Claim Nos. A20CL070, D20CL022, D20CL037

IN THE COUNTY COURT AT CENTRAL LONDON

TECHNOLOGY AND CONSTRUCTION LIST

His Honour Judge Edward Bailey

Between:

RUSSELL GRAY

Claimant

- and -

ELITE TOWN MANAGEMENT LIMITED

Defendant

JUDGMENT

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1. This is a further judgment in the long-running dispute between Mr Russell Gray, the owner of 7 Ennismore Mews, London SW7 1AP ('7EM') and Elite Town Management Limited, ('ETML') owner of 9 Ennismore Mews, London SW7 1AP ('9EM'). Mr Gray is, in addition, the owner of 5 Ennismore Mews ('5EM'). The dispute arises in connection with the construction of a basement to 9EM by ETML to a design to which Mr Gray had objection, the difficulties encountered by the contractors when excavating the ground beneath 9EM so as to underpin the party wall between 7EM and 9EM as a consequence of there being piling beneath 7EM put in place by Mr Gray when constructing his own basement in 2002, and the problems inherent in the designs prepared for ETML for its basement construction and the party wall awards which were made authorising construction in accordance with those designs. As noted in my judgment of 23 July 2015 the basement design adopted by Mr Gray at 7EM involved the setting of contiguous piles wholly within the boundary of 7EM none of which were (supposed) to be under any part of the party wall. The aim was to ensure that there was no undermining of the party wall. These contiguous piles formed a piled wall around the perimeter of the 7EM basement which entailed a significant loss of floor space, about 500mm for each wall.

2. There have been two Party Wall Award appeals to date. The first, an appeal against the 'Second Award' made on 15 January 2013 by Mr Williams and Mr Hopps as appointed party wall surveyors, was disposed of by consent with the Award being declared null and void in June 2013. The second, an appeal against the 'Third Award' made by Mr James Crowley as third surveyor on 3 October 2014, was the subject of a judgment on 23 July 2015, and against which there was an unsuccessful application in the Court of Appeal for permission to appeal on 3 November 2016.

Heard together with the appeal against the Third Award was a CPR Part 7 claim for damages brought by Mr Gray, in action A20CL070, in which an award of damages was made in Mr Gray's favour.

3. There are three matters presently before the court:

   (1) ETML's claim for damages, or compensation, on the cross-undertaking given by Mr Gray on 24 November 2014 in order to obtain ETML's undertaking not to commence or continue any work under the Third Award (which was made on 3 October 2014) until the hearing of the appeal, the hearing which took place commencing on 21 July 2015, with judgment on 23 July 2015;

   (2) Mr Gray's claim in trespass D20CL022, a claim asserting excessive excavation in the course of the works;

   (3) Mr Gray's claim in fraud D20CL037, a claim asserting that the judgment in action A20CL070 and or the appeal in A20CL126 was obtained by deceit.

   On 30 June 2016 I heard and dismissed an application by Mr Gray to strike out ETML's claim for compensation on Mr Gray's cross-undertaking.

4. This judgment overlaps in some respects the judgment I gave on the appeal against the Third Award on 23 July 2015 and on the strike out application on 30 June 2016. I will not repeat the matters contained in those judgments. I will also endeavour to keep my summary of the facts and reference to the voluminous correspondence passing between the parties and their advisers, mostly by e-mail, to a minimum.

Background to the making of the Third Award

5. It is evident that Mr Gray's and Mr Hill's relationship was poor from the beginning. Mr Gray complains that Mr Hill's basement plans did not start on a neighbourly footing, in that Mr Hill engaged Cranbrook Basements Limited ('Cranbrook'), a company specialising in complete basement packages, in or about Summer 2011, but waited over a year before informing Mr Gray that he was proposing to build a basement at 9EM, which of course adjoined Mr Gray's property at 7EM. Why it should matter that a building owner spends any amount of time preparing his basement plans before informing his neighbouring adjoining owners that he has such plans is not immediately obvious to most people, and it is in the nature of the complaint that Mr Gray was unaware of the planning which was taking place, but once Mr Gray became aware that a basement was to be built next door it plainly mattered to him that the plans were well advanced before he became aware of them.

6. Unfortunately for the future relationship between himself and ETML Mr Gray had encountered difficulties when the owner of 3 Ennismore Mews ('3EM') built a basement adjoining 5EM. Mr Gray explains that the 3EM basement construction involved a near identical basement construction method to that proposed at 9EM. Damage had been sustained to Mr Gray's property at 5EM, a claim for compensation from the owner of 3EM had had to have been made, and evidently

Mr Gray considered that the same problems would arise with ETML's proposed construction. As Mr Gray put it in his final submissions:

> "4. The similarities [were] striking: 3EM was also owned by an offshore company and the building contractors were, like Cranbrook, a complete-basement-package provider – in that case, 'London Basement Co.'. Furthermore, both contractors adopted as a default construction method a generic reinforced concrete underpinning design that has the effect of placing the party walls of terraced houses on foundations integrated with the subject property. This has the effect of transferring the fault line of any relative movement into the adjoining owner's house.
>
> 5. Although it was not known to me at the time, it was of course always well known to the basement companies themselves, and to party wall surveyors who worked with them, that the standard R/C underpinning detail adopted by companies such as Cranbrook and London Basement Co. required the consent of the adjoining owner. Another common feature of the basement projects in 3EM and ETML's in 9EM was that no consent had been obtained from me in either case but, nevertheless, both neighbours had secured party wall awards from specialist basement companies who both found two surveyors ready to issue the awards without the consent they knew was required under the Party Wall Act."

7. In the light of Mr Gray's past experience it is unfortunate that Mr Gray only learnt of Mr Hill's plans to construct a basement in the course of a conversation in a chance meeting in Ennismore Mews. Mr Gray's and Mr Hill's respective recollections of that meeting differ, including when it occurred. Mr Gray puts the meeting in the first half of 2012, whereas Mr Hill's recollection is that it was as late as September 2012. Of considerable importance, certainly to Mr Gray, is the fact that he had not by the date of the meeting received a party wall notice, although notices dated 23 February 2012 under ss 2 and 6 of the Act had been served on 23 February 2012, if the recital to the First Award is correct, or in April 2012 according to Mr Hill in his first statement. What is clear is that during the course of that meeting Mr Gray explained to Mr Hill how the basement at 7EM had been constructed, with a contiguous piled retaining wall set in from the line of the party wall, and that Mr Gray urged Mr Hill to consider a similar approach to the construction of the basement at 9EM so that the existing foundations were left undisturbed.

