Neutral Citation Number: [2023] EWCA Civ 239

Case No: CA-2022-000481

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
Mr Justice Eyre
[2022] EWHC 209 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2023

Before:

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LADY JUSTICE ELISABETH LAING

- -

Between:

(1) Ken Power **(2) Lee Kyson**	**Appellants**
- and –	
Raheel Shah	**Respondent**

- -
- -

Nicholas Isaac KC and Katie Gray (instructed by way of Direct Access) for the **Appellants**
Michael Paget (instructed by way of Direct Access) for the **Respondent**

Hearing Date: 15 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

LORD JUSTICE COULSON :

Introduction

1. This appeal raises a novel but important issue in connection with the Party Wall etc. Act 1996 ("the Act"). Can an adjoining owner seek to rely on the dispute resolution procedure provided by s.10 of the Act, in circumstances where the building owner, who intends to carry out or who has carried out building works, has served no notice under the Act in respect of the works, and maintains that the Act does not apply? Counsel are agreed that there are no authorities directly on point.

The Background Facts

2. The respondent ("Mr Shah") carried out works to his home at 34 Bull Lane in Dagenham. He did not serve a notice under s.3 of the Act (either before or after the works were carried out) because he was advised by his planning consultant, Mr Syed Ali, that the scope of the works did not fall within the ambit of the Act.

3. The adjoining owners of 36 Bull Lane, Mr and Mrs Panayiotou ("the adjoining owners") maintained that the works, including an alleged removal of a chimney breast, were within the ambit of the Act. They said that they had suffered damage in consequence of those works. Both claims are denied by Mr Shah and, because of the course that this case has taken, the underlying facts remain to be determined.

4. The adjoining owners could have commenced proceedings in the county court. Instead, they purported to appoint Mr Lee Kyson (the second appellant) to act as their surveyor under s.10(1) of the Act. Mr Shah did not engage in the statutory process (because he maintained that the Act did not apply), so Mr Kyson appointed a surveyor for Mr Shah, using the default procedure under s.10(4). That surveyor was Ken Power (the first appellant). I shall refer to Mr Kyson and Mr Power collectively as "the appellants".

5. On 3 July 2018 the appellants issued an award ("the Award") determining that:

   (a) The works performed by Mr Shah required notice to have been given under the Act;

   (b) Those works had caused damage to 36 Bull Lane;

   (c) Mr Shah was to pay the adjoining owners compensation of £4,223.49 (excluding VAT) and also to pay the fees of the appellants in a further sum of £4,630.

6. Mr Shah did not pay either of those sums, and the appellants brought proceedings for non-payment in the Magistrates Court under s.17 of the Act. Those proceedings were stayed because of Mr Shah's Part 8 claim, which contended that the Award was null and void because the Act did not apply, so that the dispute resolution procedure at s.10 had not been engaged.

7. In a judgment dated 2 March 2020, HHJ Parfitt upheld Mr Shah's Part 8 claim, agreeing with the essential submission advanced on his behalf that, in the absence of a notice under s.3 of the Act, the s.10 process had not been engaged and the Award was therefore null and void. In consequence, he did not decide any of the disputed issues

of fact, in particular whether or not the works involved the removal of a chimney breast, and/or whether a notice should have been served under the Act.

8. The appellants appealed. In a judgment dated 11 February 2022 ([2022] EWHC 209 (QB), [2022] 1 WLR 3015), Eyre J dismissed the appeal. He concluded that there was no dispute arising under the provisions of the Act in circumstances such as these, where the building owner had not served a notice and had not invoked the Act. His reasons are set out between [54]-[64] of his judgment, although it is unnecessary to set them out again here. The appellants bring this second appeal with the leave of Lady Justice Andrews. At the conclusion of the hearing we announced our decision to dismiss the appeal, with reasons to follow. These are my reasons for joining in that decision.

The Party Wall Act: Context and Provisions

9. The forerunner of the Party Wall Act 1996 was the London Building (Amendment) Act 1939. Between s.46 and s.56, the 1939 Act contained detailed provisions whereby a building owner who wanted to carry out works in or around a party structure was obliged to give notice in writing, and thereafter any differences between the owners would be resolved in the first instance either by one surveyor, or by a surveyor appointed by each party and a third surveyor. The 1939 Act was considered to have worked well in London, and eventually it was decided to extend the regime across the country. Hence the Party Wall Act, which mirrors the essential features of the 1939 Act (although some of its provisions are different).

10. Section 1 of the Party Wall Act is concerned with the situation where lands of different owners adjoin, and a building owner wants to build a party wall or a party fence wall on the line junction (ie where the boundary has not yet been built on). That section does not apply in this case.

11. Section 2(1) applies "where lands of different owners adjoin and at the line of junction the said lands are built on or a boundary wall, being a party fence wall or an external wall of a building, has been erected." A large number of rights available to the building owner are then set out in s.2(2). These include the right to underpin, thicken or raise the party structure; to make good or repair or demolish and rebuild the party structure, and so on. The relevant right for present purposes is at s.2(2)(g):

> "To cut away from a party wall, a party fence wall, external wall any footing or any projecting chimney breast, jamb or flue, or other projection on or over the land of the building owner in order to erect, raise or underpin any such wall or for any other purpose…"

12. Sub-section 2(5) provides as follows:

> "(5) Any right falling within subsection (2)(f), (g) or (h) is exercisable subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations."

13. Section 3 is headed "Party structure notices". It provides as follows:

> "**3 Party structure notices.**

(1) Before exercising any right conferred on him by section 2 a building owner shall serve on any adjoining owner a notice (in this Act referred to as a "party structure notice") stating—

(a) the name and address of the building owner;

(b) the nature and particulars of the proposed work including, in cases where the building owner proposes to construct special foundations, plans, sections and details of construction of the special foundations together with reasonable particulars of the loads to be carried thereby; and

(c) the date on which the proposed work will begin.

(2) A party structure notice shall—

(a) be served at least two months before the date on which the proposed work will begin;

(b) cease to have effect if the work to which it relates—

(i) has not begun within the period of twelve months beginning with the day on which the notice is served; and

(ii) is not prosecuted with due diligence.

(3) Nothing in this section shall—

(a) prevent a building owner from exercising with the consent in writing of the adjoining owners and of the adjoining occupiers any right conferred on him by section 2; or

(b) require a building owner to serve any party structure notice before complying with any notice served under any statutory provisions relating to dangerous or neglected structures."

