Party Wall Disputes

Notes for a talk at the PLA Autumn Training Day 2021

Introduction

Over the years I have bumped into the Party Wall etc Act 1996 from time to time. And earlier this year I was involved in a case that raised a number of issues relating to the dispute resolution procedures in s.10 of the Act, where I had the great pleasure of working with Scott Goldstein and Luke Arnold at Payne Hicks Beach and Cecily Crampin in my Chambers.

It related to Aldford House on Park Lane, a building with commercial premises on the ground floor and in the basement, and many flats above. The case was a bizarre one, and raised a number of interesting and important issues as to the operation of the Act.

The case is called *Park Lane Holdings Inc v Saidco International SA* (19 July 20210, HHJ Parfitt in the County Court at Central London). It concerned an appeal against a party wall award. To give a flavour of the case, the Judge began by saying: "… *it is perhaps worth flagging at the outset that, certainly in my experience, the circumstances in which this award has been made seem to me uniquely inappropriate and misguided*."

However, before telling you more about that, I propose first to provide a very brief overview of the main features of the Act.

I will then discuss a couple of legal issues in relation to what happens if someone wants to carry out, or does carry out, building works without serving the notices required by the Act.

Then I will address a number of points in relation to party wall appeals which I hope, if you ever get involved in one, will help you on the way to securing victory for your client and make them happy.

Brief overview of the main provisions of the 1996 Act

The Party Wall etc Act 1996 was enacted on 18 July 1996. So it is 25 years old this year. I expect the party wall surveyors in the Pyramus and Thisbe Club got together for a celebration.

For those of you who don't know that Club, it is a well known association of party wall surveyors. They have named their association after a pair of ill fated lovers who lived in Babylon in adjacent houses. Their parents hate each other so they can never meet, but whisper their love through a crack in the party wall. Ovid says that they blamed the wall for their separation: "Thou envious wall why art thou standing in the way of those who die for love?" Which seems an eccentric analysis of the reason that they could not meet. But eccentricity is something of a feature of party wall litigation.

In essence, the 1996 Act establishes a statutory procedure intended to identify and resolve issues between neighbours that might arise when someone performs building works on his land that might adversely affect the legitimate interests of an adjacent landowner.

The 1996 Act operates by requiring the owner of the land upon which the works are to be performed, called the "building owner" to give notice to his neighbour, called the "adjoining owner" where, simplifying somewhat, he intends to

(1) build a new wall on the boundary line in circumstances where there is no existing building there and, if there is an existing wall, it is on one side of the boundary only (section 1),

(2) carry out specified types of work on a boundary structure (sections 2 to 5), or

(3) carry out excavation works within specified distances of a building or structure of an adjoining owner (section 6).

S.6 is the "etc" in the title to the Act, because it is not concerned with party walls at all. It is concerned with people digging holes on their own land near to the boundary.

Most disputes arise under s.2, so I will focus on those when discussing how the Act works.

The essential scheme is that a building owner who wants to do work falling within s.3 should serve a "party structure notice" under s.3 on all adjoining owners. The notice says that the building owner desires to exercise one or more of the s.2 rights.

Then, under s.4 the adjoining owner can serve a counter-notice, saying that they want additional works done for their own benefit. This is unusual. It is not necessary for the adjoining owner to serve a s.4 counter-notice unless they want extra works done.

Under s.5, the adjoining owner can serve a notice consenting to the party structure notice. If no such notice has been served within 14 days he is deemed to have dissented and a dispute is deemed to have arisen.

That takes one to s.10 and the weird and wonderful dispute resolution procedures it imposes.

But before we turn to that, I want to discuss two issues relating to the position if no party structure notice is served.

Is there a statutory duty to serve a party structure notice?

Sections 1 and 6 clearly impose statutory duties. Section 1(2) and 6(5) say that, in the circumstances they describe, the building owner "shall" serve a notice at least 1 month before starting work.

Sections 2-5 are drafted differently. Section 2(1) tells you when s.2 applies – essentially either where a wall or floor separates buildings or parts of buildings in separate ownership, or where there is a wall at the boundary line which stands partly on one owner's land and partly on the other owner's land.

