Case No: G20CL068

IN THE COUNTY COURT AT CENTRAL LONDON

Sitting at the Mayor's and City of London Court
Basinghall Street
London EC2V 5AG

Date: 17 November 2021

Before :

HHJ BACKHOUSE

- -

Between :

Jenifer Evans	**Appellant**
- and -	
(1) Katrina Paterson	**Respondents**
(2) Elise McGeevy-Harris	
(3) Marc Newton	
(4) James McAllister	

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Mr Frame (instructed by **Pemberton Greenish**) for the **Appellant**
Ms Petrenko (instructed by **Burges Salmon**) for the **First and Second Respondents**
The Third Respondent did not attend and was not represented
The Fourth Respondent in person

Hearing dates: 10 September 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ BACKHOUSE

HHJ Backhouse:

1. The Appellant, Ms Evans, brings an appeal pursuant to s10(17) of the Party Wall Act 1996 against an Award dated 17 June 2020 made by the Third and Fourth Respondents. This is my judgment in relation to a preliminary issue which arises from ground 1 of the appeal, namely:

   "Have the two surveyors exceeded their jurisdiction in making the Award, and in particular whether or not a dispute between the owners and named parties to the Award had in fact arisen, or needed to have arisen for the two surveyors to make the Award under section 10 of the Act?"

2. Ms Evans, the Appellant ("A") is the freehold owner of the property known as 10 Princes Gate Mews, London SW7 2PS ("No.10"). She is a 'Building Owner' for the purposes of the Party Wall etc. Act 1996 ("the Act").

3. Ms Paterson and Ms McGeevy-Harris ("R1" and "R2") are the freehold owners of the neighbouring property known as 11 Princes Gate Mews SW7 2PS ("No.11"). R1 and R2 are 'Adjoining Owners' for the purposes of the Act.

4. Mr Newton ("R3") is A's surveyor, appointed under s. 10(1)(b) of the Act. Mr McAllister ("R4") is R1 and R2's surveyor, also appointed under s.10(1)(b) of the Act. The surveyors chose Mr Alexander Frame to act as the third Surveyor.

5. At the hearing of the preliminary issue, A and R1 and R2 were represented by counsel and R4 represented himself. I had the benefit of detailed skeleton arguments and oral submissions from all those parties. I understand that A and R3 have settled the dispute between themselves and that R3 is no longer playing an active part in the proceedings.

Background

6. In 2015 A decided to construct a basement in No.10. On 13th May 2015 A served on R1 and R2, as 'adjoining owners', a notice pursuant to s.2(2)(a), (f) and (g) and s.6 of the Act. Consent was not given, and a deemed dispute arose.

7. The two surveyors were appointed and on 23 October 2015 they made the primary award ("the First Award") authorising A to carry out the works as defined in that award. The First Award contains a number of clauses which have been the subject of scrutiny in this appeal:

   "4(c). [A shall] make good all damage to the Adjoining Owner's property occasioned by the works authorised by this Award where so required by the Act in materials to match existing. Such works to be undertaken to the satisfaction of the Two Surveyors or, if so required by the Adjoining Owner, to make a payment in lieu of carrying out the remedial work".

   "10. That the Building Owner shall, upon receipt of this Award, pay the Adjoining Owner's costs by way of the Adjoining Owner's Surveyor's fees directly to the Adjoining Owner's Surveyor in the sum of £2992.50 plus VAT for involvement up to and including the preparation and service of this Award. That, unless otherwise awarded by the Two Surveyors, the Building Owner shall pay the Adjoining Owner's

costs, by way of the Adjoining Owner's Surveyor's further fees directly to the Adjoining Owner's Surveyor at the rate of £190.00 per hour, or part thereof, plus VAT for any attendance outside of the aforementioned allowance strictly in relation to inspections of the Adjoining Owner's property, as may be necessary, as a result of damage attributable to the works being the subject of this Award, or such other contingencies or variations arising or any general post-Award matters reasonably requiring the Adjoining Owner's Surveyor's involvement."

