Case No: F20CL004

IN THE COUNTY COURT AT CENTRAL LONDON

TECHNOLOGY AND CONSTRUCTION LIST

The Mayor's and City of London Court
Basinghall Street
London EC

16 April 2019

BEFORE:

HIS HONOUR JUDGE EDWARD BAILEY

IN THE MATTER OF AN APPEAL UNDER
THE PARTY WALL ETC. ACT 1996

BETWEEN:

(1) ALBERTO BASU
(2) LYNN BASU

Appellants

- and -

(1) CYRUS BARON
(2) CHRISTINE CARINE BARON

Respondents

JUDGMENT

The Appellants appeared in person
written submissions from Mr Timothy Clarke

Mr Aaron Walder appeared on behalf of the Respondents

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1. JUDGE BAILEY: This is an application by the Respondents to a Party Wall Award appeal for an order striking out the appeal for want of jurisdiction, on the basis that the appeal was issued outside the time limit provided by the Party Wall etc. Act 1996.

2. The Appellants are the owners of the premises 10 Summerfield Avenue, and are building owners for the purposes of the 1996 Act. The adjoining owners under the 1996 Act are the Respondents. They own 12 Summerfield Avenue. A substantive award authorising the construction by the building owners of an extension along the boundary line was made by the parties' appointed surveyors on 12 November 2014. At the conclusion of the works there remained disputes between the owners, in particular as to the length of the extension and as to compensation. Throughout the construction of the Appellants' extension the Respondents had paying tenants in occupation at 12 Summerfield Avenue. The Respondents sought compensation on the basis that they had had to reduce their tenants' rent for the duration of the works in order to persuade them not to leave the property.

3. The details of the Respondents' claims and the nature of the dispute between the parties in that regard are of no relevance to the present application.

4. In the event the disputes outstanding at the conclusion of the works were referred to the Third Surveyor, Mr Stephen Cornish. After due consideration, and with the benefit of an opinion from counsel, Mr Cornish issued his award on 18 December 2018. The award was served on the parties by e-mail, with a hard copy being sent later. No issue arises on the use of e-mail. Mr Cornish had obtained both parties' express consent to his award being served in this way. It follows that the fourteen day period allowed by s 10(17) 1996 Act to bring an appeal to the county court, the period beginning with the day on which the award was made, expired on 31 December 2018.

5. The Appellants were dissatisfied with the Third Surveyor's award and wished to appeal it. Fourteen days is a short period of time to prepare an appeal at any time of year; it is especially difficult when it includes the Christmas period. The Appellants were acting as litigants in person, and towards the end of December 2018 Mr Basu had

conversations with members of court staff as to how the Appellants' appeal might be issued. On 31 December 2018, at 16:02, Mr Basu sent the following e-mail to the court, the Central London County Court:

> Dear Court,
>
> Further to my call with Peter today, please find attached a N161 Form detailing our intention to appeal some limited aspects of a Party Wall Award made by the Third Surveyor.
>
> We attach the Signed Award.
>
> We attach a first draft of the Grounds of Appeal, and will send a second draft with the Arguments in Support.
>
> Further supporting information and arguments will be provided as soon as possible, and we would ask the court to please advices how much time is permitted for such.
>
> We have ticked Part B in Section 10 should it be determined that the information provided today is insufficient.
>
> Please contact me on [mobile telephone number] for me to arrange payment of the associated fee.
>
> Best Regards,

6. This e-mail was duly received by the court, and an acknowledgment of receipt sent, also timed at 16:02 on Monday 31 December 2018. Quite what then happened is uncertain. This is perhaps explained (but not excused) by the date. In the event the Appellants' Notice was not stamped with the court seal until 18 January 2019. In the ordinary course of events it might be assumed that 18 January 2019 was the date on which the court fee (£160) was paid. It is the practice of the court not to issue any proceedings (whether originating proceedings or an application within an existing proceeding) without receipt of the requisite fee. However, there is no record of the fee being paid on 18 January 2019 either on the court file or on Caseman, the court's electronic record. There is indeed no record of the fee being paid on any date between

31 December 2018 and 18 January 2019. A search through all Central London's transmissions of fees received over this period has drawn a complete blank. Nevertheless the Appellants' Form N161 was undoubtedly received on 31 December 2018 and the court did subsequently issue the appeal.