Section 2(2) then says that where s.2 applies, a building owner "shall have the following rights".

Section 3(1) says that, at least 2 months before "exercising any right conferred on him by section 2" a building owner shall serve on any adjoining owner a notice called a "party structure notice".

The natural reading of that drafting is that you only need to serve a party structure notice if you want to take advantage of the s.2 rights. If you can do what you want to do in pursuance of your rights as owner of your property, you don't need to worry about a party structure notice.

So, for example, take a wall of my house, and which stands exclusively on my land. It separates my house from the shop next doors. But it is my wall. At common law, I can do anything I want to the wall, provided I don't cause a nuisance to my neighbour. Say I want to cut into it in order to put a damp proof course in. At common law I could do this without giving any notice to my neighbour and without involving three surveyors.

But because the wall separates two buildings in different ownership, it is a "party wall" and therefore a "party structure" for the purposes of the Act. And one of the s.2 rights is to cut into a party structure for any purpose including inserting a damp proof course.

Do I have to give notice? Can my neighbour get an injunction to stop the work if I don't serve one? Do I have to stick within the Act or can I shake it off?

This is not clear.

In a 2018 case, Hickinbottom LJ said of the 1996 Act scheme:

"*The scheme operates outside the common law, the purpose of the 1996 Act being to provide a simple and relatively inexpensive statutory dispute resolution mechanism, which, when the provisions of the Act are operated, supplants the respective common law rights and replaces them with rights under the Act. If for any reason the statutory procedure is not followed, then the parties' respective common law rights and obligations continue to apply*",

see *Keane v Group One Investments* [2018] EWCA Civ 3139 at [2].

So that suggests that, if no notice is served, the common law applies without the Act having anything to say.

However, in one very old case, in 1878, Sir George Jessel MR held that the rights conferred by the party wall legislation which applied in London at that time, the Metropolitan Building Act 1855, completely replaced the common law rights of the owner of a wall. He said: "*whatever the rights at common law might have been, such right no longer exists*": *Standard Bank of British South America v Stokes* (1878) 9 ChD 68.

In that case, the building owner would have been entitled at common law to do the works he intended to do without serving a notice, but Sir George Jessel held that the 1855 Act made it unlawful for him to do the work without serving a notice.

If the same is true of the 1996 Act, then Hickinbottom LJ was wrong to say that if for any reason the statutory procedure is not followed, then the parties' respective common law rights continue to apply. Rather, the Act has taken away all common law rights covering the activities to which the Act applies.

Two points are clear.

First, if a building owner carries out notifiable works without giving notice, they can be liable at common law in nuisance, trespass, and negligence. If a building owner does not obtain the s.2 rights then the Act gives them no protection. That was decided by the Court of Appeal in *Louis v Sadiq* (1996) 74 P & CR 325, decided under the London Building Acts (Amendment) Act 1939.

Evans LJ said:

> "*But if he commits an actionable nuisance without giving notice and without obtaining consent, he cannot rely upon a statutory defence under procedures with which ex hypothesi he has failed to comply.*"

It is also clear that, in such a claim, the Court will give the benefit of the doubt to the adjoining owner: *Roadrunner Properties Ltd v Dean* [2004] 1 E.G.L.R. 73. Chadwick LJ said:

> "*… in a case where the building owner has chosen to carry out works to a party wall without serving the notice for which the statutory scheme provides, he should not be allowed to obtain a forensic advantage by his own failure to comply with the statutory requirements…. a court should be prepared to take a reasonably robust approach to causation. If it can be shown that the damage which has occurred is the sort of damage which one might expect to occur from the nature of the works that have been carried out, the court must recognise that the inability to provide any greater proof of the necessary causative link is an inability which results from the building owner's failure to comply with its statutory obligations*".

But it is not clear whether the s.2 rights wholly replace all equivalent common law rights so that a person owes a duty to his neighbours not to do any of the s.2 works without serving a notice first and then, if there is a dispute, obtaining an award under s.10. No such claim was argued in *Louis v Sadiq* or *Roadrunner.* And the drafting of the 1996 Act differs in some respect from the Metropolitan Building Act 1855.

