

IN THE MATTER OF AN INVALID PARTY WALL AWARD

BETWEEN MR & MRS ?????? AND ?????? AND MR ??????
DISPUTE ARISING OUT OF THE PARTY WALL ETC ACT 1996

Confidential, Privileged and for the Purposes of Litigation.

IN THE MATTER OF AN INVALID PARTY WALL AWARD

MR & MRS ??????

AND

MR ??????

AND

MR ??????

IN THE MATTER OF AN INVALID AWARD

BETWEEN:

MR & MRS ??????

Claimant

AND

MR ??????

1st Defendant

&

MR ??????

2nd Defendant

EXPERT FORENSIC REPORT

OF

Mr Philip Antino BSc (Hons), MSc, MRICS, FFPWS.

SURVEYOR'S EXPERIENCE AND QUALIFICATIONS

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06/06/2011

PHILIP ANTINO of APA Property Services Limited, 143 New London Road, Chelmsford, Essex CM2 0QT
Tel: 01245 492495 Fax: 01245 268264 Email: phil@apaproperty.com

1. This report has been compiled by Philip Antino, BSc (Hons), MSc, MRICS, FFPWS. I am a Professional Member of the Royal Institution of Chartered Surveyors (Building Surveying Discipline) and Managing Director of APA Property Services Ltd, a Chartered Surveying practice established in 2002. Prior to this I was a Partner in Charles Living & Son, a chartered surveying practice located in East London (established in 1902). I am a certified commercial mediator.
2. I have 29 years experience within the construction and surveying profession. My academic qualifications were obtained at Heriot-Watt University Edinburgh, having obtained a Bachelor of Science Degree with Honours in Building Surveying, and a Masters of Science Degree in Construction and Project Management. My professional qualifications were obtained through the Royal Institution of Chartered Surveyors and Faculty of Party Wall Surveyors.
4. In 1997 I became involved with several surveyors and was a founder member of the Essex branch of the Pyramus & Thisbe Club. I held the position of Programme Secretary which inter alia, required arranging training seminars, guest speakers and lectures and ensuring that the members had access to information and/or experienced party wall surveyors when issues and concerns arose. This was a position which I maintained up until December 2009.
5. In 2001 I was appointed as an RICS Final Examinations Officer, to participate in the Assessment of Professional Competency (APC) interviews. As a member of the interview panel my role was to assess candidate surveyors seeking accreditation to professional member status.
6. As a consequence of my involvement within party wall procedures I was invited to become a member of the Faculty of Party Wall Surveyors, an independent and non profit making organisation dedicated to promoting education and good practice of party wall procedures. In April 2009 I was elected a Member, and became a Fellow in June 2009.
7. Philip was invited to accept the position of Regional Chairman of the Faculty for East Anglia in September 2009, which incorporates Essex, Suffolk and Norfolk and now East London. In 2010 I was appointed as a Director of the Faculty and

- participate in Faculty policy decisions, protocols and actively promote the good practice of party wall practices on seminars within my region. I also participate in the interviewing and assessing applicants for member and fellow status.
8. I commenced a Professional Doctorate Degree at Salford University in 2008 and intend to submit my thesis in December 2012. This is the first structured academic research into party wall procedures.
9. I am a member of the UK Register of Mediators and I am a commercial mediator.

THE REPORT

I Philip Antino, BSc (Hons), MSc, MRICS, FFPWS will say as follows

INSTRUCTIONS

10. I am instructed by Mr & Mrs ????? by email dated the 13th May 2011 timed at 11:31 to advise on the following.
- .1 To consider the various documentation and the party wall award of the 6th October 2010 prepared by Mr ????? and Mr ????? of ?????.
- .2 To advise whether in my opinion the services have been carried out with reasonable care and skill and for reasonable costs as described in the Supply of Goods and Services Act 1982.
11. Documents disclosed
- (1) Notice of intent to commence works 10th September 2010
 - (2) - (3) ????? correspondence 16th September 2010
 - (4) Mr ????? notice of dissent
 - (5) Mr ????? letter of appointment
 - (6) - (7) Mr ????? correspondence 28th September 2010
 - (8) ????? confirmation of Mr ????? appointment
 - (9) - (10) ????? letter of the 30th September 2010
 - (11) - (12) ????? invoice and disbursement sheet

- (13) - (18) Party Wall Award 6th October 2010
- (19) - (25) Schedule of Condition and Photographs 6th October 2010
- (26) - (31) Project Drawings
- (32) - (33) ????? (unsigned letter) 10th May 2011
- (34) Service of Award letter dated 6th October 2010
- (35) Received invoice paid 5th October 2010
- (36) - (37) ????? Website
- (38) Land Registry Search

DESCRIPTION OF PROPERTY

12. Mr ????? and Mrs ????? the owners of ?????.
13. The property is a mid terraced three bedroom house comprising traditional solid load bearing masonry construction with a cut and pitched timber roof with tiled covering.
14. The property is located between no. ????? & ?????. Mr and Mrs ????? were required to serve notice on both adjoining owners.

