Claim No. D20CL065

In the County Court at Central London

Property and Business Court List

His Honour Judge Parfitt

BRENDA FENTON

Appellant

- and –

(1) MARSHA KAREN LEWIS

(2) CLIVE WARREN LEWIS

Respondents

JUDGMENT

Dates: 13 & 14 June 2018 & 18 July 2018

Stuart Frame instructed by **Child & Child** for the Appellant

Philip Rainey QC & Katie Gray instructed by **Michael Oppler & Co** for the Respondents

Approved Judgment

I direct that pursuant to CPR PD39A 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

HHJ Parfitt:

Introduction

1. The Appellant owns and occupies 5 Cavendish Avenue, St John's Wood ("No. 5") and the Respondents own and let out 3 Cavendish Avenue ("No. 3"). This is a dispute about the Respondents wanting to build further in the space between the two houses. The parties have been in dispute about this, and other issues, for many years.

2. On 1 June 2017, the Appellant, as Adjoining Owner, issued an appeal against a Party Wall Award dated 17 May 2017. On 4 April 2018 HHJ Bailey made an order for the hearing of a preliminary issue to determine whether the Respondent was correct to contend that the Appellant could not argue in this appeal that the wall at issue was not a party wall because of estoppel, res judicata, prior agreement or abuse of process. This is my judgment on that issue.

3. The hearing of the 1 June 2017 appeal is due for September 2018 and as the scope of that hearing and the parties' preparations for it was necessarily impacted by the outcome of this decision, I emailed the parties through counsel on 20 June 2018 to tell them that I was going to rule in favour of the Respondents on the preliminary issue.

4. In this judgment I address the following: (a) the subject of this preliminary issue – what is it the Appellant is said not to be able to argue? (b) the relevant factual narrative; (c) the law; (d) the arguments; (e) discussion and conclusion.

5. The court heard evidence from Mr Lewis and Mrs Fenton. I did not find either to be impressive as witnesses because their evidence was heavily influenced by the context of the neighbour dispute between themselves which has been going on since 1997. The evidence of Mrs Fenton is more significant because the Respondents allege, based on a single joint expert report, that the title deed plan relied on by Mrs Fenton has been doctored by the insertion of a "T-mark" where the disputed section of wall appears on the map. Mrs Fenton denies any responsibility for this alleged alteration.

The Subject of the Preliminary Issue

6. The preliminary issue is said to be whether the Appellant can raise that "the wall in question is not a party wall". A "party wall" under the Party Wall etc. Act 1996 ("the 1996 Act") is either (a) a wall which forms part of a building and stands on lands of different owners…(b) so much of a wall not being a wall…in (a)…as separates buildings belonging to different owners.

7. This raises two related matters both of which are relevant to the scope of the preliminary issue: a proper description of the relevant wall and the location of the boundary. Both these issues are contentious but the purpose of the preliminary issue is to prevent the Appellant from raising those contentions. In this section I set out what those contentions are but first have to offer my own general description of the disputed wall and the

disputed boundary. It is difficult to do this in a manner which does not appear to favour one side's position rather than the other in the very choice of language but that is not my intent.

8. The wall at issue is that which forms the north-western side of the Appellant's house and is that part of the house on No. 5 which is nearest to No. 3 (all references to "wall" are to that wall unless otherwise apparent). It has not been disputed before me that the wall has a uniform vertical profile, albeit built at different times. The profile shows two widths, with its plane being built out relative to No. 3 in the bottom section (loosely just under a single storey in height) and the same face being closer to No. 5 in the upper section.

9. It is also relevant to see the wall in its boundary context. The general boundary between No. 5 and No. 3 runs from their respective front gardens / parking areas to the rear gardens with the houses being nearest the area in the middle. The boundary between the two garden areas is marked by a garden wall which is long standing and just under a single storey in height. The wall in dispute occupies the same general line as the garden wall and the built out lower part of its profile is of similar shape (in both height and width) to the garden wall which is continuous with it at its southern and northern ends. This means that from a lay person's perspective standing in No. 3 at the time of the No. 5 conveyance which created the boundary, it would have appeared that the garden wall ran the length of the boundary and formed the lower part of the flank wall of No. 5.

10. Finally, the wall is of two heights. One part which forms No. 5's garage with a room above and a taller part which extends to the full height of the house. Mr Frame referred to that taller part as "the original flank". I have used the same convention.

11. The boundary between No. 5 and No. 3 was formed when the Appellant acquired the freehold by a conveyance dated 28 February 1997 ("the 28 February Transfer"). In addition to the disputed plan (which if nothing else shows the boundary running in a straight line between the two properties) the conveyancer used express words to describe the relevant boundary and the walls described above: *That all walls and fences dividing the Property from the adjoining properties on either side are party walls and shall be repairable as such and that for the avoidance of doubt the boundary wall between the Property and 3 Cavendish Avenue ("the adjoining property") is the garden wall the whole length of the boundary between the Property and the adjoining property and is a party wall. The flank wall of the Property is inside the boundary wall of the Property and the adjoining Property.*

12. I do not need to determine the correct construction of this paragraph but the preliminary issue cannot be addressed outside of the context of what that construction might be. On the face of it the language presupposes two walls: described as the garden wall and the flank wall. The garden wall is that which runs the length of the boundary and is a party wall. The flank wall is inside the garden wall and so is not a party wall. The practical consequence of this would be that the lower part of the wall would be a party wall and the upper part of the wall would not. This is neither parties' primary position but, if I understand their case, the Respondents accept it as a secondary position.

