IN THE COUNTY COURT AT CENTRAL LONDON Case No: B20CL116

TECHNOLOGY AND CONSTRUCTION LIST

Courtroom No. 59

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Wednesday, 29th June 2016

Before:
HIS HONOUR JUDGE EDWARD BAILEY

B E T W E E N:

SHAMIN MASTERS
and others

Appellants

and

6 BOLTON ROAD LIMITED

Respondent

MS HARRIET HOLMES (instructed by Morrisons Solicitors LLP) appeared on behalf of the Applicant
MR SIMON GOLDSTONE (instructed by Keoghs LLP) appeared on behalf of the Respondent

JUDGMENT
(Approved)

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HHJ BAILEY:

1. This is a party wall award appeal brought by the owners of 5 Bolton Road, Hampstead, London, NW8 0RJ, as adjoining owners. The building owner, 6 Bolton Road Limited is, as the name implies, the owner of the adjacent property at 6 Bolton Road, London, NW8 7TU.

2. These properties were constructed in Victorian times. Quite when they were built is not in evidence. It may be as early as 1841, as the respondents suggest, or it may be some 20 or 30 years later. Whatever the date of construction, and, doubtless, with the advantage of maintenance and refurbishment works from time to time, these properties have stood successfully for well over 125 years.

3. The two properties are part of a terrace of stuccoed townhouses, each with a balcony surrounded by ornamental railings at first floor level. The balconies to the two properties are connected to each other. There is no door, as such, onto either balcony. However, the first-floor windows, which are sash windows, are of appreciable height. It is perfectly straightforward for someone resident in either property to raise the lower sash and step onto the balcony to the property.

4. On 31 July 2014, a portion of external cornice and leadwork at 6 Bolton Road fell from its position at the top of the second floor of the property and fell onto the first-floor balcony and balustrade at 6 Bolton Road. The falling cornice caused damage, not only to the 6 Bolton Road front elevation and balcony, but also to the balcony and front elevation at 5 Bolton Road.

5. The defendant instructed the firm, KMASS, to prepare necessary designs and specifications for the repair work and to undertake the management of the repair contract. KMASS is the trading name of Ken McHale and Associates Limited, of which Mr Ken McHale is the Director. Mr McHale is a chartered structural engineer. The only other person referred to on the notepaper in the bundle is a Becky McHale.

6. It is plain from the evidence given on behalf of the respondent by a director, Mr Massimilio Ferrari, that he and the respondent company relied heavily, indeed, it is probably fair to say, relied wholly on Mr McHale to do whatever was necessary to ensure that the property was repaired and restored to its original condition. A plan of the proposed works, drawing number J3117-D-01 dated September 2014, contains a schedule of works. Item 15 is, ‘Replace section of York stone balcony properly sealed and fixed to existing, using stainless steel resin dowels, prepare and form edges and surfaces of existing stone and renew waterproof membrane’.

7. For the purposes of carrying out those works scaffolding was erected outside no. 6 on 19 November 2014. It appears that there was no communication with the appellants as owners of no. 5, until Mr McHale wrote to them on 8 December 2014, introducing himself as contract administrator for 6 Bolton Road Limited in relation to the repairs to the cornice, first floor stone balcony and balustrade, and informing them that the contract for repair works had been awarded to the AMCAS Group, with an address in Bromley, Kent.

8. The letter continues:

'We have two issues that we wish to bring to your attention:

1) Whilst preparing the balcony slab to number 6 Bolton Road, the stonemason can also carry out repairs to and make good the underside of the balcony slab to your property'.

An estimate of the cost of those works is given at £1,500 plus VAT.

'If you would like the builder to carry out these repairs, please forward to us a cheque payable to AMCAS in the sum of £1,860, which we will retain on our file until those works are completed; or, alternatively, make your own arrangements with AMCAS or others, to complete these repairs.

2) We attach a photograph of the cornice to your property which was taken a couple of weeks ago. Whilst we note that the cornice appears to have been recently replaced, it is leaning over and does not appear to be stable, and repair and replacement should be considered'.

It seems likely Mr McHale has an interest in AMCAS, but that is of little significance.

9. It might seem to be a little rich that, acting for 6 Bolton Road, who on the face of it are entirely responsible for the damage at 5 Bolton Road, the contract administrator should suggest that 5 Bolton Road should pay for the repairs to their balcony caused by the cornice falling from no. 6. It is not altogether surprising that the offer made by Mr McHale in his letter of 8 December 2014 was not taken up by the appellants.

10. The appellants were, naturally, concerned as to their position. In particular, Mrs Shamin Masters, the first named appellant and the only appellant to give evidence before me, was clearly concerned as to the structural safety of the balcony that was being replaced.

