Neutral Citation Number: [2023] EWHC 2190 (KB)

Case No: QA-2022-000024

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 31 August 2023

Before:

MRS JUSTICE FOSTER DBE

- -

Between :

SUKHBINDER SINGH TAKHAR (1)

IQBAL KAUR TAKHAR (2)

PIRTHIPAL SINGH TAKHAR (3)

Appe

- and -

LAHRIE MOHAMED (1)

SHEHARA LAHRIE (2)

Respon

- -

- -

Mr David Mayall (instructed by **Thirsk Winton LLP**) for the **Appellants**

Mr Andrew Butler KC and **Mr Stuart Frame** (instructed by **Lincoln and Rowe**) for the **Respondents**

Hearing date: 06 December 2022

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Approved Judgment

This judgment was handed down remotely at 12.00pm on 31 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE :

THIS APPLICATION

1.
The application before the Court is an appeal stated to be against three related Orders of the Court by HHJ Parfitt. The last in time is an Order dated 12 January 2022 following arguments as to the meaning and scope of an earlier decision of the Judge's dated 21 November 2021 (the second Order) which decided a number of disputes arising on the proper construction of a settlement contract scheduled to a Tomlin Order between the parties dated 11 May 2016 ("the Tomlin Contract"). The earliest Order

dated 7 January 2021 decided some similar issues, and the right to appeal it was reserved with leave of the Court. HHJ Parfitt decided that the parties had agreed to an appeal process in the County Court for which it could take jurisdiction, and that process, called by him a “challenge”, was to be by way of a re-hearing, rather than a review. He held that the Liberty to Apply in the Tomlin Order of the Court could give effect to it.

2.
The underlying disputes compromised by the Tomlin Contract derived from certain building works carried out by the Mohameds and the effect of those works upon the property of their neighbours the Takhars. The works were described in a decision by HHJ Bailey in 2017 made following an injunction application brought by the Mohameds against previous Party Wall etc. Act 1996 (“1996 Act”) surveyors as:

“2.
… construction of a multi-layered basement development, including lifts to take cars to underground parking, a sub-level swimming pool, and a sunken garden to the rear of the property. These works necessitated extensive excavation up to the property's boundaries, works which were notifiable under the provisions of s.6 of the 1996 Act.”

Further details of the works in question are not relevant to this appeal which concerns construction of the Tomlin Contract and its consequences.

3.
The parties are referred to here as “the Takhars” (the Appellants) and “the Mohameds” (the Respondents).

4.
Originally four different claims had been issued by the parties, and appeals had been lodged against certain 1996 Act awards. Those claims were compromised during a mediation process and the compromise reflected in a Tomlin Order made by HHJ Bailey. In due course an award was made in respect of an aspect of the building works and the Mohameds sought to appeal it in the County Court, arguing the Tomlin Contract characterised the disputes in question as subject to the 1996 Act and thus subject to the 1996 Act jurisdiction of the County Court. The Takhars sought to strike out that appeal in November 2021.

5.
The broad issue before the Judge in November 2021 was described by him as:

“2.
The difference between the parties is whether on its proper construction, the Tomlin Order took the parties' disputes outside of the Party Wall etc. Act 1996 ("the 1996 Act") altogether or only in part and whether the Appellants are estopped from asserting that the 1996 Act should, in part, be read into the Tomlin Order as a result of their conduct before the court which led to an order drawn on 28 December 2017.”

6.
HHJ Parfitt held against the Mohameds to the effect that there remained no 1996 Act right of appeal to the County Court, but also held that it was possible to preserve jurisdiction for a differently founded appeal or “challenge” to the County Court in the following terms:

“… the [Takhars] are correct in both their contentions and consequently, the court has no jurisdiction to consider this appeal. However, I am satisfied that the court does have jurisdiction pursuant to the Tomlin Order to hear an appeal from the Award pursuant to the permission to apply provision in the Tomlin Order. I will give directions that the Appellants' N161 shall be treated as an application pursuant to CPR Part 23.1 and list a CMC to consider what further directions are required to progress that application to a conclusion.”

7.
The January 2022 Judgment considered issues described by the Judge and reasoned as follows:

“1.
… two scope issues which arise out of a decision that I made on 25 November 2021. I will start with my judgment of 25 November 2021. In the course of agreeing with the [Takhars] that the [Mohameds] were wrong to bring an appeal under the Party Wall etc. Act because the parties were not able to give the court jurisdiction in relation to such an appeal by their contractual agreement, and agreeing with the [Takhars] that, in any event, the [Mohameds] were estopped because of the position they had already taken before this court in previous proceedings, I then addressed what I described in that judgment as the [Mohameds] saving argument. In particular, I said at [48] that the most obvious route to make matters regular appeared to be the permission to apply under the Tomlin order. I did not understand Mr Butler or his team [i.e., the Mohameds’ representatives] to disagree with this comment if I was against him on the main issues, and then at [49] I said:

“I see no injustice to the parties in this case in allowing that to happen and directing that the appeal notice can be treated for all purposes as if it was an application under CPR Part 23.”

2.
And then skipping on in that paragraph:

“The [Takhars’] position on the substantive appeal has been that the award is unappealable for the reasons given in the order and it would be wrong for the court to allow the Mohameds to open up the compensation dispute from the beginning. At most, the court’s role should be limited to seeing that the expert is kept to his instructions. This scope issue, to be determined as a matter of proper construction of the Tomlin order, will be a matter for further argument at the CMC, which I will direct following the handing down of this judgment.”

3.
In broad terms, that is the scope issue which I am now going to address, and the parties’ arguments have rightly, it seems to me, broken that down into two separate heads of challenge, one of which is in relation to the nature of the exercise that the court is being asked to undertake. It is the [Takhars’] position that because the court can have no jurisdiction to hear an appeal in circumstances of this kind, really for the reasons I set out in my judgment dated 25 November 2021, then the court should be looking at this particular challenge as a challenge from an expert determination and, in those circumstances, there are only limited grounds for such a challenge. The court can look to see whether or not the expert has done the job that he or she was appointed to do and has acted within that contractual requirement, and if the expert has, then that is pretty much the end of it.

4.
On the other hand, what the [Mohameds] say is that they do not disagree with the principle that one looks at the contract, but they say if you do look at the contract in this case that that leads to the conclusion that a wider, essentially re-hearing type of challenge is appropriate, because that is what

the parties agreed to when they made reference to treating the challenge as being something which would be as if it was under the Party Wall etc. Act. Broadly, that is the first scope issue.

5.
The second scope issue relates to what, in fact, the expert did in this case in his determination which is dated 13 October 2020; the respondent saying that he made two separate determinations. One in relation to the damage that was caused as a result of works done by the applicants to their property, which caused damage to the respondent's property, and then a second determination in relation to the quantum arising out of that damage, and the [Takhars] say that, as a matter of construction of the Tomlin Order, it is only the quantum determination that falls within the scope of the appeal or the challenge.

6.
The [Mohameds] say on a proper construction of the Tomlin Order, and on the basis of what the parties did and on the basis of what the expert did in his determination of 13 October 2020, that this was all within paragraph 6 of the Tomlin Order and so all is subject to the re-hearing type challenge that they say is appropriate under the first limb of the scope of the problem."

