Case No: G20CL122

IN THE COUNTY COURT AT CENTRAL LONDON
TCC LIST

Thomas More Building
Royal Courts of Justice

Date: 25/11/2021

Before :

HHJ PARFITT

- -

Between :

(1) LAHRIE MOHAMED	**Appellants**
(2) SHEHARA LAHRIE	
- and -	
(1) SUKHBINDER SINGH TAKHAR	**Respondents**
(2) IQBAL KAUR TAKHAR	
(3) PIRTHIPAL SINGH TAKHAR	

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Andrew Butler QC & Stuart Frame (instructed by **Lincoln & Rowe**) for the **Appellants**
David Mayall (instructed by **Thirsk Winton LLP**) for the **Respondents**

Hearing dates: 8 November 2021

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Approved Judgment

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

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HHJ PARFITT

HHJ Parfitt :

Summary

1. By application dated 5 August 2021, the Respondents apply to strike out this party wall appeal for want of jurisdiction. The appeal relates to an award dated 13 October 2020 ("the Award"). At least in part, the Award was made pursuant to paragraph 7(2) of the Schedule to a Tomlin Order dated 11 May 2016 ("the Tomlin Order").

2. The difference between the parties is whether on its proper construction, the Tomlin Order took the parties' disputes outside of the Party Wall etc. Act 1996 ("the 1996 Act") altogether or only in part and whether the Appellants are estopped from asserting that the 1996 Act should, in part, be read into the Tomlin Order as a result of their conduct before the court which led to an order drawn on 28 December 2017.

3. I agree with Mr Butler QC and Mr Frame for the Appellants that the starting point for this application is CPR Part 52.18 which gives the court the power to strike out appeals when there is a "compelling reason" to do so.

4. In my view, for the reasons set out below, the Respondents are correct in both their contentions and consequently, the court has no jurisdiction to consider this appeal. However, I am satisfied that the court does have jurisdiction pursuant to the Tomlin Order to hear an appeal from the Award pursuant to the permission to apply provision in the Tomlin Order. I will give directions that the Appellants' N161 shall be treated as an application pursuant to CPR Part 23.1 and list a CMC to consider what further directions are required to progress that application to a conclusion.

Necessary Factual Background & Chronology

5. In about 2015 the Appellants gave notice to the Respondents under the 1996 Act of an intention to carry out excavation works at 59 Manor Road, Chigwell ("the Works"). The Respondents own the next door property at 57 Manor Road. A panel of three party wall surveyors under section 10(1)(b) of the 1996 Act was set up and an award determining the right to carry out the basement works was made on 4 August 2015. The identities of two out of the three surveyors changed but that is not relevant for present purposes and it is sufficient if I refer to "party wall surveyors" as being whichever individuals happened to be in place during the relevant period when the parties' disputes relating to the Works were to be determined pursuant to the 1996 Act. Those disputes were many and various.

6. By May 2016, there were four separate county court proceedings arising out of the Works and/or the 4 August 2015 award. Those proceedings and any other relevant disputes between the parties were settled by the Tomlin Order.

7. The Respondents' appointed surveyor and the third surveyor took the view that following the Tomlin Order nothing changed so far as concerned their right or obligation to determine disputes arising out of the Works. On 28 June 2016 the Respondents' appointed surveyor identified some 11 areas of dispute which he wanted to refer to the third surveyor. The position of those disputing surveyors was that section 10(2) of the 1996 Act meant their jurisdiction could not be unilaterally removed from them: *All appointments and selections made under this section shall be*

in writing *and shall not be rescinded by either party* (my emphasis). The surveyors' argument was that once appointed any disputes must be resolved by the party wall surveyors and the parties cannot remove the jurisdiction of those surveyors because to do so would amount to a rescission of their appointment which was not permitted under the 1996 Act.

8. The Appellants disagreed and brought proceedings against those two party wall surveyors seeking and obtaining, in an order drawn on 28 December 2017, an injunction preventing the party wall surveyors from "making or purporting to make any further awards" and a declaration that those surveyors "have no authority to make any further awards purporting to determine disputes between...[...the Appellants...]...and...[...the Respondents...]". The court's reasons are set out in a judgment of HHJ Bailey dated 13 December 2017. The surveyors were ordered to pay costs.

9. Paragraph 6 of the Tomlin Order described the parties' dispute about the compensation payable to the Respondents because of the Appellants' works: "the issue of compensation for the damage caused to the Takhars' property as a consequence of the Mohameds' building works" ("the Compensation Dispute").