7. The Rules governing the initiating of an appeal are at CPR Part 52 Practice Direction B. At paragraph 4.1:

> "An appellant's notice (Form N161 …) must be filed and served in all cases. The appellant's notice must be accompanied by the appropriate fee or, if appropriate, a fee remission certificate".

8. Filing by e-mail is governed by CPR Part 5 Practice Direction 5B 'Communication and Filing of Documents by E-mail'. A Form N161 (an appellant's notice) may be filed by e-mail. However, paragraph 2.3 of Practice Direction 5B provides:

"2.3 In the County Court-

(a) if a fee is payable in order for an e-mailed application or other document to be filed with the court, a party must, when e-mailing the court –

(i) provide a Fee Account Number, credit card number or debit card number which the party has authority to charge of the applicable fee: and

(ii) authorise the court to charge the applicable fee to that Account or card number.

(b) [this provides that the total pages of both e-mail and any attachments should not exceed 25 sheets of paper, double-sided printing, ie a total of 50 pages]

9. Two matters arise for consideration. First whether an e-mail received by the court at 16:02 (ie two minutes after the court closes) on any particular day is to be treated as having been received on that day or on the next subsequent day. Secondly whether the

Appellants complied with their obligation to ensure that their Form N161 was accompanied by the appropriate fee.

10. It is widely known that the public counter at the office of the county court closes at 4.00pm. There are some courts now that do not have a public counter at all, although in such cases there will usually be a drop-box to which litigants may deliver any document which was previously received over the counter. A litigant seeking to file a Form N161 in person at 2 minutes past four is likely to find the counter, or drop-box, closed and be unable to effect a filing, although he may be able to post his Form N161 and other documents through any court building letter box (as to which see paragraph 20 below). Under the CPR a litigant seeking to file by e-mail is in no better position. CPR Part 5 Practice Direction 5B, at paragraph 4.2 provides:

> "4.2 Where an e-mail, including any attachment, is sent pursuant to this practice direction and the e-mail is recorded by HMCTS e-mail software as received by the court at or after 4.00pm and before or at 11.59pm –
>
> (a) the date of receipt of the e-mail will be deemed to be the next day the court office is open;
>
> (b) the date of issue of any application will not be before that date; and
>
> (c) any document attached to that e-mail will be treated as filed on that date.
>
> 4.3 It remains the responsibility of the party sending an application or other document to the court pursuant to this practice direction to ensure that it is received or filed within the applicable time limits, taking into account the operation of this practice direction."

11. While it is evident that there were post-filing difficulties with the issue of the Appellants Form N161, it is quite clear that the Appellants failed to issue their appeal within the fourteen day period allowed by the 1996 Act if the provisions of the CPR are to be employed to govern the length of the day, and in particular, the last day of the fourteen. Under the provisions of the CPR quoted above the appeal was not issued on 31 December 2018 for two reasons. First, the e-mail was received by the court at 16:02,

that is three minutes too late to qualify for filing on the date of receipt under the Practice Direction quoted above. Secondly, the Appellants failed to comply with the requirements of the CPR (paragraph 2.3 quoted above) as to the payment of the fee. As litigants in person the Appellants will not have had a Fee Account number. What they had to do was to provide a credit card or debit card number to which the fee could have been charged and authorisation for the charge to be made. The fact that the fee is not actually paid on the date of issue is not a consideration. There has to be a credit card or debit card number from which the fee can be taken whenever the member of staff issuing the Party Wall appeal is able to process the matter. Had such a number been provided on 31 December 2018 with appropriate authority to charge the card, but the Appeal not formally processed until 18 January 2019, the fee for filing would still have been treated as paid on 31 December 2018.

