Proper conduct for the Party Wall Surveyor

His Honour Edward Bailey

A Faculty of Party Wall Surveyors Webinar – 12 November 2020

1. The aim of this Webinar is to consider what constitutes proper conduct by a Party Wall surveyor in the exercise of the dispute resolution functions arising under s 10 of the Party Wall etc. Act 1996. It originates in a request by the Faculty to give a talk on the implications of the decision in *Welter v McKeeve and McKeeve* (CLCC 27.11.2018), but I have expanded the scope of the talk to consider the conduct that might reasonably be expected of a party wall surveyor from appointment, or selection, through to the service of an Award.

2. <u>'The Party Wall Surveyor is in a quasi-judicial position.'</u>

   This is well known and oft-stated. But what does it mean in practice? Starting at the end, always a fun place to start, it is the case that a Party Wall Award appeal to a county court judge is a first appeal, and any further appeal is a second appeal and therefore goes to the Court of Appeal. This serves to emphasise the fact that the Award is treated, in the litigation context, in the same way as a judgment by a District Judge. Incidentally, I have no idea why the Earl of Lytton introduced the Party Wall Bill into the House of Lords with the comment that the duty of party wall surveyors is 'quasi-arbitral', rather than follow the hallowed 'quasi-judicial'. However I do not consider that it makes a halfpence of difference.

3. Arbitration and arbitrators are governed by the Arbitration Act 1996, a happy coincidence of date. By s 1(a) of the Arbitration Act 1996:

   > "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;…"

   And the *'General duty of the [arbitral] tribunal'* imposed on an Arbitrator under s 33 of the Act is in the following terms:

   > (1) The tribunal shall—
   >
   > (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
   >
   > (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
   >
   > (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

The object of a quasi-judicial determination of a dispute, and the overriding duty imposed on that quasi-judicial determinator of that dispute could with confidence be described in very similar terms.

4. Going back to the beginning, what impact does holding a quasi-judicial position have on the work of the party wall surveyor? Brightman J in *Gyle-Thompson v Wall Street (Properties) Limited* [1974] 1 WLR 123, 130 :

> "Section 46 et seq of the Act of 1939 give a building owner a statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests. The position of the adjoining owner whose proprietary rights are being compulsorily affected, is intended to be safe-guarded by the surveyors appointed pursuant to the procedure laid down by the Act. Those surveyors are in a quasi-judicial position with statutory powers and responsibilities. It therefore seems to me important that the steps laid down by the Act should be scrupulously followed throughout and short cuts are not desirable. I am not concerned with any question of the extent to which an irregularity is capable of being waived or cured by estoppel."

Picking up that last point, the doctrines of waiver and estoppel apply in party wall matters, see Judge Hazel Marshall QC in *Manu v Euroview Estates Ltd* [2008] 1 EGLR 165. Where there are procedural or other irregularities but nevertheless the Building Owner and Adjoining Owner engage constructively in a dispute, then it is possible that the court will find that irregularities have been waived, or the Adjoining Owner is estopped from relying on them. However, the doctrines of waiver and estoppel are not always straightforward in practice, and it may not be possible to waive that which was statutorily improper. This is not the place to embark on a consideration of such matters.

5. In the passage quoted above Mr Justice Brightman (later Lord Brightman) stresses a point of considerable importance, one that underlies all the surveyor's work under the 1996 Act. A party wall surveyor must always remember that in making an award he will, in the substantial majority of cases, be interfering with the adjoining owner's property rights, as well as ordering either owner to make payment of a sum of money to the other, or do work, or do work in a particular way. In a surveyor's everyday life, with the details of the job in hand assuming a natural importance, it can be all too easy to forget this fundamental fact : party wall awards interfere with people's rights.

6. Consistent with the quasi-judicial nature of the party wall surveyor's role is the requirement that all appointments and selections must be in writing and shall not be rescinded by either party, s10(2) 1996 Act.

7. <u>Judicial qualities for the party wall surveyor</u>:

I will not here attempt an authoritative comprehensive statement of the qualities required of a Judge, but of the many qualities required of the holder of judicial office I would extract the

following that I suggest apply to the party wall surveyor acting in his or her dispute resolution capacity, namely the duty to act:

(i) intra vires, that is within the scope of the surveyor's powers;
(ii) impartially, with a lack of bias (not inconsistent with ensuring that the appointing owner's interests are protected);
(iii) so as to ensure that each owner, usually through that owner's appointed surveyor, has the opportunity to put forward for consideration any matter relevant to the making of the award;
(iv) so as to ensure that both owners' cases are given proper consideration;
(v) thoroughly, so as to ensure that all necessary investigations are carried out before making an award and that the award is made having regard to all the material obtained.

8. Two significant differences between the position of a party wall surveyor and a judge

(1) Duty to appointing owner s 10(1)(b)

A significant difference between the party wall surveyor and a judge is that the party wall surveyor is appointed by one or other owner or selected by the owner-appointed surveyors. In this respect the position of the party wall surveyor is in some respects comparable with an arbitrator. It is open to parties to an arbitration to agree on a sole arbitrator, or each party may appoint an arbitrator. In cases where the parties appoint their own arbitrator, the party-appointed arbitrators must appoint a chairman, or umpire, and ensure an odd number of arbitrators, see s 15 Arbitration Act 1996. In contrast a judge is not chosen by the parties.

Being appointed by one of the owners, the party wall surveyor in a potentially difficult position. The appointing owner will naturally see the party wall surveyor he appointed as 'his' surveyor. The first task of any party wall surveyor is to make clear to his appointing owner that he is not there simply to fight the owner's corner. When acting in a dispute resolution capacity he must do so in a quasi-judicial manner; "owing a duty to the wall" may be a good way to put it. At the same time the owner-appointed surveyor may make clear to the appointing owner that it is not inconsistent with his quasi-judicial role that he ensures that all legitimate concerns of the owner, and all proper interests in the owner as to his property, will be given careful consideration by the surveyors in making an Award.

'Management of owner expectation is often key to avoiding contentious disputes' is one of the comments made in Guidance Note 16, and is well worth remembering.

Managing owner expectation will also include advising the appointing owner that the party wall surveyor's role is restricted to the proper exercise of the building owner's rights under the Act. A party wall surveyor can neither inhibit the exercise of those rights nor extend the scope of an Award to any matter which is not connected with any work to which the Act relates. It follows that a party wall surveyor will have discussions with and, as appropriate, give advice to his appointing owner in relation to the dispute with the other owner. This would be wholly incompatible with being a Judge or arbitrator.

Although perhaps not sitting easily under the sub-heading *'Duty to appointing owner'*, I append here a word of advice to the conscientious party wall surveyor. It is not unknown for the surveyor to be appointed by someone other than the owner (the *Gyle-Thompson v Wall Street (Properties) Limited* case is an example) and should this happen the surveyor can find himself acting without authority, and without fee. It is a straightforward and inexpensive matter to conduct a Land Registry search on the relevant property (or indeed both properties) in respect of which the surveyor is being appointed to check on the actual position as to ownership, although always bearing in mind that if the owner informs you that he has only recently purchased the property it can take several months before the registry entry is updated. Should the owner be a limited liability company a search at Companies House covering (a) the company's continued existence (ie has not been struck off), (b) the identity of the directors and shareholders, and (c) any special articles of association, (ie articles not within the standard tables – see The Companies (Tables A to F) Regulations 1985) may also be a sensible precaution. It would be very embarrassing to discover that your appointing corporate owner has been struck off the register, or that the individual instructing you has no authority to act on behalf of the company, with the result that you are not actually acting for the company, your actions are void, and you will not get paid! At present a Land Registry search will set you back £3, and a Companies House Beta search is free.

(2) Fact finder when necessary

A judge must act on the evidence adduced by the parties, and may not go looking for it himself. (A judge may go on a 'view' and this happens not infrequently in TCC cases, but the judge must be accompanied by legal representatives of both parties and may not engage in any conversation with a party in the absence of the other party's representative). In contrast a party wall surveyor is not only entitled to obtain 'evidence', by which of course I mean factual material relevant to the making of an award in the particular case, but he really should do so where he finds that he does not have the necessary factual material on which to make a sound Award. Factual material in this context includes expert calculations and opinion where needed.

9. Agreed surveyor ; one or two surveyors? s10(1)

The 1996 Act offers as alternatives a sole ("agreed") surveyor or two owner-appointed surveyors who then ("forthwith") select a third surveyor, "the three surveyors". The order in which the Act places an agreed surveyor, s10(1)(a) and three surveyors, s 10(1)(b), might suggest a parliamentary preference for a sole surveyor. In practice it is standard for both owners to appoint a surveyor under s10(1)(b) 1996 Act and, of course, there cannot be an agreed surveyor under s10(1)(a) if one party refuses to agree. There is however much to be said for an agreed surveyor, especially where the work which the building owner wishes to carry out is relatively straightforward from a party wall award perspective.