14. Section 4 permits an adjoining owner to serve a counter notice. Section 5 states that the recipient of either a party structure notice under s.3, or a counter notice under s.4, who does not indicate his consent to that notice within 14 days, is deemed to have dissented from the notice "and a dispute shall be deemed to have arisen between the parties".

15. Section 7 is concerned with compensation. Section 7(2) obliges the building owner to compensate the adjoining owner for any loss and damage "which may result to any of them by reason of any work executed in pursuance of this Act".

16. Section 10 is concerned with the resolution of disputes. Section 10(1) is in the following terms:

"**Resolution of disputes.**
(1) Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either—

(a) both parties shall concur in the appointment of one surveyor (in this section referred to as an "agreed surveyor"); or

(b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as "the three surveyors")."

Other provisions in connection with surveyors include sub-sections (4) and (6) which provide:

"(4) If either party to the dispute—

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

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

(6) If a surveyor—

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

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

refuses to act effectively, the surveyor of the other party may proceed to act ex parte and anything so done by him shall be as effectual as if he had been an agreed surveyor."

17. Section 10(10) deals with the resolution of the dispute by the provision of an award. It provides:

"(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."

The scope of such an award is set out in subsection (12) as follows:

"(12) An award may determine—

(a) the right to execute any work;

(b) the time and manner of executing any work; and

(c) any other matter arising out of or incidental to the dispute including the costs of making the award;

but any period appointed by the award for executing any work shall not unless otherwise agreed between the building owner and the adjoining owner begin to run until after the expiration of the period prescribed by this Act for

> service of the notice in respect of which the dispute arises or is deemed to have arisen."

18. Section 10(16) provides that the award is conclusive, but that is subject to subsection (17) which gives the parties to the dispute 14 days in which to appeal the award. The scope of any appeal is not limited or qualified by s.10(17) and it will often proceed by way of a rehearing.

19. Section 11 is concerned with expenses and, although it is at the heart of many of the authorities, it does not arise here. Section 16 creates certain criminal offences arising out of an owner or occupier's refusal to permit rights of entry, or otherwise hindering or obstructing the surveyors. Finally, section 20 sets out various definitions. Relevant to this appeal are the definitions of "adjoining owner" and "building owner" as follows:

> "'adjoining owner' and 'adjoining occupier' respectively mean any owner and any occupier of land, buildings, storeys or rooms adjoining those of the building owner and for the purposes only of section 6 within the distances specified in that section;
>
> 'building owner' means an owner of land who is desirous of exercising rights under this Act."

Submissions on Appeal

20. Unsurprisingly, the written and oral submissions of both sides were a re-run of the arguments before the lower courts. On behalf of the appellants, Mr Isaac argued that the dispute resolution process set out in s.10 of the Act was widely drawn, and permitted the adjoining owners' appointment of Mr Kyson, his subsequent appointment of Mr Power, and the appellants' Award of 3 July 2018. He submitted that the purpose of the Act was to resolve disputes without the parties having recourse to the courts, and it would be contrary to that purpose to allow a building owner unilaterally to deprive an adjoining owner of the benefits of the dispute resolution process in s.10. He said that any other conclusion would mean that, if the building owner wrongly refused to serve a notice or acknowledge the applicability of the Act, the adjoining owner would be left with no other option but to seek an injunction in court.

21. In response, Mr Paget submitted that the Act did not replace the common law. Whilst the Act provided the building owner with new rights, those only arose if the mechanism set out in the Act had been properly triggered. He said that that could only happen if the building owner served a notice under s.3. If there was no notice, then the Act simply did not apply. The adjoining owner could not assume that the mechanism of the Act had been engaged simply because, on their case, the building owner *should* have served a notice under s.3. An adjoining owner could not unilaterally impose upon the building owner a compensatory award, in circumstances where that award had only come into existence as a result of statutory provisions which the building owner had always said did not apply.

The Proper Construction of the Party Wall Act

22. I approach the question of interpretation by first looking at the purpose of the Act and the words used. Only then do I turn to see whether the authorities support or contradict that conclusion.

23. I am conscious of the need to adopt a construction which has regard to the purpose of the Act and to interpret its language, so far as possible, in a way which best gives effect to that purpose (see Lord Mance in *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] UKSC 25; [2011] 1 WLR 1546 at [10]; and Lewison LJ in *Pollen Estate Trustee Co Ltd v Revenue & Customs Commissioners* [2013] EWCA Civ 753; [2013] 1 WLR 3785 at [24]. However, that approach has a natural limit: merely because a statute was intended to achieve a general result does not mean that its individual provisions have to be interpreted as providing for that general result if the language used by Parliament simply does not warrant or justify it. Furthermore, many statutes have more than one purpose and, during the process of interpretation, there will be times when those purposes are or may be in conflict.

24. For the reasons set out below, I consider that, on a proper construction of the Act, both judges below were right to conclude that, in the absence of a notice from the building owner under s.3, the dispute resolution mechanism under the Act had not been engaged. There are a number of reasons for that conclusion, set out below.

25. First, it is clear that any rights which the building owner has under s.2 (including the right allegedly in play in this case, to cut away a projecting chimney breast under s.2(2)(g)), were expressly subject to s.3, and the service of a notice in advance of the works in accordance with s.3(1). The building owner has no right to carry out any of the works listed in s.2(2) unless he has served a notice under s.3. The service of the notice in advance is mandatory ("**before** exercising any right…the building owner **shall** serve…"). The service of the notice is therefore fundamental to the whole structure of this part of the Act.

26. That interpretation is not affected by s.3(3), which sets out two exceptions to that rule. The exception at s.3(3)(b), in respect of notices relating to dangerous or neglected structures, simply creates a hierarchy in which compliance with a notice to make safe a dangerous structure trumps a notice under s.3 of the Party Wall Act. That is simple common sense. As to the exception at s.3(3)(a), namely consent in writing in advance, Mr Paget may well be right to say that such consent could not safely be given by the adjoining owner unless and until he has a clear idea of the proposed works, which in almost all cases would only be apparent from the notice served under s.3(1). However, since that particular argument does not arise for final determination in this case, it would not be appropriate to decide it. What matters for present purposes is that the limited exceptions in s.3(3) do not derogate from the critical importance, in 99% of cases, of serving a s.3(1) notice in advance of the proposed works.

27. Secondly, I consider that the dispute resolution provisions in s.10 of the Act are only engaged, in a case where section 2 applies, following the service of a notice under s.3. Mr Isaac's point was that s.10 did not expressly refer to the need for a notice, or suggest that the dispute resolution mechanism that it contained required the service of such a notice before the mechanism could be utilised. (Although section 10(12), which explains the extent of an award, does refer to the need for a notice). He also

said that, if the purpose of the Act was to resolve disputes without the parties going to court, it would be wrong to limit the application of s.10 in this way.