11. On 22 January 2015 Mrs Masters sought advice from a surveyor, Mr David Bowden of Urban Building Surveyors. Mr Bowden was asked to provide advice generally as to the position the appellants were in, and whether or not the works intended by the respondents were works which fell within the provisions of the Party Wall etc. Act 1996.

12. Mr Bowden took the view that the works did fall within the Party Wall etc. Act 1996 and on 29 January 2015, in case there should be a dispute, the appellants appointed Mr Bowden to act as a party wall surveyor. On 3 February 2015 Mr Bowden wrote to the respondents informing them of his appointment on behalf of the appellants, and requesting that all the works notifiable under the 1996 Act should cease immediately. Mr Bowden made it clear that he expected the respondents to comply with the 1996 Act and serve the necessary notices.

13. Concerns as to the potential instability of the balcony caused Mr Bowden to write again on 9 February 2015, concerns with which Mr McHale engaged in an email of 11 February 2015. Although Mr McHale was engaging with Mr Bowden as to the nature and safety of the works which he was engaged in administering, he continued with those works ignoring Mr Bowden's request that they cease. Accordingly, on 20 February 2015, Mr Bowden wrote again, requesting that no further notifiable work should be carried out, and that the respondents should comply with the provisions of the 1996 Act. Mr McHale's response, on 24 February 2015, was to deny that the Act applied. The works continued and were persisted in notwithstanding Mr Bowden requesting that there should no further removal of support to

the balconies, a request made on 18 March 2015.

14. As to the appellants' concerns as to the integrity of their balcony Mr McHale wrote on 23 March 2015 to state that he had had further detailed discussions with the builder as to the works that would be carried out to connect the balcony at no. 6 to that at no. 5. Mr McHale attached a photograph to demonstrate the detail proposed, and informed the appellants that the stonemason on site carrying out these works was a Mr Chris Gladwell, BSc PGDip Cons Hist M(RICS), a man stated to have a considerable amount of expertise in carrying out this type of work. Mr McHale also gave assurances as to the temporary support that would be provided to the balconies during the course of the work. On 25 March 2015, the contractors cut away a section of the remaining balcony at no. 6 which was connected to no. 5. This precipitated threat of legal action, acknowledged by the respondent:

> 'We seem to have reached a point where we cannot go forward with our works without the threat of legal action from you. This will only serve to incur delay and cost to both parties. Our aim is only to restore the structure and appearance of our properties on both sides of our mutual boundary as soon as possible. Surely that must be your aim also? We do not understand what else it is that you want. If you have any other issue, please tell us so that we can proceed with the work, without further delay and resort to legal argument'.

15. The appellants, through Mrs Masters, wrote to Mr Bowden on 30 March setting out a number of detailed concerns and, in particular, noting that Mr McHale had failed to provide any structural calculations. Mrs Masters further pressed Mr Bowden to ensure that there should be a party wall award. This Mr Bowden did, in a letter to Mr McHale of 14 April 2015, stating that his client was keen that all matters in dispute, including the cutting in for the insertion of dowels and the groove in their balcony, be dealt with by an award under the Party Wall etc. Act 1996:

> 'You have received copies of the letters requiring that a surveyor be appointed, to which we request your client has failed to respond since 3 February 2015. I understand that you do not consider an award is necessary, but repair of the damage occasioned to both properties must be a necessity, as is agreement of some form with my client to enable the works to take place. I fail to understand why you and your client seem so against such an award'.

16. On 21 April 2015 the respondent gave way and appointed Mr McHale as its party wall surveyor. Mr McHale then engaged with Mr Bowden as to the appointment of a third surveyor, a Mr Schofield being appointed. Mr McHale then acted swiftly. On 1 May 2015, he sent Mr Bowden a draft award to cover the balcony works. Meanwhile, Mrs Masters continued to press Mr Bowden for an appointment of a specialist engineer:

> 'To provide advice, structural calculations and reinstatement method of the proposed work to the stone balcony. This advice should also include the appropriate support method to be used for propping my balcony during the installation of a section of the new stone balcony'.

17. With apologies for delay, Mr Bowden wrote to Mr McHale on 29 May 2015 stating that he had found it necessary to substantially rewrite the draft award. On 8 June 2015 Mr Bowden forwarded a copy of Mr McHale's draft award, with proposed changes tracked into the original text. The only matter of immediate concern is comment number four, dealing with the works that the building owner would be entitled to carry out. Mr Bowden has added a note to this effect:

> 'We need more detail here, a brief specification perhaps. It will either need an engineer's supporting statement with which I am happy, or I will need to obtain advice from an engineer conversant with stone repairs to advise me on it'.

