IN THE COUNTY COURT AT CENTRAL LONDON

Case No: F01CL237

Courtroom No. 57

County Court at Central London, Royal Courts of Justice
Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 2nd March 2020

Before:
HIS HONOUR JUDGE PARFITT

B E T W E E N:

SHAH

and

POWER & KYSON

MR M PAGET appeared on behalf of the Claimant
MR C FAIN appeared on behalf of the First Defendant
THE SECOND DEFENDANT appeared in Person

JUDGMENT
(Approved)

HHJ PARFITT:

In approving this transcript without the file and from memory I cannot give the exact figure for the compensation element of the award in dispute and I cannot check the quotations from the unreported decisions at the end of the judgment.

1. This is my judgment in respect of a Part 8 Claim about the validity of a party wall award dated 3 July 2018. For the purposes of summarising the relevant facts I am going to borrow gratefully from the first defendant's skeleton argument. The claimant ("the BO") owns the freehold owner of 34 Bull Lane, Dagenham in Essex. 34 Bull Lane is a semi-detached property and the property that it is attached to is 36 Bull Lane. The owners of 36 Bull Lane are Mr and Mrs Paniyiotou ("the AO"). The defendants to these proceedings, Mr Power and Mr Kyson, are party wall surveyors.
2. The AO and the defendants (Mr Kyson's advice informed these views) believe that in late 2017 the BO decided to carry out works to 34 Bull Lane, including works to the chimney breast on the party wall with 36 Bull Lane. The AO, supported by the Defendants, say that minor damage to the 36 Bull Lane was caused by these works. I call the damage minor since its repair value was assessed in the disputed award at less than £5,000.
3. The BO dispute that they did works to the chimney breast, which they say was already removed, but for present purposes I do not need to decide that dispute. BO and their surveyor considered the Party Wall etc. Act 1996 ("the 1996 Act") did not apply.
4. The AO approached Mr Kyson in his role as a party wall surveyor and he spoke to the BO in late 2017. The BO said he and his surveyor did not consider the 1996 Act applied to their now completed works.
5. Mr Kyson disagreed and therefore considered that a dispute had arisen and so the AO, presumably on Mr Kyson's advice, appointed Mr Kyson as their surveyor for the purposes of section 10 of the 1996 Act, which is the section of the 1996 Act dealing with dispute resolution.
6. The BO maintained his position that none of this had anything to do with the 1996 Act and ignored the procedures under the 1996 Act being forced on him by Mr Kyson / the AO.
7. Section 10 of the 1996 Act contains default provisions that enable one party to carry on unilaterally if another party refuses to engage. These provisions were the basis upon which Mr Kyson appointed Mr Power as the BO's surveyor on their behalf under section 10.4(b) of the 1996 Act on 25 January 2018.
8. Mr Kyson and Mr Power then together made an award pursuant to section 10(10) of the 1996 Act which was served on the BO on 4 July 2018 and determined that the BO should pay compensation of about £4,500 and should pay Mr Kyson's fees of £2,470 inclusive of VAT and Mr Power's fees of £2,160 inclusive of VAT ("the Award"). I am not aware of the AO taking any steps to obtain payment of the Award. Mr Kyson and Mr Power, however, brought enforcement proceedings in the Magistrates Court – proceedings which are now stayed pending the outcome of this claim.
9. In order to defeat the fees claim the BO asks this court to declare that the Award was invalid. The BO's case was well summed up their counsel, Mr Paget, at the outset of his reply submissions: "no notice, no Act".
10. In more detail the BO says that the dispute resolution provisions in section 10 of the 1996 Act are circumscribed to deal with disputes arising out of works or intended works which are to be carried out under the 1996 Act and such works are works for which notice under the 1996 Act has been given. Once notice has been given then the nature and extent of the matters that can be brought before the surveyors for dispute resolution pursuant to the 1996

Act is relatively wide but the notice provision is a necessary and essential gateway prior to the surveyors having the jurisdiction giving to them by Parliament under the 1996 Act.