8. The timing of this conversation, and of Mr Gray learning of ETML's basement plans, was the more unfortunate because Mr Gray did not learn of the party wall notices in time to appoint his own party wall surveyor. The appointment of an adjoining owner surveyor was done for Mr Gray by Mr Mark Williams, ETML's party wall surveyor on the basis that Mr Gray had neglected to make his own appointment during the 10 day period allowed by s10(4) of the 1996 Act. ETML's actions were, probably, lawful under the 1996 Act by virtue of the provisions of s15(1)(b) which permits service "by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom". The party wall notices were not served at 7EM but at 47 Pages Walk, London SE1, the address of Mr Gray given at the Land Registry for his title to 7EM but which, while the property concerned still belonged to Mr Gray, was "empty and seldom visited at the time".

9. There have been many and bitter complaints of Mr Gray's conduct by Mr Hill and ETML's advisers, and these complaints are, in context, understandable. But ETML and its advisers (to the extent that the latter were involved) should accept a good measure of criticism for proceeding to appoint a party wall surveyor for Mr Gray in the circumstances outlined above without at least serving copies of the party wall notices at 7EM. It is after all well known that addresses at HM Land Registry which are other than the property itself not infrequently become out of date. Reliance on such an address as a "last-known residence" without also serving the property does give cause for concern.

10. Accordingly, against an already sensitive background, Mr Gray found that, as adjoining owner, his party wall surveyor was a Mr Robert Hopps of whom he knew nothing other than that he had been appointed by Mr Mark Williams. Mr Gray was entitled to feel suspicious about the appointment, few people would not, and when Mr Hopps demonstrated a complete lack of concern as to Mr Gray's wish, or rather an earnest desire, that the party wall award should not authorise ETML to construct a reinforced wall / foundation directly under the party wall the scene was set for all the trouble to come. The court readily accepts that Mr Williams would have had to have searched far and wide to find a surveyor who shared Mr Gray's views, but it would have been better, very much better, had a surveyor been selected who was prepared to show some sympathy for those views, to explain how the profession generally approached basement construction, and to inform Mr Gray that he was entitled as of right to refuse the use of reinforced concrete in any construction which comprised 'a foundation'. There are many such surveyors.

11. In short, ETML did itself no favours in proceeding as it did, and must accept a share of the responsibility for the way matters turned out. Mr Gray was a man with determined views on basement construction that can fairly be described as unorthodox, and a man whose nature was such that he would not roll over when pushed by the other side. Far from it. He is a doughty fighter who has demonstrated over the years an uncanny ability to press his case and get under his opponent's skin in the furtherance of his aims.

12. There is no doubt that Mr Hopps let Mr Gray down in the manner in which he acted. A surveyor who is appointed by 'the other side' under s10(4) of the Act ought to be acutely conscious of his position. Such a surveyor should take pains to explain the relevant law to the adjoining owner, which should at the very least include all the provisions of sections 7, 8 and 11 of the Act and the dispute resolution procedure under s 10. It is not difficult, and for a busy surveyor there are brief guides to the Act published by the RICS and others which can conveniently be forwarded to the adjoining owner. Where a basement construction is concerned the appointed surveyor should certainly explain the provisions of s 7(4) of the Act.

13. Mr Hopps did not explain the essential party wall law to Mr Gray. Worse than that, Mr Hopps joined with Mr Williams to make the First Award in favour of ETML, on 21 August 2012, which authorised the use of special foundations. Mr Gray's consent was not sought let alone obtained. For Mr Hopps to proceed to join in the making of a special foundation award without having obtained Mr Gray's consent in writing to the special foundation element of the award is reprehensible. Mr Gray

only discovered the position in connection with the Second Award. In law, of course, ETML are not in any way responsible for Mr Hopps' conduct. But on a human level, having proceeded so that Mr Williams, ETML's surveyor, made the appointment, Mr Gray had justification for holding it against ETML that an Award had been made, in effect, behind his back.

14. Mr Gray takes matters further and reserves some of his ire for Mr O'Connor. It is the case that Mr O'Connor gave evidence that he had frequently worked with Mr Mark Williams, and that he knew of the statutory requirement that an adjoining owner must give written consent for the installation of special foundations. I do not however agree with Mr Gray that Mr O'Connor, as the contractor, had any responsibility for ensuring that the surveyors had duly obtained Mr Gray's consent to special foundations. The responsibility for obtaining Mr Gray's consent to special foundations rested squarely on the shoulders of the party wall surveyors, and in particular on Mr Hopps, neither of whom should have signed the First Award without satisfying themselves that they had the necessary consent in writing.

15. Following the making of the First Award on 21 August 2012, and in reliance on that award, Cranbrook carried out excavation under 9EM for the proposed basement. Details of the contract between ETML and Cranbrook are set out in Mr O'Connor's statement of 30 September 2016. The work commenced on 1 October 2012 and was expected to be complete by 15 June 2013. A hoarding was erected immediately outside 9EM together with an electric conveyor belt to transport excavated spoil to a skip. Cranbrook then proceeded to install underpinning to three of the 9EM walls using, presumably, reinforced concrete. Because the excavation was carried out via the garage, which is to the 11EM side of 9EM, the party wall with 7EM was left until last.

16. Cranbrook had made reasonable progress with the works and, towards the end of November 2012, turned their attention to the party wall with 7EM. Excavating under the party wall Cranbrook encountered the deviated (or 'deviant') piles which had not been set perfectly plumb by Mr Gray's contractors. This has been termed the 'first excavation' and, strictly, involved a minor trespass on 7EM's ground. By the time that Mr O'Connor contacted Mr Hill about the deviated piles on 29 November 2012 Cranbrook had excavated for the first two underpins beneath the party wall. In each case one pile had deviated significantly from the vertical, and had drifted below the body of the wall. Mr O'Connor thought that the piles were of reinforced concrete and that their removal would leave 7EM in danger of collapse. Whether or not there was real cause for concern in this regard, it was undoubtedly sensible for him to suspend work, which Cranbrook did on 5 December 2012. Cranbrook did not anticipate any early resolution of the problem presented by the deviated piles and demobilised ('the first demobilisation').

17. Mr Gray maintains that the discovery of the deviated piles came as no surprise to him. He says, realistically, that the boring of piles in the confined space of a basement is an extremely difficult task. It is all but inevitable that some will not be perfectly plumb. Mr Gray says that he explained this to Mr Hopps, or to one of Mr Hopps' colleagues, in July 2012 when talking about the works which had been carried out to 7EM pursuant to the Party Wall Award which Mr Gray had obtained for his basement works in November 2001. It would appear that Mr Hopps

neglected to pass on any such information to Mr O'Connor; in the circumstances of this case that would not be at all surprising.