28. But in my view, the link between s.3 and s.10 is clear. Mr Isaac accepted that a 'deemed dispute' under s.10(1) required the provision of a s.3 notice before the s.10 mechanism was engaged. There is a vanishingly small chance that Parliament intended that a 'deemed dispute' required a notice before the s.10 mechanism was engaged, but an actual 'dispute' did not. Such a distinction would make no logical sense. In any event, the dispute resolution mechanism in s.10 applies "in respect of any matter connected with any work to which this Act relates". In this context, 'any work' must be a reference to any of the possible work envisaged by s.2, but such work is only permitted after the mandatory notice under s.3(1) has been served. It was therefore unnecessary for s.10(1) to refer expressly to the s.3 notice, because a dispute "in respect of any matter connected with any work to which this Act relates" envisages that, in respect of all such work, a notice has already been served by the building owner.

29. Thirdly, whilst I accept that one of the purposes of the Act was to provide a dispute resolution mechanism which obviated the need for the parties to go to court, that was far from its sole purpose. Of equal importance was the requirement that the building owner serve a notice under s.3, so as to allow the adjoining owner to understand precisely what works were proposed and then, either through his or her own surveyor, or directly, to agree with the building owner the scope of the proposed works. In this way, another critical purpose of the Act was to avoid disputes arising altogether, through the transparency of the notice regime.

30. A related point concerns the prospective nature of the proposed work to the party wall. A notice under s.3(1) has to be served 2 months before the work is due to start. This allows time for the adjoining owner to consider the detail of what is proposed. It allows surveyors to be appointed if there is a concern as to the scope of the proposed work, in order to maximise the chance of any remaining issues being resolved, and to allow the works then to be carried out. The Act provides an important mechanism – because of the requirement for a notice - by which the scope of the work to be carried out can be agreed in advance. It was not intended to resolve disputes concerning the effect of works which, because of the absence of a notice, had already been completed.

31. Fourthly, there is nothing in the Act which permits an adjoining owner unilaterally to trigger s.10 in the way that happened here. If, as Mr Isaac submitted, an adjoining owner can engage the s.10 mechanism in the absence of a s.3 notice, because of his or her unhappiness with works which have already been carried out, then I consider that such a right would have had to have been expressly set out in the Act. It would be, on any view, a significant extension of the regime that requires a prospective notice by the building owner. It is common ground that such an entitlement finds no expression anywhere in the Act.

32. Fifthly, it is also common ground that an adjoining owner in the position of Mr and Mrs Panayiotou is not left without a remedy. On the contrary, the adjoining owner will have all the usual common law remedies which one would expect in this situation: the right to bring claims in trespass, nuisance and negligence, and the right, if appropriate, to seek an injunction. It cannot be said that, merely because the s.10

mechanism of dispute resolution under the Act is not open to them, there is any ultimate detriment to them.

33. In contrast, if Mr Isaac is right, and the adjoining owners could unilaterally seek a remedy under s.10 of the Act, it would mean that Mr Shah may be deprived of his right of access to the courts, or at least find that right significantly qualified: for example, there is the 14-day time limit for appeals in s.10(17), with which Mr Shah did not comply, and which failure the appellants relied on when they sought to enforce the Award. There is also a risk of forum-shopping, or even parallel proceedings.

34. Finally, it is important to stand back. If the Act is fully complied with, both parties can look to the Act, and its dispute resolution mechanism, for protection. But if there are allegations of breach by either side, suggesting that the Act has not been complied with, then such disputes would ordinarily fall to be decided by the courts, and nothing in the Act indicates a contrary intention.

35. In summary, a purposive construction of the Act identifies a specific mechanism to resolve disputes between the building owner and the adjoining owner, but that mechanism is limited to disputes "in respect of any matter connected with any work to which this Act relates". Such work can only be the work envisaged in s.2(2), which work requires a notice from the building owner under s.3. There was no such notice in this case because, rightly or wrongly, Mr Shah was advised that the Act did not apply. In the absence of a notice, the dispute resolution mechanism in s.10 was not engaged and the Award produced in purported compliance with it was null and void.

The Authorities

36. I now turn to see whether the authorities support or contradict any interpretation of the Act. I consider that my analysis of those authorities supports that interpretation. I begin with the four relevant authorities in the Court of Appeal.

37. In *Woodhouse v Consolidated Property Corp. Limited* (1992) 66 P.&C.R.234, a dispute arose under the 1939 Act which led to an award in the adjoining owner's favour. The award concluded that the collapse of the wall was due to the work carried out by the building owner which had been the subject of a notice and conditional consent. The award provided that the building owner had to pay the proper cost of rebuilding the party wall, and those parts of the adjoining owner's property that had been damaged.

38. The adjoining owner commenced proceedings in nuisance, trespass and negligence. He sought to rely on the award to argue that the building owner was estopped from denying responsibility for the collapse. Glidewell LJ said that the dispute resolution mechanism in s.55(i) and (k) of the 1939 Act[1] related only to the resolution of differences between adjoining owners as to whether one of them should be permitted under the Act to carry out works that were the subject of the notice, and if so, the

[1] Section 55(k) provided that "the award may determine the right to execute and the time and manner of executing any work…". It was this provision in particular that led Glidewell LJ to decide that the surveyor could not decide disputes beyond whether the building owner was complying with a particular requirement in the consent. That provision is repeated at s.10(12)(b) of the Party Wall Act.

terms and conditions under which he was permitted to carry out such work. He went on:

> "A matter which arises during the carrying out of the works, about which there is a dispute, must therefore be a matter which relates to the consent for the works to be carried out e.g. whether the building owner is complying with a particular requirement in the consent. Section 55 does not permit or authorise the surveyor… to determine other disputes arising between the parties".

39. So in *Woodhouse*, this court found that the surveyor did not have the jurisdiction to make an award which found the building owner liable for the consequences of the work which, on this assumption, had been set out in the original notice and then agreed by the adjoining owner. That issue of liability was a matter for the court. The award would be admissible as evidence in the court proceedings, but could not be binding. Accordingly, *Woodhouse* is authority for the proposition that, under the 1939 Act, the notice - and any consent to it - was of paramount importance in determining the ambit of any dispute to be resolved pursuant to the statutory dispute resolution mechanism, and wider disputes which only the court could determine.

