Claim No H20CL066

IN THE COUNTY COURT AT CENTRAL LONDON

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

Date: 4 October 2022

Before :

HIS HONOUR JUDGE MONTY KC

- -

Between :

STEVEN JAMES FRANKLIN WALSH

Appellant

- and -

(1) PSB MANAGEMENT LIMITED
(2) STANLEY YEH
(3) YI-HSIN KANG

Respondents

- -

Mr Adrian Davies (instructed by **Atif & Co**) for the **Appellant**
Ms Diane Doliveux (instructed by **Forsters LLP**) for the **Respondents**

Hearing dates: 30, 31 May and 1 June 2022

- -

Approved Judgment

HHJ Monty KC:

Introduction

1. This is my judgment on a Party Wall Award appeal.

2. The Appellant, Mr Walsh, lives at and is the long leaseholder of 93 Grosvenor Road, London SW1 ("93").

3. The First Respondent ("PSB") is the registered owner of 92 Grosvenor Road ("92"), which is next door to 93.

4. 92 is divided into 5 flats, and each flat is held on a separate long lease. The Second and Third Respondents ("Mr Yeh and Ms Kang") are the long leaseholders of Flat 1 on the ground floor of 92. They became the registered proprietors on 19 January 2017, having bought the lease of Flat 1 at auction from its previous owner, Ms Laura Dzelzyte.

5. There is a conservatory at the rear of Flat 1 which was built in about 1996. The conservatory has fallen into disrepair. In 2014, Ms Dzelzyte obtained planning permission to demolish the conservatory and replace it with a single-storey building. A Party Structure Notice ("PSN", a notice under the Party Wall etc Act 1996, "the Act" – all section references in this judgment are to the Act) was served on Mr Walsh, surveyors were appointed, and an Award was made on 24 August 2016 ("the First Award").

6. Mr Walsh appealed the First Award, but the appeal was settled before it was determined by the court. No work ever commenced. Ms Dzelzyte then sold Flat 1 to Mr Yeh and Ms Kang.

7. The relevance of the First Appeal will become clear later in this judgment.

8. Mr Yeh and Ms Kang wanted to carry out the works of demolition of the existing conservatory and its replacement, and in this they were supported by PSB. Together with PSB they appointed Mr Steve Campbell as the building owner's party wall surveyor ("BOS") in March 2017.

9. PSNs were served on Mr Walsh, Crown View Estates (the headlessor of 93) and St George's Estates (London) Ltd, the freeholder of 93. Each as adjoining owner appointed a surveyor ("AOS"), Mr Kurt Boyer for Mr Walsh, Mr Martin Foster for the headlessor, and Mr Roger Taylor for the freeholder.

10. As I shall go on to set out in more detail, the relationship between Mr Campbell and Mr Boyer got off to a poor start, and never recovered. Mr Campbell took the view – I think with some justification from what I have seen and heard, but that does not need a determination in the context of the present appeal – that Mr Boyer (and Mr Walsh) were dragging their feet on a number of issues. In the event, Mr Alex Frame was appointed as a third surveyor ("3S") under the Act on 28 March 2019, it would appear with the intention that an award would be made by Mr Campbell and Mr Frame as BOS and 3S (in other words, without the AOS Mr Boyer).

11. On 13 April 2021, three awards were made in respect of the three PSNs, including the award which is the subject of this appeal.

12. Mr Walsh issued his Appellant's Notice on 4 May 2021. On 27 August 2021, HHJ Lethem had determined as a preliminary issue that the appeal was brought within the time limit provided for by Section10 (17). There are 3 grounds of appeal.

13. First, that Mr Yeh and Ms Kang lack standing under the Act to serve a PSN because they are not the "building owner" as defined in section 20.

14. Secondly, that the award was infected by apparent bias in that Mr Frame's son, Mr Stuart Frame, had been counsel instructed by PSB in the First Appeal. Mr Walsh says that Mr Frame ought never to have been appointed as the 3S and the award should be set aside on that basis.

15. Thirdly, that the works materially differ from those suggested by the PSN.

16. The appeal was heard over three days. I heard evidence from Mr Walsh, Mr Boyer, Ms Vara (a director of PSB), Mr Yeh, Mr Frame and Mr Campbell. I also read the witness statements of Ms Dodd, Mr Trill and Ms Kang, permission having been given for those statements to be admitted without the witnesses being called (order of 29 April 2022). Mr Trill and Ms Dodds are directors of PSB, and they simply agreed with Ms Vara's statement (Ms Vara is also a director of PSB, I shall refer to her evidence later in this judgment). Ms Kang is the Second Respondent to this appeal, and her statement set out her agreement with the evidence of her husband, Mr Yeh, the First Respondent.

17. Mr Walsh was represented by Mr Davies of counsel, and PSB, Mr Yeh and Ms Kang were represented by Ms Doliveux of counsel. Despite the vast amount of documentary material (six very full lever arch files of documents, with additional copy plans), their cross-examination of the witnesses and their written and oral submissions were well focussed on the issues I have to decide, and I am grateful to them both.

18. I was, and remain, slightly puzzled by the amount of material which was before the court, and the relevance of some of the evidence – particularly that of Mr Walsh – to the three relatively straightforward grounds of appeal. I have not felt it necessary to deal with every point raised in submissions, although I have taken all the points made, and all the authorities to which I was referred (not all of which I have referenced in this judgment) into account.

19. I will look at each ground in turn, setting out any necessary findings of fact.

Ground 1 – Do Mr Yeh and Ms Kang lack standing to contest this appeal?

