Claim No. G20CL077

In the County Court at Central London

TCC List

Before His Honour Judge Parfitt

ALAN & BARBARA MADDOWS

Appellants

- v -

PAUL & KATHRYN FERNANDES

Respondents

JUDGMENT

Dates: 10 September 2020 & 28 September 2020

Nicholas Isaac QC directly instructed by the Appellants
Howard Smith instructed by **Child & Child** for the Respondents

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

HHJ Parfitt:

Introduction and Summary

1. The Appellants appeal under section 10(17) of the Party Wall etc. Act 1996 ("the Act"). They own and wish to carry out works to 28 Winterdown Road, Esher ("No. 28"). The Respondents own and live at 27 Winterdown Road ("No. 27"). No. 28 and No. 27 are the last two properties forming a nineteenth century terrace, some flavour of which can be got from the estate agent's particulars included in the court bundle for No. 27: "A delightful period cottage in the heart of West End Village". This dispute concerns a dividing wall to the rear of the properties.

2. On 18 October 2019 the Appellants served a party structure notice on the Respondents with an attached drawing. The notice informed the Respondents that the Appellants wanted to remove the existing party wall and the independent block wall adjacent to it and replace both with a new cavity wall which would form part of the Appellants' new extension. The notice described the works in material part as follows: "Removal of existing Party Wall due to poor foundations and structural strength preventing extension of the property, the erection of a new Party Wall and propping to the adjoining Owner's property whilst the wall is removed."

3. On 25 October 2019 the Respondents indicated they dissented from the proposed works and appointed a surveyor, Mr Radcliffe. The Appellants appointed their own surveyor, Mr Rickards and the two surveyors selected Mr Cook as the third surveyor.

4. On 24 April 2020 the appointed surveyors referred to Mr Cook three issues for an award under section 10(11) of the Act:

> "(1) Is the existing party wall defective or in a state of disrepair such that it is necessary to demolish and rebuild the same (i.e. under section 2(2)(b))?; (2) If demolition and rebuilding is necessary under section 2(2)(b), in what proportion should the expenses of that exercise be defrayed by the building owner and adjoining owner under section 11(5)?; (3) To what extent, if any, does the building owner's intention to increase the height of the wall after such rebuilding, i.e. to create a first floor extension, mean that the demolition and rebuilding of the existing party wall should be treated as being carried out under section 2(2)(e) and consequently be carried out at the sole expense of the building owner.".

5. There followed 4 sets of submissions from each appointed surveyor to Mr Cook, referencing various engineers' letters or reports about the party wall and, on 29 June 2020, a site visit by Mr Cook, with the appointed surveyors, to inspect the wall.

6. On 3 July 2020 Mr Cook produced his award ("the Award"). The Award is short and to the point. If I ignore Mr Cook's consequential findings about costs, the Award addressed the questions asked in this way:

> "4. That section 2(2)(e) applies in this situation as the party wall is not strong enough or high enough for the Building Owner's purpose. 5. That section 2(2)(b) does not apply in this situation. 6. That the works should be undertaken at the sole expense of the Building Owner".

7. The grounds of appeal are dated 13 July 2020 and raise some 9 separate grounds. Mr Isaac QC, for the Appellants, explained at the outset of his submission that the crux of the issue is who should pay the costs of sorting out the existing party wall. In essence his submissions are that the award is plainly wrong because on the evidence before the third surveyor it was obvious that the existing party wall had to be rebuilt regardless of the Appellants' wish to strengthen its foundations and increase part of its height for the new extension. In addition, the third surveyor's failure to provide adequate reasons have left the Appellants unable to understand why they are having to pay the costs of a new party wall to replace the current failed wall. If the third surveyor had done his job properly and provided reasons for rejecting the evidence about the necessity of replacing the existing party wall, then he would have reached the only rational conclusion: one in favour of the Appellants. This would have led to different findings about the expense of the works and the costs of the Award process.

8. Mr Smith, for the Respondents, agreed that the costs of replacing the existing wall are at the heart of this dispute but pointed out that the existing wall has been doing what it was intended to do for many years, including most recently, since 2012 forming part of the Respondents' kitchen. If demolition and rebuilding is required, it is because of the Appellants' intended works. The third surveyor recognised these facts and made findings accordingly and his award, though brief, followed from those findings. The criticisms made of the Award are misplaced and fail to give due regard to the particular circumstances in which awards under the Act are made. The Award should stand.

9. It was agreed between the parties in August 2020 that the court should hear this appeal as a review rather than a rehearing. This generated a number of submissions about the nature of a review which I address below.

