thinks fit."

72. It appears to the court that as what a County Court does in respect of the award is modify or rescind the award, (here modification is sought), any modification that the court makes is to the award and must date back to the award. It is therefore open to the Appellant to pursue his appeal, as he has done, seeking relief which includes a requirement that the Respondents make good the damage, as opposed to receiving an award of compensation. That of course may have ramifications on the issue of costs to which in due course I must come.

73. The final point arising under the remaining items of the schedule is that of the water penetration damage to the ground floor. Here the Appellant seeks to recover £2,500 plus VAT, which it has already expended on its evidence, in hacking off plaster on the 141 side of the party wall and re-plastering, using a cement-based plaster, providing new skirting boards and repainting an area of wall. This work was carried out in the storeroom to the wine merchant's, towards the back of the building.

74. In this respect, Mr Isaac criticises the state of the evidence. He is perfectly entitled to do so. This is, however, a party wall appeal in a County Court where criticism has already been strongly made in the Respondents' opening skeleton argument as to disproportionality of costs. In the modern age proportionality is to be held in deep reverence at all stages of the legal proceedings.

75. What is the evidence on which the Appellant relies? It is essentially the report of a Chartered Building Surveyor, Mr G Highfield FRICS, dated 5th November 2014. Instructed, it would appear by the Appellant's solicitors, Mr Highfield inspected the property on 2nd October 2014. He gives a full account of his inspection and this includes the observations beginning at paragraph 20 as follows:

> "Substantial damage has been created by the Defendant's contractors to number 141. Roof flashings have been peeled back, fascia boards and roof slates have been damaged; gutters and fascia boards have been removed; metal flashings at junction of mansard and flat roof at the top of the mansard have been damaged; rainwater downpipes have been removed; walls have been demolished; no weather protection was provided to the exposed parts of the building structure at 141 by the Defendant's contractors, which resulted in rainwater ingress to the property at 141 and damage to the premises."

> "21. The water staining on the walls and the dampness in the lower part of the ground floor walls in the commercial premises are a clear indication of lack of consideration and a failure to provide adequate protection."

76. There are also complaints as to the absence of cooperation with Ms Faye Gilligan. Then under heading 6, "Repairs":

> "4. Work will be needed in the ground floor premises; the damp proof course appears to be (inaudible) probably by debris created by the works from (inaudible); the wet and perished plaster will have to be knocked off and redone in a different type of plaster, a cement-based plaster such as Limelight Renovating Plaster will be needed; new skirting boards will be required and the affected rooms decorated."

77. Mr Highfield was not called to give evidence; his report simply put in the bundle. It would of course have been an expensive business to call a further surveyor, but it does mean, by not calling him, that the Appellant is relying on the court accepting the report of a Chartered Building Surveyor, which has not been tested in cross examination, simply on the basis that it would be expensive to call the witness. It is the case that this report, dated 5th November 2014, was forwarded to the Respondents at the time, by letter dated 4th December 2014. The report of course dealt with a number of matters, not simply the water damage to the ground floor, but it is the case that the water damage in the report is specifically highlighted under the heading "Nuisance".

> "We refer you to page 4, paragraph 8, of the report. In the wine merchant's premises, water staining is visible on the party wall in the small office area. It is also visible in the lower part of the wall in the rear store area on the party wall. It results, in my opinion, from the penetrating dampness caused by the construction work at 139."

78. There is also reference to page 6, paragraph 27.

> "It is also obvious the Defendant's contractors are not properly and adequately supervised. They caused damage and failed to repair it; they have caused the water ingress by failing to provide weather protection to opened up areas."

79. It is apparent therefore that not only was the report forwarded to the Respondents, the water damage was specifically highlighted. It is evident from the bundle that the Respondents forwarded Mr Highfield's report to Mr Osborn on 28th January 2015. Mr Osborn in an email to the first Respondent, deals with the question of trespass and then under the heading "Alleged Damage":

> "The normal course of action when dealing with damage as a result of works that are notifiable under the Act, is for the two surveyors to agree the extent of the damage and either repair works carried out or a payment in lieu. I am at a loss as to why this route is not being followed. I cannot comment on the adequacy of the work to date, as I have not inspected the works."

80. It must be said that Mr Osborn's comment as to the normal course of action is indeed correct. It is usually the case that the party wall surveyors, having prepared a schedule of condition before the works begin, should inspect after the works are completed, or practically completed, so as to identify any damage or additional works that require remediation.

81. Quite why it was that the Claimant proceeded to do the work when it did was not a matter that was pursued in evidence. That it was carried out appears from the invoice from the contractors, dated Wednesday 24th June 2015, the company POE, invoice to carry out rendering in rear of wine shop £2,500; to supply and install new skylight, £3,800; all with VAT at 20%. There is evidence that this sum was paid in the form of a print out of a bank transfer, page 289, on 21st July 2015, bill payment by Faster Payment to POE Projects, reference invoice 1637 which is the invoice of 24th June 2015.