20. Under the Act, PSNs can be served by the "building owner". The Act defines a "building owner" as "an owner of land who is desirous of exercising rights under this Act": section 20.

21. Mr Davies submits that Mr Yeh and Ms Kang are not a "building owner" for the purpose of the Act because their demise excludes the external wall of their flat, which is the party wall.

22. The lease, which is dated 8 November 1996, defines the demised premises as follows:

> "ALL THAT self contained flat situate on the ground floor of the House and known as Ground Floor Flat, 92 Grosvenor Road aforesaid as the same is delineated and edged red on the plan annexed to the Surrendered Lease TOGETHER WITH the area of the basement under the pavement vault as the same is delineated and coloured blue for information purposes only on the plan annexed hereto and numbered 1 ('Plan 1') TOGETHER WITH ALSO the flat roof above the bathroom of the Basement Flat and the air space above the flat roof up to the level of the first floor shown coloured yellow on the plan attached and numbered 2 ('Plan 2') TOGETHER WITH ALSO the flat roof adjacent to the half landing cupboard and the roof space above to the level of the second floor shown coloured green on Plan 2 TOGETHER WITH ALSO the half landing cupboard shown coloured red on Plan 2"

23. The "Surrendered Lease" which is referred to in the lease and that definition is an Underlease dated 29 September 1967, in which the demised premises are defined in the Second Schedule thereto as follows:

> "ALL THAT self contained flat situate on the ground floor of the House and known or intended to be known as Ground Floor Flat, 92 Grosvenor Road aforesaid as the same is delineated and edged red on the plan annexed hereto …"

24. The Surrendered Lease excluded from the demise the "Reserved Property", which is defined in the Third Schedule, which definition includes:

> "… ALL THOSE the main structural parts of the House including the roof foundations and external walls thereof (but not the window frames and window glass of the Demised Premises nor the interior faces of such of the external walls as bound the Demised Premises) …"

25. The flaw in this submission seems to me to be that the definition of the demised premises in the 1996 lease is only by reference to the plan annexed to the Surrendered Lease, and not to the Surrendered Lease itself. The plan shows that the area on which the conservatory was built was part of the demise effected by the 1996 lease, which does not limit the demised premises as the Surrendered Lease had done.

26. In any event, the rights which Mr Yeh and Ms Kang want to exercise under the Act (to demolish the conservatory and build a new structure) in my view clearly would affect a party wall which is the wall between Mr Walsh's flat and Mr Yeh and Ms Kang's flat, and it would be wrong to define "building owner" as meaning that Mr Yeh and Ms Kang would have to be the owners of the wall itself, if it was not owned by them. The conservatory is clearly owned by Mr Yeh and Ms Kang. Works of demolition would affect the wall between their flat and Mr Walsh's flat. It would be the wrong result if they did not fall within the definition of "building owner" under the Act. The proposed works plainly relate to works within the Act. There is nothing in the Act which requires the party wall to be owned by either the building owner or the adjoining owner; see the definition of a "party wall" in the Act, section 20, which says nothing about ownership, and the Act refers to the intention "to build on any part of the line of junction" in section 1. The definitions of "adjoining owner" and "adjoining occupier"

in section 20 refer simply to "any owner and any occupier of land, buildings, storeys or rooms adjoining those of the building owner".

27. Further, Ms Doliveux submits that the identity of the building owner is fixed when a building owner serves notice and this is unique and specific for each set of works (see *Isaac, The Law and Practice of Party Walls*, 2nd Edn, para 15-50). The PSN names the three Respondents as the building owner and no declaration was ever sought that the PSN was invalid. Ms Doliveux therefore submits that the right to take this point about standing has been waived, or alternatively Mr Walsh is estopped from asserting it. The Response to the Grounds of Appeal refers to a waiver in respect of PSB only and says nothing about Mr Yeh and Ms Kang: see the Response, paragraph 13. The standing of PSB is not an issue raised in the Grounds of Appeal, which only refers to the standing of Mr Yeh and Ms Kang.

28. Mr Davies submitted at the hearing of the appeal that PSB was not "desirous of exercising rights" under the Act (even if it enthusiastically supports the intentions of Mr Yeh and Ms Kang). Ms Doliveux submitted that the status of PSB was not relevant to the appeal because it was not raised as a Ground of Appeal.

29. I agree with the latter submission, and that must mean that since PSB's status as a building owner, fixed by the service of the PSN, is not challenged in this appeal, Mr Walsh must have waived any point about PSB not being a building owner. Mr Davies says that to add a party to a PSN who has no real intention of its own to carry out the works "is not conceded" as being sufficient, but it seems to me that Ms Doliveux is right, and the point is not open to Mr Walsh to take.

30. Mr Davies criticises paragraph 13 of the Response as referring to a predecessor in title to PSB, whereas that predecessor was an entity entirely unrelated to PSB. What happened in the previous appeal was that one of Mr Walsh's appeal grounds was that the PSN did <u>not</u> name PSB as an adjoining owner; in my judgment, Mr Walsh cannot have it both ways.

31. Mr Boyer did not make any reference to Mr Yeh and Ms Kang not having standing to serve a PSN when he made his submissions to Mr Frame.

32. All of the relevant parties are named in the PSN.

33. I also note the comments of Brightman J in *Gyle-Thompson v Wall Street Properties Ltd* [1974] 1 WLR 123 at 130, made in a slightly different context (to which I will return under Ground 2), about the importance of regularity in following the procedures under the Act, but some technical points lack merit when viewed in an overall context, even if otherwise they might have some basis.