40. In another dispute under the 1939 Act, *Louis and Louis v Sadiq* (1996) 74 P.&C.R.325, work was carried out to a party wall without the building owner having given notice. The adjoining owner obtained an interlocutory injunction restraining further work until the building owner had complied with the provisions of the 1939 Act. Following the injunction, the provision of a notice and repair work, the adjoining owner made a claim for damages, which included special damages in respect of mortgage interest, and extra costs in respect of a property to which the adjoining owners had intended to move. The judge at first instance allowed those claims.

41. The appellant building owner appealed, arguing that there was no basis for the claim for special damages, because all common law rights, duties and remedies were excluded by the 1939 Act. The appeal was rejected by this court. Evans LJ said that the appellant committed a nuisance because of the work which he had carried out without obtaining statutory authority, and that liability continued until the work was completed. He went on to say that the appellant would not have been liable in nuisance if he had given notice (or obtained consent in accordance with the Act), and then done no more than that which had been agreed or approved (as per *Woodhouse*). He said that the issue was whether the appellant's liability at common law was either excluded or reduced by the provisions of the 1939 Act which he had invoked, after the nuisance had arisen. He had no doubt that it was not excluded or reduced, saying:

> "I would have no hesitation in rejecting this submission even without reference to authority, because in my judgment there is nothing in the Act which can be said to have this effect. The adjoining owner's common law rights are supplanted when the statute is invoked, which can have the effect of safeguarding the building owner from common law liabilities when he complies with the statutory procedures, just as he may incur liabilities under the statute which did not exist at common law (the *Standard Bank* decision). But if he commits an actionable nuisance without giving notice and without obtaining consent, he cannot rely upon a statutory defence under procedures with which *ex hypothesi* he has failed to comply. If he does then give notice

> he will in due course acquire statutory authority for whatever works are approved or agreed, but in my judgment this does not relieve him from liability for the continuing nuisance which he has unlawfully committed, until such time as and to the extent that such authority is obtained."

42. In this way, in *Louis v Sadiq*, the surveyors could not decide the claims as if the absent notice had in fact been given; on the contrary, the absence of a notice meant that the statutory dispute resolution mechanism was not engaged at all, and the common law claims that had accrued to the adjoining owner all fell to be decided by the courts.

43. I readily accept that the wording of the 1939 Act, particularly at subsections s.55(i) and (k), is not precisely the same as its equivalent at s.10 of the Party Wall Act. I also bear in mind the warning of Peter Gibson LJ in *Zissis v Lukomski and another* [2006] EWCA Civ 341; [2006] 1 WLR 2778 that there can be dangers in directly reading across from the cases under the 1939 Act. But, in my view, regardless of the differences in the wording of the respective statutes, the twin authorities of *Woodhouse* and *Louis* remain of some significance because they emphasise the importance of the notice (or the lack of such a notice) in defining what can be determined by a statutory award, and what can only be determined by the courts. Both authorities were expressly endorsed by this court in *Blake v Reeves* [2009] EWCA Civ 611; [2010] 1 WLR 1 at [23], a decision under the Party Wall Act.

44. In *Blake v Reeves,* a deemed dispute arose under the Act. The surveyors appointed by the parties made an interim award determining that the notice was valid, but did not authorise the proposed work. The building owner mistakenly thought that the works had been authorised and so gave instructions for them to be carried out. The adjoining owner incurred costs in connection with a proposed claim for an injunction. But in the end that proved unnecessary because the building owner agreed to postpone the works. The surveyors produced a further award ordering the building owner to pay the adjoining owner's costs of the contemplated court proceedings. Both at first instance and in this court, it was concluded that the surveyors did not have the power to make such an order. It was held that proceedings in court to enforce common law or equitable remedies fell outside the Act.

45. During the course of his judgment, Etherton LJ noted at [14] that, generally, the Act provided procedures similar to those in the London Building Act 1939[2], "for authorising property owners to carry out works to an adjoining part structure or otherwise on or near to the boundary with the adjoining property, but which at the same time protect the legitimate interests of the adjoining owner. They are intended to constitute a means of dispute resolution which avoids recourse to the courts." As to the particular dispute on appeal, he said:

> "21. The power to order payment of such costs under s.10 of the 1996 Act is, however, restricted to costs connected with the statutory dispute resolution mechanism. As a matter of interpretation, the "dispute" mentioned in s.10(1), (10)(b), (12)(c) and (13)(c) is a dispute arising under the provisions of the 1996 Act, whether an actual dispute within s.1(8) or a deemed dispute under

[2] A similar point was made by Ramsey J in *Kaye v Lawrence* [2010] EWHC 2678 (TCC), who described the London Building Acts as the "role model" for the Party Wall Act.

> s.4(5) or s.6(7), or a dispute under some other provision, such as s.7(2) (compensation for loss and damage resulting from execution of work executed pursuant to the 1996 Act), s.11(2) (responsibility for the expenses of work), s.11(8) (expenses of making good damage under the 1996 Act) or s.13(2) (objection to building owner's account of expenses). I agree with Judge Viljoen that, by contrast, proceedings in Court to enforce common law or equitable remedies, such as damages or an injunction for trespass or nuisance or the threat of them, fall wholly outside the 1996 Act. That is equally true of preparations for such proceedings.
>
> 22. That conclusion is consistent with practice and policy. The purpose of the 1996 Act is to provide a mechanism for dispute resolution which avoids recourse to the Courts. A power of the appointed surveyors under the 1996 Act to make provision for costs incurred for the purpose of actual or contemplated litigation in Court would be inconsistent with that statutory objective. Such litigation, resulting from non-compliance with the dispute resolution mechanism, falls entirely outside the statutory dispute resolution framework."

46. Accordingly, *Blake v Reeves* is authority for the proposition that, to engage s.10, a dispute must arise under the provisions of the Act. The sorts of disputes which commonly arise are identified at [21] of Etherton LJ's judgment. Mr Isaac may be right to say that the list is not exhaustive, but it gives the flavour of what s.10 is concerned with. Etherton LJ's list is, on any view, a very long way from a claim made by an adjoining owner, in the absence of a notice from the building owner, in connection with works which have already been carried out.