18. It is evident that Mr O'Connor considered that the entire problem was Mr Gray's responsibility. He took the view that Mr Gray's piles had trespassed onto 9EM and that the cost of removing the deviant piles and the financial consequences of the delay involved would rest with Mr Gray. This view was forcefully put to Mr Gray by Mr O'Connor in a telephone conversation on 30 November 2012 described, no doubt correctly, by Mr Gray as "hostile", I assume on both sides. A site meeting for all parties was arranged for 4 December 2012 for which Mr Gray engaged the services of an engineer, Mike O'Regan. ETML had provided electronic copies of the plans for the construction, and it was in conversation with Mr O'Regan on the morning of 4 December 2012 that Mr Gray learnt that the special foundations employed in the design had required his written consent under the 1996 Act.

19. Mr Gray describes the meeting of 4 December 2012 as 'distinctly hostile' and one which 'descended into an exercise in recrimination and back-covering all round'. Doubtless it was and did. The e-mail which Mr Gray sent to Mr Hill at 19:19 that evening reflects the differences between the parties which caused the hostility. From ETML's perspective the smooth progress of a basement construction had been halted by piling which trespassed onto 9EM and for the consequences of which Mr Gray must pay. From Mr Gray's perspective a basement design of which he did not approve had been authorised by a surveyor of whom he did not approve appointed behind his back. Mr Gray contested Mr O'Connor's contention that his piles constituted a trespass and was more than a little upset to discover that Cranbrook had excavated beyond the line of the party wall on 7EM's side and were therefore clearly trespassing on his land for the purpose of reaching his piling and thereby avoid the need for shuttering. The suggestion that Mr Gray be awarded a payment for the use of his piles under s 11(11) of the Act was not perhaps fully understood by Mr Gray at the time, but was not well received. It was, of course, of the essence of Mr Gray's construction that his contiguous piling was not a party structure, and therefore no use should have been made of it by ETML for the purposes of s11(11).

20. A situation already sensitive and tense therefore became extremely acrimonious and to this day relations have not improved. Mr Hopps wrote a conciliatory letter to Mr Gray on 6 December 2012 seeking, it would appear, to persuade Mr Gray to agree to a redesign of the foundation to the minimum width possible so as to cause the least disturbance to the ground and to avoid significant costs being incurred in amending the piles. Mr Hopps acknowledged that his proposal of a "slim, reinforced concrete stem" would amount to a special foundation and he asked Mr Gray to give his written consent to such a proposal. Mr Gray was not prepared to do so.

21. That being the case it is rather surprising that the party wall surveyors made a further Award on 15 January 2013 ('the Second Award') authorising that very design. This despite a number of e-mails from Mr Gray in strong terms making it plain that he was incensed that special foundations had been included in the First Award. Mr Gray's own proposals, that ETML should copy his design (which would

of course significantly reduce the width of the 9EM basement) or adopting asymmetric foundations, was never going to be acceptable to Mr Hill.

22. The Second Award authorised a design which had a revised underpinning arrangement to accommodate the deviated piles, and thus remove from the equation the pressure which ETML had sought to apply on Mr Gray to cut back his piles or allow Cranbrook to do so. However the incorporation of a special foundation made the Second Award unsustainable on appeal. Mr Gray appealed the Second Award, and in June 2013 ETML agreed a consent order by which the Second Award was abandoned.

23. ETML had therefore to redesign the underpinning to the party wall to avoid special foundations, and the engineers Packman Lucas were instructed to prepare a mass concrete asymmetric design to move matters forward. Such a design would inevitably result in asymmetric foundations as long as Mr Gray kept his piled wall in place, and Mr Hill remained determined to have a 'full-width' basement or as close to full width as was achievable. In an effort to smooth the progress to an acceptable award Mr Hill agreed to pay for Mr O'Regan to review any proposal from Packman Lucas. That did not prevent Mr Gray continuing to press Mr Hill to agree to build a retaining wall within the line of the party wall with the original subsoil reinstated where it had been excavated, but Mr Gray's (continued) proposal fell on deaf ears.

24. By October 2013 the Packman Lucas design had been completed, and Mr O'Regan had confirmed that it was a workable design. The engineer primarily involved, Mr Ben Bradshaw, gave oral evidence at the hearing, summoned by Mr Gray. Mr Bradshaw confirmed that the design involved excavating to the face of the 7EM piles, with possible trimming of a deviated pile where required, and that the mass concrete underpin would be poured to a polythene separating layer to the face of the piles. (Trimming deviated piles was expressly excluded in the Crowley Award when it came; Mr Crowley specified that any pile trimming had to be the subject of a separate award). The Packman Lucas design therefore aimed to take support from Mr Gray's contiguous piled wall. In this regard no attempt was made in the design to differentiate between piles wholly inside the line of the party wall and those piles which by reason of deviation from the vertical strayed underneath the line of the party wall.

25. On 16 October 2013 Mr Hill asked Mr Gray to agree to the Packman Lucas design. Mr Gray would not do so and ETML appointed Mr Graham North as its surveyor to prepare for a party wall award. On 20 November 2013 Mr Graham North served fresh notices to implement the Packman Lucas design.

26. Mr Gray appointed Nithya Murthy as his party wall surveyor, as he was entitled to do. Miss Murthy, an architect qualified in India, was the subject of some comment at the hearing in July 2015, the context being a claim for her fees. It appears that Miss Murthy may have been excessively denigrated in this role. Mr Gray spoke warmly as to her abilities, and there is material in the bundle which demonstrates a good awareness on her part of the issues involved. Essentially though, in practice, Miss Murthy acted as a mouthpiece for Mr Gray. It was not possible for Mr North and Miss Murthy to agree on a nomination for third surveyor, and accordingly

Westminster City Council were approached to nominate a third surveyor under s10(8) of the Act. Mr James Crowley was appointed on 24 April 2014.

27. It was not possible for the party appointed surveyors to agree an Award authorising the Packman Lucas design, and so the matter was referred to Mr Crowley. Mr Gray made submissions against the proposal on 22 August 2014, but on 3 October 2014 Mr Crowley made the Award (the 'Third Award') authorising the mass concrete asymmetric underpinning of the party wall to the Packman Lucas design.

Background to the cross-undertaking

28. Between November 2012 and October 2014 there had been no work on site, which had been demobilised on 5 December 2012. Upon the issue of the Crowley award on 3 October 2014, ETML instructed Cranbrook to resume work. It is Mr O'Connor's evidence that Cranbrook

> "… immediately began the process of remobilisation to site including but not limited to making applications to the City of Westminster for highways licences, construction of external site hoardings and reinstallation of general plant including electrically operated conveyor belts together with temporary electrical and lighting installations".

