Case No: 2CL20030

IN THE CENTRAL LONDON COUNTY COURT
TECHNOLOGY AND CONSTRUCTION LIST

26 Park Crescent
London
W1B 1HT

15th July 2013

B E F O R E:

HIS HONOUR JUDGE EDWARD BAILEY

Eileen Paul Kelliher	**Claimant**
- and -	
Ash Estates Holdings Limited and Norman Developments Limited	**Defendant**

Judgment (Approved)

Compril Limited
Telephone: 01642 232324
Facsimile: 01642 244001
Denmark House
169-173 Stockton Street
Middlehaven
Middlesbrough
TS2 1BY

No. of folios in transcript: 235
No. of words in transcript: 16940

1 In this claim Miss Eileen Kellieher, whom we have called simply the Claimant, is both an appellant in an appeal under *The Party Wall etc Act 1996* and also the Claimant in Part 7 proceedings brought for damages for nuisance, negligence and breach of statutory duty.

2 The Party Wall appeal is in respect of an award made by the third surveyor, Mr Redler, dated 14th February 2012. It is brought by Miss Kellieher, the owner and occupier of 19 Courtnell Street, London W2, as adjoining owner, against the Respondent Ash Estates Holdings Limited of 21 Courtnell Street London W2, the building owner.

3 The skeleton argument submitted in support of this appeal describes 19 Courtnell Street as a Victorian era brick built terrace house with an attractive stucco façade on the ground and two upper floors. 21 Courtnell Street is the adjacent house to the right, looking from the street. It is owned by Ash Estates Holding Limited a company registered in the British Virgin Islands and of which the Claimant asserts, although there is no evidence of this, a Mr Lars Clausen is a beneficial owner.

4 In the Part 7 action Ash Estates Holdings Limited is the First Defendant. The Second Defendant Normand Developments Limited is a company associated with the First Defendant. It was the company responsible for carrying out the party wall and other works of which the Claimant makes complaint in these conjoined proceedings.

5 The party wall matters cover three elements of claim. The cost of repair of plaster work to the part wall at number 19; the loss of amenity, which the Claimant says she suffered as a result of the manner in which the works were carried out; and the question of costs. The Part 7 claim brings in other matters which I will deal with individually in due course.

6 It is necessary to consider the events as they unfolded between early 2010 and continuing indeed until recent times. I have been much assisted by an extremely detailed chronology prepared by counsel for the Defendant, to whom I am grateful. In considering (I trust in appropriate but not too great detail) the events that unfolded, I have divided the period into eight separate sections essentially to add structure to the amount of detail which is available to be considered on the papers.

7 These eight sections are as follows:

(1) Prior to the pre-works meeting on 9th December 2009.
(2) Period from 9th December 2009 to 23rd April 2010 when the party wall works were suspended.
(3) From 24th April 2010 until 2nd June 2010 when, on the making of the first addendum award, it was possible for the Respondents/Defendants to resume works.
(4) From 3rd June 2010 until 5th October 2010; this being the date of the last formal site visit Mr Fairhurst the engineer employed by the Claimant as adjoining owner made his last formal site visit and, as a result of which, he added additional matters to his pre-existing schedule of damage.
(5) From 6th October 2010 until 22nd December 2010- the making of the second addendum award.

(6) From 23rd December 2010 until 29th July 2011, which was the date on which the re-plastering works which were carried out at number 19 while the Claimant was away in South America.
(7) From 30th July 2011 until 14th February 2012 when the fifth award was made, subject to the present appeal.
(8) Post 14th February 2012.

(1) Prior to the pre-works meeting on 9th December 2009.

8 The Claimant purchased number 19 on 3rd March 2007. She was then an equity partner in a well-known city firm of solicitors and she decided to carry out a substantial programme of works to refurbish and/or improve the property. She entered into an intermediate JCT building contract with a company 'Matt Interiors Limited' involving a significant schedule of works, including substantial re-plastering of the walls to the property. Some 380 square metres of wall was to be re-plastered and this, I was informed, represents the majority of the walls to number 19.

9 It is of no immediate materiality but it probably was the case that the plaster that was removed was in essence, if not in its entirety, the old lime plaster which would have been applied when the property was constructed in around 1862. The Matt Interiors contract specification called for the application of a modern two-coat plaster and that work was carried out during the course of 2008. Practical completion of the works was in November 2008. A snagging list was prepared by Matt Interiors Limited in February 2009. This list does not indicate anything more than minor remedial work necessary to the plastering that had been carried out under the contract.

10 Matt Interiors Limited became insolvent in early 2009 and was not therefore available to carry out works at the conclusion of the defects period when a final list of snagging works was produced by the supervising officer Mr Peter Harris. That work was not carried out until late November 2009. In the meanwhile, on 28th May 2009, the First Defendant became the registered proprietor of number 21. The property was acquired with a view to refurbishment. It was in poor condition and was indeed occupied at some point by squatters.

11 Ash Estates Limited, the First Defendant is part of a group of companies, subsidiaries of a British Virgin Island Company. The evidence of Lars Clausen was that, ordinarily, the First Defendant Ash Estates Holdings Limited would receive rents while the properties in respect of which rents were paid would be in the ownership of another subsidiary company Cherry Estates Holdings Limited. For reasons unknown to Mr Clausen the property was purchased in the name of Ash rather than Cherry. This plays a minor part in the chronology.

12 The Second Defendant, Normand Developments Limited, is a construction company of which Mr Clausen is the managing director. It was always proposed in accordance with the practice of this group of companies that the refurbishment and other construction works at number 21 would be carried out by the Second Defendant.

13 Planning permission was sought and duly obtained. The works for which permission was obtained was rather more extensive than a simple refurbishment of the existing property. The lettable area was to be increased by the excavation and provision of a basement below the original structure and also by the erection of a mansard extension

on the roof. The fact that this development was to take place was notified to the Claimant at number 19 and also the owner of number 23.

14 In November 2009 the e-mail traffic shows the Claimant arranging for Mr Harris to undertake a review of the planning proposals and also concern expressed by a Mr Kevin Mcgahan a partner in the engineering firm KMG Partnership as to the practicality of constructing the proposed deep-raft foundation on which the basement excavation was to be founded. Apart from this concern, however, it appears that it was Mr Mcgahan's view that there was nothing, in principle from a structural viewpoint, that could be highlighted in an objection to the local planning authority.

15 On 24th November 2009 Mr Harris produced his final snagging list for the completion of the works which the Claimant had carried out at number 19 and, by 2nd December 2009, Miss Kelliher the Claimant, appreciating that there would be party wall notices served on her under the Act, authorised Mr David Moon to act as her party wall surveyor.

16 Accordingly, by 9th December 2009 the Claimant had had professionals look at the plans on which it was proposed the First Defendant would obtain permission and carry out works which would include party wall works.

(2) Period from 9th December 2009 to 23rd April 2010 when the party wall works were suspended.

17 On 9th December 2009 Mr Timothy Payne, who had been appointed to act as a party wall surveyor by the First Defendant, sent a letter to the Claimant serving notices under both section 3, the party structure section, and section 6, the adjacent excavation section, of the 1996 Act. It is the case that these notices were served in the name of Cherry Estates Limited this being the company which would ordinarily have been the building owner.

18 The same day there was a meeting at number 21 attended by Mr Clausen and Mr Payne and also on behalf of the Claimant Mr Harris, who was acting in an architectural capacity, Mr Fairhurst engineer and Mr Guerguis an assistant surveyor who was standing in for Mr Moon. The meeting discussed the proposed works and the only point of note for present purposes is that Mr Clausen mentioned to the meeting that it was proposed that, prior to the party wall award being made and planning permission being obtained, the second Defendant would undertake a "soft-strip" of number 21.

19 Over the following days, between 10th and 16th December 2009, the Defendant's professionals forwarded the full architectural package and the proposed engineer's method statement for the carrying out of the proposed works to the Claimant's professionals for their consideration.

20 So far as the substructure excavation was concerned Mr Fairhurst took the view that the proposed method was consistent with normal practice, although he noted that the depths required to form the basement slab and wall are greater than usually found in traditional underpinning. That was an observation he made within the Claimant's team copying his e-mail to Peter Harris, to Mr Guerguis and the Claimant.

21 By mid to late January 2010 no party wall award had been made. Neither, as I understand it, had planning permission been granted although I do not have the precise date on which planning permission was obtained. Nonetheless, as forewarned by Mr Clausen, the second Defendants commenced work at number 21 undertaking what had been described as 'soft-strip demolition works'.

22 It is a matter of some relevance that the second Defendant had two gangs of workman. One gang described as essentially English workers, the other Bulgarian. It was the East European gang who were involved in the work at 21.

23 There is no accepted definition of 'soft-strip'. It is an expression often associated with works undertaken in order to reclaim materials for recycling from sites due for demolition or substantial refurbishment. There is no particular magic to a definition of soft-strip; plainly the operative word is 'soft'. There is no harm in a soft-strip as commonly understood to take place before a party wall award is made. Indeed it is inconsistent with what is traditionally understood by soft-strip that any works comprised in the exercise would be notifiable under the Act.

