

IN THE COUNTY COURT AT CENTRAL LONDON

Claim No. B20CL130

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

Thursday, 17th December 2015

Before:

HIS HONOUR JUDGE EDWARD BAILEY

Between:

PROPERTY SUPPLY & DEVELOPMENT LTD

Claimant

-v-

MR GRAHAM VERITY & MRS JULIE VERITY

Defendants

Counsel for the Claimant:

MR NICHOLAS ISAAC

Counsel for the Defendants:

MR STUART FRAME

JUDGMENT (Approved)

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JUDGMENT

HIS HONOUR JUDGE BAILEY:

1. This case raises an interesting point on the proper interpretation of the Party Wall etc Act 1996. But behind the legal argument there is a real issue for the parties in this case, the owners of adjoining properties situated near Tring, Herfordshire. The Old Egg Packing Station, Station Road, Long Marston, is owned by the claimant, the building owner for Party Wall Act 1996 purposes. The Old Thatch, Long Marston belongs to the defendants, the adjoining owners. The building owner has decided, as is its right, to develop The Old Egg Packing Station. To this apparent end demolition work was carried out during March and April 2014. Building operations then ceased and the building owner left the site with temporary protection. This temporary protection extends to part of the adjoining owners' property. The roof of the adjoining owners property is thatched with water reed. The protection provided by the building owner involves covering an area of exposed thatch with sarking felt.
2. It is now December 2015. No further works have been carried out since the completion of the demolition work in April 2014. The temporary protection has been left in place for some 20 months. Sarking felt is not designed to protect against the elements for any length of time. The adjoining owners find themselves in the unfortunate position that the sarking felt is now failing adequately to protect the exposed thatch roof of their property. Furthermore, they have to endure what probably appears to them little more than a legal frolic when all they want is to have their property returned to the position it was in before the building owner's demolition works and to keep well away from lawyers. This is something that needs to be said, not least because I have been sent a statement of the building owner's costs for this present exercise.
3. The claimant building owner wishes to challenge the validity of an addendum award stated to be made under the Party Wall etc Act 1996 on 1 May 2015. This addendum award requires the building owner to pay the adjoining owners the sum of £15,233.80 in respect of a number of matters relating to the temporary protection of the unfinished works, together with surveyors' fees. The building owner appreciates (I hope) that it is liable to pay for any damage that may arise from any failure of its temporary protection including any deterioration of the adjoining owners' thatch. The building owner appreciates (I hope) that leaving its development in an unfinished state for as long as it has was likely to give rise to a further party wall award. The building owner was always going to have to pay the surveyors' fees of such an award. So the position is that the claimant is now paying £14,544.40 in legal costs (and forcing the defendants to pay a very similar sum) to avoid paying the £15,233.80 under the award. It is no part of my function to tell parties how they should behave, but it is an unhappy state of affairs that any dispute as to the precise sum payable by the building owner to the adjoining owners was not litigated (if it could not be agreed) without taking technical points on the validity of the award. That said, my task is to determine disputes that are properly (within the Rules) brought before the court. This dispute arises on claimant's appeal that the addendum award should be declared invalid because one of two surveyors purporting to make the award was not validly appointed under the Act. It is a dispute properly brought before the court (however unfortunate it may be) and I will therefore adjudicate upon it.

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4. The party structure notice in this case was served back on 23 January 2012. Appointments were made, Mr Mark Battram for the building owner and Mr Andrew Rysdale for the adjoining owners. These two surveyors, in accordance with their obligations under section 10(1)(b) of the Party Wall Act 1996, appointed a third surveyor, Mr Phil Cane. Some 14 months later, on 21 March 2013, Mr Battram and Mr Rysdale, as building owner and adjoining owners' surveyors, made an award which permitted the demolition of the building owner's property and the provision of temporary support.

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5. Late in 2013 Mr Rysdale ceased to act. The reasons are immaterial. Mr Nicholas Brown was appointed in his place as adjoining owners' surveyor. It was the following year, in March/April 2014 that the building owner demolished its building and put up the temporary protection. It was always envisaged that the protection would be temporary. That much is plain from its nature, sarking felt over thatch and some form of polythene membrane nailed on with battens to cover a newly exposed wall.