Mr Gray is reluctant to accept that there was in fact a remobilisation before he gave his cross-undertaking in early November 2014. Mr O'Connor's evidence taken as a whole does not dispel that view, particularly as Cranbrook have provided no clear evidence as to the costs involved in the exercise. To the extent that there was any mobilisation activity Mr Gray suggests (p.36 §82) that this was a sham, purely intended to force him to give an undertaking while all along ETML was aware that the defects in the Crowley Award were such that work could not recommence.

29. Whatever lay behind such mobilisation as took place in late October and early November 2014 Mr Gray is surely wrong to suggest that ETML was aware that defects in the Crowley Award precluded the recommencing of work.

30. At all events on 9 October 2014 Mr Hill sent Mr Gray an e-mail informing him in terms that Cranbrook was remobilising and was expected to re-commence work in the near future, and continuing:

> "You now have a choice: whether to appeal the Crowley Award or not. If you appeal you have a further choice: whether to provide an undertaking in damages to stop the work until the appeal is decided."

Had Mr Gray replied immediately informing Mr Hill that he intended to appeal and would provide an appropriate undertaking, he would then have had proper grounds for arguing that any remobilisation was unnecessary and its costs should not come within the ambit of the cross-undertaking. Mr Gray appealed the Crowley Award, conscious that he had only 14 days to do so, but he did not provide an undertaking in damages to stop the work. The remobilisation, whether sham or otherwise, continued, and Mr North and Miss Murthy made arrangements to meet on site at 7EM on 4 November 2014 to prepare a schedule of condition. The party wall surveyors met and the schedule of condition was duly prepared.

31. Whether Mr Gray was convinced of the remobilisation or not, he appears to have accepted that ETML was determined to press ahead with a mass concrete asymmetrical foundation. While maintaining a generally abrasive style in his e-mail communications, a style in which he was well matched by Mr Hill, Mr Gray expressed encouragement that Mr Hill would engage in dialogue and, on 2 November 2014, Mr Gray put forward two alternative underpinning designs for a symmetrical underpin, both of which involved the removal of his contiguous piles. These designs were alternative in that Mr Gray expressed a preference for a standard mass concrete foundation but offered to be persuaded to accept a reinforced concrete, special, foundation.

32. Mr Hill, it appears, was encouraged by this change of approach by Mr Gray and began to consider with his own team how the proposal might be implemented. At this point it should have been possible, with some determination on both sides to concentrate on the essential issue of constructing a satisfactory basement, to arrive at an agreed position to move to a symmetric foundation. However the issues which had bedevilled the parties' relationship over the previous two years did not go away, and the parties moved toward an appeal of the Crowley Award.

33. ETML required an undertaking in damages to agree not to proceed with works to implement the Crowley Award and appropriate undertakings were agreed by the parties' solicitors. The terms of ETML's undertaking and Mr Gray's cross-undertaking are contained in the consent order approved on 24 November 2014:

> "AND UPON THE RESPONDENT undertaking to the Court that until the conclusion of this Appeal it shall not .. commence or continue any of the works set out in the Award [ie the Award dated 3 October 2014]
>
> AND ON THE APPELLANT undertaking to the Court that if the Court later finds the above undertaking has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Appellant will comply with any order the Court may make."

34. The salient events thereafter are best considered in the context of the individual issues to which they are relevant.

Assessment of damages on a cross-undertaking - The relevant principles

35. In *Astra Zeneca AB v KRKA dd Novo Mesto* [2015] EWCA Civ 484 the Court of Appeal approved the statement of principles to be applied by the court on an assessment of damages on a cross-undertaking offered by Norris J in *Les Laboratoires Servier v Apotex Inc* [2008] EWHC 2347 (Ch), [2009] FSR 220. This statement appears at [5] of the judgment of Norris J where he said:

> "[5] The principles of law sufficient to enable me to quantify compensation in this case may be shortly stated:
>
> (a) The undertaking is to be enforced according to its terms. In the instant case (as in many others) it is that Servier will comply with any order the court may make 'if the

court . . . finds that this order has caused loss to the Defendants'. The question for me is therefore: what loss did the making of the order and its continuation until discharge cause to Apotex?

(b) The approach is therefore essentially compensatory and not punitive;

(c) The approach to assessment is generally regarded as that set out in the *obiter* observation of Lord Diplock in *Hoffmann-La Roche v Secretary of State for Trade* [1975] AC 295 at 361E namely:

'The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the Plaintiff and the Defendant that the Plaintiff would *not* prevent the Defendant from doing that which he was restrained from doing by the terms of the injunction: see *Smith v Day* (1882) 21 Ch D 421 per Brett LJ at page 427.'

(d) What Apotex was trying to do (and what the order restrained it from doing) was to enter a new market for the sale of generic perindopril. It was denied exploitation of this opportunity. The outcome of such exploitation is attended by many contingencies but *Chaplin v Hicks* [1911] 2 KB 786 establishes (per Vaughan Williams LJ at p 791) that whilst 'the presence of all the contingencies on which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision' damages for the lost opportunity are assessable.

(e) The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted. The profits that Apotex would have made from its exploitation of the opportunity to sell generic perindopril depend in part upon the hypothetical actions of third parties (other potential market participants) and in part upon Servier's response to them. A principled approach in such circumstances requires Apotex first to establish on the balance of probabilities that the chance of making a profit was real and not fanciful: if that threshold is crossed then the second stage of the inquiry is to evaluate that substantial chance (see *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602). As Lord Diplock explained in *Mallett v McMonagle* [1970] AC 166 at 176E-G '. . . in assessing damages which depend on its view as to what . . . would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing . . . would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards . . . .'

(f) The conventional method of undertaking this exercise is to assess damages on a particular hypothesis and then to adjust the award by reference to the percentage chance of the hypothesis occurring. In many cases it is sufficient to postulate one hypothesis and make one discount: but there is no reason in principle why one should not say that either Scenario 1 or Scenario 2 would have occurred and to discount them by different percentages. That is the course which Mr Watson QC urged in the present case: and I note that it has some support in *Earl of Malmesbury v Strutt & Parker* [2007] PNLR 570."

36. The terms of the cross-undertaking are contained in the consent order approved on 24 November 2014:

"AND ON THE APPELLANT undertaking to the Court that if the Court later finds the above undertaking has caused loss to the Respondent, and decides that the Respondent

> should be compensated for that loss, the Appellant will comply with any order the Court may make."