47. Finally, in *Lawrence and Sarah Seeff v Dinh Nam Ho and another* [2011] EWCA Civ 186, this court considered an appeal on both substantive matters and costs arising out of works to a party wall. In that case, no party wall notices were ever issued. There was a dispute as to what had been agreed between the neighbours. Thomas LJ (as he then was) said at paragraph 36 that, for other reasons:

> "…it is not necessary to consider whether there was a failure to follow the procedures under the Party Wall Act. The judge observed in his first judgment on costs that the whole dispute that followed would never have arisen if Mr and Mrs Ho had discharged their duty of giving notice under the Party Wall Act. The Act makes it mandatory to give notice in respect of work defined in the Act. Mr and Mrs Seeff contended that the Party Wall Act applied. Mr and Mrs Ho disputed this, on the basis of Mr Petersen's evidence, as to whether a party wall notice was necessary. Although I consider that the judge was probably right, it is not necessary to determine that issue."

48. Again, I note this court's view that, under the Act, a notice under s.3 was "mandatory" and may have made all the difference. It was not suggested in *Seeff* that the parties should have proceeded under s.10 on a notional basis, as if the building owner had served a notice under s.3, in circumstances where he had not.

49. Those are, in my view, the authorities relevant to this appeal, and I consider that they support the interpretation of the Act set out at paragraphs 25 – 35 above. As

summarised at paragraphs 3.2 and 3.40 of *Party Walls and Practice*, 4th edition, by Stephen Bickford-Smith and others, if the Act is fully complied with, the adjoining owner's common law rights are substituted for his or her rights under the Act, but in default the building owner is liable for any tort against which the Act would have protected him. These paragraphs rightly assume that those common law rights would be determined by the courts because the Act had not been complied with, so s.10 had not been engaged.

50. I note that, in the course of both judgments below, and in some of the written material that was provided to this court, there were a number of references to a number of first instance decisions. Mr Isaac expressly acknowledged that, since those decisions were not binding on this court, and none of them were directly on point in any event, there was little purpose in seeking to refer to them. I agree. The judgments in question are not always entirely clear, and it is sometimes difficult to discern any common thread running through them. Accordingly, save for one, I do not deal with the other first instance cases to which reference was made in the papers.

51. The exception is a decision of HHJ Thornton QC, sitting as a judge of the Technology and Construction Court in *Crowley v Rushmoor Borough Council* [2009] EWHC 2237 (TCC). This decision was rightly identified by Lady Justice Andrews when she gave permission to appeal because it was relied on below by Mr Isaac and seemed potentially at odds with *Blake v Reeves*, to which no reference was made in the judgment.

52. In *Crowley*, the Sampla family pursued claims against Crowley (the engineer) and Rushmoor (the local authority and building owner), following the partial collapse of their house during work being carried out in a public space owned by Rushmoor immediately adjacent to their house. Crowley settled with the Sampla family and then pursued Rushmoor under the Civil Liability (Contribution) Act 1978.

53. In his judgment, from [94] onwards, the judge addressed whether Crowley and Rushmoor were both parties from whom the Sampla family were entitled to recover compensation for the same damage. He dealt with Rushmoor's potential liability under the Act from [96] onwards. At [101] – [103] he suggested that what he called the arbitration provisions in the Act could have been operated retrospectively. He also said that Rushmoor could have been liable in damages arising from their failure to comply with the Act (because they failed to serve a notice), by way of a claim for breach of statutory duty. At [107] he concluded that "if a building [adjoining?] owner may not claim such loss as damages for breach of statutory duty, it could leave such a party without a remedy as a result of the offending party's failure to operate the mandatory statutory provisions of the Party Wall Act".

54. There are a number of difficulties with this analysis. Judge Thornton does not address how, in the absence of a notice, the s.10 mechanism would work 'retrospectively' or at all. As with other parts of the judgment, 'building owner' and 'adjoining owner' are used interchangeably, which sometimes make the sense hard to discern. In addition, this section of the judgment is, with the exception of one county court decision, unburdened by any references to authority.

55. As to [107] in particular, it is not clear why, in the absence of a claim for breach of statutory duty, the judge thought that the adjoining owner would be left without a

remedy because of the offending party's failure to operate the Act. That was an important element of his analysis, but it appears to overlook the fact that the adjoining owner would have had available the usual claims for damages, in trespass, in nuisance or in negligence (a point also made by Bickford-Smith at paragraph 3.49).

56. Ultimately, however, I am not sure that this part of the judgment makes very much difference to the outcome of this appeal in any event. Judge Thornton did not say in terms that the building owner's failure to comply with the Act could somehow be undone by a subsequent award by surveyors appointed by the adjoining owner and, for the reasons set out in the earlier part of this judgment, I think he was wrong about retrospectivity in any event. He did not say that the claim for breach of statutory duty could have been determined anywhere other than in court; on the contrary, at [107] he identified the issue as being "whether a court could award as damages the sum that the surveyors could have awarded as compensation had the Party Wall Act been engaged but had wrongly not been operated". That paragraph seems to support Mr Paget's analysis of the way in which the Act works: that, in the absence of a notice, the dispute would have been a matter for the court, not the dispute resolution mechanism in s.10.

57. Accordingly, whilst I have doubts as to whether Judge Thornton's analysis is correct, it does not seem to me to affect the result in this appeal; indeed, on one view, it provides some further support for the conclusions I have reached.

Conclusions

58. For the reasons that I have set out, I consider that, on a proper interpretation of the Act, the absence of a notice under s.3 from the building owner means that there was no dispute which engaged s.10, and therefore the Award of 3 July 2018 was null and void. I note that that analysis is consistent with the reasoning in all four of the decisions of the Court of Appeal to which I have referred above. By contrast, the interpretation contended for with such dexterity by Mr Isaac is not only novel, but unsupported by any authority.

59. I would dismiss this appeal.

LADY JUSTICE ELISABETH LAING

60. I agree with both judgments, which explain the reasons why we agreed to dismiss the appeal at the end of the hearing.

LORD JUSTICE LEWISON

61. At the conclusion of the hearing, I joined in the decision to dismiss the appeal. These are my reasons for doing so. I agree with the reasons given by Coulson LJ for dismissing this appeal. But because this issue has arisen for the first time directly, and is an important one, I give a judgment of my own. Coulson LJ's compelling analysis of the Party Wall etc Act 1996 ("the 1996 Act"), with which I agree, is supported by a consideration of its predecessor legislation; and is consistent with cases decided under the 1996 Act itself.

62. Before the passing of the 1996 Act rights in party walls in most of the country were regulated by the common law. In some parts of the country, most notably London, they were regulated by local Acts of Parliament. The Act in force before the 1996 Act was the London Building Act (Amendment) Act 1939 ("the 1939 Act"), although that Act had many predecessors. The interplay between that Act (and its predecessors) and the common law has been considered in a number of cases.