11. Mr Fain for Mr Power and Mr Kyson arguing his own case in great detail in a wide ranging written submission, disagreed with this analysis because the nature and width of the language used in section 10(1) and 10(10) of the 1996 Act is wide enough to encompass any dispute arising out of work to which the 1996 Act relates or is connected, regardless of whether or not a notice has actually been served.

12. Mr Kyson and Mr Power argue that a wide and purposive construction should be given to the jurisdiction of surveyors under section 10 because of the obvious benefit to parties to have the efficient dispute resolution mechanism of the 1996 Act and it being most unattractive if a building owner can deprive an adjoining owner of the benefits and protections intended to be given to the adjoining owner under the 1996 Act by choosing to ignore its mandatory notice requirements. At best this would require the adjoining owner to go to court for any remedies they might want to seek, as opposed to using the simple and discrete dispute resolution mechanism within the Act. At best because in many situations works that should have been notified may well be completed without the adjoining owner knowing and so being in ignorance of and having no input into what works were carried out, how those works should be carried out, and what consequence those works might have for the condition of the adjoining owner's property. All those things being common protections which adjoining owners obtain from the procedures under the 1996 Act.

13. Attractively though Mr Fain and Mr Kyson presented their cases, I consider that the Claimant is right and that this is clear from a due consideration of the relevant authorities. To my mind at the heart of this dispute is an issue about the extent to and the circumstances in which the 1996 Act replaces common law rights in favour of its own dispute resolution procedures.

14. The route I propose to take is to start by looking at the 1996 Act (section numbers hereafter refer to the 1996 Act). I will, given that this is an *ex tempore* judgment, not read out every single provision of it but I will read those particular provisions that most directly relate to the issue before the court. There are a number of notice requirements in the 1996 Act relating to different types of proposed building works but that which is relevant to the present case is section 2 and so I focus on that as illustrative (for the purpose of the determinative issue in this case it does not matter which notice provision is under consideration).

15. Section 2(1) says: "This section applies where lands of different owners adjoin and at the line of junction the said lands are built on or a boundary wall, being a party fence wall or the external wall of a building, has been erected".

16. Section 2(2) sets out a number of rights (from (a) to (n)) given to a building owner which are likely to be triggered whenever a building owner wants to do work on a wall which divides that owner's property from another's. Section 3 requires a building owner to serve a notice before exercising the rights given it by section 2. Section 5 provides that a recipient of such a notice can either give a consent notice or shall be deemed to have dissented from the proposed works with the consequence that a dispute shall be deemed to have arisen. In practice a section 3 notice is often met with an express refusal to consent, with or without reasons, and the dispute is obvious.

17. It is clear that if a building owner wishes to take advantage of the rights provided by section 2 he must serve a notice under section 3, and if the recipient of that notice agrees to the works, then all is well and good. However, if he does not agree or does not respond then he is deemed to have disagreed and a dispute arises.

18. The Defendants' arguments made express mention of section 7. Section 7(2) says 'The

building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act.' So if works are carried out pursuant to the 1996 Act, i.e. a notice is served and then an award is made or there is an agreement as to the works and if those works cause damage or loss then compensation can be given under Section 7(2). It does not seem to me that section 7 can bear the weight the Defendants would have it do – i.e. to create a free standing right of compensation independent of the notice requirements.

19. Section 10 deals with dispute resolution. I quote only those sub-sections of particular relevance. Section 10(1) says "Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner, in respect of any matter connected with any work to which this Act relates, either…". There follows mechanisms by which surveyors are appointed.

20. There is no dispute raised in this claim that these mechanisms would not have led to the due appointment of Mr Power and Mr Kyson if section 10 applied at all.

21. An award under section 10 can determine those matters set out at sections 10(12) and 10(13): "(12) 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…(13) The reasonable costs incurred in (a) the making or obtaining an award under this section…shall be paid by such of the parties as the surveyor or surveyors…determine." It was this power which led Mr Power and Mr Kyson to award themselves the costs which became the subject of the enforcement proceedings in the Magistrates court.

22. An owner who does not like the decision of the surveyors under section 10 can appeal to the County Court under section 10(17) and section 10(16) states that an award that is not appealed cannot be challenged in any court.

