IN THE COUNTY COURT AT CENTRAL LONDON

Claim Nos. B20CL103, B20CL143, B20CL144

TECHNOLOGY AND CONSTRUCTION LIST

His Honour Judge Edward Bailey

Between:

(1) MR. STUART MILLS
(2) MRS KATHRYN MILLS

Appellants

v

(1) MR. PHILIP SAVAGE
(2) MRS PIPPA SAVAGE

Respondents

(1) MR. STUART MILLS
(2) MRS KATHRYN MILLS

Appellants

v

(1) MR. ALAN SELL
(2) MRS JOAN SELL

Respondents

JUDGMENT ON
PRELIMINARY ISSUES

Counsel for the Appellants	MR STUART J. FRAME (Direct Access)
Counsel for the Respondents	MR RICHARD POWER (instructed by Littlestone Cowan)

1. Mr and Mrs. Stuart Mills ('the Mills') purchased 29 Pembury Avenue, Worcester Park, Surrey, KT4 8BU in March 2014. It was their first home as a married couple. They intended to carry out renovation works to the property prior to taking up residence. For the purpose of the renovation works the Mills engaged the services of Mr O'Callaghan, Mrs. Mills' father, a building contractor.

2. The renovation works proposed to 29 Pembury Avenue were extensive. They were always likely to impact on the property's neighbours, Mr and Mrs. Savage of 27 Pembury Avenue ('the Savages') and Mr and Mrs. Sell of 31 Pembury Avenue ('the Sells'). In his witness statement of 29 March 2016 Mr Mills states that he had discussions with the adjoining neighbours before starting the renovation, but whatever the extent of those discussions they did not cover the Party Wall aspects of the works. The works commenced in June 2014.

3. On 30 June 2014 the Sells, adjoining owners at 31 Pembury Avenue, obtained a without notice injunction in the County Court at Kingston-upon-Thames which required the Mills to halt the works pending the service of Party Wall Act notices and the making of an appropriate award under the 1996 Act. On 8 July 2014, in compliance with the injunction, the Mills, who by this time had appointed Mr James Hopkins as their party wall surveyor, served on the Sells both a 'Party Structure Notice' under s 3 of the 1996 Act and a 'Three Metre Notice' under s 6 of the 1996 Act. On 11 July 2014 the Mills, by Mr Hopkins, served a 'Three Metre Notice' under s 6 of the 1996 Act on the Savages.

4. Both the Sells and the Savages respectively appointed Mr Philip Antino as their adjoining-owner party wall surveyor. Mr Charles Dawson of Dawson & Associates was selected as third surveyor on 9 September 2014. No progress was made towards an Award to permit the Mills to carry out their proposed works of renovation. It appears that the Mills, in consultation no doubt with Mr O'Callaghan and Mr Hopkins, decided to avoid any construction works that involved the Party Wall Act.

5. On 17 October 2014 Mr Hopkins wrote to both Adjoining Owners informing them that the Building Owners, having first substantially re-designed their works in order to minimise any works notifiable under the 1996 Act, had now decided not to carry out any further notifiable works to the property at all adding "and, accordingly, the party wall notices dated 8 July 2014 are hereby withdrawn". Mr Hopkins' letter confirmed that the Building Owners would pay the Adjoining Owners' surveyor's reasonable fees up to the date of the letter.

6. The Mills evidently hoped that this would be the end of the matter so far as their works had a statutory impact on their neighbours. They were sadly mistaken. For well over a year following the Mills' attempt to withdraw the party wall notices a most extraordinary dispute raged between the Mills and Mr O'Callaghan on one side and Mr Antino for both the Sells and the Savages on the other over a range of issues, but principally Mr Antino's fees. At times this dispute became very acrimonious. It has given rise to three separate Party Wall Award appeals. These are before the court as:

   (1) *Mills v Savage* B20CL103, an appeal against an award dated 28 July 2015 made by Mr David Taylor as third surveyor. As stated in the award the referral raised two matters, namely whether the address of the appointing owner of a party wall surveyor should (i) be included within a letter of appointment or (ii) disclosed to the adjoining owners. By his award, which is not straightforward to understand, Mr Taylor decided that a letter of appointment of a party wall surveyor must include the appointing owner's current residential address and he indicated, but did not formally determine, that Mr Mike Harry (who was then the building owner surveyor) was not validly appointed;

   (2) *Mills v Savage* B20CL143, an appeal against an award dated 1 October 2015 made by Mr Philip Antino as adjoining owners' surveyor and Mr David Taylor as third surveyor. By this award the surveyors determined that because the building owners had refused to comply with a direction to pay £4,000 on account of Mr Taylor's fees for the referral they had excluded themselves from participating (making submissions) in the referral and they made a series of awards for payment of fees in connection not only with fee accounts

submitted by Mr Antino but also made an award of, in effect, general damages (in the sum of £750) "for unreasonable and general obstructive approach and abusive behaviour/approach in dealing with and resolving party wall procedures".

(3) *Mills v Sell* B20CL144, an appeal against an award dated 1 October 2015 made by Mr Philip Antino as adjoining owners' surveyor and Mr David Taylor as third surveyor. By this award the surveyors determined that because the building owners and or their surveyor had 'refused to comply with the directions', (these not being specified), they had excluded themselves from participating in the referral and made a whole series of awards requiring payments for building works carried out by the adjoining owners, payments of fees and an award of general damages in the sum of £1,875 continuing at the rate of a 'minimum sum' of £25 per week.

7. These three appeals give rise to a number of issues, many relating to the fees of Mr Antino as party wall surveyor and the fees of the third surveyor. All the various issues which arise in the appeals will take some time to argue and determine in court. On 5 February 2016 I was persuaded by the parties to Order the trial of three preliminary issues, namely:

(1) Whether the Appellants' first surveyor, Mr. Hopkins, remains as their incumbent surveyor and/or whether the Respondents have waived any defect in his resignation and/or are estopped from so arguing that he remains the Appellants' incumbent surveyor. ('the James Hopkins issue')

(2) When the Award was served on the Appellant and consequently whether the Appeal was lodged in time. ('the service issue')

(3) Whether any procedural irregularities rendered the Award invalid and whether the Appellants are estopped from relying on or have waived any procedural irregularities. ('the validity issue')

The first issue cited above relates to all three appeals in this matter, namely Claim Nos B20CL103, B20CL143, and B20CL144. The second and third issues set out above relate only to the awards dated 1 October 2015 that are the subject of Claim Nos B20CL143 and B20CL144.

8. For the purposes of considering and determining the preliminary issues it is not necessary to consider the entirety of the events which occurred in connection with the disputes between the Mills and, respectively, the Sells and the Savages. Nevertheless it is necessary for present purposes to set out much of the relevant chronology.

9. Before continuing with the facts it will be helpful to set out the provisions of s 10 Party Wall etc. Act 1996.

> **10 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").
>
> (2) All appointments and selections made under this section shall be in writing and shall not be rescinded by either party.
>
> (3) If an agreed surveyor—
>
> (a) refuses to act;
>
> (b) neglects to act for a period of ten days beginning with the day on which either party serves a request on him;
>
> (c) dies before the dispute is settled; or
>
> (d) becomes or deems himself incapable of acting,
>
> the proceedings for settling such dispute shall begin *de novo*.
>
> (4) If either party to the dispute—

(a) refuses to appoint a surveyor under subsection (1)(b), or

(b) neglects to appoint a surveyor under subsection (1)(b) for a period of ten days beginning with the day on which the other party serves a request on him,

the other party may make the appointment on his behalf.

(5) If, before the dispute is settled, a surveyor appointed under paragraph (b) of subsection (1) by a party to the dispute dies, or becomes or deems himself incapable of acting, the party who appointed him may appoint another surveyor in his place with the same power and authority.

(6) If a surveyor—

(a) appointed under paragraph (b) of subsection (1) by a party to the dispute; or

(b) appointed under subsection (4) or (5),

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.

(7) If a surveyor—

(a) appointed under paragraph (b) of subsection (1) by a party to the dispute; or

(b) appointed under subsection (4) or (5),

neglects to act effectively for a period of ten days beginning with the day on which either party or the surveyor of the other party serves a request on him, the surveyor of the other party may proceed to act *ex parte* in respect of the subject matter of the request and anything so done by him shall be as effectual as if he had been an agreed surveyor.

(8) If either surveyor appointed under subsection (1)(b) by a party to the dispute refuses to select a third surveyor under subsection (1) or (9), or neglects to do so for a period of ten days beginning with the day on which the other surveyor serves a request on him—

(a) the appointing officer; or

(b) in cases where the relevant appointing officer or his employer is a party to the dispute, the Secretary of State,

may on the application of either surveyor select a third surveyor who shall have the same power and authority as if he had been selected under subsection (1) or subsection (9).

(9) If a third surveyor selected under subsection (1)(b)—

(a) refuses to act;

(b) neglects to act for a period of ten days beginning with the day on which either party or the surveyor appointed by either party serves a request on him; or

(c) dies, or becomes or deems himself incapable of acting, before the dispute is settled,

the other two of the three surveyors shall forthwith select another surveyor in his place with the same power and authority.

(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.

(11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary 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;

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.

(14) Where the surveyors appointed by the parties make an award the surveyors shall serve it forthwith on the parties.

(15) Where an award is made by the third surveyor—

(a) he shall, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors; and

(b) if it is served on their appointed surveyors, they shall serve it forthwith on the parties.

(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.

10. I now return to the facts I interrupted at paragraph 6 above.

11. With regard to 27 Pembury Avenue Mr Antino, having received Mr Hopkins' letter of 17 October 2014, accepted that the only remaining matter would be his fees, and on 24 October 2014 he sent Mr Hopkins a spreadsheet itemising his fees which amounted to £1,383.80 plus VAT, £1,660.56. In response Mr Antino received a letter dated 27 October 2014 from Mr O'Callaghan informing him that he, Mr O'Callaghan, would now be dealing with the 27 and 29 Pembury Avenue party wall award and asserting that it was absurd to suggest that his fees, calculated as they were at £225 per hour, were reasonable.

12. The letter from Mr O'Callaghan was followed by a letter from the Mills informing Mr Antino that "Mr O'Callaghan has our full authority to deal with all matters relating to the Party Wall Act 29 Pembury Avenue".