34. I therefore conclude under Ground 1 that Mr Yeh and Ms Kang did have standing and even if I am wrong about that, any question of PSB's standing was waived and is not open to Mr Walsh to take. This first ground fails.

Ground 2 – Apparent Bias

35. The background to Ground 2, which relates to the appointment of Mr Frame as the 3S, is as follows.

36. As I have noted, the relationship between Mr Campbell and Mr Boyer did not start well.

37. Mr Boyer was appointed by Mr Walsh, and Mr Campbell had been appointed by Mr Yeh and Ms Kang.

38. On 9 May 2017, Mr Boyer emailed Mr Campbell confirming his appointment and asking him to note Mr Walsh's "formal dissent to your proposed works". Mr Boyer proposed Mr Redler be agreed as the 3S.

39. On 10 May 2017, Mr Campbell replied, attaching his appointment documents and requesting sight of Mr Boyer's.

40. On 22 May 2017, Mr Boyer sent a copy of his appointment letter to Mr Campbell.

41. Neither of Mr Boyer's two emails commenced with "Dear Mr Campbell".

42. Mr Campbell was unhappy about this. His email to Mr Boyer of 24 May 2017 referred to this failure to address him as "Dear Steve" or "Dear Mr Campbell" as being "rather aggressive" and not conducive to acting in a non-combative manner. He suggested three names for possible appointment as the 3S, one of whom was Mr Maycox; he said that he could not agree Mr Redler.

43. There was a discussion between Mr Campbell and Mr Boyer, which resulted in Mr Boyer's email of 1 June; this also failed to start with a "Dear Steve" or a "Dear Mr Campbell".

44. Again, Mr Campbell took this up in his response of 2 June; leaving that point aside, it would seem from the tone of this email that he and Mr Boyer had had a constructive discussion but Mr Campbell was clearly keen to get a 3S appointed as soon as possible, and he set out 6 names, one of whom was Mr Maycox and one of whom was Mr Frame.

45. Mr Boyer emailed on 2 June 2017, with an apology "for writing in a style you find disrespectful", and he agreed to the appointment of Mr Maycox.

46. In a further email of 22 October 2017, Mr Boyer again did not address the email "Dear Steve", and Mr Campbell was rather testy in his response:

> "I note your tone remains unchanged since our last exchange which is disappointing. I had a feeling you would be in the camp that requires a new notice. If you can tell my why [*sic*] I need to do so I shall, but will need convincing. As for communicating with Mr Walsh I am happy to do so, but as he has appointed you to act I rather expected you to act."

47. When Mr Boyer's email of 30 October 2017 simply read, "Could you email me a copy of the original notice served", Mr Campbell's response was, "Not until you learn some manners".

48. On 27 November 2017, Mr Campbell emailed Mr Boyer, saying, "Having received no meaningful replies, I shall now prepare the award, you can either agree it or otherwise, if you do not agree it I shall ask the third surveyor to join with me and we shall bypass

you. You must remain impartial in these matters. Any further attempts to delay matters will add to costs which shall be awarded against Mr Walsh."

49. Mr Boyer's response, on 29 November, was to explain why he thought a new notice was required, which was because of delay in pursuing the works. After a further exchange of emails, Mr Campbell referred to these as "clear but rather crude attempts to frustrate the lawful process" and described it as "unacceptable"; in another email he disparaged Mr Boyer's position, saying, "It appears Mr Walsh may be pulling your strings, that is not how it works I'm afraid, you and I must remain entirely impartial in resolving these matters".

50. In any event, on 8 March 2018 Mr Campbell provided Mr Boyer with the second version of the draft Award ("draft #2"). Mr Boyer emailed on 11 March, asking whether the amended plan includes a roof terrace, and asking for the proposed amendments to be specified; Mr Boyer said he needed more time to consider these and consult with his client. Mr Campbell replied, saying that there was no roof terrace and the change was to London stock bricks as Mr Walsh had requested. Mr Campbell was not prepared to give Mr Boyer more time: "I given you [*sic*] a deadline and I meant what I said". Mr Boyer then raised a query about a metal railing on the plan, which Mr Campbell dismissed by saying it was not a party wall matter, but Mr Boyer said that it may impact on Mr Walsh's privacy; he also asked for an original size plan to be sent to Mr Walsh. Mr Campbell said he had already sent one, and again dismissed the relevance of the metal railing and any privacy concerns. After another request, Mr Walsh agreed to send a further copy of the revised proposal, and that he would be approaching Mr Maycox after the weekend, as to which Mr Boyer retorted that he would make representations to Mr Maycox; Mr Campbell said, "It's rather a shame you didn't trouble yourself to make any representations to me." Mr Boyer called Mr Campbell's approach unreasonable, and Mr Campbell retorted that he found Mr Boyer unreasonable. Mr Boyer said he wanted to carry out an external schedule of condition, but Mr Campbell replied, "Like I advised, I shall be making the award with the third surveyor not you."

51. I thought all of this was extremely childish on both sides, and I have to say that I thought during his oral evidence in cross-examination that Mr Boyer was being rather petty – but neither of them come out well from this. Things got worse.

52. Mr Campbell wrote to Mr Maycox, referring to Mr Boyer (not by name) as having been "extremely tardy to say the least" and to him being Mr Walsh's puppet ("the owner is pulling the surveyor's strings"), and asking him if he would accept an appointment as the 3S.

53. Mr Maycox's response was to ask for assurance that there were no outstanding matters or matters in dispute between Mr Campbell and Mr Boyer, and noted that he would be away for most of April, which might mean that a different 3S would need to be appointed.