THE REPORT

15. Mr & Mrs ????? wanted to build a loft conversion and commissioned ????? specialist designers to prepare and produce drawings in respect of the proposed building works. The building works incorporated cutting into and altering the existing roof structure to form within the loft an additional room and en-suite. This required constructing a rear dormer window and aspects of structural works which required notification in pursuance of s.2 of the Party Wall etc. Act 1996.
16. The works included substantial structural alterations to increasing the load bearing capacity of the existing roof structure to support the proposed loft conversion. The installation of steel beams spanning the full width of the property cutting into and bearing on the party walls of Nos. ????? & ?????. Two locations positioned to the front and rear identified on the drawings as beam 1 and beam 2 (see pages 28, 30). Page 30 identifies the connection details of the beams described as 203 UC

- to 203 UC using 2 no. 150mm x 150mm x 15mm m.s. angle cleats and 9 no. 16mm diameter grade b.b. bolts. A third beam was positioned at ridge height, again extending the full width of the property bearing onto the party wall of both no. 142 & 146.
17. In addition there was a need to provide concrete or similar approved padstones to be positioned directly under each beam to spread the loads onto the party walls.
18. In order for Mr & Mrs ????? to undertake these works they had a statutory duty to serve notice pursuant to s.2(2)(f),(g),(k) & (n). I incorporate the appropriate sections of the Act beneath.

s.2(2) A building owner shall have the following rights-

- (f) to cut into a party structure for any purpose (which may be or include the purpose of inserting a damp proof course);*
 - (g) to cut away from a party wall, party fence wall, external wall or boundary 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;*
 - (k) to execute any other necessary works incidental to the connection of a party structure with the premises adjoining it;*
 - (n) to expose a party wall or party structure hitherto enclosed subject to providing adequate weathering*
19. Preparation and service of a notice can be undertaken by a property owner in this instance Mr & Mrs ????? served a notice (see page 1) dated the 10th September 2010 upon Mr ????? and Mrs ????? owners of ????? and Mr ????? and Mrs ????? of ??????. The notice describes the intended works as “**construction of a loft extension**”.
20. Upon receipt of a notice if an adjoining owner does not provide consent within 14 days, the act requires the building owner to assume dissent to have arisen.

s.5

– *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*

21. Alternatively, upon receipt of a notice an adjoining owner can either

- (i) Consent to the works in which case party wall matters do not proceed;
- (ii) Agree to the appointment of an agreed surveyor, pursuant to s.10(1)(a);
- (iii) Appoint an independent surveyor pursuant to s.10(1)(b)

s.10(1)(a)&(b)

10(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”).*

22. The Adjoining Owners Mr & Mrs ????? of ????? consented to the works by response dated the 18th September 2010. Party procedures between ????? and ????? therefore ceased.

23. The Adjoining Owners Mr & Mrs ????? dissented (see page 4) of ????? did not respond to the notice, however on the 16th September 2010 (see pages 2 & 3) Mr ????? wrote to Mr & Mrs ????? advising them that they had been appointed by Mr ??????. A letter of appointment is included at page 5. The letter of appointment has only been signed by Mr ????? and not by Mrs ??????. However, the notice was correctly addressed to both Mr & Mrs ?????.

24. Mr ????? proceeds in considerable length to explain the responsibility for payment of fees and identifying what fees will be incurred in dealing with party wall matters, specifically Mr ????? states

“Usually (you) as the building owner proposing the works, will pay all costs associated with drawing up the award, if the works are solely for your benefit, in this case it seems that you will be responsible for paying all such costs. If you are happy to appoint a surveyor from ?????, then the total fees for both surveyors will be fixed at £550 + VAT and disbursements per appointment (not per surveyor), being a total of £1,100 + VAT and disbursements.”

25. Mr ????? then continues to explain

*“The arrangement of appointing two surveyors from within ????? does not cause a conflict of (sic) interests as each party has a named surveyor appointed for them and both surveyors are under a **legal obligation to act fairly and neutrally at all times.**”* (emphasis added)

26. Continuing Mr ????? advises

“Please note that, should you and your neighbour wish to appoint me (sic) an “agreed surveyor” in this matter (which is possible) this would still constitute two separate appointments (one from you and one from your neighbour) and would be subject to the same fixed prices above.”

27. In the next paragraph Mr ????? continues

*“If you wish to appoint a surveyor from **outside** ????? (as is your statutory right) your overall fees are likely to be considerably higher as you will need to pay our fees as well as your own surveyors fees. In this instance I will expect my fee alone to be in the region of £1,100 - £1,500 + VAT in the first instance”* (emphasis added).

28. In theory, there is no specific requirement within the Party Wall etc. Act 1996 that prevents two surveyors from the same practice being appointed for different owners involved in the same project. This is similar to a situation where an

- architect may design a project and then adopt the role of the party wall surveyor. In consideration of this point I am minded to consider and rely upon the following case.
29. In the judgement of HH Cowell J in the case of *Loost v Kremer* [1997] West London County Court 12 May (Unreported). Judge Cowell was minded to consider the advice of Mr Justice Brightman in the case of *Gyle-Thompson v Wall Street (Properties) Ltd* 1 WLR 123 [1974] 1 ALL ER 295. Judge Cowell stated “*an appointed surveyor is a “quasi arbitrator” and owes certain duties in this capacity. However, in the absence of any conflict of interest, there is no impediment on a project architect being so appointed. He will simply owe different duties in his new role.*”
30. Judge Cowell continues “*the mere fact that he has acted an architect is not, in my (Cowell J) judgement necessary that he must disqualify himself. What happens – and there have been a number of cases sighted to me and I have read them – is that he changes in his capacity from simply being an agent to a quasi arbitrator and he has to bear in mind that those are his duties. That is really all there is to this point. Those new duties as quasi arbitrator on his appointment, and by law he must act accordingly, but in no way does his previous capacity prevent him from acting in the new capacity.*”
31. Whilst it is a rather unusual approach to adopt with two surveyors from the same practice representing different owners on the same project, the Act does not prevent this. However, I am minded to consider the provisions of s.10(1)(a) where the appointing owners can, if they so agree, appoint an agreed surveyor. The agreed surveyor then conducts himself in accordance with the provisions of s.10(1) (a) which are reproduced below for ease of reference.