An owner who refuses to agree to a single surveyor may be at risk on costs. In *Amir-Siddique v Kowaliw* (2018) the building owner, anxious to keep cost to a minimum, offered to consent to having the party wall surveyor appointed by the adjoining owner as an agreed surveyor. The adjoining owner (a builder who regularly did construction work subject to the 1996 Act)

refused and insisted on what he called "the two-surveyor route". So the building owner was forced to appoint her own party wall surveyor. S10(13) provides that the *reasonable* costs of making or obtaining an award may be visited on such of the parties as the surveyor or surveyor making the award determine. I held that in the, admittedly unusual, circumstances the costs of the additional surveyor were not reasonable, and ordered that they be paid by the adjoining owner.[1] This case is an interesting example of how an owner's desperation to save costs in a party wall matter may result in considerable expenditure by way of legal costs.

10. Third surveyor selected by owner-appointed surveyors.

per Brightman J in *Gyle-Thompson v Wall Street (Properties) Limited* p.132 :

> "It would be a wise precaution for the third surveyor, upon accepting office, to inspect the written appointments of those selecting him; unless they have been duly appointed, they have no power to select a third surveyor, if the third surveyor has not been validly selected in writing, he has no power to concur in an award."

A counsel of perfection, perhaps, arising from the fact that in the Gyle-Thompson case the notices were served not on the adjoining owner but on a Mr Johnson, who without formal appointment was acting informally for the adjoining owner. In the result the court held that no notice had been served and the award was improper (and, incidentally, wrong as the court held there was no right under the 1939 Act to demolish a wall and build it to a lower level) both because of the absence of notice and because Mr Johnson was not formally appointed in writing. I appreciate that it is not uncommon for owner-appointed surveyors to select a third surveyor without even informing him that he has been selected, and that third surveyors are frequently not called upon to make an award. But forwarding a copy of the owner-appointed surveyor's written appointment when calling on the third surveyor to act would be good practice on the part of the owner-appointed surveyors.

11. Appointments in writing and shall not be rescinded, s10(2)

Written appointment: This statutory provision is clear enough and is consistent with the quasi-judicial role of the party wall surveyor. Given the role of the party wall surveyor in the making of awards, a written appointment is well-advised lest there be occasion for dispute as to the surveyor's appointment. Such appointment documents as I have seen, usually in the form of a letter, have been short and to the point. None the worse for that. But all the work necessary to make an award takes time and effort, and the surveyor will expect payment "for the labourer is worthy of his hire" (Luke 10:7). In many instances party wall surveyors rely on the provisions of s10(12)(c) of the Act which provide that an award may determine "any other matter arising out of or incidental to the dispute including the costs of making the award" in order to get paid. This is fine, provided always that there is an award.

There will however be occasions, hopefully rare, where no award is made. Might the surveyor who has applied himself for many hours find himself without payment? The answer

[1] see paragraph 41 of the judgment which can be found at *www.boundariesbook.co.uk*

is yes. It would be open to the surveyor to argue that the court should accept that his appointment by his appointing owner was contractual, and that it was an implied term of that contract that the surveyor would be paid even where no award was made. But I would not give any encouragement to the surveyor to rely on such an argument, even where the reasons for there being no award were completely outside the surveyor's control. Contractual terms may only be implied where 'necessary', and it is well arguable that it is not necessary to imply a term of payment absent an award. Better for the surveyor to secure his appointing owner's agreement to written terms of contract which protect the surveyor against such an eventuality. Such terms would have to be carefully drawn, for the surveyor should not seek to put himself in a position to require payment where it is his responsibility that no award has been made, but I see no objection in principle to a surveyor adopting such a course.

Returning to the starting point here, the appointment to be in writing, a surveyor may have a written appointment document for the purposes of establishing his position under s10 without necessarily spelling out his entire agreement with the appointing owner. The terms of the appointment may be set out in a separate document, although it would be advisable for the terms to refer to the written appointment document, even if the reverse is not the case.

12. *Rescinding the appointment*. Subject always to the terms of the agreement under which he is appointed, a professional man's appointment will always be capable of revocation by his employer. But the 1996 Act elevates the party wall surveyor to the role of dispute resolution tribunal. It is plainly inappropriate that an appointing owner be in a position to remove a surveyor for any reasons of the owner's own. Hence the appointment may not be rescinded.

13. The position of a party wall surveyor who finds himself side-stepped by the owners was considered in *Mohamed and Lahrie v Antino and Stevens* (CLCC 12.12.2017)[2], a decision to which I refer in paragraph 31 below. The owners there agreed to refer all their existing and future party wall disputes to determination by an independent surveyor, with the result that there ceased to be a 'dispute' on which s10 could bite. The Defendants argued that this agreement between the owners was in effect a rescission of their appointments as party wall surveyors, and was therefore unlawful. In the course of argument counsel for the Claimants relied on a section of the judgment of Akenhead J. in *Dillard v F&C Commercial Property Holdings Ltd* [2014] EWHC 1219 QB where he stated:

> "It is accepted rightly that the parties may contractually opt out of the Act, as the parties have done here in part at least relating to the relief set out in Clauses 7 and 10 of the Deed."

The Defendants took grave exception to this comment, and they were right to do so. It is plainly wrong. But in the context of the judgment as a whole it is evident that these words should not be taken at their face value. What the parties were doing was not contractually opting out of the Act, but so arranging their affairs that the Act did not apply; 'contractually opting out of the effect of the Act' might be another way of putting it, but at the risk of misinterpretation.

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[2] This judgment may be found at www.boundariesbook.co.uk

Incidentally, on the topic of misstatements in judgments, I should say that I regret having said, at paragraph 43 of the judgment in *Mohamed and Lahrie v Antino and Stevens*:

> ".. the wise surveyor will ensure that his appointment contains a term requiring payment of fees for work properly done in the furtherance of the making of an Award even where that Award is not, for whatever reason, in fact made."

"For whatever reason" is too broad, and should have been 'for any reason not the responsibility of the party wall surveyor'.

14. The third surveyor's selection is also protected against rescission by s10(2): "All appointments and selections made under this section shall be in writing and shall not be rescinded by either party". In *Reeves v Young, Young and Antino* (CLCC 3.01.2017)[2] counsel for the Defendants argued that as s10(2) prohibited the rescission of the selection of the third surveyor 'by either party' a third surveyor selection remained open to be rescinded by the owner-appointed surveyors, as the surveyors were not parties. I rejected this argument. Owner-appointed surveyors may not have second thoughts about their selection of the third surveyor.

15. <u>Appointment for the other owner</u> s10(4)

The Act covers the situation where an owner refuses to appoint a surveyor or neglects to do so for a period of ten days beginning with the day on which the other party serves a request on him to do so by permitting the other owner to make the appointment for him. It is an essential part of the scheme of the Act that party wall matters should proceed with expedition, and an owner, primarily the adjoining owner, may not be allowed to slow things down by refusing to engage with the requirements of the Act. Under s10(4) it is 'the other party' ie the other owner, who makes the appointment, not that party's surveyor. Nevertheless it is to be expected that the owner in question will consult his appointed surveyor, and very possibly put the choice of appointment in his hands. In making such an appointment the appointed surveyor should bear in mind his quasi-judicial role. 'What view would the reasonable independent third party bystander with knowledge of all relevant facts take of the appointment?' is the question the surveyor should ask himself. No-one would expect the appointed surveyor to appoint a surveyor with whom he knows he cannot get on, but the appointed surveyor should be clearly independent of the appointing surveyor.

16. The appointing surveyor should also have regard to the circumstances surrounding the appointment and, particularly where there is an apparent refusal to appoint by the other owner, satisfy himself that the other owner really is aware that an appointment needs to be made. In *Russell Gray v Elite Town Management Limited* (CLCC 27.10.2017)[3] the owner of a mews house at 7 Ennismore Mews ("7EM") in Knightsbridge held decided views about basement construction. He considered that lowering the party wall was inappropriate; the proper way to construct a basement was by setting contiguous piles wholly within the boundary of the property. He himself had constructed a basement to this design at 7 EM, and put up with the fact that the dimensions of the resulting basement were appreciably less than

[3] This judgment may be found at www.boundariesbook.co.uk

they would have been with a reinforced concrete wall directly underneath the party wall. The Defendant, a corporate vehicle for a Mr Hill, owned 9 Ennismore Mews. Mr Hill wished to have a basement and in 2011 the Defendant engaged Cranbrook Basements Limited, a company providing complete basement packages, to do the work, and Mr Mark Williams as party wall surveyor. Party Wall Notices were apparently served in February 2012. It was not however until much later in 2012 that Mr Gray learnt of Mr Hill's plans as a result of chance conversation when the two happened to meet in Ennismore Mews. The facts are best taken from paragraph 8 onwards of the Judgment:

"8. The timing of this conversation, and of Mr Gray learning of ETML's basement plans, was the more unfortunate because Mr Gray did not learn of the party wall notices in time to appoint his own party wall surveyor. The appointment of an adjoining owner surveyor was done for Mr Gray by Mr Mark Williams, ETML's party wall surveyor on the basis that Mr Gray had neglected to make his own appointment during the 10 day period allowed by s10(4) of the 1996 Act. ETML's actions were, probably, lawful under the 1996 Act by virtue of the provisions of s15(1)(b) which permits service "by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom". The party wall notices were not served at 7EM but at 47 Pages Walk, London SE1, the address of Mr Gray given at the Land Registry for his title to 7EM but which, while the property concerned still belonged to Mr Gray, was "empty and seldom visited at the time".

