Case No: G20CL136

**IN THE COUNTY COURT AT CENTRAL LONDON**

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

Monday, 19 July 2021

BEFORE:

**HIS HONOUR JUDGE PARFITT**

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BETWEEN:

**K GROUP HOLDINGS INC & ANOTHER**

Claimant/Appellant

- and -

**SAIDCO INTERNATIONAL SA & OTHERS**

Defendant/Respondent

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**MS C CRAMPIN QC** and **MR SCOTT GOLDSTEIN** (instructed by Payne Hicks Beach LLP) appeared on behalf of the Appellant

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**JUDGMENT**
(APPROVED)

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(Official Shorthand Writers to the Court)

1. JUDGE PARFITT: This is my judgment in respect of the substantive matters arising in a party wall appeal. The appeal is dated 3 December 2020. It is an appeal from an award which is dated November 2020. It arises in respect of matters that go back at least to 2009.

2. What I will do in this judgment is give a very brief summary of the background facts before turning to the various grounds of appeal but it is perhaps worth flagging at the outset that, certainly in my experience, the circumstances in which this award has been made seem to me uniquely inappropriate and misguided.

3. This judgment concerns Aldford House which is a property in the Park Lane area of London.

4. The appellants, in particular the second appellant, K Group Holdings Inc., is the current holder of a long lease in respect of Aldford House, having acquired that lease on 6 February 2012 from the first appellant, Park Lane Holdings Inc. Back in 2009, works were carried out to the sixth and seventh floors of Aldford House, converting those floors into two residential flats.

5. The respondents to this appeal are involved in one way or another with Flat 54 Aldford House and Flat 54 is, as I understand it, on the fifth floor so was below those works and is now below the residential flats. The registered owner of Flat 54 at around the time of the works and until April 2014 was a Panamanian company called Saidco International SA, who is the first respondent. After April 2014 the registered owner was another Panamanian company called HRP Foundation. At all material times, on the evidence before me, the occupier and person who has enjoyed the benefit of Flat 54 is an individual called Mr Hattan Pharoan who is the third respondent to the appeal. Finally, on this introduction to the parties, Saidco were placed into some form of suspension which, according to the evidence before me, involved a notice being attached in the Panamanian Registry that said Saidco were "Suspendido" on 26 November 2019 and the evidence before me says that meant, as a matter of Panamanian law, the company could not act or make claims, and so on.

6. The remaining respondent is Mr Hemy. Mr Hemy is the party wall surveyor who made the award, which is the subject of the appeal. Both he and Mr Pharoan were joined, not least for the reasons of the appellants seeking costs from them. Certainly Mr Hemy purported to make the award acting as an appointee of Saidco but, for reasons I have already explained, it does appear to be slightly problematic, given Saidco's current status of "Suspendido".

7. At this hearing, neither Saidco nor Mr Pharoan has appeared. I made a directions order in April, unfortunately drawn on 6 May for some reason, but, in any event, that required all the respondents to put in responses to the amended grounds of appeal indicating the basis for any opposition and making clear the issues necessary for the determination of the appeal by 14 May. Neither Saidco, nor Mr Pharoan filed or served a response notwithstanding an unless order encouraging them to do so.

8. Mr Hemy managed to file a response but not serve it but because of his health conditions, I, in the course of this hearing, made separate directions for him, which I will come back to, but, in any event, he is only concerned with questions of costs and not the substantive merits of the appeal.

9. Notwithstanding Saidco and Mr Pharoan being debarred from defending because of the unless order, Ms Crampin has very thoroughly, both in her oral and written arguments, dealt with, rightly, the underlying merits to the appeal and I have read the relevant material referred to in those written arguments and been taken to the most salient points. So, I am able to give and do give, a judgment on the merits and this is that judgment.

10. On the evidence, the relevant conversion works were carried out between 2009 and 2013 and at some point in 2009, Flat 54, apparently, complained about a leak. I have to say apparently because the documents involved from that period are relatively sparse but, in any event, there was a complaint about a leak but there was no resolution of that matter. It is not possible for the court to tell from the material what the cause of that leak was. It is possible for me to at least note that so far as Flat 54 and Mr Hemy were concerned, it was something for which the works were responsible, those works being

the sixth and seventh floor development works. The fact of that leak and, if it occurred, the consequences were not apparently resolved.

11. The immediate chronology relevant to the November 2020 award was as follows: in 2019, Mr Hemy, who had been appointed under the party wall notices served in respect of the 2009 to 2013 works, contacted a Mr Ian Crawford who had been appointed by the building owner who carried out those works. Now, the building owner, for the purposes of the party wall procedures in relation to the 2009 to 2013 works, was neither of the appellants before me but was a company called Holding and Management UK Ltd ("H&MUK") and their appointed surveyor was a Mr Crawford.