ISSUES ARISING

8.
Before this Court the Takhars argue:

a.
(Ground 1 of the Notice of Appeal.) The Judge was wrong to hold that the Court had jurisdiction to hear any appeal or challenge to an Award made by the Agreed Surveyor appointed pursuant to the Tomlin Order, and so wrong to devise a mechanism to afford jurisdiction in the Court to hear an appeal. ("**a**. **Is there any appeal?**")

b.
The Mohameds are in particular estopped from arguing that the 1996 Act has any effect given their position before HHJ Bailey. ("**b. Is there an estoppel?**")

c.
(Ground 2 of the Notice of Appeal.) If contrary to a. and b. above, there was a right of challenge to the County Court, such challenge should take place by way of a review, not a re-hearing. ("**c. Review or re-hearing?**"). Further;

d.
(Ground 3 of the Notice of Appeal.) The scope of such challenge did not include the issue of the extent of damage caused to the Takhar's property: it is limited to the issue of the quantum of damages. ("**d. Damages - quantum only?**")

9.
The Mohameds argue the following on the Takhar's appeal (repeating the lettering):

a.
The Judge was correct to find a route to allow an appeal - it was one of a number available to him; and if the Judge's route to an appeal fails, then:

i.

the better reading of the Tomlin Contract is that the parties did not contract out of the 1996 Act entirely, and the appeal provision in section 10(17) continued in force; alternatively

ii.
the County Court has jurisdiction under sections 15 and/or 18 of the County Courts Act 1984.

b.
The Mohameds are not estopped from contending the 1996 Act still applies in part to the relevant disputes.

c.
The nature of the challenge is by way of re-hearing, not review.

d.
The extent of the damage, not merely its quantum, may be challenged on an appeal.

10.
The Mohameds also raise a cross-appeal on costs, and certain of their arguments above required permission, which is given.

SUMMARY OF CONCLUSIONS

11.
I say at this point that on the central issues I have concluded:

i)
The Judge was correct to find a route to jurisdiction in the County Court in the event there was a dispute, although not by the mechanism he used.

ii)
The scope of the recourse to the County Court is narrower than he held.

iii)
Construing the Tomlin Contract, the 1996 Act has no role to play between the parties, and even had it had, the Mohameds are estopped from arguing to the contrary.

BACKGROUND

12.
The relevant background to the dispute determined on 21 November 2021 may be found in the November 2021 Judgment from which I take it verbatim with gratitude:

“Necessary Factual Background & Chronology

5.
In about 2015 the Appellants gave notice to the Respondents under the 1996 Act of an intention to carry out excavation works at 59 Manor Road, Chigwell ("the Works"). The Respondents own the next door property at 57 Manor Road. A panel of three-party wall surveyors under section 10(1)(b) of the 1996 Act was set up and an award determining the right to carry out the basement works was made on 4 August 2015. The identities of two out of the three surveyors changed but that is not relevant for present purposes and it is sufficient if I refer to "party wall surveyors" as being whichever individuals happened to be in place during the relevant period when the parties' disputes relating to the Works were to be determined pursuant to the 1996 Act. Those disputes were many and various.

6.
By May 2016, there were four separate county court proceedings arising out of the Works and/or the 4 August 2015 award. Those proceedings and any other relevant disputes between the parties were settled by the Tomlin Order.

7.
The Respondents' appointed surveyor and the third surveyor took the view that following the Tomlin Order nothing changed so far as concerned their right or obligation to determine disputes arising out of the Works. On 28 June 2016 the Respondents' appointed surveyor identified some 11 areas of dispute which he wanted to refer to the third surveyor. The position of those disputing surveyors was that section 10(2) of the 1996 Act meant their jurisdiction could not be unilaterally removed from them: All appointments and selections made under this section shall be in writing and shall not be rescinded by either party (my emphasis). The surveyors' argument was that once appointed any disputes must be resolved by the party wall surveyors and the parties cannot remove the jurisdiction of those surveyors because to do so would amount to a rescission of their appointment which was not permitted under the 1996 Act.

8.
The Appellants disagreed and brought proceedings against those two party wall surveyors seeking and obtaining, in an order drawn on 28 December 2017, an injunction preventing the party wall surveyors from "making or purporting to make any further awards" and a declaration that those surveyors" have no authority to make any further awards purporting to determine disputes between ... [... the Appellants ...] ... and ... [... the Respondents ...]".· The court's reasons are set out in a judgment of HHJ Bailey dated 13 December 2017. The surveyors were ordered to pay costs.

9.
Paragraph 6 of the Tomlin Order described the parties' dispute about the compensation payable to the Respondents because of the Appellants' works: the issue of compensation for the damage caused to the Takhars' property as a consequence of the Mohameds' building works ("the Compensation Dispute").

10.
Paragraph 7 of the Tomlin Order provided for the Compensation Dispute to be determined by an expert in writing and that "either patty shall have a right to appeal. [... the Compensation Dispute ...] ... which for all purposes shall be treated as an appeal under section 10(17) of the Act".

11.
After a period of delay, which is immaterial for present purposes, Mr Keith Walker on 13 October 2020, made the determination envisaged to resolve the Compensation Dispute in the Award. The Respondents wanted about £1,000,000 of compensation. The Appellants suggested a few thousand and Mr Walker awarded about £500,000. The amounts make no difference to the outcome of this application, but they give some context to the issues. Causation appears to be at the heart of the dispute but that may need to be the subject of further argument in due course.

12.
By notice of appeal dated 27 October 2020, the Appellants appealed the Award under section 10(17) of the 1996 Act.

13.

At first the Respondents participated in the Appeal. The court gave standard directions on 2 November 2020. In compliance with those directions, on 1 December 2020 the Respondents filed a substantive response to the grounds of appeal. There was an effective CMC on 7 January 2021 during which the Respondents argued that the appeal should be heard as a review rather than a re-hearing. The court determined that a rehearing was more appropriate in the circumstances. The court permitted the Respondents to reserve their right to appeal that decision following the conclusion of the appeal. The parties agreed an ADR stay. There was due to be a further CMC on 16 September 2021 but then on 5 August 2021, the Respondents made this application to strike out the appeal based on the court's lack of jurisdiction."

13.
It was common ground in November 2021 that the nature of the jurisdiction challenge was such that the Respondents' participation could not confer on the County Court an appellate jurisdiction which it otherwise did not have.

14.
As recorded, the proceedings in 2017 before HHJ Bailey concerned the legitimacy of replacing three previously appointed statutory surveyors with a single agreed surveyor. HHJ Bailey determined that the parties had validly contracted out of the 1996 Act. He held that the Tomlin Contract had the effect of ending the 1996 Act dispute.

15.
The Takhars relied successfully before the Judge in November 2021 upon the fact that arguments raised by the Mohameds in the proceedings before HHJ Bailey were inconsistent with the Mohameds' position before the Judge in the January 2022 proceedings and precluded them from the approach they sought to take. The same arguments are relied upon before this Court – as appears from the issues set out above, that position is challenged on this appeal.