24 No criticism can be levied against the second Defendant for starting such works but it is of significance that, not only had there been no party wall award but of importance for present purposes is that these works commenced before a schedule of condition of number 19 had been prepared let alone agreed.

25 The works required under the final snagging list which Mr Peter Harris had prepared on 24th November 2009 for 19 Courtnell Street were being carried out during January 2010 by Mr Scott Bradley, or rather his firm S Bradley Refurbishment and Fit Out. This is a firm of which Mr Scott Bradley was the proprietor working alongside his father Alan Bradley.

26 On 25th January 2010 Mr Bradley contacted the Claimant and informed her that there was a fair amount of noise and vibration coming from the works being undertaken at number 21. This was sufficient to cause cracking to the plaster work to the party wall in number 19. This was reported to Mr Harris who e-mailed Mr Guerguis the same day at 17:23 to ask him to contact Mr Payne, as party wall surveyor for number 21, to arrange for this work to stop.

27 The following day Mr Harris, who works close by Courtnell Street, visited the site. He spoke with Mr Scott Bradley's painters and received confirmation that the vibration and banging was taking place. Mr Harris then visited the site at 21. There the second Defendants' workmen stated that they were hacking off the plaster on the party wall. On 26th January 2010 Mr Harris was told, or at least he understood from what he was told, (because it must be borne in mind that there is at least the possibility of language communication difficulties), that the hacking off to that time had been done by hand but that, as they found it difficult to remove all the plaster by hand, they would be using a drill the following week.

28 In his statement in a passage which was not challenged in the course of evidence Mr Harris says at paragraph 20:

> "On 26th January the Claimant called me again saying there were further reports of banging and vibration. My office is a few streets away from number 19 so I went round to see and hear for myself. I heard the loud drilling noise coming through the wall and it was obvious that mechanical tools were being used on the party structure.
>
> I went around to number 21 saw the contractors had done extensive demolition removing structures within the property that had been attached to the party wall and they had begun scabbling to the party wall and some excavation. The nature of the works being undertaken was very significant and it appeared that full demolition and excavation were being commenced despite the absence of any awards."

29 Precisely what work was being undertaken is not clear. It may be that Mr Harris assumed that excavation was starting when it had not yet begun, but it is plain on Mr Harris' evidence, which I accept, that the second Defendant's workman had gone a great deal further than a soft-strip of the interior of number 21.

30 The same day Mr Clausen e-mailed Mr Harris to say that the work which had started at number 21 was under the strict understanding that they were not to touch the party walls. Quite plainly that instruction was not being adhered to. Not only was the work affecting the party walls but cracks had appeared in the plaster to the party wall within number 19.

31 In the following exchange of e-mails the Defendants sought to give assurance to the Claimant that the party wall would not be affected by their works and the Claimant made clear that she understood she had rights in common law to prevent damage to her home. Nonetheless, on 27th January 2010, the Claimant while at home heard what she describes as mechanical noises, vibrations and loud banging on the party wall. Accordingly she went round to accost those responsible at number 21 as she put it in her statement,

> "This was my first interaction with the builders and I was met with some hostility. I was given to understand that none of them spoke English but I persisted and the person I understood to be the foreman came to speak to me. He was also uncommunicative and unfriendly but I was told by him that they had not received any instructions to stop work."

32 Accordingly, she sent an e-mail to Mr Payne and Mr Harris reporting on her conversation. Mr Clausen, on being alerted to the complaint, said he would attend the site to see what was happening. He later gave assurances that he would ensure that there would be no more activity on the party wall and that the cracks which had appeared within number 19 would be made good.

33 As to the state of the plasterwork at no.19 it was Mr Bradley's evidence at paragraph 8 of his statement that at the time of the works it was obvious to him that the plaster work at number 19 had been recently replaced and he adds,

> "we checked walls thoroughly, including the party wall between number 19 and 21 and there were no areas of blown plaster whatsoever. By the expression blown plaster I mean plaster where the bonding coat is loose and coming away from the brick wall."

34 With respect to the noises emanating from number 21 Mr Bradley says that there were two distinct types of noise. There was the sound of a hammer or chisel against the party wall and that there was a loud and constant drone of mechanical drills which he describes as a Kango drill or small breaker.

> "There were also strong vibrations in the wall. These were strong and could be felt clearly when I touched the wall. I was very concerned because it felt like the workers on number 21's side might even come through the wall. From my experience and knowledge of the type of building I could tell (from the type of noise and location of the vibrations) that the builders at number 21 were trying to remove plaster from their side of the party wall and, presumably because they were struggling to do it manually, had resorted to a mechanical drill."

35 He comments that it seemed odd to him. If it were that difficult to remove the plaster he questioned the need to remove the plaster at all.

36 Because of the difficulties that had been encountered Mr Clausen proposed to Miss Kelliher that they met. This meeting took place on 5th February 2010. Mr Clausen explained the position. He apologised for the Defendant's workers' behaviour which he described as over-enthusiasm on their part. There was also some discussion as to the possibility that the second Defendant might undertake a mansard roof extension for the Claimant, it having come to Mr Clausen's attention that Miss Kelliher had permission for such an extension. For her part Miss Kelliher explained to Mr Clausen that she worked long hours in the city. As a result she would not be present in her home much during the week but she was very anxious to have peace and quiet during the weekend. She describes Courtnell Street as being a very quiet residential street little used by traffic and with neighbouring residents who were respectful of that nature of the street.

37 Meanwhile discussions were taking place between professionals leading to a party wall award on 8th February 2010. Mr Clausen sent to Mr Harris the method statement that had been prepared for the cutting out and formation of Padstones to support the works being undertaken in the basement. This was followed the next day with a request that the Claimant give permission for party wall works to commence in advance of the award and Mr Fairhurst was asked to comment on the adequacy of the method proposed for the engineering of the basement excavation. An inspection of number 19 for the purposes of preparing a schedule of condition had been a little delayed because of Mr Payne's absence on holiday. It took place on 16th February 2010 when Mr Payne was in attendance on behalf of the building owner and Mr Guerguis for the Claimant as adjoining owner.

38 During the course of the inspection the surveyors heard the noise of work being carried out while they were on the second floor. Mr Guerguis clearly remembers hearing percussive machinery being used very close to or on the party wall. He went round to no 21 to investigate and found that workmen were not only removing plaster but, in addition, there was brickwork to a second-floor chimney breast that was missing. Whatever view might be taken about the removal of plaster (to which I will come in due course) it was quite plain to Mr Guerguis that removal of brickwork to a chimney breast which formed part of the party wall was not permissible.

39 On 19th February 2010 Mr Payne was informed that the Claimant had no objection to the formation of beams and Padstones into the party wall. The schedule of condition resulting from the inspection on 16th February was produced on 23rd February 2010. This schedule indicated that there were some areas of hollow plaster. In giving evidence Mr Payne explained that, after hearing the noise of the machinery being used next door, he was concerned that his client might be blamed for areas of hollow plaster. He found some areas of hollow plaster fairly adjacent to the area where the sounds of the noise had come from and these and one or two other areas were noted on the schedule of condition.

40 On 12th March 2010 the Claimant was admitted to London Bridge Hospital as an inpatient suffering from acute idiopathic thrombocytopenia. It proved to be a very stressful admission experience, the Claimant suffering with acute bleeding with the risk of such bleeding spreading. She was treated with steroids which reversed the condition and the Claimant was well enough to be discharged on 18th March. Her discharge was followed by regular reviews and continuing treatment every few weeks to June 2010 and thereafter reviews on a 6 to 12 monthly basis.

41 Meanwhile, discussions were still taking place with a view to a party wall award. There was particular concern as to the use of special foundations, not from the Claimant's perspective, but the party wall surveyor to no 23, Mr Anthony Lyons, had real concerns as to their use.

42 On 17th March 2010, with a draft party wall award in circulation, it was discovered by the surveyors that it was indeed the first Defendants Ash Estates who were the owners of number 21 rather than Cherry Estates. This of course made the original notices strictly of no effect, but it was agreed that the Claimant would accept the notices as having been served by the first Defendant.

43 It is, I trust, fair to summarise the discussions at the time as to the party wall award as showing a rather greater concern and therefore more difficulties raised by the advisors to number 23 than to the Claimant.

44 On 25th March 2010 Mr Harris, then walking past number 21, saw excavated material being taken from the property which led him to conclude that excavation works had commenced in earnest. He e-mailed Mr Clausen noting that excavation work had commenced and pointing out that works at 21 had already caused damage to number 19. In particular the second Defendant's workmen had been called on to open the Claimants front door which had become stuck which give rise to the inference that this was the result of movement the consequence of works carried out at no. 21.

45 It is of note that in an e-mail sent by Mr Payne to Mr Baldwin the building owner's engineer, Mr Payne records that he had confirmed to the party building surveyor at number 23 that no excavation was being carried out on the number 23 Courtnell Street side of the property. It may be safely inferred that it was well recognised that the Second Defendant were excavating on the no 19 side.

46 In the e-mail exchange which followed later that day that Mr Payne took a rather cavalier view of the need to have a party wall award in place before carrying out what were quite plainly party wall works. Indeed he rather annoyed Mr Harris with his

attitude. Mr Harris complained, as I see it justifiably, that in giving oral undertakings that the excavation would not commence until the award had been made but allowing the works to be carried before the award Mr Clausen had behaved most improperly.

