Judgment Approved by the court for handing down.

Neutral Citation Number: [2019] EWHC 1240 (Admin)

Case No: CO/4161/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2019

Before :

ROWENA COLLINS RICE
(Sitting as a Deputy High Court Judge)

- -

Between :

R on the application of

BISWAJIT ANNA SUBRAMANIAN
LAURA VIDAL-OREGUI SUBRAMANIAN

Claimants

- and -

CITY OF LONDON MAGISTRATES

Defendants

- and -

HUGH STEWART
REIKO STEWART

Interested Parties

- -

Mr Howard Smith (instructed by Child & Child) for the **Claimants**
Mr Nicholas Isaac QC (instructed by Morrisons Solicitors LLP) for the **Interested Parties**

Hearing date: 10th April 2019

- -

Approved Judgment

Ms Collins Rice :

Introduction

1. There is a continuing neighbours' dispute about a party wall. It comes before the Administrative Court because one household, the Stewarts, obtained a Magistrates' order in the course of this dispute, and the other household, the Subramanians, challenge that order on public law grounds.

2. The neighbours' dispute arises from some structural work the Subramanians began on their house in 2014, which has affected the Stewarts' house next door. There is a statutory framework for the resolution of such disputes, to keep them out of court as much as possible. It provides for binding decisions, or 'awards', to be made by surveyors.

3. In this case, a surveyor's award fixed a sum of money as the value of the Stewarts' fitted kitchen. The Stewarts took the award to the Magistrates to enforce payment of that sum. The Magistrates made an enforcement order. The Subramanians tried to appeal that order but the Magistrates refused. The Subramanians say the Magistrates were wrong in both decisions as a matter of law, and that they are not legally required to pay the sum to the Stewarts.

Scope of these proceedings

4. As is usual, the Magistrates took a neutral position in these proceedings. They made no submissions and were not represented.

5. The first decision of the Magistrates was an order of 3rd July 2018 that the sum of £85,950 referred to in the surveyor's award was payable to the Stewarts together with costs. Their power to make that order comes from s.58 of the Magistrates' Courts Act 1980. It is a power to order payment "*of any money recoverable summarily as a civil debt*". The definition of a sum enforceable as a civil debt in the 1980 Act (s.150) is either a sum arising out of a decision of the Magistrates themselves, or "*any other sum expressed by this or any other Act to be so enforceable*". The Subramanians say that, on a proper construction of the award, and of the relevant statutory framework, the money was not recoverable as a civil debt. So they say that the Magistrates were wrong, as a matter of law and jurisdiction, to make it.

6. The method of challenging a decision on those grounds is to ask the Magistrates to "*state a case for the opinion of the High Court on the question of law or jurisdiction involved*" (s.111 of the 1980 Act). The Magistrates may refuse to do so if they consider the application "*frivolous*" – that is to say, groundless. They issued a certificate to that effect on 30th August 2018, and gave their reasons on 1st October. They thought the award on its face required payment of the money, and the statutory framework was clear that the award was final. They thought the Subramanians' challenge was groundlessly trying to go behind the award and reopen the matters it decided.

7. The High Court has power, under s.111, to order the Magistrates to "state a case" if it concludes they have gone wrong in law or jurisdiction in refusing to do so. Permission for judicial review was granted in this case at an oral renewal hearing on

31st January 2019, on the basis that the proper construction of the award and the statutory framework (and therefore the enforcement jurisdiction of the Magistrates) was indeed an arguable matter, and not groundless.

8. It was then common ground between the Subramanians and the Stewarts that rather than go round the circuit of ordering the Magistrates to "state a case" to the High Court, I should simply confirm that they were wrong to have refused to do so, because there were arguable matters of law in issue, and proceed to determine the substance. That was the method adopted in *R oao LB Newham v Stratford Magistrates' Court* [2012] EWHC 325 (Admin) (paragraphs 22 and 23) on the basis that:

> *"if no further findings of fact are necessary in order to decide the point of law in issue and if the justices have already explained their refusal to state a case in terms which make the issues apparent, then the correct course is for this court to proceed to decide the relevant question or questions thereby avoiding additional delay and cost."*

I agreed that that was the right approach in this case. The scope of these proceedings was therefore the correct interpretation of the surveyor's award in its relevant factual and legal context. Both Counsel made attractive submissions of some legal subtlety about that, and I was grateful for their assistance.

