

Duty to mitigate and behave reasonably confirmed in Party Wall etc. Act 1996 (“Party Wall Act”) compensation case.

Important guidance/lessons for Party Wall Surveyors – the Courts have high expectations.

On 27 November 2018, HHJ Bailey in the Technology and Construction List of the Central London County Court handed down Judgment in an instructive Party Wall Act Appeal that contained guidance on the mitigation of losses, and the duties of party wall surveyors.

Background

As is more and more common in prime central London terraces, several basement extensions were built by a series of neighbours. The Appellant built his basement in 2013, and the Respondents built theirs in 2014. The intention was that the Respondents would make use of the underpinning constructed during the Appellant’s basement, but when it was uncovered the underpinning was found to be poor and in need of remedial work. After a lot of back-and-forth, the Appellants instructed their engineers to design a scheme of remedial works for the Respondents. After more back-and-forth, many months later, the Respondents instructed their contractors to carry out the remedial works.

The Respondents’ contractor charged £148,882 plus VAT for the remedial works. The Appellant argued that this was excessive, and a proper and reasonable cost of the remedial works should be much lower. The dispute was referred to the third surveyor, who awarded that the Appellant should pay the full amount. The Appellant appealed to the County Court.

The Court’s Decision

After hearing expert evidence the Court determined that the proper and reasonable cost of the remedial works was £47,977.30 plus VAT. HHJ Bailey highlighted that this figure was reached using the Respondents’ contractors own rates and that it was “£100,000 less than that quoted ...is indeed surprising”.

The Court also commented that

“it is unreasonable to expect either a party wall surveyor to make an award, or an adjoining owner to foot the bill, where (a) no competing quotations have been obtained and (b) no detail is given as to how the price is made up of the one quotation that is presented for agreement, so that it may be analysed for reasonableness”.

That the Respondents failure to do either meant they had not behave reasonably and had not mitigated their losses.

HHJ Bailey confirmed that in assessing compensation for losses under the Party Wall Act standard common law principles, including the duty to mitigate, must apply:

“Put very simply a claimant who loses a Mondeo through the actions of a defendant may decide to replace it with a Rolls-Royce, but he will only recover the cost of a Mondeo”.

HHJ Bailey amended the award so that the Respondents were due only £47,977.30 plus VAT.

HHJ Bailey, who has heard over 100 Party Wall Act appeals, included a section in his Judgment entitled “The approach to their task of Party Wall Surveyors” setting out useful experience and examples of best and worst practice of surveyors appointed under Party Wall Act. The section is worth reading in full, but in summary he reminds practitioners of the following do’s and don’ts:

Do:

- Act Impartially and professionally;
- Maintain the appropriate detachment required of an impartial tribunal including the need to maintain a proper level of detachment from owner and contractor;
- Maintain care and thoughtfulness required of a professional surveyor engaged in the proper performance of the statutory dispute resolution role;
- Make proper enquiry as to how quotations are arrived at before they can be properly used to form the basis of an award of compensation for the purposes of s7(2) of the Party Wall Act;
- Consider what other contractors would charge to provide a genuine market price for relevant works;
- Carry out such investigation as may be necessary to enable the Party Wall Surveyor to be confident that he has reached a proper decision on all the relevant material which is available;
- Take statutory duties seriously;
- Co-operate with other Party Wall Surveyors where appropriate and possible; and
- Ensure that before publishing an award, the arguments have been considered, and proposals for works or costings duly tested.

Don't:

- Favour either owner over the other;
- Behave as a mouthpiece for the appointing owner;
- Bully or allow yourself to be bullied;
- Ignore warnings relating to statutory duties; or
- Allow yourself to be pressured by your appointing owner

Morrison's Solicitors specialist Party Wall team: Matthew Hearsom, Kate Cooper and Tim Kirkconel acted for the Appellant, Mr Welter and instructed, Nick Isaac, of Tanfield Chambers to appear at trial.

Howard Smith of Radcliffe Chambers appeared for the Respondents, Mr & Mrs McKeeve, instructed by Child & Child.

A copy of the judgment is available [here](#).

If you have any queries or would like further information please visit our [Party Walls](#) or [Property Disputes](#) pages on our website or do not hesitate to get in touch with Matthew, Kate or Tim.



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