18. Mrs Masters too had been busy. She sent amendments to Mr Bowden on 15 June 2015, two of which were themes already well worn. First, a clause for an appointment of a specialist engineer to inspect the stone balcony and provide a report on the method of work and temporary report required. The second being the requirement for temporary support.

19. Mr McHale responded to Mr Bowden's suggested amendments on 25 June 2015, proposing his own amendment consistent with comment number four. Mr McHale added a sketch, as agreed in an email of 23 March and stated, 'The stonemason who is on site carrying out these works is Chris Gladwell, and he has a considerable amount of expertise in carrying out this type of work'. This by way of resistance to Mr Bowden's proposed changes.

20. The discussions over the party wall award were impacting on the progress of the works. On 23 July 2015 Mr McHale wrote to Mr Bowden, pressing him to conclude the party wall award to enable the balcony works to proceed. This was followed up by direct contact between the respondent and Mr Bowden. This direct communication is a matter which, understandably, causes the appellant some concern. Party Wall surveyors have a quasi-arbitral role and, as a general rule, a building owner should not engage in private communication with the adjoining owner's surveyor. In the event there is no suggestion that Mr Bowden allowed himself to be influenced by the respondent in the performance of his duties.

21. On 31 July 2015, in response to Mrs Masters' repeated requests that there be the appointment of a specialist engineer, Mr Bowden wrote as follows:

> 'Specialist engineer I have discussed with Ken, and he tells me that the stonemason is effectively a specialist engineer in this area. He is a stonemason with a post-grad diploma etc. in conservation of historic buildings. I do not see the need for a further engineer'.

22. Mr Bowden has not given evidence before me. Mr McHale has. In Mr McHale's recollection, Mr Bowden has gone rather further than perhaps he should in making these comments. I assume that they were intended to be soothing to Mrs Masters. In essence however Mr Bowden is setting out the thrust of Mr McHale's position, namely that there is no need for a specialist engineer, because he, Mr McHale, has gone to the trouble to select a stonemason who has such a level of competence experience and expertise that a specialist engineer would be unnecessary. Mrs Masters was not to be mollified. On 17 August 2015, she again wrote to Mr Bowden, pointing out that the stonemason was not a structural engineer and persisting in her request that a structural engineer be appointed to inspect the stone balcony, assess and advise on the stonemason's proposals, including providing a detailed report on a method statement for the works to be carried out to her balcony. She added, 'I have not received any method statement from the stonemason, apart from a one-page handwritten sketch on a piece of paper, which is unacceptable'. Mrs Masters asked Mr Bowden to provide names of

possible structural engineers who might be appointed. She also asked that details of shoring and temporary support to the balcony at no. 5 be provided by a structural engineer, to be attached and form part of the award, to ensure that such works are carried out properly.

23. On 24 August 2015, Mr Bowden informed Mrs Masters that the building owner was anxious to proceed with the repair work and that he had decided, with Ken McHale, to make a preliminary award determining repair of the balcony only, adding, 'I will not be determining that additional engineering advice is necessary, as I see no justification for it'. On the following day the award was made. It was served on the appellants on 27 August 2015.

24. That Mrs Masters' concern as to the appointment and need for a structural engineer was genuinely held is evident from the fact that shortly after service of the award, she instructed a firm of chartered engineers, Aleck Associates, in the person of Mr Paul Cullen, to prepare a report. This report had to be prepared at great speed, because of the very short timeframe allowed for a party wall appeal by s.10(17) of the 1996 Act. Mr Cullen has not given evidence before me. His report is at page 116 of the bundle. He notes that there is no specification of the temporary propping required or how the balcony would otherwise be supported. However, he is able to show by means of a photograph that, as he sees it, the stone panels being inserted or positioned to form the balcony at no. 6, were not cantilevered from the front wall of no. 6.

25. This in contrast with the information Mr Cullen said he had been given by Mr Chris Gladwell as to the work he would be carrying out. Mr Cullen observed that the balcony would only be minimally supported by cantilevering from the front wall. It would essentially be resting on the bays. Mr Cullen expresses concern that the tensile strength of the unreinforced stone balcony would be insufficient; that the additional load transferred to the proposed joint between numbers five and six would weaken it, possibly causing it to fail.

26. The contents of Mr Cullen's report alarmed Mrs Masters and on 10 September 2015 she filed an appeal against the award in this court. It is fair to say that the consensus of the expert engineers who gave evidence before me is that Mr Cullen had proceeded on a mistaken view as to the stresses involved, and that he caused unnecessary concern on the part of the claimants, but Mrs Masters had no way of knowing this at the time.