The statutory framework

9. The statutory framework is provided by the Party Wall etc. Act 1996. That sets out the rights and duties of neighbouring landowners relating to work affecting party walls (s.2), including where, as in this case, excavations are proposed (s.6). Section 6(5) requires advance notice to be given of excavation works. The Subramanians gave the Stewarts a s.6(5) notice in 2013. The Stewarts did not consent to the works. Section 6(7) provides that in such circumstances a 'dispute' is deemed to have arisen.

10. Section 10 of the Act sets out the statutory framework for resolving disputes. The parties may agree on a single surveyor for that purpose. Alternatively, each party appoints a surveyor, and those surveyors appoint a third (s.10(1)). Once the surveyors are appointed, the parties are not allowed to rescind the appointments (s.10(2)).

11. Section 10 continues:

> *"(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;...."

12. Section 10(16) provides for an award to be conclusive, and not to be questioned in any court other than by way of appeal to the county court within fourteen days, as provided in section 10(17).

13. The neighbours' 2013 dispute was resolved under this procedure. Each party appointed a surveyor, and those surveyors appointed a third. An award was made that the Subramanians could begin their works, and they did so.

14. Section 7(1) of the Act provides that owners undertaking works must not cause unnecessary inconvenience to adjoining owners. Section 7(5) requires works to be done according to plans which are either "*agreed between the owners (or surveyors acting on their behalf) or in the event of dispute determined in accordance with section 10.*" Section 7(2) provides for compensation to be paid for any loss or damage which may result from works.

15. The Subramanians' works were carried out according to the surveyors' plans. The works caused damage to the Stewarts' property. The nature and extent of that damage, and the issue of compensation for it, fell to be dealt with. A fresh 'dispute' was in contemplation.

The 2017 award

16. On 3rd October 2017, the surveyor appointed by the Stewarts, Mr Levy, wrote to the 'third surveyor', Mr Maycox. He said that he and the surveyor appointed by the Subramanians, Mr Price, had reached agreement on all the principal issues arising, but there was an outstanding difference between them. He said Mr Price had accepted that the Stewarts' kitchen floor had become tilted as a result of the Subramanians' works, and that the kitchen cabinetwork had been damaged consequential to that structural movement. The surveyors concurred that to make the floor level it would be necessary to remove the cabinetwork. The suppliers of the cabinetwork had said that if removed it could not be repaired and reinstalled. So a quotation had been obtained for the replacement of the cabinetwork. Mr Price had objected that that would amount to a windfall 'betterment'. Mr Levy said that there should be no discounting for betterment. So there was a difference of view between the surveyors as to how to deal with this kitchen cabinetwork issue, including by reference to some legal advice on the right approach. Mr Levy's letter submitted that Mr Maycox should award that the Subramanians "*shall be responsible for paying*" the Stewarts £104,600 for replacing the cabinetwork and that they should also pay the costs of the referral.

17. On 9th October 2017 the other surveyor, Mr Price, wrote to Mr Maycox in response to Mr Levy's submission. He agreed that the letter of 3rd October set out in general terms the difference between them in respect of which an award decision was being sought. He considered that the whole referral to Mr Maycox by Mr Levy was based on a disproportionate level of betterment. He took issue about the correct approach to calculating compensation.