47 The effect of the excavation was felt at number 19 not only by the door sticking but by a large crack through the front elevation. Mr Harris gave evidence in paragraph 29 of his statement that on 26th March 2010, having been made aware by Alan and Scott Bradley of a large crack through the main façade, he had walked past the property and he could clearly see the crack. He was not however able to see from the outside where the damage to the front door had arisen and he sought authorisation to enter the 21 side to inspect the works and to determine where the damage had originated.

48 It is understandable that the First Defendant wished to arrive at party wall awards with both their neighbours simultaneously. Unfortunately the Defendant became embroiled in the concerns of Mr Frank Van Luck, the engineer acting for no 23, over the proposals which Mr Baldwin, the Defendant's engineer had put forward and his calculations supporting those proposals. This led to a heated exchange of no immediate materiality to the present case, save that it is plain that feelings were running high and this only served to delay the finalisation and the conclusion of the party wall awards.

49 Meanwhile there was a financial imperative on the Defendants to get on with the works and, as I have noted they did so with serious adverse effects to the structure of no 19.

50 There was also what I may describe as a typical discussion over fee arrangements, provision of security, and consent for special foundations that took place over the end of March and the beginning of April. The Claimant, perhaps well out of it, had left home for a stay in Ireland on 31st March 2010. There was to-ing and fro-ing over revised engineering drawings and matters proceeded, from the party wall award perspective, at an extremely slow pace during the first 3 weeks of April.

51 On 21st April Mr Alan Bradley reported that he had seen disturbance of the coverings to the roof of number 19, presumably by workmen employed by the second Defendant. On 22nd April 2010 the Claimant on her return from Ireland saw the cracks in the front façade and the party wall that had resulted from the works at 21.

52 Around the same time it is Mr Scott Bradley's evidence that he inspected the crack at the front elevation at the Claimant's request and,

> "I went to have a look and at the same time I checked the condition of the plaster on the party wall. I could tell that it was now showing signs of damage that had not been there a few months earlier. I could tell that there were large patches of blown plaster."

53 Meanwhile Mr Lyons, the party wall surveyor for number 23, had visited the site and his concerns were such that he e-mailed Mr Payne to state that the excavation was clearly putting the stability of the party wall at risk and that urgent work was required to remedy the situation. He added,

> "It would appear from what you have told me that the works are not being adequately overseen by the professionals who had been appointed by the building owner".

54 In a further e-mail to Mr Payne Mr Anthony Lyons (party wall surveyor to no 23) commented that he was appalled to see that the works to the party wall had been carried on regardless of there being no award in place. The wall had been raised, beams had been installed, Padstones built into the wall, some underpinning has been carried out under the party wall, and a huge amount of spoil had been excavated from the basement. Mr Lyons informed the building control department of Westminster City Council and on visiting the site the building control officer ordered the work to be stopped.

55 Mr Rowland Hillard, who was the second Defendant's supervisor of the works, told me that much of this work had been carried out while he, Mr Hillard, was away on holiday. In an e-mail to Mr Payne he said,

> "I don't know if either they [ie his men] were jumping the gun or just plain stupid."

But whatever it was the Second Defendant's workmen had disregarded his instructions to leave undisturbed ground in the centre of the excavation. As a result the methodology had gone out of the widow and the building control officer, described as the district surveyor, had asked for the site to be propped. It was now no longer possible to follow the engineering method that had been proposed by Mr Baldwin and of course it was on the basis of this method that the party wall award was being prepared.

56 The Claimant took the view that the award should nevertheless be completed and she threatened seeking injunctive relief. On 23rd April the party wall award was made, clearly on the understanding that the engineering aspect of the excavation for the basement works would have to be the subject of a detailed award. The party wall award provided for working hours 09:00 to 17:30 Monday to Friday with no works permitted on Saturdays, Sundays or bank holidays. The planning permission (which had been obtained by this time) was subject to conditions that work should not commence before 8:30am continue beyond 6:00pm on Mondays to Fridays but 1:00pm on Saturdays.

(3) From 24th April 2010 until 2nd June 2010 when, on the making of the first addendum award, it was possible for the Respondents/Defendants to resume works.

57 Between 24th April and 2nd June there were discussions towards a new scheme for excavating the basement and underpinning the party wall. Inspections took place and damage recorded on 26th April. Mr Fairhurst noted new cracking, both externally and internally, to number 19 and he observes in his site visit record that the works carried out were totally at odds with the design and method statement. Further, if nothing else but to raise a faint smile, he notes that he was told by the workers on site that the site manager had been away on a health and safety course while they were acting as they had in such an unsafe manner.

58 Mr Guerguis also saw a new pattern of cracking on the plaster work to the party wall on 26th April which had not been present on 16th February. Meanwhile, although works took place and the excavation had been stopped, works to the remaining works were being continued. On 7th May for example the Claimant complained of noisy drilling on the party wall at 8:30am. She spoke to the foreman in charge of the workers, took him through the party wall agreement to show him that he was not to work before 9 o'clock to be told that nobody had informed him of this requirement. Mr Moon also was concerned about the lack of supervision.

59 It is evident that the relationship between the respective professionals was not as harmonious as it might have been. And over the course of this period, that is the period leading to the first addendum award, there were a number of communications as to the proposed reworking of the engineering methodology and the calculations supporting that methodology which showed conflicting views and less then perfect understanding as to how to arrive at a final conclusion.

60 It is understandable that those professionals, incidentally the professional team working for no 23, who had been given assurances that work would not be commenced before award was in place but had had those assurance broken and who had visited the site and formed the view that the workman on the site were poorly supervised and not properly instructed, should take a firm, possibly difficult approach to the professionals acting for the building owner. I need not consider the discussions between the professionals. It is sufficient to say that a second award was made on 2nd June with modifications to the underpinning detail agreed and that it was also agreed that there should be a raising of the party wall at roof level.

(4) From 3rd June 2010 until 5th October 2010; this being the date of the last formal site visit Mr Fairhurst the engineer employed by the Claimant as adjoining owner made his last formal site visit and, as a result of which, he added additional matters to his pre-existing schedule of damage.

61 This second award enabled the works to the excavation to be recommenced. The second Defendants had not suspended the works in their entirety following the stop placed on the excavation by the building control officer, but in continuing to construct the mansard roof had caused concern to the Claimant's professionals. Their concern was that the effect of these roof works was to add weight to a structure which was not properly supported in the basement, and, accordingly, in continuing with these works the Defendants were risking further damage to the party wall and indeed other elements of the Claimant's property.

62 It is in the nature of damage resulting from inadequate foundations that it is rarely possible to pinpoint precisely the extent of damage which may be attributed to any one of several causes. It cannot be said with certainty that the addition of weight to the Mansard roof did in fact increase the damage sustained at no 19 but it plainly was and remains a possibility.

63 After the second award work recommenced on the basement excavation. Mr Fairhurst's site visit record of 7th June concludes that it was safe for work now to proceed in the basement. And on 11th June 2010 Mr Moon conducted a further

inspection and prepared a schedule of damage which had arisen in his view through the works at number 21.

64 The continuation of the excavation works required further use of heavy machinery, not least in the scabbling of the concrete foundations which had been laid on a top down basis. This plainly was a matter of concern to the Claimant, for the amount of noise which would have been created by heavy machinery would have been the less had the original methodology been followed. The Defendants encountered the difficulty that the *(inaudible)* river runs underneath the road and there was some water in the deep excavation although this appears not to have held up the works to any great degree.

65 Meanwhile there was a discussion in mid-June towards the rebuilding of the garden wall between the properties the need for which had been identified in the original award. The Claimant on 15th June wrote to Mr Moon with regard to his schedule of damage complaining that she had difficulty closing a window in the front bedroom and the window lock and the top lock on the front door.

66 Unfortunately the further works in the basement did not proceed smoothly. On the site inspection on 22nd June 2010 Mr Fairhurst concluded that there were fundamental errors in fixing the reinforcement at the base of the wall demonstrating a lack of understanding by the workforce and an absence of proper site supervision. It is evident that there continued to be concern amongst the Claimant's professionals that the site operatives did not appear to be competent and were not able to carry out the required work in accordance with Mr Baldwin's designs and method statement.

67 At the beginning of July there was some concern on the part of the Claimant that a request from the second Defendant's workforce to remove debris from her roof might result in there being damage but, although this was no doubt a justifiable concern, in the event there was no damage of any significance to the Claimant's roof. Further inspection of the cracking to the front elevation on 8th July 2010 suggested that the damage was not worsening and there were hopes that it would not progress.

68 During July 2010 discussions took place between the surveyors as to the remedial works that would need to be carried out to no. 19 and there was quite evident a disagreement between them, particularly with regard to the matter of blown plaster. Little progress was made in this regard. On 16th August 2010 there was a further inspection by Mr Moon who added a number of additional matters to his existing schedule of damage. Attempts were made to settle the dispute which had arisen as to the extent of remedial works that were required as a result of the building owners works but it was not possible for the parties to compromise their differences. By 5th October 2010 a further and final inspection of no 19 by Mr Moon led to him adding yet further matters to his schedule of damage.