13. The Appellant's case is that the original flank was built (or might have been built) so as to remove and replace the garden wall. It is said this has the following consequences:

a. For boundary purposes there is no garden wall below the original flank only flank wall. It follows that on a proper construction of the 28 February Transfer the boundary must be to the No. 5 side of that part of the wall because the conveyance says the flank wall, which in referring to the original flank can only mean from top to bottom, is inside the boundary wall.

b. For party wall purposes this means that the original flank is not a party wall and cannot be used for support for the proposed two-storey extension.

14. It concerned me that this had the consequence of making a straight boundary line, as shown on the 28 February Transfer, into a boundary that would run in the mid-point of the line of the garden wall (because of section 38(1) of the Law of Property Act 1925) until it came to the original flank when it would move towards No. 5 so that it could follow the outside line around the original flank, before returning to the mid-point garden wall line on the other side. On further reflection I do not think this anomaly of itself so problematic since it could be said to be the consequence of the deeming provisions in the LPA 1925 and after all boundary lines on plans are only general indications. I should say that I remain sceptical of its legitimacy as a matter of construction of the 28 February Transfer.

15. The Appellant's position on the boundary – essentially that is should be determined by the history of how the original flank was built – has led the Appellant to categorize the Respondents' position as unreasonable – all the Respondents need do is allow the lower part of the original flank to be opened up on their side and this would demonstrate whether the garden wall was incorporated or whether the original flank was a replacement. Mr Lewis, in evidence, said such an opening up would be pointless because not conclusive. There was cross-examination about the extent to which the Respondents wanted to avoid such an opening up because it would prove their case was wrong. I need say no more about this aspect. It is not relevant to the issue before me but is curious to the extent that it is implicit that the Appellant's case is not so much that she is right but that if more information was available then a potential argument might be available to the Appellant which is not necessarily available at the present time.

16. The Respondents' case is that the boundary runs along the mid-point of the wall throughout – this is plain from the 28 February Transfer and has been both expressly and implicitly accepted by the Appellant in various ways during the disputes between the parties. It follows that the Respondents can use the wall in whatever way is permitted by the 1996 Act. However, all the Respondents want to do is to use the lower part of the wall in as they have since 1999 (to support the south east wall of the extension) and then to cut into the upper parts of the wall (including the original flank) for flashing or weather proofing purposes (as permitted by section 2(2)(j) of the 1996 Act) and as they have previously done albeit this time one whole storey further up.

17. It follows from the above that the subject matter of the estoppel, stripped to its essentials, is can the Appellant dispute that the boundary line runs along the centre line of the lower part of the wall?

Material Factual Narrative and Findings

18. The boundary was created by the 28 February Transfer. Prior to that date the freeholds of No. 5 and No. 3 were in the same ownership. Both the Appellant and the Respondents were occupying their respective properties under leases and indeed the Appellant had been there some considerable time. The freehold of No. 3 was transferred to Mrs Lewis on 12 August 1997.

19. The Appellant asserted in paragraph 13 of her witness statement in these proceedings (and in Mr Frame's skeleton argument) that the original lease plans and the 28 February Transfer had a T-mark at the location of the flank wall of No. 5 thus indicating an intention that the flank wall was within the boundary of No. 5.

20. The Respondents regarded this with some scepticism since the copy of the plan held at the Land Registry did not have such a T-mark.

21. A single joint expert was appointed to examine the relevant documents and concluded materially: (i) the T-mark on the 28 February Transfer was made in ball-point pen but the other T and H marks were made with toner; (ii) there are inked lines on the lease plan that are not on the 28 February Transfer plan; (iii) the T-marks on the lease and on the 28 February Transfer plan have been separately drawn.

22. On that basis the Respondents assert the court should find (i) the copy plan filed at the Land Registry (i.e. without the disputed T-mark) is accurate and so there was no T-mark on the original and (ii) it was the Appellant or someone acting with her knowledge and consent who added the T-mark to bolster her case. These conclusions are supported by a detailed witness statement of the Respondents' solicitor who explained the conveyancing process by which plans would have been stamped, copied and filed at the Land Registry in 1997.

23. The Appellant did not challenge the conclusions of the Single Joint Expert but did point out in closing a dating anomaly between the certified copy of the 28 February Transfer and the original document – the original had a red date stamp showing 12 March 1997 which does not appear in the certified copy dated 17 March 1997. Mr Rainey's response was that since the date stamp would have been applied at the same time as the stamp duty stamps visible on the right-hand side of both documents it was likely that the date stamp had not shown through on the 17 March 1997 copy.

24. I agree that the date anomaly does not undermine the obvious conclusions to be drawn from the expert evidence and Mr Oppler's witness statement and the fact that the T-mark did not appear on the copy registered plan. Based on the evidence I find that the conveyance plan attached to the 28 February Transfer did not contain a T-mark on the disputed wall.