12. On 25 October 2019, Mr Hemy contacted Mr Crawford and raised the need, at least in Mr Hemy's eyes, to sort out the water leak and possibly also a point about some structure. Mr Hemy got a response quickly back from Mr Crawford on 20 October 2019 to say he, essentially, had moved on from the firm he was with at the time of the 2009 to 2013 works and had deemed himself incapable of acting pursuant to the Act in relation to any of his previous appointments. It would have been clear to Mr Hemy from that time that Mr Crawford was no longer the appointed surveyor, so far as concerns the existing 2009 award.

13. Mr Hemy contacted a Mr North who Mr Hemy says was appointed as the third surveyor under the relevant 2009 award. It is not entirely clear to me whether Mr North was actually appointed or whether he thinks he was appointed but, in any event, Mr North responded to Mr Hemy on 31 October 2019 and said as follows: "Thank you for your email and attached letter of 30 October. I note that I was/am the selected third surveyor in respect of the proposed works carried out some time ago. I also see from the correspondence you have sent to me that Ian Crawford deemed himself incapable of acting when he left GBA and so Mr Crawford has no standing in this matter. As a courtesy, I am copying him in so that Mr Crawford can see that I am aware that he is no longer involved. I am able to accept the appointment of third surveyor in this matter. Please note that as there is a dispute between yourself and Mr Crawford at the time, the building owner, Holding and Management UK Ltd, should be given the opportunity of appointing a surveyor in place of Mr Crawford. However, from checking at Companies House, I see that Holding and Management UK Ltd are in

liquidation and that the liquidator was appointed on 1 September 2016. In light of this and in the knowledge that the adjoining owner may find it very difficult to recover from a company that is in liquidation, do you or the adjoining owner still wish to pursue the matter. I wait to hear further."

14. To which Mr Hemy replied in a letter of 14 November 2019, which he addressed to Mr North, which says: "Thank you for your response. In your opinion, how should matters now proceed to a conclusion as there are outstanding defects and work to be completed." Mr Hemy does not appear to have waited for any response.

15. Then, without any other steps being taken, Mr Hemy, in July 2020 made a purported award premised on H&MUK being the relevant building owner. In that award, he referred to wanting more information so far as the structure of the works were concerned and/or saying the existing structure should be removed and he decided or purported to decide that £50,000 of compensation should be paid in respect of the leak and he made an order in respect of his costs.

16. In September 2020 Mr Hemy issued another purported award. This was, essentially, the same apart from he identified that Holding and Management UK Ltd was in liquidation. Mr Hemy, finally, made the award of 19 November 2020, which is the subject of this appeal.

17. What I think is worth stressing, before I turn to the particular grounds, about this chronology is that at no time prior to Mr Hemy making the November 2020 award has there been any attempt by Mr Hemy to engage substantively or, it seems to me, at all about the issue or issues that he wanted to address and about the substance of the award with anybody who was able to deal with the matter on behalf of the parties against whom he purports to make the November 2020 award. That, of course, is problematic for all sorts of reasons.

18. I turn to the amended grounds of appeal.

19. Ground 1 is that there is no jurisdiction to make any award binding the appellants. It seems to me this is right. The origin of Mr Hemy's jurisdiction, in so far as he might

have any at all, was his appointment under one of the 2009 awards which were made between H&MUK as the building owner and Saidco as the adjoining owner. Those awards have nothing to do with the existing appellants.

20. There needs to be legal basis upon which Mr Hemy's jurisdiction, even if it could otherwise be derived from the 2009 awards, could extend to either of the two appellants in this case and no such basis has been put forward. On the facts and information I have, I cannot myself see any basis upon which the present building owner could be said to be subject to jurisdiction derived from the party wall award of 2009 and so ground 1 is made out and the award of November 2020 is set aside on that basis. All the grounds are going to be made out so I will not keep repeating that the November 2020 award is to be set aside. That means I do not have the need to carry on beyond ground 1, but I will deal with the other grounds because it seems to me they are all valid grounds.

21. The second ground is that there was no jurisdiction to make awards about a dispute not in existence in July 2009 and this starts by reference to section 10(1) of the 1996 Act which provides that: "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…"

22. It is said that once that dispute arising from the notices that led to the 2009 award was determined, then the jurisdiction of those existing surveyors came to an end and I agree with that on the facts of this case. I think the 2009 award dealt with that which was required to be dealt with as a result of the notices served and the deemed dispute that arose. The appointed surveyors had exhausted their jurisdiction by the award that was made at least so far as concerned the alleged dispute the purported subject of the November 2020 award, not least because there was no building owner or, perhaps, adjoining owner (apart from Mr Pharoan) under the 2009 award who would have been relevant to the purported award in November 2020.