18. The Subramanians' solicitor also wrote to Mr Maycox, on 31st October 2017. He said it was common ground that the excavations had given rise to structural movement at the Stewarts' house and that the movement caused damage in a number of areas. He said:

> *"At present, we are concerned solely with the damage in the kitchen; a separate award will no doubt be made in due course in respect of the damage elsewhere. So far as the kitchen is concerned, the excavation works caused the floor to sink and this must of course be repaired."*

He said:

> *"My clients fully accept that an award of compensation must be made in the adjoining owners' favour under section 7(2) and, the appointed surveyors having failed to reach agreement, it falls to you to make that award under section 10(11). You must therefore address the key issue: whether, in all the circumstances, it would be reasonable to require the building owners to foot the bill for replacement cabinetry."*

He said that that was a matter of judgment, but also of the application of legal principle, which he went on to consider. He said:

> *"My clients fully accept that they must make such payment as is fair and reasonable and have no wish to escape their liabilities. It is important, however, that the correct balance is struck between the competing interests of the two owners: I think it is plain that the balance is in favour of removal, repair and reinstallation. An award should of course include a provision that the damages be paid only against evidence that the works have been carried out: if the adjoining owners elect for any reason not to do the work, the costs would naturally not be incurred. Under those circumstances, the adjoining owners would be entitled, instead, to an award for the loss of amenity which they would suffer from continuing to use the kitchen in its present state and the calculation of that loss of amenity would proceed on very different principles."*

19. Mr Maycox made his award on 9th November 2017. It is very brief (the effective part occupies one page of a single column of text). He set out the terms of the dispute in this way:

> *"It is a matter of agreement between the first two named surveyors that damage occurred to the Adjoining Owners' property as a consequence of the execution of the notified works described in the [2013] Award. As part of that damage it is agreed that the kitchen floor has moved out of level necessitating remedial work which in turn requires the removal of the kitchen units. The dispute between the surveyors referred to me per Section 10(11) of the Act involves three considerations:*
>
> *1. Whether or not the existing Smallbone kitchen units can be successfully removed, temporarily stored, repaired, reinstalled and re-polished or whether the kitchen units have to be replaced.*

> *2. Whether or not a consideration relating to betterment is applicable in the event that the kitchen units have to be replaced.*
>
> *3. Responsibility for the costs of this reference in respect of the first two named surveyors' fees in preparing their submissions, the fees of solicitors engaged by both parties and my fees in acting as the Third Surveyor."*

20. His decision was:

> *"1. THAT the re-use of the existing kitchen cabinetry is an inappropriate solution and that the cabinetry will have to be replaced...*
>
> *2. THAT ... I award that the estimated cost of the replacement of the kitchen cabinetry ... shall be discounted by 25% to take account of the betterment that accrues to the Adjoining Owner such that the amount payable by the Building Owner to the Adjoining Owner will total £85,950 inclusive of VAT."*

He made a split award as to costs and fees.

Subsequent events

21. The Stewarts took this award to the Magistrates on 10th April 2018 claiming the £85,950 as a civil debt. There had been some correspondence preceding a formal demand by them for payment on 29th March.

22. In the meantime, Mr Price had discharged himself and the Subramanians had replaced him with a new surveyor, Mr Dewhurst, in December 2017. When *he* came to consider the issue of the Stewarts' kitchen floor itself, it was Mr Dewhurst's view that the slope was not caused by the Subramanians' work at all. It predated that work altogether. He confirmed that view in a letter of 19th February 2018. This turn of events prompted Mr Levy to write again to Mr Maycox on 13th April 2018 in these terms:

> *"I regret that despite having reached agreement as to the scope and extent of repair to the Adjoining Owners' property with Simon Price prior to him deeming himself incapable of acting, Andrew Dewhurst has expressed his disagreement with the scope of repair, repair expenses and diagnosis associated with the damage. The difference between us is so substantial that I consider there is no merit in further discussion with Mr Dewhurst as this would only serve to increase the magnitude of costs to the detriment of the parties. I am therefore referring this dispute to you, the Third Surveyor, for determination under Section 10(11) of the Act."*

Mr Dewhurst, in a response to Mr Levy of the same date, agreed they were poles apart and that Mr Maycox needed to resolve the matter. This latest dispute has yet to be resolved.

The different interpretations

(a) General

23. Two radically different interpretations of the 2017 award are contended for. These are put forward as matters of law and principle within the scheme of the 1996 Act. To the extent that the factual context assists (which is to a degree disputed), no new evidence was submitted for this hearing.