(5) From 6th October 2010 until 22nd December 2010- the making of the second addendum award.

69 Between October and December 2010, while works continued at number 21, there were continuing discussions as to the extent of the remedial works, disagreement as to

the extent of the damage caused, and further unsuccessful attempts made to resolve differences.

70 During October works were carried out by the Claimant at number 19, comprising plastering to the main first floor sitting room with associated redecoration and items of joinery with repairs to the roof and repairs to the structural cracking externally with external decoration. The works were carried out by Scott Bradley at a total cost of £17,883 which was paid by the Claimant.

71 During November and December 2010 discussion and negotiations to settle the matter were unsuccessful. In summary the difficulty was that, while Mr Clausen was prepared to pay the total sum requested by the Claimant (notwithstanding the fact that Mr Payne, the Defendant's surveyor, advised that the Claimant was seeking far too much for this works), but only on the basis that she forwent any further claim. It is understandable that Mr Clausen wanted to bring this aspect of his development to an end but equally understandable that the Claimant was not prepared, given the history of the matter, to forgo any further claims in the event that further damage might arise. Accordingly it was necessary for a further award to be made. A second addendum award was produced by Mr Payne and Mr Moon on 22nd of December 2010 awarding the Claimant some £21,339.18 in respect of damage caused by the works.

(6) From 23rd December 2010 until 29th July 2011, which was the date on which the re-plastering works which were carried out at number 19 while the Claimant was away in South America.

72 This second addendum award is described in the skeleton argument supporting the party wall award as 'a provisional determination in respect of compensation to be awarded to Miss Kelliher for damage to her home being simply for cracking, re-plastering and re-decoration'. Many issues were in dispute between the surveyors as noted in paragraphs 4 and 5 of the second addendum award, the areas of disagreement being recorded in the first schedule. The major area of disagreement is in relation to item 30, the unkeyed plaster to the party wall to the top front bedroom. Mr Payne took the view that this was a pre-existing defect. He took the same view as to the unkeyed plaster to the party wall in the first floor main front reception room and to unkeyed plaster in the front hall.

73 It was not possible for the party wall surveyors to reach agreement as to these outstanding matters and a referral was made to Mr Redler as third surveyor. There had already been a referral to him on matters of security and the holding of security which is of no relevance to this case.

74 During July 2011 the Claimant took advantage of her absence from the property on holiday to undertake further re-plastering of the party wall by Scott Bradley. This was not agreed to be damage caused by the works by the Defendant and she had to pay for it herself.

75 During the course of this work Mr Bradley had discovered a crack on the party wall brickwork reach required stitching and epoxy resign repairs, and Mr Moon also found a crack in the external reveal of the front door and considered the cracks on the party wall to be "quite prominent". There were nevertheless plainly some cracks in the

plaster work which were the result of shrinkage nothing to do with the Defendant's works and there remained a disagreement as to both the cause and extent of cracking and de-bonding to the plasterwork.

(7) From 30th July 2011 until 14th February 2012 when the fifth award was made, the subject of the present appeal.

76 During October and November 2011 both surveyors made submissions to the third surveyor. There was an intervention by the Claimant who e-mailed the third surveyor herself which caused concern amongst the surveyors and demonstrates the pressures which understandably were felt by her with regard both to the damage that had occurred to her house but also the very slow progress that was being made or not being made towards a third surveyor award.

77 By January 2012 Mr Moon was concerned that there was evidence that the damage to number 21 may be continuing and by 17th January 2012 Mr Moon found that further cracking had further developed which he attributed to continuing movement in the party wall. This finding was contested by Mr Payne and the point was made that the underpinning had now been completed for over a year and that other properties along Courtnell Street had also shown cracking which was to be taken as subsidence from the unstable nature of the ground beneath the properties.

78 In late January 2012 the Claimant made the claim for inconvenience and disturbance and, following further representations to the third surveyor the fifth award, or his second award, but the fifth award that is subject to this appeal was promulgated on 14th February 2012. That award was substantially in favour of the building owner Mr Redler stating that he could not agree that the unkeyed plaster to the joining owner's house was the result of the building owner's works.

> "I cannot be sure that this is the case particularly as the building owner had commenced work at their property prior to the schedule of conditions being prepared and as Mr Payne has acknowledged that he did not check all areas of the party wall for blown plaster, although this was checked on areas of the wall on upper floors where a hollow patch was noted.
>
> However, I am sympathetic to Mr Payne's argument that the building owner's works are unlikely to cause such extensive unkeying of the plaster. If the plaster had been replaced prior to the building owner's work commencing and done to a high standard then I would not expect this to become so extensively unkeyed. Older plaster is likely to have been hollow in parts in any case as was identified on the upper floor when the schedule of condition was prepared."

79 Mr Redler also agreed with Mr Payne that the crack found in the party wall by Mr Bradley on removing the plaster was likely to be a pre-existing defect as any significant crack would show through plaster, particularly newly applied plaster if the crack had been caused by the building owner's work.

(8) Post 14th February 2012.

80 The party wall award has to be appealed within 14 days so an appeal was launched and shortly followed by the Part 7 claim. There is no need to consider the progression

of these proceedings but I conclude this over-extensive summary of the events by noting that there was difficulty with the tamper alarm which was found in November 2011. On 11th May 2012 Mr Fairhurst visited to inspect number 19 and found new internal cracking which he describes as,

> "Most likely due to a combination of residual consolidation of the clay soil at the deeper foundation level following on complacent excavation at number 21 and drying out / shrinkage of the new plaster which the Claimant had put on during July to repair the original damage."

In the course of oral evidence he said he could not say which was the primary cause, he made the point that building deep foundation was always going to affect the substrater and give rise to ongoing consolidation.

The Claimant's claims

81 I now turn to consider the various claims that are made by the Claimant in these proceeding but I should first make just a few observations on the witnesses that have given evidence.

82 The first comment I should make is that, as in so many construction cases, the sheer volume of contemporary written material means there is little scope for fundamental disagreement on any important fact. There is no indication here that any individual deliberately attempted to deceive in the course of any e-mail or site visit report. That is not to say that, as might reasonably be anticipated, there is a slant from individuals contesting what they see as their corner. That can be taken due account of and does not speak ill of the individual, even (perhaps) the reverse.

83 It is possible that it is unfortunate that the site diary was not disclosed. When considering the extent to which works were undertaken before an award was made it might have been useful. On the other hand, it may not have been. Some site diaries are remarkably devoid of useful information.

84 I have noted in summarising the facts that in the course of the communications between professionals a degree of heat was generated. Mr Van Luck who was the party wall engineer for no 23 took a remarkably firm line on a number of occasions, but he was not alone in raising the temperature. There was also an amount of heat generated during the course of this hearing by Mr Payne's repeated assertion that he was deliberately denied opportunities to inspect the 2008 plaster that was removed by Mr Bradley in October 2010 or the plaster that he removed and repaired in July 2011. I will make brief comment on that in due course.

85 As to reliability of recollection and areas where reporting factual matters does necessary involve contemporary of opinion of professional tradesman as to what he is viewing I will make the following observations. The Claimant's professional team had acted in the main for her on the 2008 refurbishment. There were indications that they showed themselves somewhat protective of the Claimant as a client. Nothing however gave me any course for concern as to the impartiality or reliability of their evidence.

86 With the Defendant's team there is additional complication over their natural empathy with a client that they had acted for the Defendant and/or Cherry Estates and other companies in the group on a number of previous occasions. The impression given are that the Defendants are part of a successful group of property companies. They understandably wish to, and I am sure consider that they do, engage a very professional, competent team. But it is in the nature of that relationship that individual members of the team will be understandably concerned to impress what is after all a good client or one who offers good prospect of future work. They had better relationships as I have observed with the Claimant's team than with their counterparts at number 23 but in general I have felt the need to view aspects of their evidence with a degree of caution.

87 There were at some length settlement negotiations between the parties that caused a degree of ill-humour, although perhaps nothing out of the ordinary. These are negotiations which Mr Bickford-Smith, counsel for the Claimant, has summarised at considerable length at paragraph 47 of his closing submissions.

88 I resist the temptation to rehearse the course of negotiations. As I have already commented, in essence Mr Clausen was prepared to pay what was being asked in 2010 by way of compensation for carrying out remedial works but only in full and final settlement. It is quite understandable that he wanted an end to the matter. The Claimant on the other hand was not prepared to give up rights to future claims should further damage arise given the uncertainty that all further settlement, other damage arising from the works at 21 had been completed.

89 The formula proposed by Mr Payne that the settlement would not be in full and final compromise of all matters but only those which would not cover those matters of which "we are not currently aware" understandably gave the Claimant little cause for comfort. The real concern that the court has about these settlement negotiations was the use that Mr Payne put them to when dealing with the third surveyor on the award the subject of this appeal. I am bound to say it seems to me quite inappropriate to draw such negotiations to the attention of the third surveyor at all. Further than that; the manner in which they were drawn to his attention was, to put it mildly, unfortunate.