25. However, I do not find that the Respondents have proven on a balance of probabilities that the Appellant was responsible for the presence of a T-mark on the plan she seeks to rely upon. In not making that finding I have weighed the following factors:

a. There is strong circumstantial evidence against the Appellant – someone put the mark there and it was the Appellant who benefited and who has sought to benefit from it. However, the evidence remains circumstantial. Neither the expert nor anyone else has been able to provide direct evidence linking the Appellant to the interference.

b. It has not been possible to date the addition. The pool of potential perpetrators, while it includes the Appellant, also includes her late husband. While I do not find it inherently likely that any of the professionals who might have had access to the original 28 February Transfer plan would have made the change, it is certainly no more nor less likely that the Appellant's late husband might have done it. If nothing else this lessens the likelihood that it was the Appellant.

c. It was not explored in evidence when or in what context the T-mark point was first used by the Appellant for her own purposes or otherwise when it first crossed the line between the parties. I would have regarded this as important evidence for context – was it more likely that the Appellant found a plan that had a T-mark on it or that she had a plan that did not until she caused it to be put there (or knew it had been added) and then relied upon it.

d. The Appellant was taken to hand written comments she had made on a copy of the lease and copy architect's plans dated 3 July 1997 both of which make reference to a pink and green plan being *with kite marks*. It was not established when these references were made, Mrs Fenton said when Mr Lewis started saying about party walls, or in what context. They appear to be internal notes rather than material intended to cross-the-line and so are inconsistent with a fraudulent intent or at least equally consistent with an innocent noting something she understands to be significant.

e. The Appellant denied the allegation with an understandable degree of upset. I was not impressed by her immediate response to the allegation being to explain why she would not have done it rather than a simple denial but there is nothing necessarily telling in that.

f. The standard of proof remains the balance of probabilities but this is one of those findings where because of the seriousness of the allegation combined with its relatively high degree of inherent improbability (forging plans is not an everyday action for the Appellant) the weight of evidence required to meet that standard needs to flex with those factors. Although the finding that the T-mark was not on the conveyancing plan makes it easier to make a finding against the Appellant than it would have been otherwise.

g. It is not necessary for me to make this finding to determine the present dispute. Although it would be relevant to the Respondents' arguments about abuse of process, it would not be conclusive of those arguments which need to stand or fall independently of any document manipulation by the Appellant.

h. It is perhaps of some minor significance that this issue has arisen not in the context of part 7 proceedings with pleadings directly focused on the issue but as a side issue in a party wall appeal.

26. Balancing all those factors together my finding is that I am not satisfied that the Appellant was responsible for or party to the addition of the disputed T-mark to the plan in the 28 February Transfer.

27. I have set out the relevant wording from the 28 February Transfer above and have commented to some extent on its construction. I add only that if my immediate impression was correct and the conveyance makes a vertical distinction between the wall which is continuous with the garden wall and the wall which is above that section of the wall then even if there was a T-mark where the Appellant asserts there was on the plan, it would make no difference to the construction of the conveyance – the T-mark would be limited in its application to the upper part of the wall.

28. On 5 March 1997 the Respondents obtained planning permission for an extension to the side of No. 3 that was closest to No. 5 (I refer to the works as built as "the 1999 Works"). It was part of the Appellant's case in her answers to cross-examination, but rightly not pursued on her behalf by her legal representatives, that the planning authorities were hoodwinked into giving permission because they thought that the proposed works were only to the other side of No. 3 not the side that bordered No. 5. This contention is contradicted by the actual planning materials from which it is clear what was intended by the Respondents is what was built and cannot stand with a letter dated 7 May 1997 from the Appellant's then solicitors objecting to the planning application to build in the space between the two properties. It is one of those beliefs that are sometimes held onto in long running disputes but which do not reflect what happened at the time.

29. The 1999 Works required the Respondents to comply with the predecessor of the 1996 Act, the London Building Acts (Amendment) Act 1939. An award was obtained on 27 May 1997 which set out at paragraph 1(a) that *the wall separating 3 Cavendish Avenue, NW8 and 5 Cavendish Avenue, NW8 as defined between points A & B on drawing CA005 is deemed to be a party wall ("the 1997 Award").*

30. The 1997 Award assumed the boundary ran through the middle of the lower part of the wall and authorised the Respondents to build a new wall on the No. 5 side using the No. 5 side of the existing wall for support for the full length of the upper part of that structure: *to carefully remove the existing tile creasing and to raise the party wall in brickwork tied into the existing wall as shown on the drawings…to cut into the party wall to form and chase and fix in new lead flashing*.

31. The Appellant made but did not pursue in closing submissions, a point about the lack of any meaningful A & B points on drawing CA005. It was a good point to the extent that it was right – there are no A & B points marked on drawing CA005 that give meaning to paragraph 1(a) of the 1997 Award but the substantive point is hopeless – it does not follow from this that the 1997 Award did not purport to found its jurisdiction on the wall being party. There is no doubt which wall was being referred to – it was that which was the subject of the award and along which the 1997 Works were to be built.

32. The party wall issue had already been raised between the parties. The Respondents had set out their scepticism about the Appellant's position in a letter from the Respondents' surveyor to the Appellant's surveyor dated 24 March 1997: *the contention that the wall is not a party wall as advised to you by Mrs Fenton is in conflict with all information in respect of No. 3 Cavendish Avenue*.

33. The Respondents obtained a letter dated 4 April 1997 from the Eyre Estate (who had owned the freehold and were the sellers to Mrs Fenton and Mrs Lewis) which said that the legal boundary ran through the wall. The Respondents had the letter sent to the Appellant's representatives. The letter was put to Mrs Fenton but she explained that her husband dealt with all these matters for her.