10. I take things in the following order: (A) The relevant sections of the Act; (B) The *sui generis* nature of an award by a third surveyor; (C) the material principles relevant to a "review" appeal; (D) the evidence before the third surveyor; (E) discussion; (F) the grounds of appeal; (G) conclusion.

(A) The relevant sections of the Act

11. Section 2 of the Act gives a number of rights to a building owner to carry out works which will impact a shared wall. The rights are set out in a series of sub-paragraphs to subsection (2). The general applicability of those rights is stated in subsection (1):

> "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".

12. The relevant rights for present purposes are one or both of:

> section 2(2)(b) "to make good, repair or demolish and rebuild, a party structure or party fence wall in a case where such work is necessary on account of defect or want of repair of the structure or wall"; and
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> section 2(2)(e) "to demolish a party structure which is of insufficient strength or height for the purposes of any intended building of the building owner and to rebuild it of sufficient strength or height for the said purposes…".

13. There was some discussion in the submissions before me as to whether these rights are exclusive of each other or overlap. I return to this below but note here that the Appellants' position is that the third surveyor was required to focus on the present state of the disputed wall and whether its condition made it necessary for works to be carried out. If the answer to that question was yes, and the Appellants' case is that on the evidence before the third surveyor that was the only realistic answer, then those works should be carried out and the costs divided as an exercise of the section 2(2)(b) right. The Appellants say that their intended extension works are irrelevant to this issue.

14. On the other hand, the Respondents agree with the third surveyor that looked at substantively works to the shared wall are required because the existing wall is insufficient for the Appellants' intended extension and accordingly section 2(2)(e) is applicable: this is not a maintenance issue, it is an improvement issue.

15. These distinctions matter because of the way in which building expenses are allocated under the Act. The general position is stated at section 11(1):

> "Except as provided under this section expenses of work under this Act shall be defrayed by the building owner".

16. The material exception is at section 11(5):

> "Where work is carried out in exercise of the right mentioned in section 2(2)(b) the expenses shall be defrayed by the building owner and the adjoining owner in such proportion as has regard to (a) the use which the owners respectively make or may make of the structure or wall concerned; and (b) responsibility for the defect or want of repair concerned, if more than one owner makes use of the structure or wall concerned.

17. As I have set out above, from the Appellants' perspective, it is unfair that they should have to pay the full cost of building works that will at least in part benefit the Respondents since once the works are completed the Respondents' kitchen wall will be in a much better condition than it is at present. The Appellants also consider that the Respondents could have rebuilt the wall as part of their kitchen renovation works in 2012 and this would have created a stronger wall which the Appellants would have been able to incorporate into their new extension.

18. From the Respondents' perspective they have been making use of the party wall as part of their kitchen extension since 2012 without incident or problem and it would add insult to injury if in addition to having to have that kitchen destroyed and rebuilt, with the necessary

associated disturbance and inconvenience, they also have to pay half the cost of the new wall, which is only required to give the Appellants a new extension. The Appellants predecessors in title agreed to the Respondents' kitchen works at the time. It is the Appellants' current plans which have caused the problems and the Appellants should be paying to get the extension they want.

(B) The *sui generis* nature of an award by a third surveyor

19. In framing the dispute about the sufficiency of the third surveyor's reasons Mr Smith referred me to *Jones v Sherwood Computer Services Ltd* [1992] 1 WLR 277, a case about an expert determination: an expert decision cannot be challenged in court if the expert has done what the relevant contract requires of them. Mr Isaac countered by referring me to *Flannery v Halifax Estate Agencies Ltd* [1999] 1 WLR 377, a case in which the Court of Appeal emphasised the judicial duty on a district judge (in that case) to give reasons and address the cases made by the parties' evidence and submissions.

20. In reply, Mr Isaac submitted that awards under the Act are *sui generis*, although they share certain characteristics with expert determination, arbitration and judicial decision, they need to be looked at as their own category of decision. I agree and it demonstrates that those cases about expert determination or judicial decision, while they might throw some light on the surveyor's role under the Act do not circumscribe it. The statutory role needs to be seen within its own context.

21. There was a useful summary of this position in another case involving Mr Isaac and Mr Smith, to which Mr Smith referred: *R (Subramanian) v City of London Magistrates* [2019] EWHC 1240, Ms Collins Rice (sitting as a deputy High Court Judge, as she then was) in particular at paragraphs 27 to 28:

> 27. As a general observation, party wall disputes have a high probability of contentiousness. That is why statutory regulation came about. Where people's homes are involved, so, often, are their primary economic assets and their intimate private lives. Where neighbours are also involved, it is not surprising to find strong feelings engaged. The scheme of the 1996 Act is to contain these matters in an orderly structure designed to provide clarity, fairness and a degree of expert oversight. It aims to prevent disputation in the first place, and, where disputes cannot be avoided, to resolve them quickly, objectively, fairly and finally.
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> 28. The way in which s.10 of the Act puts dispute resolution in the hands of surveyors is carefully calibrated. Parties can try to agree on a single decision maker themselves. Or they can each appoint 'their' surveyor, and the surveyors appoint a third as a tie- breaker for disputes they cannot themselves resolve. But once engaged as decision- makers, the surveyors must act quasi-judicially *(Gyle-Thompson v Wall St Properties* [1974] lWLR 123, p.130, paragraph H; *Mohamed &Lahrie v Antino & Stevens* 2017 unrep. CLCC case no.C20CL075; paragraph 24). The surveyors' appointments cannot be rescinded and their

awards are binding (subject to appeal to the county court). The objectivity, impartiality and finality this brings is fundamental to the scheme."

22. In *Zissis v Lukomski* [2006] EWCA Civ 341, the Court of Appeal considered the nature of an appeal from an Award made under the Act following the introduction of the CPR and concluded that it was a statutory appeal governed by CPR Part 52. The court made the following material observations:

    a. A positive reference to *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155, in which Judge Humphrey Lloyd QC referred to awards as *sui generis* and not having to contain findings of fact or law;

    b. The decision that since an award is non-speaking and made without a hearing an appeal will generally be a rehearing which will allow the county court to hear evidence so that it can reach its own conclusion as to whether the award was wrong.

23. It is clear from *Zissis* that it is not a necessary requirement of an award under the Act that reasons should be given. It would follow as a matter of logic, as Mr Smith submitted, that a challenge to an award based purely on lack of reasons should fail – the appropriate remedy in those circumstances is to pursue a rehearing appeal.

24. However, I agree with Mr Isaac when he submitted that in general awards do contain reasons and that if an award does so then it is to be expected that those reasons would allow a reasonable recipient of the award with knowledge of the background to understand why the decision was reached.

25. There is a potential tension between these two positions but I do not need to resolve it for present purposes.

26. In any event, for the reasons I explain below, the Award did contain reasons, albeit briefly and those reasons are sufficient to understand the basis of the decision.

(C) The principles relevant to a "review" appeal in these circumstances

27. Contrary to the operating assumption in *Zissis*, which was that appeals from awards under the Act would be dealt with by rehearing, the parties in this case agreed for pragmatic reasons that the appeal should be by way of review.

28. There is no doubt that the scope of the court's consideration during a review is different from the scope of a rehearing. There was no real difference between the parties on this and in both *Zissis* and the notes to the 2020 edition of the White Book at 52.21.1 reference is made to *Dupont de Nemours (EI) & Co v ST Dupont (Note)* [2003] EWCA Civ 1368 (May LJ). In relevant particular:

> "The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the court and its decision making process. There will also be a spectrum

of appropriate respect depending on the nature of the decision of the lower court which is challenged…".

In my own words and tailoring the distinction with party wall appeals in mind: a rehearing reconsiders the issues in the award, a review looks at the award and assesses whether it is fit for purpose in all the circumstances.

29. In any event whether a review or a rehearing, the core principle is stated at CPR 52.21(3): "The appeal court will allow an appeal where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court".

30. In the present case what matters is whether the Appellant can convince me that the Award was wrong. For this purpose it is not sufficient to persuade me that it might be wrong, it needs to be plainly wrong. Mr Isaac's case goes further than that – he says that the Award was "perverse". The authorities make clear that, outside binary questions of law, the test is not quite that high but nevertheless an appeal should only be allowed on a review basis if the decision maker has gone outside that which was properly available to them in the light of the evidence and submissions (where relevant) that were made below.

31. A further point is that when a decision maker has a degree of expertise (as surveyors do in party wall disputes) then a degree of deference or benevolence is appropriate (Mr Smith refereed me to *Graham v Easington DC* [2008] EWCA 1503, Carnwath LJ at [24], which was tribunal decision but the point is a general one).

32. In short in reviewing the Award the court should recognise the reality of the circumstances in which the decision was made and address it from within its own context. The court should not expect it to be something which it is not (e.g. a judgment following a full trial) but should expect it to meet the objectives summarised by Ms Collins Rice in the passage cited above.

(D) The Evidence before the Third Surveyor

33. I became concerned during Mr Isaac's submissions that the Appellant was expecting this court to go through the evidence of the various surveyors and engineers which addressed the disputed wall and then reach its own view – without the benefit of hearing those witnesses be cross-examined or with their evidence being subject to the controls implicit within CPR 35. As if this was a rehearing rather than a review. However, that was not Mr Isaac's intention. Rather, it is fundamental to the Appellants' criticisms of the Award that the weight of the expert type evidence overwhelmingly pointed to the present wall requiring to be rebuilt – it was not "fit for purpose".