Compensation will therefore be awarded to ETML if the Court finds that abiding by the undertaking did in fact cause ETML loss, and the Court decides that there should be compensation for that loss. This apparent discretion in the Court to award compensation should there be loss is plainly to be exercised judicially, and only a very compelling reason would justify the court not making an Order which compensates ETML for loss the Court has found that it has suffered. The award is however one of equitable compensation rather than damages, as Norris J pointed out in *Les Laboratoires Servier v Apotex Inc* [2008] EWHC 2347 (Ch) at [7]. The Learned Judge also raised the question, if common law rules were to be applied, whether the Court was bound to adopt contractual rules, or whether, in appropriate circumstances, the Court might adopt rules relating to breach of tortious or other duties, a possibility plainly indicated by Brett LJ in the course of his judgment in *Smith v Day* (1882) 21 Ch D 421 from which only a short excerpt was quoted by Lord Diplock in *Hoffmann-La Roche*.

37. ETML must demonstrate loss through being unable to commence or continue the works authorised by the Crowley Award. This is a question of causation. Can ETML demonstrate on a balance of probabilities that, but for its undertaking not to commence or continue works, it would not have suffered the item of loss in question? Mr Gray's cross-undertaking was given in correspondence on 7 November 2014 and any loss sustained by ETML between then and the hearing of the appeal on 21 July 2015 comes within the ambit of the cross-undertaking. The Court has to consider what would have happened had no undertaking and cross-undertaking been given during that period to assess whether the necessary causation is established. In undertaking this exercise the Court has the benefit of hindsight and can and should take into account not only what happened during the relevant period, but what happened after the period ended and ETML was no longer constrained by its undertaking.

38. In his opening argument Mr Gray submitted that the Court must ask itself whether the losses claimed were within the contemplation of the parties at the time of the cross-undertaking. I do not accept this submission. In the ordinary course of events it would be surprising were losses to arise which were not within the contemplation of the parties at the date of the cross-undertaking. But both the undertaking and the cross-undertaking are made in relation to future conduct and events, and the parties must take their chances as to what in the event transpires. The present is an exercise in equitable compensation, not damages for breach of contract.

39. The further submission of Mr Gray, that in relation to matters which depend on an assessment of what would have happened had the undertakings not been in place the Court must consider what the chances are that a particular hypothesis would have occurred, is one I do accept. The chances that any course of action would have occurred must be assessed, and, particularly where more than one course would have been open to either party, the present exercise is one which must be undertaken on a balance of probabilities.

40. The factual backgrounds against which the court in *Les Laboratoires Servier v Apotex Inc* and in *Astra Zeneca AB v KRKA dd Novo Mesto* had to assess damages arising under a cross-undertaking were very different to the present. The Defendant in each case was by its undertaking prevented from bringing a new drug on the market (or continuing with the sale of a new drug), and the difficulties inherent in assessing how that drug would have fared without the undertaking do not arise in the present case. But, as in most cases involving human behaviour, this case throws up real difficulties of its own. Throughout the relevant period, and beyond, the parties had real feelings of antipathy toward each other. While these feelings may not have entirely governed their respective conduct in relation to the party wall they certainly influenced it.

41. As to events after the release of the undertakings Mr Gray is perfectly entitled to rely on the fact that at the date of the hearing in July 2017, not quite two years after the undertaking ceased to have effect, ETML still has not recommenced the work for which it had remobilised before giving its undertaking in November 2014. For much of that period, of course, that is between July 2015 and November 2016, ETML faced the fact that Mr Gray was appealing the July 2015 decision on his Party Wall appeal to the Court of Appeal. But ETML can hardly assert that it was reasonably discouraged from recommencing work because of the risk that the Court of Appeal might allow Mr Gray's appeal. For throughout the whole of the relevant period (ie November 2014 to July 2015) ETML would, even without the undertakings, have faced the prospect of an appeal against the Party Wall award. The risks inherent in recommencing work pending an appeal under s10(17) of the 1996 Act are likely to be greater than those arising in the case of an appeal to the Court of Appeal, a second appeal. To pursue any claim for compensation now ETML must satisfy the court that it would have been prepared to risk the possibility that the County Court Judge would allow the appeal in substance (the appeal was in the event successful only on minor matters) and render any construction work undertaken in the basement, or important elements of it, nugatory.

<u>ETML claim for compensation</u>

42. This is pleaded in the Schedule of Loss at £242,661.59, but reduced in opening (at paragraph 104) to take account of an adjusted rental figure to £195,533.99. The claim is made up as follows:

(A) <u>Construction and maintenance costs</u>

(i)	demobilisation costs	£14,404.80
(ii)	hire of specialist propping equipment	£48,306.00
(iii)	weekly site attendance to maintain propping	£24,900.00
(iv)	remobilisation and site preparation	£19,495.20
(v)	uplift in contract price due to delay	£14,272.92

(B) <u>Loss of amenity / loss of rent</u>

(vi) loss of amenity through Mr and Mrs. Hill living in a property subject to incomplete building works

between 28 June 2015 and 25 September 2015 £15,166.67
(vi) loss of rent for 39 weeks less expenses [£67,857.00]

43. (A) Construction and maintenance costs

There are five elements to these costs, as listed above. Relatively little time was spent during the hearing on the quantum of these costs. Mr Gray makes submissions as to why particular heads of costs should not be allowed at all, but in respect of only three of the five heads of claim is the court in a position to consider individual aspects of the figures in any detail.

44. Mr Gray asserts that none of the sums claimed in respect of liabilities of ETML to Cranbrook are properly made out. These sums are dealt with in evidence by Mr O'Connor in paragraphs 52 onwards of his witness statement of 30 September 2016. Mr O'Connor there makes the point that this was the second time Cranbrook had demobilised, and a number of the charges made are the same as those agreed (but not apparently paid) in respect of the first demobilisation in December 2012. Mr O'Connor acknowledges the fact, stressed by ETML in their final submissions, that Mr Hill was concerned as to the level of these charges and instructed a quantity surveyor, Mr Toby Hunter of Burke Hunter Adams to look into them.

45. Two reports from Mr Hunter have been disclosed. The first is dated 21 October 2014 and is concerned with claims for additional payment made by Cranbrook on 4 September 2014 arising out of the first suspension of works in November 2012. Mr Hunter categorises all but one of the various claims as disruption and prolongation claims and, while accepting that the claims might legitimately be made, concludes that insufficient information has been provided to substantiate the charges levied. The exception is the remobilisation claim, which Mr Hunter considers is in fact a claim for additional costs resulting from changes to the party wall award. Mr Hunter acknowledges that a claim might properly be made for remobilisaion, but again concludes that insufficient information has been provided to substantiate Cranbrook's charges.

46. Following his first report Mr Hunter had a meeting with Mr O'Connor, but no further report has been disclosed in which Mr Hunter has reconsidered the claims in the light of further information provided by Mr O'Connor. Mr Hunter did however prepare a report dated 14 January 2015 headed "Various Price Issues". The report comprises three full pages of text. The copy of the report in the bundle carries the page numbers 1, 2 and 3 out of 3, but it has no evident ending (no signature) and no obvious final paragraph. There is no signature either on the first report, but it does end with a "Recommended Next Steps" paragraph which provides a natural conclusion. The reader of the second report is left uncertain whether the three pages disclosed have been prepared for disclosure out of a lengthier report.