34. The parties' solicitors were exchanging correspondence in May 1997. In a letter dated 28 May 1997 addressing the Respondents' contentions about the party wall (that it was a party wall and the boundary ran through its middle), the Appellant's solicitor said: *In paragraph 1 of your letter you state that ownership of the party wall is divided vertically. We agree. The flank wall of our client's property is built upon half of the party wall. If your client builds on his half of the party wall, then in order to make the joint between the two properties weatherproof, he will require to affix some form of flashing to our client's flank wall. Our client is the owner of the land to which that item of work relates…*

35. The relevant assumptions behind that section of the letter are:

    a. The party wall is the lower part of the wall (i.e. that which can be described as the continuation of the garden wall);

    b. The flank wall is the upper parts of the wall (i.e. that part of the wall which is further away from No. 5);

    c. The proposed 1999 Works were going to build up from the party wall, which was fine, but would need to cut into the flank wall which was not permitted[1].

36. Mrs Fenton distanced herself from this letter by referring to her husband dealing with these matters. Mrs Fenton accepted that she was happy for her husband to do this and that there was no doubt about him having her authority to do so. I find that there is no meaningful distinction between the two so far as any attribution of the solicitor's correspondence to Mrs Fenton is concerned.

37. Notwithstanding this correspondence, on 12 June 1997 the Appellant appealed the 1997 Award ("the 1997 Appeal"). The 1997 Appeal was based on two assertions: (i) that the wall referred to in paragraph 1(a) of the 1997 Award was not a party wall and/or (ii) that the flank wall built above the garden wall was not a party wall. It can be seen that (i) was intending to refer to the whole wall but (ii) was just the upper part of the wall. The former is inconsistent with the 28 May 1997 letter, the latter is making the same point.

[1] It was explained to me that such cutting could be permitted under the 1996 Act but could not be permitted under the predecessor statute.

38. The Respondents (in fact Mrs Lewis alone but the difference is immaterial for present purposes) filed an answer to the 1997 Appeal. The answer asserted that the wall was a single and continuous wall built at different dates, with the following history: (i) the garden wall; (ii) which was then thickened from foundation level upwards to create the flank wall; (iii) the new flank wall incorporated the garden wall and so it became all one wall for the purposes of the legislation. The Respondents accepted that the 1997 Award was not conclusive on the party wall issue because it could be reconsidered by the court. The answer is undated but can be presumed to be in the latter half of 1997.

39. I was shown an exchange of correspondence between solicitors acting on the 1997 Appeal which is about directions and disclosure. The Appellant's solicitors attempted to explain away their reference to "we agree" in the 28 May 1997 letter by saying this was the surveyor's position and not the client's. This is no more convincing now than I expect it would have been in 1997.

40. The parties have not put before the court any further documents regarding the 1997 Appeal. It would have been helpful to have any court orders. It is likely at that time London Building Act appeals would have been treated as *sui generis* but akin to a fixed date summons.

41. A letter dated 14 April 1998 from the Respondents' then solicitors to Mr Lewis refers to the Appellant's then solicitors having sent a notice of discontinuance relating to the 1997 Appeal. The Respondents' solicitors were going to draw up a bill of costs. It is common ground that the Appellant paid the costs of the 1997 Appeal to the Respondents. Under the CPR it is not possible to discontinue a statutory appeal any more than any other appeal and so the order determining an appeal which a party chooses not to pursue is likely to say (or should say) that the appeal is dismissed. It is not possible to predict what order the court would have produced to end the appeal from the 1997 Award. The rules regarding discontinuance (then as now) did not of themselves preclude a fresh action raising the same issue but as the Respondents reminded me a fresh appeal of the 1997 Award was not possible – it would have been out of time.

42. Mrs Fenton, in evidence, said the reason why she (or her husband) brought the 1997 Appeal to an end is that on advice the view was taken that planning challenges were more likely to be successful. Whatever the subjective reason for the withdrawal, what is clear is that the issue of whether or not the flank wall was a party wall was raised before the court by the Appellant, was contested by the Respondents, and then the Appellant withdrew that issue from the court in circumstances where the Appellant paid the costs.

43. In the early part of 1999 the Respondents carried out the 1999 Works. Mrs Fenton was cross-examined about an incident when during the currency of those works she entered No. 3 with two mounted police officers and objected to the works. Mrs Fenton said she heard the work being done and told the police that the work was wrongly being done to her wall. The Respondent asks the court to conclude from this incident that the Appellant knew that the works were being carried out and that those works involved, as was stated in the 1997 Award, building up from the thicker part of the wall. I make those findings about the Appellant's state of knowledge – they necessarily follow from the evidence.

44. I am not able to find, because I do not accept that Mrs Fenton's recollection now would be capable of making any meaningful distinction, that her objections were to the Appellant's right to carry out the works at all (a trespass issue) rather than to how the works were being done (a nuisance issue) or both.

45. No action was taken by the Appellant to stop the 1999 Works being done or assert a right not to have the 1999 Works done to any part of the wall. Most relevantly, no court proceedings were taken and no formal objection was raised to what, from the Appellant's current perspective at least, was a trespass to her wall (or at least that part of it comprising the Original Flank). It is important to set out that this potential trespass (based on the Appellant's current position) would have extended to the Original Flank because the support which the Respondents required for the 1999 Works extended into that area of the wall and that it would have related to the entirety of the disputed lower wall (for support) and the disputed upper wall (cutting in for flashing[2]).

46. During the 2000s the parties had disputes about the Appellant putting fence panels on top of the garden wall. The Respondents obtained damages in this respect. I don't regard the various fence panel disputes as relevant to this judgment.