s.10(1)(a)&(b)

10(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”).*

32. It seems to me reasonably foreseeable that the purpose of having an agreed surveyor is to minimise costs to the appointing owners and make the whole process of addressing the dissent relatively straight forward. Accordingly, I do not understand why the two surveyors, Mr ????? and Mr ????? were prepared to accept two appointments. I am minded to consider correspondence of Mr ????? (see page 2) where he goes to considerable length to advise that fees will be fixed at £550 + VAT for each surveyor if appointed from ????? and if not Mr ????? fees immediately increased to at least £1,100 - £1,500 + VAT and disbursements if the building owners (Mr & Mrs ?????) appoint another surveyor from a different practice. I do not think this is reasonable advice.

33. In the first instance I have to consider s.10(13) which states the surveyor(s) will determine

s.10(13)(a)(b)&(c)

(13) *The reasonable costs incurred in-*

- (a) *making or obtaining an award under this section;*
 - (b) *reasonable inspections of work to which the award relates; and*
 - (c) *any other matter arising out of the dispute,*
- shall be paid by such of the parties as the surveyor or surveyors making the award determine

34. There is a requirement for a building owner to pay the reasonable fees of the appointed surveyors. The question therefore arises, is it reasonable for Mr ????? to be able to claim that his fees will increase substantially if a surveyor outside of ????? is appointed by Mr & Mrs ??????. I do not think that it is reasonable, the question of the fees would have to be discussed by the two surveyors and if a dispute arises settled in accordance with s.10(11) of the Act. A further question that should be raised is it reasonable for two surveyors within the same practice to be appointed, are they creating unreasonable and unnecessary fees.

– **s.10(11)**

(11) *Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuant of this section to determine the disputed matters and he shall make the necessary award.*

35. And the third surveyor would award what they consider are reasonable fees.
36. Furthermore, it does not naturally follow that because two surveyors have been appointed especially where they are from the same office, that fees should double. The whole process of dealing with the party wall matters is considerably easier given the fact that two surveyors will be sitting in the same room and can discuss matters immediately as they arise. It can reduce if not eliminate the need to send copious amounts of correspondence and make the whole process that much easier.
37. Furthermore whilst the Act does not expressly prevent this situation from arising, I do believe that it creates a potential conflict of interest. Mr ?????? is an employee of Mr ?????? and accordingly it could be inferred that he was under some pressure to simply agree with whatever Mr ?????? proposes. The inference of bias is there and this should never arise and quite clearly Mr ?????? acknowledges this when he states in his fifth paragraph (see page 2) specifically making the point that *“the arrangement of appointing two surveyors from within ?????? does not cause a conflict of interest as each party has a named surveyor appointed for them and both surveyors are under a legal obligation to act fairly and neutrally at all times.”*
38. In my opinion a conflict does arise and the surveyors applying the ordinary diagnostic skills of a competent surveyor should have recognised and avoided this scenario.
39. I am mindful that Mr ?????? and Mr ?????? are not chartered surveyors and therefore would not be bound by the same rules of professional ethics as a chartered surveyor such as myself. Most certainly the RICS would consider that there was a significant conflict of interest in this instance and even though the Act does not prevent a situation like this from arising a chartered surveyor would find

- themselves exposed to a potential complaint for a breach of the rules of professional conduct.
40. I think it is also important to note that neither Mr ????? nor Mr ????? are members of any recognised professional body such as the Faculty of Party Wall Surveyors. I have checked the website of ?????, they suggest on their website (see pages 36 & 37) that they are not chartered surveyors but are **specialist party wall surveyors** and advertise their services as *“our party wall surveyors undertake and work nationally under the Party Wall Act in respect of domestic and commercial construction work. Our party wall surveyors do not undertake any other type of work and operate only in this **highly specialised field**. As such we have required **vast experience** in helping adjoining owners and building owners to deal with party wall agreements and party wall awards **efficiently and effectively**. We believe that we can be justifiably proud of our reputation as an expert professional firm”* (emphasis added).
41. It is quite clear that ????? and in particular Mr ????? & Mr ?????, are holding themselves to be experts in party wall matters. Accordingly, Mr & Mrs ????? and Mr & Mrs ????? are entitled to receive a level of service that reflects that of an expert in party wall matters.
42. Following the appointment of the surveyors, the two surveyors so appointed shall in pursuance of s.10(1)(b) select a third surveyor. I note (see page 8) that Mr ????? of ?????, was selected to act as the third surveyor. The purpose of the third surveyor is to resolve any disputes between the two surveyors or to deal with any issues which are raised by either owner pursuant to s.10(11) of the Act and ????? advised Mr & Mrs ????? correctly in their correspondence of the 28th September 2010 (see page 8).
43. Given the relationship between the two surveyors, is it reasonably foreseeable that the two surveyors **were not** going to disagree; it certainly appears that they agreed the award which is defective on a number of points.
44. In correspondence dated the 30th September 2011 (see page 9) ????? advised Mr & Mrs ?????