9. There have been many and bitter complaints of Mr Gray's conduct by Mr Hill and ETML's advisers, and these complaints are, in context, understandable. But ETML and its advisers (to the extent that the latter were involved) should accept a good measure of criticism for proceeding to appoint a party wall surveyor for Mr Gray in the circumstances outlined above without at least serving copies of the party wall notices at 7EM. It is after all well known that addresses at HM Land Registry which are other than the property itself not infrequently become out of date. Reliance on such an address as a "last-known residence" without also serving the property does give cause for concern.

10. Accordingly, against an already sensitive background, Mr Gray found that, as adjoining owner, his party wall surveyor was a Mr Robert Hopps of whom he knew nothing other than that he had been appointed by Mr Mark Williams. Mr Gray was entitled to feel suspicious about the appointment, few people would not, and when Mr Hopps demonstrated a complete lack of concern as to Mr Gray's wish, or rather an earnest desire, that the party wall award should not authorise ETML to construct a reinforced wall / foundation directly under the party wall the scene was set for all the trouble to come. The court readily accepts that Mr Williams would have had to have searched far and wide to find a surveyor who shared Mr Gray's views, but it would have been better, very much better, had a surveyor been selected who was prepared to show some sympathy for those views, to explain how the profession generally approached basement construction, and to inform Mr Gray that he was entitled as of right to refuse the use of reinforced concrete in any construction which comprised 'a foundation'. There are many such surveyors."

It was not an issue before the court, thankfully, whether the Defendant had intentionally behaved in an underhand way in serving notices on an HM Land Registry address and not at 7EM where Mr Gray was either living or at least was a frequent visitor. Accordingly no arguments were addressed to the court on the possibility, and no finding was made. However, I consider myself to be on strong ground in suggesting that a party wall surveyor in the

position of the building owner's surveyor in this case should have ensured that notices were (also) served at the adjoining owner's address. As for the appointed adjoining owner's surveyor, he did not give evidence before the court and was not therefore in a position to answer Mr Gray's concerns. But there was nothing in the trial bundles to suggest that Mr Gray's complaint was unfounded, and there can be no doubt whatever that the appointed surveyor did not draw Mr Gray's attention to the provisions of s7(4) of the Act.

The facts in *Gray v Elite Town* were unusual but the case is, I hope, instructive. Exercising appointment rights under s10(4) should be exercised with care. The statutory right to appoint applies to either owner, but in practice it is almost inevitable that the building owner will be appointing a surveyor for the adjoining owner. Even when there is cause for haste, a relatively rare case I suggest, there will be ten days from the service of the request to appoint under s10(4), and that should be sufficient time for basic steps to be undertaken to check whether the adjoining owner has indeed received the notice and is aware that a surveyor may be appointed for him. At the very least the party wall surveyor conducting himself properly should ensure that the party wall notices have been served at the adjoining owner's property, and, if service has been to another address, a further copy served at the adjoining property with an accompanying letter clearly warning the adjoining owner that an appointment will be made for him under s7(4) if he does not engage with the notice. Where the building owner lives at the building address it cannot be too much to ask him whether the adjoining owner lives next door, and if next door is inhabited by tenants, ask the tenants for the owner's address.

17. Dies, becomes or deems himself incapable of acting, s10(5)

S.10(5) 1996 Act specifies three circumstances in which an owner may appoint another surveyor in place of his original appointment notwithstanding the provisions of s10(2): ie when the surveyor (i) dies, (ii) becomes incapable of acting, and (iii) deems himself incapable of acting. Death is clear and final, and there is little more to be said. It comes to us all.

18. (ii) 'Becomes incapable of acting'. In times past 'incapacity' was restricted to an inability to manage or administer property and affairs by reason of lacking capacity with the meaning of the relevant Mental Health statute, now the Mental Capacity Act 2005. But in more recent times the law recognises that a person may also be incapable of managing his property and affairs due to a physical affliction or disability. Either way 'incapacity' is a matter which should be capable of objective determination, should the issue ever be challenged.

19. Where the surveyor suffers from a serious physical or mental illness which will render him incapable of acting in a party wall matter for a considerable period of time it is plainly correct that he be replaced. The position is not so clear cut however where the incapacity is of short duration. A minor heart attack, a moderate stroke, or a dose of Covid-19 can incapacitate a surveyor for a few weeks without impairing his longer ability to perform his duties. In the scheme of things there will be periods during any party wall procedure when there is nothing that need be done, and in such circumstances a short-term condition is no reason to replace a party wall surveyor however keen the owner may be to make a change. It is to be expected that no responsible surveyor will accept a replacement appointment on the ground of the

existing appointed surveyor's incapacity without checking the degree to which the previously appointed surveyor is incapacitated and the need for any activity during the expected period of incapacity. Any new appointment will involve some extra cost to one or both owners, as the replacement surveyor gets up to speed with the matter in hand, and additional expense may not be warranted where there is only a short-term incapacity.

20. Where a short-term incapacity strikes at a time when the party wall surveyor needs to be active, the other appointed surveyor might reasonably be expected to ask the third surveyor to become involved. The Act does of course enable one surveyor to act ex parte if a party-appointed surveyor "refuses to act effectively", s10(6) or "neglects to act effectively" after the expiry of ten days following the service of a notice requesting the other surveyor to act in relation to one or more specific matters detailed in the request, s 10(7). A refusal to act effectively for the purposes of s10(6) must be clear and demonstrable and this will hardly be the case where a surveyor is suffering from a short-term incapacity and is not doing anything. Inability to act will not amount to a refusal to act effectively for the purposes of s10(6). Service of a formal s10(7) request will presumably follow one, or probably several, attempts to make contact informally, but nevertheless the reasonable surveyor acting properly will take any obvious steps to enquire as to the position of his opposite number before acting ex parte. In some cases ten days may be too long a period to wait to act, in which event the third surveyor will have to be involved. Where a delay of ten days is not critical a responsible surveyor may reasonably serve a s10(7) request to safeguard the position, but provided the third surveyor is prepared and able to act it is preferable for the party Wall surveyor to involve the third surveyor than act ex parte in any but obvious cases.

21. Whether it is proper for an appointed surveyor to speak to the 'other owner' will very much depend on the situation. It would be difficult to fault a simple request for assistance: "I have been trying to contact your appointed surveyor without success, can you help?". Discussing a possible replacement, or a forthcoming award, would be a different proposition. Whatever contact there is the sensible surveyor makes sure that it is all in writing clearly stating that meeting or telephone calls would be inappropriate.

22. (iii) "Deems himself incapable of acting" is plainly subjective and must surely import more than incapacity, for otherwise the provision is otiose. The only reasonable interpretation therefore is that it is a matter for the individual surveyor to decide, which is consistent with the way in which the 1996 Bill was introduced into the House of Lords: ("the Bill provides for instances where surveyors are unwilling or unable to act"). That at least was my decision in *Mills v Savage* [2016] EGLR 43[4] see paragraphs 87 to 107. I do not believe that this decision is controversial, at least in that respect, but I may be wrong.

23. There will be times when a surveyor should deem himself incapable from the start and not accept an appointment. The obvious example is where acting for a particular owner in connection with a party wall matter involving another individual owner would give rise to a conflict of interest or a perceived conflict of interest because the surveyor has previously acted for the other owner. With possible conflicts the surveyor needs to ask himself whether he has obtained information relating to the matter in hand when he or his firm has acted for

[4] This judgment may also be found at www.boundariesbook.co.uk

a particular client that the surveyor acting for the other owner ought not to be privy to. When this is the case it will not be enough for the surveyor to assert that he is acting judicially and 'for the wall' and is able to disregard the private knowledge he has obtained. The surveyor may indeed be well able to act appropriately, but he is acting quasi judicially and perception is very important. The surveyor's acting in any particular case must look right to the fair-minded objective observer with knowledge of all the relevant facts.