In one case, it was said by an Official Referee, HHJ Thornton QC, that there was a duty to serve a s.3 notice, but in that case s.6 also applied, and the contrary was not argued: *Crowley v Rushmoor BC* [2009] EWHC 2237 (TCC).

So the matter remains open for argument.

Can a compensation claim be made using the s.10 procedure if no notice is served?

S.7(2) provides: "*The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act*."

So that creates a statutory entitlement to compensation for any loss or damage, provided the work is "*executed in pursuance of this Act*".

It has been said at High Court level that a claim can be made under s.7(2) even if no party structure notice has been served prior to the work taking place and the damage occurring. In *Crowley v Rushmoor BC* [2009] EWHC 2237 (TCC) HHJ Thornton QC identified three ways in which an adjoining owner could bring proceedings against a building owner for damage caused by notifiable works where no 1996 Act notices had been served. The first was that the s.10 procedures can be operated retrospectively. The second was a claim for breach of the statutory duty to serve a notice. The third was a common law claim for negligence, nuisance, trespass, and withdrawal of support. On the first, he said:

> "*103. Firstly, the relevant arbitration provisions provided for by the Party Wall Act can always be operated retrospectively. These provisions involve the appointment of surveyors to resolve disputes arising in connection with any matter connected with any work to which the Party Wall Act relates. The surveyors so appointed would have jurisdiction to award appropriate compensation for any damage resulting from excavation or demolition work close to the flank wall and the adjoining planter which could and should have been, but had not been, made subject to an appropriate award prior to work starting and which undermined and damaged the foundations and the property that they supported (see sections 7(2),10(1), 10(12), 10(13)(c)) and 17 of the Party Wall Act).*"

However, in a County Court decision last year, *Shah v Kyson* (HHJ Parfitt 2.3.2020), it was held that this is only possible if the building owner serves a notice. He said that the principle was "*no notice, no Act*". He said:

> "*So if works are carried out pursuant to the 1996 Act, i.e. a notice is served and then an award is made or there is an agreement as to the works and if those works cause damage or loss then compensation can be given under Section 7(2). It does not seem to me that section 7 can bear the weight the Defendants would have it do – i.e. to create a free standing right of compensation independent of the notice requirements*".

He thought HHJ Thornton's remarks were obiter and could only apply if both parties operated the procedures under the Act.

It is unclear whether this is correct. However, if there is a statutory duty to serve a s.3 notice then it would be possible to claim in court damages equal to the compensation that would have been awarded under s.7(2) had a notice been served.

Party wall appeals

I will now take you on a magical mystery tour of s.10.

We will start at the end with s.10(16) and s.10(17)

(16) The award shall be conclusive and shall not except as provided by this section be questioned in any court.

(17) Either of the parties to the dispute may, within the period of fourteen days beginning with the day on which an award made under this section is served on him, appeal to the county court against the award and the county court may—
(a) rescind the award or modify it in such manner as the court thinks fit; and
(b) make such order as to costs as the court thinks fit.

An appeal under s.10(17) is a statutory appeal to which CPR part 52 applies: *Zissis v Lukomski* [2006] 2 EGLR 61. So you use an Appellant's Notice – not a claim form. You therefore have to provide Grounds of Appeal which summarise the criticisms of the Award. The Appellant's Notice also enables you to say the orders that you want the Court to make on the appeal – like a prayer at the end of Particulars of Claim

The first point to note is that s.10(17) only applies if a party wants to appeal the award – i.e. recognises it as a valid award, but says it was wrongly made and should be rescinded or modified.

If the aggrieved party contends that the award was made without jurisdiction, and is a nullity, then it is unnecessary to appeal it. "*The award shall be conclusive*" only applies if there is a document which is actually a valid award made under the jurisdiction conferred by the Act. In one case, Brightman J said: "*The important point is that the building owner was not required to resort to the County Court in order to free himself from an obligation imposed by the surveyors in excess of their jurisdiction*": *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 WLR 123.

If the aggrieved party wishes to contend that the award was made without jurisdiction, is a nullity and, in the alternative, that it was wrongly made, then it is necessary to issue an appellant's notice within the time limit allowed. In that case, it is permissible to use an appellant's notice to assert that the award is void or, in the alternative, should be rescinded or modified: *Zissis v Lukomski* [2006] 2 EGLR 61.