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*“As is normal procedure with party wall awards, we usually require **full settlement of your surveyors invoice before he will finalise and sign the award. We would therefore be grateful if you could ensure that payment is made within the next 10 days so as not to delay the process**” (emphasis added).*

And they continue

“In the event of payment not being received within 10 days, your surveyor may have to undertake additional work, thereby increasing his overall fee. You will be responsible for any additional fees incurred if payment is made after 10 days has elapsed.”

45. Both of these paragraphs are incorrect and misleading.
46. The issue of payment of fees is only dealt with specifically pursuant to s.10(15) of the Act

s.10(15)(a)&(b)

(15) *Where an award is made by the third surveyor-*

- (a) *he shall, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors; and*
- (b) *if it is served on their appointed surveyors, they shall serve it forthwith on the parties*

47. Section 10(15) applies only to the third surveyor, who can request payment of his fees prior to the service of an award. There is a specific reason for this. The third surveyor is only ever selected and has no statutory appointment, whereas the two surveyors Mr ????? & Mr ????? have a statutory appointment and the Act specifically deals with recovery of costs at considerable length in s.17 of the Act. s. 17 is produced below.

s.17

- 17 *Any sum payable in pursuance of this Act (otherwise than by way of a fine) shall be recoverable summarily as a civil debt*
48. I do not believe that ????? have acted with impartiality and/or integrity in requesting their fees to be paid in advance of service of their award. Furthermore, to suggest that ????? would incur additional costs because a payment had been made outside of a request of payment within 10 days, is also misleading and unacceptable.
49. This situation would never have occurred if two independent surveyors had been appointed.
50. Mr & Mrs ????? and indeed Mr & Mrs ????? are fully entitled to receive a copy of the award duly served and to be able to consider the contents of that award to establish whether or not they wish to file an appeal pursuant to s.10(17). To request payment in advance is unreasonable and not permitted within the Act.
51. Mr & Mrs ????? paid the sum of £1,357.83 inclusive of VAT and disbursements by bank transfer on the 5th October 2010 (see page 35).
52. The two appointed surveyors owe a duty of care to the appointing owners to conduct themselves properly and impartially. Given the statements identified in correspondence (see page 2) that there is no conflict of interest due to the impartiality of each surveyors appointment it must naturally follow that the appointed surveyors have entered into this unusual arrangement with their “eyes wide open”. Accordingly, both surveyors have a joint and several liability to conduct themselves properly in relation to party wall procedures.
53. The two surveyors accordingly agreed an award which is dated (see pages 13 – 18) the 6th October 2010 and has been signed by both Mr ????? and Mr ????? and witnessed by ????? both employees of ??????. There is nothing wrong in that regard they are simply identifying that these surveyors openly and willingly signed the awards after due consideration.

54. I have now had an opportunity to consider the award. I will now deal with the award in some detail as this is clearly significant in respect of establishing the reasonableness of the conduct of the appointed surveyors.
55. In the first paragraph (page 14) Mr & Mrs ????? are identified correctly as the building owners. In the second paragraph the adjoining owner is identified as Mr ????? of ??????. The original notice (see page 1) is addressed to ????? and ????? (Mr & Mrs) therefore by virtue of their marriage they have a joint interest in the property and are therefore considered pursuant to the Party Wall etc. Act 1996 to be adjoining owners and Mr ????? should have been appointed by both and incorporated within the award.
56. I was provided with a copy of a land registry search (see page 38) which identifies the registered owners as Mr ??????. I am minded to refer to the case of *Lehmann v Herman* [1993] 1 EGLR 172. The importance of this case is that Mr Herman had served notice upon the adjoining owner for works he proposed to carry out. His wife had not participated in the preparation of the notices and Mr Herman had argued that his wife had no involvement in the works and there was no intention that she should have any, *“save perhaps to the extent of offering mugs of tea to the building contractors from time to time”*.
57. In support of this argument Mr Herman sighted the case of *Crosby v Alhambra Co Ltd* [1907] 1 Ch 295 and which had considered whether there was a requirement to serve notice on more than one owner. This case related to the 1894 Act and considered the combined effects of s.5(29) definition of owner, and s.5(32) definition of adjoining owner. Mr Herman referred in particular to the following extract from the judgement of Neville J's;

“I hold, therefore, that the true interpretation of the two sub-sections is that all the persons coming within the definition of owner and sub-section 29 must be served, except in the case where several persons hold, tenants in common or as joint tenants, some particular interest in land, in which case service on one such tenants in common or joint tenants would be sufficient.”

58. In the more recent case of *Lehman v Herman*, the court did not agree with Mr Herman's argument in relation to the *Crosby v Alhambra* judgement. The court considered there was a clear distinction between the service **on** a single joint tenant (which was valid) and the service **by** a single joint tenant (which was not). In the case of service on a single joint tenant the relevant issue is simply whether bringing something to the attention of one tenant constitutes doing the same in respect of all of them.

59. The same practical considerations apply to this as the service of other legal documents. Service by single joint tenant is however an entirely different matter. This is concerned, not with simply bringing something to someone's attention, but with the instigation of a course of action that has the potential to interfere with the existing property rights. Because of this property law is used of greater significance. This point is emphasised in the judgement which stated

"Simply in practical terms it would be odd if the statute provided for one of two joint owners to deal with an adjoining owner without the other joint owner being involved. In real property law terms the concept of one joint owner being able to deal with the property without the other being party to the transaction has been foreign to English law since the 1925 Property Legislation."