24. Occasionally both owners instruct surveyors from the same firm. If this is as a result of persuasion by the first surveyor instructed it would be difficult to justify. Even where the two appointments are made quite independently a conscientious party wall surveyor should think long and hard before agreeing to act for an owner where a member of his own firm has already been instructed by the other owner. ('Long and hard' incidentally is my way of saying "don't, unless there are very compelling circumstances to lead you to do so.) In this connection a reading of the judgment in *Reeves v Young, Young, and Antino* CLCC (03.01.2017)[5] (yes indeed - another one of mine) might be of interest. Both surveyors came from the same firm, there was uncertainty as to whether a letter informing one of the owners of the appointment of Mr Alastair Redler as third surveyor was sent, and it appeared that all the work required of the two owner-appointed surveyors was in fact being carried out by a single employee of the firm. In some mysterious manner (at least to the court) Mr Redler was replaced by the Third Defendant and there was trouble over fees. The end result was an expensive CPR Part 7 claim to the county court. Arranging for the work of the Party Wall Surveyor to be conducted by an employee of the Surveyor's firm is perfectly acceptable, provided of course the employee has the necessary competence, but if only one employee does the work of both surveyors that must surely be unsatisfactory. If the owners wanted an agreed surveyor they could have agreed to appoint one. Incidentally, it is clear (I suggest) that the Award should be written by the appointed party wall surveyors or, at the very least, read and approved by the party wall surveyors. Award writing is the one area of the party wall surveyor's work that should not be delegated.

25. When deeming himself incapable the party wall surveyor should bear in mind that his removal from the scene and replacement by another surveyor will almost certainly increase the costs of the award. The surveyor must act responsibly and, having a conscience, act in accordance with it. A useful rule of thumb is that the surveyor should keep working towards an award unless the circumstances are such that he has a reasonable well-founded concern that he will not be able to do the work required to a satisfactory standard. There will be times when the appointing owner or other side's owner, surveyor, or contractor become exasperating and the temptation grows to have done with it all. Exasperation, even when fully justified, should never be a good reason for walking away. All professionals find themselves in such situations during the course of a practising life. Head down, keep calm, and carry on. The surveyor should be particularly acute to discern attempts to force him to stand down especially where the motive behind the attempt appears to be that he is doing his job properly to the annoyance of an owner, the other surveyor, or contractor, and resist them. Nevertheless a party wall surveyor who finds himself the object of verbal abuse, especially when coupled with assertions of unprofessional conduct in breach of the applicable RICS terms of guidance, may be excused stepping down by deeming himself incapable of acting,

[5] This judgment is available at www.boundariesbook.co.uk

see eg *Bibzadeh v Dodosh* CLCC (15.09.2015)[6] at para 87 although please note the point there made that an appointing owner finding herself without a party wall surveyor is placed in an extremely difficult position as she cannot realistically seek an injunction to require the surveyor to continue acting.

26. Refusal to act effectively, s10(6), or neglects to act effectively, s10(7)

I will take these two provisions together, and shortly. For the purposes of s10(6) there must be a *refusal*; simply failing to act is *neglect* and comes within s10(7). No party appointed surveyor must ever rely on s10(6) without being able to demonstrate a clear refusal, preferably in writing, although an oral refusal will bring the surveyor within the Act. If there should be an oral refusal the party wall surveyor is well advised to write a letter or send an email to the refusing surveyor setting out the circumstances in which the oral refusal was given.

27. Acting ex parte within s10(7) requires a request which sets out the subject matter in respect of which the surveyor is being asked to act. The request must be *served* and therefore the request must be in written form, and service effected under the provisions of s15 of the Act. Given that the statute provides that the surveyor may act ex parte "in respect of the subject matter of the request" it is evident that the request to act should be in specific terms, making clear what the surveyor is being requested to do, ie 'the subject matter of the request'. Simply asking the other surveyor "to act" will not be sufficient for the purposes of s10(7). In *Frances Holland School v Wassef* [2001] 2 EGLR 88 Judge Crawford Lindsay QC, considering the very similar provisions of s55(e) of the London Building Acts (Amendment) Act 1939 held that a surveyor wishing to avail himself of the provisions enabling him to make an ex parte award must comply strictly with the formalities of the Act. That holds true for the purposes of s10(7).

28. I will now return to the five judicial qualities listed in paragraph 7 above which I suggest the party wall surveyor should have and maintain.

29. (i) Acting Intra Vires. Intra vires ie within the scope of the authority given by the Act

> "The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter –
> (a) which is connected with any work to which this Act relates, and
> (b) which is in dispute between the building owner and the adjoining owner."
>
> And s 10(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.

[6] This judgment is available at www.boundariesbook.co.uk

This statutory wording makes clear that an Award may cover a wide range of matters, provided always that these matters relate to the dispute. And, of course, there must be a dispute.

30. The subject-matter of the award must therefore relate to work under the Act, and must be in dispute between the building owner and the adjoining owner. What relates to work under the Act should be clear enough, and must be interpreted by reference to the notice(s) served on the adjoining owner, and any counter-notice served by the adjoining owner. The Act requires party structure notices and counter-notices to be detailed (see s1(2), s3(1)(b), s4(2), and s6(6)) and work outside the details given is, prima facie, outside the scope of the surveyor's authority. 'Work outside the details' will not include work necessarily inherent in the details given, but the careful surveyor will make sure that he does not describe the work with too broad a brush when preparing the notice. These comments are all subject to the provisions of s3(3)(a) which enable the building owner to proceed to exercise any right under s2 with the consent of the adjoining owner and occupiers. Such work will not require an award, but if an award is being made on other aspects of the work as a whole, work to which the adjoining owner has consented may reasonably be included as part of an award so as to provide an award which is comprehensive with respect to the matters covered.

31. The award must also be in respect of matters in dispute between the owners. In *Mohamed and Lahrie v Antino and Stevens* (CLCC 12.12.17)[7] both owners became so exasperated at the number and cost of party wall awards made by the party wall surveyors that they held a mediation in which they entered into an agreement by which they agreed to refer all existing and any future disputes to the determination of an Agreed Surveyor. Incidentally, these disputes included any dispute as to what reasonable fees should be paid to three of the party wall surveyors involved. It was plain that the aim of the agreement was to take away from the party wall surveyors and the court any involvement in or jurisdiction over both existing and future disputes. The agreement was embodied in a consent order which was approved by the court.

32. This did not go down at all well with two of the surveyors concerned. They maintained that the consent order was an improper way of rescinding their appointment and selection contrary to s10(2) of the Act. They threatened to make further awards and the owners sought an injunction to restrain them. Before the court the surveyors argued that they remained appointed / selected and could continue to make awards. It was plain to the court (myself) that the consent order did not seek to rescind the appointment and selection. There was no breach of s10(2). What the mechanism embodied in the consent order did do was resolve all the various disputes between the owners to which the Act did or would apply, both existing and future, albeit by referring the issues arising in any dispute to a single expert for determination. There was therefore no dispute remaining under the Act in respect of which the surveyors could make an award. Accordingly I made a declaration that the Defendants had no standing to make any further awards, and an injunction restraining the making of any such awards. The distinction between the dispute resolution procedure under the Act not

[7] This judgment is available at www.boundariesbook.co.uk

applying because there were no disputes and the parties contracting out of the Act was not one which appealed to the Defendants!

33. The making of an award in practice:

I will take the remaining four judicial qualities listed in paragraph 7 above together, and consider their application in practice by reference to the decision in *Welter v McKeeve and McKeeve* (CLCC 27.11.2018) a decision in respect of which permission to appeal was refused by Lord Justice Coulson on 29 March 2019 with detailed reasons[8]. The four qualities are:

(ii) Impartiality - lack of bias (not inconsistent with ensuring that appointing owner's interests are protected);

(iii) a duty to ensure that each owner, usually through his appointed surveyor, has the opportunity to put forward any matter relevant to the making of the award for consideration;

(iv) a duty to ensure that both side's cases are given proper consideration;

(v) thoroughness – a duty to ensure that all necessary investigations are carried out before making an award and that award is made having regard to all the material obtained. These duties on the part of the party wall surveyor are I hope clear in statement and uncontroversial in substance.

34. *Welter v McKeeve and McKeeve* was a case involving basement extensions by both neighbours at 5 and 6 Earls Court Gardens. Number 5 was first off the mark with a party wall award made in April 2013 permitting underpinning of the party wall between 5 and 6 and the construction of a basement. The underpinning and basement works were carried out to a design by the consulting engineers Carter-Clack partnership, with the underpinning carried out in August 2013 and the basement completed in April 2014.