16.
Before HHJ Bailey the Mohameds had argued for

"a declaration that the Defendants have no locus to make any further awards purporting to determine disputes between the Claimants and the Takhars"

on the basis that the 1996 Act disputes were all at end. It was put in correspondence by their solicitors to the Respondents' surveyors:

"The consent order explicitly removes all existing disputes between the parties. There are therefore no disputes between the building owner and the adjoining owner for the purposes of section 10(10) …".

However, HHJ Bailey held:

"37 The distinction may be drawn between agreements between parties which conclude a substantive resolution of the parties' differences and those, such as the present, which do not resolve those differences but provide for the differences to be determined outside the 1996 Act. I do not however see this to be a valid distinction for present purposes. The Agreement embodied in the Consent Order has the effect of ending the dispute for the purposes of the 1996 Act even though some time will necessarily pass before the parties achieve their substantive resolution through their own alternative procedure."

THE TEXT OF THE TOMLIN CONTRACT

17.
The Tomlin Order is in the usual form and provides:

“UPON the parties having agreed the terms set out in the schedule hereto and BY CONSENT

IT IS ORDERED THAT:

1.
All further steps in the above-mentioned proceedings be stayed save for the purposes of carrying into effect the terms set out in the said schedule, for which purpose the parties or either of them have liberty to apply; and

2.
There shall be no order as to costs.”

18.
The relevant parts of the Tomlin Contract are as follows:

“1.
The parties make this agreement in full and final settlement of all matters between them to date save for those explicitly mentioned below and is in resolution of all disputes between them under the Party Wall etc, Act 1996 ("the Act").

2.
The parties agree that all future disputes which would normally be resolved by an award under the Act shall be resolved by an independent surveyor appointed jointly by the parties as set out below ("the Agreed Surveyor"), and who shall resolve (1) the disputes set out below, and (2) any future party wall disputes between the parties arising out of the current works being carried out by the Mohameds as if he were an agreed surveyor appointed under section 10(1)(a) of the Act.

3.
The parties agree to use their best endeavours to communicate with and resolve disputes themselves prior to referring any dispute to the Agreed Surveyor.

Appointment of Agreed Surveyor

4.
The Agreed Surveyor shall he appointed by agreement between the parties, or in default of agreement within three days of the date hereof, shall be appointed by the President for the time being of the RICS … […].

Current disputes to be determined by Agreed Surveyor

5.
The disputes which shall he referred to the Agreed Surveyor for immediate determination are as follows:

(1)
What monitoring and trigger action protocols are appropriate for notifiable works still to be carried out by the Mohameds;

(2)
What damage has been caused to the Takhar's property as a consequence of the building works carried out so far by the Mohameds;

(3)
What reasonable fees should be paid by the Mohameds to the Takhars in respect of the fees of [(a) ….] down to and including the date hereof.

6.
It is further agreed that the issue of compensation for the damage caused to the Takhar’s property as a consequence of the Mohameds' building works shall be determined on completion of the works to the Mohameds' works in so far as the same are notifiable under the Act it is envisaged that this will be on completion of the bulk excavation of the basement.

Resolution of disputes by Agreed Surveyor

7.
In resolving the disputes referred to in paragraph 2 above, the Agreed Surveyor:

(1)
shall make his determinations in writing;

(2)
shall make such determinations as an expert, there being no right of appeal in respect of such determinations save only that either party shall have a right to appeal the determination of the current dispute set out in paragraph 6 which, for all purposes, shall be treated as an appeal under section 10(17) of the Act;

(3)
may make determinations summarily (i.e., without requiring or permitting written submissions to be made);

(4)
may give directions, impose time limits and in all other respects decide and direct how disputes to be decided by him shall be managed;

(5)
shall in all respects act promptly, fairly and proportionately in relation to the parties and any disputes referred to him, in particular with a view to both enabling the Mohameds' works to proceed with all reasonable expedition, and to ensuring that those works do not cause unnecessary inconvenience to the Takhars, or damage to their property.

Determination whether payment £50,000 should be made

8.
The question set out below shall be referred to Gary Webber as a neutral evaluator ("the Evaluator") to adjudicate upon, and, in the event, he is unwilling or unable so to act, Sara Benbow shall identify and nominate an appropriate third party who can undertake an independent evaluation in his place.

9.

The question to be adjudicated upon, on the balance of probabilities, is: In the exchange of emails attached hereto, did the building owner, or the building owner's team, withhold any documents which should have been disclosed in accordance with the award dated 4 August 2015.

10.
The Evaluator shall have an inquisitorial role, and may give such directions, impose such time limits and in all other respects decide and direct how the procedure for determination of the said question shall proceed.

11.
If the question set out in paragraph 9 is answered in the affirmative, the Mohameds shall pay the Takhars (1) the sum of £50,000 within 14 days of the date of the determination, and (2) the costs of determining the question, such costs to be determined summarily by the Evaluator and paid within 14 days of such determination.

12.
If the question set out in paragraph 9 is answered in the negative, the Takhars shall pay the Mohameds the costs of the determining the said question, such costs to be determined summarily by the Evaluator and paid within 14 days of such determination."

THE JUDGMENT OF NOVEMBER 2021

19.
The Judge decided the material issues in the following way. He began with the estoppel issue:

"17 A party who obtains a court order because they took a particular stance before the court which led to the making of that order can be estopped from maintaining before a subsequent court a contrary position. The law is set out in LA Micro Group (UK) Limited and Ors v LA Micro Group, Inc and Ors [2021] EWCA Civ 1429, Sir Christopher Floyd, [19] to [26] …"

20.
The Judge set out in paragraphs 19 to 25 the LA Micro Group approach, drawing on United States authority Davis v Wakelee 156 US 680, 689, (1895) per Justice Ginsburg, (as reflected in Spencer Bower and Handley on Res Judicata, 5th edition, 2019). This identifies that the purpose of the equitable doctrine was the protection of the integrity of the judicial process by prohibiting parties from changing position at whim and "playing fast and loose with the Court". First, a party's later position must be "clearly inconsistent" with its earlier position; second, the Court may look to see if the party in question persuaded the Court to accept the earlier position – such that if it were to accept the later inconsistent argument, it would appear one or other Court was misled. Third, it should be asked whether an unfair advantage would be obtained – or an un unfair detriment would be imposed on the opposing party if they were not estopped. Furthermore, per Sir Christopher Floyd, this was a broad merits based assessment and, the starting point was to determine whether the earlier decision was obtained "on the footing of, or because of, the stance taken by the party in the earlier proceedings" (LA Micro Group at paragraph [26]; cited by HHJ Parfitt at paragraph [17]).

21.
No issue is taken with the treatment of the HHJ Bailey Judgment by HHJ Parfitt, who recorded that the submissions before HHJ Bailey by the Mohameds included that the parties to the Tomlin Order had contracted out of the 1996 Act and so made the existing party wall surveyors "redundant" because there were no disputes under the 1996 Act for those surveyors to determine. HHJ Parfitt held

that the Mohameds had succeeded against the surveyors “on the basis that the Tomlin Contract took the parties’ differences outside of the 1996 Act by agreement”.