24. The Subramanians contend that, as a matter of fact and law, the 2017 award was a limited, and interim, determination. Its scope was necessarily restricted to the two substantive issues on which the surveyors were in disagreement at the time. Those were questions about valuing consequential loss. They were contingent on primary liability (causation and degree of damage, and remedial measures, to the floor). The award did not – and could not – make, confirm, or assume final settlement of that primary liability. It simply answered the technical questions as to whether, *if* the kitchen cabinetry had to be removed in order to do remedial work on the kitchen floor, it *could* be reinstalled, and, if not, how much compensation *would* be due. None of that had yet happened. No conclusion had been reached about levelling the floor: the tilt was of debatable significance and levelling might turn out to be a disproportionate measure. No dispute about any of this had been referred to Mr Maycox, so he had no jurisdiction to make a binding award on it. The preconditions for entitlement to compensation money had not yet been fulfilled, so no civil debt could arise out of the award. The Magistrates' order was premature.

25. The Stewarts contend that, as a matter of fact and law, the 2017 award was a binding and final determination of the only outstanding matters left in dispute at the time. The agreement of the surveyors, and the parties, was plain. It fulfilled any preconditions to the relevance of the questions put to Mr Maycox (especially causation), and meant the award effectively settled the whole issue of liability in relation to the kitchen cabinetwork. Not having been appealed, the award was fully effective and enforceable. This challenge was simply an impermissible attempt to go behind it and reopen a decided matter.

26. The first step in understanding where these rival interpretations come from, and where they lead to, is to return to the scheme of the 1996 Act and look in more detail at the functions of surveyors in dispute resolution under s.10.

27. As a general observation, party wall disputes have a high probability of contentiousness. That is why statutory regulation came about. Where people's homes are involved, so, often, are their primary economic assets and their intimate private lives. Where neighbours are also involved, it is not surprising to find strong feelings engaged. The scheme of the 1996 Act is to contain these matters in an orderly structure designed to provide clarity, fairness and a degree of expert oversight. It aims to prevent disputation in the first place, and, where disputes cannot be avoided, to resolve them quickly, objectively, fairly and finally.

28. The way in which s.10 of the Act puts dispute resolution in the hands of surveyors is carefully calibrated. Parties can try to agree on a single decision maker themselves. Or they can each appoint 'their' surveyor, and the surveyors appoint a third as a tie-breaker for disputes they cannot themselves resolve. But once engaged as decision-makers, the surveyors must act quasi-judicially (*Gyle-Thompson v Wall St Properties* [1974] 1WLR 123, p.130, paragraph H; *Mohamed & Lahrie v Antino & Stevens* 2017 unrep. CLCC case no.C20CL075; paragraph 24). The surveyors' appointments cannot be rescinded and their awards are binding (subject to appeal to the county

court). The objectivity, impartiality and finality this brings is fundamental to the scheme.

29. The foundation of the surveyors' decision-making jurisdiction is the existence of 'a dispute' between the parties (s.10(1)). Once this jurisdiction is engaged on a dispute, it must be discharged by making an 'award' (s.10(10)). The award is to settle any matter 'which is in dispute' between the parties (s.10(10)(b)). It is a determinative judgment.

30. The scheme thus focuses on dispute, or disagreement. The key question in the present case, however, goes to the place, within this scheme, of *agreement* – both agreement between the parties and agreement between the surveyors. The Act is not explicit about the role of agreement. The rival interpretations contended for in this case take different starting points about it.

(b) Agreement as the absence of 'dispute'

31. The first interpretation (favouring the Subramanians) starts from the basis that the only relevance of any state of agreement from time to time subsisting between *the parties* is to exclude subject-matter from the scope of s.10. Agreement just means there is no 'dispute'. If there is no 'dispute', there is nothing for s.10 to bite on and no jurisdiction for the surveyors to make a binding award about it.

32. Similarly, the only relevance of any agreement between *the two surveyors* is to make a distinction between disputed matters they themselves will make an award about under s.10(10) ("*or any two of them*") and those they will refer to the third surveyor under s.10(11).