35. In constructing the underpinning to the party wall, No 5's contractors did not do a neat and tidy job, and they allowed concrete to spill over onto the land belonging to No 6. Stepping outside my comfort zone for a moment I would observe that this was yet another case which came before me on appeal where the underpinning contractors were not required to make use of sacrificial shuttering to the back of their works to ensure both that the underpinning concrete did not spill over in a trespass to next door's land and to assist in ensuring that the underpinning concrete was inserted uniformly throughout the length of the party wall. You are the experts here, and it may be that there is a simple reason not to employ sacrificial shuttering, but no-one has ever told me what that might be. Of course the shuttering would trespass, but that is a minor matter, de minimis from the lawyer's perspective, and I would assume that should the neighbour wish to construct a basement extension whatever shuttering then remaining could be easily removed.

[8] Both my Judgment and Coulson LJ's reasons for refusing permission to appeal are available at www.boundariesbook.co.uk

36. Returning to the *Welter* case, No 6 had served the necessary party wall notices in September 2013 in respect of a basement extension, this being part of an extensive programme of works to refurbish the whole property. The same surveyors (Mr Peter Davies and Mr Nigel Acres) were engaged as party wall surveyors, now of course with their Building Owner / Adjoining Owner roles reversed, although a new third surveyor was selected. In the event, No 6's surveyor, Mr Acres (BOS1) deemed himself incapable of acting (because of a family tragedy) before an award was made, and he was replaced by Mr Mark Williams (BOS2).

37. On 25 June 2014 BOS2 and AOS made an award authorising various works including the enclosure on the underpinning carried out for the basement extension at No 5 together with a payment of £50,000 to No 6 under s11(11) for making use of the underpinning.

38. The owners of No 6, the Respondents to the Appeal, had engaged Cranbrook Basements Ltd to carry out all the works of refurbishment to their property, including the basement extension. In the light of what happened later it is interesting to note that Cranbrook carried out an exercise of calculating the reasonable cost of carrying out the original underpinning works as at the time these works would be made use of, a proper calculation for the purposes of s11(11). Cranbrook arrived at the figure of £28,968.48 plus vat (£34,762 odd) for all the party wall underpinning works. This meant that their employer should be paying only some £17,380 under s 11(11). The AOS was unimpressed, commenting that "the submission bore no relation to the job actually done, and paid no attention to the fully costed details already provided by the AO". Well, no-one could accuse Cranbrook of not seeking to look after their client, but it was not a happy start. BOS1 made an attempt to persuade AOS to accept Cranbrook's figures, but AOS would have none of it and he and BOS2 made the award of £50,000 to which I have already referred in June 2014. Given that AO had provided the necessary details for the s 11(11) award on 15 November 2013, and Cranbrook's figures were advanced on 25 January 2014 it may be noted that this attempt to reduce the s 11(11) compensation served to delay the making of the award for the No 6 works by several months.

39. It was in late July 2014 that Cranbrook uncovered the underpinning carried out by No 5's contractors and discovered what they, acting by their managing director Mr O'Connor, decided was "of an appalling standard … exposing the owners and families of 4 and 6 Earls Court Gardens to danger of significant harm". On 1 August 2014 BOS2 wrote to AOS informing him of the situation, asserting the evident need for remedial works, and the fact that Cranbrook were proposing to carry out tests of the underpinning concrete. AOS made the point that the work in question had been carried out under the No 5 Award, and so had nothing to do with BOS2, as BOS1 had deemed himself incapable of acting in the No 6 award but had not similarly acted in respect of the No 5 award. AOS (as BOS in No 5 award) was of course correct, but he did not refuse to engage with the problem raised by BOS2. AOS's view was, in effect, that this was a storm in a tea cup. The underpinning, in his view, "looked like a fairly normal situation where concrete is cast against earth" and although untidy would operate perfectly well as underpinning although "It may need some cosmetic trimming, dubbing out and finishing to turn into an internal wall surface, which is entirely normal where a retaining wall is dug out".

40. This cut no ice with Cranbrook who proceeded to obtain test results on the strength of the concrete and commission an engineer's report condemning the underpinning, with the implication that it required replacing. However Cranbrook did not disclose this or any engineer's report to AO. AO obtained a report in early October 2014 from Carter-Clack, the engineers who had designed the scheme. Carter-Clack expressed the opinion that the underpinning work was poor, noting a number of defects, but concluded that since the wall was no longer acting as a retaining wall but merely operating to transfer vertical loads to the ground, it did not require replacement, provided some remedial work was carried out. A remedial scheme was prepared and attached to the report. Between October 2014 and 11 February 2015 an unedifying exchange of correspondence took place between the surveyors, with BOS2 raising general concerns about the Carter-Clack report and contending that the underpinning was unacceptable, while not disclosing anything concrete himself to support the contention or detail the concerns.

41. It was all vague and woolly stuff and was dealt with firmly by AOS:

> "… I am left unsure as to what you are trying to say, what you are proposing or what you expect to happen next, if anything, and almost everything I have said previously still seems to apply."

This shadow boxing came to an end on 13 April 2015 when BOS2 informed AOS that he had received confirmation that the Carter-Clack remedial scheme was an appropriate way of stabilising and repairing the defective underpinning. BOS2 also informed AOS that he had received costings to carry out the remedial works from Cranbrook in the sum of £148,882 plus vat. Unbeknown to AOS, new engineers appointed by BO had reported in February 2015 that once the Carter-Clack remedial proposals had been completed the reinforced concrete underpins should perform satisfactorily. However, this engineer's report was not disclosed to AOS.

42. As to the remedial work figure, AOS was, again, unimpressed. He asked for a detailed breakdown of the £148,882 figure. In reply Cranbrook provided AOS with a two-page document dividing the total figure into 61 priced items, an exercise which AOS, perfectly reasonably, described as 'only a summary'. AOS insisted on full supporting documentation, materials, man-hours at varying rates, hired equipment invoices etc. BOS2 refused to play ball, because in the background Cranbrook had refused to provide any further details of its overall figure. That would not have prevented BOS2 from looking at the matter himself, and seeking advice if necessary from a quantity surveyor, but, as I state at para 31 of the judgment:

> "He plainly wished to proceed to make an award based on Cranbrook's figures without any investigation by the party wall surveyors into how these figures were arrived at".

BOS2 took the line that he and AOS would never agree a figure, and this being so BOS2 stated on 29 April 2015 that he would refer the matter to the third surveyor.

43. AOS pointed out that the third surveyor in respect of any award in respect of remedial works would have to be the third surveyor for the No 5 Award not the third surveyor for the No 6 Award, and continued with his objections in an email of 5 May 2015:

> "….
>
> 2. I fear that your mistake and information [ie regarding the identity of the third surveyor] illustrate a possible lack of motivation on your part to apply the necessary attention or to engage effectively to understand or deal with matters of detail in this case, which may be a concern to both owners. In your email of 29/4/15 you jump to several other conclusions, which save you having to do work, but do not advance the substantive matters.
>
> 3. I therefore repeat my request of 27/4/15 for supply of the better information which must be in the hands of the owners at No.6 or, if not, in the hands of the contractors under their control. If the information remains in the hands of their contractors, I suggest that the owners at No.6 need to secure it in their own interests as well as to enable you and I to proceed effectively.
>
> 4. As to your comment that you "feel now that we must refer the matter to the Third Surveyor …" I am bound to say that you speak only for yourself when you say "we". I suggest that the first question a Third Surveyor would put to you is the question of why you have not provided to me the information requested which the Third Surveyor, undoubtedly, would then himself seek from you in any case. You, I and the Third Surveyor are a quasi-judicial tribunal and we, individually and collectively, cannot function effectively without proper disclosure. (See note on Gyle-Thompson v Wall Street attached)."

44. In the event, although BOS2 informed BO on 11 May 2015 that he had a call outstanding to the third surveyor, there was no formal referral to the third surveyor until 7 July 2016, fourteen months later. In the meanwhile a number of other matters had arisen between the respective owners, outside the scope of the appeal. Email correspondence between AOS and BOS2 continued over this period during which AOS raised with BOS2 the fact that he was copying in Cranbrook Basements Ltd to email correspondence passing between the surveyors and that he appeared not to be challenging Cranbrook's figures for remedial works nor taking seriously the nature of the work of a party wall surveyor.

45. In the judgment I set out a fair amount of the email exchanges, and I should not repeat it all here. But the essence of the matter is contained in AOS' email to BOS2 on 9 June 2015. As to his position as to the Cranbrook estimate AOS makes his view very clear:

> "The Owners of No.6, through the offices of Cranbrook Basements, first issued to me on 13/4/15 a single unexplained figure of £148,882.32 plus VAT. At the time of writing, you have still not provided the further breakdowns of this sum requested and I have so far declined to comment on it accordingly. Having said this and because you pointedly comment on 27.5.15 that I have "… not indicated that you consider the estimate provided by the contractor on site as being excessive…", I do therefore, here, note very clearly that my impression of the Cranbrook figures are that they are grossly and extremely excessive and probably bear no relationship to the true costs of carrying out the actual work properly

required and anticipated in the report by Carter Clack Consulting Engineers of 3/10/14".