23. It could perhaps have been possible, if nothing else, through some potential waiver or estoppel. Had the existing building owners been contacted on behalf of Mr Pharoan, if he is really the substantive and beneficial owner of the property or on behalf of HRP

Foundation, if they are the current registered owners, and it could theoretically, it seems to me, at least have been possible for some sort of jurisdiction to have been derived from actual participation in a new award process or for the now relevant parties to have agreed to confer jurisdiction pursuant to the 2009 award (although such arguments, if they facts existed to support them, are not without problems).

24. But what cannot happen is for the surveyor to take for himself a sort of overarching jurisdiction to determine anything that might arise at any point in relation to Flat 54, Aldford House and the works that were done between 2009 and 2013 simply on the basis of the 2009 award. Ground 2 is made out. There was no relevant dispute.

25. Ground 3 is there was no dispute with the appellants and I have covered the substantive and underlying factual background above. It is made out because, essentially, there needed to be a dispute which could be resolved which would have involved the current owners and there was not. There was no dispute with the appellants and so ground 3 is made out.

26. Ground 4: similarly, not only would there have had to have been a dispute but in relation to that dispute, the relevant parties would have had to have made their appointments in respect of surveyors. That has not occurred. As ground 4 says, Mr Hemy was not appointed in any dispute between the appellants and Saidco. As it happened, I suspect Saidco would not have the capacity to enter into any dispute, at least not since 26 November 2019, and so, realistically, it probably would have had to have been HRP Foundation and/or perhaps Mr Pharoan who should have been involved and so created a dispute and then having created the dispute, then potentially appointed Mr Hemy. That is, again, assuming that whatever issues it is that are purportedly resolved by the November 2020 award are issues which properly need to be dealt with and should be dealt with under the Act which, I have to say having looked at the November 2020 award, it is not an assumption that I would readily make.

27. Ground 5 is in relation to the Saidco suspension. I have touched on that already. I agree that on the evidence before me as to the impact under Panamanian law as to the Saidco "Suspendido", no award could have been made at the initiation of Saidco and, certainly Mr Hemy purports to, in the award at least, to act on the initiation of Saidco.

I say “purports in the award at least” because in a previous email to the appellants' legal representatives, Mr Hemy said at one point that he was acting as the party wall surveyor for Mr Pharoan, which may be nearer to the truth in terms of who was providing him instructions. So, ground 5 is made out.

28. Ground 6 is that Mr Hemy had no justification to make an award acting alone. There are, of course, limited circumstances in which an appointed surveyor could act alone or **ex parte** and I agree with the appellants that none of those circumstances arise here. The easiest way to deal with that, without having to recite lots of the Act, is to identify that Mr Crawford had already told Mr Hemy that he deemed himself incapable of acting. It follows from that that his appointment had ceased and so Mr Hemy was not able to found any **ex parte** jurisdiction on the premise that Mr Crawford was refusing to act because Mr Crawford has renounced his appointment. Likewise, he could not have founded any jurisdiction to act without notice on the basis that Mr North had refused to act because the Act does not give him that power. If Mr North, as a third surveyor, refused to act, then the other two surveyors needed to appoint. If I ignore the myriad of other problems, what could have happened as soon as Mr Hemy was told that Mr Crawford had deemed himself incapable of acting was for Mr Hemy to go back to the appointment procedure and contact whoever it was required to appoint a surveyor, which almost certainly would have been one of the appellants, if anybody, and then he would have had to act on the basis that they had not appointed one within ten days. Then Mr Hemy could have made an appointment on their behalf or whoever Mr Hemy was acting for, presumably one would have thought, depending on the timing either Saidco or HRP Foundation or possibly Mr Pharoan would have had to have appointed a surveyor on behalf of whichever of the appellants they considered was the appropriate person; one imagines K Group. Anyway, none of that happened and in the absence of any of that, then ground 6 is made out. Mr Hemy had no jurisdiction to make an award acting alone, even if this award had survived the other grounds which it cannot.

29. Ground 7 is Mr Hemy had no jurisdiction because he had not invited submissions from the appellants. This starts off with a reference to HHJ Bailey's decision in *Mills v Savage*: "Surveyors are bound by the rules of the Natural Justice Act (**Several**

**inaudible words**) the party wall surveyor must enable the parties to make submissions if they wish and must give due consideration to any submissions made."