13. Mr Hopkins had apparently been away and on his return on 5 November 2014 he took up the question of fees with Mr Antino. Mr Antino had by then referred the question of his hourly rate to the third surveyor Mr Dawson, and Mr Hopkins asked Mr Dawson to hold fire while he discussed the issue with the Mills. There was no fruitful outcome to any such discussions.

14. On 14 November 2014 Mr Dawson received a letter from Mr Antino in connection with a referral in relation to building works, where the Sells were the Adjoining Owners, informing him that "Mr Hopkins is clearly no longer acting", that Mr O'Callaghan had written to state that he would be acting in Party Wall matters, but that he, Mr Antino, had no intention of dealing with Mr O'Callaghan "and I call upon you as the Third Surveyor to assist in this matter".

15. Mr Dawson e-mailed Mr Hopkins on 28 November 2014 to express his opinion that Mr Hopkins remained the Building Owners' surveyor, but the next day both he and Mr Antino received an e-mail from Mr Hopkins attaching a letter of resignation dated 28 November 2014, the covering e-mail explaining that "For cost reasons my appointing owners have asked me to resign as they wish to represent themselves".

16. The position was more complicated with regard to 31 Pembury Avenue where the Sells maintained that works had been carried out which amounted to a trespass and in breach of the injunctive relief which had been granted by District Judge Gold on 30 June 2014. In his letter of 22 October 2014 responding to Mr Hopkins' letter of 17 October 2014 withdrawing the Party Wall notices, Mr Antino made the point that Building Owners could not withdraw notices having completed work without the protection of an award. Mr Antino further pointed out that Mr Hopkins had made amendments to a draft award and that in doing so, Mr Antino suggested, had accepted that works had not been carried out properly and that further investigations would be necessary.

17. Mr Antino had by this time referred issues relating to the Mills' building works to Mr Dawson as third surveyor, and he saw no need to rescind this referral. As noted above Mr Antino informed Mr Dawson as to Mr O'Callaghan's 'appointment' as the Building Owners' party wall surveyor and his refusal to deal with him. It was the following day that Mr Antino received Mr Hopkins' letter of resignation which stated:

> "Please take this letter as my formal resignation as your party wall surveyor ... for the property at 29 Pembury Avenue... I deem myself incapable of acting in

this respect and I must advise you that all the rights, duties and obligations revert to you as the legal land owners."

I have already quoted part of the covering e-mail dated 29 November 2014. The full text is as follows:

> "For cost reasons my appointing owners have asked me to resign as they wish to represent themselves.
>
> "To that end please find attached copies of my letters of resignation for both sets of notices.
>
> "Philip [Mr Antino] – Please communicate a common sense list of your perceived remedial works and I am sure that a settlement can be made. It does not have to be the way that you are currently dealing with it. You appear to have got yourself embroiled in a neighbourly matter where people have taken sides (not me I hasten to add) whereas our role is to be objective.
>
> "As to your hourly rate all I did was type 'reasonable fees' over your hourly charge in a draft award and at no point have I said your rate is wrong. The total fee is a function of time and rate. If your rate is high and you spend far too long on the matter, then your overall fee will be unreasonable. If you spend a short amount of time and have a high rate, then overall, your fee will be reasonable. But I am sure you know all that.
>
> "The owners appointed representative from now on is Mr Kevin O'Callaghan. If you need his email it is [set out]."

18. Mr Antino's response to this e-mail was to describe Mr Hopkins' comments to Mr Dawson as "bizarre" and as "unprofessional criticism", while making the more substantive observation that Mr Hopkins should know he should not accede to his appointing owners' request to resign. Mr Antino also suggested that Mr O'Callaghan's involvement was unlikely to be helpful. In reply Mr Dawson pointed out that the 1996 Act allowed anyone to be appointed (although he might have added 'other than the owner in question') and that he would proceed with the referral.

19. On 20 January 2015 Mr Dawson published his Award on two matters referred to him in the 29/31 Pembury Avenue dispute namely Mr Antino's hourly rate and payment for a CCTV Drain Investigation. In his covering letter Mr Dawson informed the respective owners that he would not be available for future referral "due to pressure of work, which will keep me abroad in 2015".

20. While he may not have used the formal language of s 10(9)(c) of the 1996 Act, Mr Dawson's covering letter plainly indicated that he deemed himself incapable of

acting as the third surveyor. This put Mr Antino in something of a quandary, given that he was refusing to accept Mr O'Callaghan as the Building Owners' surveyor. Mr Antino's stance meant that he was the only surveyor in place, and, on the face of it, unable to proceed to make awards under s 10 of the 1996 Act.

21. On 30 January 2015 Mr Antino forwarded Mr Dawson's award to the Mills and requested that they pay his fees of the referral to Mr Dawson. Failing payment, Mr Antino asserted, he would be entitled to proceed ex parte under both s 10(6) and s 10(7) of the 1996 Act to make an Award, and that he would do so. This letter brought no response from the Mills and on 12 February 2015 Mr Antino proceeded to make an Award, ex parte, (in the 29/31 Pembury Avenue dispute) for the payment of his fees. On 3 March 2015 Mr Antino sent a letter before action.

22. Mr O'Callaghan's response to the letter before action, on 24 March 2015, was to assert that Mr Dawson had not been validly appointed, stressing that he, Mr O'Callaghan, was the only person with authority to act on behalf of the Mills. He also suggested that the Award had not been served, but he made an offer in respect of Mr Antino's claim for fees. Mr Antino instructed Mr Bean of MLC Solicitors.

23. On 7 April 2015 Mr Antino wrote letters to the Mills in both disputes. In his 27/29 Pembury Avenue dispute letter Mr Antino expressed the firm opinion that Mr Hopkins' "purported withdrawal of his appointment because Mr and Mrs Mills want to represent themselves is a refusal to act [and] is not a justified reason to deem himself incapable to act under s10(5)". Mr Antino asked the Mills to "resurrect Mr Hopkins' appointment, or appoint an independent experienced party wall surveyor" if they wished to dispute his fees.

24. In his 29/31 Pembury Avenue dispute letter Mr Antino stated that MLC Solicitors had requested a letter of authorisation of Mr O'Callaghan as the Mills' representative pending receipt of which he had been "instructed not to engage with Mr O'Callaghan". As to the service of the Award Mr Antino stated that he had a certificate of posting but was prepared to accept that the Mills may not have received the Award, and suggested that the Mills contact Mr Hopkins to invite him

to resurrect his appointment or alternatively appoint a qualified surveyor in his place.

25. Unable, it appears, to leave matters be, Mr Antino wrote to Mr Hopkins on 8 April 2015 (in the 27/29 Pembury Avenue dispute) asking Mr Hopkins to consider Mr Antino's outstanding fees and make an Award for their payment. Mr Antino added that he did not consider that Mr Hopkins' resignation was valid and stated that if Mr Hopkins did not join Mr Antino in making an Award for fees that would be treated as a refusal to act.

26. Mr Hopkins refused to reconsider his position and so, on 13 April 2015, Mr Antino wrote to Mr Dawson (two letters one for each dispute) asking him to continue as Third Surveyor.

> "If you do not agree to continue to act then regrettably that would be considered a refusal to act under section 10(6) albeit I accept that if you are out of the country you would have a very valid reason for not continuing. I am asking this question just for the avoidance of doubt and clarity because if you are not continuing to act as the Third Surveyor then I will have to try and agree the selection of another Third Surveyor with Mr O'Callaghan."

Mr Dawson declined to resume his role as Third Surveyor, and Mr Antino responded by accepting that Mr Dawson's refusal was a refusal to act for good reasons.

27. Meanwhile, Mr O'Callaghan had e-mailed MLC Solicitors attaching a copy of the letter of 4 November 2014 signed by both Mr and Mrs Mills authorising Mr O'Callaghan to act on their behalf. On 10 April 2014 (in the 29/31 Pembury Avenue dispute) Mr Antino wrote to Mr O'Callaghan in terms which appear, begrudgingly, to accept Mr O'Callaghan's appointment as technically possible but only if Mr Hopkins' "rescinding his appointment" is valid. Mr Antino raised concerns as to Mr O'Callaghan's competence to act and doubts as to Mr O'Callaghan's ability to act impartially and with a clear mind. On a more practical level Mr Antino raised the issue of service, 29 Pembury Avenue being vacant, and 'requires' both Mr O'Callaghan's full address and the Mills' current home address otherwise all documents sent to 29 Pembury Avenue will be deemed delivered.

28. On 16 April 2015 Mr Antino sent an e-mail to Mr Alex Chaplin in his capacity as the appointing officer for the Royal Borough of Kingston upon Thames, to whom he had spoken the previous day, asking him to select a Third Surveyor under s 10(8) of the 1996 Act. In reply Mr Chaplin expressed concern as to the party wall surveyor position as explained to him, suggesting that he would have difficulty finding anyone to act as Third Surveyor, but also raising doubts as to whether the procedure laid down in s 10(9) of the 1996 Act had been followed.

29. Indeed the statutory procedure had not been followed (assuming of course that Mr O'Callaghan was validly appointed) and on 20 April 2015 Mr Antino wrote to Mr O'Callaghan (again two letters one in each dispute) seeking his agreement to select a Third Surveyor within 10 days otherwise "I shall without further redress request the local authority under section 10(8) to select a Third Surveyor".

30. On 1 May 2015 Mr Antino wrote to Mr Chaplin (a letter in each dispute) with a request that Mr David Taylor, Vice President of the Chartered Association of Building Engineers, be appointed as Third Surveyor, and on 5 May 2015 Mr Chaplin duly obliged without any consultation with Mr O'Callaghan. This brought forth an immediate response from Mr O'Callaghan who complained that Mr Taylor was based in Norfolk, ie a considerable distance from the properties, had been nominated by Mr Antino, and that there had been no communication let alone consultation with him as the Building Owners' surveyor.

31. There was also this complication. Mr Antino had also, erroneously, approached Mr Robert Hunter-Jones, the appointing officer for the London Borough of Sutton to make an appointment. Mr Hunter-Jones had, very properly, written to the Mills on 22 April 2015 informing them that Mr Antino had proposed Mr Taylor as Third Surveyor and asking them whether they had any objection to Mr Taylor's appointment. On learning of the error as to the proper appointing officer Mr Antino had told Mr O'Callaghan to ignore Mr Hunter-Jones' letter of 22 April 2015, which he did, and accordingly Mr O'Callaghan was understandably put out to learn that Mr Chaplin had proceeded to appoint Mr Taylor without first raising the matter with the Mills to ascertain whether or not they had any objection.