22.
He concluded that there was no doubt HHJ Bailey’s decision was founded on the proposition that the Tomlin Contract provided an alternative method for resolving the parties existing and future disputes – and (as above) “took the parties’ differences outside the 1996 Act by agreement” (paragraph [23]). HHJ Parfitt roundly rejected the Mohameds’ contention that they were merely arguing the parties had terminated the surveyors’ retainer, or that HHJ Bailey’s decision was based upon that. On the issue of the inconsistency of the two positions held by the Mohameds, he held that before HHJ Bailey it was argued (successfully) by the Mohameds that they had contracted out of the 1996 Act both as to present and future disputes - whereas before him it was argued that they had not. HHJ Parfitt recorded the submission of Mr Butler KC (who had not appeared before HHJ Bailey) before him to the effect that the Tomlin Contract contained the parties’ agreement that the 1996 Act would apply save in the respects that the parties agreed that it would not. These positions were “plainly inconsistent” and the criterion of Justice Ginsburg that it looked like one or other court was being misled, applied.

23.
The Judge held the Mohameds were seeking to derive an unfair advantage, and considered the position of the surveyors in the action before HHJ Bailey who lost because the conclusion was there were no more 1996 Act disputes for the surveyors to resolve – they were taken outside the Act, as the Mohameds had argued. The case might well have been decided differently had they not contended the Act no longer applied to any disputes, and this would be playing fast and loose by the Mohameds; justice prevented them from being able to assert before him that the 1996 Act applied at all to their disputes (paragraphs [32] to [33]).

24.
On the construction of the Tomlin Contract and the existence of an appeal right, he held that there could be no reservation of a right of appeal under the 1996 Act because there remained no Award under section 10 of the Act so as to afford the County Court jurisdiction for any such appeal: the parties could not opt in only to an appeal mechanism. He recorded that it was common ground that the County Court’s jurisdiction could come only from section 10(17) of the 1996 Act, for which an award made under section 10 was required.

25.
Before HHJ Parfitt the Mohameds argued that there were nonetheless ways in which an appeal to the County Court could be spelt out. The Judge called these the “saving arguments”. The Judge did not deal with the alternative suggestions of sections 15 and 18 of the County Courts Act, but rather himself suggested that the liberty to apply contained in the Tomlin Order could be utilised; he could treat the Notice of Appeal as if it were an application pursuant to CPR 23. His decision was expressed thus at paragraph [49]:

“I see no injustice to the parties in this case in allowing that to happen and directing that the appeal notice can be treated for all purposes as if it was an application under CPR part 23. The appeal notice contains all the formal requirements of an application, and it is clear to all what the Appellants want and why – essentially a redetermination on evidence of the Compensation Issue. The respondent’s position on the substantive appeal has been that the Award is unrepeatable for the reasons given in the Award and that it would be wrong for the court to allow the Appellants to open up the Compensation Dispute from the beginning, at most the court’s role should be limited to seeing that

the expert has kept to his instructions. This scope issue, to be determined as a matter of proper construction of the Tomlin Order, will be a matter for further argument at the CMC which I will direct …"

THE JUDGMENT OF JANUARY 2022

26.
On 12 January 2022 a Case Management Conference was held in which the two scope issues were determined.

27.
The Takhars maintained their argument that the Court has no jurisdiction to hear an appeal against an Award in circumstances of the present kind. The most the Court could do would be to look at the challenge as if it were from an expert determination, and accordingly any challenge could only take place (if at all) on limited grounds. The Court could look to see whether or not the expert had done the job they were appointed to do and acted within the contractual requirement: if that was so, that was final. The Mohameds argued a wider, essentially re-hearing type of challenge was appropriate because that is what the parties agreed to when they said it was "as if" under the 1996 Act.

28.
The second scope issue related to what the expert had done in his determination of 13 October 2020. The Mohameds argued he had made two separate determinations, one relating to the damage caused and the second relating to the quantum arising from damage. The Takhars argued that only the quantum determination was within scope of any challenge.

29.
The Judge decided by reference to Premier Telecom Communications Group Ltd and another v Webb [2014] EWCA Civ 994 that the correct starting point was the contract between the parties, and it was reasonably clear what the parties were doing in agreeing the Tomlin Order. He agreed with the Mohameds' construction of paragraph 6 and "the issue of compensation for the damage caused to the Takhars property as a consequence of the Mohameds building works", rejecting the Takhars reading that the wording was descriptive of the issue of compensation only.

30.
The Judge referred to the terms of paragraph 5(2) stating that the Takhars' construction in fact created a lacuna:

"[11] … between damage that might have been caused as a consequence of the building works as at the date of the settlement agreement, 11 May 2016, and damage that might be caused by works carried out thereafter. I think [counsel for the Takhars] view was that it is the damage that had to have been caused so far, but I think it is the works that needed to have been carried out so far that create the line in the sand or a temporal line in the sand rather than the damage. But I do not think that makes any difference to the existence of the lacuna.

[12] It is difficult to speculate on what the parties thought the benefit was of 5(2) and how it was to relate to 6, but what I am clear about is that 6 is a freestanding issue and that it is an issue which is inclusive of all the things that are said in paragraph 6. That is to say the issue of compensation for the damage caused to the Takhars property as a consequence of the Mohameds building works, and there are two main reasons for that."

31.

The two reasons that the Judge gave were that his reading did not create a lacuna and it made more practical sense since all the issues in relation to how much compensation should be payable, necessarily including damage caused as a consequence of the building works, could best be determined once the works had been completed and one could see what had happened. He referred to matters that they had corresponded about and said it was “relatively clear” that practical matters were dealt with in paragraph 6, which he was clear was “a free-standing issue”.

32.
The Judge noted there had in fact as yet been no separate 5(2) determination and had there been it was difficult to see how it fed into paragraph 6. The purpose of paragraph 6 was “to make sure that [the Takhars] got the compensation to which they were entitled” (paragraph [15]) and so was to be construed to include consideration of damage as well as compensation.

33.
In respect of paragraph 7(2) he said the issue was whether this should be treated as an equivalent to an appeal under section 10(17) of the 1996 Act, insofar as the Court had power to do so, or whether it should be treated as an expert determination. He continued:

“18.
The starting point is to recognise that [Counsel for the Takhars] is right to say that whatever jurisdiction the court is exercising under the Tomlin Order, it is not hearing an appeal. Mr Mayall has used the word “challenge” and that will do.”

34.
Although not part of the argument before him he went on to say that he understood the practice was that as it was part of a Tomlin Order, and as the parties had put their disputes before the Court,

“The court was endorsing the mechanism by which they resolve those disputes and allowing them to come back in order to give effect to that Tomlin Order.”

35.
He referred to Zenith Logistics v Coury [2020] EWHC 774 as consistent with his suggestion that where a court is asked to enforce an order it will check that it is content that the enforcement should take place. He therefore assumed (see paragraph [22]) that the Court was content with the idea that the parties could come to court where either of them did not like the determination of the paragraph 6 dispute and say to the Court they wished to challenge it. The Judge’s application of this authority is specifically challenged by the Takhars in this appeal.

36.
As to the scope of such challenge, whilst normally a case-by-case decision, where founded on the Act itself, per O’Farrell J in Lee Valley Developments Ltd v Derbyshire [2017] EWHC 1353, the starting point was he said, “a broad basis and generally a complete re-hearing”.