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6. As 2014 wore on it became a matter of concern to the adjoining owners that no further works were being carried out. On 15 September 2014 Mr Brown, writing to the adjoining owners, informed them that he had drawn their concerns about the lack of progress and the effect on their thatched roof to the attention of Mr Battram, wrongly described in the letter incidentally as the adjoining owners' surveyor. Mr Brown did indeed write the same day to Mr Battram raising these concerns.

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7. On 24 October 2014 Mr Brown wrote again to Mr Battram repeating his concerns for the adjoining owners' property. Mr Brown noted that the weather had significantly worsened, that it would be reasonable to assume further worsening would occur as autumn wore on, and Mr Brown informed Mr Battram that it was his intention to make a further award if he had not heard from Mr Battram by 31 October 2014. The award he was threatening would be for payment in lieu of works to the roof and would also take into account any damage that had occurred. He finishes his letter by saying:

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"I am not an advocate of acting ex parte but I may have to undertake this role if I have not had a formal response by 31 October 2014."

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8. Lest there be any doubt as to the appropriateness of Mr Brown's concern, a report was obtained from a thatcher, Mr Quantrill, dated 12 January 2015. Mr Quantrill's report makes it clear that the thatch was suffering through being inadequately protected. I observe in passing that the problems the thatch is encountering as highlighted in Mr Quantrill's report are in their early stages, and it is to be hoped that provided action is taken in the not too distant future there should be no really serious long term damage to a water reed thatched roof, but damage there is. It would be idle to suggest that the damage will not worsen over time if no further works are undertaken to protect it.

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9. In February 2015 Mr Brown declared himself incapable of acting further as the adjoining owners' surveyor. On 6 February 2015 the adjoining owners appointed Mr Alex Frame as their surveyor to replace Mr Brown. The letter of appointment of is dated 10 February 2015 and appears at page 119 of the bundle, but nothing turns on the terms of appointment. Whatever other problems this development has had, retaining party wall surveyors is certainly one of them. On 2 March 2015 Mr Battram

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informed the building owner that he too was declaring himself incapable of acting as a party wall surveyor for the building owner. Mr Battram proposed that he be replaced by Mr Cane, the third surveyor.

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10. On 16 March 2015 Mr Frame, now the adjoining owners' surveyor, wrote to the building owners in the person of Mr Lamb, noting that Mr Battram had deemed himself incapable of acting and calling upon Mr Lamb to appoint a new party wall surveyor in Mr Battram's place. Mr Frame had evidently learnt of the proposal to appoint Mr Cane as the building owner's surveyor and he asked for confirmation that that was, indeed, the position. He had not heard back from Mr Lamb by 25 March 2015 when he wrote again expressing the opinion that it was important that a replacement be appointed quickly:

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"Therefore, should I not hear from you within the next ten days, I will make an appointment of a surveyor on your behalf in order that the matter might proceed properly in accordance with the Act."

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11. Mr Lamb responded by e-mail on 1 April 2015 expressing the opinion that Mr Frame had no power at this stage to appoint a surveyor on the claimant's behalf:

"However, we are in the process of appointing a new surveyor and briefing him on the legal position regarding the current award."

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An exchange of e-mails on 1 April 2015 then ensued with Mr Frame on the one hand insisting that he did have power to make an appointment on behalf of the building owner under section 10(4)(b), (indeed insisting that either the adjoining owners or the party wall surveyor had such power) and, on the other hand, with Mr Lamb and his solicitor, Mr John Wagstaffe of Longmores, firmly rejecting that contention.

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12. Undaunted, on 8 April 2015 Mr Frame wrote to Mr Campbell of Steve Campbell Associates in the following terms:

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"Further to our telephone conversation I would confirm that as I have not received a reply from the building owner regarding the replacement party wall surveyor, I hereby appoint you in accordance with section 10(4)(b) of the Act. I enclose a copy of the file of papers for your perusal and understanding of the matter. I would wish to meet on site with you as soon as possible as damage has been recorded at the adjoining owners' property and clearly needs attention. However, we are obliged to select a third surveyor in the first instance so may I propose Mr Alan Bright from Brentwood."