54. Mr Campbell's reply was: "No involvement from him really, no response to two drafts, no agreement to meet on site, no efforts made to gain access, asking the odd irrelevant question but not understanding the job (or purporting not to) enough is enough but you are of course entirely welcome to ask him anything you wish."

55. Mr Boyer had not been copied in to this correspondence; he emailed Mr Maycox asking whether Mr Campbell had asked him to accept an appointment and in what capacity. Mr Maycox replied that he had been asked to be the 3S, but that he wanted confirmation that there were no outstanding matters or matters in dispute.

56. The next day, Mr Maycox emailed Mr Campbell saying that he could not act. This was because he could not be a 3S if there were outstanding issues between the existing surveyors; "It is not simply a matter of calling on the Third Surveyor to engross an Award because, in your opinion, your counterpart is acting in a tardy manner."

57. Mr Campbell did not accept "No" for an answer. He said to Mr Maycox, "I am asking you to make an award with me as two of the three surveyors under sec 10(10) … The other surveyor is not just 'tardy' you will see from the referral I make [*sic*] that it's rather more than that. Can you confirm whether you are willing to act, or whether you intend to deem yourself incapable [to act under section 10(9)]."

58. Mr Maycox responded that he had not received confirmation that there were no issues in dispute, he was not prepared to engross an Award with Mr Campbell, and because he was away in April it was appropriate that he deem himself incapable to act.

59. Mr Campbell emailed a copy of this response to Mr Frame, copied to Mr Stuart Frame, saying, "What a prick. See below. I'll forward the other threads."

60. Mr Campbell then emailed the same recipients, saying, "He's a cock. Why would anyone go to the third surveyor if there was nothing in dispute? F**cking moron !!!!!"

61. This was in my view an appalling and completely unacceptable way to refer to a professional who had politely declined to accept an appointment, whether the reasons were good or bad.

62. Mr Stuart Frame sent an email on 27 March 2019, timed at 16:29, expressing his views about Mr Maycox's stated position. It was sent to Mr Campbell and Mr Frame.

63. Mr Campbell sent an email to Mr Boyer, suggesting 5 names for possible appointment as the 3S, on 27 March 2019 timed at 16:30. The first name was that of Mr Frame.

64. Mr Campbell then emailed a reply. It was sent to Mr Stuart Frame and Mr Frame on 27 March 2019 timed at 16:35. He disagreed with Mr Stuart Frame's views: "If one of the appointed surveyors just does not engage, or is just being a twat, it must be open to the other surveyor to call upon the third surveyor to join him and they can make their own award. WE TEACH THAT IN OUR SEMINARS as a better and safer option than going ex parte. … Maycox has got this wrong and I am f*cking fuming."

65. Mr Frame agreed with Mr Campbell. In an email of the same day, but later that evening at 20:57, he said that he had "joined with other surveyors to make an award, when I have been the third surveyor, otherwise there is a stalemate and unfair to the building owner who just wants to get on with the job. I have only done it when the other surveyor has come under either 10(6) or 10(7) usually 10(6)." This email was sent also to Mr Stuart Frame.

66. Mr Stuart Frame replied to both, some 10 minutes later, "So what's the point of the ex parte provisions then?"

67. Mr Frame's response, 2 minutes later, again to both, was that the ex parte provisions could be used but it was better for the surveyors to agree.

68. Mr Stuart Frame again responded to both soon after. He was not convinced by his father's position.

69. Mr Frame replied to both shortly thereafter, saying that he thought that the 3S route was better than ex parte. Mr Campbell replied to both, expressing the view that this would also make the award fairer. This latter email was on 28 March, timed at 08:10.

70. On 28 March at 13:05, Mr Boyer emailed Mr Campbell agreeing to the appointment of Mr Frame.

71. Mr Frame emailed on 28 March at 14:56, saying he thought that Mr Campbell's comment about it being fairer (in his email early that morning) was absolutely correct.

72. There was no other correspondence between them.

73. Why had Mr Campbell emailed Mr Frame and Mr Stuart Frame, and why was there this email correspondence?

74. In his witness statement, Mr Campbell said this:

> "At around this time, I also contacted Alex Frame and Stuart Frame to ask for their views on the position taken by Mr Maycox. It is not unusual that I did this. As above, Alex, Stuart and I are all active members of the Faculty of Party Wall Surveyors. We are often engaged in providing educational content for the Faculty … and we often share thoughts and views about the correct interpretation of the Act. Surveyors who are part of the Faculty will often speak to one another to discuss academic issues relating to the Act and to discuss interesting, live matters we are dealing with and to share professional opinions with their peers. I did not agree with Mr Maycox and I was interested to share thoughts with Alex Frame and Stuart Frame about the stance he was taking. I do not know the exact date that we first discussed the matter, but it is likely that we would have discussed it at a Faculty meeting (or some other professional meeting), or I may have telephoned him [*sic*] for a chat which I often do.
>
> There followed a series of email correspondence with Stuart and Alex Frame. I regret now the tone of some of this correspondence, but it was also an informal discussion about an interesting technical issue that had arisen regarding section 10(10), upon which I felt strongly Mr Maycox was interpreting incorrectly and causing further difficulty to the resolution of the dispute. It will be remembered that Alex Frame was not at that time involved in any capacity in relation to Mr Walsh's matters under the Act and so I did not think this informal discussion about section 10(10) would ever be relevant. Our discussion also only reflected on the position of Mr Maycox and did not touch upon the detail of the Works – there was only a discussion on the technical issues relating to Mr Maycox's role as third surveyor."