60. Further in order to understand whether the notice was served effectively and whether Mr ????? was appointed by the adjoining owners has to be considered with specific reference and consideration to the definitions provided of the 1996 Act. s.20 defines as follows

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

s.20 also provides the definition of an owner

"owner" includes-

- (a) *a person in receipt of, or entitled to receive, the whole or part of the rents or profits of land;*

-
- (b) *a person in possession of land, otherwise than as a mortgagee or as a tenant from year to year or for a lesser term or as a tenant at will;*
 - (c) *a purchaser of an interest in land under a contract for purchase or under an agreement for a lease, otherwise than under an agreement for a tenancy from year to year for a lesser term*

61. Accordingly, it is my opinion that Mrs ????? is an adjoining owner and should have also been included in the appointment of Mr ????? and included within the definition of the adjoining owner within the award. In the absence of an invalid appointment, Mr ????? had no jurisdiction to sign and serve an award.

62. The award therefore does not properly identify all of the building and/or adjoining owners and on that point I consider that the award should be considered invalid for this reason alone.

63. More interestingly and more relevant is another case of Gyle-Thompson v Wall Street (Properties) Ltd (1974), this is probably the most famous case known to all practising party wall surveyors.

The facts of this case are quite straightforward; the building owners Wall Street (Properties) Ltd owned a warehouse which also formed the rear garden walls of some houses adjoining the building owners property. Wall Street planned to redevelop their property by demolishing the existing warehouse and to reduce the height of the western wall which formed the garden walls of the adjoining properties.

During the partial demolition of the warehouse a plaque was discovered which indicated that the wall which formed part of the warehouse and the rear garden wall of the adjoining properties, was in fact built across the line of junction and therefore a party wall astride the boundary under the 1939 Act. However, because it no longer formed part of the building it became a party fence wall as defined under the Act.

Wall Street intended to reduce the height of the party fence wall and duly served notice. The adjoining owners sought the advice of a surveyor, without formally appointing him, in respect of the proposed works. This surveyor wrote to the building owners surveyor advising him that there was no right under the Act to reduce the party fence wall height, although accepted that the wall was unsupported and would collapse, and consequently signed an interim award in 1972 with the building owners surveyor, allowing Wall Street to shore the wall, but was expressed to be without prejudice to any future negotiations over the reduction of the walls height. The award also recorded the selection of a third surveyor.

After the service of the award the adjoining owners then signed a formal surveyor's appointment under the 1939 Act, which was intended to regularise the paperwork prior to payment of the surveyor's fees. However, it proved impossible to reach an agreement as to whether the wall could be reduced in height and the building owners surveyor referred the matter to the third surveyor.

The third surveyor advised the two surveyor's that they no longer had any power to act under the notice, more than 6 months had elapsed since the date of the service of notice and this had therefore now expired.

In the interim the building owners architect had produced another scheme which would involve reducing the height of the wall to 19 feet rather than the 15 feet as previously advised, and would incorporate obscure glazing in its top half to increase the level of illumination to the new development and privacy to the adjoining owners.

New party structure notices were served on the basis of these revised proposals. The adjoining owner's surveyor again refused to consent to the proposed works or sign any award which would authorise the works, maintaining that the Act contained no right to reduce the height of the party wall. The building owners surveyor therefore referred the matter to the third surveyor who then together published an award, which sanctioned the reduction in height of the wall on the basis of the revised proposals. The award was served on the adjoining owners.

— Immediately on the 14 day period of appeal having expired the building owners started to demolish the wall but were stopped when the adjoining owners personally intervened with the help of the police.

The matter proceeded to court on a number of points the more relevant to this situation was the service of notices. The court held

“Firstly, the party structure notices, which underpin the surveyor’s jurisdiction to make the award had not been validly served. On the 20th December 1972 these had been served on surveyor ‘b’ rather than the individual owners, according to the evidence he had no authority to accept service the resulting award was therefore invalid.

Secondly surveyor ‘b’ had never been validly appointed other than the Act s.55(h) provided that all appointments must be in writing, apart from the retrospective appointments during July and September 1972 in relation to the notices served on the 23rd February 1972. No such appointments having been made these appointments were not effective in relation to the second set of notices purportedly served on 20th December 1972.”

His Honour the Judge Brightman stated

“The validity of his appointment was vital to the validity of the award. If they were not validly appointed, he had no statutory authority to concur in the selection of the third surveyor. If (the surveyors) were not validly selected then the award must be void”.

The Judge continued

“It would be a wise precaution for the third surveyor on accepting office to inspect the written appointments of those selected, unless they have been duly appointed, they have no power to select a third surveyor, if the third surveyor has not been validly selected in writing, he has no power to concur in an award.”