"11. "That the Surveyors reserve the right to make and serve any further Award or Awards that may be necessary in relation to compensation, damage or change in physical design"

8. The works commenced but on A's case, she had to cease work in March 2016 due to an alleged discrepancy or ambiguity between the wording of the First Award which stated that the use of special foundations was not permitted without the Adjoining Owners' consent and the drawings attached to it, which appeared to indicate the use of special foundations. It is A's case that the works have not recommenced.

9. Between 2016 and 2019 there was correspondence between A's solicitors and R3 and R4 requesting the surveyors to correct what A considered to be their error at no additional cost. The surveyors denied any error on their part. They were prepared to make an additional award but made it clear that they would charge a fee for doing so. A referred the issue to the third surveyor who made an award dated 11 May 2019 ("the Second Award") which resolved that matter.

10. On 19 June 2019 R1 emailed R4, inviting him *"back to inspect the walls of the house [No.11] after the recent construction of a basement at No.10. My sister and I have noticed some cracking on the party wall with no.10 particularly in the downstairs rooms over the last 12 months. We'd like to understand the nature of the cracking. I understand that you surveyed the condition of our walls in advance of the work being done at no.10. I also understand that a return visit after the completion of the works is covered under the original award. Please could you confirm this."*

11. On 22nd November 2019 R3 inspected No.11 on his own and on 27th November 2019 he sent a letter to R4 in which he summarised the extent of the cracking and opined that the cracks could be filled and decorated. On 22 May 2020 R4 inspected No. 11 alone. (I understand the delay was due to Mr McAllister suffering a period of ill-health). The next day, 26th May 2020, he emailed R3 stating that (in summary) he agreed with R3 in relation to the area of damage (save that he also identified a further area of damage) and further stated that he considered that the costs of redecoration would be £8,130.00 (inclusive of VAT). On 27th May 2020 R4 emailed R3 a draft party wall award. There followed some emails between R3 and R4 relating to costs of reinstatement etc.

12. On 17th June 2020 the surveyors issued the award under appeal ("the Third Award") which is said at clause 6 to be supplemental to the First Award.

13. A number of recitals are set out in 'Part 2 – Background to this Award' from clause 7 to clause 13. At clause 8, it is said "*Between 2016 and 2019 the Building Owner has been in the process of undertaking the Authorised Works"*. That would appear to be inaccurate (on the evidence before me) as R3 was notified by A's solicitors at least in May 2016 that the works had ceased.

14. Clause 9 states *"in or around late 2019 the Adjoining Owner complained to the Two Surveyors of damage believed to be attributable to the Authorised Works in the form of cracking to and around the Party Wall with the Adjoining Owner's Property ("the Damage")".*

15. Clause 10 records that pursuant to Clause 4(c) of the First Award, *"the Adjoining Owner has called upon the Two Surveyors to inspect the Damage and make an award for compensation in accordance with s.7(2) of the Act"* and further that the Adjoining Owner does not want A's contractors to remedy the damage.

16. Clause 11 records that the surveyors incurred costs dealing with A's request for an addendum award. The correspondence is detailed in appendix 2 to the award.

17. 'Part 3 – Findings and Determination' contains clauses 14 – 20. Clause 15 sets out the extent of the damage to No.11 which the surveyors consider was caused by the works.

18. The award is contained in clauses 21 – 29. A is required to pay R1 and R2 £8,130.00 as compensation. A is also required to pay R3 his fees in the sum of £945.00 (including VAT) and to pay R4 his fees in the sum of £2,850.00 (inclusive of VAT) *"without deduction or set-off for his involvement since the First Award, up to and including the making of this Award"*.

This appeal

19. The appeal contains 6 grounds of appeal. The first is that the Third Award is a nullity as the two surveyors have exceeded their jurisdiction.