34. The Award recites at paragraph 2 the material available: submissions from Mr Rickard of 1.5.20, 12.5.20, 19.6.20 and 25.6.20; submissions from Mr Radcliffe of 6.5.20, 14.5.20, 21.5.20 and 24.6.20. For the most part those submissions also contained evidence received from other professionals. Moreover and significantly, the third surveyor had the benefit of a site visit with the other surveyors: he saw the wall, as it is, for himself.

35. The professional material produced from the Respondents' side included the builder who carried out works in 2012 and the surveyor who supervised / provided recommendations for those works. For both professionals Mr Isaac suggested that their evidence should be given less weight than the equivalent evidence from the Appellants' side (or from a Mr Holt who was independent) because it was more likely that those individuals would defend the choice not to rebuild the wall in 2012. I do not think this point goes very far. As often the case with expert type evidence, what will be more important are the reasons given for any view or opinions expressed. I would agree that any witnesses evidence needs to be looked at within its own context and that the characteristics of the witness (such as having been party to decisions taken about the disputed wall in 2012) are part of that context but to suggest that because of those characteristics the relevant evidence must be given an inherently inferior status to that produced by the Appellants, is wrong.

36. Even though this was a review hearing, it is necessary to go through and summarise those parts of the evidence that I was taken to by the parties' counsel. There are two related reasons for this: firstly, because given the brevity of the findings / reasoning in the Award whether or not the decision was plainly wrong cannot be judged otherwise and, secondly, when addressing the Appellants' points about the paucity of the reasoning it is necessary to do so from the context of the information which would be available to the addressees of the Award.

37. After a general description of the disputed wall, I will take that evidence in the order it was produced (I am grateful to Mr Isaac for providing a chronology that makes this process easier than it would otherwise have been).

38. The wall was most likely constructed in the nineteenth century. It is of half a brick width and sits on a corbel base without other foundations. It contains other block work (presumably from occasional repairs / repurposing or infilling) and in places old timber inserts. Whatever its previous history, on the No. 27 side since 2012 it has formed part of the Respondents' kitchen wall. On the other side, at the time of the service of the notice relevant to the potential works the subject of the Award, the wall was adjacent to a separate block wall which formed part of the then one storey rear extension to No. 28 and was proximate to the higher point of both extensions' sloping roofs. The photographs of the two extensions show the extensions meeting with the common apex of their roofs the highest point of each. At least the Respondents' evidence says the wall was getting some support and/or protection from this pre-existing configuration since 2012. The No. 28 extension, including the blockwork wall adjacent to the disputed wall, has since been taken down, as part of the Appellants' proposed new extension works. This has exposed the No. 28 face of the wall.

39. It was part of the Appellants' case that the wall had to have complied with material building regulations when it was incorporated into the Respondents' new extension in 2012. It is relevant in that context to note that a compliance certificate was obtained for those works dated 16 February 2016.

40. Mr Smith submitted that mere non-compliance with Building Regulations does not necessarily mean that a wall will require works under section 2(2)(b), not least because

carrying out works to bring walls into conformity with statutory requirements is expressly provided for under section 2(2)(c). I agree that mere statutory non-compliance is not likely to be relevant but statutory non-compliance, if established, might be relevant in any particular case to whether or not a wall is defective or out of repair such as to make works necessary under section 2(2)(b).

41. The Appellants obtained two engineer's reports from a Mr Murphy. The first in time is dated January 2020 and was prepared following a site inspection on 15 January 2020 ("Murphy 1"). Murphy 1 addressed the proposed new rear extension. The relevant conclusions of Murphy 1 were that the wall, so far as is visible, was in poor condition and Mr Murphy was surprised it had been approved. It was not recommended to build off the existing walls (this seems to include reference to No. 28's blockwork wall) and a recommendation was made to take both walls down and rebuild off a new foundation.

42. Mr Isaac urged that the scope of the question for the third surveyor was the want of repair or defect of the existing wall and the necessity of works to make it good. In that context, Murphy 1 is of no assistance: it expresses no view other than that in order to build the proposed extension, it would be best to take down what is there and start again. A point made by the third surveyor when deciding this was a section 2(2)(e) case rather than a section 2(2)(b) case.

43. A further report was obtained from a Mr Holt dated 10 March 2020. Mr Holt was proposed as an independent engineer (selected by the Respondents and paid for by the Appellants). Mr Holt's inspection was on 2 March 2020 and by then the blockwork wall had been removed.

44. Mr Smith commented that this removal should not have been done without award because of section 2(2)(n) of the Act. I think this correct but nothing turns on it for present purposes (I note Mr Rickard says it was agreed between him and Mr Radcliffe in February 2020 but that agreement, like many potential facts in the case, appears to be disputed).