12. It is difficult not to be sympathetic to the position the Appellants find themselves in. They were three minutes late with their e-mail, and they did not appreciate the importance of providing a credit card or debit card number. Their e-mail of 31 December 2018 ends with the sentence "Please contact me on [mobile number given] for me to arrange payment of the associated fee". That indicates an awareness that a fee had to be paid and a willingness to pay it. But it does not meet the requirement of the Rules.

13. However, submits Mr Timothy Clarke, acting through the Bar Direct Access scheme, in written submissions in support of the Appellants' case, the Appellants require no sympathy. Mr Clarke submits that neither of the two reasons stated above, e-mail after 4pm and absence of credit or debit card details, apply to render the Notice of Appeal out of time.

14. As to the first reason, the e-mail out of time, Mr Clarke argues that the fourteen days given by s10(17) of the 1996 Act (quoted at paragraph 24 below) are a full fourteen days, and carry through to 11:59pm on 31 December 2018. Bringing the fourteen day period to a close at 4pm on the fourteenth day is only achieved by elevating the CPR, secondary legislation, to the position of overriding primary legislation, that is the 1996

Act. Such an elevation is improper. Reliance is placed on the decision of the House of Lords in *Mucelli v Government of Albania* [2009] UKHL 2, [2009] 1 WLR 276, and in particular the speech of Lord Neuberger. *Mucelli* concerned the time limits applicable under ss 26(4) and 103(9) of the Extradition Act 2003, there being separate time limits applicable both to filing (at the High Court) and service (on The Serious Organised Crime Agency ('SOCA') as the designated authority in England and Wales for the purposes of Pt 1 of the 2003 Act). The appeal in *Mucelli* concerned the service of the notice of appeal on SOCA, the notice of appeal having been filed in time. The appeal also raised the question whether the court had power to extend either the time for filing or the time for serving the appeal notice.

15. The House of Lords held that the relevant sections of the 2003 Act required filing and serving within the respective periods of seven and fourteen days, and that it was not open to the court either to extend time or dispense with the requirement to serve the notice. Much of their Lordships' consideration concerned the meaning, in the context of the 2003 Act, of the word "given", and the desirability of ensuring that an Act of Parliament which covered all the jurisdictions in the United Kingdom was interpreted in a similar manner in all jurisdictions. Such concerns do not arise in the present context. Their Lordships did however deal with the suggestion that the period allowed for serving an appeal under the statute might be effectively cut down by the application of the CPR.

16. The relevant passage, from the speech of Lord Neuberger (with whom Lords Phillips, Carswell and Brown agreed), starts at paragraph 81:

> "*SERVICE AT THE END OF THE 7 OR 14 DAYS*
>
> [81] Both filing and service of documents often occur towards the last minute, and this is particularly likely in cases where the time for filing and service is short. Two questions of principle arise in connection with this practical problem in relation to the time limits in ss 26(4) and 103(9). The first is whether the provisions of CPR 6.7, which is concerned with deemed service, are applicable to those time limits. Thus, under the rules as they were at the time of the instant appeals, a document transmitted by fax after 4.00pm was deemed to have been served "on the business day after the day on which it is transmitted". Such deeming provisions have been consistently held to be irrebuttable – see eg *Anderton v Clwyd County Council* [2002] EWCA Civ 933, [2002] 1 WLR 3174. In these appeals, it appears to have

been generally assumed that these provisions govern the question of when a notice of appeal is treated as having been "given" under ss 26(4) and 103(9).

[82] In my view, that general assumption is wrong. Section 26(4) requires the Appellant's notice to be issued and served within seven days, and I can see no warrant for the CPR being invoked to cut down that period. If a statute permits something to be done within a specific period, it is hard to see how that period can be cut down by subordinate legislation, as a matter of principle. In relation to the first two points of principle raised by these appeals, it is part of the Prosecutor's case, indeed it is part of my reasoning, that the reference to rules of court in the section govern the manner, not the time, of service. In these circumstances, it is particularly hard to see how invocation of provisions of the CPR can be justified in order to curtail that period. The point is reinforced by practical considerations: the seven day period laid down by s 26(4) is short, and it does not seem very fair to cut it down, even if only by a few hours. Although the 14 days permitted by s 103(9) is somewhat longer, the same reasoning applies.