AOS then repeats a concern already expressed that BOS2 copied Cranbrook into email exchanges between the party wall surveyors and reminded BOS2 of his duty to his appointing owners, and continues:

> "I have noted in the past that you have copied emails to Cranbrook Basements Limited, who work for the Building Owners at No.6. I have also expressed concern that you disclose material to them so extensively. You are appointed by their employers and the interests of Cranbrook and the owners of No.6 will not align exactly at all times. You will appreciate the risks to your clients where their contractor has responsibility for design, construction, supervision and costs control working for a lay employer with, apparently, no independent consultants involved, apart from you. This, of course, increases your responsibility to advise and warn those for whom you act of various risks. I suggest that you need to be concerned about the possibility that the owners of No.6 are not being best served by their own contractors and that the information provided from their contractors may lack credibility. In addition you need to remember your own duties under the Act and the nature of the work of our Tribunal which is quasi-judicial in nature. I attach again a copy of a case note from Gyle-Thompson v Wall Street (Properties) Ltd. as Brightman J. usefully explained what is meant by "quasi-judicial".
>
> The point is that you and I need to exercise judicial discretion and apply judicial standards to our deliberations. I now also attach for your reference a previous estimate the same owners at No.6 provided from their same contractors relating to the historic underpinning costs which Cranbrook Basements priced at £28,968.48 plus vat for the entire construction of the whole underpinning between Nos. 5 & 6 (the 100% cost)."

BOS2 may not have appreciated being lectured in this way, but it would be difficult for him to suggest that the inherent criticism was misplaced. Neither could BOS2 have failed to appreciate the disparity between Cranbrook's price of £28,968.48 for the construction of the entire underpinning wall and its price of £148,882.32 for the remedial works scheme to that wall. Stressing the fact that as party wall surveyors they were a quasi-judicial tribunal was undoubtedly merited. AOS continued by suggesting that

> "… what our Tribunal now needs to do is to obtain independent costs from other contractors to provide a genuine market price for the actually relevant works. Please therefore confirm that access will be made available for other contractors to inspect and price this work".

This suggestion was perfectly apt, although AOS could equally properly have suggested obtaining an opinion as to a genuine market price from a quantity surveyor with experience of basement work in this area of London. AOS informed BOS2 that the owner of No.5 had already received an indicative quote (from Sheer Projects Ltd) of £7,000 to £8,000 plus vat on a desk-based analysis of photographs drawings and the Carter‧Clack report. Until the work of obtaining independent costings had been done AOS was not willing to proceed to make an award. AOS ends his email with some forceful comment on the cost of the involvement of the third surveyor, and a complaint that BOS2 is seeking to avoid his 'primary duty to perform simple tasks and instead try to pass the burden on to the Third Surveyor and me to perform complex tasks'.

46. In the event BOS2 sought a costing of the work from a QS, but he did not inform AOS that he had down so, and any report that BOS2 received from the QS was never disclosed to the AOS or to the court during the appeal. In January 2016 BO presented substantial new claims to the AO covering not just the remedial work but also matters of delay, rental costs, borrowing costs and so on. These were not agreed and on 7 July 2016 BOS2 referred the various claims to the third surveyor.

47. The third surveyor made his award on 22 February 2017, restricted to the cost of the remedial work. The Award begins with the recital

> "AND having heard the views of both surveyors, examined supporting correspondence and papers and having inspected the properties"

and the terms of the award are simply:

> "THAT the building owner shall pay the adjoining owner the sum of £148,882.32 plus VAT being the sum charged by Cranbrook Basements for remedial work"

The Award also included payment of both the third surveyor's fees and the fees of BOS2. The third surveyor (perhaps wisely!) gave no reasons for his award, nor is the material relied on by him identified, the recital quoted above being the only indication of the documents and other material relied on in the making of the award. It is possible, although unlikely, that the papers before the third surveyor included material not in the trial bundle. It is, however, apparent that the third surveyor neither obtained quotations from other contractors nor sought the opinion of a quantity surveyor. What, if any, efforts the third surveyor made to analyse the estimate provided by Cranbrook on 1 April 2015 is uncertain. The wording of the award, quoted above, is not at all encouraging.

48. The appeal proceeded on the ground that the BOs failed to mitigate their loss. I need not discuss the legal aspects of the appeal. Evidence was given by expert quantity surveyors instructed by each side and a reading of the judgment shows that each element of the Cranbrook Schedule of Work (a very summary schedule as the AOS said at the time) was gone through and a figure reached. In the event the £148,000 + vat figure was reduced to £47,977.30 plus vat. During this exercise it should be stressed neither the experts nor the court were able to investigate Cranbrook's quotation. Having noted that I had reduced the figure to 32.2% of the quotation I observed that "…Cranbrook's absolute refusal to allow any insight of any significance into how the quotation was arrived at or into how much the works actually cost to carry our prevents any meaningful analysis of this surprising disparity".

49. The Respondents appealed and Peter Coulson LJ refused the permission required for a second appeal. He endorsed my criticism of BOS2.

At paragraphs 165 to 174 of the judgment I comment on the proper approach to their task of party wall surveyors.

50. *Welter v McKeeve* is, I accept, a case towards the extreme end of the spectrum. It is particularly interesting because on the one side there were two party wall surveyors acting for No 6 who behaved with apparent total disregard to their duties as a dispute resolution tribunal under the Act and on the other side a party wall surveyor acting for No 5 who was at pains to do his work properly. There must also be real doubt as to the approach adopted by the third surveyor. However the third surveyor did not give evidence. Accordingly, I did not hear his account of how he decided that it was appropriate to endorse Cranbrook's quotation for the purposes of his award, nor whether he made any, and if so what, enquiries into the appropriateness of the figure in that quotation.

51. What may be learnt from the decision and the facts arising on the appeal?

52. (1) the party wall surveyor must maintain his independence from his appointing owner. The correspondence in the appeal, only part of which I quoted in an already lengthy judgment, showed a party wall surveyor as little more than a puppet on a string, apparently anxious to please his appointing owner, and little else. I have encountered party wall surveyors in other cases who saw their role as little more than doing the best they could for their appointing owner, and that cannot possibly be consistent with a quasi-judicial role in a dispute resolution tribunal. Acting quasi-judicially must involve acting impartially, and this is wholly inconsistent with simply advancing the interests of the appointing owner.

53. (2) the party wall surveyor must carry out his dispute resolution duties assiduously, and not rely on others where it is inappropriate to do so. I have suggested that BOS2 (and BOS1) were little more than puppets, but worse still, it was not the owner who was pulling the strings but the owner's contractor. Cranbrook Basements Ltd have a reputation in the field, and the managing director appears supremely confident in his knowledge of basement construction and the high quality of his company's work. This was not the first appeal in which I have encountered Cranbrook Basements (see eg *Gray v Elite Town* referred to above). I should state that in the various cases where I have encountered Cranbrook Basements Ltd there has never been any suggestion that Cranbrook does not know what it is doing or that its work is anything other than good quality construction. But in this case Cranbrook was, as AOS pointed out, responsible for design, construction, supervision, and costs control with no independent consultants involved, apart from the party wall surveyor.

54. To the extent that the BOS2 relied on Cranbrook in carrying out his duty he was failing in his task as a dispute resolution tribunal. I would stress that where an owner places his reliance on a 'one-stop shop' such as Cranbrook that is his decision, and it ought not in theory increase the duties owed by the party wall surveyor to his appointing owner[9]. As to these duties, I comment below. But it was dangerous indeed for BOS2 to rely on Cranbrook for the appropriate figure for an award for remedial work, and doubly so to do so without requiring Cranbrook to make good its figures. Cranbrook's refusal to explain its costings is deeply

[9] In practice, I fear, the adjoining owner's surveyor is likely to find himself with more work to do. But if this results in a higher fee payable to the AOS the building owner will have to take that on the chin.

troubling, and it should have been a red flag to the party wall surveyor. The third surveyor appears to have followed exactly the same path, but, as I say, I was not able at the appeal hearing to investigate how he arrived at the Cranbrook figure for his remedial work award. As an aside it would have been particularly interesting to hear the third surveyor explain how it could have been appropriate for Cranbrook to charge £148,000 odd for a remedial scheme when it had costed the work of building the original underpinning at £29,000!