90 Mr Redler was sent both details of the negotiations and also he was copies of many of the communications. I am bound to say a surveyor who engages in party wall work surely should pause before writing as Mr Payne did on 28th October 2011:

> "In making your decision please consider the following points. Ash Estates is the building owner previously and, entirely without prejudice, offered to settle Eileen Kelleher the adjoining owner's claim of £43,781.68 in full. I attached copies of my e-mail."

And so on….

What did he think entirely without prejudice meant? It would be strange if a surveyor was to take the view that it was perfectly proper to send to a third a surveyor, acting in a quasi judicial capacity, material which he would never dream of sending to a judge acting in a fully judicial capacity. It is as I say unfortunate; not least because although

careful reading of what he says shows that he did make some effort to present both sides of the story, the effect of the submission might well have led, and I assume was designed to lead, to the third surveyor taking the view that the building owner was being entirely reasonable and that the adjoining owner was not. I do not overlook the fact that Mr Redler did send an e-mail stating that he would not be influenced by these matters, but it is a great pity that he was put in this position and I think it probably best that I say no more about it.

91 I turn then to the party wall award appeal. The first item is that of blown plaster. The principle award requires that damage to number 19 caused by the building owner works be made good. That is the effect of section 7(2) of the Act. The Act proceeds on the basis that the adjoining owner may elect either to have the building owner carry out the works or, under section 11(8) to claim damages. There is a substantial issue on the blown plaster claim. Mr Payne expressed the view and argued to the third surveyor that blown plaster is not in itself a defect. It is possible that a very small area of blown plaster might possibly be considered not to have been a defect but I certainly would not readily take that view myself. But the extent to which there was blown plaster in this case with the need to replace some 100 square metres of plaster makes the suggestion that it does not amount to a defect quite unacceptable. It really cannot be suggested that this amount of plaster can be left blown in any house, whatever its standard of decorative repair, let alone one finished to the high standards to be found in no 19. I accept that that blown plaster was not an expected consequence of the works. It is the experience of the professionals giving evidence in this case that it rarely, in Mr Whitestone's view never, happens. The fact that such a consequence is not to be expected cannot be ignored but neither can it be determinative.

92 Of course with a house originally constructed in the 1860s it would not be at all surprising that old lime plaster is by 2010 extensively unkeyed and ready to come off the walls. Age alone coupled with the effects of central heating will readily make the old lime plaster unkeyed. Where, however, the plaster is newly applied to modern standards is unusual for party wall works to result in substantial areas of unkeying.

93 In the circumstances it is not at all surprising that the Defendants came to court unwilling to admit that the plaster had indeed been replaced with a modern two coat plaster in 2008, as the Claimant maintained was the case. In the light of the evidence however, the Defendants accept (realistically) that this work or renewing the plaster was indeed done. The Defendants therefore argue that the work must have been done poorly; so poorly that the work carried out in 2008 and in respect of which the defects period ran out in 2009 and the snagging works completed in 2010 had failed very soon afterwards.

94 The central issue therefore is how did the plaster come to be blown? The Claimant's case is that it was a result of vibration and settlement from no 21. The Defendant's case is that it must have been poor application in 2008 without any proper remedial work carried out at the end of the defects period. The suggestion at the start of the trial was that the surface could not have been properly prepared or that, in some other unspecified way, the plaster must have been improperly applied.

95 During the course of the trial the expert architect called by the Defendant suggested that one or both coats had been applied too thickly. There was a further comment that

plaster might have been unkeyed as a result of settlement through the operation of subsidence through an external factor, namely the removal of a poplar tree. This tree would have been removed at least two years and probably more before the works. However, to be fair to defence counsel, I did not see this to be a ball that he picked up and ran with.

96 No other possibilities have been suggested. Indeed it is very difficult to attribute any other cause, particularly one which applied coincidentally in time, beside that asserted by the Claimant. What are the pieces of evidence to assist the court?

97 First, that in 2008 the entirety of the party wall plaster was hacked off and replaced with a modern two coat gypsum plaster. This work was carried out as part of a substantial project. It was a project that was undertaken under a formal JCT contract with a supervising officer whose responsibility it was to ensure that the work was carried out in a good and workman like manner and that the payments that were due under the contract by way of interim certification were the consequence of a proper valuation of properly completed work.

98 Mr Harris, the supervising officer, draws attention to the fact that in the priced schedule to the Matt Interiors JCT contract under the heading wall finishes making good has been struck through and replaced with hacking off. The significance suggested Mr Harris is that in hacking off plaster it would have necessarily been the case that any blown or defective plaster must have been removed and that any plaster work left would be sound plaster which would be difficult to remove. Mr Harris vouches for the firm although, of course, it was he who introduced Matt Interiors to the Claimant and the pros and cons of a close relationship between a contractor and a supervising officer has to be borne in mind. Nevertheless there is every imperative on a supervising officer to ensure that he does not pass works that have not been completed to a proper standard.

99 It could be seen from the two snagging lists prepared by Matt Interiors in February 2009 and that by Mr Harris on 24th November 2009 the end of the defects liability period, that there is no indication that there was anything more than the standard almost inevitable shrinkage cracks at junctions. I was favourably impressed by Mr Harris. There is no reason for the court to suppose that he did not do a proper job as supervising officer and that he took proper care of his client the Claimant.

100 There is also the evidence of Scott Bradley, again bearing in mind that he too was a contractor recommended by Mr Harris. He took over the snagging items of the insolvency of Matt Interiors and was on site during the last three weeks of January 2010. I have already quoted Mr Bradley's witness evidence at paragraph 8 and his assertion, which I accept, that he checked the walls thoroughly including the party wall and found no areas of blown plaster. Mr Bradley impressed as a witness.

101 Of some appreciable importance it appears to me is the evidence of Mr Moon that the plaster work to the remainder of number 19 was in good condition. It is difficult to suppose that Matt Interiors applied the plaster well and competently to other walls but failed to do so to the party wall with number 21.

102 Mr Whitestone drew attention to a line that is visible in the foil paper in the bedroom in the photograph at bundle 4 page 1091A. Certainly on viewing the photograph there is casue for concern. The photograph is taken showing the majority of the foil papered wall vertically, half enjoying daylight from the window to the right but the other half in greater shadow. The fact that there is such a demarcation vertically between the door side and the window side of the wall is a matter to bear in mind. It reminds one that great care needs to be taken with photographs. But on the right hand side there is apparently a line, generally horizontal, appearing to show a difference in external level of the wall possibly with the lower half projecting ever so slightly more than the upper half. There is no evidence from anybody regarding the application of the wallpaper. It is presumably the case, but I cannot be sure, that a lining paper was applied beneath. There is no evidence as to how it was applied and, even though it is a photograph that cannot be dismissed out of hand, where does it lead? It is difficult to see that this shows blown plaster either above or below the horizontal line to which I have referred. This is, I fear, a matter only of speculation. If it is indeed blown plaster, one must ask where it is on the schedule of condition? Is it the case that Mr Payne and Mr Guerguis have missed a matter of some significance? That, it seems to me, is unlikely. Accordingly I do not see that this photograph either by itself or in conjunction with other matters raised by the Defendant should lead me to conclude that this is evidence of a significant area of blown plaster in the bedroom. Of course I do not ignore the fact that the photograph was taken at all but it is as I have observed not attached to comment in the schedule of condition.

103 That is the evidence of the plaster from the prospective of number 19. Looking at the work in number 21, as I have observed, the work to remove the plaster from the 21 side of the party wall began in mid to late January 2010. It was carried out by a team of labourers under Mr Ivanov and under the general supervision of Mr Hibbert. Mr Hibbert I have to say did not particularly impress as a witness and there must in any event be doubts about his ability to supervise a gang of workers given the serious breach of engineering method statement in the basement. Certainly, in the course of oral evidence, he told me that he was embarrassed by what had happened; he excused it on the basis that he was on holiday and only saw the error when he got back. But as for the removal of plaster above the basement areas, he said in re-examination that he probably would not have seen the gang removing the plaster. He was not therefore in a position to comment on the way this had been done; neither, it may be inferred, did he give any instructions to the gang as to the manner in which it was to be done. I have already noted the evidence arising from the complaints of banging and vibration in the party wall at the time. That is January and February 2010, coupled as this is with the observation that cracking was caused.

104 There is also the evidence of Mr Payne and particularly Mr Guerguis as to the vibration and banging they heard on 16th February 2010 which, at least in part, must be related to the work being carried out in removing part of the rear chimney breast which was photographed by Mr Guerguis.

105 There is a juxtaposition; one cannot be precise on the basis of the evidence given by Mr Bradley of his recollection of so after a number of years, of the cracking with the rear chimney breast and also the hollow plaster which was found by the surveyors undertaking the schedule of condition. But it is notable that Mr Payne thought it worthwhile checking and noting because he was concerned that, as he put it, his client

would be blamed for it. But he ignores the fact that, as he notes in his submission to the third surveyor, by 16th February 2010 work had been going on in number 21 for the best part of 3 weeks. It was a bit late to protect his client from blame. It is basic good practice for any party wall surveyor to prepare and agree a schedule of condition before any works are commenced to the party wall.