32. Mr Taylor notified all parties of his acceptance of his selection by letters dated 11 May 2015, and received a firm response from Mr O'Callaghan on 13 May 2015 stating that he did not accept Mr Taylor's nomination and suggesting that a surveyor local to the properties concerned should be appointed. Replying by return Mr Taylor informed Mr and Mrs Mills that his appointment was valid, and that as he had accepted appointment as third surveyor that appointment could not be rescinded. Mr O'Callaghan's complaint as to the selection to Mr Antino was met with the response that it was not he, Mr Antino, who selected Mr Taylor but Mr Chaplin, a statement which while strictly true was, in the light of the correspondence between Mr Antino and Mr Chaplin, disingenuous.

33. Following his selection as Third Surveyor Mr Taylor took up the question of his resignation the previous November with Mr Hopkins. Mr Taylor suggested that Mr Hopkins' resignation was not in accordance with s 10 of the 1996 Act. There is no indication in the trial bundle that Mr Hopkins engaged with Mr Taylor as to the validity of his resignation.

34. 29 Pembury Avenue was sold by Mr and Mrs Mills to Mr O'Callaghan on 3 June 2015. On 4 June 2015 Mr O'Callaghan wrote to Mr Antino to inform him that he was now the owner of 29 Pembury Avenue and to make an offer to settle Mr Antino's fees. In rejecting the offer by letter of 8 June 2015 Mr Antino informed Mr O'Callaghan, correctly, that the transfer of ownership of the property would not affect the Mills' liability for party wall matters which arose during their period of ownership and that he, Mr O'Callaghan, was now precluded by statute from acting as the Building Owner's party wall surveyor.

35. Mr O'Callaghan's ardent desire (on the face of it) remained to extricate himself and his daughter and son-in-law from the unwelcome continuation of the party wall procedure. He replied to Mr Antino the next day, 9 June 2015, making a further offer to settle the fee claims, challenging the propriety of both Mr Dawson's and Mr Taylor's respective appointments. His offers to settle were not accepted although the terms of the offer with payment gives rise to an issue not presently before the court as to accord and satisfaction.

36. On 11 June 2015 Mr O'Callaghan wrote a lengthy letter to Mr Taylor giving an account of the history of the matter from his and Mr and Mrs Mills' perspective. Amongst a fair number of other matters Mr O'Callaghan took exception to Mr Antino's fees and general approach to the party wall disputes.

37. Although it is not evident on its face, Mr O'Callaghan sent Mr Antino a copy of his letter of 11 June 2015 addressed to Mr Taylor. On 16 June 2015 Mr Antino e-mailed Mr Taylor suggesting that as Mr O'Callaghan could not be his own (building owner's) party wall surveyor he could not make submissions in the capacity of the building owner. The same day Mr Taylor took up this point in a letter to Mr O'Callaghan informing him that he was "not entitled" to make submissions in respect of party wall matters. Mr Taylor suggested that Mr O'Callaghan appoint his own surveyor or await his award on Mr Antino's fees. He also refuted Mr O'Callaghan's continued insistence that his appointment was not valid.

38. I note in parenthesis at this point a matter of possible interest that arises here on the definition of 'surveyor' in s 20 of the 1996 Act. Certainly an individual who is the owner of a party wall property may not act as his own party wall surveyor. But does that preclude an individual, currently owning a party wall property, from acting as party wall surveyor for a previous owner of the party wall property? Is he a 'party to the matter'? It is not obvious that he is.

39. Mr O'Callaghan remained undaunted. In his letter of 16 June 2015, while accepting that the 1996 Act precluded him acting as his own surveyor, he reiterated his position that he had only acted as the Mills' spokesperson rather than party wall surveyor and repeated a complaint that Mr Antino had treated him as the Mills party wall surveyor improperly for the purpose of invoking s 10(8) of the 1996 Act to secure Mr Taylor's appointment as third surveyor.

40. For his part Mr Taylor was not prepared to accept Mr O'Callaghan's assurance that he had not acted as the Mills' party wall surveyor. In his letter of 18 June 2015 he wrote:

> "…. I am also pleased to see that we are making progress with your acceptance that you cannot represent yourself since you purchased the freehold title of No 29. However it is quite clear that you have indeed been engaging in and acting for Mr and Mrs Mills as their surveyor, and that much is ultimately very clear from your correspondence. Mr Antino and indeed myself have engaged with you in that capacity….
>
> I must courteously point out to you that your suggestion that you were a party to the matter before your purchase of the freehold title of No 29 is unfortunately incorrect. Mr and Mrs Mills were not prevented under the Act from appointing you. Therefore I appreciate your comment and I am not ignoring any such point but it simply does not arise.
>
> With regards to Mr Chaplin, Mr Antino was entitled to serve a section 10(8) notice and your failure to participate in the selection process is unfortunate and accordingly I am appointed. I would also courteously suggest that you consider section 10(10) of the Act, this is applicable and I am therefore under section 10(11) obliged to settle this matter by award."

41. Mr O'Callaghan then decided to appoint a party wall surveyor (Mr Mike Harry) to act in both disputes in respect of Mr Antino's fees which of course related primarily to the period when the Mills were the owners of 29 Pembury Avenue. Mr Taylor was informed of the proposed appointment on 22 June 2015, and he responded with a short email in which he looked forward to hearing from the newly-appointed surveyor.

42. If, of course, Mr O'Callaghan had been duly appointed as party wall surveyor for the Mills it was at the very least arguable that he could not be replaced except under s 10(5), by dying, becoming incapable, or deeming himself incapable of acting. This appears not to have troubled Mr Taylor, nor incidentally, Mr Antino although Mr Antino in a letter dated 23 June 2015 did raise the concern with Mr Taylor as to whether or not Mr O'Callaghan was in a position to appoint a party wall surveyor on behalf of the Mills. This concern apparently warranted the taking of counsel's opinion.

43. Interestingly it was Mr O'Callaghan who took up the point as to the propriety of the appointment of Mr Harry if indeed Mr O'Callaghan had been validly appointed as the Mills' party wall surveyor. In a memorandum "To whom it may concern" dated 23 June 2015 Mr O'Callaghan stated that he had never been appointed party wall surveyor to Mr and Mrs Mills but that "in anticipation of the unlikely event that any court or other authority should in future deem that I was appointed" he records that

he deems himself incapable of acting 'due to lack of professional capacity to address the issues raised'. Mr O'Callaghan referred to s10(3)(d) of the Act (which applies to an agreed surveyor) whereas the reference should have been s 10(5), but it is unlikely that anything turns on that error.

44. Mr Mike Harry was appointed party wall surveyor by the Mills in a formal appointment letter dated both 23 and 24 June 2015. The appointment letter gives the Mills' address as 29 Pembury Avenue and is signed by both Mr and Mrs Mills. Mr Harry sent a copy of this appointment letter to both Mr Taylor and Mr Antino on 24 June 2015. In his letter to Mr Taylor, Mr Harry expresses the view both that Mr O'Callaghan was never appointed as party wall surveyor and that Mr Taylor's appointment as third surveyor was valid. He adds "for correctness" that he formally confirms his agreement to Mr Taylor's selection in his capacity as the building owners' surveyor. Mr Harry notes that there has been what he describes as a 'chequered history' to the matter but continues "I have no doubt that together we will be able to address the outstanding matters with a view to resolving them and bringing this party wall process to a close."

45. Mr Harry's optimism was misplaced. By letter of 26 June 2015 Mr Antino challenged Mr Harry's appointment on the basis that the Mills had given their address as 29 Pembury Avenue:

> "I acknowledge receipt of a letter of appointment signed by Mr and Mrs Mills dated 24 June, they continue to use Pembury Avenue for correspondence. This is incorrect and I believe invalidates your appointment. You may not be aware but Mr O'Callaghan is the current owner of No. 29. Please provide a valid letter of appointment."

46. Mr Antino did however indicate a willingness to engage with Mr Harry but on the basis that he obtain a valid letter of appointment. In a second letter of 26 June 2015 Mr Antino raised two separate matters of concern. First Mr Antino informed Mr Harry that he considered that the 'issue' of change of ownership gave rise to what he described as a very important legal point which he has referred to Counsel for advice. The point was whether 'the burden' incurred by the Mills transferred to Mr O'Callaghan on his acquisition of the property, this in addition to "the burden created since he purchased the property". The second matter of concern was the validity of Mr Harry's letter of appointment. Mr Antino put it this way:

> "...if Mr and Mrs Mills are intending to appoint you, must they [they must?] recognise that they have an ongoing burden to discharge their liabilities then that letter of appointment must include their current residential address. They cannot use no 29 Pembury Avenue as their address because firstly they have never lived there, and secondly they do not own the property, Mr O'Callaghan owns the property. it must be a basic principle of any letter of appointment that the details of the appointing owners are correctly recorded.
>
> While I was prepared to entertain Mr and Mrs Mills using the Pembury Avenue address during the party wall procedures, they were of course at that time owners of the property and presumably it was their intention to move into the property."

47. Mr Harry dealt with the first matter succinctly, and correctly, in a letter incorrectly dated 24 June 2015. Party wall matters are personal, and do not run with the land. Liability under an award might be passed by contract but not otherwise. Mr O'Callaghan was never a party to the dispute; accordingly there is no "burden created since he purchased the property" which falls for consideration by party wall surveyors under the 1996 Act. "Accordingly, if there has been any mischief caused by operations undertaken after the purchase of the property and your appointing owners are seeking recourse, they must do so under the provisions of common law".

48. As for the second matter Mr Harry expressed the view that an appointing owner is at liberty to state any correspondence address they wish or indeed no address at all. In either case there would be a valid letter of appointment within the meaning of the Act. Mr Harry further suggested that the matters appear to be straightforward and would not warrant the incurring of fees in seeking Counsel's opinion.