10. Paragraph 7 of the Tomlin Order provided for the Compensation Dispute to be determined by an expert in writing and that "either party shall have a right to appeal...[...the Compensation Dispute...]...which for all purposes shall be treated as an appeal under section 10(17) of the Act".

11. After a period of delay, which is immaterial for present purposes, Mr Keith Walker on 13 October 2020, made the determination envisaged to resolve the Compensation Dispute in the Award. The Respondents wanted about £1,000,000 of compensation. The Appellants suggested a few thousands and Mr Walker awarded about £500,000. The amounts make no difference to the outcome of this application but they give some context to the issues. Causation appears to be at the heart of the dispute but that may need to be the subject of further argument in due course.

12. By notice of appeal dated 27 October 2020, the Appellants appealed the Award under section 10(17) of the 1996 Act.

13. At first the Respondents participated in the Appeal. The court gave standard directions on 2 November 2020. In compliance with those directions, on 1 December 2020 the Respondents filed a substantive response to the grounds of appeal. There was an effective CMC on 7 January 2021 during which the Respondents argued that the appeal should be heard as a review rather than a rehearing. The court determined that a rehearing was more appropriate in the circumstances. The court permitted the Respondents to reserve their right to appeal that decision following the conclusion of the appeal. The parties agreed an ADR stay. There was due to be a further CMC on 16 September 2021 but then on 5 August 2021, the Respondents made this application to strike out the appeal based on the court's lack of jurisdiction.

14. It is common ground between the parties that the nature of the jurisdiction challenge is such that the Respondents' participation in the appeal to date cannot give the county court an appellate jurisdiction which it otherwise does not have. A similar point can be made about the Tomlin Order because pursuant to paragraph 7 the Respondents

agreed to treat this appeal "for all purposes...as an appeal under section 10(17) of the Act". If nothing else the Respondents' application is contrary to that apparent contractual commitment.

15. But, as the parties recognised in their submissions, the problem raised by this application is *a priori* subject matter jurisdiction and I agree that in the context of this particular appellate jurisdiction within the county court, such jurisdiction cannot be conferred by conduct or agreement.

16. I deal with the issues in their logical order. First, whether the Appellants are subject to an estoppel because of the stance they took before the court in December 2017. Second, the construction issue about the Tomlin Order.

Estoppel By Conduct

17. A party who obtains a court order because they took a particular stance before the court which led to the making of that order can be estopped from maintaining before a subsequent court a contrary position. The law is set out in LA Micro Group (UK) Limited & ors v LA Micro Group, Inc & ors [2021] EWCA Civ 1429, Sir Christopher Floyd, [19] to [25] and in particular:

> "19. The possibility that an estoppel arises from the conduct of a party in litigation was recognised in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, where Viscount Radcliffe said:
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> > "A litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."
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> 20. That doctrine was applied in *Gandy v Gandy* (1884) 30 Ch D 57. The husband had covenanted in a deed of separation from his wife to pay to trustees an annuity and to pay expenses of education of his two youngest daughters. The wife's application for increased alimony was rejected by the Court of Appeal (on appeal from Sir James Hannen) on the basis that the husband remained liable under the deed of separation. The husband subsequently argued that the covenant had been brought to an end by the grant of custody of the youngest daughters to the wife. The court did not allow him to do so. Cotton LJ said at 80:
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> > "The decision on the appeal from Sir James Hannen was in favour of Mr Gandy, on the ground that this was a continuing provision for the maintenance of the children. He contends now that this is not the true construction of the deed. It would be wrong in my opinion to allow him to take advantage of a decision given on one construction, whether accepted by him or argued by him, and to give another decision in his favour on the ground that this was not the true construction."
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> 21. Bowen LJ said at 82:

> "I am not certain that this is not res judicata within the view which has been taken of res judicata when the same questions arise between the same parties litigating similar subject matter. But whether it is res judicata or nor, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the court allowed that."

23... Justice Ginsburg, giving the judgment of a unanimous court, approved an earlier statement in Davis v Wakelee 156 US 680, 689 (1895):

> "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

24. The purpose of the rule was said to be to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment and preventing parties "from playing fast and loose with the court". Whilst observing that the equitable doctrine was not "reducible to any general formulation of principle", Justice Ginsburg identified a number of factors which typically inform a court's decision as to whether to apply the doctrine in any individual case. First, a party's later position must be clearly inconsistent with its earlier position. Secondly, the court may enquire whether the party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled. Thirdly, the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

25.The authors of Spencer Bower and Handley: Res Judicata 5th Edition, 2019 paragraph 9.46 consider that there is no reason to suppose that the law of England is different from that held to be the law of the United States in New Hampshire v Maine. No party to these appeals suggested that this was wrong and I agree.