27. I am uncertain as to precisely when it was that the appellants became aware that Mr Cullen had mistaken the engineering position. It was certainly not before 13 October 2015. On this date Mrs Masters, possibly having received the order for directions made on 12 October, wrote to Mr Ferrari suggesting that the appeal be stayed in order to allow the respondents to provide the information requested in the five matters in the appeal: "To resolve this matter amicably and save on legal costs".

28. The five matters were structural engineers' reports, structural engineers' calculations, method statement for the temporary and permanent work, specification and drawing of the temporary propping, and building control approval. With regard to this latter point, Mr McHale was able to inform Mrs Masters that this being a work of repair, the building regulations were not engaged.

29. Mr Ferrari gave evidence that his attitude on receiving the letter of 13 October 2015 from

Mrs Masters was to pass it over to Mr McHale and to be guided by him. The guidance he received was that it was unnecessary to provide the documents sought by Mrs Masters. Accordingly, the appeal proceeded and an opportunity to save costs was lost. The appeal proceeded on its way.

30. On 17 December 2015 Keoghs LLP, solicitors for the respondents, wrote to Mrs Masters referring to her letter of 13 October, and setting out, as they say:

> 'The comments of our client's structural engineer below. These are:
>
> 1. That Aleck Associates Limited's calculations were wrong and enclosing an annotated document showing the shortcoming of Aleck's calculations.
>
> 2. It was accepted by the surveyors that agreed and signed the party wall award, that the balcony is being reinstated. All of the other balconies in the road's properties show no issues… there is little need to prepare calculations for the balcony that has provided good service for 100 years.
>
> 3. However, for completeness, our client's surveyor has prepared two alternative calculations. We attach documents detailing these calculations and the results of the same. We summarise these results below for ease of reference.
>
> A panel calculation has been undertaken based upon the commonly used method in BS 5628. This calculation shows that because the balcony section is narrow and long, the slab will span onto the wall of the building. The calculation demonstrates the safety factor of nine, being a calculation using limit state (yield line theory), yields a safety factor of 13.
>
> In light of the above, we look forward to hearing from you with confirmation that the appeal will immediately be withdrawn'.

31. The difficulty with that letter, as demonstrated by Mr Huband in evidence, is that neither of the methods of calculation were apposite to this particular balcony. The panel calculation involves a British Standard which proceeds on the basis that a whole series of panels are placed together. This plainly bears little relation to a solid stone wall. Additionally, the limit state theory also bears no close relationship to a York stone wall balcony construction.

32. The appeal was not withdrawn, and proceeded with the service of witness statements and the preparation of experts' reports, including a joint statement.

33. I will comment briefly on the evidence that I heard. Mrs Masters was the only witness on behalf of the appellants. She gave evidence that the balcony at no. 5 was in regular use, indeed she said daily, which cannot surely be right, but subject to the season and the weather I have no doubt that the appellants made good use of the balcony. I fully accept that Mrs Masters has acted throughout with genuine concern as to the safety and security of the replacement balcony. She is a trainee solicitor and it is, of course, always possible that a person who is embarking upon a legal career adopts a rather more enthusiastic approach to a legal problem which comes her way than others might do. However, as to the genuineness of her concern there can be no doubt. Indeed, that is clearly borne out by the fact that, at her own expense, when it finally became clear that the award had been made without provision

for a structural engineer's calculations, she herself took on the expense of instructing a consulting engineer. It is a great pity that she happened to select someone who made errors, but that, of course, was not something of which Mrs Masters would have been aware at the time she engaged the engineer in question. For his part Mr Ferrari left matters to Mr McHale which was a perfectly reasonable thing for him to do.

34. For the appellants, Mr Nicholas John Huband, an associate of William J Marshall & Partners, gave expert engineering evidence. Mr Huband, by his CV and also by his presentation in the witness box, is clearly an engineer of great expertise. His work has covered a variety of buildings, including Grade II listed buildings and other historic engineering projects going back to a thirteenth century church. Mr Huband's record in his previous firm, SB Tietz & Partners, includes involvement in many substantial projects and his experience ranges from the Athenaeum to pre-fabricated toilet pods.