49. Mr Harry's views cut no ice with Mr Antino. In a lengthy letter dated 30 June 2015 Mr Antino suggested that taking counsel's opinion, the cost to be charged to the Mills, on whether in the circumstances liabilities under the party wall process passed to Mr O'Callaghan was 'perfectly reasonable'. With regard to the validity of the letter of appointment Mr Antino stated:

> "... for you to suggest that an owner is at liberty to withhold any address on their letter of appointment is I am afraid misconceived. There has to be an address because there has to be service of documents. How can one serve documents if no address is given, therefore on the points that I have made I believe that the letter of appointment is invalid."

Further correspondence failed to resolve the impasse, and on 7 July 2015 Mr Antino informed Mr Harry that if you "cannot provide us with an actual address to where your appointing owners reside then it will have to be put to the Third Surveyor".

50. The issue as to the validity of Mr Harry's letter of appointment was not merely academic. The Mills' relationship with the Sells was very far from cordial, and their relationship with Mr Antino even worse. They formed the view that Mr Antino was excessively keen to discover their residential address, and Mr Harry too considered that Mr Antino was intent on seeking to find out where they lived. At Mr Harry's instance the Mills provided a further letter of appointment giving their address as 25A Limes Road Croydon, a property owned by Mr O'Callaghan, accompanying this letter with a letter of authorisation from Mr O'Callaghan as to their use of his address.

51. Mr Harry made a formal referral to Mr Taylor on the question of the validity of his letter of appointment given that it did not state the address at which the appointing owners currently resided on 7 July 2015. The same day Mr Harry sent an email to Mr Antino explaining that the Mills did not want Mr Antino to have their current address as a result of their previous dealings with him and suggesting that they progress matters, despite Mr Antino's threat, made on 4 July 2015, to suspend all further communication pending the provision of that address.

52. Mr Antino, having tried in vain to persuade Mr Harry to withdraw his referral on the basis that it was misconceived and would only serve to visit considerable costs on his appointing owners, provided his submissions (at very considerable length) to Mr Taylor on 14 July 2015.

53. Mr Taylor prepared and signed his award on 28 July 2015. On 30 July 2015 Mr Taylor e-mailed the Mills and the Savages asking whether they would be prepared to accept service of the award by e-mail. His e-mail indicates that he will also send the award by post and 'to ensure safe delivery' asks the Mills for their current residential address for posting. Mr Mills responded on 31 July 2015 stating that he was happy to receive service of the award by e-mail and for the hard copy to be posted to his place of business stating "this will also represent service of the award

on both me and my wife as I will of course share the award with my wife". Mr Mills had the previous day made it clear that because of the 'fraught history behind this party wall process' he was not prepared to inform Mr Antino of his family address.

54. By letter dated 14 August 2015 Mr Antino made further referrals to Mr Taylor as third surveyor. In the 27/29 Pembury Avenue dispute Mr Antino raised two matters for determination; first the question of the adjoining owners' costs in appointing their surveyor (ie Mr Antino's fees) and secondly 'compensation for inconvenience and nuisance caused to the Adjoining Owners as a consequence of the commencement of unlawful works in the first instance'. The scope of this referral was widened by Mr Antino's letter dated 20 August 2015 to include a determination that the rear dormer construction constituted a trespass onto the Adjoining Owner's property and to determine the costs of removing the trespass and or compensation in lieu. This additional referral was made, on the face of the letter, as a direct result of learning that Mr and Mrs. Mills had appealed the award as to the validity of Mr Harry's appointment.

55. In the 29/31 Pembury Avenue dispute Mr Antino raised both the question of his fees and a list of some 13 separate matters covering a wide range of subject. In both cases Mr Antino requested Mr Taylor to join with him to make the award (ie without involving Mr Harry) under s 10(11) of the 1996 Act or in the alternative to 'engage with all three surveyors' and determine the matters referred under s 10(11) of the 1996 Act. In making these referrals Mr Antino expressed concern that the Mills would not pay Mr Taylor's fees. Mr Antino suggested that Mr Taylor issue a direction that both building and adjoining owners pay a substantial sum on account of fees, putting forward the sum of £9,000.

56. Taking up Mr Antino's suggestion Mr Taylor issued directions in both disputes on 17 August 2015. In the 27/29 Pembury Avenue dispute, 'Directions No.1' was in the following terms:

> "I will be happy to proceed under s 10(11)" [ie to determine the matter by himself alone] "on the assumption that both the Building and Adjoining Owners each pay into my account the sum of £4000.00 within 7 calendar days

> of today's date. This money will be held on account and distributed in the usual manner after service of my Award.
>
> If however I do not receive payment from both sets of owners then I shall proceed as requested under section 10(10) with the party that has paid the sum of £4000.00 into my account within 7 calendar days of today's date. Regrettably and unfortunately should an owner fail to meet this timeframe, the defaulting owner will be excluded from the process as clearly appropriate and following the explicit wording of section 10(10)."

In the 29/31 Pembury Avenue dispute an otherwise identically worded direction required the payment of £7,000 by each owner.

57. Mr Harry replied to the Directions letters on 22 August 2015 stating that his appointing owners wished to be given the opportunity to make representations in respect of any referral made to the third surveyor and confirming that his appointing owners would accede to any reasonable request of payment of costs "immediately prior to your service of the award and in accordance with section 10(15)(a) of the Act".

58. Mr Taylor was not prepared to move from his Direction, and on 1 September 2015 Mr Harry wrote to him expressing the view that it was unlawful for a third surveyor to refuse to consider submissions on a building owner who did not pay a sum on account in advance of the consideration of an award. Mr Harry suggested that it was particularly unfortunate because Mr Taylor was clearly following a lead suggested by Mr Antino based on assertions as to a referral to a previous third surveyor, assertions which Mr Taylor had not troubled to raise with the Mills.

59. Mr Taylor rejected Mr Harry's observations, and insisted that he had not denied the building owners the right to participate in the party wall procedures; they had done so by their own actions, by which it may be assumed Mr Taylor meant by failing to make the required payments of £4,000 and £7,000. By this time the Mills had instructed Mr Stuart Frame of Counsel on a direct access basis. Mr Frame wrote to Mr Taylor in connection with both disputes on 29 September 2015. Mr Frame took issue with Mr Taylor's requirement of payments on account without which he would not accept submissions from the building owners by reference to s 10(15)(a) of the 1996 Act. Mr Frame also referred to the fact, if fact it be, that the Savages

had not actually been aware of the previous referral and suggested that it was Mr Antino who was "entirely driving, and indeed escalating these matters".

60. Mr Frame's letter suggested that the Mills had an understandable concern that Mr Taylor's impartiality was not guaranteed, given that Mr Taylor had so obviously followed Mr Antino's lead in the making of the Directions. The letter also pointed out that in corresponding with Mr Hopkins as to the identity of the third surveyor in August 2014 Mr Antino had asserted that he had rejected many of the surveyors put forward because they were personally known to him; by implication Mr Taylor was not. Yet Mr Frame felt able to point out that this was not the case. The letter concluded with a request that Mr Taylor deem himself incapable of acting in these disputes.

61. Referring as it did to personal matters it is not surprising that it engendered a response from Mr Antino. Quoting any part of Mr Antino's 14 page response dated 8 October 2015 is, fortunately, unnecessary for present purposes. Mr Taylor too responded with personal comment, here directed against Mr Frame's father, but he described Mr Antino's letter of 8 October 2015 as 'very informative' and stated that he did not intend to cover the same ground.

62. By the date of these responses the Awards, made by both Mr Antino and Mr Taylor and dated 1 October 2015 both in the 27/29 Pembury Avenue dispute and in the 29/31 Pembury Avenue dispute had been made.

63. The 27/29 Pembury Avenue Award determined that the building owners should pay the adjoining owners (the Savages) £750 for inconvenience and nuisance as a consequence of "the Building Owners breaches of the Act in the first instance, their refusal to engage in the Act and their unreasonable and general obstructive and abusive behaviour/approach in dealing with and resolving the party wall procedures". The Award also directed the building owners to pay the adjoining owners' costs of their surveyor's fee accounts 1, 2 and 4 in the sums of £1,822.56, £5,575.80 and £243 respectively (total £7,641.36) and required the building owners to pay Mr Antino's fees of £3,433.92 and Mr Taylor's fees of £1,006.25 in

connection with the preparing of the referral and the Award. Interest was also awarded at 5% pa.

64. The 29/31 Pembury Avenue award made the following determinations against the building owners in favour of the adjoining owners (the Sells):

(a) £928.80 paid by the Adjoining Owners on the release of the Mr Dawson's award confirming that Mr Antino's hourly rate of £225 plus VAT was reasonable;

(b) £504 for the costs of the CCTV survey as awarded by Mr Dawson;

(c) £7,080 "in lieu of the Adjoining Owners granting an easement for the dormer to remain in its current position";

(d) £480 in lieu of the cost of internal decorations;

(e) £2,256 as a reasonable contribution (representing 50%) toward the cost of the extending of the Adjoining Owners' rear extension wall;

(f) £1,875 for inconvenience and nuisance;

(g) £3,000 for the flashings 'to the front of the house';

(h) £2,601 for Mr Antino's fees for the ex parte award "which was not appealed and is therefore valid";

(i) £1,296 for Mr Antino's fee account no 3;

(j) £3,431.98 for Mr Antino's fee account no 4;

(k) £3,295.41 for Mr Antino's fee account no 7;

(l) £3,254.34 for Mr Antino's fee account no 8;

(m) £2,100 for "the Adjoining Owners surveyors compensation towards the costs of constructing the flank wall of the rear extension;

(n) 5% pa interest on all outstanding sums;

(o) £210 "for the T.Bosher estimate";

(p) the sums of £7,138.50 to Mr Antino and £3,703.50 to Mr Taylor in connection with the preparation of the Award.

65. Both the Awards dated 1 October 2015 in the 27/29 Pembury Avenue dispute and in the 29/31 Pembury Avenue dispute are stated by Mr Antino to have been sent by

him by post to the Mills addressed to 84 Chatsworth Road, Croydon, CR0 1HB. In clear contrast to the position with the Award dated 28 July 2015 there is no e-mail announcing the Award, or a request that service be accepted by e-mail with a copy in the post. This may just be a reflection of a different approach between Mr Antino, who sent out the later Awards, and Mr Taylor who sent out the earlier and who appears not to have been involved in publishing the later Awards although he was one of their authors. But it is troubling that when so much of the correspondence between the parties was sent by e-mail (the practice appears to have been to send formal letters either by post and e-mail or by e-mail alone) there was no e-mail communication to alert the parties to the fact that an award had been published.