82. The court is put in this difficulty, the Appellant has not adduced the evidence of Mr Highfield, nor of the contractors, but relied on the documentation. It does mean that the Respondents have not been able to cross-examine on the matter. It is fair to say that Mr Whybrow was not pressed in cross examination as to why he did the work when he did and how he came to, for example, choose POE Contractors, but in the scheme of things that was a perfectly proportionate approach for counsel to take.

83. There is concern, voiced particularly by Mr Osborn, that the party wall surveyors were unable to inspect. The dates on which such inspections were to have taken place are not clear, but why they were unable to get into the premises is entirely outside the evidence. The wine premises were, of course, tenanted, but that should be no reason to prevent inspection by party wall surveyors.

84. There is also the question as to whether the generalised complaints of lack of protection against rainwater ingress can fairly be blamed for the work which was carried out. During the course of the evidence reliance was placed by counsel for the Appellant on photo 408, which showed a gap resulting from the taking down, or lowering, of the party wall in the course of the works, which would allow water access. It may have been thought that this photograph showed where the water penetration occurred which caused the damage to the store. Mr Isaac demonstrated in argument that this is most unlikely to be the case, but Mr Smith makes the point that the gap shown in the photograph was merely a demonstration of the gap that, in the course of the works, opened up along the full length of the party wall.

85. No issue arises as to the extent of the gap and neither was it suggested that effective, or indeed any particular measures, were taken by the Respondents' contractors to protect 141 from penetration. Photographs produced to the court do show dampness to be quite extensive. What is shown is more, I am bound to say, in the nature of rising, albeit penetrating, damp, rather than damp coming from the top of the wall, but that is not inconsistent with the findings of Mr Highfield in his report. At the end of the day, I do not feel that there is any good reason to doubt Mr Highfield's report, nor the genuineness of the claim. It seems to me that I should allow the £2,500 plus VAT claimed, but not it seems to me the £500 which the surveyors were prepared to award for the painting of the ceiling and wall stain.

86. This brings me to the final point raised on behalf of the Appellant, that of Ms Galligan's fees. The award, as cited at the start of this judgment, provides for each party to pay their own surveyor's costs. In a short witness statement, Ms Galligan, who gave evidence before me, explains that what she considered to be the first draft of the award, which she exhibits, which she received from Mr Osborn, provided that the building owner should pay the fees of both surveyors. In the event, that provision was altered in the final award; she signed the final award without noticing that the provision in the award as to where the fees were to fall, had changed. She makes the point that the change, as to the payment of fees, was not highlighted by Mr Osborn and she accepts that it was a mistake on her part not to check the final award carefully and notice the change.

87. Mr Osborn in his evidence accepted that he had not highlighted the change, although he did suggest that what Ms Galligan considered was a draft award, was not an award but, as he put it, more his "workings". Looking at page 144 of the bundle, all beautifully headed up as an addendum award with all the preambles and so on, it is difficult, indeed impossible, to accept that evidence at face value. Be that as it may, Mr Osborn accepted that there had been no discussion, let alone express agreement, about the change from his working draft, or the draft award to the final award. Ms Galligan, in the event, was too trusting, but Mr Osborn deserves at the very least mild censure for changing the award as to where the fees fell, without highlighting the fact, either orally or in writing.

88. There appears to me on the facts of this matter to be no good reason not to follow the general practice in this field and order the building owner to meet the fees of both surveyors. However, while that is the answer of the court to the point raised by the Appellant in appeal it is, in my judgment, overtaken by the fact that the Appellant has now changed its mind as to whether to require compensation or have the Respondents carry out the work.

89. As I have already said the Appellant was entitled to change its mind, for that is undoubtedly what it has done, and seek a modification of the award to require the Respondents to carry out all the outstanding works in the schedule; that is all the works in the schedule bar items 4 and 9. But the consequence is this. The work undertaken by the party wall surveyors to quantify the schedule and to include that quantification in an award is wasted. It seems to me that on a reasonable approach to the matter the party wall surveyors had, in the making of their addendum award, two tasks to fulfil. First, to produce a list of works to be carried out. Secondly, to put figures upon the individual items in the list. The schedule of works has been in existence since 1st February 2016; there is no evidence to suggest that it was not a matter that was swiftly and conveniently dealt with and would have been, but for the need to put figures on it, an award that could have been very simply and economically prepared. But when it came to it, Ms Galligan obtained figures from a contractor; there were discussions with Mr Osborn and the unnecessary part of the award would have taken up an appreciable amount of time of the surveyors.

90. During the course of argument, I suggested that as much as 90% of the fees would be properly attributable to the quantification of the schedule. It is possible that that is perhaps a little high, but the figures are themselves low and it seems to me only right that I should stick with that figure. So, accordingly, although absent the change of mind, I would have ordered that Ms Galligan's fees should fall upon the Respondents as building owners, I will modify the award to require the adjoining owner to pay 90% of both Mr Osborne and Ms Galligan's fees in the making of that addendum award.

91. That concludes my judgment. I will consider with counsel the appropriate form of order.

End of Judgment

We hereby certify that this judgment has been approved by His Honour Judge Bailey.

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