30. Party wall surveyors are subject to the requirements of natural justice or to put the same point a different way, those parties who are to be impacted by awards made under the Act have natural justice rights related to such awards. Quite how those requirements will work out in any particular case will always be very sensitive to the particular circumstances. The court will always have regard to the party wall surveyor as being a statutory appointment designed to deal with matters practically and justly and will not be too prescriptive about what is required. However, I would agree with the appellants that an essential requirement of any award process is not to make an award against somebody who has absolutely no idea you are considering an award, who has no idea about the existence of any dispute or issue which might be the subject of an award, has no idea about the process that is purportedly involving them and have had no opportunity to participate.

31. The November 2020 award seems to me, as the appellants say, to be so outside of that which might be appropriate for any person acting in a quasi-judicial capacity as to mean either that it is, in the purest sense, without jurisdiction or more likely that it inevitably makes the award invalid because it was made without engaging the party against whom you are making the award. The respondents to the November 2020 award were handed a fait accompli without any means or opportunity to be heard.

32. Ground 8 is a limitation ground and says the award of €445,000 compensation in respect of the leak from 2009 is barred by limitation. The November 2020 award purports to order damages of €445,000 of damage is said to have arisen. It is impossible to look at the award and understand what has caused that loss and, of course, in trying to understand it, it is difficult not to take into account that, notwithstanding the relevant events going back to 2009, in the purported awards of July 2020 and September 2020, the amount that was said to be appropriate compensation for this alleged leak was only £50,000. So, Mr Hemy's view on appropriate compensation seems to have increased in value, getting on for four or five times the value, depending on the sterling/euro exchange rate in a matter of months which, of course, is at least unlikely. But let us assume for the moment that there was a potential claim and that

that claim was one that could be resolved by party wall surveyors, all of which must mean that it is a claim for compensation under the Act in some way so it is a claim under statute.

33. There is no direct authority on this but Ms Crampin has provided me copies of *Hillingdon London Borough Council v ARC* [1999] 1 Chancery 139, a Court of Appeal case, in relation to the right to statutory compensation under the Compulsory Purchase Act 1965 which found that the relevant right arose once the Council took possession of the compulsory purchase land and was subject to a six-year time bar. She refers me to various cases that were cited in the *Hillingdon* case which established that the definition of action in section 38 is wide to cover various types of statutory compensation, reference being made to, in particular, other cases, *Pegler v Ry Executive* [1948] AC 332 and *China v Harrow Urban District Council* [1954] 1 QB 178. I am persuaded, and I agree with her, that the right compensation, assuming there was one here pursuant to the Act, is one that will be subject to the section 9 limitation award and that that limitation would start to run from whatever date it was in 2009 when Flat 54 first suffered damage and that that right to compensation would be subject to a time bar after six years, in the ordinary way. Of course, the same would apply if it was, if you think of the action in terms of whatever common law rights might be derived from the leak, whether it would be negligence or nuisance and so on, they also would be subject to a similar limitation. So, in any event, I agree with the appellants that, so far as concerns a right to compensation which could be within the surveyor's jurisdiction, that that would also be subject to a six-year bar and is time barred.

34. Ground 9 is that the November 2020 award purported to require the appellants to remove the structures that had been put up by their predecessors, H&MUK when they were carrying out their works and had possession of floors six and seven. I agree with Ms Crampin and Mr Jordan QC, whose name also appears on the end of these amended grounds of appeal, that the surveyor did not have the power to do that under the Act. The court and not surveyors have power to grant injunctions of this kind. It may be that Mr Hemy was thinking more in terms of investigations but I do not consider the sureveyors have power to investigate, rather than resolve disputes under the Act.

35. Ground 10 is the quantum of the water damage claim. I think I have already set out the relevant facts here. I agree that that should be set aside simply on the basis that it is completely incomprehensible as to how that might arise. In the context of everything else, it is not only unfair but even just in contrast to the £50,000 purported award in July 2020 and the lack of any explanation as to why it gets to €445,982, it would have been set aside, in any event.

36. Ground 11 is that the award purports to enforce payment of fees said to be outstanding under the 2009 award and the surveyors . That is also correct. The surveyors cannot enforce their own awards; they need to go to the court to do that, the Magistrates' Court most obviously, and, of course, that would be subject to a separate time bar.

37. Ground 12 is to set aside the costs order again because of a lack of clarity as to exactly what costs are covered and whether it is also covering costs in relation to the earlier July and September 2020 award, and so on. Insofar as those awards are in favour, as they are, of Saidco and/or Mr Pharoan, then I would have set aside the awards, had we got that far.

38. In conclusion, this award is a nullity and will be set aside.

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**This transcript has been approved by the Judge**