20. In the other grounds, A disputes causation of any damage and the quantum of the award for compensation as excessive. She also disputes any liability for the surveyors' fees relating to the correspondence about an addendum award and contends that R4's costs are unreasonable in amount.

21. A CCMC in November 2020 was adjourned by consent and finally came before me on 5.5.21 (at which R3 was represented). The parties agreed that ground 1 should be determined as a preliminary issue. I directed that the parties must disclose all correspondence between each and any of them in relation to the alleged damage caused by A's works.

The parties' positions

22. A's primary case is that, prior to service of the Third Award, she was completely unaware of the alleged damage or what, if any, remedial works were required. It is not disputed that neither R1 nor R2 informed A or her solicitors of any alleged damage to No.11. Ms Petrenko's instructions were that R1 and R2 did not know of A's contact details until 2020 but that cannot be correct as A's solicitors served the Second Award on them under cover of a letter dated 17.5.19 – and of course, they had A's postal address. A also says that she was unaware that the surveyors were proposing to issue a further award. R4 contends that A's solicitors were put on notice of the damage in his letter to them of 22.5.19 to which I will return.

23. A's case is that she was given no opportunity to resolve any alleged damage directly with the owners of No.11. There was no 'dispute' between the parties which required settling by way of an award pursuant to s10(10) of the Act or which gave the surveyors jurisdiction to make the award. A submits that the Third Award is *ultra vires* and should be declared a nullity.

24. R1, R2 and R4 all submit that the surveyors did have jurisdiction pursuant to s10(12)(c) of the Act in that the damage was caused by the works authorised by the First Award and were therefore *"any other matter arising out of or incidental to the dispute including the costs of making the award"*. Alternatively, they say that if it was necessary for there to be a dispute, one had arisen by virtue of R1 and R2 raising the alleged damage with R4.

25. In this judgment I have made due allowance for the fact that R4 is a litigant in person but it appears from Mr McAllister's skeleton argument and submissions that he is well-versed in the details of the Act and the case law.

The 1996 Act

26. For the purposes of this appeal, the following sections are relevant. Section 10 is headed *"Resolution of Disputes":*

"(1) Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either—
(a) both parties shall concur in the appointment of one surveyor (in this section referred to as an "agreed surveyor"); or
(b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as "the three surveyors").
…
(10) 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.

(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;
but any period appointed by the award for executing any work shall not unless otherwise agreed between the building owner and the adjoining owner begin to run until after the expiration of the period prescribed by this Act for service of the notice in respect of which the dispute arises or is deemed to have arisen.

(13) The reasonable costs incurred in—
(a) making or obtaining an award under this section.
(b) reasonable inspections of work to which the award relates; and
(c) any other matter arising out of the dispute,

shall be paid by such of the parties as the surveyor or surveyors making the award determine".

27. Section 7 is entitled *"Compensation":*

"(2) The building owner shall compensate any adjoining owner and any adjoining occupier for any los or damage which may result to any of them by reason of any work executed in pursuance of this Act".

28. In respect of works under s2(2)(a) (underpinning), s2(3)(a) provides that the right is *"exercisable subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations".* There is a similar provision for works under s2(2)(f), (g) or (h) (certain works to the party wall) in s2(5) which provides that the right *"is exercisable subject to making good all damage occasioned by the work to the wall of the adjoining owner's building".*

29. Section 11 is headed *"Expenses".* Section 11(2) provides:

"Any dispute as to responsibility for expenses shall be settled as provided in section 10".

30. Where the right to making good arises under s2, s11(8) provides:

"Where the building owner is required to make good damage under this Act the adjoining owner has a right to require that the expenses of such making good be determined in accordance with section 10 and paid to him in lieu of the carrying out of work to make the damage good".

The issues

31. As is apparent from the way in which the preliminary issue is framed, there are two main issues which have a number of sub-issues:

(1) Had a dispute arisen between the parties as to the damage? In considering this, I need to address the parties' submissions on:

(a) the meaning of a 'dispute';

(b) whether R1/2 raising the cracking with R4 amounted to a dispute;

(c) the rules of natural justice.