63. Section 46 of the 1939 Act provided that where lands of different owners adjoin and at the line of junction are built on, a building owner had a number of listed rights. Section 47 (1) provided that before exercising any right conferred by section 46 a building owner "shall serve" on the adjoining owner a party structure notice. Section 55 provided for a dispute resolution procedure leading to an award by surveyors where "a difference arises between a building owner and an adjoining owner in respect of any matter connected with any work to which this Part of this Act relates". Section 55 (i) provided that an award may settle:

> "… any matter which before the commencement of any work to which a notice under this part of this Act relates or from time to time during the continuance of such work may be in dispute between the building owner and the adjoining owner"

64. In *Standard Bank of British South America v Stokes* (1878) 9 Ch D 68 a building owner was carrying out excavations under a party wall in order to construct a sub-basement. He had served a notice under the Metropolitan Buildings Act 1855; and surveyors had been appointed but had not come to any agreement or appointed a third surveyor. The adjoining owner sought an injunction restraining the continuation of the excavation. Jessel MR held that rights under the legislation then in force superseded rights at common law in a party wall. At 73 he said:

> "The law of the metropolis now defines the rights of a building owner. He is a building owner within the definition of the 82nd section, because he wants to do some work in respect of a party structure, and, being such a building owner, he has these rights, which, in my opinion, are exclusive, and he has no other rights."

65. At 76 he said:

> "I think it the duty of the Court to read these Acts in a reasonable manner, with a view of carrying out the manifest intention of the Legislature that these party structures should not be interfered with by building owners without due notice to the person or persons other than the building owner interested in the party structure, and without its being referred to the surveyors to decide how the work should be performed."

66. At 77 he referred to the dispute resolution procedure under that Act and said:

> "As they [i.e. the surveyors] have to determine the right to do and the time and manner of doing the work, it would really be reducing the Act to an absurdity to suppose that the building

> owner had a right to proceed with the work until they have so determined. It must mean that they are to determine the time, that is, the work is not to be done until the time is determined, and that, if the work is commenced before that time, the building owner is committing a breach of the Act of Parliament. Then there is a power of appealing, and the appeal may no doubt be delayed for a very considerable time; but if his right is, as I read it to be, a right merely to do that which the surveyor or the umpire may direct shall be done, the building owner has no right to do anything at all until he obtain such directions. The Defendant therefore had no right to proceed with his work until the direction of the surveyor had been obtained, and the Plaintiffs are entitled to come here to restrain his so proceeding."

67. That was, of course, a case in which a party structure notice had been served, so Jessel MR was not concerned with a case in which no such notice had ever been served. One of the important points, however, was that the adjoining owner was entitled to invoke equitable remedies in court proceedings where the procedure laid down by the Act had been invoked (by the service of a party structure notice) but not followed.

68. In *Leadbetter v Marylebone Corporation* [1904] 2 KB 893 a building owner carried out works to a party wall without serving a party structure notice, claiming to have been entitled to do so under an award issued under a previous dispute. This court rejected that argument. Of particular note is the observation of Mathew LJ at 902:

> "The right to make an award springs from the notice given by the building owner, and the surveyors had jurisdiction over the matters contained in that notice and in the notice given by the adjoining owner."

69. In *Selby v Whitbread & Co* [1917] 1 KB 736 a building owner had served a party structure notice under the London Building Act 1894 as a precursor to rebuilding his house. He transferred a strip of land to the local authority. Surveyors made an award requiring him to build a brick pier on the land transferred in order to support the party wall. The issue was whether, having transferred the strip, the building owner was bound by the award. McCardie J held that he was. He said at 742:

> "It seems to me that that section contemplates that the person who serves the notice under s 90 [i.e. a party structure notice] shall be and remain liable for all the results which follow from such notice."

70. That, too, was a case in which a party structure notice had actually been served. But he did say at 746:

> "In the present case, as already stated, the defendants gave their building notice in 1914. *Thereupon* the rights of the plaintiffs sprang into being under the Act of 1894." (Emphasis added)

71. That observation supports the view that it is the service of a party structure notice that triggers the operation of the Act. The defendants in that case were the building owners and the plaintiffs the adjoining owner. It was, therefore, the rights of the adjoining owner (not merely those of the building owner) that were triggered by the service of the party structure notice.

72. He went on to say at 752:

> "Hence I think that the Act of 1894 is not an addition to but in substitution for the common law with respect to matters which fall within the Act. It is a governing and exhaustive code, and the common law is by implication repealed. … I therefore hold that the plaintiffs cannot succeed upon their claim at common law *inasmuch as the defendants' party wall notice had been duly given under the provisions of the Act of 1894*. In so holding I in no way negative the proposition that a plaintiff may bring his action for damages if he can establish that the defendant has exerted his statutory privileges so as to inflict injury on the plaintiff by negligence, improper obstructiveness, avoidable nuisance, or unreasonable delay…" (Emphasis added)

73. Once again, it is the service of the party structure notice that causes the substitution of rights under the Act for common law rights. The service of such a notice gives a building owner the statutory rights laid down in the Act. Those rights, once activated, superseded the common law both as regards the building owner and the adjoining owner. Where, however, a party structure notice has not been served, the adjoining owner's common law rights remain intact.

74. In *Gyle-Thompson v Wall Street Properties Ltd* [1974] 1 WLR 123 Brightman J emphasised the importance of the procedures laid down in the 1939 Act; and held that if those procedures had not been correctly followed, a purported award was invalid.

75. In *Woodhouse v Consolidated Property Corp Ltd* (1993) 66 P & CR 234 Glidewell LJ said at 242:

> "In my judgment the provisions of section 55 relate only to the resolution of differences between adjoining owners as to whether one of them shall be permitted under the Act to carry out works, the subject of a section 47 Notice [i.e. the party structure notice], and if so, the terms and conditions under which he is permitted to carry out such work."