37.
The Judge concluded both parties had carved out the one particular issue, financially likely to have been the main issue in May 2016, and the options for challenge:

“… in a way that I think meant that they both envisaged that a rehearing might be appropriate, appropriate so that they could have the court determine this compensation issue once for all rather than the expert.”

DISCUSSION

Construction

38.
There was no dispute between the parties concerning the well-established principles applicable when seeking to construe a contract of settlement scheduled to a Tomlin Order, which is to be regarded as a commercial contract. The principles (noted also in the White Book) were summarised succinctly by Popplewell J in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune) [2018] EWHC 163 (Comm); [2018] 1 Lloyd's Rep. 654:

“8.
There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 ; Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 ; Re Sigma Finance Corp [2010] 1 All ER 571 ; Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 ; Arnold v Britton [2015] AC 1619 ; and Wood v Capita Insurance Services Ltd [2017] AC 1173 . The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, which is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest…”

39.
I also have regard particularly to the expression of principle articulated in Sirius International Insurance Co (Publ) v FAI General Insurance Ltd [2004] UKHL 54; [2004] 1 W.L.R. 3251, where, construing a Tomlin Order, Lord Steyn said as follows (with emphasis added):

“16.
In the construction of commercial documents, a hard-headed approach is necessary. The merits of the underlying dispute, predating the Tomlin order, were as such entirely irrelevant to the determination of the question of construction. But **the matrix of the Tomlin order may cast light on its meaning**.

…

18.
The settlement contained in the Tomlin order must be construed as a commercial instrument. **The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that**

question is to be gathered from the text under consideration and its relevant contextual scene.

19.
There has been a shift from literal methods of interpretation towards a more commercial approach. In Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 , 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed: "**if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense**".
In Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, 771, I explained the rationale of this approach as follows:

"**In determining the meaning of the language of a commercial contract ... the law ... generally favours a commercially sensible construction**. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. **Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.**"

The tendency should therefore generally speaking be against literalism."

40.
As was said in respect of an agreement scheduled to a Tomlin Order in Community Care Northeast (A Partnership) v Durham CC [2010] EWHC 959 (QB) [2012] 1 WLR 338 per Ramsey J at paragraph [24]:

"... In general once the parties have entered into an agreement the ability to set aside or vary that agreement depends on there being a remedy in relation to that contract. Otherwise the court is only concerned with the meaning of the agreement in the schedule and this depends on normal principles."

41.
Applying these principles the proper approach to the Tomlin Contract is as follows.

42.
The matrix of this agreement includes the deeply contentious history between the parties, described to an extent in the judgement of HHJ Bailey in 2017:

"The works did not proceed with any degree of harmony. The precise details of the various discords between the Claimants and the Takhars have no immediate relevance to the issues in this claim. Suffice it to say that, in the words of Mr Isaac, counsel for the Claimants, "the Mohameds and the Takhars descended into a flurry of litigation" ..."

43.
The Judge then refers to the four sets of proceedings issued between October 2015 and April 2016 which were compromised in the Tomlin Order and Tomlin Contract. There were disagreements between surveyors, as well as between the neighbours, and as between surveyors and opposing parties, which it is unnecessary to set out save to note that a considerable amount of doubtless expensive dispute lay behind the Tomlin Contract achieved in 2017. The 1996 Act procedure had produced considerable contention. The reasonable person in this context would in my judgement be seeking a common sense commercial solution that resolved any disputes as economically and swiftly as reasonably possible, and I read the language of this agreement with that in mind. There are occasions when the detailed syntactical analysis of the wording may appear to show a lacuna or an

uncertainty. Applying business common sense, I have concluded it is nonetheless possible to make commercial sense out of the Tomlin Contract preserving what I deduce to be the parties' agreement. It appears the Tomlin Contract came into being after a long and difficult process of mediation; I also bear that in mind.

The Tomlin Contract

44.
In my judgement, the agreement contained in the Tomlin Contract comprehends two main types of dispute between the parties: (a) those which have already arisen at the date of signing the agreement, and (b) those which may yet arise. There is a further classification of disputes: those which have arisen, or would, but for the agreement arise, under the 1996 Act, on the one hand, and other disputes.

45.
The agreement further differentiates between disputes which are to be determined at once under the agreement, by the Agreed Surveyor, (necessarily, disputes which have already arisen), and those which may have already arisen but are not to be determined at once, together, again necessarily, with such future disputes as might occur but have not yet done so.

46.
The opening paragraphs of the Tomlin Contract are wide in application. Paragraphs 1 and 2 make clear that any and all disputes existing between the parties as at the date of the Tomlin Contract, are to be considered as fully and finally settled by it except for those existing disputes specifically mentioned in it. Accordingly, it is only the specific matters of dispute, whether current or certain potential future disputes, that are within the agreement.

47.
Importantly, the Tomlin Contract is stated in the second clause of paragraph 1 to be a resolution of all disputes that have arisen under the 1996 Act. The phrase is "and is in resolution of all disputes between them under the Party Wall etc Act …" No temporal limitation is actually expressed but reading paragraphs 1 and 2 together shows that they are intended to be comprehensive.

48.
Paragraph 2 records that the parties agree that an Agreed Surveyor will deal with what are described as "all future disputes that would normally be resolved by an award under the Act". The paragraph then refers to the totality of the disputes which have been referred to the surveyor; they fall into two categories:

(1)
the "disputes set out below", that is to say the current disputes which come within the description in paragraph 1 as being matters between the parties to date, which are "explicitly mentioned below", and which are not fully and finally settled;

(2)
"any future party wall disputes between the parties arising out of the current works being carried out by the Mohameds"

with the Agreed Surveyor acting in respect of all disputes "as if" he'd been appointed under the Act - but not in fact so appointed. This must be so in my view given the previous wording which states in

terms that the future disputes normally resolved by an award under the Act, are to be dealt with differently henceforth.

49.
This in my judgement means that the Agreed Surveyor is to perform the same kind of professional function as would have been carried out, in terms of analysis, approach etc. but the Act itself does not apply, nor is the Agreed Surveyor in fact appointed under the Act, and the award will not be a statutory award, so as the Judge held, the County Court would have no statutory 1996 Act jurisdiction in respect of it.

50.
The “disputes set out below” referred to in paragraph 2(1) of the Tomlin Contract are those numbered (i) to (iii) under paragraph 5, and the dispute (or part of it) referred to in paragraph 6. Both paragraphs fall under the heading “Current disputes to be determined by Agreed Surveyor”.

51.
Paragraph 5 indicates both the time at which the disputes are to be referred for determination, and what those disputes are, stating these disputes are to be referred to the Agreed Surveyor for “immediate determination”. The first concerns protocols in respect of works still to be carried out, the second concerns the question of “what damage has been caused to the Takhars’ property as a consequence of the building works carried out so far by the Mohameds”. The third item refers to the reasonable fees payable by the Mohameds to the Takhars in respect of three named persons, down to the date of the Tomlin Contract.