35. In the expert joint statement Mr Huband and Mr McHale state that the structural form of the balcony may be described as a flat arch spanning between the bays, taking some cantilever and torsional support from being built into the façade brickwork. There is agreement that the Aleck Associates' analysis contains errors and does not fully model the behaviour of the structure. The experts accept that the new balcony matches the original historic form of construction and observe that if it were necessary to demonstrate structural adequacy by calculation a reasonable figure to use for a superimposed load, would be 1.5 kN per m². Mr Huband accepts that, having been in place for some 175 years, the existing balconies would appear to be safe, or as he puts it, 'are apparently fit for purpose', but adds that:

> 'Any new balcony must demonstrate by calculation an ability to carry a superimposed load of 1.5 kN per m² (this is the standard load for the floors of domestic properties) to provide documented reassurance to the adjoining owner and any third parties in the future'.

36. Mr Huband disagrees with Mr McHale as to there being no need for a method statement. He expresses the view that a simple method statement, such as an annotated sketch, should be prepared to demonstrate how the new balcony is supported, particularly during the final stages of the works. This is because of the need to insert the last stone by means of stainless-steel dowels into the stones on either side, bearing in mind that each of the balcony stones is providing and receiving support from the adjacent stones. Accordingly, the insertion of the last stone into the balcony structure is plainly more complicated than any previous stone, and, as Mr Huband advises 'is more complicated than the detail included in the party wall award'.

37. Mr Huband's view is recorded in the joint statement as follows:

> 'Mr Huband is also of the view that the calculations and method statement are required, firstly to confirm the method of construction has been properly thought through at the time of construction, and, secondly, to demonstrate to the adjoining owner and any third parties that the new balcony works are structurally sound and have been properly carried out. The requirement to provide some form of audit trail is commonplace in these circumstances'.

38. I found Mr Huband to be an impressive and knowledgeable witness. In the course of his evidence Mr Huband accepted that there was no record of failures of this particular type of balcony. However, he pointed out that there were no real design techniques in place at the time of its original construction and ventured the opinion that it was reasonable for there to be calculations for the reassurance of the adjoining occupier and also, of the engineer. As Mr Huband put it, 'the engineer needs to be able to sleep at night'.

39. Unfortunately, Mr Huband was not asked personally to calculate the loads. In consequence we have no calculation of the loads from either expert, Mr McHale considering such calculations to be unnecessary. In these circumstances Mr Huband declined to express any opinion as to whether the proposed reconstruction of the balcony would be safe or unsafe. Mr Huband explained the sketch that he himself provided to accompany his outline method statement. This sketch plainly contains more detail than that offered by the respondent. Mr Huband drew particular attention to three factors. First, the position of the stainless steel dowels. The end section of the York stone is rebated, so as to allow each stone to be affixed to that adjacent to it with cement grout. The stainless steel pin, which is shown as protruding from the rebate in the respondent's drawing, is shown in Mr Huband's drawing as being above the rebate. The purpose of that, advises Mr Huband, is to ensure that there is no obstruction to the free passage of the cement grout when the joints are filled with cement. Second, it is important that the entirety of the rebated joint is filled with cement. For this purpose not only should the stainless steel pins not obstruct the free movement of the cement grout, but also there should be bleed holes to ensure that the entirety of the rebate is filled. The operative injecting the grout must be in a position to be confident that, as far as possible, the entirety of the joint is properly filled.

40. The third factor to be noted is the requirement that there be non-shrink additive to the cement grout. Mr Huband explained that cement grout carries with it a real danger of shrinkage. It is important to ensure that the joint is as fully cemented as is reasonably practicable. Mr Huband also provided details of the location of the final balcony joint. All this by way of a sketch, accompanying an outline method statement in ten paragraphs, which I need not rehearse.

41. Mr Huband was criticised for not providing a dimension for the length of the dowel. His response was that the length is unimportant (provided, of course, the operative does not use a ridiculously short dowel), as the dowel is there to prevent shearing. As for the need for a method statement, Mr Huband's evidence was that it was appropriate to have a statement in order to pick up things that might otherwise be overlooked. He quite accepted that the competence of the stonemason building the balcony was important and he stressed the need for communication between an engineer and the stonemason. In conclusion, Mr Huband rejected the suggestion that the award was perfectly satisfactory as it stood. He considered that the detail contained in his method statement and accompanying sketch to be important to ensure, as far as possible, that all the key aspects of the construction would be addressed.

42. In the present context Mr McHale wears a number of hats. He is the designer, to the extent that there is a design aspect when engaged in a like-for-like replacement. He is the contract administrator. He is the party wall surveyor, and he is the respondent's expert witness. There may well be occasions when a consulting engineer, wearing so many hats, might find himself in a difficult position, but Mr McHale had no such difficulty. In the drafting of the award Mr McHale was clearly influenced by his knowledge of what was happening and what was proposed to happen on site, and with the individuals concerned in the construction. As for

the essential elements of Mr Huband's evidence, Mr McHale offered little disagreement. The essence of his evidence was that having selected a very able and experienced stonemason it was simply unnecessary to provide a method statement or any accompanying sketch. The stonemason would know what to do. Yes, the steel dowels may have been put in the wrong position in the drawing. Yes, there were no bleed holes. Yes, there was no note requiring non-shrinking additive to be mixed with the cement grout, but the stonemason would know all that, so it would really not be necessary to tell him. He was not opposed, in essence, to Mr Huband's suggestions, but said that in these circumstances they were unnecessary. He accepted the criticism of Mr Huband to the two methods of calculation offered by way of reassurance in the letter of 17 December 2015.