(2) Was it necessary for a dispute to have arisen? Here R4 and to an extent R1/2 rely on:

(a) s10(12)(c) and the decision in ***R (Farrs Lane Developments Ltd) v Bristol Magistrates Court (ex parte McAllister)*** *[2016] EWHC 982 (Admin);*

(b) clauses 4(c) and 11 in the First Award;

(c) s11(8) of the Act

(3) There is also the issue of R4's costs in relation to the mooted addendum award.

Scheme of the Act

32. In my judgment, the scheme of the Act is clear. The foundation of the surveyors' decision-making jurisdiction is the existence of 'a dispute' between the parties (s10(1)) and they settle that dispute by making an award under s10(10) which is final, subject to the right of appeal. Without a dispute, there is no need for an award. The Act provides for a 'deemed dispute' to arise where there is no response to a notice served on an adjoining owner but not otherwise. R4's suggestion that A's failure to respond to his letter of 22.5.19 meant that a 'deemed dispute' arose is therefore incorrect.

33. Whilst the Act contemplates some continuing involvement by the surveyors, whose appointments cannot be rescinded, and whilst the surveyors can make successive awards, the Act does not provide the surveyors in terms with a continuous and ongoing jurisdiction to determine any issue which may arise. I consider that R4 is wrong to the extent that he contended otherwise.

34. It is well-established that party wall surveyors must act quasi-judicially (*Gyle-Thompson v Wall St Properties* [1974] 1WLR 123). That brings with it a duty to act fairly and impartially. The surveyors are not the agents of the appointing party, who is not their client, save in certain circumstances provided by the Act, such as s7(5). In his submissions, R4 suggested that the surveyors incurred costs 'acting on A's instructions' and subsequently the instructions of R1/2. That may have been an unhappy choice of language, but insofar as it is contended that the surveyors act on their clients' instructions, that again is incorrect.

(1) Was there a dispute?

35. In this appeal, A relies upon the persuasive authority of a decision by HHJ Simpkiss in ***Lion Homes (Sussex) Ltd v Brighton & Hove City Council*** *(unreported) Brighton County Court, 5 November 2018.* In that case, the building owner was aware of the specific damage that had been caused by its works, and solicitors for each party were in communication regarding resolution of that matter. The two surveyors proceeded to make an award specifying the remedial works that they considered needed to be conducted, without either party requesting them to do so. The appellant contended that the surveyors had 'jumped the gun' and that the award was made without jurisdiction. Mr Isaac QC for the Respondent conceded in ***Lion Homes*** that there would have to be a dispute for the surveyors to make an addendum award and they could not do so '*simply off their own bat*'.

36. In his judgment, HHJ Simpkiss refers at paragraph 55 to the dicta of Lord Denning in ***Monmouth County Council v Costelloe & Kemple*** (1965) 5BLR 83 in which he said this in relation to the terms of a contractual arbitration award:

> *"The first point is this: Was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractor. Until that claim is rejected, you cannot say that there is a dispute or difference. There must be both a claim and a rejection of it in order to constitute a dispute or difference".*

37. In paragraph 56, HHJ Simpkiss quotes HHJ Anthony Thornton QC (sitting in the TCC) in ***Fastrack Contractors Ltd v Morrison Construction Ltd*** [2000] BLR 168 in relation to an issue under the Housing Grants, Construction and Regeneration Act 1996:

"A 'dispute' can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion.

…The Court of Appeal [in the Monmouth case] held that a rejection of a claim does not necessarily occur when the claim is submitted to an engineer or during subsequent exchanges of views in relation to that claim. A dispute only arises when the claim is rejected in clear language. An obvious refusal to consider the claim or to answer it can, however, constitute such objection".