47. Despite the heading of the second report, just two price issues are considered. The first is the charge for propping and support at £970 per week. Mr Hunter notes that Cranbrook have employed 8 soldier props and 61 acrow props throughout the basement excavation as a whole. The question as to how many of these props would have been required for temporary support even had the works progressed in

November 2014 was not investigated at trial; it is difficult to reach any other conclusion but that many would have been required for at least some if not all the relevant period. Mr Hunter proceeds on the basis that Cranbrook had to hire the props, which is the standard approach of a QS in this situation. There is no evidence that Cranbrook did in fact hire the props rather than use their own stock. At paragraph 13 of his statement of 30 September 2016 Mr O'Connor states "The vast majority of Cranbrook's labour, plant, machinery, vehicles and equipment is internally owned and operated due to the highly specialised nature of the equipment required and basement construction generally". I am sure that it is. Props are not highly specialised equipment, far from it, but a firm specialising in basement construction will be using props in almost every job. Props are inexpensive to purchase, but costly to hire. In the absence of compelling evidence to the contrary I proceed on the basis that, on a strong balance of probabilities, the props used by Cranbrook were owned by Cranbrook.

48. Even proceeding on the basis that the props were hired Mr Hunter concludes that a reasonable weekly hire rate was £200 per week rather than the £970 per week charged by Cranbrook, and he arrives at this figure after adding a small sum for the use of scaffold poles as handrails. Mr Hunter adds 15% per week for overheads and profit, but whether such an addition should be included in an equitable compensation claim, particularly where £1,400 has already been included for white-collar time to review the requirements of demobilisation and prepare method statements etc is debatable. In his second statement Mr O'Connor explains that his charge of £970 per week covers not just a hire charge for props but

> "…represents Cranbrook's charges in respect of the provision of a system of temporary support to the host and adjoining properties, with an inbuilt charge for the system design and potential changes to the system design which might be required as a consequence of the changing site conditions, which would be experienced during a period of prolonged works suspension."

Mr Gray describes this as a "grandiose description of a few props" and he is not off the mark. Mr O'Connor fools no-one but himself with this nonsense, and he certainly did not fool Mr Hunter. Mr Hunter concludes, at 2.9 of his report "Accordingly I would envisage difficulty in recovering all of Cranbrook's hire costs as damages on the basis that they are demonstrably not reasonable". Mr Hunter is a master of understatement.

49. The second of the two price issues considered by Mr Hunter was the claim for £500 per week for 'weekly site attendance for prop adjustment, water monitoring, etc etc.'. Whether or not Mr Hunter was aware that Mr O'Connor was basing his claim on each visit being undertaken by two men lasting half a day is uncertain. At all events Mr Hunter allows for a three hour visit by both a foreman and a labourer, and arrives at a figure of £190 per week plus vat. Mr Hunter concludes this issue with the observation ".. I would envisage difficulty in recovering all of Cranbrook's charges as damages on the basis that they are demonstrably not reasonable".

50. In his witness statement of 30 September 2016 Mr O'Connor states that "on a weekly basis two operatives would be required to attend No.9 for the purposes of checking the condition of the multiple props that have been installed and ensuring that the founding structure up on which the props delivered their thrust were still in a condition to offer adequate support". He continues: "For reasons of health and

safety to our workmen, I determined that two operatives should attend site during the weekly inspections, as opposed to a single person risking entry to the basement on an unsupervised basis". Mr O'Connor also suggests that the two operatives often took longer than half a day to undertake the various checks that were required, but Cranbrook's charges were restricted to the half a day charge he had 'agreed' with ETML. The 'agreement' suggested is simply an e-mail dated 3 March 2013 from Mr O'Connor to Mr Hill advising him that there would be various charges during the suspension of works the figures quoted being either 'approx' or 'in the region of'. The reply from Mr Hill states simply "understood". This is not clear consent, certainly not to any figures, and did not prevent Mr Hill from challenging the figures with a quantity surveyor subsequently, as noted above.

51. Unlike Mr Hunter the court does have evidence as to Cranbrook's weekly site visits. Mr Gary Ashwood is a sub-contract carpenter and joiner who has been working for Mr Gray since about October 2014 at 7 Ennismore Mews. Mr Ashwood has not been on site continuously; he estimates that about 50% of his time has been at Ennismore Mews. While working on site he became aware "of a site visit made weekly by a man from Cranbrook Basements who attends in a small car or van and spends about 15 minutes on site". In conversation on one occasion this Cranbrook employee told Mr Ashwood that he had to visit once a week to check if everything was 'ok' on site. I have no reason to doubt this evidence. It would only take about 15 minutes to get into the basement and look around to see if everything was in order, and given the likelihood that the propping of and the utilities to an unoccupied site would remain in an orderly condition one cannot imagine that Cranbrook would send a foreman as well as a labourer. It is only if a problem arose that a visit would take longer. There has been no suggestion that there was ever a problem.

52. Mr O'Connor was not prepared to accept Mr Hunter's view that these charges were unreasonable and states that he is not prepared to reduce the costs. As noted, Mr O'Connor asserts that the charges have been agreed with ETML. Mr O'Connor relies on the e-mail exchange referred to above. He suggests that there was no challenge by ETML to the charges Cranbrook stated it would make on the first demobilisation (although the instruction of Mr Hunter suggests otherwise) and states that ETML agreed to pay £100,000 on account of Cranbrook's invoice for £206,508 for additional costs. These costs included £11,908 for "specialist propping equipment at £970 per week from 5 December 2012 to 14 October 2014". I observe that soldier props and acrow props are 'specialist propping equipment' in the same way as a screw is 'specialist fixing equipment'. I can find no concluded agreement on the part of ETML to pay these costs, and even if this were the case the court is not bound to award compensation at a wholly unreasonable sum simply because the receiving party has agreed to pay such a sum to a third party.

53. In my judgment either the props used by Cranbrook to support the building were not hired but belonged to them, as I suspect is the case, or the props should have been purchased by Cranbrook. Mr Winser submits that it was reasonable for Cranbrook to hire the props after October 2014 because it had been hiring them since December 2012. The factual basis of this submission is doubted. There is no evidence to the point. But whatever the position before October 2014, as at the date of the undertakings ETML and Cranbrook were well aware that the props would be

in place, undisturbed, until at least the date on which the appeal was heard. I accept that neither ETML or Cranbrook, or indeed anyone else, knew then precisely when the appeal would be listed. But no-one could possibly have thought that this would be a short space of time. ETML's solicitor would know that a hearing date for a case of this nature was likely to be at least 9 months and very possibly 15 to 18 months away. In the event the appeal was listed 9 months and 4 days after it was filed. It is the general practice in the TCC list in this court to give earlier hearings to party wall appeals than other matters, but no litigant could expect a hearing in less than 9 months in the absence of an application for an expedited hearing. Accordingly, as ETML and Cranbrook could look forward with confidence to the props being needed for at least 9 months there was every reason to purchase the props and no good reason to hire them at all, let alone at a weekly hire rate which would exceed their purchase cost in less than four weeks.