43. In the event, the difference between the experts is of very narrow compass. From Mr McHale's perspective reasonable and sensible as Mr Huband's suggestions undoubtedly are, they were, in this particular instance, unnecessary. Therefore, the award, cannot be said to be in any way defective and can safely be left as it is. Whatever may be required of other awards, this award did not require engineer's calculations before work was carried out, nor a method statement or any other assistance to the stonemason carrying out the work.

44. For the respondents Mr Goldstone argues that this appeal should not be allowed because it cannot be demonstrated to be wrong. 'Wrong' is the word which appears CPR 52.21(3)(a). Mr Goldstone reminds the court that the Court of Appeal in *Zississ v Lukomski* [2006] EWCA Civ 341, having considered the matter at some length, determined that an appeal under Section 10(17) of the 1996 Act is governed by CPR Part 52. CPR 52.21(3) provides that: 'The Appeal Court will allow an appeal where the decision of the court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.

45. Mr Goldstone argues, correctly, that there can be no suggestion of any procedural, or other, irregularity, let alone a serious one, on the part of the party wall surveyors. Thus it follows that this appeal may only be allowed on the basis that the party wall surveyors in their award were 'wrong'.

46. What is 'wrong' in the context of a party wall award? This is not a straightforward question to answer. There is no definition of an award in the Act. Neither is there a statement of what an award is designed to achieve, other than as a means of resolving a dispute. A dispute may arise between a building owner and an adjoining owner in connection with any matter connected with any work to which the 1996 Act relates, see s.10(1). Section 10 of the 1996 Act provides a dispute resolution procedure which results in an award. The scope of an Award within the statute is wide: 'An award may determine, (a) the right to execute any work, (b) the time and manner of executing any work, and (c) any other matter, arising out of or incidental to the dispute, including the costs of making the award…', see s 10(12).

47. The Act therefore authorises an award to determine a very wide range of matters. The importance of the award is emphasised in two further provisions of the 1996 Act: (i) s.10(16), 'The award shall be conclusive and shall not, except as provided by this section, be questioned in any court', and (ii) s.7(5), which is in the following terms:

> 'Any works executed in pursuance of this Act shall (a) comply with the provisions' statutory requirements, and (b) be executed in accordance with such planned sections

> and particulars as may be agreed between the owners, or, in the event of a dispute, determined in accordance with Section 10, and no deviation shall be made from those planned sections and particulars, except as may be agreed between the owners (or surveyors acting on their behalf) or in the event of dispute determined in accordance with Section 10'.

48. For the purpose of completeness, I note that an appeal may be brought in respect of an award only to the County Court, s 10(17) 1996 Act. The scope of an appeal could scarcely be wider.

> 'Either of the parties in the dispute may, within the period of 14 days, beginning with the day on which an award made under the section served on him, appealed 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 as to costs as the court thinks fit'.

49. It is only as a result of the decision of the Court of Appeal that Part 52 CPR applies to party wall appeals that s 10(17) is qualified by a requirement that an appeal against an award where there has been no procedural irregularity may be allowed only where the award is shown to be wrong. This is not an express statutory requirement. Having said that, if an award is not 'wrong' no county court judge has any business to be interfering with it.

50. Here the appeal is concerned both with the design of the work and with the manner in which the work is to be executed. The design must meet a requirement of sufficient strength, and that strength is agreed by the expert witnesses to be 1.5 kN per m². As to the manner in which the work is to be executed, that is ordinarily encompassed in a method statement and accompanying sketches.

51. In order to consider whether an award is 'wrong', it is necessary to consider what an award should achieve. It is only against that background that the correctness or otherwise of the award may be determined. It is important, also, to bear in mind that the Party Wall Act quite intentionally interferes with property-owning citizens' rights under the common law. In commenting on the predecessor statute, the London Building Acts (Amendment) Act 1939, Brightman J, *in Gyle-Thompson v Wall Street Properties* [1974] 1 WLR123, said this:

> 'Section 46 et seq. of the Act of 1939 gave a building owner statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests. The position of the adjoining owner whose proprietary rights are being compulsorily affected is intended to be safeguarded by the surveyors appointed pursuant to the procedure laid down by the Act. Those surveyors are in a quasi-judicial position with statutory power and responsibilities. It therefore seems to me important that the steps laid down by the Act should be scrupulously followed throughout and shortcuts are not desirable'.

