Case No: F20CL088

**IN THE COUNTY COURT AT CENTRAL LONDON**

Royal Courts of Justice
Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

**HIS HONOUR JUDGE PARFITT**

BETWEEN:

**THOMAS ASH** **APPELLANT**

**- and -**

**SHAYNE TRIMNELL-RITCHARD** **RESPONDENT**

**Legal Representation**
Mr James Matthew Frampton (Counsel) on behalf of the Appellant
Miss Cecily Mary Crampin (Counsel) on behalf of the Respondent

**Other Parties Present and their status**
None known

**Judgment**

Judgment date: 19 November 2020
(start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No



Number of folios in transcript 67
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**His Honour Judge Parfitt:**

1. This is my judgment in respect of a party wall appeal. The award is dated 18 September 2019. I will take a brief and sufficient background from the first seven paragraphs of the grounds of appeal which are, happily, admitted in the response to the grounds of appeal. It is about the only matters, I think, upon which the parties have been able to agree.

2. I will just read those out:

> **"The Appellant is the owner of the leasehold and one of three joint owners of the freehold of 56A Collingbourne Road, London W12 0JQ. The Appellant is an adjoining owner for the purposes of the Party Wall Act 1996 (the Act). The Respondent is the owner of the freehold of 58 Collingbourne Road, London W12. The Respondent is a building owner for the purposes of the Act.**
>
> **On 18 June 2019 the Respondent, by Mr Andrew Schofield who was appointed as her surveyor for the purposes of the Act, served a notice under Section 2(2)(b) of the Act on the Appellant.**

I will read the notice out later:

> **"On 11 July 2019 the Appellant returned the notice, said he dissented to the proposed works and a dispute has arisen. Then the Appellant appointed a surveyor, a Mr Ben Cairns, and then Mr Stuart Birrell was selected as the third surveyor pursuant to Section 10.**
>
> **On 26 July 2019 the Appellant's surveyor and the Respondent's surveyor carried out a joint inspection of the property. The party appointed surveyor subsequently sought to agree an award under the Act and then on or around 18 September, *although it is dated 7 September*, the Respondent's surveyor and the third surveyor agreed an award under the Act. The award was served on the Appellant on 19 September."**

3. There are some nine grounds of appeal which I will go through but first I need to give the context for this particular award. The problem that the Respondent has is that there is a leak in the ceiling of her basement and it is that problem which is the background to this particular award. The notice pursuant to the Act was served under Section 3 and it says:

> **"I hereby serve you with notice in accordance with my rights under Section 2(2)(b), and with reference to the party wall separating the above premises. It is intended to carry out the works detailed below after the expiration of two months from the service of this notice. The proposed works are to carry out repairs to address a problem of water leakage into the building owner's property, thought to be caused by the connection of a side extension to the party wall by the adjoining owner, to carry out repairs of internal damaged finishes and decorations."**

And then the normal rubric about consenting or not consenting and deemed disputes and so on.

4. The Respondent wanted to investigate the cause of the leak. The problem that she had, as I have said, was the water leakage but she did not know what caused it. The surveyor who wrote this notice says that it was thought to be caused by the connection of the side extension to the party wall by the adjoining owner, but that was only a thought, a theory, at that stage. On the evidence before me that was a theory that was not true.

5. It was not known and there was no assertion about what, in fact, was the cause and it was not possible at that stage, given that they did not know what the cause was, to know what repairs they needed to do or, indeed, even if they needed to carry out repairs at all, save on the operating premise that if I have a leak then there must be something wrong.

6. Whether or not that was something wrong which actually involved the exercise of a right under Section 2(2)(b) is something that was only prospective at that stage, something that would require investigation. That need to investigate follows through into the award that was subsequently made.

7. There is unsatisfactory email correspondence between the parties' respective surveyors and prior to the award in August of 2019. There does not appear to me, reading it sometime later and with the benefit of hindsight perhaps, any serious attempt to engage with each other's position. I would be particularly critical of Mr Schofield in this respect. On the other hand, the Appellant's surveyor, Mr Cairns, just before the surveyors finally fell out which led to Mr Schofield and the third surveyor making the award, said in an email dated 23 August 2019 as follows:

> **"I consider one of the first avenues to explore would be to undertake opening up works from the building over the side in the location of the damp staining itself. This will involve relatively little disruption and would likely extend to the removal of some plasterboard."**

8. And then at the end of that email he says:

> **"In summary, it's evident that neither you or I can categorically state the reason(s) for the damp ingress into the building owner's property and I think we are agreed on that. Therefore I reiterate again that we should engage the service of a damp specialist to ascertain the real cause before we try to eliminate what we think may be the likely causes. This is guesswork at best and neither owner is going to thank us for the additional costs and fees this approach is likely to bring."**

I cannot more accurately summarise the futility of the process that was undertaken by the Respondent's surveyor. Mr Cairns was right as to what should have happened at that stage: engage the service of a damp specialist to ascertain the real cause before we try to eliminate what we think may be the likely causes.