55. It is particularly important that a party wall surveyor should bear in mind that when an Award is made requiring an Owner to pay a specific sum of money it is in effect a judgment sum. By s10(16) the award is conclusive and may not be questioned in any court other than by appeal under s10(17). No Judge could possibly order one litigant to pay another litigant a sum of money without being entirely sure that it is a proper sum to order to be paid. A Judge must, of course, explain himself and show how the sum is arrived at by reference to the evidence that has been adduced in court. A Party Wall Award may be (and often is) non-speaking, and no explanation is required. It is therefore all the more important that the party wall surveyor has done his work thoroughly and can say, hand on heart, that the sum awarded is a proper sum to award. I need hardly say that relying on the contractor who is going to be paid the money to determine what sum should be awarded is not due compliance with the party wall surveyor's duties. I doubt I need say anything about how the task should have been done in this case. A QS opinion, and or quotes from alternative contractors are obvious steps.

56. It is worth making the judgment sum point expressly. By his award the third surveyor ordered AO to pay BO the total sum, including vat, of £178,658.78. A careful analysis of the work involved with the assistance of two expert quantity surveyors resulted in a revised award requiring payment of £57,572.76. It follows that by failing to carry out his dispute resolution task properly the surveyor ordered AO to pay an additional £121,086.02 for which there was no warrant. Most people would find this to be outrageous.

57. There is, incidentally, a further consideration. The award made an appeal inevitable, and while I do not know what the costs figures were I would be astonished if the appeal exercise together with the second appeal did not end up costing No 6 well over £500,000. Still, it was the Respondents' choice to contest the appeal and then, after losing, to seek permission to appeal my judgment, so perhaps there is no particular need to feel sorry for them!

58. Back to what may be learnt from the decision. (3) A party wall surveyor may rely on advice from others, especially in matters requiring expertise, but he should make it clear when he is relying on such advice. No party wall surveyor should be reluctant to obtain expert assistance when it is necessary to do so, but he should disclose the fact that he has taken assistance, and from whom. Engineering advice and QS costings probably form the most common examples of taking advice in practice, but a range of specialist advice may be required, even legal advice, particularly when the award is covering matters of compensation. *Shamin Masters v 6 Bolton Road Limited*, a case I refer to below, is a good example of a case where it would have been better had the party wall surveyor obtained engineering advice.

59. At the same time however, the party wall surveyor should not take advice when it is not necessary to do so for this will serve to increase the cost to the paying owner unnecessarily. The party wall surveyor has a duty to act reasonably in incurring additional expense. Where the award is being made by two or three surveyors it is plainly good practice for the appointment of an expert adviser and the terms of his brief to be agreed between the surveyors before an appointment is made.

60. (4) A party wall surveyor, as part of a dispute resolution tribunal, should be open and frank with his fellow tribunal member and make full disclosure to his fellow tribunal member of any material which is relevant to the determination of any issue under discussion in the making of an award. Under s 10(10) and (11) an Award may be made by the Agreed surveyor or the third surveyor or by any two or all three of three surveyors. It is plainly preferable not to involve the third surveyor unless this is essential and most awards are indeed made by the two owner-appointed surveyors. Where there is more than one surveyor making the award it is a joint award, agreed by both surveyors, and it is difficult if not impossible to reconcile with acting judicially that one of two surveyors should keep secret from his colleague material which is, or may be, relevant to the making of the Award.

61. In the *Welter v McKeeve* case BOS2 did not disclose to the AOS either the first or the second engineering consultant reports on the strength of the original underpinning, this despite the fact that they had agreed to simultaneous exchange of engineering reports. Neither did BOS2 inform AOS that he was seeking a costing report from a firm of quantity surveyors, let alone show him the report when it was provided, which presumably it was. This was no way to behave. As AOS put it in his email of 5 May 2015 "You, I and the Third Surveyor are a quasi-judicial tribunal and we, individually and collectively, cannot function effectively without proper disclosure, (see note on *Gyle-Thompson v Wall Street* attached)" [10].

62. In this context it seems to me that a party wall surveyor should take care about disclosing to others the content of his discussions with a fellow party wall surveyor. I would not go so far as to say that it must inevitably be wrong to let others into the content of discussions between party wall surveyors where those others have a legitimate interest in the party wall dispute, but it seems to me that it would rarely be appropriate. In *Welter v McKeeve* BOS2 simply copied Mr O'Connor into all the email correspondence, (ie as a named recipient of the email), so BOS2 was not making disclosure to Mr O'Connor behind AOS's back, something which I would have thought would have been impossible to justify. But even open disclosure should be avoided. Apart from anything else it suggests that the party wall surveyor is not independent and is allowing a third person to influence him in the making of an award.

Acting as an agreed surveyor

63. In his book on Party Wall law Nicholas Isaac QC's states:

> 7-35 "In a small and simple domestic situation, where minimal disturbance to the party wall is likely, an agreed surveyor can be a sensible and cost-effective option for the parties.

[10] Incidentally, I never did get to see the Gyle-Thompson note. There is nothing specific about disclosure in *Gyle-Thompson*, but I entirely agree with the comment.

> However, where significant works are to be carried out, it is generally not sensible to appoint an agreed surveyor. The potential for conflict between the appointing owners in such a situation is high. The agreed surveyor is obliged to deal with the dispute under s 10 in a scrupulously independent way, but this is likely to leave neither owner content. It is simply not conducive to the efficient resolution of the party wall process."

I agree. The basic advice to a PWS on being asked to act as agreed surveyor is don't unless both (i) the party wall works proposed by the building owner are straightforward, and (ii) the PWS, having met both owners, considers that neither are of a difficult let alone litigious disposition. On accepting an agreed surveyor role the surveyor should take particular care to warn both owners that he is acting in a quasi-judicial capacity and stress that 'he is acting for the wall, not either owner'.

64. *Practice as agreed surveyor*

An agreed surveyor ('AS') should remember that he is effectively both the BO appointed surveyor and the AO appointed surveyor. Where there are two surveyors the BOS will ensure that all relevant information is available to the AOS who will then advise the AO accordingly. The AS is likely to be drawn into the work of the BO design team (and he may be part of that team already) and it may be easy to forget his duties to inform the AO of any part of the scheme or proposed building operations that will or may impact on the AO. A clear summary of the works and issues arising in writing will help the AS focus on what is important and be a useful tool in advising the AO. In preparing such a summary it will frequently be sensible for the AS to undertake the academic exercise of asking himself what he would looking for (and possibly complaining about) were he the AOS. The AS may find himself discussing / arguing with the BO or his contractor or supervising surveyor quite how the works are to be designed and carried out. The AS will not have the comfort of having a fellow professional for the other owner with whom to discuss contentious matters and the support that comes from both party appointed surveyors agreeing on the appropriate way forward when this does not find favour with the BO or his contractor. Neither, of course, will the AS be able to pass a difficult problem to a third surveyor.

As discussed elsewhere the party wall surveyor should take advice when sensible to do so, but there is no automatic right to engage specialists and external advisers. An AS may be the more tempted to seek external advice than he would as one of a two-appointed owner team. On a strict view an AS should no more readily seek expert advice than a single owner-appointed surveyor. Should a dispute subsequently arise as to his fees, the AS, in common with any party wall surveyor, is restricted by s10(13) to what is "reasonable", and an unnecessary recourse to expert advice may not be reasonable. An AS may have a useful degree of judicial sympathy, although this cannot be counted on. It may not see the AS home in any particular case, but the well-advised AS will make it clear in his letters of appointment that, as a condition of acting as AS, he is to be given a free hand to seek external advice when he considers it to be appropriate.

65. <u>The Award(s)</u> s10(10)

"(10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by away any matter –

(a) which is connected with any work to which this Act relates, and

(b) which is in dispute between the building owner and the adjoining owner."

The party wall surveyors will normally agree an award, or a series of awards which should cover:

(a) a schedule of condition of the AO's building,
(b) a clear statement of the works which the BO is authorised to carry out by the Award. This will usually comprise a general statement of the work, accompanied by all relevant drawings (which need to be identified and scheduled in the Award).
(c) (where appropriate) a method statement detailing the manner in which the work will be carried out.
(d) a list of conditions with which the BO must comply (these will cover such matters as security for expenses, compliance with building regulations, access, rights of entry onto AO's land, erection of scaffolding, temporary protection, insurance, making good damage, and payment of AO's surveyor's fees.

Further Awards may be required to cover such matters as changes in the scope of works, and an award of compensation under s7(2) Act.

66. I have two points to make with respect to the Award.

(1) An Award should be as complete within itself as is reasonably practicable. This does not preclude reference to other documents, indeed almost all Awards refer to plans which cannot realistically be included in the Award document, but all external documents should be clearly identified.

(2) An Award is "non-speaking" *Zissis v Lukomski* [2006] EWCA Civ 341 approving Judge Lloyd QC's comment that awards are *sui generis* and do not have to contain findings of fact or law.