66. The Mills state that they never received the letters of 1 October 2015 enclosing the Awards. They first saw the Awards when they were sent by e-mail to Mr Mills by the Respondent's solicitor on 26 October 2015.

67. In evidence Mr Antino stated that he did not send the Awards by e-mail because there was no agreement to that effect. This was unimpressive. He neither sought prior agreement nor forwarded the Awards by e-mail with a request that this be accepted as service as Mr Taylor had done with the earlier Award. There was some discussion in the course of Mr Antino's evidence as to whether the Awards would have been returned to Mr Antino's address if not delivered, and as to why Mr Antino's firm no longer had a franking machine. This discussion did not advance the case either way.

68. Mr Taylor, who for some reason was copied in to both letters to the Mills although as an author of the Award it might be expected that he already had a copy, sent an e-mail dated 5 October 2015 to Mr Antino acknowledging safe receipt of both Awards.

69. Mr Antino has produced certificates of posting of the Awards both to the Mills and to the respective adjoining owners to corroborate his case that he did indeed post the Awards to the Mills on 1 October 2015 . These certificates indicate that two letters were sent to building numbers 27 and 31 at postcode KT4 8BU at 12:07 on 1

October 2015 from a post office in Chelmsford, and that two letters were sent to building number 84 at postcode CR0 1HB at 12:18 on 1 October 2015 from the same post office. In evidence Mr Antino was unable to recall, or to explain, why there should be a gap of 11 minutes between the sending of the KT4 8BU letters and the CR0 1HB letters.

70. Prior to the making of the awards, Mr Harry and Mr Frame had been making representations to Mr Antino and Mr Taylor challenging the lawfulness of the procedure adopted by them, in particular in excluding submissions on behalf of the building owner because of the Mills failure to make a payment on account of fees in advance of the publication of the award. Mr Frame wrote to Mr Taylor on 29 September 2015 both by e-mail and in hard copy, (copying in Mr Antino by e-mail) and Mr Harry wrote to Mr Antino, copying in Mr Taylor, on 3 October 2015. These letters called for a response, particularly Mr Harry's letter to Mr Antino which asked Mr Antino to agree a date for a joint visit and ended with the statement:

> "For the avoidance of doubt, I am suggesting that it is right and proper that in the first instance, you address all matters directly with me as the party appointed surveyor with a view to resolving those matters and avoiding the need for a referral to the Third Surveyor".

71. Mr Antino replied to Mr Harry on 5 October 2015. There was no reference to the making of an award in that letter. As to the invitation to agree a date for a joint visit he states simply "your invitation to join with you at present is not justified and may incur further unnecessary costs".

72. Mr Taylor replied to Mr Frame by e-mail on 8 October 2015. He apologised for not replying earlier because of excessive workload and promised a substantive response in a week or so. He said nothing about the publication of the Award of which he was an author, receipt of which he had of course acknowledged in his e-mail of 5 October 2015 to Mr Antino.

73. Mr Antino had been copied in by e-mail to Mr Frame's letter to Mr Taylor. On 8 October 2015 Mr Antino replied at great length (10 pages) covering past events and arguing the case for the validity of Mr Taylor's directions. Conspicuous by its

absence in this reply is any reference to the fact that the Award in respect of which the arguments are being presented had already been made.

74. The substantive response to Mr Frame's letter promised by Mr Taylor did not arrive until 19 October 2016 when it was e-mailed to Mr Frame. Mr Taylor's letter engaged with Mr Frame's comments only in part, and, towards the end, stated:

> "For the avoidance of doubt as you will appreciate from the awards which have now been served, all party wall matters have now been concluded, and obviously payment of costs and damages which have been awarded."

75. This letter was copied to Mr Harry. It came as a complete surprise to him that Awards had been published; neither Mr Antino nor Mr Taylor had told him. On 22 October 2015, having checked with the Mills and learnt that they had not received the Awards Mr Harry e-mailed Mr Taylor and requested him to e-mail or post copies of the Awards.

76. Mr Taylor did not reply to Mr Harry, but Mr Harry did receive a reply from Mr Antino. On 23 October 2015, by e-mail only, Mr Antino stated:

> "I refer to your email to Mr Taylor dated 22 October 2015 timed at 13:43, for reasons which are not apparently clear, however I can confirm that the Awards have already been served on your appointing owners, this occurred on the 1 October 2015 your clients have not appealed the Award, the timeframe under s.10(17) has now expired. My appointing owners have asked me to now forward all the relevant documentation to their solicitors, Mr Ashley Bean of MLC, dealing with this particular aspect."

77. Mr Harry responded the same day, 23 October 2015 at 18:23, with a request that he be sent a copy of the 'purported' award. In the event copies of the Awards were sent to the Mills by MLC Solicitors by e-mail on 26 October 2015.

78. This is a summary of the events relevant to the preliminary issue. A more complete account would be appreciably longer.

79. I now turn to the preliminary issues.

80. **The James Hopkins issue : 'deems himself incapable of acting'**

The issue as formulated by the parties:

(1) Whether the Appellants' first surveyor, Mr. Hopkins, remains as their incumbent surveyor and/or whether the Respondents have waived any defect in his resignation and/or are estopped from so arguing that he remains the Appellants' incumbent surveyor. ('the James Hopkins issue').

81. On 28 November 2014 Mr Hopkins wrote to the Mills in the following terms:

> "Please take this letter as my formal resignation as your party wall surveyor for the notices that I served under the Party Wall etc Act 1996 on your behalf for your property 29 Pembury Avenue and for the works that have effected 27 Pembury Avenue, Worcester Park, Surrey KY4 8BJ.
>
> I deem myself incapable of acting in this respect and I must advise you that all the rights, duties and obligations revert to you as the legal land owners.
>
> Please let me know if you have any further questions in this respect I will endeavour to answer them.

From the documents in the bundle this letter appears only to have been written with respect to the 27/29 Pembury Avenue dispute, but it is plain that Mr Hopkins was resigning with respect to both disputes. Indeed in his e-mail to Mr Antino and Mr Dawson the following day Mr Hopkins attaches 'letters of resignation for both sets of notices'.

82. This use of language, 'deem myself incapable' demonstrates that Mr Hopkins had in mind the provisions of s 10(5) of the 1996 Act:

> "If, before the dispute is settled, a surveyor appointed under paragraph (b) of subsection (1) by a party to the dispute dies, or becomes or deems himself incapable of acting, the party who appointed him may appoint another surveyor in his place with the same power and authority."

83. In the e-mail the following day, 29 November 2014, to Mr Antino and Mr Dawson Mr Hopkins stated simply "For cost reasons my appointing owners have asked me to resign as they wish to represent themselves". I note in passing that the Mills deny that they asked Mr Hopkins to resign for costs or any reasons; however it may well have been Mr O'Callaghan who prompted the resignation and who raised issues of cost.

84. This resignation incensed Mr Antino. Within two hours of receiving Mr Hopkins' e-mail he wrote to Mr Dawson:

> "You have no doubt read Mr Hopkins email and comments which I find bizarre to say the least. Mr Hopkins is a member of the faculty and should therefore know that an owner cannot request the surveyor's resignation; s10(2) is explicit."

The 'faculty' is the Faculty of Party Wall Surveyors. Surveyors who are members of the Faculty, or of the other association of Party Wall Surveyors, the Pyramus and Thisbe club, are all conscious that as appointed surveyors they owe duties independent of the party appointing them. The RICS Guidelines for members on the Party Wall legislation and procedure (6th Edition 2011) states, at 5.3,:

> "Any surveyor appointed under section 10 of the Act is undertaking a statutory role. The appointed surveyor should seek to conclude an award that fairly sets out the rights and obligations of both owners, ensuring that the work specified in the award is permissible under the Act. The award should enable the building owner to carry out the work without causing unnecessary inconvenience to adjoining owners or occupiers.
>
> The appointed surveyor should seek to identify and represent the interests of the appointing owner, but this should not extend to following instructions from their appointing owner where these conflict with their duties under the Act.
>
> The appointed surveyor cannot be discharged by an owner. The appointment only comes to an end if the surveyor dies, becomes or declares him or herself incapable of acting. This ensures that the surveyor is able to conclude an award without undue interference from the appointing owner.
>
> It is necessary for the surveyor to act diligently in considering information provided and in seeking to reach agreement and conclude an award. The Act allows one surveyor to conclude an award alone if the other surveyor has refused to act effectively, or has neglected to do so for ten days after being so requested in writing."

85. Section 10(2) of the 1996 Act does indeed provide that appointments 'shall not be rescinded by either party'. It is understandable therefore that Mr Antino and Mr Dawson should feel that in some way Mr Hopkins had 'let the side down'. But neither of them were prepared to leave the matter there. Mr Antino in particular took the view that Mr Hopkins' resignation was ineffective, Mr Hopkins remained the Mills' party wall surveyor, and his failure to correspond or act after 29 November 2014 was a refusal to act effectively for the purposes of s 10(6) of the 1996 Act thereby enabling Mr Antino to act ex parte as if he were an agreed surveyor.

86. In the Awards dated 1 October 2015 both Mr Antino and Mr Taylor, who by then was the Third Surveyor, adopted a somewhat schizophrenic approach to Mr Hopkins resignation. Both these awards include in their recitals the statement that

"the Building Owners appointed Mr James Hopkins "BOS1" ... to act as building owner's surveyor, who subsequently rescinded his appointment under s 10(5)". However at paragraph 7.1 of both Awards they state: "The Building Owners and/or their Surveyor "BOS1" having refused to comply with the directions have by their own actions excluded themselves from participating within a referral under section 10(11)".

87. I turn to consider the proper interpretation of s 10(5) of the 1996 Act. The sub-section envisages three situations in which the power to appoint a replacement surveyor arises:

(1) when the original surveyor dies;
(2) where the original surveyor becomes incapable of acting; and
(3) where the original surveyor deems himself incapable of acting.