- If the works do not require notice then none of the surveyors have been appointed therefore we cannot select a third surveyor. Accordingly, the third surveyors selection cannot be valid.
64. Accordingly, if Mr ????? was not validly appointed, he and Mr ????? had no jurisdiction to select the third surveyor. The tribunal has not been properly convened.
65. Paragraphs 1.1, 1.2 and 1.3 of the award are standard paragraphs save that the drawing references will change between respective projects.
66. However, I now have to consider the adequacy of the award and its purpose. The purpose of an award is to reconcile the issues which are in dissent between the adjoining owners and to produce a legal document that allows a building owner to undertake certain works which are subject to the provisions of the Act.
67. There are only three areas of work within the Act which require notice and therefore can only be considered within the appointed surveyors narrow jurisdiction to confer certain rights. Those works are s.1 building on a new line of junction, s.2 works which relate to a party wall which are initiated by notices prepared pursuant to s.3 and excavations within specified distances of 3m and 6m subject to specific qualifying requirements. These works are identified in s.6(1)(a) or s.6(2) works.
68. The works which the two surveyors have so awarded are identified in paragraph 2.1 & 2.2 (see page 15). These are repeated below.

“2.1 the excavation and back filling of deep concrete strip foundations wholly upon the building owners land, not to exceed the depth specified in the attached drawings or the recommendation of the local authority building inspector.

2.2 the construction of, and enclosure upon, a brick wall at the line of junction between the two premises expanding wholly upon the building owners land.”

69. The award specifically states in paragraph 2

*“That upon delivery of the signed award the building owners shall be at liberty if they choose, but shall be under no obligation to carry out the following works (herein after referred to as **“the agreed works”**), subject to the provisions of s.10 (17) of the 1996 Act”* (emphasis added).

70. The award allows Mr and Mrs ????? to do works which have no relationship to the notice which is to form a loft conversion.

71. These works in paragraph 2.2 of the award are initiated pursuant to s.1 of the Party Wall etc. Act for ease of reference I repeat s.1 and s.6 procedures.

s.1(1)(a)&(b)

Construction and repair of walls on line of junction

1(1) This section shall have effect where lands of different owners adjoin and-

- (a) are not built on at the line of junction; or
 - (b) are built on at the line of junction only to the extent of a boundary wall (not being a party fence wall or to the external wall of a building),
- and either owner is about to built or any part of the line of junction.

s.1(2)

(2) If a building owner desire to build a party wall or party fence wall on the line of junction he shall, at least one month before he intends the building work to start, serve on any adjoining owner a notice which indicates his desire to build and describes the intended wall.

s.1(8)

(8) Where any dispute arises under this section between the building owner and any adjoining owner or occupier it is to be determined in accordance with section 10

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The works awarded in paragraph 2.1 of the Award are initiated pursuant to:

s.6(1)(a)&(b)

6(1) The section applies where-

- (a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured horizontally from any part of a building or structure of an adjoining owner; and
- (b) any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations of the building or structure of the adjoining owner

and

s.6(2)(a)&(b)

(2) This section also applies where-

- (a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of six metres measured horizontally from any part of a building or structure of an adjoining owner; and
- (b) any part of the proposed excavation, building or structure will within those six metres meet a plane drawn downwards in the direction of the excavation, building or structure of the building owner at an angle of forty-five degrees to the horizontal from the line formed by the intersection of the plane of the level of the bottom of the foundations of the building or structure of the adjoining owner with the plane of the external face of the external wall of the building or structure of the adjoining owner

72. Mr and Mrs ????? notice (which the two surveyors considered was valid) (see page 1) clearly states the intended works are for the "**CONSTRUCTION OF LOFT EXTENSION**", and Mr & Mrs ????? reinforce their intention by commencing their narrative by stating "*we are planning to have a loft extension built*". Accordingly I consider that it is quite clear what the notice relates to although it does not make a

- specific reference to s.2. It is quite clear that the works relate only to a loft extension.
73. The appointed surveyors visited the site and recorded a schedule of condition with a series of photographs (see pages 22 – 25). The annotation for ease of reference has been provided by Mr Philip Antino. These photographs were attached to a schedule of condition, which has been prepared and signed by both surveyors dated the 6th October 2010.
74. Notwithstanding, both surveyors have considered the schedule (see page 20 & 21) and the attached photographs and considered them to be accurate for the purposes of the Act.
75. The context of the schedule has to be considered with clear regard to the preliminary notes. Paragraph 1 of the schedule identifies that it was prepared by ????? on behalf of ?????.
76. Paragraph 2 very importantly states *“it was prepared in connection with, and should only be read in connection with, **an award for proposed works at ????? to be carried out pursuant to the Party Wall etc. Act 1996 (the 1996 Act”** (emphasis added).*
77. The photographs commence with a rear elevation photograph (a) page 22, photograph (b) is a close up of the alignment of the rear elevation roof between ????? & ?????. Photograph (c) is the ground floor rear elevation and adjacent boundary wall which already exists on the line of junction. Photographs (d) – (i) are all of the roof void of no. ?????. Photographs (j) & (k) are ceilings of the front and rear bedrooms in relation to the party wall between ????? & ?????. Photographs (l) and (m) (see pages 24 & 25) are front elevation photographs and a close up of the junction between the two roofs of ????? & ????? where the roof alignment changes.
78. It is quite clear from the schedule of condition that the surveyors were aware that the works involved the construction of a dormer window and formation of a loft conversion to create a bedroom and en-suite bathroom. This is also supported by