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Mr Campbell was prepared to accept appointment on behalf of the building owner. He was in agreement with Mr Frame that Mr Bright should be selected as third surveyor and the two of them, Mr Frame and Mr Campbell, then proceeded to make the addendum award dated 1 May 2015 against which the building owner appeals. That then is the background, the claimant building owner maintaining that Mr Campbell was not properly appointed.

A 13. The argument proceeds on the wording of section 10 of the Party Wall Etc Act 1996. Under the heading *Resolution of disputes* the provisions of s.10, so far as they are relevant to present dispute, are as follows:

“(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—

B (a) both parties shall concur in the appointment of one 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’).

C (2) All appointments and selections made under this section shall be in writing and shall not be rescinded by either party.

(3) ...

(4) If either party to the dispute—

D (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.

E (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 [*emphasis added*]...

(6)

F (7)

(8) (*quoted below*)

(9)

G (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.

H (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.”

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14. The adjoining owners’ argument has been forcefully advanced by Mr Frame. He accepts, as he must, that on a literal reading of section 10(4), there is authority given to either a building owner or adjoining owner only to make an appointment on behalf of the other owner if that other owner refuses to appoint a surveyor under subsection (1)(b), that is on the dispute arising or having deemed to have arisen. That may be seen as the initial appointment. However where the initial appointee has deemed himself incapable of acting and has been replaced with a subsequent appointee under the provisions of section 10(5) (and in this case not only the initial appointed surveyor but also his replacement have been replaced), such an appointee is not an initial appointment under subsection 1(b) and on their face the provisions of section 10(4)(b) do not apply to enable a replacement appointment to be made.

15. Mr Frame argues that to restrict the appointment provisions of 10(4)(b) to initial appointments only would give rise to a manifest absurdity. He invites the court to adopt a purposive interpretation of the Act’s provisions and hold that the appointing provisions of section 10(4)(b) apply throughout the party wall dispute resolution process. Mr Frame points to the provisions of subsection (5). These begin as cited above:

“If, before the dispute is settled, a surveyor appointed under paragraph (b) of subsection (1) by a party to the dispute dies...”

and then provides a replacement provision. If that provision is to be interpreted literally Mr Frame suggests that there could only ever be one replacement, for were the second appointee deem himself incapable the party who had lost his surveyor would not be able to call upon the provisions of subsection (5) to appoint a further replacement.

16. Mr Frame also relies on the provisions of section 10(8). Subsection (8) reads:

“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).”

Again, there is reference in this subsection to a surveyor appointed under subsection (1)(b). Mr Frame submits that a literal, and as he puts it, restrictive, interpretation of this provision would mean that if a third surveyor does not act, the provisions of section 10(8) would not be available to a surveyor appointed under section 10(5) because he has not been appointed under section 10(1)(b). Mr Frame submits that such an interpretation would amount to a second lacuna to the dispute resolution provisions of the Act. Accordingly, Mr Frame contends that the provisions of section 10(4)(b) should apply not only to the initial appointment but to any subsequent appointment made necessary by the death or incapability of an appointed surveyor.