106 The Claimant also draws attention to the failure of the second Defendant's workmen to follow the sequence of work in the basement and suggests that the fact that the excavations were not properly supported by shuttering for propping would lead to movement in the party wall which could well result, not only in the cracking of the seam, but also to de-bonding. This may be coupled with the fact that work on the mansard roof continued during the period when there must be doubts as to the full and proper support of the party wall.

107 There is no doubt that the cracks appeared and it is not unreasonable to infer that the movement in the structure which led to cracking also resulted in de-bonding. This was not a matter debated in any detail in expert evidence. Mr Scott Bradley is not an expert in the sense of being professionally qualified but he is experienced in building and construction works. His evidence was that when he checked the condition of the plaster on the party wall around 21st April 2010 he could tell that it was showing signs of damage that had not being there a few months earlier. He found there were large patches of blown plaster. The appreciable increase in the area of blown plaster between late January and indeed 16th February 2010 and 21st April 2010 is worthy of note.

108 For the Defendant Mr Whitestone, giving expert evidence from a wide background of experience from, as he put it, Crouch End to Harley Street, told the court that he had never encountered de-bonding of this nature. He spoke vividly of experience in Harley Street where heavy work to one side of the party wall caused no de-bonding to the other side. This in circumstances where, due to the nature of the occupancy, a failure to report the existence of de-bonding was, he suggested, improbable.

109 Much of Harley Street is of earlier construction to properties in Bayswater but there is no reason to suppose that the standards of construction of party walls were different. And, as I have already remarked, it is clear from the evidence as a whole that none of the professionals surveyors and engineers involved in this case anticipated the de-bonding problems that eventually arose.

110 That is the main strength of the Defendant's case absent a finding, which as I have already indicated I do not make, that Matt Interiors applied plaster improperly and failed to do so in a good and workman like manner and that Mr Harris failed to detect that that was the case.

111 There is one further point that should be noted. Mr Payne complains that he was deliberately prevented from seeing the plaster taken off the wall so that he could form a view as to its quality and the workmanship involved in its application. It was a matter he raised in the period leading to the third surveyor's award and again in court.

112 As to the complaint it is, I find, unworthy, but neither is the suggestion made in paragraph 16 of counsel's final submissions that "he knew that the works were

imminent on both occasions plastering took place but chose not to inspect". I fear that there was an assumption on the Claimant's part that Mr Payne knew when the works were starting rather than the imparting of information which he deliberately chose to ignore. I fear this is one of those examples in life where parties who know what is about to happen readily assume that such knowledge is shared by others when in fact it is not. It is plain for example that, prior to the works Mr Bradley carried out in July 2011, the matter that works were going to be carried out was raised with Mr Payne. The fact that Mr Payne was informed of the works that were going to be carried out might well indicate to many a surveyor that they were just about to be carried out and that this was the very time to remind the adjoining owner that he wished to inspect the plaster as it was coming off and as it had come off the wall. But Mr Payne, when asked about this in evidence, said that he appreciated that the works were being brought to his attention but that he assumed that the adjoining owner would wait until all the works that were to be carried out had been identified and would only then be carried out. That there could be a failure of meeting of minds is unfortunate but understandable and is by no means unique. But, as I say, for Mr Payne to complain that he was deliberately kept from seeing these works is really a most unworthy suggestion.

113 As to the October 2010 works the documents in the bundle (and I observe that there are instances where it appears that documents are incomplete) suggest that the concern was more with Mr Redler being able to inspect the works. It seems to me improbable in the extreme that notifications were given to Mr Redler about the imminence of works and not given, let alone deliberately kept from, Mr Payne.

114 The salient facts and matters therefore appear to be these:

1. There is no reason to suppose that the 2008 works were done improperly by the contractors and that this was not picked up by the supervising officer.
2. The inspection at the end of the defects period may reasonably be supposed to have picked up any significant poor workmanship with regard the plaster.
3. Mr Bradley's evidence as to the state of plaster when snagging is that there were no areas of blown plaster in January 2010 before the work started.
4. The second Defendant jumped the gun and used heavy percussive machinery on the party wall in late January and early February 2010.
5. The work continued through to 16th February 2010 when the schedule of condition was prepared. The fact that blown plaster apparently in relatively small areas was found does not mean that this was the condition of the plaster before the second Defendant started its works.
6. Work continued after 16th February both above ground to the party wall and below ground to the basement. The latter work did not comply with the work scheme and imposed a strain on the party wall which undoubtedly resulted in cracking to this wall and the front elevation.
7. On Scott Bradley's evidence de-bonding continued to spread between January and April 2010.
8. The plaster work on the other walls to number 19 was not in the same de-bonded condition and there is no reasonable explanation as to why Matt Interiors might have done their works poorly on the party walls but properly on the other walls.

115 I conclude therefore, on a balance of probability, that the de-bonding of plaster experienced by the Claimant in number 19 was as a result of the works at 21. The 2008 work was done to a good standard and it is difficult to see what other cause there might be to explain the de-bonding. For the avoidance of doubt I reject the suggestion that this party wall de-bonding was the result of dislocation of soil beneath the party wall from the removal two to three years earlier of a poplar tree in the corner of the garden of 19 adjacent to 17; a removal which incidentally did not cause any damage to the rear wall closest to the position of the tree or least so it would appear for none was noticed or commented upon. There is liability under the party wall award clause 5f to make good the damage and I will modify the fifth award accordingly.

116 It is not necessary in the circumstances that I make findings as to the common law claim in nuisance or negligence I will say simply this; it is not at all clear that the Claimant can bring herself with the tort of nuisance, the tort of uncertain boundary as Lord Wilberforce commented in *Goldman v Hargrave* [1967] AC 645 because, as I have stated, there was no awareness that this damage would result from the works.

117 There is however, a case in negligence against the second Defendant both in the manner in which the Defendant used percussive tools on the party wall to remove plaster and chimney and in the utterly careless way in which the second Defendant undertook the basement excavation works leading to unnecessary stress in the structure of number 19.

118 I make a very brief comment on the suggestion as to whether or not the removal of plaster involves notifiable works under *The Party Wall Act* or could in itself amount to a breach of the obligations under the Act by the building owner carrying out works. I note the reference counsel for the Claimant makes to *Grand v Gill* [2011] EWCA Civ 554 and the law that, for the purposes of section 11 of the *Landlord and Tennant Act 1985*, plaster is structural for the purposes of the implied terms under the Act.

119 It seems to me that one must look beyond the simple removal of plaster and to look as to how precisely the work is done. Where there is a plaster which, because of its age or because of the condition it is in after poor application, it can be removed by the simple application of a putty knife or similar implement it seems to me that that is not notifiable works within the Act. The difficulty comes where plaster does not "fall off" the wall but, being well adhered, the workman charged with its removal finds it necessary to use a percussive tool. It is extraordinary difficult on the evidence to use such a tool in a manner which simply removes the plaster and does not involve any cutting into the party wall. As soon as an operative, holding an electric or other Bosch tool whether with a drill end or a spade end, so attacks the plaster that he goes into even the very edge of the brickwork comprising the party wall, he then is in a position where as I see it he is cutting into the party structure, for any purpose and in this of course the removal of plaster, which is covered by section 2(2)(f) of the Act.

120 I turn then to the reasonableness of the sum claimed. The Claimant claims the sum of £24,153.82 which is arrived at by deducting the £21,339.18 awarded under the second addendum award from the total sum paid to Mr Bradley's firm of £45,493. As I have indicated this sum has been paid by the Claimant to Mr Bradley.

121 The Defendant's complain that Mr Bradley's rates are very high amounting as they do to £85 per square metre for both hacking off and re-plastering with a two coat plaster. Mr Whitestone was particularly outraged at this figure suggesting that the work should have been done for no more than £25 per square metre. Mr Whitestone dismissed, unhesitatingly, the suggestion that a rate of £25 per square metre if achievable at all could only be achieved as a rate for an entirely empty room; that is a room without furnishing, without the need to protect any decoration or piece of furniture. He asserted that the same rate should be applied with the cost of protecting the furnishing covered by a sum (unspecified) or percentage (unspecified) on the works by way of preliminaries. I should also observe that he was not impressed by the suggestion that a lower rate might apply when doing a very large area to that would properly be charged for a rather smaller area. Mr Moon, the Claimant's party wall surveyor, was more sympathetic to Mr Bradley's prices but he was reluctant to go beyond £60 per square metre for hacking off and re-plastering.

122 What the Claimant did was to go to Mr Bradley, the contractor who had done the snagging works,and she asked him to quote. She then engaged him without obtaining any competitive quotes. She told me, and I quite accept, that as a single woman in her own home she felt comfortable with Mr Bradley's firm; she did not wish to look elsewhere and seek quotations from a contractor of whom she had had no previous experience.

123 Mr Bickford-Smith points out that this is an issue not expressly raised on the pleadings. It is brought in as an issue in the trial on the back of a non-admission to the common law claim. No affirmative case as to quantum was raised before the third surveyor although the observation that Mr Bradley's prices were high is certainly noted. The result however, is that the parties have not prepared this issue as they would have done had it been clear from the outset. The evidence on the issue has been extracted piecemeal as the trial progressed.