9. In the process that the parties have participated in in this appeal such a specialist report has been obtained to the joint expert report and they have agreed on three items of works that can be done, one of which they say they are satisfied has been the cause of the damp and the other two which they recommend as being things which are likely to

assist. I do not need to go into exact detail about that. That identification at that point, that the surveyors did not know what was causing the leak and should take steps to find out was entirely right. Anyway, the Respondent's surveyor did not take that step and instead, with the assistance of the third surveyor, made this award which I now come to.

10. In the introduction at (iv) the surveyors decided it would be a good idea to have a paragraph that starts:

> **"As a record but not forming part of this determination, the surveyors agree that the adjoining owner has undertaken works to the party wall in connection with which notice in accordance with the provisions of the Act was required and was not served."**

11. That was wholly irrelevant, it was contentious, it should not have been in that award. It did nothing apart from indicate to any reasonable person reading the award that the surveyors were not carrying out their function, or appeared not to be carrying out their functions in a way that would fit their quasi-judicial roles. It is unfortunate that that was there, albeit it can be safely ignored, but it begs the question as to why the surveyors thought it was necessary or appropriate to put such a prejudicial comment in an award. That is not the least problem that this award has.

12. I will read, with some comment, through the award:

> **"1) After service of the signed award the building owner may carry out the following works, defined as the Works, namely**
>
> **a) To lift, set aside and replace upon completion the decking at the rear of the adjoining owner's extension, photograph 3 in the attached schedule.**
>
> **b) Investigate the abutment detailing between the structure at the top of the underlying basement slab and the party wall.**
>
> **c) Carry out repairs to the joint between the basement slab and the party wall.**
>
> **d) Repair damp-affected plasterwork and redecorate affected surfaces within the building owner's property, redecoration to the extent required to achieve a reasonable colour match."**

13. I remind myself that the purpose and intent of awards under the Act as set out in Section 10(12) is:

> "An award may determine the right to execute any work, the time and manner of executing any work and any other matter arising out of or incidental to the dispute including the costs of making the award."

14. On the face of paragraph 1 of this award, it would seem that what was being identified was necessary and an exercise of the right that was identified in the notice, which was the right under Section 2(2)(b) of the Act:

> "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."

Was the repairs between the basement slab and the party wall and repairs to the joint, but when the reader got to paragraph 3 of the award it would be immediately apparent that that was not the case and that those works were not being authorised or determined as being the subject of execution under this award because paragraph 3 says:

> **"Following the lifting of the decking described in clause 1(a) above and before carrying out the works described in clause 1(c), carry out such further investigations as are considered necessary."**

15. That, of course, as a sentence makes little sense, but I think one has to infer that the building owner is being authorised to carry out such further investigations as are considered necessary, and then.

> **"Provide the surveyors with the results of the investigations, a photograph of the area showing the concealed fabric."**

Presumably the junction line that is going to be exposed by the removal of the decking:

> **"And obtain their approval of a description of the proposed works and an itemised estimate of cost."**

16. So far from the award determining the right to execute the work which is the subject of the award, and the time and manner of executing that work, what this award purports to do is to authorise investigations on the part of the Respondent, the building owner, and then envisages the preparation of a schedule of works following those investigations, a description of the proposed works, together with an itemised estimate of cost and then the surveyors potentially authorising those works. It is obvious that an award cannot authorise works for which there is no specification or any determination that works might be required.

17. So this is an award which does not determine the right to execute any work because the right to execute that work would be dependent on it falling within Section 2(2)(b), which is the right identified in the notice. That is the right that, on the face of it, the building owner wanted to exercise when she served the notice but, in reality, the building owner was not in a position to know whether or not they wanted to exercise that right because there were no planned works, i.e. works that were going to be carried out, works that were going to be subject to the Act, which fell within that entitlement. All the building owner wanted to do was whatever works were necessary, which she did not know because she did not have the necessary information, to be able to solve her damp problem.

18. It seems to me that there is no free-standing right, certainly not express in the Act, but neither is it implicit within the other rights that are granted, to carry out exploratory investigations outside of the actual entitlement to carry out work but to investigate if there is an entitlement to carry out work. If Parliament had wanted to grant such an investigatory right then it would have done so expressly. There is a long list of rights in Section 2 and the right to investigate to see whether or not you need to exercise other rights contained in the Act is not one of them, and I do not think that it is ancillary

to any of the rights set out in Section 2 or otherwise, nor can it be implied and nor, as a matter of purposive construction, can the Act be said to create or give rise to such a right.