23. However, it is uncontentious (at least neither Mr Fain nor Mr Kyson has disputed this) that the conclusiveness provision in section 10(16) does not prevent a party bringing an action before the courts to have the award declared invalid because of a want to jurisdiction. In *Gyle-Thompson v Wall Street (Properties) Limited* [1974] 1 All ER 295, Brightman LJ said p130E: "The important point is that the building owner was not required to resort to the County Court in order to free himself from an obligation imposed by the surveyors in excess of their jurisdiction."

24. The gist of the dispute in this claim is whether the award served in July 2018 was in excess of the surveyors' jurisdiction as referred to by Lord Justice Brightman. A more recent reference to the same principle can be found in *R (Farrs Lane Development Ltd) v Bristol Magistrates Court* [2016] EWHC 983 (Admin), Holgate J at paragraph 33.

25. I turn to the cases that are relevant to the drawing of this dividing line referred to by Brightman LJ and Holgate J between that which is within or without the surveyors' jurisdiction and whether the "notice" provides that line in the present case. I bear in mind that some of these cases concern differently worded predecessor legislation, including the London Building Act 1894 and the London Building Act (Amendment) Act 1939.

26. I refer first to part of the decision in *Woodhouse v Consolidated Property Court* (1993) 66 P. & C.R. 234, Glidewell and Simon Brown LJJ. In that case a wall had collapsed following works which had been carried out without a party wall award being in place authorising the works. A notice was served and under that notice an award was made addressing compensation for the collapse of the wall. The case concerns procedural issues surrounding a summary judgment and amendment applications but one issue raised was whether the compensation award was valid. The Court of Appeal said it was not. The lead judgment is that of Glidewell LJ. Who said at page 242:

> Although subparagraph (i) of section 55 requires the surveyor to settle by his award "any matter which … from time to time during the continuance of such work may be in dispute …" this must in my view be read in its context. The context in particular includes the provisions of subparagraph (k), which commences: "The award may determine the right to execute and the time and manner of executing any work …" In my judgment the provisions of section 55 relate only to the resolution of differences between adjoining owners as to whether one of them shall be permitted under the Act to carry out works, the subject of a section 47 Notice, and if so, the terms and conditions under which he is permitted to carry out such work. A matter which arises during the carrying out of the works, about which there is a dispute, must therefore be a matter which relates to the consent for the works to be carried out, e.g. whether the building owner is complying with a particular requirement in the consent. Section 55 does not permit or authorise the surveyor appointed under this part of the 1939 Act to determine other disputes arising between the parties. It follows in my judgment that under the 1939 Act Mr. Poole had no jurisdiction to make the award which he purported to make. Mr. Poole's award in this action is evidence, but no more. That is how the judge treated it in his judgment.

27. That is often cited as authority for the general proposition that the dispute resolution mechanism in the act is limited to matters defined within the Act and works that are permitted by the Act because they are consequent upon a notice having been served or works that are envisaged by a notice that has been served. Before leaving that case, I should point out that it said in particular by Mr Fain on behalf of the first defendant, or perhaps both defendants perhaps, that the court must remember that the 1939 Act, as predecessor of the 1996 Act, had significantly different wording, and in particular, in the dispute resolution part of the 1939 Act express reference is made to the service of notices and works governed by notices which is absent from the 1996 Act. Therefore, in addition it is said that the court must remember to try and construe the 1996 Act as is without thinking that it is determined by cases under the 1939 Act. I take that on board and turn to a Court of Appeal case that was decided under the 1996 Act.
28. In *Reeves v Blake* [2010] 1 WLR 1, Mummery, Moses, Etherton LJJ, the Court of Appeal considered whether surveyors had jurisdiction under section 10 of the 1996 Act to award legal costs that had been incurred by a party in contemplation of litigation for common law remedies at a time prior to notice being given but arising out of a dispute concerning party wall works. Etherton LJ gave the leading judgment.
29. The decision of the Court of Appeal was that those fees were outside of the jurisdiction allocated to the surveyors under Section 10. *Reeves v Blake* directly addresses the distinction in issue in the present claim between that which is within the jurisdiction of the surveyors and that which is without it. The references to paragraph numbers which follow are to the judgment of Lord Justice Etherton (as he then was).
30. Paragraph 14 says:

> 'The 1996 act does not reproduce an identical terms of the provision of the London Building Acts. It contains, for example, new provisions as to costs. Generally, however, it provides procedures similar to those in the London Building Acts for authorising property owners to carry out work to an existing party structure or otherwise on or near to the boundary with the adjoining property but which at the same time, protect the legitimate interests

> of the adjoining owner. They are intended to constitute a means of dispute resolution which avoids recourse to the courts.'