[83] Another point which arises is what happens if it is impossible to give notice on, or during the final part of, the last day. For instance, in relation to filing, the Court Office may be closed on the last day because it is Christmas Day or another Bank Holiday, and the court office will be closed at some point in the late afternoon on the last day. Equally, the Respondent's office may be closed for the same reasons.

[84] Where the requisite recipient's office is closed during the whole of the last day, I consider that the notice will be validly filed or served if it is given at any time during the first succeeding day on which the office is open (ie the next business day). So if the final day for giving a notice of appeal would otherwise be Christmas Day, filing or service can validly be effected on 27 December (unless it is a weekend, in which case it would be the following Monday). This conclusion accords with that reached in *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336. As Lord Denning MR said at 349E, "when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when time expires, then, if it turns out . . . that the day is a Sunday or other *dies non*, the time is extended until the next day on which the court office is open". I agree, and I can see no reason not to apply the same principle to service on a Respondent in relation to the Respondent's office. The fact that fax transmission can be effected at any time does not cause me to reconsider that conclusion.

[85] It might be argued that it follows from this that time should be similarly extended to the next business day, in cases where, even if only for a few hours, the required recipient's office is closed before midnight on the final day (as will always be true of the court, and will almost always be true of any other recipient). In my opinion, while there is a real argument based on consistency to support such a proposition, it is not correct, at least where the office in question is open during normal hours. While there is no reason to deprive an Appellant of his full statutory 7 or 14 days, if, for instance he transmits his notice of appeal by fax, or even if he posts the notice through a letter box in the door of the Respondent's office, just before midnight on the last day for service, it does not follow that he should have cause for complaint if he cannot file the notice at the court office, or serve it on the Respondent in person, outside normal office hours. I believe that this conclusion is

> consistent with the law as it is understood in relation to time limits for filing and service, when it comes to the operation of the Limitation Act 1980."

The observation in paragraph 82 to "the reference to *rules of court in the section* govern the manner, not the time, of service" relates to the wording of the 2003 Act, s 26(4). This provides that: "Notice of an appeal [against a district judge's order for extradition] must be given in accordance with rules of court before the end of the permitted period, which is seven days starting with the day on which the order is made".

17. The passage quoted above is concerned with service, rather than filing, and the application of the deemed service provisions of CPR 6.7. The Appellants in the present case argue that it is equally applicable to filing, and the provisions of the CPR governing filing. The opening sentence of paragraph 81 and the second and third sentences of paragraph 82 of Lord Neuberger's speech indicate support for this argument. The Appellants may also rely on the comments of Lord Brown in his speech agreeing with that of Lord Neuberger:

> "[38] Against this background it seems to me tolerably plain both that s 26(4) is requiring the notice of any appeal to be both filed and served within the stipulated seven-day period and that this, being a statutory time limit, is unextendable. The rules of court are to dictate everything about the filing and serving of the notice save only the period within which this must be done; this is expressly dictated by the section itself. Whatever discretions arise under the rules are exercisable only insofar as is consistent with the filing and serving of the notice before the statutory time limit expires.
>
> [39] But by the same token that the court has no discretion under the rules to extend time for filing and serving the notice beyond the seven-day limit, so too the rules themselves cannot operate to limit the period for achieving service to less than the stipulated seven days. Effectively that is what r 6.7(1) does by deeming a faxed notice, transmitted after 4pm on a business day, to be served not on that day but on the next business day. On any view the court cannot be denied a discretion to make an order which operates to extend time up to midnight on the seventh day. Here all that is required in Moulai's case is to treat his failure to complete the transmission of his faxed notice of appeal by 4pm as remediable under r 3.10, alternatively to extend time for faxing the notice to shortly after 4pm on the day in question."