124 There is no evidence before me that the Claimant appreciated that Mr Bradley was expensive, certainly not as expensive as he may well be. He may indeed have tailored his bill to his client (although that was not his evidence) but even assuming he did I am satisfied that the Claimant was not aware of this. It appears also that she did not seek to negotiate a lower price. Many clients do not. It is, I might observe, not the traditional English or indeed Irish way.

125 The Claimant argues that the Defendant is estopped by conduct from arguing that the rates were unreasonably high. As put in the skeleton argument, for the purposes of the second addendum award, the Defendants accepted many of Mr Bradley's prices even though there was an initial complaint that the prices were too high and a suggestion made that three estimates should have been obtained. In their submissions to the third surveyor the Defendants on advice decided not to contest Mr Bradley's rates but to rely on the argument that there was no liability.

126 That, submits the Claimant, results in an estoppel by conduct from arguing that the rates are unreasonably high. They have elected deliberately not to take the point and the Claimant has justifiably relied on this to her detriment in not seeking any evidence to justify the reasonableness of Mr Bradley's rates. I was taken to a passage in

Kosmar Villa Holidays v Trustees of Syndicate 1243 [2008] EWCA Civ 147 but I will not rehearse the section quoted to me.

127 My Payne explains the stance that was taken before the third surveyor by the fact that Mr Clausen was very anxious to have the matter resolved which I can quite understand. It seems to me that the Defendant did enough in the submissions to Mr Redler to indicate that they were not accepting the rates quoted by Mr Bradley as reasonable rates as to preclude an estoppel by conduct. Nevertheless the failure to pursue the matter before the third surveyor or raise a positive case in the pleadings puts the court in this difficulty. Although the sum quoted is on the evidence on the high side it was not known to be unreasonable to the Claimant and it was not clear to her that there was any obligation on her, assuming there was, to have two or three quotes; quite apart from the fact that she had a reasonable desire to have a contractor with whom she is comfortable a factor which should command some respect.

128 It seems to me, to put it frankly, inappropriate of the Defendants to make such an issue of the cost of Mr Bradley's work at trial without having pleaded a positive case or otherwise making it clear to the Claimant that she should prepare to meet this potentially important point with evidence at trial. It is not unknown in this court for architects to be way out of order with prices, and it is a fact of life demonstrated often enough in Court 3 at Central London County Court that prices in inner and affluent London can differ markedly with those existing in outer and less affluent London let alone the surrounding home counties.

129 The Claimant has not produced evidence from other tradesman to the prices they would have charged in these circumstances; she did nott appreciate that she might have to. On first principles the Claimant has paid Mr Bradley. She is seeking to recover a sum paid. The Defendant's argument must be one of mitigation. The onus of proof on the issue of mitigation is on the Defendant. It is a significant onus. Taking all the above factors into account I find that the Defendant fails in his case to meet that onus and the appropriate sum to award in relation to the blown plaster is that claimed.

130 I move to the repair of cracking in 2012 to the internal finishes. This is a claim arising under paragraph 19.4 of the Part 7 claim. It is as I have made of the evidence that further cracking appeared in 2012. The sum claimed for remedial works is £6,960. It is relatively slight cracking. I accept Mr Fairhurst's evidence that this is the result of a combination of further movement from the effect of the works at number 21 and shrinkage in the plaster. There will be some cracks which are clearly shrinkage, as and when they appear at junctions of walls and/or walls and ceilings of the others it would be impossible to be dogmatic. Insofar as they are shrinkage cracks it is a natural consequence of the 2010 / 2011 works. Plastering of any sizeable area is hardly ever a single operation. It is known that areas of plaster shrink, the resultant cracks need filling. To the extent of course that they are the result of further movement then it is plain that they fall to the account of the Defendant. Either way therefore, it appears to me that, this is a claim which is made out by the Claimant.

131 I now turn to the disturbance, loss of amenity and inconvenience claim. This is a claim that arise both under section 7 of the Act and in common law. It is a claim that arises, not because the works took place at all, but because they were unnecessarily

delayed through the failure of the second Defendants to carry out the works in the manner tended. There is also a justifiable complaint on the part of the Claimant as to the breach, albeit occasional, of starting hours.

132 By section 7 (1) of the 1996 Act;

> "The building owner shall not exercise any right conferred on him by this Act in such a manner, or on such a time as to cause unnecessary inconvenience for any adjoining owner or any adjoining occupier."

133 There are two quite separate aspects to this claim. First the lengthening of the time over which it took the second Defendants to complete the works. Secondly the early starts in breach of the party wall award terms.

134 It is to be noted that an adjoining owner occupier has to put up with normal construction site sounds, dust, and dirt provided these do not exceed a reasonable extent either in volume, quantity or the length of time for which it is necessary to put up with them. As for cleaning and dust and dirt I would observe that the evidence is that the second Defendants did protect the removal of spoil from the excavation works with appropriate panelling. It is also the evidence of Mr Ivanov that they cleaned the front of the house each day and that they swept the Claimant's front path; it is not contended otherwise.

135 The argument as to the lengthening of the works is made in this way. The original programme which appears at page 1426 of the bundle shows the work starting in January and finishing in June. Viewed before the start of the works it is not surprising that Mr Hibbert accepted that this was a reasonable forecast and not dissimilar to other jobs that were carried out. However, the works did not start as originally programmed and it seems to me that the reasonable approach to the conclusion of the works, had there been none of the difficulties that were encountered in the basement, is that suggested by Mr Fairhurst who said at paragraph 34 of his statement, page 783 of the bundle:

> "Had the initial agreed method statement been complied with the basement excavation would have been completed by late July 2010."

The consequence of this view is an estimate of overall delay of 12 – 14 weeks; delay which was entirely avoidable, as he says in paragraph 34, with proper supervision of the site during the initial stage of basement construction.

136 The lower of that 12 – 14 weeks seems to me to be the appropriate finding to make as to the length of additional time resulting from the failure to comply with the method statement on the basement excavation.

137 As to the early starts in breach of the party wall award terms I have already noted that the planning permission was subject to conditions that work should commence at 8:30 and continue not beyond 6pm on weekdays, and not continue beyond 1pm on Saturdays. As for the party wall works these were not to begin before 9 o'clock and not to continue beyond 5 o'clock. It is the start times rather than the finish times that are of concern to the Claimant. It was the evidence of Mr Ivanov that the normal arrangement was that the workman should arrive from 7:30, change their clothes because they would not travel in their work clothes, have tea and chat about the days

work before starting at 8am. And the clear impression was given that no distinction was made for these purposes between party wall works and non-party wall works.

138 Mr Hibbert said, in the course of his oral evidence, that work normally started at 8am. There appears to be no appreciation on the part of the work force that they were not to start before 8:30am. The Claimant complains of hearing them moving around from about 6:30am on some days and while I do not suggest that she must be wrong it was surely on very rare occasions that anybody was there that early.

139 It is an unfortunate feature of living in London with a party wall one brick wide that where the adjoining property is entirely empty and devoid of furnishing, talking and even ordinary sounds of moving about will be magnified and cause far greater disturbance than is caused by a person walking about a fully furnished house. There is equally no doubt that the Claimant made repeated complaints about breaches of the working hours. This was noted for example by Mr Moon in his e-mail of 28th May 2010.

140 It seems to me that in these two separate respects the Claimant is entitled to claim damages, both under the Act against the first Defendant and in common law against the second Defendant.

141 Taking the 12 week delay it operated from the backend of July, included August, September and the first part of October. These of course are summer or early autumn months when the Claimant might ordinarily expect her to be able to use her garden.

142 The claim is made for £12,000. It is calculated on the basis of a notion of diminution in value relying on the decision of *Dobson v Thames Water Utilities* [2011] EWCH 3253 and, taking the loss of the use of garden at £300 a week and the loss of value of the Claimant's home calculated at 25% of the notional of rental value for the same period which for the purposes of calculation is 15 rather than 12 weeks. The notional rental value is assessed by reference to the £2,800 per week at which number 21 is currently being advertised thus making no allowance either for the fact that it is now 2013 but perhaps more pertinently that in today's rental market tenants will regularly, although not always, negotiate a lower rent. With that comparable in mind Mr Bickford-Smith has suggested that the figure of £2,000 was a realistic figure.

143 In my judgment these figures are significantly too high. I accept that it is the notional diminution in value approach is properly adopted as per *Dobson*. I also accept that even making the allowances for the factors I have noted a £2,000 per week rental is not unrealistic bearing in mind the comparable. But I can neither accept that the garden has a separate additional value nor that its use was completely lost during this period. I note that the Claimant was concerned about the scaffolding remaining up as it did throughout the period, observing in parentheses that it is not unreasonable of the Defendant not to strike it and re-erect it for final decoration. Nevertheless it was covered and while workman could presumably see anyone in the garden there would have been no work on Sundays or Saturday afternoon.

144 Certainly the garden would not have been so pleasant to use while the works were continuing and I note that, under the terms of the award, the garden should have been returned to a proper condition by late January 2010. Nevertheless it cannot be said

that the garden was completely unusable. In my view a fair assessment of the loss of value is 20% of the figure of £2,000 for a period of 12 weeks. That arrives at £4,800 which I round up to £5,000 to take account of the early morning activity in breach of the party wall award and uplift a further 10% on the authority of *Simmons v Castle* [2012] EWCA Civ 1039 resulting in a final figure of damages of £5,500.