76. Thus the dispute resolution procedures under the 1939 Act were tied to the party structure notice.

77. In *Louis v Sadiq* (1997) 74 P & CR 75 this court considered the position before the service of a party structure notice. Having referred to *Standard Bank* and *Selby*, Evans LJ said at 332:

> "These authorities establish, in my judgment, that the appellant would not have been liable in nuisance if he had given notice, or obtained consent, in accordance with the Act and then done no more than was agreed or was approved by the surveyors. But then, no damage would have been caused to the respondents' house, save in the party wall itself, and in that respect no liability would have arisen. The issue raised in the present case is whether the appellant's liability at common law is either excluded or reduced by the provisions of the Act which he invoked, eventually, after the nuisance had arisen.
>
> I would have no hesitation in rejecting this submission even without reference to authority, because in my judgment there is nothing in the Act which can be said to have this effect. The adjoining owner's common law rights are supplanted when the statute is invoked, which can have the effect of safeguarding the building owner from common law liabilities when he complies with the statutory procedures, just as he may incur liabilities under the statute which did not exist at common law (the *Standard Bank* decision). But if he commits an actionable nuisance without giving notice and without obtaining consent, he cannot rely upon a statutory defence under procedures with which *ex hypothesi* he has failed to comply. If he does then give notice he will in due course acquire statutory authority for whatever works are approved or agreed, but in my judgment this does not relieve him from liability for the continuing nuisance which he has unlawfully committed, until such time as and to the extent that such authority is obtained."

78. The critical point here is that the adjoining owner's common law rights are supplanted "when the statute is invoked". The statute is invoked by the service of a party structure notice. Until that time, the position remains governed by the common law of trespass and nuisance. *Woodhouse* is also consistent with that interpretation. In my judgment, the position under the 1939 Act and its predecessors was clear.

79. The real question is whether the Party Wall etc Act 1996 has changed the position. Mr Isaac KC stressed the difference between section 10 of the 1996 Act and that of section 55 (i) which tied the surveyors' jurisdiction to a matter to which the notice related. By contrast section 10 (1) of the 1996 Act simply referred to "any matter to which is connected with any work to which this Act relates". There is, therefore, no longer any link between a party structure notice and the surveyors' jurisdiction. Although there cannot be a deemed dispute in the absence of a party structure notice, there can be an actual dispute.

80. In my judgment the difference in wording does not justify the radical change in procedure for which Mr Isaac argues. According to its promoter, the Earl of Lytton, the aim of the Party Wall etc Act 1996 was to extend the "tried and tested" procedures under the London Building Act (Amendment) Act 1939 to the whole of the country: *Zissis v Lukomski* [2006] EWCA Civ 341, [2006] 1 WLR 2778 at [24]. In *Kaye v Lawrence* [2010] EWHC 2678 (TCC), [2011] 1 WLR 1948 at [31] Ramsey J quoted

another statement by the Earl of Lytton in the committee stages of the Bill which became the 1996 Act:

> "The intention remains, as always, that the Bill will follow as closely as possible the London Building Acts which are its role model and the precedents and practice which have been established for inner London over a long period of time."

81. In *Reeves v Blake* [2009] EWCA Civ 611, [2010] 1 WLR 1 Etherton LJ said at [14]:

> "The 1996 Act does not reproduce in identical terms the provisions of the London Building Acts. It contains, for example, new provisions as to costs. Generally, however, it provides procedures, similar to those in the London Building Acts, for authorising property owners to carry out work to an existing party structure or otherwise on or near to the boundary with the adjoining property, but which at the same time protect the legitimate interests of the adjoining owner. They are intended to constitute a means of dispute resolution which avoids recourse to the courts."

82. In my judgment, therefore, cases decided under the previous legislation are of continuing relevance when interpreting the 1996 Act. Indeed, one relevant principle of statutory interpretation is the *Barras* principle. The *Barras* principle derives from *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 411 in which Viscount Buckmaster said:

> "It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

83. Although this is not a question of a particular word or phrase, the method of invoking rights under the predecessors of the 1996 Act has been made clear in a number of decided cases, both at first instance and in this court. Parliament must, in my judgment, be taken to have had those cases in mind when enacting the 1996 Act. The point is all the stronger because the promoter of the Bill made it clear that it was the intention to follow the "tried and tested procedures" under the 1939 Act; and that the 1939 Act was its "role model". Subsequent decisions under the 1996 Act itself are, in my judgment, consistent with that view.

84. In *Rashid v Sharif* [2014] EWCA Civ 377 Mr Sharif built a garden shed which entailed the demolition of a party fence wall; and did so without serving a party structure notice. Jackson LJ said:

> "[56] The judge has rejected the defendants' evidence that Mr Rashid agreed to what the defendants were doing. Therefore the defendants were not entitled to carry out such substantial works

> to the party fence wall without (a) serving the appropriate notices under the Party Wall etc Act 1996 and (b) following the statutory procedures to secure permission. The defendants did not do this.
>
> [57] In those circumstances the defendants' execution of works to the party fence wall constituted a trespass …"

85. In *Kaye v Lawrence* the question was whether the building owner could be required to give security under section 12 of the 1996 Act in connection with the works. Ramsey J said at [47]:

> "I now turn to consider the rival contentions of the parties on the meaning of section 12 of the 1996 Act. Much of the debate centres around the meaning of the phrase "any work in the exercise of the rights conferred by this Act" in section 12 . The right of the adjoining owner to require the building owner to give security *depends on notice being given* to the building owner before he begins such work." (Emphasis added)

86. The notice to which he referred was a party structure notice. In similar vein, he said at [59], having referred to authority:

> "These authorities show that, *when the provisions of the relevant Act are operated*, the common law rights are "supplanted" or "substituted" by the rights under the Act in relation to matters dealt with under the Act." (Emphasis added)

87. It is, I think, implicit that the relevant provisions of the Act are "operated" when a party structure notice is served.

88. In *Group One Investments Ltd v Keane* [2018] EWCA Civ 3139 Hickinbottom LJ said at [2]:

> "If for any reason the statutory procedure is not followed, then the parties' respective common law rights and obligations continue to apply."

89. In that case a building owner began work without serving a party structure notice. The adjoining owner sought legal advice and contemplated proceedings to compel the building owner to serve a party structure notice. This court held that those costs were irrecoverable under the dispute resolution procedure in the 1996 Act. In my judgment, when Hickinbottom LJ referred to following the statutory procedure, he must have meant events following the service of a party structure notice. Moreover, what he contemplated was that both parties' common law rights remained in being, not simply those of the adjoining owner.

90. In *Rodrigues v Sokal* [2008] EWHC 2005 (TCC) a building owner began work without serving a party structure notice. HHJ Toulmin CMG QC said at [51]:

> "My understanding of the law is that until such time as the Party Wall etc Act 1996 is invoked and either the building

> owner has obtained consent or acquires a statutory authority under the s.10 procedure, the building owner cannot rely upon a statutory defence under procedures with which "*ex hypothesi*" he has failed to comply. If the building owner subsequently obtains authority for building works which were started without authority, that authority abates the common law rights from the time of the subsequent consent or when the Party Wall etc Act procedure was successfully invoked. If the works were never or would never subsequently have been authorised, the common law rights continue."