18. In *Mucelli* the issue did not arise in relation to filing, because the appellant had filed his appeal at the High Court at 3.45pm, safely before the High Court 4.30pm deadline. Nevertheless the statement of Lord Neuberger that the Rules govern the manner not the

time (of service) and of Lord Brown that the Rules dictate everything about filing and serving save only the period within which this must be done, do indicate that the House of Lords is stating that a statutory period of seven days for an appeal gives the prospective appellant until 11.59pm on the seventh day both for the filing of his appeal as well as for his giving notice to the relevant prosecuting authority. That this is the proper understanding of the effect of the decision in *Mucelli* is clear from later decisions of the High Court, for example *Regional Court in Poznan v Waldemar Czubala* [2016] EWHC 1653 (Admin).

19. Given the shortness of the relevant time limits it is not perhaps surprising that the reported decisions in this area are overwhelmingly related to extradition, an area of law outside the remit of the county court. Party Wall award appeals are restricted the county court. The two other main areas of statutory appeals in the county court are appeals against housing review decisions under s 204 Housing Act 1996, and appeals against penalties imposed by the Secretary of State for the Home Department under s 17 Immigration and Nationality Act 2006. There do not appear to be any decisions involving a consideration of the decision of *Mucelli* as to filing after court hours in either of these jurisdictions.

20. The full use of the statutory period for an appeal under s 204 Housing Act 1996 (21 days) was however considered in *Van Aken v Camden London Borough Council* [2003] 1 WLR 684 (CA). In this case, on the final day for filing the notice of appeal, the appellant's solicitors' clerk arrived at the Central London County Court office at 4.15pm to find it closed. The solicitors sent through the relevant documents by fax at 5.56pm, and, for good measure, at 6.30pm posted a full copy of all the appeal documents through the letter box for the court, then situated at Park Crescent near Regent's Park. Noting that CPR r 2.3(1) defined 'filing' in relation to a document as "delivering it, by post or otherwise, to the court office" (a definition which holds good today) the Court of Appeal held that the posting of a set of appeal documents through the court letter box was effective delivery of appeal which was therefore safely filed on the last day of the statutory period.

21. Giving the leading judgment in the Court of Appeal Jonathan Parker LJ rejected counsel's submission that a distinction should be made between the court office and the court building. As the Learned Lord Justice observed, at [48], "the letterbox in the instant case was the designated means of communicating with the court office out of hours". None of the members of the Court of Appeal appear to have been in the least concerned that the filing of the appeal took place after court office hours. The Court was satisfied that the appeal had been filed within the 21 day statutory appeal period. Unfortunately, for present purposes, having determined that the appeal was filed by manual delivery at 6.30pm the court did not also consider whether the faxing of the appeal documents at 5.56pm was an effective filing of the appeal.

22. *Yadly Marketing Co Ltd v Secretary of State for the Home Department* [2016] EWCA Civ 1143 concerned an appeal against a civil penalty under s 17 Immigration and Nationality Act 2006, for which the statutory period for issue is 28 days. The final day for Yadly's appeal was 26 May 2014, which was a bank holiday. On 27 May 2014 the appellant's managing director attempted, during court office opening hours, to file the appeal at Edmonton County Court. This would have been in time, being the next day the court was open after a day's closure. Unfortunately a court official refused to accept the appeal, informing the managing director, wrongly, that it had to be filed at an Immigration Tribunal. The appellant's solicitors then posted the appeal documentation to Canterbury County Court (being a court stated in an HMCTS document as being a venue dealing with many such appeals) where the documents arrived on 30 May 2014.