31. Pausing there. One of the points made most strongly, by Mr Kyson was that because the purpose of the Act is "a means of dispute resolution which avoids recourse to the courts" a construction of the 1996 Act which avoids recourse to the courts must necessarily be right. It seems to me that that is specious on a number of grounds. The question here is the hard edged line between the surveyors' jurisdiction under the 1996 Act and the common law and it is no answer to that question to say well it would be very good if all these matters could be resolved by parties going to surveyors rather than going to the courts because that is not ignore the necessary distinction altogether on the basis that it is always better for parties to use surveyors rather than the courts. That seems to me a misunderstanding of both the intentions of parliament when it was drafting and putting into effect the 1996 Act but also a misunderstanding of what the Court of Appeal is saying. The 1996 Act and its predecessors are beneficial for neighbouring owners within their own terms and those terms do not need to be stretched without limit simply because there is a perceived public good in parties being able to remedy matters without going to the court. In short the jurisdictional issue cannot be avoided by reference to an asserted general benefit to the public from having surveyors determine their disputes.

32. The adjoining owner's case in *Reeves* and the relevant facts for present purposes are set out at paragraph 16, I note in particular the assertion that the language of the 1996 Act was of "wide ambit" – similar arguments are being made before me by Mr Power and Mr Kyson in this claim:

> "16. In the present case, there was a deemed dispute under section 6(7) of the 1996 Act, which was resolved by the second award made pursuant to section 10 . In supporting the authority of Mr Maycox and Mr Levy to give the legal costs direction in the second award, the adjoining owner relies particularly on the provisions of section 10(12)(c) , under which an award may determine "any other matter arising out of or incidental to the dispute", and section 10(13)(c) , under which the reasonable costs incurred in "any other matter arising out of the dispute" shall be paid to such of the parties as is determined by the appointed surveyor or surveyors. Mr Nicholas Isaac, counsel for the adjoining owner, emphasised that these are clear and unambiguous provisions of wide ambit, and, giving them their plain and ordinary meaning, manifestly include legal costs reasonably incurred…
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> 17. Mr Isaac reinforced those submissions, and particularly as to the width of the ambit of section 10(12)(c) and (13(c), by reference to the wording of section 10(1) and (10). In particular…authority is conferred on the appointed surveyor…where "a dispute arises…*in respect of any matter connected with* any work to which this Act relates…any matter in dispute "*which is connected with* any work to which this Act relates" (emphasis added)…"

33. Mr Power and Mr Kyson also say that the plain and ordinary meaning of Section 10, in particular 10(1) and 10(10) are "wide ambit", not limited by any reference to notice like in the 1939 Act, and that consequently the court should allow the surveyors to have as wide a jurisdiction as possible.

34. However, that was not the approach the Court of Appeal took in *Blake v Reeves*. On the contrary, the Court of Appeal was concerned to identify and uphold a clear line between

that which was governed by the common law and that which was the subject of a potential award under the 1996 Act. The key explanation is at paragraphs 20 to 23:

> 20. In view of the nature of the disputes referred to surveyors under the 1996 Act, and the wide wording of section 10(1), (10), (12)(c) and (13)(c) , there can be no doubt that there may be circumstances in which appointed surveyors have the power under section 10 to order payment by one adjoining owner of legal costs reasonably and properly incurred by another. Judge Birtles correctly so held in Onigbanjo v Pearson [2008] BLR 507, especially at para 39. Mr Stephen Bickford-Smith, counsel for the building owner, did not contend otherwise. Nor did Judge Viljoen suggest otherwise. That also appears to be the view generally held by practitioners in this field: see The Party Wall Act Explained, 2nd ed (2008) published by the delightfully named Pyramus and Thisbe Club.
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> 21. The power to order payment of such costs under section 10 of the 1996 Act is, however, restricted to costs connected with the statutory dispute resolution mechanism. As a matter of interpretation, the "dispute" mentioned in section 10(1), (10)(b), (12)(c) and (13)(c) is a dispute arising under the provisions of the 1996 Act, whether an actual dispute within section 1(8) or a deemed dispute under section 6(5) or section 6(7) , or a dispute under some other provision, such as section 7(2) (compensation for loss and damage resulting from execution of work executed pursuant to the 1996 Act), section 11(2) (responsibility for the expenses of work), section 11(8) (expenses of making good damage under the 1996 Act) or section 13(2) (objection to building owner's account of expenses). I agree with Judge Viljoen that, by contrast, proceedings in court to enforce common law or equitable remedies, such as damages or an injunction for trespass or nuisance or the threat of them, fall wholly outside the 1996 Act. That is equally true of preparations for such proceedings.
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> 22. That conclusion is consistent with practice and policy. The purpose of the 1996 Act is to provide a mechanism for dispute resolution which avoids recourse to the courts. A power of the appointed surveyors under the 1996 Act to make provision for costs incurred for the purpose of actual or contemplated litigation in court would be inconsistent with that statutory objective. Such litigation, resulting from non-compliance with the dispute resolution mechanism, falls entirely outside the statutory dispute resolution framework.
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> 23. Further, the appointed surveyors have no power under the 1996 Act to grant common law or equitable relief for causes of action in trespass or nuisance: compare Woodhouse v Consolidated Property Corpn Ltd [1993] 1 EGLR 174; Louis v Sadiq [1997] 1 EGLR 136. Those were the causes of action for the contemplated and threatened proceedings by the adjoining owner. Leaving aside the 1996 Act, neither counsel could suggest any example of Parliament conferring on one or more persons, whether or not lawyers, power to make orders for payment of the costs of actual or contemplated litigation, where the court alone or some body other than those persons has the power to determine the substantive dispute and grant the substantive relief claimed. The observations of Judge Viljoen about the complexity of making costs orders are best understood in this context. The discretionary power to make such orders, which must be exercised in the

> light of all the circumstances, sits comfortably with the court or other body having the ability and right to adjudicate the causes of action and grant the substantive relief sought. It sits extremely uncomfortably with any other *9 person or persons having no such ability or right, more particularly if they are not even lawyers.

35. Now it is clear from those passages that there is a clear distinction between the common law and rights and remedies arising out of the common law and the dispute resolution mechanism under the Act. The difficulty I have with the defendant's position in this case is that it inevitably mixes them up or ignores the distinction in favour of the surveyors being able to determine what are essentially common law rights (here the claim for damage to the wall from works carried out without a party wall notice is a claim in common law nuisance or negligence).
36. The arguments of the surveyors in this case come to the surveyors being given the power by the adjoining owner without the consent of the building owner to determine an issue of an alleged right to damages and the quantum of those damages just because that right arose from works done by the building owner that should have been the subject of a notice under the 1996 Act. However, the reasoning in *Blake v Reeves* is that surveyors do not have jurisdiction to determine common law claims: *person or persons having no such ability or right*.
37. The Court of Appeal places the line of distinction not as to whether or not the parties are in dispute in the wide ambit sense to be derived from the language of section 10 but where the 1996 Act identifies matters of actual or deemed dispute for which the provisions of section 10 provide a remedy (see paragraph 21 and its contrast between the sections of the 1996 Act which makes reference to disputes and deemed disputes and the common law and the conclusion that common law and equitable remedies fall outside the 1996 Act). In short section 10 does not create a free-standing right to have party wall disputes resolved but only a right to have disputes arising under the other provisions of the 1996 Act resolved.
38. An example of the distinction relevant to the facts of this case is provided by section 7 of the 1996 Act to which I have referred above. The surveyors could determine a claim under Section 7 but that can only relate to works that are done pursuant to the Act and works can only be done pursuant to the Act if the notice provisions are followed.
39. This distinction between the common law and the rights under the Act is of long standing. It was expressed robustly in a judgment which is often quoted: *Selby v Whitbread* [1917] 1 KB 736. The relevant passage was cited with approval in the Court of Appeal in *Louis v Sadiq* (1997) 74 P. & C.R., Evans, Henry and Aldous LJJ a case to which Etherton LJ referred in paragraph 23 cited above. *Louis v Sadiq* was a case where damage was caused by works which should have been carried out only following a party wall notice. Further works were injuncted until a notice had been served and the procedures under the 1939 Act completed. Proceedings were issued for common law remedies arising out of the works done. Those claims were successful – the 1939 procedures had not been complied with prior to the works taking place and common law remedies remained open to the injured party. A defence under the 1939 Act would only have been available if its procedures had been followed.
40. I quote from the judgment of Lord Justice Evans, pp 332 - 333:

> "In Selby v. Whitbread & Co. McCardie J. considered the relationship between the statutory scheme and the parties' rights at common law. He said this:

> An examination of the code at once shows that common law rights are dealt with in a revolutionary manner. The two sets of rights, namely, the rights at common law and the rights under the Act of 1894 (which followed the Act of 1855), are quite inconsistent with one another. The plaintiffs' common law rights are subject to the defendants' statutory rights. A new set of respective obligations has been introduced the common law was seen to be insufficient for the adjustment of modern complex conditions. Hence I think that the Act of 1894 is not an addition to but in substitution for the common law with respect to matters which fall within the Act. It is a governing and exhaustive code, and the common law is by implication repealed.

In the particular case, he held "the plaintiffs cannot succeed upon their claim at common law inasmuch as the defendants' party wall notice had been duly given under the provisions of the Act. …". He then referred to actions which might be brought outside the Act if the building owner abused his statutory rights (quoted above).

These authorities establish, in my judgment, that the appellant would not have been liable in nuisance if he had given notice, or obtained consent, in accordance with the Act and then done no more than was agreed or was approved by the surveyors. But then, no damage would have been caused to the respondents' house, save in the party wall itself, and in that respect no liability would have arisen. The issue raised in the present case is whether the appellant's liability at common law is either excluded or reduced by the provisions of the Act which he invoked, eventually, after the nuisance had arisen.

I would have no hesitation in rejecting this submission even without reference to authority, because in my judgment there is nothing in the Act which can be said to have this effect. The adjoining owner's common law rights are supplanted when the statute is invoked, which can have the effect of safeguarding the building owner from common law liabilities when he complies with the statutory procedures, just as he may incur liabilities under the statute which did not exist at common law (the Standard Bank decision). But if he commits an actionable nuisance without giving notice and without obtaining consent, he cannot rely upon a statutory defence under procedures with which ex hypothesi he has failed to comply. If he does then give notice he will in due course acquire statutory authority for whatever works are approved or agreed, but in my judgment this does not relieve him from liability for the continuing nuisance which he has unlawfully committed, until such time as and to the extent that such authority is obtained.

41. *Louis v Sadiq* is relevant to the facts in this case because where there has been no notice the parties' rights and obligations are governed by the common law (which may include a right to bring claims in court arising out of the building owner's failure to serve required statutory notices) but the procedures under the Act, in the absence of a notice or written consent, are not triggered and that includes the dispute resolution mechanism under section 10.

42. In my view the clear outcome of those authorities, at Court of Appeal level, addressing the jurisdiction of surveyors under the Act and the interrelationship between the 1996 Act and its predecessors and the common law, is that Mr Power and Mr Kyson were acting outside of their jurisdiction.

43. Mr Fain and Mr Kyson have referred to a number of first instance cases which they say would justify or support a different conclusion. It is accepted that none of these cases bind this court to find that the defendants are right but it said they point in a direction that I should follow. I disagree for the reasons set out above: the surveyor's jurisdiction is indeed established not as a freestanding matter derived from section 10 but by the procedures under the 1996 Act which themselves describe disputes for resolution pursuant to section 10.