75. Mr Campbell, in cross-examination, described the discussions as "an academic conversation" and "an academic debate about Mr Maycox's stance, and nothing to do

with Grosvenor Road". He said all of this was "very much 'off the record' as it were". Again, he said he was "not happy with the language" he had used, and accepted that looking again, now, at Mr Stuart Frame's comments maybe there was a point there and that Mr Maycox may not have been a "moron" after all.

76. Mr Stuart Frame is a barrister specialising in neighbouring land disputes; his chambers' website says that "his real specialism is in the law relating to the Party Wall etc. Act 1996 which now makes up approximately 70% of his practice. Consequently he has advised or appeared in court on hundreds of party wall cases nationwide in recent years." He is also an Honorary Fellow of the Faculty of Party Wall Surveyors. Mr Stuart Frame was instructed in respect of the First Appeal, which came about in the following circumstances.

77. The freehold to 92 had been acquired by enfranchisement by several long-leaseholders of the flats through a company called 92 Grosvenor Road Ltd ("the company"). The conservatory had been built in around 1996 with the permission of the then freeholder, before the company's purchase. Ms Dzelzyte submitted a planning application to demolish the conservatory, which by then was in a poor condition, and to build a replacement structure. The company gave its permission for the works, and Ms Dzelzyte served a PSN on Mr Walsh as an adjoining owner on 20 November 2015. Ms Dzelzyte appointed Mr Henderson as surveyor for the company, Mr Walsh appointed Mr Boyer, and they selected Mr Sirman as the 3S. On 2 August 2016, in circumstances which have some parallels with the present appeal, on the basis that Mr Boyer had failed to act effectively for the relevant period of 10 days, Mr Henderson served notice on Mr Boyer under section 10(7), and when Mr Boyer did not respond to that notice, Mr Henderson and Mr Sirman made an award dated 24 August 2016. On 9 September 2016, Mr Walsh issued an Appeal in respect of that award against the company as respondent, and grounds of appeal and a skeleton argument were served. Mr Stuart Frame was instructed by the company, and he drafted a combined skeleton argument and reply. The First Appeal settled before a hearing.

78. Mr Frame is a chartered building surveyor of considerable experience and is a director of the Faculty of Party Wall Surveyors. In his witness statement he said that he was aware that his son had dealt with the First Appeal but he had no involvement in or knowledge of the nature or outcome of the First Appeal. He said,

> "I object to any suggestion that my son's previous involvement with a matter relating to No.92/No.93 would affect my independence or impartiality as third surveyor. I am a party wall surveyor with over 50 years of experience. I understand my duties as a professional and under the Act very well, and take them very seriously."

79. Mr Frame also dealt with how he became involved in the present case.

> "Mr Campbell first contacted me regarding the matter in around March 2018. Stuart was also involved in those discussions. I cannot remember the point where Mr Campbell and I first discussed the matter, but we often discuss interesting legal points on the phone or at meetings. We are both members of the Faculty of Party Wall Surveyors. My discussions with Mr Campbell only related to the position which had been taken by David Maycox, who was selected third surveyor before me before he declared himself incapable of acting, in

> relation to s10(10) of the Act. Mr Campbell did not provide me with any details of the works or the building, and I had no other information relating to the position of the owners."

80. In cross-examination, Mr Frame said he did have discussions before his appointment with Mr Campbell, but not a great deal. He accepted that it was not usual for a 3S to have discussions with one of the surveyors only, and that a referral to a 3S should be referred to all parties. He also accepted that it was not common for one surveyor and the 3S together to make an award without the second surveyor.

81. Mr Frame was taken to the framework in section 10. He noted that under section 10(10), any two surveyors may make an award, but he agreed that the use of section 10(11), under which either of the parties or either of the surveyors may call on the 3S "to determine the disputed matters", was more frequent.

82. Mr Frame was then taken to the pre-appointment email traffic. He was asked if he had ever, in any other case, had this sort of correspondence before he was appointed; he said that he did not know of Mr Stuart Frame's prior involvement (I note that in his witness statement, as set out above, he said that he knew about his son's involvement). He was asked if he could recall any other occasion on which he had discussed questions with one surveyor only and a legal adviser without the knowledge of the second surveyor, and he said that it was possible he had; but if on any such occasion he had been asked for his opinion, and had given a detailed answer, he would not have accepted an appointment. He felt that he had no reason to decline an appointment in the present case, because "my involvement was very slight"; he described the discussions as "general stuff" and "pretty de minimis", and he did not think he needed to tell Mr Boyer.

83. For his part, in answers to questions put in cross-examination Mr Walsh said that he did not recall if he saw Mr Stuart Frame's skeleton argument before or after the First Appeal settled; he said that he saw it eventually, but he was not sure when; he said his "guess" was that he probably saw it before the order was drawn up settling the case. He said he made no enquiries about Mr Stuart Frame, never met him and was not aware he specialised in party wall cases. Mr Walsh was asked whether the skeleton argument was shown to Mr Boyer, and he said he did not think it was (his answer to this question was quite lengthy and, in keeping with much of his oral evidence, argumentative rather than factual).

84. Mr Boyer, in his cross-examination, said it was a "deception" to have failed to inform him of Mr Stuart Frame's involvement in a party wall issue at 92. He said he thought that Mr Campbell should have told him because his understanding now is that Mr Stuart Frame had given a "legal opinion" in an earlier case and he had no idea about that.

85. Mr Davies submitted that Mr Walsh objected to Mr Frame's involvement on the grounds of appearance of bias in someone performing a quasi-judicial or quasi-arbitral role, relying on what was said by Brightman J in *Gyle-Thompson* in the passage to which I have already referred that party wall "surveyors are in a quasi-judicial position with statutory powers and responsibilities."