38. HHJ Simpkiss determined that the award in ***Lion Homes*** had been made without jurisdiction because there was no dispute and was void. He concluded at paragraph 68:

"It is important to have clarity and therefore if surveyors are to produce awards of their own initiative, they must make sure that there is clear evidence of a dispute, within the meaning set out above. In many cases the absence of a clear dispute may not be a problem, but if, as in this case, one party takes the point then the route to avoiding this lies in obtaining written acknowledgment of the parties that a dispute has arisen requiring an award, or a clear letter leading to a clear dispute if it is not responded to in its terms".

39. In this case, A says that she did not did not even have the luxury of being told what the claim against her was, let alone be consulted in the matter, or be given the opportunity to engage with the First and Second Respondents or the two surveyors regarding it. Mr Frame submits that it is clear that no dispute at all could possibly have arisen between A and R1/2 in such circumstances, and certainly not one that required resolution by way of an award made by surveyors.

40. R1/2 and R4 contend that a dispute arose simply as a result of R1/2 referring the cracking to R4. When and how R1/2 did so is unclear. The correspondence shows that on 11.12.18, R4 emailed R2 enclosing a letter from A's solicitors about the foundations. In that email, he asked if R1/2 had *"suffered any damage as a result of the works to date"*. R2 replied by email the next day asking for 'a quick chat' about the letter but not mentioning any damage. R4 told me in submissions that in fact, there had been a phone call with R1 or 2 (it is unclear which) in December 2018, in which she mentioned some damage. If that is the case, it was not explained why R4 did not act on that report immediately.

41. On 22.5.19, R4 wrote a 3-page letter to A's solicitors, disputing the validity of the Second Award. The salient parts of that letter are on the last page as follows:

"4……you will now be aware that only disputed matters may be referred to the Third Surveyor. The subject matter of the outstanding fees of Mr Newton and myself cannot possibly be a disputed matter since your client is not yet aware of what they are. Furthermore, it is now also settled law that the Appointed Surveyors have jurisdiction to make an award for their costs even where their fees are not in dispute [with a footnote reference to ***Farrs Lane****], as provided by sections 10(12) and 10(13) of the Act.*

4.1 The appointed surveyors shall determine their costs in due course by way of a further award or awards. We have outstanding costs in relation to our involvement in this matter since the First Awards were issued in 2015 and have now received from the Adjoining Owner reports of damage believed to be attributable to the awarded works. This matter is currently being investigated by the Appointed Surveyors and we will be in contact in due course".

42. Immediately after sending that letter to A's solicitors by email, R4 sent an email to R2 saying *"Please see attached a letter I received from Ms Evans' solicitors yesterday shortly after Katrina and I spoke. I also attach my response which I am confident will put them in their place.*

Please do let me know of any damage you consider you have suffered. The Award allows me to deal with this on your behalf at Ms Evans cost".

43. In submissions, R4 said that R1 had mentioned damage in that phone call on 21.5.19 which explains the reference to damage in the letter to A's solicitors. If that is correct, it is curious that R4 again asked to be notified of any damage in his email. Nor do the terms of R1's email of 19.6.19, set out in paragraph 10 above, suggest any previous telephone discussions. It was only after receipt of R1's email that R4 notified R3 of the allegations of damage. Lastly, I note that clause 9 in the Third Award states that R1/2 complained about the cracking 'in or around late 2019'. I can take the matter no further as I have no witness statements from R1/2 or R4.

44. In any event, it is clear that at no time did R1/2 contact A or her solicitors to notify her of any damage. It is also clear that the only communication from either surveyor to A or her solicitors was R4's letter of 22.5.19 until the Third Award was served some 13 months later. It appears that neither A nor her solicitors replied to that letter; it may be that they were waiting to hear further from the surveyors, but I have no evidence in that regard.

45. In ***Mills v Savage*** (unreported), HHJ Bailey said at paragraph 131: *"Party wall surveyors are exercising a quasi-arbirtal function. They are bound by the rules of natural justice. It is axiomatic that in considering and making an award a party wall surveyor…..must enable the parties to make submissions if they wish and must give due consideration to any submissions made"*.