- A 17. Mr Frame goes further and argues that as section 10(5) expressly provides that once a replacement surveyor has been appointed, that replacement surveyor should have “the same power and authority” as the initial surveyor, then on the appointment of that replacement surveyor he and the existing surveyor should then proceed under section 10(1)(b) to select a third surveyor. Mr Frame concedes that it would be open to the ‘replacement pair’ of surveyors (albeit one of the surveyors will usually be one of the original appointments), to select the same third surveyor as had originally been selected by the parties’ former pair of surveyors, but Mr Frame submits that the ‘replacement pair’ of surveyors would be under no obligation to maintain the same third surveyor.
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- C 18. While Mr Frame must accept that there is no express provision in section 10 covering a further selection of a third surveyor, as he suggests is the case, he points out that one of the roles of the third surveyor is to determine matters of dispute between the building owner and adjoining owners’ surveyors. The third surveyor acts as a referee. Mr Frame suggests that where two surveyors are appointing a referee it is only appropriate that they should select their own choice of referee; they should not be required to continue the appointment of the third surveyor/referee handed down to them by the original appointees.
- D 19. I quite accept the general proposition that where, as here in the Party Wall etc. Act 1996, statute sets out a dispute resolution mechanism, it is incumbent upon the courts to construe the Act as purposively as may be required to ensure that any defect that might be found in the parliamentary mechanism is cured so as to give effect to the general intention of parliament. That intention here is quite plainly that disputes in relation to party wall matters should be resolved by surveyors appointed under the 1996 Act, subject to a swift recourse to the county court by way of appeal. It is necessary therefore for me to consider whether there is the lacuna in the dispute resolution mechanism which Mr Frame argues is present.
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- F 20. In the 1996 Act parliament acknowledges that a party wall surveyor may not continue in place throughout the entirety of a dispute between a building owner and adjoining owner in any particular development. It is also evident that it is perfectly possible, and this case demonstrates that well if demonstration were necessary, that not only an initial appointment but also a subsequent appointment of party wall surveyor may require replacement by reason of death or incapacity. Where one party loses his party wall surveyor it is important that he should not be left in a position where, by the simple expedient of refusing to appoint a replacement, he is able to thwart the intention of the Act and prevent awards being made for the benefit of either building owner or adjoining owner.
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- H 21. In the present case the adjoining owners and their currently appointed surveyor Mr Frame have two live concerns. First that by failing to get on with the development the building owner has put the thatched roof of the adjoining owner’s property in jeopardy. Secondly that by failing to replace Mr Battram on his declaring himself incapable of further acting, the building owner may be acting in its own perceived interests (namely leaving the development in its present state and avoiding the cost of further protection work) by preventing a further Party Wall award. I recognise these concerns. Whether they are well placed I am in no position to reach a firm conclusion. They may be. But while a court should not hesitate to give a purposive construction to a statute where it is essential to do so, a court must be cautious in its approach and should never give

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purposive constructions where such constructions are not necessary, particularly when invited to do so to assist an individual party, however worthy of sympathy that party may be.

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22. I note in passing that it is an unfortunate feature of the facts of this case that after Mr Steven Campbell accepted appointment by Mr Frame on behalf of the building owner, he did not trouble to make any contact whatsoever with the building owner before making an award. In this regard Mr Campbell could doubtless point to the fact that the Act does not expressly require a surveyor appointed on behalf of either party to be in communication with the party concerned but it would be surprising if by failing to put in an express requirement to that effect, parliament was intending to encourage surveyors to have no regard whatsoever to their appointing party, even where that party is only nominally the appointing party. Mr Campbell's behaviour in this regard cannot have helped progress matters in a positive way.

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23. Mr Isaac for the building owner points out that section 10(4) of the 1996 Act gives a very powerful right to one side to appoint a surveyor for the other side. He submits that the court should not extend this right in a liberal way; only if it is absolutely essential to avoid a manifest absurdity should there be an extension of the right to appoint the 'other side's surveyor'. Under s.10(5) of the 1996 Act, as Mr Isaac points out, the appointment of a replacement surveyor is permissive and not obligatory. There is thus this indication in the terms of the statute that parliament did not consider it necessary that both owners should have their own surveyors. (There is another in s.10(1)(a)).

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24. Mr Isaac suggests that there is here no manifest absurdity that requires remedy. On the declaration of incapacity by Mr Battram as the building owner's surveyor, there remained in place Mr Frame, the adjoining owners' surveyor, and Mr Cane, the third surveyor. It was perfectly open to Mr Frame and Mr Cane to make an award; they had express power to do so under s10(10) of the 1996 Act. In response to this suggestion Mr Frame of counsel submitted that there was an onus on the claimant to demonstrate that Mr Cane was available to make an award with Mr Frame the surveyor, and that the claimant had not done so. The court should not therefore proceed on the basis that after Mr Battram's incapacity there still remained in place two surveyors, validly appointed, who were ready and willing to make an award in the absence of proof that Mr Cane was able and willing to join Mr Frame in the making of an award.