The 2 week time limit is strict, and very short. It cannot be extended.

There are service provisions in s.15. But the Court of Appeal has held they are permissive, not obligatory: *Knight v Goulandris* [2018] 1 P. & C.R. 19. In that case, the adjoining owner received the award by email at 11:19 pm on 2 September 2015. He opened the email and read the award the next day. The Court held that was the date that it was served on him. That was the first of the 14 days, and so time for making the appeal expired on 16 September. The appeal was issued on 17 September. So it was out of time.

So if you have a client who is aggrieved by a party wall award, you really need to jump. You may have to do what I did in the Aldford House case – put together Grounds of Appeal which

are as coherent as you can make them, while making it clear that you will probably need to apply to amend them when further information becomes available.

The appeal must be issued in the county court, but if it is really heavy you can seek a transfer to the High Court.

Under part 52, an appeal usually proceeds by way of review, but with party wall appeals the judge usually directs that it will proceed by way of rehearing.

Things to think about if bringing a party wall appeal

If you are bringing a party wall appeal, then the things to think about are:

- Are the things that were determined in the award things that the surveyor or surveyors who made it had power to determine under the Act?
- Were there any flaws in the procedure that was followed in respect of the appointment of the surveyors and the making of the Award which could mean it was made without jurisdiction?
- What criticisms can be made of the substance of the Award, and how can those criticisms best be advanced on appeal? What evidence is needed to challenge the Award?

We will now look at the key provisions of s.10 with those questions in mind.

S.10(1) – appointment of surveyors

(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").

Although the Act talks about "surveyors" there is no requirement that they have any particular professional qualifications. In Aldford House, the individual who made the award, Antony Hemy, was an architect.

Surveyors appointed under the party wall legislation "*are in a quasi-judicial position with statutory powers and responsibilities*": per Brightman J in *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 WLR 123, 130, approved by the Court of Appeal in *Gray v Elite Town Management* [2016] EWCA Civ 1318.

They must, therefore, act in conformity with the principles of natural justice. In *Mills v Savage* [2016] EGLR 43 HHJ Bailey said, surely correctly:

> "*Party wall surveyors are exercising a quasi-arbitral function. They are bound by the rules of natural justice. It is axiomatic that in considering and making an award a party wall surveyor, and this must include the third surveyor, must enable the*

parties to make submissions if they wish and must give due consideration to any submissions made."

One thing to consider is whether the surveyor or surveyors who made the award did act fairly, and whether the Award itself contains any provisions that are unfair.

For example, in one county court case the award provided that, if one party had not raised any dispute in respect of a certain issue within 5 days of an inspection, it would be automatically determined against them. The Judge held the award void on other grounds. But he said that even if the award had been valid, that provision would not. He said: "… *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*," *Ash v Trimnell-Ritchard* (19 November 2020 HHJ Parfitt, County Court at Central London).

Procedural provisions about replacement of surveyors and the right to act ex parte

There then follow a number of provisions about the circumstances in which surveyors can cease to act and be replaced. These need to be studied very carefully if the need arises as they are not straightforward. The following points are worth noting:

First, a surveyor can deem themselves incapable of acting under s.10(5) in which case the party that appointed them may appoint another surveyor in his place. Whether or not a surveyor deems themselves incapable of acting is up to them.

Secondly, under s.10(6), if surveyor refuses to act effectively, the surveyor of the other party may proceed to act ex parte and anything so done by him shall be as effectual as if he had been an agreed surveyor. Clearly this cannot happen if the surveyor has deemed himself incapable of acting under s.10(5).

Thirdly, under s.10(7), a party or one surveyor can serve a request on the other party's surveyor asking him to act in some respect, and if the recipient neglects to act effectively for a period of ten days, the surveyor of the other party may proceed to act ex parte in respect of the subject matter of the request.

Fourthly, an award can be made by any two surveyors or by the third surveyor acting alone: s.10(10), s.10(11).