86. Reference was also made on this point to *Bickford-Smith, Party Walls, Law and Practice*, 4th Edn, at para 8.5:

> "There is little authority on the degree of independence required [for an appointed surveyor]. Surveyors are not judges, who may be disqualified for any circumstances which would lead a fair-minded and informed observer to conclude that there is 'a real possibility' that the tribunal is biased. But their position has been described as 'quasi-judicial' and the definition in s 20 implies, as has been suggested, that they must be genuinely independent."

87. At para 8.6 it is suggested

> "that the degree of impartiality required of an agreed surveyor or a third surveyor is higher than that required of a surveyor appointed by a party."

88. There is emphasis placed on the duty to protect both sides' interests: see for example *Manu v Euroview Estates Ltd* [2008] 1 EGLR 165, at 166, a case which is referred to in para 8.5 of *Bickford-Smith* and was also cited to me.

89. In *Isaac* (*op. cit.*), at para 7.58, it is noted that the process under section 10

> "is regularly and correctly described as 'quasi-arbitral' and 'quasi-judicial'".

90. I was also taken to an article by *Chinoweth, Impartiality and the Party Wall Surveyor* (2001) 17 Const.L.J. No 2 at 127, in which the duty of impartiality is described as "fundamental" and "well-established". The author also notes:

> "Although most appointed surveyors will be subject to additional professional duties regarding independence and conflicts of interest a breach of the legal duty of impartiality probably requires proof of actual bias or a danger of real bias: *R v Gough*."

91. *R v Gough* [1993] AC 646 is a case on bias of jury members, in which the House of Lords held that the relevant test for alleged bias was whether there was a real danger of bias having created an injustice, in that case whether the defendant had been denied a fair trial. If there is anything of assistance to be drawn from that case, in my view it is from Lord Goff's speech:

> "It is possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to

> ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

92. As has been observed (see *Hollander and Salzedo, Conflicts of Interest*, 6th Edn at para 11-014), *Gough* has been the subject of some criticism on the ground that it tended to emphasise the court's view of the facts and to place inadequate emphasis on the public perception of the irregular incident.

93. In *Porter v Magill* [2002] AC 357, the test was reformulated as follows:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude whether there was a real possibility … that the tribunal was biased."

94. In the same work, the learned authors comment:

> "There is a real difference between the position of the tribunal or judge as to conflict of interest and that of the professional acting for or on behalf of one of the parties. In the one case, it is the appearance of bias and the concern is the effect on the administration of justice. In the other, what is important is conflict or confidential information. There have been some occasions where the principles applying to decision-makers have been applied to those involved in the administration of justice. There is here no art.6 issue: art.6 is limited to decision-makers. However, there have been cases where the court has applied principles analogous to those applicable to decision-makers to others."

95. I agree with Ms Doliveux that there is no Article 6 issue here, as Article 6 does not apply to the award itself.

96. I was also shown a copy of a webinar talk given to the Faculty of Party Wall Surveyors on 12 November 2020 by His Honour Edward Bailey, who for many years until his recent retirement was a Circuit Judge who, as is well-known, had particular experience of hearing party wall disputes. The talk agrees that the nature of the surveyor's role is quasi-judicial, and says that a surveyor must act "impartially, with a lack of bias (not inconsistent with ensuring that the appointing owner's interests are protected)". At paragraphs 60 and 62 there are some interesting and helpful observations:

> "A party wall surveyor, as part of a dispute resolution tribunal, should be open and frank with his fellow tribunal member and make full disclosure to his fellow tribunal member of any material which is relevant to the determination of any issue under discussion in the making of an award. Under s10(10) and (11) an Award may be made by the Agreed surveyor or the third surveyor or by any two or all three of three surveyors. It is plainly preferable not to involve the third surveyor unless this is essential and most awards are indeed made by the two owner-appointed surveyors. Where there is more than one surveyor making the award it is a joint award, agreed by both surveyors, and it is difficult if not

> impossible to reconcile with acting judicially that one of two surveyors should keep secret from his colleague material which is, or may be, relevant to the making of the Award."
>
> "In this context it seems to me that a party wall surveyor should take care about disclosing to others the content of his discussions with a fellow party wall surveyor. I would not go so far as to say that it must inevitably be wrong to let others into the content of discussions between party wall surveyors where those others have a legitimate interest in the party wall dispute, but it seems to me that it would rarely be appropriate. In *Welter v McKeeve* BOS2 simply copied Mr O'Connor into all the email correspondence, (ie as a named recipient of the email), so BOS2 was not making disclosure to Mr O'Connor behind OS's back, something which I would have thought would have been impossible to justify. But even open disclosure should be avoided. Apart from anything else it suggests that the party wall surveyor is not independent and is allowing a third person to influence him in the making of an award."

97. *Welter v McKeeve* (27 November 2018) is an unreported but much commented-on decision of HHJ Bailey in which the judge said:

> "The party wall surveyor must act impartially … Acting impartially requires the party wall surveyor (whether an owner-appointed surveyor or a third surveyor selected by the owner-appointed surveyors) not to favour either owner over the other."

98. Mr Davies said that it was not acceptable for 2 of 3 persons intending to act together in a quasi-judicial function to confer together and with a third party, the son of one of the two. He pointed out that the discussions took place before and after Mr Campbell put forward Mr Frame as one of the potential appointees (only one short email was sent after Mr Boyer agreed to Mr Frame's appointment).