46. R4 submitted that his letter of 22.5.19 complied with the requirements of natural justice; A was given notice of the allegation of damage and had ample opportunity to respond but failed to do so. That failure to respond amounted to a rejection, as held in ***Fastrack***. He contended that the words '*we will be in contact in due course"* had to be understood as meaning that the surveyors would produce an award.

47. In my judgment, those few lines referring to the possibility that the works may have caused damage to No.11 do not amount to clearly putting a claim to A. The letter does not even mention the type of damage. The obvious way in which the last sentence would be understood is not that the surveyors will proceed to make an award, but that they will investigate to see if the works have caused any damage and will revert to the parties with their views.

48. I accept that ***Lion*** Homes is not completely on all fours with this case, since in that case neither party asked for the surveyors to become involved. I am doubtful that R1's email of 19.6.19 can properly be said to be a referral to the surveyors or a request for a further award. At best, it is a request to R4 to inspect and compare with the schedule of condition. But even if there was a referral by R1/2, in the circumstances of this case that did not mean that a dispute had arisen without more, or that the surveyors were entitled to act thereafter without reference to A.

49. In ***K Group Holdings Inc v Saidco International SA*** 19.7.21 (unreported), (a case with more extreme facts), HHJ Parfitt said this at paragraph 30:

"Party wall surveyors are subject to the requirements of natural justice or to put the same point a different way, those parties who are to be impacted by awards made under the Act have natural justice rights related to such awards. Quite how those requirements will work out in any particular case will always be very sensitive to the particular circumstances. The court will always have regard to the party wall surveyor as being a statutory appointment, designed to deal with matters practically and justly and will not be too prescriptive about what is required. However, I would agree with the appellants that an essential requirement of any award process is not to make an award against somebody who has absolutely no idea you are considering an award, who has no idea about the existence of any dispute or issue which might be the subject of an award, has no idea about the process that is purportedly involving them and have no opportunity to participate".

50. In my judgment, those words apply with considerable force to this case. The Appellant remained completely unaware of the nature of the damage alleged or what, if any, remedial works were expected or required. The two surveyors provided no indication that they had inspected No. 11 or that they were preparing an award dealing with the issue. The Appellant was given no opportunity to come to an agreement with R1/2 or to make submissions or to participate in the process in any way. One obvious way in which A's lack of participation was prejudicial to her was that she was unable to raise with the surveyors the issue of causation of any damage. As I have set out above, the Third Award proceeded on the basis that the work had been ongoing until 2019, rather than having ceased 3 years before the cracking was apparently noticed. The process was, in my judgment, fundamentally unfair.

51. I am conscious that the Act is designed to provide a quick, efficient and final method of resolving disputes and that a degree of flexibility is required. However, the process must also be fair and impartial. Whilst an allegation of damage to No.11 was a matter 'connected with any work to which this Act relates' for the purposes of s10(10)(a), I conclude that there was no dispute for the purposes of s10(10)(b) between the parties to give rise to a jurisdiction to make the Third Award.

(2) Was it necessary for a dispute to have arisen?

52. In his skeleton argument, R4 states that ***Farrs Lane*** makes it clear that *"the ability of party wall surveyors to draw jurisdiction in order to 'determine' matters under the Act does not always require a 'dispute' beyond the originating dispute which triggered the appointment of surveyors under section 10 of the Act. Therefore, following the initial dispute in response to service of notices whereby the surveyors are appointed, further*

matters may be 'determined' by the appointed surveyors regardless of any dispute between the parties".