47. In 2014 Mrs Fenton made a claim for damages for nuisance arising out of the 1999 Works. The works as built had caused water nuisance to the wall with consequent damage both to the wall and the interior of the Appellant's property. I was provided with the order concluding those proceedings and the court's judgment ("the 2014 Claim"). The 2014 Claim was in nuisance and the Appellant, as claimant in that claim, obtained from the court an order that the roof of the 1999 Works be removed and not replaced in a way which would cause water to flow onto No. 5.

48. The Respondents make the point that not only was there no claim in trespass brought before the court in 2014 but the injunction requiring any rebuilt roof not to cause water to flow onto No. 5 necessarily recognised that the rest of the 1999 works were lawful – because no steps were taken to prevent the rest of the structure remaining as was. Such a recognition was inconsistent with the Appellant's current position which was that the wall supporting the 1999 Works was not a party wall (such support being provided by the full extent of the disputed wall in this Appeal including the Original Flank).

49. Mr Frame's response refers to the 1997 Award – this authorised the works and the Appellant could not raise issues inconsistent with it. This procedural or statutory bar does not apply in the present proceedings which are concerned not with works authorised by the 1997 Award but with new intended works only purportedly authorised by a later award. I deal with these arguments below.

[2] It is true that the cutting in would be at a different point (that necessary for a one-storey extension and not a two-storey extension). It is a distinction without a difference for present purposes. It follows from this that I have no time for a reductionist argument whereby the Appellant can raise the party wall issue again each time the Respondents require 1996 Act authority to do anything to a different part of the wall. No such argument is being run – the Original Flank argument is not reductionist in this way – it says the Original Flank is not and never has been a party wall.

50. The Respondents have sought to rely on a party wall notice served by the Appellant on 2 April 2015 which related to what was without dispute part of the garden wall. I do not consider that such conduct takes the present issue any further and I do not refer to it again.

51. The Respondents say that prompted by the need to replace the roof on the 1999 Works, on 29 September 2015 they applied for further planning permission to construct a two-storey extension (I will refer to those proposed works as "the Two-Storey Works"). Notwithstanding the Appellant's objections, on 5 January 2016 permission was obtained for the Two-Storey Works.

52. On 30 November 2015 the Respondents' surveyor, Mr Redler, gave notice of intended works. The description of those works appears wide enough to include a two-storey extension, which was what Mr Lewis said in his witness statement. However, Mr Lewis was taken to the drawings which accompanied that notice (and / or were relied on as part of the works described after the notice) and these were limited to a single-storey extension but with the slope of the roof compliant with HHJ Bailey's order. I find accordingly.

53. Following that notice a dispute arose and in that context an award was made dated 6 June 2016 which determined that the wall in dispute was a party wall. The Appellant did not appeal that award and on 8 December 2016, the Appellant's surveyor referred to the lack of an appeal when writing that the surveyors had to accept that as now being the position.

54. The Appellant contends that the 6 June 2016 award is invalid because the parties' appointed surveyors did not comply with the requirement under sections 10(1) and 10(2) of the Party Wall etc. Act 1996 to forthwith select a third surveyor and to make that selection in writing.

55. It was argued by the Respondents that the court should assume that the surveyors would have done this and that the emails exchanged between them at or just prior to the issuing of the 6 June 2016 award were sufficient. It was said in those circumstances the Appellant cannot prove that the selection was not made in writing and that the Appellant could but did not call her own surveyor to admit his failings. I disagree. In the absence of proof of a written selection, and no evidence from any of the relevant surveyors that there was a written selection, I find that there was no written selection within section 10(1). This raises a dispute on the law which I address briefly because it is not relevant on my other findings.

56. On 17 May 2017 the award was made which was the subject of the current appeal – this permitted the building of the Two-Storey Works.

The Law

57. Although some 35 or so authorities were cited to me, for the most part, there was no substantive dispute about the relevant legal principles. I can set them out here. I do so in what seems to be the most cohesive logical order, starting from the particular and moving to the general. In passing I comment on and dispose of certain arguments that can be got out of the way at this point.

58. Section 10(16) of the 1996 Act[3] provides that party wall awards are conclusive and shall not except as provided by this section be questioned in any court. This section refers to the statutory right of appeal. However, it is common ground that this does not apply to decisions made during a party wall process which are necessary for the jurisdiction of the surveyors or which are not within any powers the surveyors might have had. The distinction is apparent from *Selby v Whitbread* [1917] 1 KB 736, McCardie J at page 449 where the judge contrasts the arbitrators' decision about the necessity of a pier (binding) and a decision relevant to their own jurisdiction (not binding).

59. It follows that there is nothing in the various party wall awards of themselves that would create any binding estoppel or statutory bar as to the status of the disputed wall. Necessarily any decision about the wall's status as a party wall would be a decision relevant to the surveyors' jurisdiction under the legislation. Although the Respondents raised a collateral attack on the 1997 awards and 2016 awards as a separate head of objection I do not accept those arguments. The decision of party wall surveyors as to whether or not a particular wall is a party wall (which in this case is in substance a decision about where a boundary is relative to a wall) is a decision founding jurisdiction and consequently as explained in *Selby v Whitbread* does not bind the parties and provides no defence to subsequent court proceedings which ignore such a decision (i.e. a trespass claim inconsistent with a decision that a particular wall is party).