The matters that can be addressed in an award

(12) An award may determine—
(a) the right to execute any work;
(b) the time and manner of executing any work; and
(c) any other matter arising out of or incidental to the dispute including the costs of making the award; …

(13) The reasonable costs incurred in—
(a) 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.

The power of surveyors to make an award which is binding on the parties arises in the context of a dispute, or deemed dispute, arising under the 1996 Act.

Therefore an award cannot determine any common law rights or liabilities but is confined to rights and liabilities in respect of the matters covered by the Act. The "dispute" mentioned a number of times in s.10 is a dispute arising under the provisions of the 1996 Act, and the appointed surveyors have no power under the 1996 Act to grant common law or equitable relief for causes of action in trespass or nuisance: *Reeves v Blake* [2010] 1 W.L.R. 1.

So if a wall collapses after service of the party structure notice, the surveyors cannot determine who was responsible for the collapse: *Woodhouse v Consolidated Property Corp Ltd [*1993] 1 E.G.L.R. 174.

An award cannot confer rights going beyond those specified in the Act: *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 WLR 123.

For example, it cannot authorise the adjoining owner to build on the party wall in the future without serving a party structure notice: *Leadbetter v Marylebone Corpn (No. 1)* [1904] 2 KB 893, CA.

Nor can it authorise exploratory works to see if works are needed to a party structure, nor confer rights of entry in excess of those provided for in s.8: *Ash v Trimnell-Ritchard* (19 November 2020 HHJ Parfitt sitting in the County Court at Central London).

The right to make an award in respect of "*any other matter arising out of or incidental to the dispute including the costs of making the award*" does, however, authorise surveyors to give directions as to undisputed matters, provided they arise out of or are incidental to the dispute: *R (Farrs Lane Developments Ltd) v Bristol Magistrates' Court* [2016] EWHC 982 (Admin).

The distinction is between:

- making an award in respect of something which arises out of the dispute as to the rights and obligations created by the 1996 Act, or making an award which is incidental to that dispute, which is permissible, and

- making an award on a matter which, although relating to the properties and the building work, does not relate to or arise out of the rights and obligations created by the 1996 Act.

For example, if the adjoining owner, acting reasonably, takes legal advice on their rights under the 1996 Act, the costs of that advice can be awarded. Those costs arose out of the dispute about the exercise of the 1996 Act rights: *Onigbanjo v Pearson* [2008] BLR 507.

But if the adjoining owner incurs legal costs in obtaining advice about going to court to get an injunction to stop the building owner doing work not authorised under the Act, surveyors cannot make an award ordering the building owner to pay those costs: *Reeves v Blake* [2010] 1 W.L.R. 1. Nor can the surveyors award costs incurred in preparing to apply for an

injunction to restrain the building owner from doing work without serving a notice: *Keane v Group One Investments* [2018] EWCA Civ 3139. Proceedings in court to enforce common law or equitable remedies, such as damages or an injunction for trespass or nuisance or the threat of them, fall wholly outside the 1996 Act. That is equally true of preparations for such proceedings. Court proceedings to enforce, not the rights and remedies emanating from the 1996 Act, but those deriving from the common law or equity fall entirely outside the Act. The costs of such proceedings equally fall outside the ambit of the Act. That is true for the cost of actual proceedings, and the preparation for such proceedings.

One can see that there can be blurred lines between matters within the Act and matters not within the Act; the distinction is fine in principle but can create real difficulties in practice.

I will now turn to the Aldford House case, which illustrates the sort of points that can be taken on a party wall appeal.

The Aldford House case

I will first summarise the story. The headlessee of the building was a company called Park Lane Holdings Inc. It appointed a company called Holding and Management (UK) Limited to carry out works on the 6th and 7th floors to extend the flats on those floors and convert them from one flat on each floor to two flats on each floor and gave Holding and Management possession to carry out the works.

In 2009, Holding & Management as building owner served a s.2 party structure notice on Saidco as adjoining owner. Saidco was the long leasehold owner of flat 54 on the fifth floor. A separate s.2 party structure notice was served by Holding & Management as building owner on Park Lane Holdings as adjoining owner. The notices said that Holding and Management intended to do work to the party structure separating the fifth and sixth floors.