19. Despite all that has been said on behalf of the Respondent, and I very much recognise that nothing further could have been said to try and make these arguments out, there is no practical benefit in having such a right if it gives rise to precisely the types of problems that there are here, when it is apparent from the material that I have already referred to that the Respondent's surveyor had made an assumption about the reason for the damp ingress, an assumption against the Appellant that it was something that related to a problem to do with the joint between the basement slab and the party wall, but, in fact, it now appears that that is not the case, because the experts have identified a separate cause.

20. It is right to say, as Miss Crampin reminded me a number of times, that the experts have not excluded the possibility that the joint between the basement slab and the Respondent's walls, I say in plural, might have some role to play because they identify that that particular joint could be strengthened or made even more weatherproof than it is. It could be made even more waterproof by the addition of an upstand, but that level of clarity as to what might be required, actual expert evidence that identified the problem, as suggested by the Appellant's surveyor a long time before, has only emerged subsequently. I point out that the right to install an upstand at the potential party wall junction was not the subject of any notice nor was it the subject of the award.

21. The building owner was not in that position at the time of this award. The award, being as benevolent to it as I can, envisaged that the Respondent would need to carry out works to the party structure to solve the damp problem. But to proceed on a assumed need which requires investigation is not the purpose of an award. It is outside the powers of the surveyors under the Act, and I am going to set the award aside for that reason alone. The surveyors had no jurisdiction to make this award because the Act does not give them the power to require or allow a party, independent of the exercise of an actual right given by the Act, to investigate and that is what this award purports to do, and that problem, the failure to identify that the award must first determine the right to execute work to which the Act is relevant is a fatal flaw throughout the very difficult to follow wording in this unfortunate and unhappy award.

22. Moving on, it says at 4:

> **"If within five days following the investigations, etc. described in 3 above the adjoining owner disputes that the cause of the damage (water leaking into the building owner's property) is the result of works that he has undertaken or the works proposed by the building owner this shall be determined by the surveyors."**

There are two things to say about that.

23. The first is that implicit within that is that the surveyors have already determined, or at least assumed, that the water leak is the fault of the Appellant. I will leave aside, because it is not necessary for this judgment, whether or not the surveyors could in any event have the jurisdiction to determine fault.

24. I will assume that such could be relevant in relation to an expenses determination pursuant to Section 11(5), where the surveyors, if the matter is disputed:

> "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 ... (b) responsibility for the defect or want of repair concerned, if more than one owner makes use of the structure or wall concerned."

25. So it could be possible that in the context of making that apportionment the surveyors might have to have regard to responsibility so, generously, one can see how they might need to look at fault. But what the surveyors should not have done was to presume against the Appellant's interest that he was responsible and then set out this extremely short period of time after which it would be presumed against him that he was responsible.

26. I pass over slightly more quickly the more conventional clauses, albeit that they make very little sense in the context of this particular award, remember which does not actually award, or certainly actually authorise any works to be carried out. It does not determine the right to execute any work, so when it says at 5:

> **"No deviation shall be made from the works without the agreement of the owners."**

It is talking about works which have not been authorised and have not been considered by the surveyors, the actual works being limited to removing the decking and investigating the detailing.

27. I will now with more speed go through the grounds of appeal. I have already given the substantial reason why this award is going to be set aside and the appeal allowed, which cuts across a number of the grounds and I will not repeat that. I will just give a short judgment on each ground.

28. Ground one is:

> **"The award seeks to determine common law rights."**

In the course of my discussions with Miss Crampin about the Respondent's case, I referred as a metaphor to the Act replacing common law as when you open the door into the Act and you walk in and you are in the arena of the Act, and common law does not apply. Parties have the rights that they have under the Act, the surveyors have the powers that they have under the Act, they can do by award those things that they need to do in order for, normally the building owner, to be able to exercise the rights that they have and so on.

29. All of which is independent of the common law but absolutely vital prior to getting into that arena, the room where the common law does not apply and the Act does, you have to go through the appropriate gateways, which is the intention to carry out works subject to the Act. No such intention existed here. At best, as I have described, what the Respondent had was a belief, or her surveyor perhaps had a belief, that it was going to be necessary to make good, repair or demolish and rebuild a party structure or a

party fence or wall in a case where such work is necessary on account of defect or want of repair of the structure or wall. She wanted to find out if she would be in that position.

30. One of the other problems with the award is that for the Appellant reading it there is a clear but unevidenced and undetermined assumption that he is responsible for the leak. It reads in a way that would give a reasonable reader in the Appellant's position the impression that it was biased against him and because of that I think that this ground is fairly made out. It looks like it is determining his responsibility for a nuisance. The surveyors have no power to do that.

31. Putting those two bits together, first, they do not go through the gateway and, secondly, that actually it does look like it is trying to determine he is liable for nuisance or, at least, it is going to investigate and we are pretty sure that you are going to be liable but we just give ourselves some backs doors so that potentially if you comply with our self-imposed requirement to give us notice in five days then we might reconsider the position, is grossly unfair. In purporting to assume common law liability without establishing a jurisdiction under the Act, the Award is bad and this ground succeeds.