60. It is this which makes the dispute about whether an estoppel or waiver could arise in respect of the lack of writing for the third surveyor's selection before the 6 June 2016 award of academic interest only. In the circumstances I shall briefly state that I would have followed the reasoning of HHJ Hazel Marshall QC in the *Manu* case and held that there had been a waiver by the Appellant in not challenging the 6 June 2016 award earlier (or by her surveyor in proceeding with the third-party appointee in the absence of writing). The failure to appoint in writing is not a failure which goes to the jurisdiction of the appointed person and to that extent the cases of *Gyle-Thompson* and *Reeves v Young* are different – a person who cannot appoint a person does not have that power but a person who does have the power but does not go about it in the required manner is a different situation. The same position can be reached by asking the question whether the intention of the 1996 Act is that the appointed surveyors' jurisdiction to select a third surveyor is only a jurisdiction to select such a person in writing or a jurisdiction to make that selection which must be in writing.

61. Although the ability of party wall awards to create binding estoppel might be limited on matters which go to their jurisdiction, court proceedings, being proceedings before a court of record of competent jurisdiction have a wider application and most relevantly cause of action or issue estoppel will apply even if the matter was determined by consent. In *Khan v Golechha International* [1980] 1 WLR 1482 the Court of Appeal held that issue estoppel arose following an appeal that was withdrawn by consent which prevented a matter from being relitigated even though the consensual withdrawal was made because of a concession made in error. The Respondents rely on this principle to say that the

[3] Section 55(m) of the London Buildings Acts (Amendment) Act 1939 is similar.

withdrawal of the 1997 Appeal created an issue estoppel in respect of the party wall issue which was the subject of the appeal.

62. A similar, although different and wider, form of estoppel is derived from the *Henderson v Henderson* jurisdiction. The essence of this doctrine as referred to by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC in the speech of Lord Bingham: *the bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all*. It is necessary to take into account all the circumstances in what is a particular and fact-based assessment. I have also reminded myself of the summary in *Virgin Atlantic v Zodiac* [2014] AC 160, Lord Sumption JSC between 180H and 186B – which focuses the Henderson principle within its overlap with estoppel per rem judicatam. A focus which is relevant for the present arguments. Mr Frame, helpfully, drew my attention to the summary of the law by Clarke LJ at paragraph 49 in *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14 – it is not enough that a matter could have been raised earlier, it is always a question of whether it is abusive to raise it now and that will likely involve a finding that so raising it involves harassment or oppression.

63. Finally, on the law, the Respondents assert a factual bar on the Appellant's case about the wall arising from either (i) an implied boundary agreement or (ii) proprietary estoppel. The cases relied upon being:

    a. *Burns v Morton* [2000] 1 WLR 347. A boundary fence was replaced by a wall that was 6 inches within the previous boundary. The Plaintiff's predecessor planted Leylandii trees up to the wall. The Defendant went on to the strip to prune the trees and the Plaintiff claimed in trespass. It was held that the building of the wall, in the light of the conveyance, amounted to an implied agreement that the new wall was the boundary and so the disputed land became owned by the Plaintiff.

    b. *Thorner v Major* [2009] 1 WLR 776. In which Lord Walker said most scholars agreed that proprietary estoppel required three main elements: a representation or assurance made to the claimant; reliance on that representation by the claimant; and detriment arising from that reliance. The relevant assurance can be given by "standing by" (paragraph 55) *because this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstances of looking on is in many cases as strong as using terms of encouragement*.

64. In respect of the latter (but I can see no reason at all in principle why it would not also apply to the former) I point out, because it is an argument sometimes made, although not by Mr Frame in this case, that the court in considering whether the elements of an estoppel are made out at the time when the question arises for decision does not have to pin down the existence of that estoppel to a precise moment prior to which it did not exist and after which it did exist (*Thorner*, Lord Hoffmann at 779H-780A) – rather the court needs to look at all relevant evidence and address the question whether the estoppel existed at the time for which the court must answer the question.

The Arguments (to the extent not already dealt with)

65. The Respondents argue that the facts set out above constitute either a boundary agreement or a proprietary estoppel. The issue is the location of the boundary and that is addressed expressly in the 28 February conveyance. It follows that the subject of the agreement or estoppel relates to the meaning of the conveyance and not to any transfer of land. The 1997 correspondence culminates in the Appellant's solicitors agreeing that the boundary line is down the middle of the lower wall. Consistently with this agreement, the appeal from the 1997 Award was withdrawn and the Respondents then built their extension on the party wall in such a way that would be impermissible unless the boundary was down the centre line, this was obvious and apparent to the Appellant and yet she took no steps to assert a trespass claim thereafter, whether in the 2015 proceedings or otherwise. This would give rise to an implied agreement under the *Burns v Morton* principle.

66. If not an implied boundary agreement then there is an estoppel: (i) the solicitor's letter, the withdrawing of the appeal and the lack of substantial challenge to the building of the extension are a consistent representation that the boundary runs along the centre line; (ii) the Respondents relied on that in building the original extension; (iii) this was detrimental because of the cost of the works. Mr Lewis was not cross-examined on reliance and detriment.

67. Alternatively, there was a *res judicata* arising out of the withdrawal of the appeal from the 1997 Award which raised the very issue which the Appellant now seeks to raise some 20 years later.