- the drawings which have been provided and attached to the award (see pages 26 – 31).
79. I do not think that Mr ????? or Mr ????? can argue that they were misled or confused about the proposed works intended by Mr & Mrs ?????.
80. The surveyors owed a duty of care to both the building and adjoining owners to be properly aware of the proposed works which should have been at the forefront of their minds when considering and agreeing the award.
81. For the avoidance of doubt the surveyors accepted the validity of the notice (see page 1) describing the intended works to be undertaken by Mr & Mrs ?????.
82. The awarded works (paragraphs 2.1 and 2.2) (see page 15) relate to excavation for foundations. There is nothing within the drawings that suggest that foundations will be excavated and in any event foundations are not necessary for a loft conversion. The surveyors have therefore been negligent in awarding these works.
83. Paragraph 2.2 (see page 15) allows the construction of or an enclosure upon a brick wall on the line of junction. I am minded to consider the photographs recorded by the surveyors (photograph (c) see page 22) which shows the position of an existing wall separating the gardens of ????? & ?????. s.1 works do not apply where a wall has already been built upon, the Act is explicit on this point.
84. We therefore have two surveyors determining and awarding works which the building owners are **not** intending to carry out and in any event the surveyors had no jurisdiction to award works where the Act does not apply.
85. The surveyors must confine their award to matters arising out of the works (see s. 10(13)(c)) I include for ease of reference.

s.10(13)(a)(b)&(c)

(13) *The reasonable costs incurred in-*

(a) *making or obtaining an award under this section;*

– (b) *reasonable inspections of work to which the award relates; and*
(a) *any other matter arising out of the dispute,*
shall be paid by such of the parties as the surveyor or surveyors making the award determine

86. I have identified that the appropriate works relate to the party wall and which sections of the Act actually apply in relation to the proposed works, none of which appear to have been included within the award.

CONCLUSION

87. I have considered at great depth the services and advice provided by ?????, in particular their employees Mr ????? and Mr ??????. ????? hold themselves to be experts in party wall matters although acknowledging in their website that they are not chartered surveyors.

88. Furthermore, they are not recognised by any independent professional organisation. Accordingly, I have to consider whether it would be reasonable to assume that they are required to provide the same level of expertise as, for example, a chartered surveyor. I do not think that I can apply the same level of standards because neither Mr ?????? or Mr ?????? are professionally qualified.

89. However, they do hold themselves to be experts and Mr and Mrs ?????? are entitled to the level of service and knowledge of an expert.

90. Mr ?????? and Mr ?????? have created a situation whereby from the same office have been involved in the same project representing neighbouring owners. I have commented in my report that this is a very unusual arrangement and given the provisions of s.10(1)(a) of the Act, believe that it was not appropriate or reasonable for the two surveyors to have accepted their individual appointments in this instance, given the provisions of the s.10(1)(a) of the Act for the following reasons.

(i) Mr ?????? is an employee of Mr ??????, accordingly a conflict of interest arises by the very nature of the relationship between the two surveyors and their duties under the Act.

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(ii) It could be argued that the presence of bias between the two parties could be an influencing factor.

(iii) Given that there are substantive errors in the award, this relationship may have prevented one of the surveyors from asserting their position in a more authoritative role. For example, would it be reasonable for Mr ????? to have challenged his employer Mr ????? on a specific point. Whether or not that situation arose is not the issue. The fact that the two surveyors put themselves into a position where a potential conflict and bias exists cannot be acceptable or appropriate for experts providing expert advice.

(iv) The surveyors owed a duty of care to their appointing owners to carry out their works diligently and applying the ordinary diagnostic skills of a competent party wall surveyor. Given the fact that ????? hold themselves to be experts, one could argue that the level of care is therefore substantively increased due to their promotional material and their alleged position within the party wall surveying community.

91. We then need to consider Mr ????? position in this matter where he clearly has only been appointed by Mr ?????, Mrs ????? appears to have been left out of the equation after the service of the original notice (see page 1) which Mr ????? considered to be valid.

92. However it must be correct that Mr ????? accepted the notice was valid and therefore recognised Mrs ????? as an owner. This notice clearly identifies the adjoining owners as Mr ????? and Mrs ?????. Accordingly, Mr ????? should have been appointed by both owners and this is something which Mr ????? has also failed to identify (this again raises the issue of the conflict of interest between the two surveyors roles and positions as employer and employee. On this very fact alone I consider that the award must be invalid because it does not properly identify the owners and with reference to the specific cases referred to above, this appears to be established legal precedent.

93. Both surveyors then carried out a schedule of condition of the loft area, they did not undertake any schedule of condition of the boundary walls or their positions or make any observations or concerns in any correspondence of that proposed excavations and accordingly it must therefore be reasonable to assume that both surveyors were fully aware that the works as identified in the original notice (see page 1) were for the construction of a loft extension.
94. If both surveyors are experts in party wall matters it must be reasonably foreseeable that they are also knowledgeable in construction technology procedures and principles. I note that Mr ?????? has a BSc(Hons) degree and a Post Graduate Diploma (PGDip Surv) in surveying and is a member of the Association of Building Engineers.
95. I have been unable to identify whether the BSc(Hons) degree is in construction or surveying, but clearly from the post graduate diploma in surveying and membership of the Association of Building Engineers it must be reasonable to assume that Mr ?????? does have knowledge of construction technology principles and procedures.
96. Accordingly, Mr ?????? should have been able to recognise that the awarded works in paragraph 2.1 and 2.2 has no relationship to the intended works for a loft conversion and therefore both surveyors have been negligent in their assessment of the proposed works and drawings in awarding for the excavation of foundations (see paragraph 2.1) and for the construction of a wall on the line of boundary (see paragraph 2.2).
97. Applying the ordinary diagnostic skills of a party wall surveyor it must be obvious that the two surveyors have not properly considered the proposed scheme and the works which they have so awarded because they have no relation to the proposed works and indeed do not even satisfy the requirements of the notice.
98. Mr & Mrs ?????? served their own notice which they are entitled to do and they properly identify and describe the proposed works, they provide drawings details and specifically identify the contractor as ?????? and provide a link to their website. They also provide a link to an explanatory book on the Party Wall Act and also