45. The instructions for Mr Holt give a good indication of what was being discussed between the surveyors / parties at that time and what their concerns included. Mr Isaac's chronology quotes an email from 28 February 2020: "we simply need some impartial comment on the feasibility of repairing the wall to allow for the subsequent increase in height…". In the context of the other emails to which reference is made it is clear to me that the context at that stage was to see if the extension could be carried out without demolishing the existing wall and the linked substantial destruction of the Respondents' 2012 kitchen.

46. Mr Holt described the wall as being in poor condition and at the extreme end of compliance with design codes in terms of stability, even were it of good construction. Like Mr Murphy, Mr Holt queried how the wall was signed off by building control. Mr Holt concluded that the wall should be demolished and rebuilt as part of the extension works (i.e. he agreed with Murphy 1) or that the extension works should be totally separated from the wall (similar to No. 28's existing extension at the date of the notice for works). Mr Holt ended by saying that this would not address "the fact that the existing wall is not considered "fit for purpose"". It may have been this comment at the end of Mr Holt's report which

subsequently focused the Appellants on the current state of the wall as a prior issue to the new extension.

47. In early April 2020 there was an exchange of emails between the parties' surveyors which included at item 3 "we agreed that the Engineer's report confirms that the existing party wall requires reconstruction no matter what works are to be taken above". This agreement was in the context of an offer being made that the costs of the works would be born by the Appellants (i.e. without the present dispute about rebuilding cost). The Respondents' surveyor replied that agreement was reached on "the party wall items" but not on various costs and the Respondents' wish for alternative accommodation.

48. I get nothing of assistance from this informal "agreement" for present purposes which objectively shows the surveyors trying to move forward the various issues to determine the basis upon which the intended works could take place. The further emails contained in the chronology show further attempts to agree matters and a little more focus on the current state of the wall, albeit at that stage in the context of what future attribution of cost might arise should the Respondents' subsequently make use of the new party wall (most obviously by raising their own extension). This is all very different from the Appellants' current assertion that they can get half the cost of the demolition and rebuild because of section 2(2)(b).

49. The Appellants' building contractor obtained a letter dated 24 April 2020 from ACT Building Control which stated the writer's view that the wall was not fit for purpose and required removing. ACT referred to passing this view up to the local authority building control for action. Whether or not ACT did this both parties had correspondence with building control and the Appellants, in particular, can be seen trying to improve their position in that correspondence.

50. In any event, the local authority emailed the Respondents on 17 June 2020 having carried out an inspection of the wall. The view of the local authority was that there were "no other signs of movement or distress that would lead us to believe the wall was in a dangerous condition…although the wall is in poor condition, it is not such a condition that we would be required to serve notice…".

51. Mr Smith emphasised this evidence as consistent with and supportive of the conclusions reached by the third surveyor. I agree. It also has the apparent benefit of being free of the various issues arising out of the works dispute which is inherent in much of the other evidence about the wall.

52. The Respondents' obtained evidence from the engineer who worked for them in 2012, Mr Stodart. In a letter of 4 May 2020 he explained the basis upon which the wall was considered adequate in 2012 and noted the Respondents telling him that there had been no problems since. Mr Stodart shared other concerns that the existing wall would not be suitable for the proposed new works but thought removal and rebuilding was an extreme solution given the existing wall was sufficient. He made an alternative proposal.

53. Mr Rickard's 1 May 2020 submissions relied on Mr Holt's report of 10 March and the ACT letter of 24 April 2020.

54. Mr Radcliffe's 6 May 2020 submissions were largely narrative but referred to the Stodart letter of 4 May 2020 and the Respondents' builder in 2012 who also said the wall was adequate for its current purpose.

55. I also note the photographs of the Respondents' kitchen – which show a smart modern fitted kitchen without signs of defect or want of repair (so far as the disputed wall is concerned). I can well understand the Respondents' concerns about the damage the Appellants propose to do to this feature of their home.

56. Mr Rickard's 12 May 2020 submissions are more adversarial than anything else and do not take the evidential picture any further forward.

57. Mr Radcliffe's submissions of 14 May 2020 repeat the point that even if the wall looks in not that good condition from the No. 28 side, it is functioning for No. 27. I note that this was the first time the Respondents saw the letter from ACT and that perhaps gives some background to the local authority visit in June 2020.

58. Presumably, Mr Radcliffe's 14 May submissions crossed with Mr Rickard's of 12 May because on 21 May 2020, Mr Radcliffe responded to Mr Rickard's 12 May submissions. The responses, like the submissions, are forensic / adversarial and do not add to or further the evidential picture.