68. But, if there was not a strict res judicata then there was nevertheless *Henderson v Henderson* abuse because if the Appellant wanted to challenge the boundary issue and the status of the party wall then she should have done it in the appeal from the 1997 Award, or after the Respondents started and completed the extension work but that was not done and no attempt was made to challenge the lawfulness of the extension in the 2014 proceedings (other than the nuisance creating roof slope and guttering). Under this head the Respondents also referred to the 28 May 1997 letter, the Appellant's use of the party wall procedure for other disputes about the garden wall, which can only be on the basis that the boundary runs down the centre of the garden wall, not challenging the 2016 Award, and various objections to Westminster City Council about planning for the extension and the temporary roof.

69. The Appellant's case in summary is that the Respondents refusal to open up the wall on their side is unreasonable and telling. Each of the 1997, the 2016 and the 2017 Party Wall awards need to be treated distinctly because they relate to different disputes. There can be no res judicata arising from those awards about the status of the wall because it is a matter going to the surveyor's jurisdiction. There cannot be *Henderson v Henderson* type abuse unless the court is satisfied that the subsequent litigation involved unjust harassment or oppression – as to that the Second Respondent was not party previously, the 1997 Award is of historic interest only, the 2017 Award arises out of the Respondents' wish to build a two-storey extension which is a new issue not previously considered and

those earlier awards create no form of *res judicata* accordingly it cannot be just to prevent the Appellant from raising her full case before this court.

70. Furthermore, the informal boundary cases do not extend to a situation of this kind. The letter of 28 May 1997 letter is written in objection to the works being proposed and was not intended to lay down any formal boundary proposal. Besides which the letter was not authorised by the Appellant and the Respondents' attempt to squeeze these facts into a *Burns v Morton* type situation while understandable ultimately fails because the circumstances here are so different. In short (in my summary and not Mr Frame's) the Appellant has always believed it to be her wall and it would be unjust to prevent her from raising this now.

Discussion

71. I find that the Respondents are correct in their contentions based on proprietary estoppel and abuse of process but not on implied agreement or res judicata (but the near misses on those latter two arguments rather prove the reasons why the former are successful).

72. The predominant factor is that the Appellant has acted in a manner which is only consistent with an objective representation that the boundary between No. 5 and No. 3 runs through the centre of the lower part of the disputed wall. I will go through each of the relevant events chronologically and relate them to their legal consequences.

73. The boundary issue was live between the parties soon after the 28 February 1997 conveyance. It is addressed in the correspondence leading up to the Appellant's solicitor's letter of 28 May 1997. The Respondents' solicitor had set out the position that the wall was party because the boundary was deemed to run through its vertical centre. The Appellant had been sent the letter from the Eyre Estate confirming this.

74. In that context the solicitor's letter of 28 May 1997 stated the writer's agreement that the boundary ran through the centre line of the garden wall (which meant the lower part of the disputed wall). I disagree with any suggestion that the Appellant cannot be responsible for this representation because it was made by a solicitor who was taking instructions from her husband. The solicitor was acting for the Appellant and the Respondents are entitled to expect that letters have been sent with her authority. In any event, on the Appellant's evidence set out above she gave her husband authority to deal with the solicitor on her behalf and is bound by his actions.

75. It is also wrong to categorise the letter as not making any statement about the boundary issue because its main subject was objecting to the proposed works. The two are not alternatives. On the contrary the reason given for objecting to the works started from the agreed position that the boundary wall was divided equally and then continued that the flank wall above that boundary wall was not party because it was solely within the Appellant's side of the boundary and so could not be cut into by the Respondents. This was a good point (assuming the wall could be so divided) until 1 July 1997 after which the 1996 Act allowed such cutting in.

76. The letter is a clear representation that the position was agreed to be as the Respondents' now assert in their fall-back position. It does not amount to an actual agreement (and is

not alleged so to do) because, among other reasons, it would not be intended or expected to have such legal consequences. It is the starting point for the arguments which rely on conduct.

77. The appeal from the 1997 Award was based in part on an assertion that the entire wall was not party but also raised the alternative contention that the upper flank was not party but the lower parts were party (i.e. a position consistent with the 28 May 1997 letter).

78. At some point prior to 14 April 1998 a likely notice of discontinuance was sent regarding the appeal. The appeal was then ended and the Respondents costs were paid. There are no further documents about this. Mrs Fenton said she withdrew the appeal because she and her husband considered that the planning process would be a more fruitful way of stopping the building. This is curious since the planning process was complete by then so far as I can tell on the evidence. It may well be that the withdrawal was a recognition that the alternative case, the same as that set out in the 28 May 1997 letter, would likely be a pyrrhic victory because of the provisions in the 1996 Act about cutting in to an adjoining owner's building.

79. I do not consider that a *res judicata* arose out of this withdrawal because it cannot be clearly said on the evidence that the court brought the appeal to an end in a way which would necessarily mean the Appellant lost her right to contest the issue subsequently. This is because of the uncertainty surrounding whether the appeal was or could be discontinued. Of itself a discontinuance would not create an issue estoppel because the rules provided that the discontinuance would not be a defence to a second action. Of course, on the facts there was no practical possibility of a second action because the time for appealing the award had passed. I do not consider this practical difference sufficient to turn an uncertainty into a final issue estoppel on the party wall point. However, the decision not to pursue the appeal was a further objective representation, consistent with the 28 May 1997 letter, that the Appellant accepted that at least the lower wall was a party wall. Moreover, to use the language of *Khan* (p1491H) the Appellant had the opportunity in the context of her appeal from the 1997 order to establish before the court that the wall was not a party wall but by choosing not to pursue that appeal she abandoned that opportunity.