26. It is clear, therefore, that this form of estoppel by conduct is one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as, for example, issue estoppel). The matters to consider include, but are not limited to, those enumerated by Justice Ginsburg in the New Hampshire case. It is material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute."

18. The starting point must be, therefore, to identify the basis upon which the Appellants succeeded before HHJ Bailey set out in the 13 December 2017 judgment. There is no

doubt that HHJ Bailey's decision in favour of the Appellants was given because the Tomlin Order provided an "alternative method" for resolving the parties' existing and future differences (paragraph 10) and that such an "alternative method" was intended "to take away from both the party wall surveyors and the Court any involvement in or jurisdiction over both existing and future disputes which arise in connection with matters within the scope of the 1996 Act" (paragraph 12) and this was effective because "...the Consent Order has the effect of ending the dispute for the purposes of the 1996 Act..." (paragraph 37).

19. This undercut the surveyors' argument based on section 10(2) of the 1996 Act because the agreement to an alternative method of dispute resolution took away the surveyors' subject matter jurisdiction: there was no dispute for the surveyors to determine because the parties had agreed to a different mode of resolution. It is that different mode of resolution which was the key basis for the court's decision.

20. HHJ Bailey's judgment makes no mention of the express reference to the 1996 Act in paragraph 7(2) of the Tomlin Order. This is presumably because nobody mentioned it to the judge and/or it was otherwise not considered relevant to refer to it. I refer to it here only to show that I have not overlooked it, since with the benefit of hindsight one can see it might have been worth raising.

21. I have no other evidence than the judgment of 13 December 2017 in order to determine the Appellants' stance taken before HHJ Bailey. I make no criticism of the parties in this respect. It is consistent with paragraph 22 of LA Micro: "...these suggest that it must be apparent from the earlier judgment that the stance taken by the party was a reason for the judgment which he obtained...".

22. HHJ Bailey set out the Appellants' submissions before the court in December 2017 at paragraph 27 of his judgment. HHJ Bailey broke those down into three submissions and the first two are the same point: the parties to the Tomlin Order had contracted out of the 1996 Act and so made the existing party wall surveyors "redundant" because there were no disputes under the 1996 Act for those surveyors to determine.

23. The Appellants succeeded before HHJ Bailey on that basis: the Tomlin Order took the parties' differences outside of the 1996 Act by agreement. This answers one of Justice Ginsberg's three questions.

24. In their supplemental skeleton argument before me, the Appellants' counsel argued that the position of the Appellants before HHJ Bailey in December 2017 was not so much that the parties had contracted out of the 1996 Act but that the parties had "terminated" the retainer of the surveyors. I disagree. At most this was the subject of the third submission identified by HHJ Bailey at paragraph 27 of the judgment but as HHJ Bailey said, that submission was not developed at the hearing and was plainly not the basis for the decision.

25. Another of Justice Ginsberg's questions is whether the Appellants' position before me is "clearly inconsistent" with the stance taken before HHJ Bailey. In their skeleton argument, Mr Butler QC and Mr Frame argued that the appeal was within the Act because that was what the parties agreed to by paragraph 7(2) of the May 2016 Settlement. In their supplemental skeleton, this position was opened out a bit more because it was said that "in so far as the Agreed Surveyor also determined "any future

party wall disputes" those too would be subject to a right of appeal under the 1996 Act in the normal way". In oral submissions, Mr Butler QC met Mr Mayall's argument that for the county court to have jurisdiction there must be an "award" within section 10(10) (i.e. an award made by surveyors acting pursuant to the powers contained in section 10 of the 1996 Act) by saying that the Tomlin Order set out the parties' agreement that the 1996 Act would apply save in the respects where the parties agreed that it would not, i.e. that the "grundnorm" for the agreement was the 1996 Act but with agreed departures so taking away various disputes from the existing surveyors.

26. The Appellants argue that this is not clearly inconsistent with their earlier stance. I disagree. It seems to me that looking at the matter from a position of substance and reality, the decision from HHJ Bailey in favour of the Appellants and against the two disputing party wall surveyors was obtained because the Appellants argued and the court agreed that the parties had contracted out of the 1996 Act but before me the Appellants are arguing that the parties did not contract out of the 1996 Act but rather they contracted into it. These are inconsistent positions and are plainly inconsistent positions and from an objective perspective, but making no finding as to the actual state of mind of the Appellants or their various counsel, it looks like one or other court is being misled as to the true nature of the May 2016 Settlement: did it contract out of the 1996 Act or not?