88. Plainly the third situation arises where the original surveyor is in fact capable of acting but deems himself unable to act, for otherwise there would be no need for the third provision. 'Deems' falls to be interpreted in this context. It is a word which is regularly found in jurisprudence generally, although not often in statutes. It can be used to mean 'presumed without the need for evidence', as for example in the Interpretation Act 1978 s 7:

> "Where an Act authorises or requires any document to be served by post.. then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the documents and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

'Deem' can also be used to denote or create a fiction, as in *R v Norfolk County Council* (1891) 60 LJQB 379, at 380, DC, per Cave J.:

> "Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless .. it is to be deemed to be that thing."

See also *Batcheller & Sons Ltd v Batcheller* [1945] Ch 169 at 176, per Romer J.:

> "It is of course, quite permissible to "deem" a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to 'deem' that a thing happened when it is known positively that it did not happen."

although the Learned Judge continued by stating that he thought the latter conception a complete absurdity.

89. The Oxford English Dictionary gives ten separate meanings to deem as a verb, but 'the current ordinary sense' is "To form the opinion, to be of opinion; to judge, conclude, think, consider, hold". This definition is also to be found in authority. In *R v Brixton Prison (Governor), ex p Soblen* [1963] 2 QB 243 at 315 Pearson LJ, when considering 'deem' in the context of the Secretary of State exercising the quasi-arbitral act of making a deportation order when he deems it to be conducive to the public good under Article 20 of the Aliens Order 1953, said:

> "The word "deems" normally means only "is of the opinion" or "considers" or at most "decides", and there is no implication of steps to be taken before the opinion is formed or the decision taken."

90. It is this latter meaning which, it seems to me, is the appropriate meaning of 'deems' in the context of s 10(5) of the 1996 Act. The party-appointed surveyor is capable, but he considers or decides that he should not continue to act. Is it the position that the surveyor may only so decide on 'proper grounds' and if so what constitute such grounds? I see no words in the statute that would indicate that that a party-appointed surveyor may only deem himself incapable of acting on 'proper grounds'. My inclination would be to hold that it is entirely a matter for the surveyor to decide whether he wishes to resign by deeming himself incapable of acting, and he may do so on whatever ground seems appropriate to him.

91. I am conscious that there are many surveyors, both of the Pyramus and Thisbe Club and the Faculty of Party Wall Surveyors, who hold firmly to the opinion that once a Party Wall appointment has been accepted its quasi-arbitral role and statutory protection from dismissal require a greater loyalty to the task in hand than such an approach would suggest. The argument is that once appointed the party wall surveyor must see through the procedure to the very end, absent good reason. Protection from dismissal by the appointing party carries with it responsibilities, and the party-appointed surveyor may not therefore decide that he is no longer willing to act, and go. This was the approach adopted by Mr Antino and Mr Taylor, and it has not been suggested that they were not genuine in their belief whatever the

consequences may have been for these particular disputes and whatever the ramifications for their own personal positions.

92. Furthermore, the provisions of s 10(2), precluding as they do the rescinding of an appointment by a party to the dispute, might indicate that a surveyor should not allow himself to be put in the position where his appointment is 'constructively rescinded'. The courts would not accept without question a party securing indirectly what statute precludes him obtaining directly. But I am doubtful that being asked to resign by appointing owners on grounds of cost is in fact a constructive rescission. The surveyor may well feel that the costs of his appointment constitute an unnecessary financial burden on the appointing party. Having formed this view it would then be open to the surveyor to decide that he should no longer continue to act. In the present case the Mills had decided not to pursue any works which engaged the 1996 Act. They were trying their level best to extricate themselves from the financial implications of commencing such works and doing so without first obtaining a party wall award. It is not obvious in these circumstances that they should be required to shoulder the continued financial burden of their own appointed surveyor.

93. I return to the wording of the s 10(5) 1996 Act. 'Deems himself incapable of acting' was not in the previous party wall legislation. The London Building Act (Amendment) Act 1939, s 55 provided:

> "(d) If before the difference is settled a surveyor appointed under subparagraph (ii) of paragraph (a) of this section by a party to the difference dies or becomes incapable of acting the party who appointed him may appoint another surveyor in his place who shall have the same power and authority as his predecessor."

Once appointed under the 1939 Act therefore it appears that only death or incapacity of his appointed surveyor would entitle the party to appoint an alternative. This did not mean however that the party-appointed surveyor was required to act as such. As with the 1996 Act the 1939 Act envisaged the possibility that such a surveyor might either refuse or neglect to act in which event the other party-appointed surveyor could proceed ex parte.

94. In introducing the Party Wall Bill to the House of Lords on 31 January 1996 the Earl of Lytton said:

> "The aims of the Bill are to extend the tried and tested provisions of the London Building Acts to England and Wales. It rests upon a principle of voluntary agreement between parties wherever possible; it provides for notice to be given where works are proposed; there is an opportunity to respond and comment; it sets out to protect existing structures; there is a clear liability for damage and making good; there is provision for the resolution of disputes, other than by going to law; its sets out how costs of works and fees arising from them shall be dealt with; and clarifies the extent of rights over common structures, including floors -- that is, floors between different units of occupation. So the Bill is a safety net and not a fiery hoop."

With respect to Clause 10 the Noble Lord said this:

> "Clause 10 deals with the resolution of disputes. In this particular instance both parties can agree on the appointment of one surveyor. That is a step to be recommended most strongly, particularly for householders carrying out small works. Alternatively, the parties may each appoint a surveyor. These in turn will nominate a third surveyor who is called in to adjudicate only in the few instances of sustained disagreement. Between them they will produce an agreement or award. Normally a party wall surveyor or third surveyor cannot be removed, but the Bill provides for instances where surveyors are unwilling or unable to act.
>
> The duty of party wall surveyors is quasi-arbitral. Once appointed they have a duty to act properly in the interests of both parties as statutory surveyors, which is a most important safeguard. Experience indicates that the great majority of disputed cases are dealt with by agreement between surveyors. The building owner generally meets the cost of the adjoining owner's surveyor. But that is not a licence to charge excessive fees and there are generally prior agreements on charges. Safeguards are provided where a party to the dispute neglects to appoint a surveyor, in which case the other party may appoint one on his behalf. There is a fallback power whereby the local authority makes the appointment of a third surveyor on application of one surveyor if there is a breakdown in the normal procedures.

There was nothing in the ensuing debate to assist in the elucidation of clause 10(5); nothing to add to the "unwilling to act" description given to the phrase "deems himself incapable". As far as it goes however "unwilling to act" is more consistent with a personal decision not open to review, than a decision that may only be taken on 'proper grounds'.

95. The legislature has used the word 'deems' in statutes only rarely. It appears in the Public Health (Ireland) Act 1878 s 269 "Appeal to quarter sessions":

> "Where any person deems himself aggrieved by any rate made under the provisions of this Act, or by any order, conviction, judgment, or determination of or by any matter of thing done by any court of summary jurisdiction, such person may appeal therefrom..."

"Deems" also appears in the Supreme Court of Judicature (Officers) Act 1879, s 25 "Compensation for prejudice to right or privilege":

> "If any person deems himself aggrieved by reason of any right or privilege, customary or otherwise, being prejudicially affected by this Act or the courts of Justice Building Act 1865 .... he may present a petition to the Lord Chancellor..."

The use of "deems" in the Interpretation Act and also in the Aliens Order has been noted above. There is no well-established use of "deems" in statute law to which the Court may turn to assist in the interpretation of S 10(5).

96. With regard to the statutory provisions quoted in the previous paragraph, in both these cases the word 'deems' is used as a synonym for 'considers'. Neither provision is particularly apposite to the present case, for although there would be no basis to challenge the making of the decision to appeal or petition as the case may be, the merits of that decision would be reviewed by the body to whom the appeal or petition was addressed. No such review would arise here, unless it were open to challenge the basis on which the surveyor deemed or considered himself to be incapable. Nevertheless these examples of the use of 'deems' are helpful as far as they go.

97. On due consideration I remain of the view that it is entirely a matter for a party-appointed surveyor who, while remaining capable of acting as such, has decided that he no longer wishes to continue in the role to resign as party wall surveyor by deeming himself incapable of acting, and he may do so on whatever ground seems appropriate to him.

98. But even if I should be wrong about that, on one thing I am positive. It is not for the other surveyors, here Mr Antino and Mr Dawson followed by Mr Taylor, to police the deemed incapacity of Mr Hopkins. That would be a matter either for his professional body, if a complaint were made by his appointing party, or for the court were the matter brought before it for a determination in or in connection with the party wall process. The other surveyors have no business to be requiring explanations or demanding a resumption of acting on the part of the resigning surveyor. It might, theoretically, be possible for any person interested in the particular party wall process to seek a declaration that the surveyor in question had improperly deemed himself incapable of acting, and that an interested person for these purposes might well include another surveyor duly appointed to act in that

particular process. But it is likely to prove a pretty empty declaration. For it is difficult to imagine any court imposing a mandatory injunction on a surveyor requiring him to return to and be involved in the party wall process.

99. Whatever the other surveyors think about their colleague's action they have to accept it and proceed accordingly. It is wholly inappropriate for the other surveyors to insist that the surveyor who has resigned and is no longer acting remains the surveyor for his originally appointing party and should be treated as having refused or neglected to act effectively for the purposes of s 10(6) and s 10(7) of the 1996 Act. Neither is it open to them to refuse to accept any replacement appointee made by the appointing party under s 10(5).

100. Accordingly I conclude that Mr Hopkins does not remain the Mills appointed surveyor. He ceased to be their appointed surveyor on his resignation.

101. The first preliminary issue also raises the possibility that the Respondents have waived any defect in Mr Hopkins' resignation or are estopped from arguing that he remains the Appellants' surveyor. Waiver may be dealt with shortly. If, on a proper construction of s 10(5) of the 1996 Act, Mr Hopkins had no business to be resigning his position as the Appellants' party wall surveyor because he did not have proper grounds on which to do so, it would not be open to the Respondents to waive any defect. There is no provision in the 1996 Act which would give the Respondents the authority to waive that which was statutorily improper.

102. As to the possibility of estoppel, strictly, I do not need to consider whether the Savages and the Sells are estopped from arguing that Mr Hopkins remains the Appellants' incumbent surveyor. Mr Hopkins is not the Appellants' surveyor. I will however consider the arguments raised, albeit briefly. Whatever the proper categorisation of the estoppel asserted there must be established (1) a representation of fact intended to be acted upon (2) acting on that representation, and (3) an alteration of position (detriment) by so acting.