52. The appeal in *Gyle-Thompson* was concerned with technicalities, and the learned judge held that the technical requirements of the Act should be scrupulously followed.

53. Party wall surveyors have an independent position, described by Brightman J, as 'quasi-

judicial'. When introducing the Bill which became the 1996 Act to the House of Lords on 31 January 1996 the Earl of Lytton described the party wall surveyors' role as 'quasi-arbitral'. There can be no real distinction between the two descriptions of the role. The statutory powers and responsibilities of the surveyors are to be exercised in a proper manner and, as Brightman J points out, with the surveyors bearing in mind that the position of the adjoining owner is to be safeguarded.

54. Conscious that implementing the provisions of the 1996 Act might override the common law rights of an adjoining owner Parliament included within the statute a number of provisions designed to protect the adjoining owner's position. Examples include the ability of an adjoining owner to serve a counter notice requiring the building owner to include within his works construction details for the adjoining owner's convenience, s.4, and the various provisions protective of the adjoining owner in s.7. Section 12 enables an adjoining owner to require security from the building owner to cover the due exercise of the works, thus providing financial protection.

55. Given that once the award is made the building works authorised by the award must be executed without any deviation, see s.7(5), except with the consent of the adjoining owner or under the authority of a further award, it is important that the award should be as comprehensive as is reasonably practicable. A party wall surveyor should take care to ensure that there is as little scope for uncertainty and argument as possible. To the extent that the award involves a design element, the party wall surveyor should ensure that the design involves no unnecessary risk to the adjoining owner's property and his enjoyment of that property within the law. To the extent that the award involves construction methods and practice, the party wall surveyor should have regard to the rights of the adjoining owner not only to his property, but also his enjoyment of that property within the law.

56. The issues in this appeal cover both the question of design and also the manner of construction.

57. Dealing first with the design. It was Mr Huband's unchallenged evidence that the design must be capable of withstanding 1.5 kN per m², and that unless there are structural calculations available to demonstrate that this design requirement is met the construction should not be proceeded with. Such calculations would cost about £2,000. Such a cost is not insignificant but it cannot be suggested that it is disproportionate when balanced against the risk of injury or death which might be the consequence of a falling balcony.

58. For the building owner Mr Goldstone does not suggest that the cost of structural calculations is disproportionate, he argues that such calculations are wholly unnecessary. The design requires no confirmation by calculation. The point is made that the balcony has stood for upwards of 175 years. True, it cannot be stated with certainty that the balcony has never had any work done to it, but the probability is that until 31 July 2014 the structure of the balcony at no. 6 was the same structure as that constructed with the original house. The balcony only came down when assailed by a heavy cornice, apparently topped with lead. Mr McHale's evidence was that as designs go, it may be safely assumed that the original design was a safe design. Accordingly, says Mr McHale

> 'Well, I'm replacing like for like. My design must necessarily, therefore, be seen to be a safe design'.

59. This logic of Mr McHale, says Miss Howells, who appears for the appellants, is flawed in three respects. First, she points out, in the light of Mr Huband's evidence, that this is a new structure. It may be designed to look like the original, but the fact that the design may well follow the original balcony design is not immediately relevant. The new structure must itself be safely designed.

60. Secondly, Miss Howells points out that Mr McHale did not see the original balcony in situ, nor does he have plans or photographs which should the detail of the construction of the original balcony. Mr McHale cannot be entirely confident that the present design is indeed a like-for-like replacement with the original. Furthermore, a designer in 2016 should have regard to modern design practice.

61. Thirdly Miss Howells argues that engineers should be responsible for their design. There should, as Mr Huband says, be a clear audit trail from the perspective of ensuring safety of the structure which is now to be constructed.

62. Two further points may be added, both arising out of Mr Huband's evidence. First, that there is no clear indication of the original purpose of the balcony, nor of the use to which the balcony has been put over the 100 plus years it has been up. Having said that, it seems unlikely that the use of the balcony for recreation purposes including hosting parties and so on, described by Mrs Masters, has been in place only relatively recently. It seems a natural use of the balcony, certainly in good weather. But the extent of such use may have increased with the present owners, both as to numbers using the balcony and their activities when on it.