52.
Paragraph 6 of the Tomlin Contract dealing with “compensation for the damage caused to the Takhars property as a consequence of the Mohameds’ building works” intends in my judgement to comprehend the element of financial compensation (only) for damage caused to the Takhars property:

i)
as a consequence of the Mohammed’s building works down to the date of the Tomlin Contract; and

ii)
any compensation for damage caused by works after that date that may be in dispute thereafter.

The paragraph characterises the amount as a “current dispute” but provides that it will not be determined until all the damage is known - i.e., including any damage caused by works after the date of the Tomlin Contract.

53.
This clause is intended to mean that the issue of compensation for all damage, whether caused by works taking place before or works taking place after the Tomlin Contract, is to be resolved at the end. The wording is somewhat unhappy, since only one part of the issue could properly be called a “current dispute”, but the wording “as a consequence of the Mohameds’ building works” is in my judgement broad enough, taking a commercially realistic and practical approach to construction, to encompass compensation for all damage whenever the works causing it were performed. I also accept the logic of the parties requiring an assessment of compensation at the end of the intended works, so compensation is considered once for all and that any right to challenge that determination should cover all of the issue, no matter when the damage to be compensated may have been inflicted. This is

also the reading likeliest to accord with the parties' commercial intentions given the history of their dealings as well with common sense.

54.
I do not accept Mr Butler KC's further submission that the wording of paragraph 6 viz. "… the issue of compensation for damage caused… as a consequence of the… building works" is intended to comprehend questions of damage causation etc. The wording is distinct from that in paragraph 5(2) which uses the phrase "damage… caused… as a consequence of the building works carried out so far…". Paragraph 6 deals with financial compensation alone.

55.
On a proper reading of paragraph 2 there is no lacuna. Paragraph 2 in terms refers to both the current disputes – "the disputes set out below", and future disputes - "any future party wall disputes … arising out of the current works …". This is so despite the fact that, perhaps clumsily, the first reference to disputes in paragraph 2 is to future disputes. Paragraph 2 comprehends all of the disputes which have been referred to the Agreed Surveyor: those which have already arisen, the current disputes, and any that may in future arise - including as to what damage may be caused by works undertaken after the date of the agreement. Such a dispute would be comprehended within "any future party wall disputes … arising out of the current works being carried out by the Mohameds…" under paragraph 2(2).

56.
This means that the question of the damage and its causation by works so far (under 5(2)) is determined once for all by the Agreed Surveyor, and any future damage and its causation (under 2(2)) will be determined once for all by the Agreed Surveyor – because they are not the subject of the paragraph 6 exception and any agreed right of challenge. Thereafter, quantum would be determined, which determination the parties evinced an intention to treat as susceptible of re-consideration by the County Court. It is irrelevant that the 5(5) determinations had not taken place.

57.
Paragraph 7 indicates the manner in which the parties have agreed the Surveyor will carry out his agreed functions in respect of all disputes. It governs the resolution of all disputes referred; 7(1) indicates that the Agreed Surveyor's determinations will be in writing. Paragraphs 7(3) and (4) indicate that determinations may be summary, without written submissions made and that the Agreed Surveyor may give directions and impose time limits and so forth, and has discretion as to how the disputes are managed. The general obligation to act promptly fairly and proportionately, enabling the works to proceed with all reasonable expedition without unnecessary inconvenience is further set out.

Existence of "Appeal"

58.
It was argued by the Mohameds that to accept one of the Takhar's propositions i.e. that paragraph 7(2) constituted an agreement there should be a right of appeal, but as a matter of law there was none because the determination was outside the scope of the 1996 Act, was to be illogical and failed to apply the proper approach to the construction of the contract. Mr Butler KC referred to the dictum of Carr LJ in Network Rail Infrastructure Ltd v ABC Electrification Ltd [2020] EWCA Civ 1645 (a recent application of the principles set out above) and the need to identify the intention of the parties by reference to the reasonable person with all the background knowledge. He argued there was clearly a common intention to give a right of appeal, for which the Judge had found a practical mechanism - what he called "a procedural route", namely the Liberty to Apply.

59.
I agree with Mr Butler KC to this extent. In common with the Judge below, I accept it is clear the parties intended that there should be a right to litigate the conclusion of the Agreed Surveyor on the paragraph 6 issue. The parties also intended to exclude the effect of the 1996 Act, accordingly, any right of appeal could not arise under the statute, nor in my judgement can it condition the nature or scope of the Court's involvement given the proper analysis of the effect of the Tomlin Contract. A common sense reading in context suggests that characterising the appeal "as if" it were under the 1996 Act was intended to represent agreement that the County Court was also to have jurisdiction in this case, in the event of the dissatisfaction of one of them with the relevant determination. That determination, I have held was as to compensation for damage only and connoted a challenge to quantum. The words used did not import the 1996 Act into the agreement.

60.
Paragraph 7(2) begins by stating broadly that there shall be no right of appeal "in respect of such determinations", in other words a blanket prohibition on challenge in respect of all matters referred, but then provides for the single exception in the determination of "the current dispute set out in paragraph 6", referred to as the "issue of compensation for the damage caused to the Takhars property [etc]". Then come the words "which, for all purposes, shall be treated as if it were an appeal under section 10(17) of the Act." That phrase, in light of the earlier wording of paragraphs 1 and 2 should in my judgement be read in terms of the parties agreeing to invoke the County Court's jurisdiction (as would be the position in a 1996 Act case), but no more than that.

61.
It was submitted by the Mohameds that an alternative analysis was to the effect that the parties had not contracted out of the 1996 Act entirely, but rather had expressly retained section 10(17) in respect of an appeal to the County Court. I reject this submission. As explained above, the language of the Tomlin Contract is clear in excluding the effect of the 1996 Act (from which, see the case of Dillard v F & C Commercial Holdings Limited [2014] EWHC 1219 (QB), they were entitled to contract out), in respect of both current and future disputes. Further, the more fundamental point arises, as the Judge noted, the County Court may take jurisdiction to decide statutory issues only where there is a statutory Award in issue, that is not the case and, as rightly conceded, the parties may not confer upon the County Court, which is not a court of inherent jurisdiction, a jurisdiction that it does not have.

62.
Similarly, the use of the phrase "party wall disputes" in paragraph 2 is merely as a descriptor of the nature of possible future disputes, not a legal characterisation of them nor evidence of an intention to contract into the Act, in light of the clear wording elsewhere in the agreement ousting the 1996 Act.

63.
This interpretation is assisted by the fact that it is clear the parties intended that there should be finality in respect of the determinations of each and every dispute referred to the Agreed Surveyor save for the one issue encapsulated in paragraph 6 such that there should be a swift and relatively clear-cut conclusion to their disputes.

Mechanism and scope of appeal

64.
As to giving effect to the purported right to appeal or challenge, it was argued on behalf of the Mohameds that the wording was sufficient to support the mechanism invoked by the Judge. I regret

that, whilst recognising the sensible thrust of his conclusion, and agreeing in part the outcome, I disagree as to his means of achieving it.