There was no response so that there was a deemed dispute. Holding & Management appointed Ian Crawford as its surveyor, and Mr Hemy was appointed as Saidco's surveyor. They together appointed Graham North as the third surveyor.

Mr Crawford and Mr Hemy then made awards authorising the works to be carried out and they were carried out.

During the works, in 2009, Saidco complained that the works had caused a water leak into Flat 54 and Mr Hemy discussed compensation with Mr Crawford and his colleague.

In 2011, an engineer who Mr Hemy had appointed asked for information about the structural calculations for the works. Some information was provided and the engineer asked for more, but nothing more was provided, and the matter was not followed up.

The discussions about compensation for the water leak continued up to the summer of 2013, but nothing was agreed and the matter was not pursued. Nothing further was said by Mr Hemy or by Saidco about the water leak or the structural calculations until 7 years later, in July 2020.

In the meantime, a number of things had changed:

- Holding & Management had been wound up and struck off the register of companies.
- Saidco had transferred the lease of flat 54 to another Panamanian company.
- Saidco had become "suspendido" under Panamanian law meaning that it could not present claims or exercise any right
- Park Lane Holdings had assigned the headlease to K Group, which used Holmanag Ltd as its agent.
- Mr Crawford had left the firm he had been at previously and had written to Mr Hemy saying that he, Mr Crawford, deemed himself incapable of acting

In July 2020, Mr Hemy sent to Holmanag a document which called itself an Addendum Party Wall Award, signed by Mr Hemy alone.

It identified the parties affected as Holding & Management as "Building Owners" and Saidco as "Adjoining Owners". It said that Mr Crawford, the building owner's surveyor, and Mr North, the third surveyor, had both been unable to act and therefore Mr Hemy as the adjoining owner's surveyor had had to issue the award alone. It said that Holding & Management had to either remove the extension, or produce satisfactory calculations. It ordered compensation for repairs to Flat 54 of £50,000. It ordered Holding & Management to pay Mr Hemy's fees said to be outstanding from the original 2009 award, and a further fees for additional work said to have been done since.

Park Lane Holdings' solicitors responded to Mr Hemy, pointing out Holmang had no authority to accept service of any documents on behalf of Holding & Management, and that they had spoken to Mr Crawford and Mr North who had not been consulted about the award, and Mr Hemy was not entitled to produce an award alone.

Several more months went by until, on 19 November 2020, Mr Hemy sent to Park Lane Holdings and K Group a new version of the Addendum Award. This one treated Park Lane Holdings and K Group as the building owners; Saidco was still treated as the adjoining owner. As before, it said that Mr Crawford and Mr North were unable to act and so Mr Hemy had made the award alone.

It said that the building owners had to either remove the extension, or produce satisfactory calculations. It ordered compensation for repairs to Flat 54 – which had now gone up from £50,000 to €445,982 or equivalent in pounds sterling. And it ordered the building owners to pay Mr Hemy's fees said to be outstanding from the original 2009 award, and a further fees for additional work said to have been done since.

That was the award that was successfully appealed from. There were 12 grounds of appeal and they all succeeded. I will not go through all of them but only those which afford illustrations of the sorts of points to look out for when preparing a party wall appeal.

1 No jurisdiction to make an award affecting anyone other than the original building owner

The Judge held that the only jurisdiction which Mr Hemy could have had was his appointment under the 2009 award made between Holding and Management as building

owner and Saidco as the adjoining owner. Park Lane Holdings was not party to that award and nor was K Group. Therefore, even if the 2009 award had authorised Mr Hemy to make a subsequent award dealing with structural calculations and compensation, it could only be made against Holding and Management.

An award determines matters in dispute, or deemed to be in dispute, between the building owner who served the notice and the adjoining owner who was served with it. It can impose obligations to pay money or do things on the parties, but not on anyone else.

2 No jurisdiction to determine new disputes which arose after the original award was made

The Judge held that the 2009 award did not give the appointed surveyors jurisdiction to make an award concerning the water damage or the structural calculations. He said: "…. *what cannot happen is for the surveyor to take for himself a sort of overarching jurisdiction to determine anything that might arise at any point in relation to Flat 54, Aldford House and the works that were done between 2009 and 2013 simply on the basis of the 2009 award*."