53. ***Farrs Lane*** was a case in which Mr. McAllister's right to award his professional costs of the primary award against his own appointing owner (the Building Owner) was challenged on the basis that it was not a matter 'in dispute' between the Building Owner and the Adjoining Owner. Holgate J found that the issue of surveyor's costs was not necessarily a matter that needed to be 'in dispute' in order to be included in an award, as it was a matter that was 'consequential' or 'incidental' to the primary dispute that the award was settling. At paragraphs 39 and 40 he stated:

"39. First, turning to section 10(12)(c), the phrase "any other matter arising out of or incidental to the dispute …" is apt to include matters going beyond the ambit of the dispute between the parties. For example, there could be consequential matters which are not the subject of disagreement between the parties. Second, the word "determined" is not limited to the making of a decision on a dispute. As a matter of ordinary English, the word can simply mean "to lay down decisively or authoritatively or to pronounce or to declare". That makes sense in the present context, so that the award can be enforced between the owners as a totality. Such an approach enables a complete package of provisions to be treated as binding as between the parties and to be enforced, some of which provisions may be the outcome of the resolution of disputed matters and others of which may not.

40. It is common ground that section 10(12)(c) can cover consequential matters arising from the approval of "works" by an award; for example, an environmental protection scheme relating not only to the carrying out of disputed "works" but also subsequent monitoring of their effects. However, on the claimant's argument, an award could only determine, and therefore could only include, such matters if they themselves had been in dispute. I reject that narrow reading of the word "determine"."

54. I do not agree that ***Farrs Lane*** is authority for the proposition that once an award has been made, there is jurisdiction for the surveyors to determine any other matters which may arise later without the need for a dispute. The case itself concerned costs incidental to the making of the primary award and the judgment makes it clear that such 'consequential' or 'incidental' matters can be included in an award (as in the express wording of section 10(12)(c)) even if they are not in dispute, in order to provide a complete package of provisions. In my judgment, this does not however remove the fundamental need for there to be a dispute between the parties which underpins the need for any subsequent award in the first place.

55. For those reasons, I do not agree with HHJ Simpkiss' conclusion in paragraph 62 when he says that ***Farrs Lane*** *"appears to be authority for the proposition that an issue arising after the original award can be determined without the parties being in dispute, provided it can come within the terms of s10(12)(c)".* Indeed, he appears to come to a contrary view in the following paragraph:

"63. Early on during the hearing Mr. Isaac conceded that there would have to be a dispute for the surveyors to make an addendum award and that they couldn't do it simply off their own bat. I consider that concession to have been rightly made in the context of this case. If a determination is to be made then it makes not [sic] sense,

outside the context of McAllister itself, for the surveyors to make an award without there being any reference to them by at least one of the parties.
That appears to have been what Mr. Crowther expected to happen. For something to require "determination" by the surveyors under s. 10(12)(c) may or may not require a dispute, but there is a world of difference from the incidence of costs and matters which are a natural consequence of the completion of the works (such as the environmental scheme contemplated by Holgate J as being a necessary part of starting the works authorised by the award) and significant works consequential on a subsequent accident to other property."

56. I am not persuaded that ***Farrs Lane*** assists the Respondents as they suggest. I turn now to the clauses in the First Award on which R4 relies. R4 suggests that the surveyors' jurisdiction to make the Third Award comes from clauses 4(c) and 11 in the First Award. Mention was also made in the skeleton argument of clause 4(e) which provides that A shall 'bear the costs of making any justified claims' but I was not addressed on that point which appears to take matters no further.

57. It is well-established that a tribunal of limited jurisdiction cannot by its own volition enlarge that jurisdiction. The surveyors derive their jurisdiction from the Act, and they cannot enlarge that jurisdiction beyond that which the statute provides. A submits and R1/2 agree that the surveyors' jurisdiction to make a further award comes from the Act, not from the First Award and I agree.

58. An identical clause to that found at clause 4(c) of the First Award in the present case was dealt with in ***Lea Valley Developments v Derbyshire*** [2017] EWHC 1353 (TCC). This was a case in which the works were solely under s6 of the Act. Mr. A Williamson QC observed at paragraph 23 of his judgment that s2 makes express provision for making good but there is no such provision in s6. He held that such a clause in the primary award was *ultra vires*, as pursuant to s10(10) *"the parties were not, when the Award was made, 'in dispute' about a right of making good, a matter not contemplated by section 6 at all"*. Further, in relation to s10(12), *"an obligation to make good neither arises out of, nor is incidental to, a dispute under section 6"*.