65.
Absent the structure of the 1996 Act, it is agreed the County Court has no jurisdiction to resolve these disputes unless some jurisdiction may be spelt out elsewhere, which the Takhars say, at the high point of their submissions, that it may not: they argue there is no action in play, no contractual dispute, nor any statutory dispute. Mr Mayall emphasises there is no freestanding appellate jurisdiction, and all grants of jurisdiction against non-judicial decision makers are expressly set out – section 10 of the 1996 Act is an example. Both parties properly accept that jurisdiction may not be conferred by consent save as the County Courts Act provides and the Takhars argue there is no effective invocation of the County Court's jurisdiction at all.

66.
I accept that the Liberty to Apply cannot afford the opportunity to impose jurisdiction for a right of appeal or "challenge" upon the County Court as if it were a 1996 Act appeal in circumstances where the 1996 Act does not apply. Accordingly, I agree the Judge was wrong so to hold; in truth it purports to clothe the Court with jurisdiction by agreement which cannot be done - even if called a "challenge".

67.
My reasons for a different analysis derive from the case law concerning the nature of a Tomlin Order and any scheduled contract of settlement. It includes the analysis of Warby J in Zenith Logistics Services (UK) Ltd v Coury [2020] EWHC 774 (QB) where he explains that the only parts of such an order that represent the exercise of judicial power to require, prohibit or allow a party to take any action are the stay of proceedings, and the liberty to apply. The Schedule to such an order does no more than record the terms of settlement, which amount to a contract between the parties which may be enforced only by means of a subsequent application. Warby J said (with emphasis added):

"60.
If, however, one asks whether the Schedule contains or records a direction or imperative issued by the Court in the exercise of its judicial function, one is asking a different question. The question is not one of material form, but an abstract question about what the Court is doing. And this, in my judgment, is the critical question for the purposes of the Appeal and the Application. The answer to the question is also different. In this sense, **as Sir David Foskett says, the terms of settlement are "not strictly part of the immediately enforceable court order". The precise words of the White Book are to be noted: "not part of the order as such".** So too are the exact words used by Ramsay J in Community Care at [28]: **"The terms of the schedule are not an order made by the court"**. This is similar to the wording of Mr Goodfellow's core submissions, as can be seen from the wording of his Grounds of Appeal, quoted at [14] above.

61.
That is clearly right, when it comes to an order in the unvarnished, classic Tomlin form set out in the White Book ([49] above). The only parts of such an order that represent the exercise of judicial power to require, prohibit or allow a party to take any action are the stay of proceedings, and the liberty to apply. The Schedule to such an order does no more than record the terms of settlement, which amount to a contract between the parties. **Those terms can only be enforced by means of a subsequent application. It is only at that point, if it arrives, that the Court may need to scrutinise the terms of settlement and adjudicate on their enforceability.** That is what happened in the case of Bostani v Piper, referred to by the Master. The issue there was whether the Limitation Acts applied to

the application to enforce. The Court held that they did, because the Schedule was a simple contract. There is nothing in the decision that supports the view that the terms in the Schedule to a Tomlin order represent an order of the Court, in the sense I am considering now. Nor do the other two cases mentioned by the Master assist. Both were cases of rectification, treating the Schedule as a contract."

68.
I also do not agree that it is possible to spell out, from the fact the Tomlin Order is an Order of the Court, some sanctioning of that approach by HHJ Bailey. I agree with Mr Mayall that is not the effect of the Zenith decision. Further, the White Book (note 40.6.2) says:

"Essentially, a Tomlin order records terms of settlement agreed between the parties, but those terms are not ordered by the court and are not enforceable without a further order. The terms contained in the schedule are not something for approval by a judge. The judge will, however, approve the order itself.

…

In Community Care North East v Durham CC [2010] EWHC 959 (QB); [2012] 1 W.L.R. 338 (Ramsey J), where the submission that the court has a general power to vary the terms of a settlement agreement incorporated in a Tomlin order was rejected (see further para.40.6.3 below), the authorities on the application of contractual remedies to agreements contained in the schedules to such orders (e.g. rectification) were explained and applied."

69.
Thus, the schedule records the terms of settlement which is a contract between the parties and those terms can only be enforced by a subsequent application. As Warby J also pointed out:

"If it is intended to embody terms of settlement which can be enforced as an order the terms need to be in the order itself (not the schedule) and set out clearly. Such an order should not include provision for a stay of the proceedings as there would be no point to such a stay. Practitioners need to decide whether the case requires an order of the court or a Tomlin order with the compromised terms set out in a schedule and take care to draft the order appropriately."

70.
In Vanden Recycling [2017] CP Rep 33 the Court of Appeal per Hamblen LJ said to like effect [with emphasis added]:

"45.
… a court will not make a consent order unless satisfied that it has power to do so, **whilst it has no right to disapprove a Tomlin order and such an order can include matters that the court has no power to order. A breach of a consent order may be punishable as a contempt in appropriate circumstances, whilst the remedy for breach of the scheduled terms of a Tomlin order is a claim for breach of contract**. In terms of enforcement, the remedies in CPR Pt 83 are available for breach of a consent order but not for breach of a Tomlin order. **Variation of a consent order is possible in the interests of justice, whilst rectification would be necessary to vary the contractual terms of a Tomlin order.** Confidentiality for a consent order requires CPR r 39.2 to be satisfied, whilst it can be contractually agreed for a Tomlin order. **An appeal of a consent order is possible subject to the usual permission test, whilst there is no appeal from the agreed terms of a Tomlin order. These differences reflect the fact that a consent order is an order of the court whilst the scheduled terms to a Tomlin order are a contractual agreement.**

…

47.
… A Tomlin order involves a contractual settlement agreement and allows for proceedings to be continued for the purpose of carrying out that agreement. **In the consent order the settlement terms are part of the court order. Enforcement does not require further proceedings. Application can be made directly to the court to enforce the terms of the order it has made.**"

71.
Accordingly, I do not believe it is possible to take comfort from the fact that the Judge who made the Tomlin Order may have seen the terms of the Schedule containing the Tomlin Contract. To do so might be said to blur the distinction between a Tomlin Order and a consent order.

Estoppel

72.
I have reached these conclusions on the construction of the words used, but a further point was raised by the Takhars, were I not to accept their submission that the 1996 had been completely excluded from effect under the Tomlin Contract. It was argued before HHJ Parfitt and before me that an estoppel arose prohibiting the Mohameds from arguing that the 1996 Act applied at all in respect of this Tomlin Contract. HHJ Parfitt said the following at paragraph [33] of his judgement of November 2021:

" … I do consider it would be allowing the appellants to play fast and loose to allow them to take the no and yes approach to the interaction between the Act and the Tomlin order and that on the facts of this particular case, justice requires the appellants to be prevented from asserting before me that the '96 Act continued to apply. In my view, to do otherwise would allow the appellants to both reprobate and approbate the '96 Act's application to the disputes described in the Tomlin order in a manner that would be unfair and contrary to the interests of justice."

73.
For the same reasons (not repeated here) as given in that judgment I am clear that the Mohameds are estopped from arguing the 1996 Act applies. There is a stark inconsistency between the position adopted by the Mohameds before HHJ Bailey in which they asserted that the agreement did not bind them, and that taken before HHJ Parfitt and here on the 1996 Act. I do not accept that it was necessary for the application or otherwise of s.10(17) of the 1996 Act to have been directly in issue before HHJ Bailey: that mistakes the broad approach of the courts to the doctrine.