33. Applying that interpretation to the present case supports the following narrative. At the point of referral to Mr Maycox in 2017, the dispute, and the only matter over which he had any jurisdiction, was about the proper approach to valuing the cabinetwork: one aspect of a potential compensation entitlement under s.7(2). As the submissions made to Mr Maycox recognise, this was not a straightforward exercise. The proper construction of s.7(2) does not appear to have been considered by the High Court until the summer of 2017, in *Lea Valley Developments Ltd v. Derbyshire* [2017] EWHC 1353 (TCC). In that case, the Court gave guidance that common law principles should be applied to the calculation of a s.7(2) award. That in turn pointed back to authorities such as *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] AC 344, and the need to consider proportionality between remedial expenditure and benefit to be obtained, and whether the correct measure of compensation should be cost of reinstatement or diminution in value. All of this is highly fact-sensitive, and Mr Maycox was being asked to resolve the precise issue of the reinstalment, and any 'betterment' discount, of the kitchen cabinetry in this context and for this purpose.

34. It was no surprise this issue was taken early in settling a compensation package. The other two surveyors were confident of dealing with other issues – causation, the levelling of the floor, and any other consequential matters such as loss of amenity or disruption while kitchen work was done – in due course. They could make awards about any disputed issues relating to those, if they had to, and did not expect to have to trouble Mr Maycox about them. The complete s.7(2) entitlement would be finally

decided in the round, with the assistance of the 2017 award, which would have settled a difficult bit.

35. The Subramanians were content with the 2017 award on that basis and had no reason to appeal it. It settled the technical quantum questions put to Mr Maycox. That was all. Nothing was finalised about any other aspect of compensation. Nothing was understood about the amounts or timing of any payments ultimately due. Nothing was clear about what works would in fact be done, either to the floor or to the kitchen cabinetry. No expectation of any immediately payable sum arose, or could have arisen, on receipt of the 2017 award. That is where this interpretation ends up.

(c) Agreement as operative settlement

36. The second interpretation (favouring the Stewarts) starts again with the relevance of 'agreement' to the scheme of the 1996 Act. On this interpretation, agreement operates not just as 'absence of dispute' for the purpose of s.10 jurisdiction, but to settle disputes in its own right and give necessary meaning and context to surveyors' awards. It works as follows.

37. The 1996 Act is intended to prevent and resolve parties' disputes as efficiently and conclusively as possible. The formal s.10 procedure is a last resort, not least because it is the last possibility of avoiding court litigation. There is no point in going to the trouble and expense of seeking a s.10 award unless it is going to resolve something meaningful that the parties need resolved.

38. In this case, the referral materials show that, on the professional advice given at the time, everyone accepted that the Subramanians' work had caused the Stewarts' floor to sink. Of course, many consequential details were yet to be finally resolved, including working out exactly what needed to be done about the floor itself. But it was possible to get on and resolve the cabinetwork issue in the meantime. Every component of the compensation package for the cabinetwork was settled by agreement apart from the quantum question. *On that basis*, Mr Maycox was being asked to put the final piece in place and the picture would be complete. There was no other reason to invoke the s.10 procedure at that point.

39. The agreement of the two surveyors recited in the award's preamble, on this analysis, could be relevant only in confirming the underlying agreement of the parties. The surveyors could not have been agreeing about other matters they would be settling themselves in other awards without reference to Mr Maycox, because the parties had no other live disputes between them at the time. The outstanding questions – about the levelling of the kitchen floor and any other consequential compensation issues – might have been agreed in due course without needing the s.10 procedure at all.

40. The surveyors' s.10 jurisdiction has to be invoked to tackle issues logically and sequentially – and finally – as party wall projects progress. Nothing else makes legal, operational or economic sense. Causation of damage to the kitchen floor was an obvious early issue. By the time of the 2017 award, it was long settled. The reference to Mr Maycox could not have been on any other basis. That is how the award must be understood in good faith. It could be relied on as a full and final answer to the only matter in dispute and so was fully enforceable as a civil debt. That is where this interpretation ends up.

Analysis

(a) General

41. The 2017 award specifies a sum of money. It is certainly a formal and binding decision, with statutory legal effect. The question is whether it identifies a civil debt 'expressed to be enforceable' by virtue of the 1996 Act.