99. Mr Davies also said that Mr Frame had proved "more accommodating" than had Mr Maycox, and in cross-examination of Mr Frame he said that the 2 hours of time which Mr Frame had charged for in working on the award showed that he could not have considered the issues very carefully; but I accept Mr Frame's response, which was: "When you have my experience it doesn't take too long!"

100. In my view, whilst what was said about Mr Maycox by Mr Campbell in his exchanges with Mr Frame and Mr Stuart Frame was inappropriate, it has no bearing on the issue I have to decide, which is whether there was apparent bias on the part of Mr Frame such that the award cannot stand.

101. The reason I have gone into the exchanges in such detail is because Mr Campbell was heavily criticised by Mr Davies for holding Mr Boyer to a standard which he did not apply to himself (Mr Davies referred to him as a hypocrite).

102. This appeal is not about this sort of petty squabbling. As I shall go on to emphasise because of the way in which this ground was pleaded, I have concluded it has nothing to do with the issues I need to decide.

103. For similar reasons, it seems to me that it would serve no purpose to set out my views on Mr Walsh's evidence in any great detail.

104. Mr Walsh explained in his oral evidence that he was particularly interested in ensuring that the fall of the roof on the new structure was sufficient to divert water away to the east side, and that whatever was constructed would be reasonably free from long term maintenance. He also said that he was "not enthusiastic" about the possibility of light being cut off in his basement and ground floor.

105. I was not impressed with a lot of his evidence; I do not accept, for example, that there was any attempt to conceal details of the new construction by providing a smaller than A1-sized drawing, and he accepted that he refused access to Mr Campbell because he thought the PSN was invalid, which struck me as unreasonable. When Mr Walsh said that he recognised that the present conservatory was badly constructed and could not be maintained and that something needs to go in its place, he went on to comment adversely on the council's planning decisions, and I thought he was aggregating to himself the role of a quasi-expert in expressing his opinions about those decisions (which he tried to temper by starting those parts of his evidence by saying, "I may be wrong, but…").

106. However, the motives behind the First Appeal and the present appeal, and whether there were deliberate delaying tactics, are not relevant, and the evidence on all of this (and the fact that there was far more documentation before the court than was actually required) tended to obscure the questions of standing, bias and changes to the works (the three grounds) rather than shed any light on them.

107. I was however impressed by, and accept, Ms Vara's evidence about the reasons why PSB was encouraging the works, and how PSB simply wanted the works done. As Ms Vara rather aptly put it, "We just need to stand shoulder by shoulder with the owner of the flat." I also completely accept Mr Yeh's evidence, particularly how he intended to do the works properly and correctly and that he intends to retain the property. I got the impression that he was bemused by how tortuous a process this has become.

108. I did not think that Mr Davies was right when he referred to Mr Frame as "plainly just a rubber stamp". I accept that Mr Frame carried out his role as 3S as he ought to have done.

109. In any event, I agree with Ms Doliveux that this ground focusses on the apparent bias of Mr Frame, and not on criticisms of Mr Campbell or of Mr Frame in the way he carried out his role as 3S.

110. I also agree with Ms Doliveux that this pleaded ground is solely related to the family relationship between Mr Frame and his son: see paragraph 18 of the Grounds of Appeal. It has nothing to do with the email correspondence between Mr Campbell, Mr Frame and Mr Stuart Frame, nor what Mr Frame did.

111. I agree that I do not need to consider whether there was actual bias. However, if I was wrong about that, I am satisfied that there was no actual bias on the part of Mr Frame. I found Mr Frame to be an honest and straightforward witness. I accept his evidence that he was not aware of his son's role in the First Appeal.

112. I also accept that the correspondence between Mr Campbell, Mr Frame and Mr Stuart Frame had nothing to do with the issues relevant to the works or the award, and was limited to the question of when, and in what circumstances, a surveyor can or should decline to accept an appointment as a 3S. I accept the evidence of Mr Campbell and Mr Frame that this was an academic point of interest to them (and to Mr Stuart Frame) and was the sort of thing that they would on occasion bat back and forth between them.

113. In my judgment, the reasonable and fair-minded observer would know – and should be taken to know – that an experienced surveyor such as Mr Frame would not be swayed in carrying out his functions by his relationship with anyone who had been involved in a previous appeal. As it happens, Mr Frame was not aware of that involvement, and I accept his evidence that he would not have acted other than completely independently. Further, that observer would also know, or should know, that a surveyor has to comply with the professional standards of their governing body, which require independence.

114. The draft 3S award was circulated on 13 December 2019. Mr Boyer provided comments on 20 March 2020. On 30 March 2021 Mr Campbell provided his submissions. The reason for the delay is not material. Mr Campbell's submissions took the form of annotations in red to the comments by Mr Boyer. In providing those to Mr Frame, he also sent a copy of Mr Stuart Frame's skeleton argument in the First Appeal, because it was perceived that a number of the issues raised by Mr Walsh were similar to or the same as those raised in the First Appeal. I accept the evidence that this was the first time that Mr Frame saw his son's skeleton argument from the First Appeal.

115. Of, I think, more importance is this.

116. Mr Campbell had emailed both Mr Frame and Mr Boyer on 14 August 2019 saying, "Having read the skeleton arguments prepared by counsel when this matter was previously before the courts I am satisfied that identical tactics and arguments were used at that time." This was plainly a reference to the First Appeal; Mr Boyer did not ask for copies of those skeleton arguments (and nor did Mr Frame). Had Mr Boyer done so, he would have known about Mr Stuart Frame's involvement. As I have already set out, Mr Walsh accepted that he would have seen Mr Stuart Frame's skeleton argument at some point before the settlement agreement that brought the First Appeal to an end.