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25. The claimant has put no evidence before the court to demonstrate that Mr Cane was available and willing to make an award. However I cannot see that there is any such onus on the claimant as is suggested by Mr Frame of counsel. In my judgment it is not only open to but incumbent on the court to assume that once a surveyor has accepted appointment as a third surveyor he is available and willing to act in that role until such time as the contrary is shown. Indeed, the material before the court indicates that when it was mooted that Mr Cane should replace Mr Battram in March 2015, Mr Cane showed every inclination of being ready, willing and able to accept that appointment. It would be strange indeed in these circumstances for the court to proceed upon the basis either that Mr Cane was not available to act in April 2015 or that in the absence of the claimant demonstrating that fact, the court should presume that he was not able to act.

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A 26. Where one of the owners in a party wall matter fails to appoint a replacement surveyor on the death or incapacity of an existing appointment there are still two ways in which an award may be obtained by either party under the Act. Section 10(10) provides that:

“... the three surveyors or any two of them shall settle by award any matter—

B (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.”

That is the first way of obtaining an award, making use both of Mr Frame and of Mr Cane. Section 10(11) provides that:

C “Either of 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.”

That is the second way in which an award might be made, making use of Mr Cane alone.

D 27. It seems to me that there is no lacuna which requires a purposive construction which would give the parties a third way of arriving at an award where one party fails to appoint a successor where ‘his’ surveyor dies or is incapable of acting. It may well be the case that the most common way of obtaining a party wall award is by agreement of the building owner’s and the adjoining owner’s surveyors. But it is not essential that the award is obtained in this way. The Act makes that clear. There being in my judgment no lacuna to fill, there is no need to give the Act the purposive construction for which Mr Frame contends.

E 28. It is possible, the ingenuity of man is such, that events might be hypothesised under which the parties would find themselves unable to proceed with the dispute resolution procedures of section 10. All three surveyors might die or become incapable, there might for instance be a tragic accident when all three surveyors were on site together, and that might make life extremely difficult for the building owner to continue with his development against an adjoining owner who is determined to be difficult and refuses to make a further appointment. However it seems to me that quite how the court should resolve such a problem or any other hypothetical problem that the ingenuity of counsel might devise should await facts that fall for determination and argument directed expressly to those facts. For the present, it is sufficient to point out that the failure of the building owner to appoint a replacement for Mr Battram, unfortunate as it was in the circumstances, did not give rise to a lacuna in the dispute resolution procedure of the 1996 Act that requires a construction of section 10 which permits the appointment of Mr Campbell by Mr Frame.

F 29. I would also add for the sake of completeness that I do not find attractive Mr Frame’s argument that on a replacement appointment being made under s.10(5) the provision in the sub-section that the replacement surveyor has “the same power and authority” as the originally appointed surveyor necessitates the new pair of the existing surveyor and replacement surveyor to proceed under section 10(1)(b) to select a third surveyor. It seems to me that while parliament was concerned to ensure that the replacement

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surveyor should have the same power and authority as the initial surveyor, parliament did not provide that the replacement surveyor should be under the same obligation as the initial appointee to appoint a third surveyor. There is no basis for assuming that the new pair of existing and replacement surveyors are under the obligation placed on the initial appointees in s 10(1)(b) to select a third surveyor where there is in place a third surveyor validly selected by the initial appointees.

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30. In the circumstances, I must accede to the claimant's claim. There was no basis for Mr Frame to appoint Mr Campbell. In the circumstances the addendum award was made only by one validly appointed surveyor, the adjoining owners' surveyor, which is not permissible under any provision of section 10 of the 1996 Act. Accordingly, and with no little reluctance, I must declare the addendum award invalid.

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[Discussion re costs follows]

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