32. Ground two:

> **"The structure identified as a party wall in the award is not a party wall."**

I am conscious in relation to this particular aspect that, given the time when we finished Ms Crampin's submissions I did not give Mr Frampton the opportunity to reply and I do not need to go into great detail on this. I think I can say I would probably have been persuaded by Ms Crampin's submissions about the interrelationship between the slab and either the admitted party wall below it or the free-standing wall but which, insofar as it abutted the roof slab, might well have been incorporated into the building structure in such a way as to make that very small bit a party. However, time did not allow me to hear from Mr Frampton about this and so my observations are obiter and nothing more.

33. Ground three:

> **"Recital 4 is outside the surveyor's jurisdiction."**

Recital 4, I have already dealt with that in passing above. Recital 4 should not have been there.

34. Ground four:

> **"The authorised works throughout *are the terms by destructive notice*[1] under the Act."**

Yes, that is the reason fundamentally why this award is bad, for the reasons I have already given. I will not need to go and do not need to go into that in any more detail.

35. Ground 5:

[1] HHJ Parfitt: something has gone wrong with the grounds there but as I am approving the transcript without the benefit of the papers I cannot correct it.

**"Timings, to challenge the timing for the Appellant to dispute his presumed responsibility."**

Well, as put, that is only a timing issue. But I think that that paragraph in the award is fundamentally improper and wrong because nobody in a quasi-judicial role should determine such an essential matter against a person either without allowing them to be heard or by simply assuming it against them without evidence but just on the basis they might not respond in time. So far as the actual ground of appeal is concerned, should five days be a longer period of time? Yes, it should, and I would say with the Appellant that 28 days would have been better but not cured the more fundamental problem that concerns me.

36. Ground six:

**"The Respondent's rights of access."**

The award purports to give to the Respondent a right of access outside of the framework provided in the Act at Section 8, Rights of entry, and Ms Crampin's submission is that just because Section 8 provides a regime in respect of right of entry it does not preclude the surveyors themselves, pursuant to their powers under Section 10(12):

> "Any other matter arising out of or incidental to the dispute including the costs of making the award."

From setting out a different right of entry regime.

37. A property owner is entitled to control those who he or she allows to come on or off of their property, and there is a presumption that a person's ownership rights are not to be overridden so it is unlikely that independently of the Section 8 right, an award could allow or compel a party to allow another onto their property as unlikely. I can see no reason for it and I can see no reason for it given that Parliament has expressly dealt with those rights and has set out a comprehensive code in relation to them which there is no reason to think requires to be supplemented at the particular whim of any surveyor, any two surveyors or third surveyor making an award.

38. There are no obvious gaps in that description in Section 8. For example, Section 8(1):

> "A building owner, his servants, agents and workmen may during usual working hours enter and remain on any land or premises for the purpose of executing any work in pursuance of this Act and may remove any furniture or fittings or take any other action necessary for that purpose."

39. And then it provides for those rights to be exercised on notice and so on. It even provides for entry to be made by force in the presence of a constable or police officer as required, and then there is a notice provision. Those rights are sufficient. So in trying to provide a right of entry that was inconsistent and outside of Section 8 the surveyors again exceeded their jurisdiction. So ground six would have resulted in paragraph 6(e) of the award being set aside.

40. Ground seven:

**"The Surveyors' right of access."**

In relation to that one the award says:

> **"The building owner's surveyor shall be permitted access to the relevant parts of the adjoining owner's property from time to time during the works at reasonable times and after giving notice in accordance with Section 8."**

I would, had the award survived, otherwise taken a benevolent construction to that and assumed that it was to be construed so as to be consistent with Section 8. I do not disagree with Mr Frampton that it can be construed to take the right to entry as going outside of Section 8 but, given that my view is that Section 8 is, itself, an exclusive description of the rights of entry that are given to a building owner and of surveyors, it would be the only reasonable construction to presume that that was intended to be consistent with Section 8, because if it was not it would invalid and it would be better to construe it in a way that gave it validity if that was possible.

41. Ground eight:

**"Responsibility for the cost of the works."**

In short, I agree with the position of the Appellant in relation to this, that the costs fell to be dealt with, and should have been dealt with, pursuant to Sections 11(5) and 13, and that the way in which this award purported to deal with them was improper and outside of those requirements, and the way the award dealt with those costs could not have stood.

42. Ground nine:

**"Responsibility for the surveyors' fees."**

I do not need to say any more about that since I am setting aside the whole award and that will go as well.

43. In conclusion, the appeal succeeds for the reasons argued by Mr Frampton for the Appellant and as I have set out in this judgment.

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