145 The next claim is that of loss of earnings. As a matter of principle I accept that a loss of earnings claim may be brought under section 7(2) of the 1996 Act;

> "The building owner shall compensate any adjoining owner and any adjoining occupier for loss or damage which may result to any of them by reason of any work executed in pursuance of this Act."

While it is a claim open in principle it will usually be a difficult claim to sustain in cases other than those where the adjoining habitually works from home. It is of course the case that many professionals work both at the office and at home and the decision when to spend hours in the office and when at home may be dictated by reference by meetings and conferences which must take place at the office. Rarely dictated except in the case where there are maternal duties by the need to be at home. I note that in many cases it would not be unreasonable to expect a professional person to spend a little more time in the office when she or he might have chosen to be at home. But these are considerations which do not arise in this particular case.

146 The claim is presented on the basis that the Claimant, after her illness, would have returned to work earlier than she did in fact do because of the party wall works undertaken next door and the fact that she was unable to convalesce as successfully as she might otherwise have done. It is pleaded at paragraph 19.6.1 as follows:

> "The Claimant's existing illness and her recovery from the treatment which she received for the same was exacerbated and prolonged. The Claimant took a total of 12 weeks of unpaid leave from her work during the time that she was being treated for her autoimmune disease and then recovering from that treatment. She estimates that approximately 4 of those 12 weeks were attributable to that prolongation of her illness. The Claimant estimates on that basis the loss of earnings she suffered as a result is not less than £40,000."

There is no challenge to the figures. The Defendant's answer to the claim is that there is no medical evidence to support the assertion that either the illness or the recovery from the treatment received from the illness was exacerbated or prolonged by the Defendant's works.

147 The Claimant has expressed the view that the works did contribute both to prolonging her illness and preventing a phased return from work. I do not doubt that she genuinely takes that view but such matters do need to be proved on a balance of probabilities and it is customary to do so by reference to expert medical evidence. There is such evidence in the form of a report from Doctor Paul Fields dated 25th October 2012. In this report he sets out a history of the Claimant's admission, discharge and continuing treatment and under the heading "further questions regarding this case" gives an explanation of the condition of which the Claimant unfortunately has suffered, his recollection of the admission and offers observations as to recuperation. He says, paragraph 8:

> "Giving the acuteness of her diagnosis and the requirement for steroids it would have been preferable for Miss Kelleher to recuperate in a restful environment. It is important that the quality of life and environment for patients on steroids are stable and relaxed to optimise a full and speedy recovery. In my view stress and anxiety are not conducive to speedy recovery for such patients. Also it was necessary in Miss Kelliher's case that she have regular, frequent monitoring of her platelet count as an outpatient. I consider that it would have been sensible for Miss Kelliher to have had a gradual phased return to work. Many patients do not start back at work after serious illness full time but rather combine part time working with working from home, this expedites a full return to work."

What these observations do not do is state that in fact in this case Miss Kelliher was reasonably prevented from working by reference to the condition she found herself in from the Defendant's works at home. It goes some way to that case but I take the view it falls short of the evidence necessary to make good the case. Accordingly, while the court certainly sympathises with the position the Claimant was in, it does not seem appropriate to make an award for loss of earnings.

148 The next claim is that of alternative accommodation between 8th and 30th July 2011. This was the period during which Mr Bradley was re-plastering the party wall. I accept that the Claimant could not reasonably have been expected to have remained in her home during the remedial works. Neither it seems to me can any point of principle be taken by the Defendants that the Claimant's claim is for alternative accommodation in Rio de Janeiro rather than say London or the Cotswolds. She cannot of course claim the cost of the airfare but comparable accommodation will not be more expensive in Rio and certainly not when having regard to the comparables relied on by counsel for the Claimant.

149 The fact however that the alternative accommodation was in Rio tells its own tale. The Claimant very fairly accepted that she expressly arranged for the remedial works which were carried out in July 2011 to be carried out then because she was always planning to be away for that time.

150 Mr Bickford-Smith submits that she should not be penalised as he puts it for being accommodating. He well knows that there is no such penalty. Rather she cannot be rewarded for being accommodating. On first principles the Claimant cannot recover expense she would have incurred in any event. The accommodation she enjoyed in Rio was not alternative accommodation because of the works but holiday accommodation which she had planned. To put it simply she may well be entitled to brownie points but not to money recovery.

151 The next claim is that of the garden wall. As Mr Bickford-Smith submits the facts are not really in dispute. The original party wall award permitted the rebuilding of the party fence/ wall in the event the Defendants did not do that work, instead they built a new wall immediately inside the existing wall and abutting it.

152 Incidentally they built it, whether intentionally or otherwise, one brick higher than the original wall. The reason for building this wall Mr Clausen told me was because of the poor relationships that they had with the Claimant. I am bound to say the actions of the Defendants in this respect show a meanness of spirit that contrasts poorly with

the Claimant's ensuring that the building works took place while she planned to be on holiday. I am not impressed with the reasons given for the additional wall but say no more about it. The fact is clear the Defendants were entitled in law to build it, subject to planning permission which they may or may not have obtained. What they were not entitled to do, which they did do, was undermine the foundations of the original wall.

153 Permission is sought and is given to amend paragraph 17.10 of the particulars by adding the sentence after "unsightly" "further the construction of the new wall undermined the foundations of the original wall". The evidence is plain, the foundations were undermined. It was therefore necessary for the Claimant to carry out the works that she did to shore up the wall. That was in the sum of £1,380 and that claim is made good.

154 I turn then to the roof damage claim, a small claim in the sum of £350. It was referred to but not dealt with by the third surveyor. In the schedule of works that the third surveyor was considering the building owner gave the reply, this is 2435 as against the work:

> "To go onto the roof and point and fill all areas that the adjoining building created during installing the roof mansard, I gave the reply this has already been attended to by the building owner and no longer requires undertaken."

155 On the face of it, that seems a sufficient answer against an item that is drafted apparently in respect of works to be done in the future. However, the wording on the schedule follows the wording in the estimate which is dated 15th January but in reality was prepared on 15th July 2010, see page 569, and was part of the works invoiced on 14th October 2010. Mr Bradley's evidence that he did this work was not challenged. Accordingly it seems to me in the circumstances the Claimant is entitled to £350 plus VAT.

156 The next claim is in respect of the burglar alarm. It is a claim relying on an invoice which I understand was paid by the Claimant from Southern Electrical Services Limited for £276 inclusive of VAT for attending a call out on 19th December 2011 when the following works were undertaken:

> "1. Fired up system;
> 2. replaced keypad due to broken tamper;
> 3. supplied and fitted new battery."

157 The Claimant's evidence is that she was woken up one night with the alarm going off. The only viable answer to the question why it went off, the Claimant suggests, was that there had been movement in the party wall. As a claim it is a bit of a puzzle. I can readily accept that movement in the party wall could cause the tamper mechanism to trigger, set off the alarm resulting in the need for a call out, but there was no explanation given as to how the tamper mechanism was broken or why a new battery was required. It may be that I misunderstand the position. Whenever a tamper alarm goes off it may possibly be necessary to replace the keypad but I am bound to say in the absence of evidence I am reluctant to make any such finding. Accordingly it seems to me that, although a call out charge of £120 plus VAT is recoverable by the Claimant, the cost of a new keypad at £85 and a new battery at £25 is not.

158 The next claim is for professional fees. This involves Mr Moon's fees at £4,556.25 exclusive of VAT and may include other fees but for the moment I do not feel sufficiently confident to put figures on the claim. As a matter of principle it seems to me that I am overturning the party wall award of the third surveyor and there should be consequential payment of fees and I would be grateful if counsel could in a short while assist me as to the proper quantum of that claim.

159 Finally there is a claim for general damages. There were no doubts numerous breaches of the first award and to the extent that they give rise to inconveniences and disturbance I have already made the claim. The submission made on behalf of the Claimant is that breaches of the award such as failing to protect the roof with polystyrene sheets and failure to carry out proper cleaning works should be the subject of an award of general damages together with a general failure to comply with regulations and progress the works in a proper manner.

160 I accept that the roof was not properly protected as it should have been but no damage resulted and, although it was for a time a concern on the part of the Claimant that the roof might be damaged, this concern, whether viewed objectively or even subjectively in the light of her own evidence, was not of an order to warrant an order for general damages. Of more seriousness was the excavation works. A risk of collapse might in certain cases give rise to a claim for general damages but not on the evidence in this case.

161 I am not persuaded that there was a failure to carry out proper cleaning works but even if there were I do not think a claim for general damages would arise in circumstances where the Claimant employed a cleaner / gardener in any event and did not, I infer from the absence of evidence to the effect, pay them extra for additional work.

162 As for the manifold failures to comply with regulations they may carry their own penalty in a different court but there is no claim for an adjoining occupier for general damages simply because the builder next door fails to comply with all appropriate regulations. Accordingly I will amend the third party surveyor's award and award damages in accordance with the judgment I have just given.

End of judgment

We hereby certify that this judgment has been approved by His Honour Judge Bailey.

Compril Limited