42. The award recites the dispute to which it relates. That recital refers to agreement of the surveyors that the kitchen floor had moved out of level as a result of the works next door. Mr Smith for the Subramanians says that that is purely a jurisdictional recital, excluding causation from the scope of the award and leaving it at large as a matter of law. Mr Isaac for the Stewarts says that the underlying agreement on causation is meaningful operative context for the award, and that that is recognised by the recital. If causation is excluded from the scope of the award it is not because it is at large, it is because it is settled.

43. The wording of the award's 'decision' section does not answer the question conclusively: "will have to be replaced" and "the amount payable... will total" can be read as either an imperative, or a conditional, as to the future. The award is capable of making sense in its own terms on either basis. Nor in my view can the interpretative question be settled simply on the circumstantial facts. Either narrative is plausible on the papers. A certain amount therefore does rest on the effect of the recital and its reference to 'agreement'.

44. The contention for the limited, jurisdictional, effect of 'agreement' is relatively straightforward to follow, if narrow in the result it produces. The contention for the operative effect of 'agreement' has to demonstrate how, in the scheme of the Act, agreement operates in law to create a civil debt here. Mr Isaac's argument is a more complex one, with a number of strands.

(b) Agreement a part of the award

45. The first strand suggests the award itself gives effect in law to the agreement. This argument rejects the idea that there is a restrictive link between s.10 jurisdiction and matters not in active dispute. It relies on the proposition that s.10(11) of the Act is broad in scope and that 'the necessary award' should not be over-interpreted as being narrowly limited to the precise terms of the referral. So the two substantive questions put to Mr Maycox do not exhaust the scope and effect of the award.

46. There is support for this view from the general scheme of the Act. The purpose of awards is to minimise and resolve disputation, not to give ever more grounds for it by encouraging debate over the exact terms of reference of awards, trying to limit their effectiveness.

47. There is also some support from the authorities. Mr Isaac took me to *Farr's Lane Developments Ltd v Bristol Magistrates* [2016] EWHC 982, a case he said had strong parallels to the present. There, the Court said (paragraphs 36, 38):

> *"The claimant then submits that the word 'determine' in section 10(12) and (13) indicates that an award by a surveyor can only deal with disputed matters. ... In*

> *my judgment, the construction contended for by the claimant does not accord with the natural meaning of the language used in the 1996 Act and would not allow the legislation to operate in a sensible manner."*

The court concluded that the phrase "*any other matter arising out of or incidental to the dispute*" in section 10(12)(c) is apt to include matters going beyond the precise ambit of the dispute between the parties (paragraph 39). Again, at paragraph 42:

> *"A particular subject may not have been in dispute between the parties during the s.10 process, but it is nonetheless important that it be "pronounced" or "declared" so as to form part of the overall "determination" by the surveyors so that subsequently it may be enforced as part of the award and the "conclusive" effect of section 10(16) may apply to the totality."*

48. In *Farr's Lane*, however, the operative part of the surveyor's award made explicit and detailed provision for the immediate payment of fees and for the calculation and payment of future fees. The interpretation of the award was not in doubt. The question was whether it was ultra vires because those particular issues had not been raised between the parties at the time of the referral of the dispute. The Court did not have much patience with the idea that incidental and consequential issues such as fees could not be formally finalised by award as things went along, in the interests of orderliness.

49. So an award *can* deal *explicitly* with matters not in active dispute where they are *incidental* to the award, in order to avoid future disputes. It is however a big step from that to concluding that the 2017 award impliedly, by virtue of reciting agreement, did in fact go beyond the remit of the two quantum issues in dispute to confirm an underlying agreement about causation as an effective part of the decision. This strand of argument does not by itself demonstrate the creation of a civil debt here. More is needed.

(c) Agency

50. The second strand of the 'operative' argument relies on the text of the preamble to the 2017 award as crystallising the parties' agreement about causation through the agency of the surveyors, acting on their behalf. The surveyors translated that agreement into the context of a binding award.