74.
I do not accept as submitted that the Judge was wrong to consider the fairness issue as widely as he did, including in respect of the previous litigant surveyors. It was suggested that HHJ Parfitt should have been concerned only with fairness between the Mohameds and the Takhars, and that the argument had benefited the Takhars equally in the 2017 proceedings. However, as the authorities carefully considered by the Judge set out, the issue is the protection of the integrity of the judicial process by prohibiting parties from changing position at whim. The doctrine is widely drawn, certainly sufficiently so as to cover the current position.

Jurisdiction

75.

As to the two alternative mechanisms suggested by the Mohameds, I accept that by virtue of section 15 of the 1984 Act, the County Court may take jurisdiction over the dispute as to quantum of compensation. However, the parties will require to sue upon the Tomlin Contract. It appears to me no strain upon the language of section 15 to hold that, insofar as there might be a dispute between the parties as to the matters contained in any Agreed Surveyor's determination in respect of paragraph 6, that would be a dispute "based upon a contract" namely that contained in the Tomlin Contract scheduled to the Tomlin Order.

76.
As to whether this is a claim "founded on a contract" as that phrase is properly to be understood, the case of Hutchings v Islington L.B.C (C.A.) [1998] 1 WLR 1629 is helpful (and is one of the few authorities on the point). There, vindication of a statutory entitlement to pension was held to be capable of being an action founded on a contract of employment, giving the County Court jurisdiction. I was also referred to Cussens v Realreed Ltd [2013] EWHC 1229, a landlord and tenant case to like effect where Andrew Smith J held that in landlord and tenant proceedings for a declaration, there was jurisdiction in the County Court:

"…. Under section 15 of the 1984 Act County Courts may hear "any action founded on contract …". Mr Seitler submitted that these proceedings are "founded on contract", even though there was no privity of contract between the landlord and the tenant. I accept that submission. A lease is, of course, a contract. Sections 78 and 79 of the Law of Property Act 1925 (the "1925 Act") provide that covenants in leases, if they are covenants "related to any land" of the covenantee or, as the case might be, the covenantor, are deemed to be made with or on behalf of persons deriving title from them. A landlord is entitled to enforce a tenant's covenants: section 141 of the 1925 Act. This, it seems to me, means that proceedings of this kind brought by a landlord against a tenant between whom there is privity of estate are "founded on contract" within the meaning of section 15."

77.
Further, as cited in Hutchins:

"The rule … that … if, in order successfully to maintain his action, it is necessary for [the plaintiff] to rely upon and prove a contract, the action is one founded upon contract. See per A. L. Smith L.J. in Turner v Stallibrass [1898] 1 Q.B. 56 , 58."

78.
Turner v Stallibrass was a case concerning whether the claimant was compelled to rely upon a contract or as was held, in fact he could and did make his case in negligence (the issue was the amount of recoverable costs for the one as opposed to the other action).

79.
The contractual analysis would work in the following way in my judgement: the parties would need to assert there was a breach of the Tomlin Contract.

80.
It was argued by the Mohameds that the agreement meant the Court could intervene in the same way that it would be able to if the 1996 Act did apply, and that this was a contractual agreement as to the scope of the County Court's jurisdiction. I disagree.

81.

The scope of the appeal is not a matter which the parties may decide for themselves, in my judgement, it is a matter of the Court's own jurisdiction. This is a contractual dispute in which the Court must adjudicate upon an asserted breach of contract. A failure to pay the sum determined by the Agreed Surveyor as compensation could be defended by reference to an implied term requiring payment of compensation under the settlement agreement only of a sum determined without error of principle or procedural unfairness, or to the effect that a party should be restrained from accepting a determined sum for the same reason, that the determination reached does not represent what the parties contracted for – namely a proper estimation of compensation reached according to proper principle as the Tomlin Contract implies. Thus, the scope of the Court's intervention will accord more nearly with the description of the "appeal" argued for by the Takhars, and similar to that in an appeal by way of review.

82.
This analysis is consistent with the fact that the parties had, on my analysis, agreed that the subject matter of the dispute was an expert determination on compensation which necessarily involved a recognition of the expertise of the Agreed Surveyor. This interpretation is apposite particularly against the extended contractual background which has been described. The context suggests strongly that the intention of the parties was to minimise the scope for lengthy re-determination of matters committed to the Agreed Surveyor, for the reasons given.

83.
It will not be an appeal - rather a determination of a contractual dispute, but, like HHJ Parfitt, I do not find that the word "appeal" is any impediment to construing the agreement, without literalism, as meaning the parties wished for a right to resort to the County Court if dissatisfied with (on my findings) financial compensation awarded by the Agreed Surveyor.

84.
As to section 18, I find it is not necessary to determine the issue, but it seems to me to present some difficulty in this context. The section provides:

"Jurisdiction by agreement in certain actions.

18.
If the parties to any action, other than an action which, if commenced in the High Court, would have been assigned to the Chancery Division or to the Family Division or have involved the exercise of the High Court's Admiralty jurisdiction agree, by a memorandum signed by them or by their respective legal representatives, that the county court shall have jurisdiction in the action, that court shall have jurisdiction to hear and determine the action accordingly."

85.
There is clearly a memorandum in writing signed by the parties agreeing that the County Court have jurisdiction, and the documentation does not have the difficulties of arguing an implied agreement by virtue of failing to object to jurisdiction in the pleadings as in the Cussons case. At the time of signing the Tomlin Contract the parties were parties to "the action[s]", which upon agreement, became stayed. Under section 18, however, jurisdiction is described as "in the action" to which the signatories are parties and in which the memorandum is signed. Here the Tomlin Contract would give rise to an action – but it is quite clearly a different one – it is an action on the Tomlin Contract. For these reasons I doubt the applicability of section 18 of the 1984 Act.

86.

Accordingly, by reference to section 15 of the 1984 Act, for the reasons given above, the County Court may hear a contractual dispute (yet to be articulated in proper form) but limited to ascertaining whether there had been a breach in the terms set out.

CROSS APPEAL

87.
The Mohameds' cross appeal on costs does not arise in the form in which it was made as I have overturned a number of the bases on which the decision was made which founded the impugned costs decision. The parties will need to make separate submissions on the appropriate order in the current case.

ANSWERING THE QUESTIONS

88.
My conclusions on the issues are thus.

a.
Is there any appeal?

89.
The parties may have recourse to the County Court but as a matter of a dispute founded on a contract that requires to be articulated as such. The 1996 Act does not apply to the Tomlin Contract or condition the scope of the County Court's jurisdiction.

b.
Is there an estoppel?

90.
Yes, the Mohameds would otherwise be estopped from arguing the 1996 Act applied.

c.
Review or re-hearing?

91.
The County Court will be determining a breach of contract in which there will likely be an allegation in terms that there has been breach of an implied term to require payment under the settlement agreement only of a sum determined on a fair basis, without error of principle. This is likely to be equivalent to a review jurisdiction.

d.
Damages - quantum only?

92.
The scope of the challenge is to the quantum of compensation determination only.

SUMMARY

93.
This appeal succeeds for the reasons given.