80. It is no answer to that conclusion to say that the 1997 Award was a party wall award and the party wall issue only went to jurisdiction and so did not bind the parties because the appeal from that decision was asking the court to rule on the issue. It engaged wider principles about court proceedings not party wall surveyor awards. A party may have a choice whether to appeal an award or subsequently bring proceedings inconsistent with a jurisdictional type finding in the award but once an appeal is brought the choice is made.

81. I find that at least by the date of the withdrawal of the appeal there was a clear unequivocal representation by the Appellant that at least the lower wall was a party wall (i.e. that it crossed over the boundary).

82. I do not mean by this that the Appellant subjectively thought any such thing but that her actions or the actions of those for whom she was responsible would reasonably have entitled the Respondents to consider that the issue was settled – at least the lower part of

the wall was accepted to be party (as the previous freeholders had written, as the Appellant's solicitors had written, and as the Respondents themselves had been asserting). The withdrawal of the appeal without any qualification was conduct from which the Respondents might reasonably assume the party wall issue was not going to be raised again. If it were necessary to describe the position from the Appellant's point of view it would be a reluctant acceptance of a reality with which she continued to disagree.

83. I am satisfied that in reliance on that reasonable assumption the Respondents carried out the 1999 Works. This is asserted in Mr Lewis' statement and as Mr Rainey reminded the court was not challenged in cross-examination. Plainly the cost of the 1999 Works was a detriment in this respect. Mr Lewis' statement also makes the point that if he had thought otherwise regarding the withdrawal of the appeal then he might have considered objecting to the discontinuance. I also accept this point – it is notable that in the then current edition of the Green Book the case of *Ernst & Young v Butte Mining plc* [1996] 2 All ER 623 is cited for the availability of such an application.

84. It follows that from that time, say by the latest 11 March 1999 when the works were completed, all the relevant elements of a proprietary estoppel were in place: a representation, reasonable reliance and detriment.

85. I make this finding without taking into account the Appellant not taking steps to stop the works. One of Mr Frame's points was that since the works were done consequent on the 1997 Award there was no basis for any challenge. This is a bad point for the reasons Mr Frame gives when asserting, rightly, that Party Wall awards do not create estoppels on matters going to jurisdiction – the 1996 Award did not prevent the Appellant from going to court to assert a trespass in respect of the lower garden wall. The failure to do so and otherwise the standing by in respect of this work is a further reason why the representation relevant to the estoppel is made out.

86. It has not been argued that anything in the incident of the mounted police, which was only raised in cross-examination of Mrs Fenton and was not put to Mr Lewis at all, makes any difference to this analysis but I have found above that at best it was equivocal but when balanced against the strong inferences to be drawn from the other matters I have set out above it carries no weight in any event.

87. I find that the Appellant is estopped by proprietary estoppel from asserting that the boundary line does not run down the centre line of the lower and wider part of the disputed wall.

88. I am not persuaded, however, that there was a boundary agreement. It seems to me that there likely needs to be some positive conduct by the party to be bound that demonstrates that there was such an agreement. In *Burns v Morton* the moving of the wall provided this positive act only consistent with the agreement then confirmed by the Leylandii planting. I do not find the actions of the Appellant to be of that kind – they are, to use the words from *Thorner* "standing by" and so fall on the side of the line where the law requires something more, detrimental reliance, to give rise to binding consequences.

89. I am not satisfied that the estoppel extends any further than the lower wall. This is for two related reasons (a) that is the extent of the implied representation to be gathered from the circumstances I have set out, and (b) this is the limit of the estoppel necessary to give effect to the equity arising out of those circumstances.

90. I understand the Respondents' case is that this is all that is required to enable them to build the two-storey extension because works authorised by the 2017 Party Wall award build up from the lower wall and then cut into the higher wall.

91. I do not understand Mr Frame to disagree with this analysis and certainly no evidence was called to contradict it. It follows that the findings I have made will prevent the Appellants from running the grounds of appeal other than that which is concerned with load measurements.

92. I can take the other matters more briefly.

93. The 2014 Claim was another occasion on which the Appellant acted in a manner only consistent with a recognition that the existing extension did not amount to a trespass. I have already explained that Mr Frame's argument about not being able to assert contrary to the 1997 Award is wrong – he cannot have it both ways, arguing that awards do not create estoppels on boundary issues and at the same time justify the Appellant not raising a boundary issue before the court by pointing to the award.

94. The 1997 Appeal and the 2014 Claim (subject to the estoppel I have already found) were both opportunities when the Appellant either did or should have raised any title issue over the lower wall. When taken together with the factual history which I have referred to above in the context of the estoppel claim, raising the issue before the court now, some 20 years after the court was first asked to determine it but then not because of the Appellant's withdrawal of the appeal, some 19 years after the Respondents built the 1999 Works, without raising the issue in the meantime, but bringing to court the 1999 Works for nuisance purposes without raising the issue at all, notwithstanding requiring those works to be rebuilt, does amount to harassment – as referred to by Clarke LJ – and is an abuse of process within the *Henderson v Henderson* principle.

Conclusion

95. The Respondents succeed on the preliminary issue. I have already invited the parties to work towards an agreed order but I will give counsel a further opportunity before handing down this judgment.

HHJ Parfitt