This is another point to look at when preparing a party wall appeal. Is the award one which was made in respect of a matter in dispute when the surveyors were appointed, or something arising from that dispute or incidental to it? Or does it arise from some separate and later dispute?

The power of surveyors to make what are called "addendum awards" is a matter of some uncertainty. One book says that, once surveyors have been appointed to resolve a dispute or deemed dispute about notifiable works, they remain in post throughout the works and have exclusive jurisdiction to determine any new dispute that arises during the works: *Isaac: The Law and Practice of Party Walls* (2nd ed) [8-38]. It is far from clear that this is justified by the language or policy of the Act.

3 Mr Hemy had no jurisdiction to make an award acting alone

This focussed on the fact that Mr Hemy had signed the award alone, when neither s.10(6) nor s.10(7) applied: "*There are, of course, limited circumstances in which an appointed surveyor could act alone or ex parte and I agree with the appellants that none of those circumstances arise here.*"

If you are faced with an ex parte award, then clearly it is essential to review in detail the facts that led up to its making and see whether either s.10(6) or 10(7) applied.

4 Mr Hemy had no jurisdiction because he did not invite submissions from the Appellants

This ground focussed on the fact that Mr Hemy made the award with no prior contact with the Appellants. The Judge said:

> "*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…. 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 had no opportunity to participate*."

As I have said, one thing to consider with a party wall appeal is whether the procedure used to make was fair and impartial. In this case, it was the opposite.

5 Award of €445,982 should not have been made as barred by the Limitation Act 1980

This ground was concerned solely with the award of compensation in the sum of €445,982 said to be in relation to damage to Flat 54 from an alleged water leak in 2009. The Appellants said that any cause of action Saidco had in relation to that leak under the 2009 Saidco Award accrued no later than 31.12.2009, and any action to recover it was time barred under the Limitation Act 1980 by 31.12.2015.

The Appellants relied on *Hillingdon London Borough Council v ARC* [1999] 1 Ch 139, which held that the cause of action for recovery of compensation for compulsory purchase accrues when the acquiring authority takes possession, even though the amount of compensation is not determined by the Lands Tribunal until much later.

The Judge agreed that this was a relevant analogy, and held that the limitation period started to run from whatever date it was in 2009 when Flat 54 first suffered damage, and the statutory right to compensation would be subject to a time bar after 6 years.

Limitation issues will, of course, only arise if there has been a long delay before the making of the award but, if that is the case, then they should be investigated.

6 No jurisdiction or wrong to make the award directing new structural calculations or removal

This focussed on the requirement in the award that the Appellants provide satisfactory calculations to prove that the existing structure and all elements affected by increased loadings were fully justified, or remove them.

The Judge agreed with the Appellants that a party wall surveyor has no power to grant in injunction of this kind: "*I do not consider the surveyors have power to investigate, rather than resolve disputes under the Act*."

This is an illustration of the need to consider whether any part of the award goes outside the powers conferred by s.10.

The costs dispute

The Appellants obtained an order for costs personally against the individual who owned and controlled Saidco. They also sought an order for costs against Mr Hemy personally.

The Judge joined Mr Hemy as a party and gave directions for that application to be determined.

As that remains outstanding, I will not say anything about it, except to point out that, in *Farrs Lane Developments Limited v Bristol Magistrates' Court* [2016] EWHC 982 (Admin), Holgate J indicated that, in a appropriate case, a surveyor who unreasonably makes an award they should not have made can be joined as a party, and ordered to pay the costs of the appeal. He said:

> *"49. It was suggested that this analysis might cause considerable difficulties for surveyors. I do not see why that should be so. First, a surveyor who acts reasonably should generally have no reason to fear that he will need to apply to be heard in a section 10(17) appeal, less still that he will be ordered to pay the costs of those proceedings or part thereof. Second, even where a surveyor may potentially be the subject of a third-party order for costs, the application for such an order would have to be made on notice so that the surveyor would have an opportunity to make representations to the court and it is to be expected that that jurisdiction would only be exercised in clear cases".*

Stephen Jourdan QC
17 November 2021