103. As for the representation of fact that Mr Hopkins was no longer the building owners' appointed surveyor Mr Frame relies on (i) the failure of Mr Antino to use the ex parte provisions of the Act, (ii) the express reliance by Mr Antino on Mr

O'Callaghan's refusal to select a replacement third surveyor for the purpose of utilising s 10(8) of the Act, and (iii) the engaging by the adjoining owners in a referral to the third surveyor specifically regarding the validity of Mr Harry's letter of appointment.

104. There is nothing in (i). Certainly Mr Antino stated that it was open to him to act ex parte, and that in my view was wholly inappropriate. But Mr Antino also, contrary to the basis of counsel's submission, proceeded to make an ex parte award on 12 February 2015. Mr Antino's ex parte award, and his statements that he was entitled to act ex parte, were plainly based on the assertion that Mr Hopkins remained the Mills party wall surveyor and that he was refusing or neglecting to act effectively by failing to act at all.

105. (ii) With Mr O'Callaghan Mr Antino blew hot and cold. He objected to Mr O'Callaghan's 'appointment' on the basis that he did not have the requisite knowledge but he treated him as the appointed surveyor when it suited. Mr Frame relies on the letters, in similar terms, written in both disputes on 20 April 2015 stating "I am obliged to inform you that unless you agree to select with me a replacement third surveyor within 10 days I shall without further redress request the Local Authority under section 10(8) to select a Third Surveyor". That letter treats Mr O'Callaghan as the Mills' appointed surveyor and, more to the point, is inconsistent with Mr Hopkins being the Mills appointed surveyor. The difficulty for the Mills here however is that while Mr O'Callaghan was concerned as to the identity of the third surveyor appointed by the local authority, and wanted to be consulted as to the appointment, he himself took the line that he was not the building owner's appointed surveyor. He said as much in his letter of 16 June 2015 when he complained that Mr Antino had treated him as such for the purpose of invoking s 10(8). This is hardly acting in reliance on Mr Antino's representation that Mr O'Callaghan and not Mr Hopkins was the Mills appointed surveyor.

106. (iii) As for Mr Harry's 'appointment' Mr Antino initially welcomed it but from the start took the view that Mr Harry was not validly appointed without a letter of appointment which contained the Mills' current residential address. This is an interesting view, but as it is a matter on which I may have to make a determination

on a hearing of this appeal I say no more about it. What Mr Antino did not do, and it is this that Mr Frame relies on, is assert that Mr Harry could never have a valid letter of appointment because Mr Hopkins remained the Mills' appointed surveyor. This then is a representation that Mr Hopkins was no longer the appointed surveyor, but, for the purposes of an estoppel, how was it acted on? Mr Harry had already been appointed.

107. I have been sparse with my analysis of Mr Frame's estoppel arguments as to a representation by Mr Antino which was acted upon by the Mills, and not perhaps done them full justice, because there can be no realistic suggestion that the Mills altered their position in consequence of any representation that Mr Hopkins remained their appointed surveyor or that they otherwise acted to their detriment. From November 2014 the Mills just wanted to extricate themselves from a party wall process that seemed to them to grow inexorably at their expense. Mr Hopkins resigned. Mr O'Callaghan took his place, whether as party wall surveyor or simply as representative, and in due course Mr Harry was appointed in June 2015 by Mr O'Callaghan essentially to contest Mr Antino's ever-increasing fee accounts. I see no change of position by, and no detriment to, the Mills over the period in question.

108. **The Service Issue**

(2) When the Award was served on the Appellant and consequently whether the Appeal was lodged in time. ('the service issue')

This issue relates to the awards dated 1 October 2015 that are the subject of Claim Nos B20CL143 and B20CL144.

109. The Mills, Mr O'Callaghan, their party wall surveyor Mr Harry, and their direct access counsel, Mr Frame, were all perfectly well aware that s 10(17) of the 1996 Act provides that an appeal against a party wall award may be made to the county court but only "within the period of fourteen days beginning with the day on which an award made under this section is served on him". By 1 October 2015 the Mills, with Mr O'Callaghan, had already launched an appeal against the award dated 28 July 2015. This was an appeal of which Mr Antino was clearly conscious.

110. The facts immediately relating to this issue are set out in paragraphs 65 to 76 above. The Respondents naturally rely on the Certificates of Posting provided by Mr Antino. Mr Mills, who gave oral evidence, denies receipt of the Awards. I accept his evidence. He was a good, frank, witness. Mr Mills lived at Flat 2, 84 Chatsworth Road, Croydon, CR0 1HB, and during the course of his evidence the possibility was investigated that he might not have received post addressed to him and delivered to his address because the residents of other flats also had access to post which came through the front door letter box. The possibility that another resident intercepted and or discarded post addressed to the Mills can never be entirely discounted, and Mr Mills did not suggest that it was not possible, but the likelihood is small, and on a balance of probabilities I reject that possibility as happening in this instance.

111. The real concern is that the Awards never reached 84 Chatsworth Road at all, despite the evidence of the certificates of posting. The certificates of posting prove only that the letters were sent as indicated, to a particular number in a particular postcode area, not that letters were in fact sent to the specific address. They are valuable evidence but only to an extent. The reliance on the certificates does however mean this. There is little, if any, room for error, mistake or misunderstanding. In practical terms either Mr Antino sent the Awards as he says in evidence that he did, or he engaged in some underhand behaviour to ensure that the Awards were apparently served at a date before the expiry of the 14 day period for an appeal. Mr Antino gave oral evidence. He was pressed on the 11 minute gap between the sending of the letters with the adjoining owners' postcode and the letters with the Mills postcode. He could not remember. Mr Antino was not an impressive witness not just in this respect but generally.

112. The surrounding facts give real cause for concern. The earlier Award had been sent by e-mail. These Awards were not. Nearly all the written communication between the parties, and particularly that sent by Mr Antino, was either sent only by e-mail or was sent both by e-mail and in hard copy. Yet there was no reference whatever in any e-mail sent within the 14 day period to the fact that Awards had been made and published.

113. During the relevant time, 2 to 16 October 2015, there was correspondence between Mr Antino and Mr Taylor on the one hand and Mr Harry and Mr Frame for the building owners, directly relating to the making of an award, it being known that a referral had been made. It is not short of astonishing that Mr Antino did not anywhere in his letter of 5 October 2015 refer to the fact that an Award had already been made and published so there was no question of avoiding the need for a referral to the Third Surveyor.

114. Equally, it is most surprising (to put it at its lowest) that Mr Taylor made no reference to the Award when responding to Mr Frame's letter of representations by e-mail on 8 October 2015. Mr Taylor had, on 5 October 2015, acknowledged receipt of the letters of 1 October 2015 enclosing the Awards by e-mail to Mr Antino. This e-mail of 5 October 2015, far from giving a reassurance that the Awards were sent, gives rise to concern because of the mere fact of it being sent. Mr Taylor had made the Award jointly with Mr Antino. He had signed it. It can hardly be suggested that he did not have a copy. Why in these circumstances, the Appellants are entitled to ask, were copies of the Awards sent to him at all and, more pertinently, why did Mr Taylor feel the need to acknowledge receipt of the Awards in an e-mail sent solely for the purpose.

115. It was not until 19 October 2015, safely after the expiry of the 14 day period, that the first reference was made to the publications of the Awards, and then it was a passing reference (quoted at paragraph 74 above) in a letter from Mr Taylor responding to the detailed submissions made by Mr Frame by letter and e-mail dated 29 September 2015, two days before the two Awards were published. Mr Harry, to whom Mr Taylor's letter of 19 October 2015 was copied, then requested a copy of the Awards. The response came not from Mr Taylor but from Mr Antino. The e-mail from Mr Antino, set out in full in paragraph 76 above, speaks volumes.

116. In the event the Mills only received a copy of the Awards when they were forwarded to them by the Respondents' solicitor on 26 October 2015. I am satisfied that it was only on this date that the Awards were served on the Mills, assuming for present purposes that service by e-mail was good service, a vexed question. It

follows that the time for appealing the awards expired on 9 November 2015. These appeals were issued on 6 November 2015. They were in time.

117. **The Validity Issue**

(3) Whether any procedural irregularities rendered the Award invalid and whether the Appellants are estopped from relying on or have waived any procedural irregularities. ('the validity issue')

118. The procedural irregularities which might render the Award invalid are not specified in the Order for the Preliminary Issues. However two were pursued before me. First that it was improper for Mr Antino to proceed to make the Award(s) with Mr Taylor, the third surveyor, without involving Mr Harry, the surveyor appointed by the building owner. Second, that there was no justification for Mr Taylor's direction that the respective party wall owners had to provide a payment on account for Mr Taylor's fees in default of which a party wall owner was treated as having excluded himself from participating in the referral and no account would be taken of any representations he might make as to any award which might be made on the referral.

119. (1) <u>The failure of Mr Antino or Mr Taylor to involve Mr Harry.</u>

Mr Harry was appointed by the Mills on 24 June 2015 and by letter dated 25 June 2015 Mr Antino challenged the validity of Mr Harry's appointment on the basis that the Mills gave an address on his letter of appointment at which they were not resident. In due course Mr Taylor, in his Award dated 28 July 2015, determined that Mr Harry was not validly appointed. This is the subject of the appeal in B20CL103. I have not had full argument on the matter and the point is outside the scope of this preliminary hearing.

120. If they were being consistent on the question of the validity of Mr Harry's appointment Mr Antino and Mr Taylor might have considered themselves the only two duly appointed surveyors and proceeded without Mr Harry on this basis. But there was no such consistency either in their correspondence nor on the face of the Awards.

121. Both the Award in the 27/29 Pembury Avenue dispute between the Mills and the Savages and the Award in the 29/31 Pembury Avenue dispute between the Mills and the Sells have fairly lengthy recitals and introductory statements. In the 29/31 Pembury Avenue dispute there is also a section entitled 'Breaches of the Statutory Legislation' containing further introductory statements. In both Awards the makers set out the history of building owner appointments and end with the statement 'Mr M Harry of Planning & Party Wall Specialists Ltd ... "who purported to be appointed"' in the 27/29 Pembury Avenue dispute and "was purported to be appointed" in the 29/31 Pembury Avenue dispute. So both Awards question the validity of Mr Harry's appointment in the introductory sections.