67. (1) <u>An Award should be complete within itself</u>

By this I mean that a knowledgeable third party should be able to ascertain from the award, and any documents to which the award refers, all the detail of the work required by the 1996 Act. An example of an incomplete award is the case of *Shamin Masters v 6 Bolton Road Limited* (CLCC 29 June 2016) The *Masters' Case* involved two properties forming part of a terrace of stuccoed townhouses, each with a balcony surrounded by ornamental railings at first floor level. The balconies were connected to each other and could be reached through the first floor sash windows. On 31 July 2014 a portion of external cornice and leadwork at 6 Bolton Road fell from the top of the second floor of that property onto the balcony and balustrade of both 6 and 5 Bolton Road. The owners of no.6 appointed an engineer (Mr

McHale) both to prepare designs and carry out the repair work at no.6 and work commenced. The owners of no.5 were concerned as to the integrity of the balcony being repaired at no.6, a balcony to which of course their balcony was attached, and appointed a well-known party wall surveyor to act on their behalf. Once persuaded that the Act applied, Mr McHale became party wall surveyor for no 6 and he and the AO appointed surveyor selected Mr Schofield as third surveyor.

68. A draft award was prepared, which passed between the respective surveyors, but argument ensued as to the statement of the works which the BO was permitted to carry out. The AO surveyor requested a brief specification supported by an 'engineer's supporting statement' ie a statement confirming that the completed work would leave a structure which was sound and capable of bearing the stresses to which it was subject. Mr McHale provided a sketch to take the place of a brief specification but took the view that an engineer's report or statement was unnecessary because the BO had appointed a highly qualified and competent stonemason to carry out the work, a stonemason who was "effectively a specialist engineer in this area".

69. There was coming and going over the need for specialist engineering input for over three months. This held up the progress of the works much to the exasperation of the BO who, in the hope of securing an early award, made direct contact with the AO party wall surveyor. At the hearing of the appeal the AO expressed some concern as to this contact, and, as I observed in my judgment, there should as a general rule be no private contact between a BO and the AO's party wall surveyor, given the quasi-judicial / quasi-arbitral role of the party wall surveyor. In practice, the answer here for the party wall surveyor is simple. Copy the AO into all correspondence received from and replies sent to the BO. As a Judge I would from time to time receive correspondence directly from one party or the other in litigation and I made a point of copying all correspondence on to the other party with a warning that all communications with the Judge (which were not to be encouraged) should always be copied to all opponents.

70. In the event the AO's surveyor was persuaded that the stonemason concerned did indeed know what he was about and signed off on an award which identified the works to be carried out by reference only to the sketch without any supporting engineering evidence. In doing so the AO's surveyor was relying on a letter sent to him by Mr McHale assuring him that the relevant work would be carried out by the particular stonemason in question. There was however no reference to the letter or the assurance in the Award.

71. Things then unfortunately went pear-shaped. This because the AO, who all along had been pressing her surveyor to insist on the obtaining of an engineer's report, then herself instructed an engineer who prepared a report condemning the work authorised by the Award on a wholly false basis supported by inaccurate calculations. This was bad luck for the AO. The report was provided at great speed and the AO was able to launch an appeal in time. At trial the AO relied on expert evidence from a different engineer who approved the design overall although he had a number of pertinent criticisms of the sketch which omitted a number of salient features. Each of these features, steel dowels in the wrong position, no bleed holes, no note requiring non-shrinking additive to be mixed with the cement grout, were met with the answer that the criticisms were not in themselves unfair but were in the circumstances

unnecessary, because the stonemason knew perfectly well how to construct the balcony and would of course put the steel dowels in the correct position, ensure there were bleed holes, and use non-shrinking additive in the grout. The expert engineer also criticised the absence of a method statement, a further criticism met by the confident assertion that the stonemason in question knew perfectly well how to go about his work.

72. Importantly, in my view, the expert assured the court that in a job of this sort expert engineering calculations supporting the design would be the norm not the exception.

73. In the event there was considerable argument as to whether the appeal should succeed, given the fact that the design of the works had not been condemned and no evidence had been led to suggest that the stonemason was not perfectly competent to carry out the work without requiring any of the information which the appellant's expert had stated should have been on the sketch or in a programme of works.

74. Nevertheless I allowed the appeal. It is, in my view, entirely unsatisfactory that an Award should be made which authorises work which is not properly detailed, and for which there is no method statement, on the basis that the work will be executed by a particular workman who knows what he is doing and will remedy any omissions or defects in the description of works authorised by the Award, without the Award clearly spelling out that the workman in question will carry out the work. On the face of the Award in this case there was nothing to prevent the BO, or any successor in title to the BO, having the work carried out by another stonemason. Of course the likelihood was that the identified selected stonemason would do the work, and no reason to suppose that he would not do it perfectly well. But a Party Wall Award should stand by itself and not be dependent on important matters not referred to in the body of the award or in a document identified in the award.

75. Two quotations from the judgment; at paragraph 55

> "Given that once the award is made the building works authorised by the award must be executed without any deviation, see s7(5), except with the consent of the adjoining owner or under the authority of a further award, it is important that the award should be as comprehensive as is reasonably practicable. A party wall surveyor should take care to ensure that there is as little scope for uncertainty and argument as possible".

And at paragraph 66

> "In my judgment, a party wall award should be as complete within itself (including references to external documents) as is reasonably practicable…. An award should not depend for its implementation on understandings or assumptions which cannot be gleaned by a third party from the words of the award itself".

76. On the evidence before me, incidentally, I took the view that it was perfectly reasonable for the AO to request engineering calculations. It is interesting to observe that the BO was anxious to avoid obtaining such calculations because he wanted to get on with the work, delayed at that stage by about 3 months, and avoid the cost of the engineer which would have been in the region of £2,000. In the event he was delayed another 10 months before the appeal

was heard, and he had to pay the costs of the appeal (a six figure sum with counsel and solicitors on each side) in addition to any additional losses of rent resulting from the collapse of the balcony over the ten months extra delay.

77. (2) An Award is 'Non-speaking'

I ended my judgment in the *Welter v McKeeve* case by saying:

> "174. I would observe further that while it may well be that an arbitrator or judge who is not required to give reasons for his decision is well advised not to do so, the discipline inherent in the exercise of ensuring that the task has been properly carried out, that the arguments have been considered, and proposals for works or costings duly tested, is always worth undertaking before an award is published."

I stick by that, but it is also worth noting that towards the latter years of my judicial career I came across an increasing number of Awards where the surveyor(s) had made findings of fact with brief comments as to why he / they arrived at such findings, and or had explained the reasoning behind contentious issues in the Award. It is perhaps a matter of confidence. I do not suggest that the competent party wall surveyor should necessarily feel obliged to escape the 'shelter' afforded by a non-speaking award, but if you feel able to explain how important decisions of fact have been arrived at, and perhaps more importantly what evidence or factors are behind such decisions, so much the better. Evidence from an engineer or quantity surveyor, or even quotations from alternative contractors may usefully be referred to, if not in the body of the award perhaps in the opening recitals or in an addendum.

78. The point I seek to make in the *Welter* judgment, quoted above, is that even where you do not give factual decisions or reasons in the Award, it is an excellent discipline to note down for yourself all the important factual issues, and any expert technical issues, that lie behind the award. Having noted these down it is well worthwhile listing the material which is relevant to the issue one way or the other, so that you can be confident in your own mind that your ultimate finding is one you are comfortable with.

79. Service of the Award

Service is governed by s15 of the Act as amended by Party Wall etc Act 1996 (Electronic Communications) Order 2016 (2016 No. 335) ("the 2016 Order"). I need not set out these provisions. The methods of service specified in the Act are not exhaustive, the 'may' in s15 being permissive, *Knight v Goulandris* [2018] EWCA Civ 237, but email (or any other form of electronic) service is now covered by the 2016 Order and requires the express agreement of the recipient. In the *Knight* case the Court of Appeal noted that at common law 'service' requires 'receipt', (putting aside the special rules about post), but the Court did not expressly consider whether the arrival of an email in the recipient's inbox is sufficient to constitute receipt or whether there is no receipt until the email is accessed. The distinction was not relevant on the facts. Accordingly it is still open to argument that an email received (but not opened) at 23:59 sets the 14 day clock ticking with only one minute remaining for the 'day on which an award .. is served'. Whatever the position, I would like to think that no self-respecting party wall surveyor would send an email late in the evening, and certainly not for

ulterior motives. The facts discussed under ‘The Service Issue’ paragraphs 108 to 116 in *Mills v Savage* gave rise to real concern, and are and will remain, I trust, unique.

80. Having finally made my way to the service of the award, it is time to stop.

Edward Bailey