117. I am therefore satisfied that Mr Walsh was aware that Mr Stuart Frame had been involved, and that Mr Boyer knew that Mr Frame was being proposed as the 3S. Any potential bias point could have been taken at that point – perhaps there was a lack of communication between Mr Walsh and Mr Boyer, but I need not speculate.

118. I am not persuaded that there was any apparent bias nor that the independent fair-minded observer would have thought that there was any possibility, let alone a real possibility, of bias. It is not open to Mr Walsh to refer under this ground to any alleged failings by Mr Frame in acting as the 3S (which in any event I reject), nor can he extend his contentions under this ground beyond what is set out in the Grounds of Appeal to criticisms of Mr Campbell, Mr Frame or Mr Stuart Frame in relation to their email correspondence.

119. There is a danger of over-complicating this ground. Many of the reported or published cases in this area, and much of the textbook commentary, concern bias by the surveyor in carrying out their role, for example where a surveyor has failed to act impartially. There is a debate to be had about this, and the nature and extent of duties of surveyors (and I include the 3S) in the course of acting, but that sort of bias or apparent bias is not directly relevant here.

120. The simple question, which arises from the ground as pleaded and the application of the law on apparent bias, is whether in all the circumstances as I have found them there is anything in the familial relationship between Mr Frame and his son which leads me to conclude that a fair-minded observer would think there was a real risk of bias in the appointment of Mr Frame such that the award cannot stand. I do not think the question has been widened by the agreed list of issues, as Mr Davies suggested. In my view, the answer to that question, in the circumstances I have outlined above and on the basis of the facts of this case, is plainly no.

121. This second ground fails.

Ground 3 – Material Change

122. Mr Davies submits that the changes introduced by the revised drawings amounted to changes in design, and therefore fresh PSNs were required.

123. It is common ground that there were changes. The dispute here is whether the changes necessitated new PSNs.

124. As noted in *Bickford-Smith* (*op. cit.*) at para 3.29, it is not an infrequent occurrence for the design of works to change in some respects, and whether a new PSN is required is a matter of fact and degree. At para 3.29 the learned author observes:

> "The Act makes no provision for amendment of notices. It is suggested that whether changes in design require service of a fresh notice will depend on whether the changes involve recategorizing the works or some of them for the purposes of the paragraphs (a)-(n) of s 2(2) in a way not covered on a fair reading of the current notice. Provided this test is satisfied, the matters are within the dispute and the surveyors have jurisdiction, given the wide words of s 10(12)."

125. It is I think helpful to look at section 2(2). I need not set it out here. It sets out the rights of the building owner to carry out various works in considerable detail; those rights are extensive.

126. Section 10(12) provides that an award may determine the right to execute "any work" and "any other matter arising out of or incidental to the dispute", which explains why it is referred to as "wide words" in para 3.29 of *Bickford-Smith*.

127. The pleaded matters set out in the grounds of appeal under this third ground are as follows:

> "Thirdly, the Award contemplates works that would differ materially from the works suggested by the party structure notice. In particular:

> (i) on or about 23rd October 2018, the Respondents made a revised planning application supported by a drawing no. 581.01.02, supposedly dated more than fifteen months before, 11th August 2017, which amounts to a material variation of the party structure notice.
>
> (ii) in or about the month of February 2019, the Respondents further varied their proposed works to the party wall in material respects, notably by adding a requirement for steel joists and to cut into the chimney wall of no. 93 to support the joists, which the structures contemplated in the party structure notice would not be capable of supporting."

128. It is said that as a result new PSNs ought to have been served both in October 2018 and in February 2019.

129. It seems to me that the starting point is to look at the description of the works in the PSN. This included as proposed works cutting into the structure for any other purpose as may be necessary in connecting the new structure to Mr Walsh's wall or the party structures.

130. I accept Mr Campbell's evidence in relation to the changes that were made in relation to the facings, and the reasons for those changes, which he sets out in his witness statement and which I can summarise as follows (and I also accept what Mr Yeh said about the changes being because Mr Walsh requested them).

131. It was Mr Walsh who wanted to change the detail of the works. He was opposed to the proposed rendered panels and asked for the wall to be raised in London stock bricks. Mr Yeh agreed, even though this was more expensive, and new plans were drawn up and permission was sought.

132. This resulted in the changes which were made to the plans on both occasions, the second changes coming about after advice from the structural engineer.

133. Although all three surveyors agreed that there is a real difference between a lightweight wall and a load-bearing brick wall, I am not persuaded in the slightest that it is open to Mr Walsh to assert that this was a material change when it came about at his request. With respect, I fail to see how it can sensibly be asserted otherwise on Mr Walsh's behalf. Either there was a waiver of this point, or there is an estoppel, the detriment suffered by the Respondents being the additional cost of complying with Mr Walsh's requested changes.

134. I also accept Mr Campbell's evidence (with which Mr Boyer did not disagree in cross-examination) that neither of the revised plans engaged new or additional subsections under section 2. This was a change to the outer covering of the new structure, at Mr Walsh's request, and although it required additional works not set out in the original plans, I am satisfied that the work envisaged in the new plans was within the original wording, it did not engage any new provisions of section 2, and did not amount to a material change which necessitated new PSNs.

135. In my judgment, and in any event, the 3S was entitled to determine – as he did – that the works be carried out in accordance with the revisions: see section 10(12).

136. I also reject the appeal under this third ground.

Conclusion

137. This appeal is dismissed on all three grounds.

(End of judgment)