27. I add that I do not disagree that it is possible for parties to contract in and out of the 1996 Act at the same time but that is not what was being contended for before HHJ Bailey. Not the least of the reasons for this was because the context of the Tomlin Order was the wish to remove present and future disputes from the existing party wall surveyors (see paragraph 6 of HHJ Bailey's judgment). If disputes already exist and party wall surveyors have already been appointed / selected then any "contracting in" would most likely have to involve the existing panel of surveyors, at least in respect of disputes then in existence. If that is the case then, at least for existing disputes, the parties to the Tomlin Order would have been stuck with the panel of surveyors they wanted to be free of.

28. The third of Justice Ginsberg's questions is whether the Appellants are seeking to derive an unfair advantage. On the facts of this case it is helpful to address this from the perspective of the losing surveyors in December 2017. The surveyors' position was that the parties could not rescind their appointments. But that became irrelevant since the Appellants argued and the court agreed that there was nothing for the surveyors, even though appointed, to do: no disputes to be resolved under the 1996 Act because the parties had agreed to resolve those disputes outside of the 1996 Act. If, instead, the position of the Appellants in 2017 had been that there were no disputes to be resolved by the existing surveyors because the parties had agreed to resolve their disputes by a new agreed surveyor under the 1996 Act then the "no recission" argument of the surveyors would have had much more traction (and in my view may well have been correct).

29. As a result of the 28 December 2017 order the surveyors were prevented from continuing to act and made liable for the Appellants' costs with an interim payment of £30,000.

30. In my judgment, to allow the Appellants to raise their present arguments about the Tomlin Order would be objectively unfair to the surveyors in the proceedings resolved by the December 2017 judgment.

31. I think for that reason that it would give the Appellants an unfair advantage to allow them, from their perspective, to broaden their argument about the interaction between the May 2016 Compromise and the 1996 Act at this hearing to a yes and no type position: yes, the 1996 Act applied to the Agreed Surveyor appointed under the Tomlin Order; but no, the 1996 Act did not apply to any disputes present or future relevant to the then current panel of surveyors.

32. I do not think it unfair to the present Respondents because those Respondents agreed to the May 2016 Compromise which was intended to and did remove the parties' disputes, present and future, from the existing surveyor panel and was intended to but, for the reasons I set out below, did not succeed in providing a right of appeal under the 1996 Act in respect of the Compensation Dispute.

33. But, finally, balancing these various factors I do consider it would be allowing the Appellants to play fast and loose to allow them to take the no and yes approach to the interaction between the 1996 Act and the Tomlin Order and that on the facts of this particular case, justice requires the Appellants to be prevented from asserting before me that the 1996 Act continued to apply to the resolution of the parties' disputes. In my view to do otherwise would allow the Appellants to both reprobate (before HHJ Bailey) and approbate (before me) the 1996 Act's application to the disputes described in the Tomlin Order in a manner that would be unfair and contrary to the interests of justice.

The Construction of the May 2016 Compromise

34. I will take this briefly, but in short, I agree with Mr Mayall that the construction put forward by the Appellants before HHJ Bailey was correct and that the May 2016 Compromise was premised on the parties' present and future disputes being resolved outside of the 1996 Act and that while generally parties can agree to opt in or opt out of the 1996 Act, what they cannot do is opt in to the appeal mechanism without also opting in to any such award being made pursuant to section 10.

35. It was common ground between the parties that the county court's jurisdiction to hear a party wall appeal can only come from section 10(17) of the 1996 Act, which itself requires an award to have been made under section 10.

36. It was also common ground that *Dillard v F&C Commercial Property Holdings Limited* [2014] EWHC 1219 (QB) proceeded on the basis that parties "may contractually opt out of the Act" (Akenhead J at 17(j)).

37. In my view, the ability to "opt out of the Act" was the key starting point for the Tomlin Order. I reach this view not because of anything the Appellants may have subsequently stated to HHJ Bailey in the hearing which led to the December 2017 Judgment but because of the language used in the Tomlin Order. In particular in paragraphs 1 and 2: *The parties make this agreement...in resolution of all disputes between them under* [the 1996 Act]*...all future disputes which would normally be resolved by an award under the Act shall be resolved by an independent surveyor*

appointed jointly by the parties...("the Agreed Surveyor")...who shall resolve (1) the disputes set out below...as if he were an agreed surveyor appointed under section 10(1)(a) of the Act.

38. The Tomlin Order then set out how the Agreed Surveyor was to be appointed and excluded various individuals from the potential pool of appointees. It then set out the disputes to be resolved by the Agreed Surveyor and then at paragraph 7 set out the contractual parameters within which the agreed surveyor was bound to act.