122. The Awards are not expressly consistent however as to Mr Hopkins' position, ie whether he continued to be the building owner surveyor on the basis that he rescinded his appointment improperly. Paragraph 7.1 of the 29/31 Pembury Avenue dispute Award states that the building owners and or their surveyor Mr Hopkins had refused to comply with the Third Surveyor's directions. In contrast at paragraph 7 of the 27/29 Pembury Avenue dispute the Award refers to Mr Harry as the building owners' 'agent' and at 7.1 states that the Building Owners had refused to comply with the directions, making no reference to Mr Hopkins.

123. This is in some contrast to the fact that both Mr Antino and Mr Taylor did engage with Mr Harry as a party-appointed surveyor. Mr Taylor's letter of 17 August 2015 in which he made his 'Directions No.1' is an example of that engagement. Mr Taylor was there responding to letters to him dated 14 August 2015 from both Mr Antino and Mr Harry addressing the question whether a referral had in fact been made to Mr Taylor. Mr Harry's letter is clearly written on the basis that he is an appointed surveyor, referring as it does to "my appointing owners". Mr Taylor's response was to note "Mr Harry has indicated an acceptable willingness to participate in the referral". There is no indication whatever that Mr Harry should not do so because, as per Mr Taylor's own Award of 28 July 2015, his appointment was not valid.

124. There are other examples of inconsistency which would be tedious to rehearse. Put shortly, and colloquially, Mr Antino and Mr Taylor got themselves in rather a

pickle over the validity of Mr Harry's appointment. Having secured or made an Award declaring Mr Harry invalidly appointed, both Mr Antino and Mr Taylor continued to engage with Mr Harry and I would be prepared to accept that had the Mills paid the £11,000 demanded as a payment on account Mr Taylor would have allowed Mr Harry to make representations as to the award to be made on the referrals.

125. In the event the failure to involve Mr Harry was the result of enforcing the sanction in 'Directions No.1' not an independent failure.

126. I would add, in deference to Mr Frame's submissions as to the proper approach to the interpretation of s 10(10) of the 1996 Act, that I would be loath to hold that the words "as the case may be" ("The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter..") should be interpreted so as to render invalid any award where one of the party wall owner appointed surveyors who was willing to be involved in an Award was excluded by the other two. Neither would I interpret the wording of s 10(10) as giving a party appointed surveyor the unfettered right to join with the third surveyor and make an award at any time without reference to the other party appointed surveyor, an interpretation which Mr Frame rejects, but which might be thought to encapsulate the approach of Mr Antino and Mr Taylor. The Act is entirely silent as to when it is appropriate or proper for any two surveyors to proceed without the other. Each award has to be considered on its own merits and against the background to which it was made.

127. The standard approach, overwhelmingly adopted in practice, is for the two party-appointed surveyors to proceed together to make any necessary award without involving the third surveyor. This seems eminently sensible. It would be a rare case where the court would uphold a complaint that the two party-appointed surveyors proceeded without involving the third surveyor.

128. It is a different matter where one party-appointed surveyor proceeds with the third surveyor behind the back of the other party-appointed surveyor. Such a proceeding would be difficult to justify in ordinary circumstances. The mischief however is

more likely to be that shutting out one party-appointed surveyor will result in the award-makers not allowing the party in question to make representations as to the content of the award, rather than proceeding to an award to the formulation of which the relevant surveyor had not contributed. Receiving and considering any submissions or representations each side wishes to make is an essential part of the quasi-arbitral role of the party wall surveyor.

129. (2) Failure to comply with directions.

It is a particular feature of the two disputes with which these appeals are concerned that there were continuing arguments about Mr Antino's fees. I have omitted all but a very few such references in my summary of the facts for the purposes of these preliminary issues. As noted in paragraph 57 above Mr Antino expressed concern to Mr Taylor that the Mills would not pay his fees, and this led Mr Taylor to make a direction that each party should make payments on account of fees before Mr Taylor proceeded with the referral and made an Award. A direction lacks bite if it does not carry a sanction. Mr Taylor's direction carried the sanction that an owner who 'defaulted' in making the directed payment should be "excluded from the process". In other words Mr Taylor was imposing the sanction that a defaulting owner could not make any representations to the surveyors considering the referral as to the Award which should be made, and, by implication, any representations that were made would be ignored.

130. Mr Taylor had no business to make this direction. It goes flatly against the express provision in s 10(15) of the 1996 Act. This provides:

> "Where an award is made by the third surveyor –
>
> (a) he shall, after payment of the costs of the award, serve it forthwith on the parties or on their appointed surveyors; and
>
> (b) ...."

It will be seen that parliament was conscious that a third surveyor would have no contractual relationship with the parties and needed protection as to his fees. 'Costs' as I read the statute will include the third surveyor's reasonable fees. The protection given by parliament is that which is traditionally enjoyed by arbitrators. Once the

award has been made, but only after it has been made, the third surveyor may require his costs / fees to be paid before he releases the award.

131. This, ie payment between award and its publication, being the protection afforded by parliament it is impermissible for a third surveyor to require a payment on account of fees to be made before he even embarks on a consideration of the matters referred to him let alone before he begins to make an award. The direction becomes a serious irregularity with the sanction imposed by Mr Taylor. There is, it must be accepted, no express provision in the 1996 Act entitling parties to make representations or submissions to the surveyors who are considering a referral with a view to making an award. I have no doubt that had the matter been raised in debate on the Bill, parliament would have considered such a provision to be unnecessary. 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.

132. In the present case Mr Antino and Mr Taylor make no secret of their position. In paragraph 7.1 in each Award, albeit in slightly different terms, the two surveyors state in terms that the building owners have "excluded themselves from participating within / in [the] referral".

133. There is incidentally a strange reference in both Awards to s 10(11) of the 1996 Act. This is the third surveyor only provision. It is only in the 27/29 Pembury Avenue dispute that the Award refers to s 10(10) which is the appropriate provision for the making of an award by any two surveyors. Whatever was meant by these references it is abundantly clear that the Mills were treated as having excluded themselves from the award-making process and therefore the submissions made on their behalf were ignored.

134. This was a procedural irregularity which in my judgment, subject to any estoppel or waiver on the part of the Mills, rendered the Award invalid.

135. Before turning to the question of estoppel there is one further observation to make. In the Awards of 1 October 2015 Mr Taylor awarded himself fees in the sum of £1,006.25 inclusive of VAT in the 27/29 Pembury Avenue dispute, and in the sum of £3,703.50 inclusive of VAT in the 29/31 Pembury Avenue dispute. These figures contrast ill with the sums of £8,000 and £14,000 which Mr Taylor directed should be paid by the owners combined before he commenced any work on the reference; they sit ill with the sums of £4,000 and £7,000 which Mr Taylor directed the Mills alone to pay. The size of these sums give rise to concern as to what Mr Taylor meant in 'Directions No.1' by the statement "This money will be held on account and distributed in the usual manner after service of my Award". There is, of course, no "usual manner". I have not heard evidence or argument as to what the statement meant. I take the matter no further than this observation and the comment that even where it is legitimate to require advance payment on account of costs the quantum of any such payment must never be out of proportion to the sum that will eventually be due.

136. Estoppel. The validity issue raises the possibility that the Mills may be estopped from relying on or have waived any procedural irregularities which may be found to have occurred. At the hearing however I did not understand this possibility to be seriously contended by the Respondents. Certainly any such argument would be hard to sustain.

137. Mr Harry, the surveyor appointed by the Mills, protested most firmly about the Direction which required a payment to Mr Taylor before he embarked on a consideration of the referral and imposed an exclusion sanction in default of payment. By letter to Mr Taylor dated 14 August 2015 he placed formally on record that the Mills wished "to be given the opportunity to make full submissions in respect of any matter that is referred to you". There had not by then been a referral, merely Mr Antino's statement that he would be making one. On 20 August 2015 Mr Harry asked Mr Antino to let him know what matters would be referred to the third surveyor for an award, which was Mr Harry's understanding of Mr Antino's then proposal.

138. The issue as to Mr Taylor's costs was firmly on the agenda, and on 22 August 2015 Mr Harry wrote to Mr Taylor:

> "You will of course have had my letter to you of 14 August. Further to that letter and for the avoidance of doubt, I would take this opportunity to remind you that my appointing owners wish to be given the opportunity to make full representations in respect of any referral that is made to you and that they would like me, their appointed surveyor, to be given the opportunity at first instance to address matters in the normal way with Mr Antino, the appointed surveyor for both adjoining owners.
>
> As to your costs, my appointing owners confirm that they are happy to accede to any reasonable request for payment of your costs immediately prior to your service of the award and in accordance with section 10(15)(a) of the Act."

139. By 1 September 2015 Mr Taylor had made it clear to Mr Harry that he was determined to proceed to determine a referral from which he considered the Mills had excluded themselves by not making a payment on account. Mr Harry wrote:

> "Thank you for your letters dated 17 and 25 August 2015.
>
> By its content it is clear that your letters are resolute in nature and as such, it is also very clear that you will proceed as you have stated.
>
> Accordingly, whilst acknowledging the risk that it may be futile, so that my duty to my appointing owners is properly discharged, I would draw your kind attention to the following; …."

Mr Harry then set out a series of submissions.

140. In addition to Mr Harry's submissions, Mr Frame, as direct access counsel, sent a letter containing detailed submissions to Mr Taylor on 29 September 2015. This letter was sent by e-mail on 29 September and would have arrived two days before the signing of the Awards. It is evident that these submissions were not considered in line with the resolute determination of Mr Taylor to proceed without considering anything submitted by or on behalf of the Mills. In these circumstances there can be no question of estoppel or waiver.

141. Accordingly, as to the third preliminary issue, I conclude that there was a procedural irregularity which rendered invalid both the Award dated 1 October 2015 in the 27/29 Pembury Avenue dispute and the Award dated 1 October 2015 in the 29/31 Pembury Avenue dispute.

142. I will make the appropriate Order. Questions of costs and further directions may be considered electronically or at a further hearing, as the parties prefer.