59. On 3 June 2020 by agreement between the parties Mr Stodart and Mr Murphy met on site. This resulted in two further letters / reports.

60. In Mr Stodart's letter of 4 June 2020 he stated that the purpose of the visit was to inspect and comment on the existing party wall. Mr Stodart provided a detailed description of the wall. Notwithstanding what he says is the purpose of the visit, his conclusions focus on the possible solutions for the new extension. Mr Stodart says the condition of the exposed brick party wall is not good but states his view that it is currently fit for purpose as confirmed by building control.

61. In response to their meeting and Mr Stodart's letter of 16 June 2020, Mr Murphy wrote a further letter / report dated 16 June 2020 ("Murphy 2"). Murphy 2 refers back to Murphy 1 and Mr Holt. Murphy 2 takes issue with Mr Stodart's views about the removal of the blockwork wall being detrimental to the party wall (these tit for tat criticisms and forensic jockeying between the different parties / professionals involved in the exchanges I am referring to in this section is typical and generally unhelpful to any progression of the real issues). Murphy 2 said that the wall was not fit for purpose for its current use and was concerned about its slenderness ratio. It was noted that there were no defects / problems apparent from the No. 27 side. Murphy 2 sets out a number of points said to be relevant to the conclusion "is the wall fit for current purpose" but apart from referring to earlier reports there is nothing in these points which progresses the wall being fit for current purpose issue. Murphy 2 (like the Stodart letter of 4 June 2020) then moves on to looking at works options for the new extension.

62. Mr Rickard produced further submissions dated 19 June 2020. Leaving aside that which is merely critical, a point is made that Mr Stodart refers to the current wall requiring propping and that being inconsistent with the assertion that it is fit for purpose.

63. Mr Radcliffe added more on 24 June 2020 addressing the two engineers' reports / letters and Mr Rickard's submissions of 19 June 2020. Again leaving aside that which is critical and/or not progressive of the wall issue, it is said that the propping proposal related to Mr Stodart's view that the removal of the block wall would have had an impact on the remaining wall's stability (in an email Mr Stodart relates this to the roof structure and increased wind loading risk). The conclusion focuses on the options for the new building rather than the existing party wall.

64. The final submission was made on 25 June 2020 by Mr Rickard who picked up that just because the wall was not considered dangerous did not mean it was not in need of repair.

(E) Discussion

65. I have no doubt that there was a sufficient evidential platform before the third surveyor for him to conclude, as he did, that the wall was fit for its current purpose. The most obvious point, which is the one he referred to in his award, was that the existing wall, configured as necessary to perform its function relative to No. 27's kitchen, had been in place without problem since 2012.

66. Mr Isaac criticises this because it fails to look at the function the wall is performing from the No. 28 side. I think this is misplaced. Firstly, because outside of the Appellants' desire to replace the wall for the purposes of their new extension, it was performing no particular function for No. 28 other than being a practical boundary. Secondly, because even looked at independently of No. 28's intended works (which is artificial given the whole purpose of the Award is to resolve a dispute arising out of the notice for those works and so further those works) the wall's function from the No. 28 perspective was to remain standing and so required no separate consideration from that inherent in looking at it from No. 27's side. The conclusion that the wall was "sufficient for the purposes of the adjoining owner" is equivalent to saying that it was fit for purpose for both parties – if the No 28 notice works were disregarded.

67. It does not undermine that conclusion that the wall might not comply with current building regulations – this will all depend on the circumstances, what the relevant regulations might be, what the consequences might be for any breach and what remedies might be required. None of which was detailed in the evidence and I include in this the passing reference to slenderness ratios.

68. The process of going through the exchange of submissions in this case is not an enlightening one. It is necessary to step back from the detail and party / party carping and look at the substance of the problem before the third surveyor: the Appellants want to build a new extension to the line of and incorporating the existing party wall but the existing wall cannot sustain that building.

69. I well understand and agree with the third surveyor's approach in the Award to start by determining at paragraph 4 that this is a section 2(2)(e) case. Looked at objectively, on the material, that is what this party wall dispute is about: what needs to be done to the party wall to enable the Appellants to carry out the intended works (bearing in mind that the Act gives them the right to make whatever changes might be required and made the subject of an award, if necessary, so that the Appellants can complete the intended works).

70. The one submission of Mr Isaac that gave me more pause than any other was that the existence of the right under section 2(2)(b) to "make good, repair or demolish and rebuild…where such work is necessary on account of defect or want of repair" should be applied prior to a consideration of the right under section 2(2)(e). But assuming that the two rights are complementary rather than independent, this possibility will all depend on the particular circumstances.