23. In these circumstances the question whether appeal documents may be filed after court hours on the final day did not arise in *Yadly*. In giving the only judgment in the case Beatson LJ referred to *Mucelli* only in the context of Lord Neuberger's remarks as to the position where it is impossible to file documents because the court is closed on the final day (without any consideration as to whether it will never be impossible to file documents at a court which has a letter box). The decision in *Van Aken* was referred to the court and Beatson LJ expressed some reservation as to Jonathan Parker LJ's rejection of the distinction between the court building and the court office. However, this was in the context of the suggestion that it might be incumbent on an appellant

faced with a county court office with no letter box to search around the country for a county court which did have a letter box, or where the documents might be slid under the front door (a possible solution which was rejected (somewhat unconvincingly) in *Barker v Hambleton D.C.* [2011] EWHC 1707 (Admin)). As there is no uniformity between county courts as to the provision of letter boxes or front doors with gaps between the bottom of the door and the threshold to the building, it would plainly be unsatisfactory for the state of the law to require litigants to find a court with either facility when their chosen court has neither.

24. An appeal against a Party Wall Award is brought under s10(17) of the Party Wall etc Act 1996 which provides:

> "(17) Either of the parties to the dispute may, within the period of fourteen days beginning with the day on which an award made under this section is served on him, appeal to the county court against the award and the county court may—
>
> (a) rescind the award or modify it in such manner as the court thinks fit; and
>
> (b) make such order as to costs as the court thinks fit."

An appeal to the county court "within the period of fourteen days" might be thought to imply that any rules imposed by the county court must be taken into account. If an owner cannot appeal to the county court after 4pm on any particular day because the Rules so provide then, on the face of it, he has not brought his appeal within the fourteen day period if he files after 4pm on the fourteenth day. But the wording of s26(4) of the 2003 Act is an even stronger indicator that the rules of court must be taken into account in determining the precise time at which an appeal is out of time, expressly providing as it does that 'Notice of an appeal must be given *in accordance with rules of court* before the end of the permitted period'. Yet, as noted above, the House of Lords stated that the rules govern the manner and not the time of the required action.

25. Of course in any practical sense it little matters that a Notice of Appeal is 'filed' at court between 16:00 and 23:59. The prospect of the Notice of Appeal being processed before the following day (or week or fortnight or even later) is vanishingly small. The precise moment on the fourteenth day on which a Notice of Appeal is filed is of interest only to

the Respondent to the appeal, who in the ordinary course will know nothing about the filing until some time after it has been completed. Only the Respondent will suffer if an appeal e-mailed to the court at 16:02 is treated as filed within the fourteen day period allowed by the 1996 Act.

26. Practical considerations are, however, of little importance in this context. Whether the day for filing ends at 4.00pm or 11.59pm is a matter of law, and a matter on which the House of Lords has made a determination. I arrive at the conclusion that, properly considered, the House of Lords's decision in *Mucelli* applies not only to the service but also to the filing of the Notice of Appeal. In the event the Appellants in the present case failed to file their appeal within the time allowed by the CPR, but these Rules, as subordinate legislation, cannot take effect so as to override the statute. The 1996 Act gives the appellants fourteen days beginning with the day on which the award is made to appeal that award, and the fourteen days end at 11.59pm on the final day. The appellant's notice was delivered to the court office for the purpose of filing at 4.02pm on the fourteenth day. This was in time.

27. I would observe at this point that criticism might fairly be levelled at the content of the Appellant's notice that was delivered to the court as an attachment to the e-mail. The grounds of appeal are far from clear, and indeed the Appellants' e-mail (quoted above) recognises that the Grounds of Appeal are only a first draft and that a further draft will follow. Nevertheless, in the light of the observations of Lord Mance in *Pomiechowski v District Court of Legunuca Poland* [2012] UKSC 20, see paragraph 35 below, the appellant's notice was sufficient to initiate an appeal. To be fair, Mr Walder, counsel for the Respondents, did not suggest that the appeal should fail on this basis.

28. Being in time with the delivery of the appellant's notice is, however, not by itself sufficient to initiate an appeal. By CPR 52BPD 4.1 "The appellant's notice must be accompanied by the appropriate fee or, if appropriate, a fee remission application or certificate". There is no question in this case of fee remission. As stated above, the appellants failed to comply with the requirements of CPR 5BPD 2.3 and both provide a credit or debit number and authorise the court to charge the applicable fee to that card number.