51. There is no doubt that the quasi-judicial or quasi-arbitral s.10 function of the surveyors is not exhaustive of their entire role in party wall cases. Section 7(5) of the 1996 Act, for example, makes explicit reference to the surveyors being able to act on the parties' behalf in agreeing any deviations from the plans agreed for the building works.

52. However, when the surveyors are actively seized of a s.10 dispute, *then* the authorities do underline that they are required to act independently. Mr Maycox cannot be regarded as acting as an agent for the parties in making his award, consistently with the exercise of his quasi-judicial functions. There is also an argument that the two s.10 *referring* surveyors are expected to act quasi-judicially, including in identifying matters to be decided by the third surveyor. If *referring* surveyors are to 'agree' about something as a matter of substance rather than purely as a matter of identifying the

third surveyor's jurisdictional questions, then the scheme of the Act suggests that, to have legal effect, that must be expressed in an *award by them* (s.10(10)). To suggest that they may in parallel be able to form agreements as agents for the parties, and that those agreements can be given implied binding effect in a third surveyor's award, is to create a complexity and ambiguity about their functions which it is hard to reconcile with the scheme's objectives of simplicity and clarity.

(d) Common law sources of legal effect

53. The third strand of the 'operative' argument is that there was, in fact, a state of agreement between the parties, before the referral was made, which had legal significance in its own right, and that the preamble to the award declared that agreement formally, thus giving it the finality provided for by s.10(16).

54. Mr Isaac argued there was support for that analysis in *Mohamed & Lahrie*, with particular reference to paragraphs 35 and 36 of the judgment. However, the question in that case was whether a formal consent order, agreed between the parties "*in full and final settlement of all matters between them.. and ... in resolution of all disputes between them under the Party Wall etc At 1996*" was effective in removing the jurisdiction of the surveyors and of the Court to award anything different. It was. But as the Court observed (paragraph 35), this was a *rare* case in which the parties had made express and formal legal arrangements which an award could not set aside. This is not such a case.

55. The task for this strand of the argument is to show that there was a *legally effective* agreement between the parties as to causation, capable of being declared and given conclusive effect to in the 2017 award. There was no *express* written – or oral – *contract* between the parties dealing with it. Mr Isaac did not suggest an implied contract arising from a course of conduct (it is hard to see how he could have done, on the facts). Instead, he suggested that equitable principles could assist.

56. These submissions were not developed in detail, and I was not taken to any authorities for them. The proposition, broadly, was that having been in agreement about the causation issue, and allowed the s.10 reference about the kitchen cabinetwork to go ahead without disputing causation at the time, it would be inequitable for the Subramanians to take any other position subsequently – and that the 2017 award locked that position down with finality so as to create an immediately enforceable civil debt.

57. The components of equitable estoppel (clarity of position, detrimental reliance) are not obvious on the facts of this case. It is also not easy to see the place for them in a statutory scheme designed to take party wall disputes away from debate about the parties' behaviour to each other, and put them into a simple system of professional dispute resolution. It is difficult to follow this strand of argument to the conclusion contended for.

Conclusions

58. The reality appears to be that until Mr Dewhurst's arrival, the Subramanians and the Stewarts were mutually going along with the idea that the excavation works had caused the kitchen floor to sink. That is what their surveyors had told them, and they

had no reason to doubt it. But going along with an idea, based on professional advice, is not the same thing as being legally bound by it. Something more is needed for that. Otherwise there is a continuing entitlement to disagree.

59. It might be going too far to say that nothing in a contested party wall situation is finally decided until it is clearly settled by formal legal agreement or a surveyor's award. But as the 1996 Act recognises, the potential for dispute is ever present. Matters that do not at one time look at risk of dispute can become disputatious. It takes more than going along with something to prevent that. Absent the 2017 award, the only matters *formally* settled were the original award for the works to proceed, and the s.6(5)(b) plans. Everything else was inevitably proceeding at risk of future contentiousness.