39. Those included at paragraph 7(4) a power to *give directions, impose time limits and in all other respects decide and direct how disputes to be decided by him shall be managed* and at paragraph 7(5) a duty to *act promptly fairly and proportionately in relation to the parties any disputes referred to him....* I mention those provisions because one of the Appellants' submissions was that the intention of the Tomlin Order was for the 1996 Act to make good any gaps in the resolution agreement. On the contrary, it seems to me that those general provisions provide sufficient authority and instruction to the Agreed Surveyor to do that which he was instructed to do without the need for recourse elsewhere: the parties were contractually bound to follow his directions and accept his decisions (save for the paragraph 7(2) "appeal").

40. The Appellants submit that in the Tomlin Order the parties agreed to opt out of certain parts of section 10 of the 1996 Act but agreed to opt in to others, and in particular the right to appeal so far as it related to the agreed surveyor's decision on the Compensation Dispute.

41. This position appears reasonable on the face of the Tomlin Order because the agreement states in terms that the Compensation Dispute determination "...for all purposes, shall be treated as an appeal under section 10(17) of the Act". But I agree with Mr Mayall, and I do not think it was seriously disputed (not least because at paragraph 18 of their skeleton, the Claimants accept that there "must be a dispute within the meaning of s10(1)"), that section 10(17) cannot be engaged by agreement between the parties but only if there has been an award made under section 10 of the 1996 Act. If this was otherwise then the parties would be conferring a limited statutory jurisdiction on the county court by agreement between them and both parties accept this cannot be done.

42. So the real issue is whether the Award was made under section 10(10). Both parties focused in submissions on the phrase "as if" in paragraph 2 of the Tomlin Order. Mr Mayall says that because that which is "as if" something must lack the quality of being that something, the use of this idiom necessarily determines the construction issue against the Appellants. I disagree but only as to degree. Such an absolute approach to the language of the Tomlin Order fails to have due regard to the need to consider the totality of the language used and the difficulties involved in drafting a compromise of this kind. However, taking those other factors into account, I do think that "as if" points consistently with the rest of the Tomlin Order to the conclusion that the role of the Agreed Surveyor was not to make awards within the 1996 Act but on the contrary to make awards that were not within the 1996 Act.

43. This conclusion avoids the problem I addressed above about how to break the circle between the existence of disputes and the existence of a panel of surveyors, whose

appointment cannot be rescinded, and whose statutory jurisdiction was to resolve those disputes.

44. For those reasons I consider that by the Tomlin Order the parties gave contractual jurisdiction to the Agreed Surveyor appointed under the Tomlin Order to determine, among other things, the Compensation Dispute and the Award was such a determination and was not a determination under section 10 of the Act and nor were any of the Agreed Surveyor's other contemplated determinations to be made under section 10 of the 1996 Act.

45. This means that the court lacks subject matter jurisdiction for the present appeal: the county court can only hear appeals from awards made under section 10 of the 1996 Act and the Award was not made under that section.

The Appellants' Saving Arguments

46. Mr Butler QC and Mr Frame set out at the end of their skeleton argument a number of ways in which the county court could have jurisdiction because of the contract between the parties represented by the Tomlin Order. It was said that if that was the case then the court could use its case management powers to make regular the present process.

47. Mr Mayall's best point about this was that it was not clear what the Appellants position was because sometimes they were asserting that if the section 10(17) appeal provision was of no effect then the Tomlin Order might be voidable for common mistake and on other occasions they were asserting a right under the Tomlin Order to enforce the agreed appeal route by way of court proceedings.

48. I suggested to Mr Butler QC that the most obvious route to make matters regular appeared to be the permission to apply under the Tomlin Order. I did not understand Mr Butler or his team to disagree with this comment, if I was against them on the main issues.

49. I see no injustice to the parties in this case in allowing that to happen and directing that the appeal notice can be treated for all purposes as if it was an application under CPR Part 23. The appeal notice contains all the formal requirements of an application and it is clear to all what the Appellants want and why – essentially a redetermination on evidence of the Compensation Issue. The Respondents' position on the substantive appeal has been that the Award is unappealable for the reasons given in the Award and that it would be wrong for the court to allow the Appellants to open up the Compensation Dispute from the beginning, at most the court's role should be limited to seeing that the expert has kept to his instructions. This scope issue, to be determined as a matter of proper construction of the Tomlin Order, will be a matter for further argument at the CMC which I will direct following the handing down of this judgment. I suggest that costs issues arising out of this judgment are dealt with at the same time.