91. But he went on to say that if the procedure under the 1996 Act is invoked, then an award may cover matters that took place before its invocation. Again, I think, that what the judge meant by "invoked" was the service of a party structure notice.

92. This approach is, in my judgment, supported by the words of the 1996 Act. Section 2 (2) gives the building owner a number of "rights" to carry out works relating to party walls. These rights are, in many cases, more extensive than the rights enjoyed by a building owner at common law, but they come with conditions requiring the making good of damage. But as Coulson LJ points out, exercise of those rights is contingent on serving a party structure notice under section 3. In order to be able to exercise the "rights" conferred upon him by the 1996 Act the building owner must serve a party structure notice under section 3. The adjoining owner may serve a counter-notice under section 4. Section 5 provides:

> "If an owner on whom a party structure notice or a counter notice has been served does not serve a notice indicating his consent to it within the period of fourteen days beginning with the day on which the party structure notice or counter notice was served, he shall be deemed to have dissented from the notice and a dispute shall be deemed to have arisen between the parties."

93. Any such dispute is to be resolved in accordance with section 10. It is that section which confers power to make an award. Section 10 applies:

> "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…"

94. Mr Isaac accepts that in the absence of a party structure notice there can be no "deemed dispute" under the Act. But he says that does not prevent an actual dispute from arising under the Act. Like Coulson LJ, I consider that that would be an unlikely intention to attribute to Parliament.

95. In addition, the expression "building owner" is defined by section 20 as;

> "an owner of land who is desirous of exercising rights under this Act"

96. Mr Isaac submits that that definition must be interpreted as if it had read "an owner of land who is desirous of executing works of a description contained in this Act". But that is not what the definition says. A building owner may rely on his common law rights, but in that event he is vulnerable to claims of trespass or nuisance.

97. In *Blake v Reeves* a building owner served notice under section 6 (5). A dispute with the adjoining owner was deemed to have arisen pursuant to section 6 (7). The surveyors appointed by the parties made an interim award determining that the building owner's notice was valid but did not at that stage authorise the proposed works. The building owner mistakenly took the view that the award authorised the proposed works and gave instructions for them to be carried out. The adjoining owner was advised by her solicitors to bring proceedings for an injunction for trespass and/or nuisance and particulars of claim for issue in the High Court were drafted. In the event the building owner undertook to suspend the works and no court proceedings were issued. By a second award the surveyors authorised the carrying out of the proposed works but directed that the building owner pay the adjoining owner's costs of the contemplated court proceedings. The issue was whether the surveyors had jurisdiction to issue the second award.

98. Etherton LJ explained at [21]:

> "As a matter of interpretation, the "dispute" mentioned in section 10(1), (10)(b), (12)(c) and (13)(c) is a dispute arising under the provisions of the 1996 Act, whether an actual dispute within section 1(8) or a deemed dispute under section 6(5) or section 6(7), or a dispute under some other provision, such as section 7(2) (compensation for loss and damage resulting from execution of work executed pursuant to the 1996 Act), section 11(2) (responsibility for the expenses of work), section 11(8) (expenses of making good damage under the 1996 Act) or section 13(2) (objection to building owner's account of expenses). I agree with Judge Viljoen that, by contrast, proceedings in court to enforce common law or equitable remedies, such as damages or an injunction for trespass or nuisance or the threat of them, fall wholly outside the 1996 Act. That is equally true of preparations for such proceedings."

99. It is, therefore, only a dispute (or deemed dispute) which arises "under the provisions of the 1996 Act" which is within the dispute resolution procedure under section 10. A dispute which arises outside the Act is not, therefore, covered by section 10. If section 10 covered all matters which are capable of falling with the scope of the Act (irrespective of whether a party structure notice has been served), then *Blake v Reeves* must be wrong, because proceedings to enforce common law or equitable remedies would be subsumed by the 1996 Act. As *Woodhouse* and *Louis* make clear, the application of the Act is triggered by the service of a party structure notice. Etherton LJ referred to both those cases in *Blake v Reeves* at [23]. He clearly took the view that they were of continuing validity in relation to the 1996 Act. Mr Isaac sought to finesse that point by submitting that an adjoining owner, who had not been served with a party structure notice, had the option either to pursue his remedies at common law or to invoke the provisions of the Act. But the Act does not say so, and there is no procedure under which an adjoining owner is required to initiate any process.

Moreover, it would be a far-reaching (and unheralded) change in the law if an adjoining owner could unilaterally remove a citizen's right of access to the courts, simply by appointing a surveyor (who need not have any qualifications); all the more so in a case in which there is a dispute about whether works fall within the various descriptions of work in the 1996 Act. In my judgment, unless the Act is triggered by the service of a party structure notice, the adjoining owner is not entitled to invoke the Act. In short, I agree with the judge that "no party structure notice, no Act".

100. That does not necessarily leave an adjoining owner without a remedy. He retains his rights at common law to sue in trespass or nuisance. Mr Isaac said, with some force, that proceedings in court are potentially more costly than an award by surveyors; and that if an adjoining owner wished to obtain an interlocutory injunction they might be deterred by having to give a cross-undertaking in damages. But he also accepted that surveyors have no power to grant an injunction and that if work was carried out otherwise than in accordance with an award, the adjoining owner would, in practice, have to pursue his common law and equitable remedies.

101. In *Crowley v Rushmooor BC* [2009] EWHC 2237 (TCC) HHJ Thornton QC suggested that a failure to serve a party structure notice might be a breach of statutory duty. But the consequence of that would be that the adjoining owner on whom the notice ought to have been served would be entitled to recover damages at common law, the measure of damages being what a surveyor would have awarded under the Act (see also *Roadrunner Properties Ltd v Dean* [2003] EWCA Civ 1816, [2004] 1 EGLR 73 at [9]). That may or may not be right (see *Hough v Annear* (2007) 119 Con LR 57, which took a different view); but assuming that it is, it does not result in a surveyor's award becoming binding: it results in the jurisdiction of the court being exercised. I cannot see any justification in the 1996 Act for a provision which deems a building owner to have served a party structure notice under the Act when in fact he has not, such as to confer jurisdiction on a surveyor.

102. In his original skeleton argument Mr Kyson laid stress on the proposition that rights under the Act supersede common law rights. So they do, but only once the Act has been brought into operation.

103. It was for these reasons that I joined in the decision to dismiss the appeal.