- provide a link to the Act. There can be absolutely no excuse for the two surveyors failing to understand what the intentions of Mr & Mrs ????? were.
99. Furthermore, both surveyors went into this unusual arrangement of representing different owners and specifically state in their correspondence (see page 2) produced by Mr ????? that *“the arrangement of appointing two surveyors from within ????? does not cause a conflict of (sic) interests as each party has a named surveyor appointed for them. Both surveyors are under a legal obligations to act fairly and neutrally at all times.”*
100. By their own hand they admit that they should act independently, yet clearly they have not. How can two alleged experts in party wall matters get what is a basic element of the party wall procedures so fundamentally wrong. Accordingly, the award which has been prepared and served by the two surveyors is invalid, it provides no value or benefit to Mr & Mrs ????? or indeed Mr & Mrs ?????.
101. However, I am also concerned with the fact that ????? requested payment in advance of service of the award, something which is not allowed within the Act. The fact that the Act expressly states s.10(15) that the third surveyor is entitled to request payment for release of his fees suggests in my opinion that if the Act is silent on the building owners surveyor and adjoining owners surveyor in relation to fees in advance of service of the fee, it must be reasonable to assume that the Act does not permit it.
102. Notwithstanding, Mr & Mrs ????? then had to pay under duress what is considered to be an unreasonably high fee in the amount of £1,357.83 for undertaking the services provided by the two surveyors, which culminated in an invalid award. This could have been produced by one surveyor at a cost of £750 plus VAT.
103. It is reasonable to assume and accept that Mr & Mrs ????? did not recognise or understand the significance of the errors contained within the award being laypersons and not experts and consequently did not realise that the award was invalid.

104. They commenced the works as a direct result of the negligence of Mr ????? and Mr ?????, carrying out works which were unlawful. They were by the actions of the surveyors carrying out works in breach of their statutory duty pursuant to s.10 of the Act.
105. It is my opinion that there is clear and undeniable negligence of the two surveyors and accordingly the money which Mr & Mrs ????? paid to ????? should be repaid in full by the two surveyors. In addition Mr & Mrs ????? are entitled to interest on this money which should be calculated accordingly.
106. Furthermore, Mr & Mrs ????? have been put in a position where they have had to seek independent professional advice and the costs which they have incurred in appointing a surveyor was reasonably foreseeable due to the two surveyors negligence.
107. The award is invalid if the surveyors refuse to acknowledge their negligence, I would advise that a declaration of invalidity is obtained.
108. My overriding duty as an expert witness is to the tribunal to whom this expert evidence is given. This duty overrides the contractual duty to my client. My evidence and opinion will be provided in accordance with RICS Practice Statement and Guidance Note *'Surveyors Acting as an Expert, a Guide to Best Practice' 3rd Edition*.
109. I have made all necessary and reasonable checks where possible to identify if a conflict of interest arises with either party to the dispute and can confirm that no such conflict has been identified at the date of writing this report.
110. In compliance with Guidance Note 6.1 the purpose of my expert evidence is to assist or enable the Tribunal to form its own independent judgment in respect of the nature of this dispute.

EXPERTS DUTY

I, Philip Antino BSc (Hons) MSc, MRICS, FFPWS understand that my duty is to provide an impartial report to truly reflect my own independent opinion and

conclusions. I confirm that the comments I have made have not been influenced by any party directly or indirectly connected with this dispute.

STATEMENT OF TRUTH

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Declaration

I declare that:-

- i. I understand that my duty as an expert witness in providing this written report and giving evidence is to help the Court and that this duty overrides any obligation to the party that has engaged me.
- ii. In compiling this report and its appendices I have taken into account all the information made available to me. I confirm that I have complied with this duty, I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct.
- iii. I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and the opinions I have expressed represent my true and complete professional opinion, which I consider to be relevant to the opinion expressed and that any matter that would affect the validity of the opinions expressed have been disclosed.
- iv. I have not included or excluded anything that might have been suggested to me by others without reaching my own independent and considered views on such matters. I understand that I may be subject to cross-examination on the contents of this report by either side's legal advisors or the Judge.

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- v. If, for any reason, I subsequently believe my report requires correction or qualification, I will advise those instructing me immediately.

 - vi I confirm that no arrangement for the payment of contingency fees or any other arrangement whereby the payment or amount of the fees is dependent on the outcome of the case have been entered into.

 - vii In compiling this report I have had in mind the provisions of Part 35 of the Civil Procedure Rules, particularly Rules 35.3 and 35.5. I have also studied the Guidance Note and Practice Statement issued by the Royal Institution of Chartered Surveyors for Surveyors acting as Expert Witnesses and confirm that the preparation of my report complies with the guidance documentation.

 - Viii I believe the facts stated in this report are true and that the opinions I have expressed are correct.

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Philip Antino BSc (Hons) MSc MRICS FFPWS

Date: 27th May 2011