71. The problem here, as I mentioned in passing during the remote hearing, is the width of what is potentially encompassed within the phrase "make good, repair or demolish and rebuild". From the Appellants' perspective the wall needs to be put in a condition sufficient for it be capable of supporting the new extension (or at least being incorporated within the new extension without further demolition). But, of course, this cannot be the stated intention relevant for section 2(2)(b) because the purpose of that section (in my words but it is obvious) is to maintain not improve. It is triggered by defects or want of repair. There may be a coincidence between these two states: a duly repaired wall might also be sufficient to be incorporated in a new extension but the coincidence is not necessary (at least it is not established on the evidence that it is necessary).

72. The question which the third surveyor was asked to answer assumed, if the answer was to be favourable to the Appellants, that there was no making good or repair that could be carried out to the wall to remedy the potential defects or want of repair. It had to be a "demolish and rebuild" case. For the third surveyor to make a finding in favour of the Appellants in that respect would have required him to be satisfied that demolish and rebuild was the only way to put the wall back into repair or remedy its defect.

73. This also demonstrates why Mr Isaac is wrong to submit, as he did, that since it was common ground that the wall was out of repair that it must follow that the third surveyor was wrong to say it was sufficient for present purposes or adequate for its current loading. It seems to me that the third surveyor rightly focused on whether demolish and rebuild was a requirement for the wall to perform its existing function and determined that it was not.

74. On the evidence and considering his specialist knowledge and the advantage of a site visit, I can see no basis for reviewing that decision as plainly wrong – on the contrary my own view on the material I have seen would be similar (but my own view should be given less weight than that of the expert surveyor). I also see the possibility of repairs that would assist if the wall was to remain doing its current job but the third surveyor was not asked that question and nor is it obvious to me that such a question would have been of any assistance to the Appellants – who do not want the wall to be merely brought into good repair but to be brought into such a condition that it can be incorporated into their new extension.

75. As Mr Smith emphasised, despite all that is said about the existing wall, there is no evidence of any apparent movement to the wall since at least 2012. It would be curious in those circumstances if a wall which has been standing perhaps for more than 100 years (assuming it is nineteenth century) must now be demolished if it only needs to continue to perform its current function. On the other hand what is clear is that for the Appellants to be able to build their intended extension – as is made plain by the plans accompanying the notice of works – demolition and rebuilding is the Appellants' proposed method and the one which all of their own evidence (and Mr Holt's) says is required.

76. The third surveyor, with the benefit of the submissions made to him, has seen the wall with the parties' surveyors and was well placed to determine the starting question asked of him, which was did the wall require demolition and rebuilding to perform its present function.

(F) The Grounds of Appeal

77. In this section I summarise each ground of appeal and address it in the light of the evidence and submissions I have heard.

Ground 1: *the Third Surveyor erred in wholly failing to answer the question referred to him as to whether the Party Wall was defective or in a state of disrepair such that demolition and re-building of the same was necessary.*

78. In submissions, Mr Isaac clarified that this ground included the assertion that the third surveyor should have addressed what repairs might have been required of the wall.

79. I have quoted the relevant question from the referral above. It only asked whether the wall required to be demolished and rebuilt. The second two questions submitted to the third surveyor assume that the answer to the first question was "yes, the wall does need demolition and rebuilding". It is clear from the Award that the third surveyor's view was that the wall did not need demolishing and rebuilding to continue to perform its current function. It is also clear that the third surveyor's view was that the wall was insufficient strength and height for the Appellant's intended works.

80. The questions asked did not include the different question about what repairs would be required to the wall for it to continue to perform its current function. I can understand why: stepping back that was irrelevant to the Appellants' stated intentions and the notice of works which was the subject of the dispute.

Ground 2: *Alternatively, the Third Surveyor erred in equating "in repair" or "not defective" with "sufficient for the Respondent's present purposes".*

81. It was suggested that the phrase "sufficient for the Respondent's present purposes" was an illegitimate subjective test. I agree that a subjective test would be illegitimate: it matters not whether a party thinks it is necessary to demolish the wall or thinks it is not necessary to demolish it and the third surveyor did not apply such a test. The third surveyor looked at the wall, the evidence and the parties' use of the wall and determined (a) the wall was sufficient for its present purpose and (b) it was insufficient for the Appellants' intended purpose. These were decisions made on objective grounds, not subjective ones.

82. Moreover, it seems to me, that in contrast to the point scoring and sniping contained within the parties' submissions to the third surveyor, the third surveyor appropriately and commendably cut through to the gist of what the dispute was about. In so doing, he performed his statutory function.

Ground 3: *Having concluded (correctly) that the Party Wall was not compliant with current building regulations, the Third Surveyor could not properly have concluded that the Party Wall was not defective*.