59. In cases where damage is caused by s6 works, the provision for compensation is contained in s7(2). As Mr Frame pointed out in submissions, the Third Award states that it is made under s7(2) (clause 17). There is no determination in the award as to whether the damage was caused by the s2 or s6 works or both.

60. I am satisfied that the reasoning in ***Lea Valley*** applies to this case. In any event, clause 4(c) qualifies the requirement to make good by the words 'where so required by the Act'. The clause therefore appears to do no more than mirror the Act but to the extent that it purports to impose a blanket obligation to make good which goes beyond the Act, it is *ultra vires*.

61. As for clause 11, this appears not to assist R4 as he suggests, since the right of the surveyors to make further awards is qualified by the words '*that may be necessary*'. An award would only be necessary under s10(10) if there was a dispute between the parties. Insofar as the clause purports to give the surveyors the power to make awards without a dispute, that is not a right granted by the Act and the clause is *ultra vires*.

62. R4 submits that A cannot now take issue with clauses in the First Award which was not appealed. In ***Zissis v Lukomski*** [2006] EWCA Civ 341 at paragraph 45 the Court of Appeal confirmed that *"a party challenging an invalid award does not need to do so by the appeal process but may seek declaratory relief or challenge the award's validity by resisting its enforcement or by bringing an action inconsistent with it* (Re Stone and Hastie's Contract [1903] 2 KB 463 and Gyle-Thompson v Wall Street (Properties) Ltd [1974] 1 WLR at page 130). I am satisfied that by this appeal, A is challenging the *vires* of the clauses (to the extent that is necessary) on the second and third bases as approved in ***Zissis***.

63. Lastly in relation to this issue, I turn to R4's submission that s11(8) of the Act gave the surveyors jurisdiction. He emphasised that that section (as well as s12(1)) does not mention the word 'dispute'. In my judgment, that argument does not assist R4. Firstly, section 11(8) is only applicable in relation to damage caused by s2 works but in any event, s11(8) says that the expenses will be determined in accordance with s10 and in order for s10 to apply, there must be a dispute. Similarly, s12(1) refers back to s10.

64. For all the reasons given, I am satisfied that the award of compensation to R1 and R2 was made without jurisdiction and is a nullity.

(3) Surveyors' costs

65. The last issue is whether the award of costs can nonetheless stand. Mr McAllister contends that he is entitled to the costs specified in the Third Award under s10(13). *"This award must be valid on costs at least"* he submitted.

66. As I set out at the beginning of this judgment, the costs award is framed as the surveyors' costs *"for their involvement since the First Award was served, up to and including the making of this Award"*. The figure claimed by R4 appears to be made up of the costs of making the Third Award and the costs of R4's communications with A's solicitors about the alleged error in the First Award but there is no breakdown of the figure from which it can be seen how much relates to each category.

67. It follows from my finding that the award of compensation was made without jurisdiction that the award in respect of the costs of making that award must also be set aside. Whilst an award can be severed in principle, it is not possible to sever the costs award as no separate figure for the pre-award costs is given. Accordingly, the whole costs award must be set aside.

Conclusion

68. R4 submitted that in bringing this appeal, A is trying to (a) prevent the surveyors from going about their statutory duties; (b) deprive the surveyors of their costs of doing so; and (c) deprive the adjoining owner of the ability to have costs in lieu of making good.

69. I think it is sufficient to say that this judgment does not prevent R1/2 from raising a claim in relation to the alleged damage. If A (contrary to her expressed intention) does not engage with that claim or agreement cannot be reached, the surveyors will be entitled to and indeed obliged to make a further award.