63. Secondly, Mr Huband points out, the fact that the balcony construction has had to have been replaced may impact on the value of no.5 as and when the owners wish to sell. On any sale the fact of the replacement will have to be disclosed. Quite how, if at all, a prospective purchaser views the fact that the balcony has been replaced is very uncertain. Safety is plainly an important aspect of house purchase. An ordinarily competent surveyor carrying out structural survey would be expected to request details of the replacement. Where the vendors are able to provide the engineering calculations on which the construction works took place they are likely to be in a better position to reassure the surveyor, and thus the prospective purchasers, that there is no basis for concern as to this particular aspect of the purchase. The many and various factors which come into play where residential property is sold are such that it is difficult in the extreme to reach any firm conclusion as to the impact of there being no engineering calculations available to provide to a prospective purchaser. The point however is not fanciful.

64. On the advice of Mr Huband, the appellants wish there to be engineering calculations prepared to cover the proposed construction. In my judgment the correct approach of the court on a party wall award appeal is to ask whether the appellants, as adjoining owners, are acting reasonably in seeking such calculations. Their common law rights to refuse consent, or, perhaps more pertinently, to give consent subject to conditions, are being overruled by an award under the 1996 Act. A reasonable neighbour is entitled to be satisfied that the works will be carried out safely, and that the completed construction will be safe. Requiring engineering calculations to demonstrate structural stability of the completed work is, on the evidence of Mr Huband, the norm not the exception. It is good practice. In this respect therefore I conclude that the appellants are acting reasonably in requesting engineering

calculations.

65. I turn to the question of the manner in which the works are to be executed. I would observe that there can be few hard and fast rules applicable to every party wall award. Each award has to be made in its own context, and party wall surveyors will encounter a wide range of differing situations in which an award is required to be made. It is common practice, and a very sensible practice, for a party wall award to refer to and append any plans, sketches or calculations which are relevant to the award itself. There is no reason why an award should not refer to external documents, provided the documents in question are clearly identified. An award may refer to particular construction or engineering practices. It may even refer to particular individuals, with regard, for example, to the performance or supervision of the works.

66. In my judgment, a party wall award should be as complete within itself (including references to external documents) as is reasonably practicable. In this connection an award should not depend for its implementation on understandings or assumptions which cannot be gleaned by a third party from the words of the award itself. Here, the appellants' concerns, real concerns whether in the final analysis justified or not, (concerns, incidentally, which Mr McHale accepted might not unreasonably have been accommodated within the award), were met, if at all, by an arrangement that formed no part of the award and was not referred to in any place within the award. I refer to the appointment of Mr Chris Gladwell as the stonemason for the performance of the works. True, there was correspondence between the surveyors and between the adjoining owners' surveyor and the appellants as to the identity of the stonemason, but it did not form part of, neither was it referred to, in the award.

67. It may well be that Mr Gladwell is as knowledgeable about stonemasonry as any structural engineer. He may be one of these craftsmen or artisans whose hands-on experience and acquired knowledge leaves him in a position where he could usefully teach any structural engineer a thing or two. However, the position here is that the adjoining owners' justified concerns are here being met, asserts the building owner's surveyor, by an appointment which does not form part of the award. No award, it seems to me, can safely proceed upon the basis that a particular craftsman will be available to carry on and complete the works. Mr McHale responded to that suggestion by saying it did not matter. He, Mr McHale, had identified three such craftsmen, Mr Gladwell was only one of them, and he had two others to whom he could turn if it were necessary. There is nothing of that in the award.

68. Mr McHale may move on to other work and the supervision of this work fall on someone else. That someone may be a person who does not have the inter-surveyor correspondence available to him, or having it, does not read it, or indeed having it and reading it, believes he knows better. In these circumstances, in the absence of express provision in the award, there is a real risk that the rights the adjoining owner should have under Section 7(5) that the works are carried out without any deviation from the proposals, are eroded or lost.

69. It is undoubtedly the case that the chances are high that Mr Gladwell will be able to do the work, or that if he is unable to do so, Mr McHale will continue to be available to ensure that a stonemason of equal competence is engaged in his place. But this is no answer. The adjoining owner has a legitimate expectation that the award affords him all proper protection, and the proper implementation of the works authorised by the award are not left to matters

which are not expressly covered in the term of the award. It is, after all, straightforward for the award to meet the adjoining owners' concerns, either by requiring a method statement or a sketch sufficiently annotated to amount to method statement, or, alternatively, by specifying a particular craftsman or contractor, or preferably both a method statement and an identified contractor.

70. For the above reasons the award is, in the words of CPR 52, 'wrong', both with regard to the design element and with regard to the construction element.

71. Accordingly, for these reasons, I allow this appeal.

End of Judgment

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This transcript has been approved by the judge.