29. In this regard Mr Clarke for the appellants submits that "although it was not in accordance with CPR PD5B, [the issue fee] was paid in accordance with the verbal [oral] guidance given to Mr Basu by the court and contained in the written guidance sent to him".

30. It is well settled that litigants may not rely on anything told them by court staff, and this is (or certainly should be) made clear to litigants at the counter and on the telephone. The appellants do not, incidentally, specify precisely what Mr Basu was told on the telephone, whether by 'Peter' or any other member of staff. In any event, it appears that Mr Basu was not told anything orally that does not appear in written guidance.

31. The written guidance relied on is the two-page document issued by HMCTS entitled 'The use of email in the Civil and Family Courts'. The relevant section is in the following terms:

> 'Can processes that carry a fee be sent by email?
>
> In both Civil and Family cases court processes that carry a fee can also be received by email and processed by the court staff. However the same conditions as above must apply [ie as to size of email] and in addition:
>
> - the party issuing the process must either quote a Fee Account number, or
>
> - the party who wants to pay has a valid credit or debit card. If you wish to pay using this method please say this on the email and include a contact number for the Court to contact you to take payment."

32. This guidance note does not clearly reflect the relevant rule, 5BPD.2.3. It is not made clear that a credit card number or a debit card number must be provided. It is not made clear that the court must be authorised in the e-mail to charge the applicable fee to the card number given. Strictly, Mr Basu did not in fact follow the guidance note because he did not state in terms that he wished to pay by credit card or by debit card. But Mr Basu did include a contact number and it would be understandable were he to feel that the sentence 'Please contact me on [number] for me to arrange payment of the associated fee' clearly implied that he wished to pay by credit or debit card. It is very disappointing that the guidance note does not inform the reader that a credit or debit

card number must be given, and that payment of the fee from that card is authorised, although with respect to authorisation it might be thought that giving a card number for payment purposes would imply any necessary authorisation.

33. The result however is that the Appellants did not comply with requirements of the CPR as to the payment of the required fee within the period within which an appeal might be brought. Indeed these requirements appear never to have been complied with.

34. By way of further argument Mr Clarke submits that if the appeal was not filed in time, the facts of this case constitute exceptional circumstances so as to justify an extension of time for appealing. For the proposition that the court has power to extend time for the application of a statutory time limit in exceptional circumstances Mr Clarke relies on the decision in *Nursing and Midwifery Council v Daniels* [2015] EWCA Civ 225. This is a decision founded on the Supreme Court's decision in *Pomiechowski v District Court of Legunuca Poland* [2012] UKSC 20. The Supreme Court there held that the application of an absolute statutory time limit may in appropriate circumstances be challenged for non-compliance with Article 6 of the European Convention on Human Rights.

35. The decision in *Pomiechowski* is of interest to the present case in that the Supreme Court both declined to depart from the decision of the House of Lords in *Mucelli* with regard to the filing and serving of a notice of appeal and also in the Court considering what constitutes a Notice of Appeal, and to the extent to which such a notice must fully set out the grounds of the appeal. In this respect, Lord Mance (with whom Lords Phillips, Kerr, and Wilson agreed) stated, at [18] :

> In my view, a generous view can and should be taken of this, bearing in mind the shortness of the permitted period and the fact that what really matters is that an appeal should have been filed and all respondents should be on notice of this, sufficient to warn them that they should not proceed with extradition pending an appeal. This should not however be taken as a licence to appellants to give informal notices of appeal. Any potential appellant serving anything other than a complete copy of the sealed Form N161 will need to seek and will depend upon obtaining the court's permission to cure the position under the rules.

At [19] Lord Mance stated that it did not follow that a Notice of Appeal was a nullity unless it was accompanied by grounds. The absence of grounds can "in an appropriate case" be cured under CPR rr 3.9 and 3.10.