83. This ground wrongly asserts that the third surveyor concluded that the wall was "not defective". He did not. He concluded that the wall did not require demolition and rebuilding to meet its current purpose but that for the Appellants' purpose it would require demolition and rebuilding because "[it] is of insufficient strength or height for the purposes of the [Appellants'] intended works".

84. I addressed above my agreement with Mr Smith's point that just because the wall might fail current building regulations does not mean that it was defective for the purpose of section 2(2)(b) and that in any event the evidence before the third surveyor (and likewise the evidence before me) did not provide sufficient particularisation of the building regulation issues for any conclusion to be made about whether any such matters would have required demolition and rebuilding (that being the question asked of the third surveyor) or indeed any particular repair.

Ground 4: *The Third Surveyor's conclusion "there is no evidence on the Adjoining Owners internal face of the party wall of distress or structural damage indicating the existing structure is adequate for its current loading" was contrary to the overwhelming weight of independent engineering evidence and/or perverse*

85. I have addressed this above. The conclusion that the wall was "adequate for its current loading" was well supported by the evidence of no distress or structural movement since 2012.

86. The only "independent" engineering evidence was that of Mr Holt but his view on the "fit for purpose" contained no analysis or reasoning and was given when the issue being discussed between the parties was about carrying out the Appellants' extension works without having to destroy the Respondents' kitchen.

87. Moreover, the third surveyor was able to look at the wall and form his own view – he was not bound to or limited by the parties' submissions: his function included being an expert who had been appointed to apply his technical expertise to resolve the issue placed before him.

Ground 5 *The Third Surveyor erred in failing to answer the second question referred to him*

88. I agree with what is said in the narrative of the grounds of appeal: once the third surveyor answered the first question against the Appellants, this question was hypothetical and there was no need or reason to answer it.

Ground 6 *The Third Surveyor erred in concluding that section 2(2)(b) of the Act is not applicable in the current situation*.

89. The text of the grounds of appeal expand this ground in two different ways. The first point is that the "key question" was whether the wall could be repaired in any other way than demolishing it. Since that was not a question the third surveyor was asked, this ground is hopeless. Moreover, as I explained above, objectively the key questions were those the third surveyor answered by his award: if the Appellants wanted to build off the party wall then they would need to pay for its being demolished and rebuilt; and for its then present purposes (i.e. not those flowing from the Appellants' notice of works) the wall did not need to be demolished and rebuilt.

90. The second point asserts that if works were required under section 2(2)(b) then the cost of those works would fall equally between the parties. In the present case that is a hypothetical question: the third surveyor was not asked to determine what repairs, if any, would be necessary to address defects or want of repair in the wall. But it could not be a given, bearing in mind the open discretion referred to in section 11(5) and the benefit the Appellants would get if they were right about a rebuilt wall being good for their new extension, that the split would be 50/50 rather than placing more of the cost (or possibly all of the cost) with the Appellants.

91. The logic of the questions put to the third surveyor, from the Appellants' point of view, was that since the existing wall required to be demolished and rebuilt to perform its current function, the Appellants should get the benefit of such a wall for the purpose of their extension. The third surveyor rejected the premise that the current state of the wall required it to be demolished and rebuilt and was not plainly wrong in doing so.

Ground 7: *The Third Surveyor erred in determining that section 2(2)(e) of the Act applied "as the party wall is not strong enough or high enough for the Building Owners' purpose*

92. Again, this ground fails because it assumes the premise which the third surveyor, rightly in my view, rejected: the existing wall did not require to be demolished and rebuilt to remedy any current defect or want of repair. As the third surveyor determined and as the Appellants' stated in their notice of works (these being separate points), the wall was insufficient in height and strength for the new purpose of being incorporated into the Appellants' proposed extension.

Ground 8: *The Third Surveyor erred in determining that the Appellants should bear the entirety of the costs of works to the Party Wall*

93. In the light of the third surveyor's findings, which although briefly expressed are clear and well within the evidence available (which includes the benefit of the surveyor having a site visit and being able to apply his own expertise to the on-site conditions), the conclusion that this was a section 2(2)(e) case was correct and it necessarily followed from that conclusion that any works required – which remain to be the subject of an award – will fall outside the section 11(5) exception and within the general principle stated at section 11(1): "…expenses of work under this Act shall be defrayed by the building owner".

Ground 9: *The Third Surveyor was wrong in requiring the Appellants to pay the costs of the Award. In all the circumstances, he should have ordered the Respondents to pay the same*

94. The Appellant's lost. The conclusion that they should pay the costs of the Award is unremarkable.

(G) Conclusion

95. For the reasons set out above, the appeal is dismissed. I invite counsel to agree a suitable order.

HHJ Parfitt