60. As an illustration, one of the reasons s.10(2) of the Act makes surveyor appointments non-rescindable is no doubt to ensure that parties do not shop around to find professional advice that suits them from one issue to the next. But s.10(5) recognises that sometimes unavoidably surveyors do have to be replaced. The risks of different professional advice in consequence are absolutely inherent in that. Those risks are to a degree managed in the 3-surveyor system, with its provision for a majority conclusion. But they are clearly recognised in the provision made in the single 'agreed surveyor' system by s.10(3), where dispute settlement has to begin again *de novo* when a surveyor is replaced. There is no discernible provision in the scheme for a new surveyor to be bound by the opinion of his or her predecessor otherwise than by means of an award. (In this case, for example, it appears that the slope to the Stewarts' kitchen floor was not picked up at all until Mr Levy was appointed in substitution for a predecessor surveyor.) It is one of the ways issues which have not been disputed before, and are proceeding at risk, can become disputed. But it is only one example.

61. The 2017 award takes its place in a statutory scheme aimed at regulating this high potential for disputation in party wall cases. I do not think it consistent with that aim, or with the specific provision made by the 1996 Act, to complicate the interpretation of an award by unspecific reference to general equitable principles, or to over-interpret its recital clause. The 2017 award, unlike the award in *Farr's Lane*, says nothing on its face about the creation of an immediate civil debt. It contains no explicit provision in its operative section either addressing the issue of causation or giving effect to any conclusive pre-existing agreement between the parties about causation. Did it do so by implication, because it deals with a matter which is relevant and meaningful for the parties only if causation is accepted, and because that was also the general assumption on which the reference was made? I cannot conclude that it did, either as a matter of law or on the facts.

62. I conclude that the agreement recited in relation to the 2017 award was as to the premise of the questions. Mr Maycox answered the questions put to him on that premise. That is all. The agreement recited does not convert a premise into a determination. To suggest otherwise is to attempt to impose the strict s.10(16) and (17) limitation of appeal rights onto a potential range of issues which have not been identified at the time with any sufficient degree of precision and clarity. That is oppressive.

63. Precision is required in resolving party wall disputes. Any attempt to articulate the detail of precisely what is said to be eliminated by the 2017 award *because of agreement* from future dispute founders for uncertainty. Causation is not a binary issue. The *exact* effect of the Subramanians' works on the Stewarts' kitchen floor had yet to be considered. Whether *any* remedial works to the floor should be undertaken, and if so which and how, had yet to be finalised. The answers to all of these were preconditions to the practical relevance of the 2017 award. The award cannot in my view sensibly be read as incorporating answers to those questions. It is not clear enough precisely what those answers would be, even on the shared understanding at the time.

64. Surveyor awards decide the points of dispute put to them. They cannot guarantee the practical effects of an award in an evolving situation without making explicit provision. A surveyor's award has to say what it means. Legal certainty requires that. Legal certainty is the whole point of surveyor awards. It relies on unambiguous drafting and clear jurisdictional limits to the scope of an award, so that its effects can be clearly understood, and litigation like this avoided. In case of doubt, those limits are set by the questions referred for decision. The simpler approach to the legal effect of (informal) 'agreement' – that it just identifies what is *not* being referred for settlement by award – looks closer to the scheme of the Act and the realities of an inherently disputatious context. Importing a whole substructure of premise and assent into the operative terms of awards, on any basis other than necessity, would simply serve to make them radically uncertain. No case for necessity can be made in the present case. It is not objectively necessary to import a binding and irrevocable agreement on causation to make sense of the 2017 award on its face. It is comprehensible as an award simply about the practicality of kitchen cabinet reinstallation, and about quantum on a premise of replacement.

65. The 2017 award was part of a picture which has itself become less, rather than more, clear as time has gone on. That may not be a happy state of affairs, but it is not at odds with a legal scheme which recognises the omnipresent potential for disputation. The 2017 award may or may not prove in the end to have been a nugatory exercise. Whether the reference and award were the right steps to take at the time is not, however, a matter for this Court.

66. For better or worse, the award cannot in my view properly be made to fix the entire situation, in law, in the state of the parties' expectations at the time of the reference. It is a binding determination of the issue of cabinetwork quantum, for whatever purpose that may continue to serve. It cannot properly and fairly be read as having created an immediately enforceable civil debt, and the Magistrates' Order predicated on that view should be set aside.