54. Mr Gray suggests that the props would have cost Cranbrook around £3,000 to buy, £4,000 after additional props were installed some time between November 2014 and September 2015. This is a matter dealt with in Mr Gray's fourth witness statement, at paragraph 45, and the enclosures referred to. In her letter of 23 November 2015 Miss Murthy explains that she, as the adjoining owner party wall surveyor and Mr North, as the building owner surveyor, undertook a photographic schedule of condition of both 7 and 9 Ennismore Mews. Miss Murthy writes:

> "On [4 November 2014] there were five RMD super slim soldier props ('props') installed in various locations along with several acrow props. I did not stop to consider what exactly they were supporting. The props are indicated in the attached plan as the ones numbered 1-5… Apart from these there were around 50 acrow props on site, many of which were idle or in positions where they perform no work….
>
> It is clear from the two sets of photographs, the older set taken in November 2014 and the more recent taken in September and October 2015, that additional soldier props are now in place and that some of the original props have been moved. From the photos there are four new props in place now making a total of nine soldier props where earlier there were five… The prop indicated as No 6 in the plan appears to be holding off a concrete wall at no. 9 EM and the RCC piles in No.7 EM at the other."

55. There is no evidence as to when the additional four soldier props were installed. I proceed on the basis that they were installed for the purpose of support during the period of the undertaking, although as no work was actually carried out in October or November 2014 it is not obvious why the five props which had successfully supported the structure between December 2012 and October 2014 needed addition. The quotation dated October 2015 at E:516 for all nine soldier props together with adjustable bases and joint stiffners amounts to £3,194. There were also 'several' acrow props, their role (if any) uncertain. Mr Hunter refers to 61 acrow props and it is not surprising to read Miss Murthy's comment that many of these props were idle or in positions where they performed no work. Realistically there just would not be enough room for so many props to be placed in useful positions. The comment does however put in context Cranbrook's outrageous claim for £970 per week rental, and confirms me in the belief that the props used belonged to Cranbrook and came from stock, of which Cranbrook had ample.

56. To allow for a few acrow props and the cost of carriage to site, I assess the cost of purchasing all new propping for the period of the undertakings at £3,500. That is the appropriate level of compensation under this head, without any additional sum for loss of use or for having the capital tied up. It is sufficient in this regard for Cranbrook that they receive the cost of the props, which, when they are no longer needed at Ennismore Mews, will go into Cranbrook's stock and be used for many years yet. Mr Winser (§112) makes the point that Mr Gray did not pursue any questioning on this point with Mr O'Connor. It would have been better had he done so, and the allowance the court may give to a litigant in person only goes so far. Mr Winser also points out that there is no evidence to support the figure of £3,000. True. But three points may be made. First Mr O'Connor does not say that Cranbrook itself hired the props, simply that it levied a hire charge on ETML. If props had been hired from a third party I would have expected Mr O'Connor to add the invoice to the many appendices to his statement. Secondly this court refuses to assess compensation at a wholly preposterous level. Thirdly this claim proceeds in the TCC list in the county court. The cost of props and other such pieces of equipment is part of the specialist knowledge which may be used by judges in this court.

57. As for the weekly visit, plainly a weekly visit was advisable to make sure all remained in order and to be aware of any unexpected problem. Allowing the cost of a weekly visit lasting 15 minutes, with a reasonable time for getting to and from the site, is the proper approach to quantification of this claim. Had the unexpected happened, and there was a problem which had to be dealt with at a longer visit, perhaps with two or more personnel, the cost of dealing with that problem would be recoverable as an additional item. The standard weekly visit however is adequately covered by a charge for a labourer for one hour at £20 per hour (Mr Hunter's figure) and a van for one hour at £5 (Mr Hunter's figure but omitting the additional 15% for overheads and profit). £25 per week for 41.5 weeks (assuming a visit takes place in the half week) amounts to £1,050.00.

58. The claim includes a 7.5% uplift in the contract price as a result of the 9 months delay during the period of the undertakings. This is a matter dealt with by Mr O'Connor at paragraphs 78 to 80 of his statement of 30 September 2016. In this section of his statement Mr O'Connor asserts that the Office for National Statistics records building costs as having risen between June 2013 and May 2016 by 12%, that building costs in Central London are much higher than elsewhere, and that the 7.5% annual increase he has adopted is below the level of increase experienced by Cranbrook between November 2014 and September 2015.

59. This is not impressive. First, the ONS statistics comprise a building cost index starting at a base of 100 in the year 2000. The statistics show that between June 2013 and May 2016 building costs rose from 158 to 170, a rise of 7.6% over a three year period. Secondly, while there can be no doubting that Central London building costs are higher than elsewhere in the country, this fact is no basis for an assertion that they have risen faster than elsewhere over the period in question. Indeed Mr O'Connor does not actually go so far as to make such an assertion. Mr O'Connor refers to 'enormous demand' from householders to complete their basement projects before the (possible) change in planning regulations as a result of press reports that both the Royal Borough and the City of Westminster were considering

‘draconian restrictions on the type and scale of basements for which planning consent may be given’. A much-heralded restriction on basement extensions may indeed be a reason for householders to rush to make their applications for planning permission. It is not obvious why householders with planning permission need to rush to complete their projects. Planning consent for basement extensions follows planning consent for other works. It is lost if it is not acted on (ie commenced) within 3 years of the granting of consent, but there is no need to rush to completion. There was never a suggestion that planning consent for uncompleted basements would be withdrawn, and such an alarming possibility may be entirely discounted. Thirdly Mr O’Connor refers to his own direct experience but gives no examples. Fourthly he uses a flat 7.5% annual increase for a nine month delay.

60. Any delay attributable to the undertakings was for the nine month period between October 2014 and July 2015. The ONS statistics show that between October 2014 and July 2015 there was a rise in the index of building costs from 162 to 166, ie a rise of 2.47%. There is no evidence to show that Central London costs rose more or less rapidly than the national average. ETML’s claim under this head for 7.5% is overstated by a factor of three, and should be quantified at £4,757.64.