36. I return to Mr Clarke's submission that the court can and should extend the time for the Appellants to bring their appeal in the present case. In *Pomiechowski* the Supreme Court determined that in an appeal against extradition from the UK by a UK citizen, who, as such, has a common law right to enter and remain in the UK, Article 6.1 requires that a right of appeal against any extradition decision must be free of limitations impairing "the very essence" of the right. Extradition proceedings must pursue a "legitimate aim" and involve a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved", and may be challenged on this basis. Accordingly, the Supreme Court held that the statutory time limit may be extended by the court if by doing so a defect in the proceedings amounting to a breach of Article 6.1 may be remedied.

37. This may all seem a long way from a party wall dispute or, indeed, the disciplining of a nurse or midwife. It is however instructive to see how the Court of Appeal dealt with the issue in the latter case. In giving the leading judgment in the Court in *Nursing and Midwifery Council v Daniels*, and under the heading 'The Law', Jackson LJ said, with reference to The Nursing and Midwifery Order 2001:

> "[24] Article 29 (10) of the 2001 Order allows 28 days for commencing an appeal. It contains no provision for extension of time. Nor do the 2004 Rules contain any such provision.
>
> [25] It used to be thought that the 28 day time limit was inflexible and would admit of no exceptions. However, the Supreme Court's decision in *Pomiechowski v District Court of Legunica Poland* [2012] UKSC 20, established that an absolute statutory time limit may need to be read down in order to comply with art 6 of the European Convention on Human Rights.
>
> [26] The time limit under consideration in *Pomiechowski* related to the commencement of an appeal in extradition proceedings, but it was clear that the decision may have wider implications. The Court of Appeal considered the application of *Pomiechowski* in the context of appeals by nurses under the 2001 Order in

> *Adesina and Baines v Nursing and Midwifery Council* [2013] EWCA Civ 818, 133 BMLR 196, [2013] 1 WLR 3156. In those two appeals which were heard together two nurses, Ms Adesina and Ms Baines, sought to appeal out of time against decisions of the Conduct and Competence Committee of the NMC. The judge struck out both appeals and the Court of Appeal upheld that decision.
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> [27] Although the Court of Appeal held that there could be no extensions of time in those two cases, it rejected the proposition that the 28 day time limit was absolute and inflexible. Maurice Kay LJ (with whom Patten and Floyd LJJ agreed) held that the principle established in *Pomiechowski* was applicable to the time limit contained in art 29(10) of the 2001 Order. He held that time could be extended in exceptional circumstances, namely where enforcing the 28 day limit would impair the very essence of the statutory right of appeal…"

38. There is no reason to suppose that similar principles do not apply in appeals against Party Wall Awards. In an appropriate case, (which might be thought to be as rare as hen's teeth but can never be wholly discounted see eg the facts in *Yardly Marketing* where the period was extended), the court may extend the fourteen day period stipulated in s 10(17) of the 1996 Act so as to ensure compliance with Article 6. But there must exist exceptional circumstances justifying any such extension. In the present case no specific individual facts are advanced by the Appellants as constituting exceptional circumstances. They rely on their being (only) three minutes late in sending the e-mail by which they sought to file their appeal, and the fact that the HMCTS guidance note as to the use of email, in accordance with the oral advice they received, did not make plain that the rules required the provision of a credit card or debit card number and an authorisation to the court to charge the relevant fee to that card number.

39. These cannot amount to exceptional circumstances justifying an extension of the period within which a party wall award appeal must be brought. They do not impair the very essence of the statutory right of appeal. The relevant rules are clear. It is the duty of the litigant to acquaint himself with the rules and comply with them.

40. It follows from the above that the Appellants' appeal must be struck out, with costs. The Respondents have provided a Statement of Costs on Form N260 to enable a summary assessment under CPR PD44 9.5. I will deal with the assessment of costs in a separate judgment.

HH Edward Bailey

19 July 2019