44. The first in time is a decision of His Honour Judge Thornton QC sitting in the TCC in the Queen's Bench Division, who in an obiter section of a much longer judgment addressed briefly the remedies available to an owner when a neighbour had ignored the 1996 Act's notice requirements which included at paragraph 103 applying the provisions of the 1996 Act retrospectively. It was suggested that this must contemplate a unilateral procedure of the type carried out by the Defendants in this case. I disagree. It appear to me that Judge Thornton was expressly contemplating the parties both operating the procedures under the Act or at least was not obviously addressing a unilateral appointment ("These provisions involve the appointment of surveyors to resolve disputes…").

45. The next case I was referred to was a decision of HHJ David Grant sitting in the Birmingham District Registry. HHJ Grant decided that he would strike out an alleged failure to pay compensation in breach of 7(1) of the 1996 Act because no such independent statutory duty existed. However, it is said that in the course of the judge's reasoning at paragraph 23 helps the Defendants here because of the distinction between parties having rights under the Act and parties exercising rights under the Act. I have to say that I am not sure that I necessarily agree with this aspect of HHJ Grant's reasoning albeit his conclusions seems obviously correct. But in any event, a distinction between having rights and exercising them does not touch the question in the present case which is whether or not the surveyors had the power to make an award when there had been no notice under the 1996 Act. Applying HHJ Grant's language to the circumstances of the present case only establishes that the building owner could only exercise his rights under section 2 if he served notice under section 3 and if he did not do so then either the adjoining owners' rights arose at common law (the Claimant's position) or under section 10 of the 1996 Act (Mr Kyson's and Mr Power's position) but that only restates the problem, it does not help to resolve it.

46. I was then referred to a decision of HHJ Luba QC made in this court. This does support the Defendants' case but was obiter and make without full argument on the point. HHJ Luba said at paragraphs 46 and 50:

> "46. Even if I had found that the statutory notice was unanswerably invalid, I would have found that there was jurisdiction under the terms of the new 1996 statute sufficiently embraced the award that was made by the surveyors in this case. It seems to me that Sections 10 and 11 of the Act read together with Section 7 provide more than sufficient scope for the determination of disputes relating to works which fall within the purview of the Act or with which, in the language of Mr Power, the Act engages…
>
> 50…. This broad and very general approach to the provisions of the 1996 Act reflects the approach taken by His Honour Judge Birtles in *Onigbanjo v Pearson* he took a much more expansive approach to the jurisdictional

framing for the statute than that taken by the Court of Appeal in *Woodhouse*."

47. I do not know whether Judge Luba was referred to the various cases set out above. It seems to me that had he been and had he seen the case of *Onigbanjo* reflected and described by the Court of Appeal in *Blake v Reeves* then it would have been unlikely that he would have reached the conclusion that he did. In fact *Onigbanjo* is good authority (like *Farrs Lane*) for the breadth of the surveyors jurisdiction under section 10, once that jurisdiction is established by the procedures under the 1996 Act outside of section 10 (all as per *Blake v Reeves*). The question here is different – can the surveyors establish jurisdiction based on section 10 alone, regardless of the procedures set out in the 1996 Act.
48. Then finally, a case of my own: *Yamin v Edwards* unreported from I think November 2019. That was a case where an award had been made when there had not been a notice but the claimant in that case did not take the point that the award was invalid because there had been no notice. The court noted at paragraph 4 that the only jurisdiction arguments put forward in that case were those that the court addressed by going through the arguments that were made in that case. Therefore, whilst it might have been of some surprise that the no notice issue was not raised (to Mr Kyson in particular who was also involved), it was not so raised and the case is no authority to support the arguments of the Defendants here.
49. I was also referred but do not find it necessary to address or deal with two of the practitioner texts in this area. They do not add anything to the law that I have already referred to and relied upon. I was also referred to a government document describing the 1996 Act. I do not think that is of much assistance since at best it can only reflect the law rather than be creative or descriptive of it.
50. For the reasons I have set out above, in my judgement the claimant is correct essentially for the reasons that Mr Paget so well summarised: no notice, no act. I will allow the relief sought in the claim on that basis and ask counsel to draw an order.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

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This transcript has been approved by the judge.