61. There remain the claims for demobilising and remobilising. The essential elements of the demobilising costs claimed are the following:

(a) A director and project manager to attend site, review the requirements for demobilisation, and prepare a risk assessment and method statement, £1,400.

(b) Designing and erecting a hoarding, £5,090.

(c) Modifying the electrical and plumbing installation, £1,761.

(d) Transport, £924.

(e) The removal of the conveyor belt and support structure, £2,500.

The essential elements of the remobilising costs are the following:

(a) A director and project manager to attend site, review the requirements for remobilisation, prepare a risk assessment and method statement, £1,400.

(b) Designing and erecting a hoarding, £7,743.

(c) Electrical and plumbing installation, £2,333.

(d) Transport, £462.

(e) Erection of the conveyor belt and support structure, £4,088.

62. I appreciate that Mr Gray has concerns as to what if any work was carried out, and the reasons behind Cranbrook carrying out any remobilising work. For the present I

am considering the quantum of the claim and do so on the basis that the work was all carried out. For this exercise there is little material before the court. ETML rely on Mr O'Connor's schedule of *de*mobilisation costs referred to at paragraph 55 of his statement of 30 September 2016, the schedule itself, with comments, at [Bundle C:480]. Consideration of comments to the schedule shows that of the 18 items 17 are 'assessments' and the 18th an 'estimate'. There is no documentation supporting the assessments.

63. Mr O'Connor's evidence as to *re*mobilisation costs is at paragraph 62 of his statement. Again a schedule is referred to, at [Bundle C:498]. This remobilisation schedule is headed '*Demobilization from site November 2014*' and appears to be, in essence, a copy of the demobilisation schedule with the word 'remobilise' substituted for 'demobilise', except in item 12 where the original demobilise has been left unaltered.

64. Of course there has been no remobilisation for the purposes of the cross-undertaking for ETML have yet to restart the works. But that does not preclude both a proper analysis of the costs of the demobilisation which has taken place or a proper assessment of the actual costs that will be occurred should there ever be a remobilisation. After all, it must necessarily be ETML's case that a remobilisation took place between 6 October 2014 and, at the latest, 7 November 2014. The precise work involved and all the costs incurred in relation to that remobilisation should be readily available to Cranbrook, and could presumably be used for the remobilisation costs exercise carried out for the purpose of the present claim. But there is no reliable evidence from Cranbrook as to the work involved and costs incurred in the remobilisation it had (supposedly) just completed before the demobilisation began.

65. An additional complication for a court attempting to analyse the claim is that there is no evidence as to how long either the works of demobilising took to complete or the works of remobilisation will take. This should be a straightforward exercise for Cranbrook if, as the claim necessarily implies, it completed remobilisation during the last two or three weeks of October and the early days of November 2014, and then moved to demobilisation after the first week of November 2014. The claim for weekly inspection of the propping, incidentally, makes no allowance for the time taken to demobilise after the undertakings were given.

66. It is of little comfort to the court that a witness who in advancing five heads of claim has significantly overstated the three which can be investigated, and has simply assessed or estimated the remaining two and in the most general of terms. It is, to be frank, offensive to the court that the remobilisation schedule is essentially a rehash of the demobilisation schedule, with no reference whatever to the remobilisation which had occurred immediately before the demobilisation. It cannot be taken seriously.

67. The figures in the two schedules certainly appear on the generous side, and were of course prepared in the knowledge that the cross-undertaking had been given. These are not sums which ETML have actually paid to Cranbrook, and there is no clear statement from ETML that they will be paid, certainly not in full. There is evidence in the bundle that ETML have paid £100,000 towards an invoice for over £206,500

in respect of additional costs incurred before the cross-undertaking was given. The bundle also contains 5 invoices rendered by Cranbrook to ETML between 10 and 24 March 2017 each in the sum of £8,333 plus vat (£10,000) and each stating "interim payment for works completed to date" which may or may not cover the works for which compensation is sought under the cross-undertaking. But there is no evidence of payment of any of the costs presently sought under the cross-undertaking.

68. It is simply not possible to conduct a proper analysis of this claim. It would not be right to allow the quantum of the claim on the basis that it has not been specifically challenged by Mr Gray (as Mr Winser submits at §111) for it is incumbent on ETML to prove its case, and that must include the quantum of the individual heads of claim. But neither would it be right to allow nothing because of the state of ETML's evidence. Plainly costs were incurred. If I have to assess figures for both demobilisation and remobilisation I quantify these claims at £20,000 inclusive of vat, allocating £9,000 for the demobilisation and £11,000 for the subsequent remobilisation

(B) <u>Loss of amenity / loss of rent</u>

69. The quantification of these claims rely on the evidence of the single joint expert valuer, Mr Adams-Cairns. His report is dated 20 December 2016. There is no reason for the court not to accept this evidence.

70. The loss of amenity claim is made on the basis that Mr and Mrs. Hill stayed at 9 Ennismore Mews between 28 June 2015 and 25 September 2015 with the basement works yet to be completed as a result of the delay to the works consequent on the undertakings. It proceeds on the basis that had Cranbrook proceeded with the works after the October 2014 remobilisation all would have been completed by 28 June 2015.

71. The claim is assessed on a weekly figure for loss of amenity amounting to one-third of the amount for which the property could have been let. The amenity lost is both the absence of the completed basement and also the fact that Mr and Mrs. Hill had to access their property through a hoarding and to live with the signs within the property that basement works had been commenced but remained incomplete. Calculating loss of amenity by reference to rental value is an acceptable approach to the quantification of this claim. It is akin to the housing defects claims once common but now, while less frequent, are still brought in the county court.

72. The valuation evidence of Mr Adams-Cairns is that had the works been completed, the property would have commanded a rent of £2,150 per week. There is no reason not to accept Mr Adams-Cairns' evidence on rental figures. The claim at one-third the letting value is however too high. A more realistic figure would be one-fifth the letting value, that is £430 per week. In arriving at this fraction I have taken account of the fact that this was a house in which Mr and Mrs Hill only used to live for short periods each year, and was otherwise available for rent. This is not really a 'home' in the sense that this word is conventionally understood. Over thirteen weeks the claim amounts to £5,590.

73. Mr Adams-Cairns' evidence is that the loss of rent claim is to be assessed on the basis that the current market rent of 9 Ennismore Mews in its current condition with no ongoing works is £1,250 per week, a reduction of £900 per week. The claim is for the full 39 weeks between October 2015 to June 2016 during which the property would have been available to let out had the works been completed. To be deducted from this claim should be a one week void period, commission at 18%, and agreement and inventory costs of £900, that is £34,200 less £6,156 and £900, total £27,144.

74. In summary therefore my findings on the quantum of ETML's claim for compensation are as follows:

A) Construction and maintenance costs

(i)	demobilisation costs	£9.000.00
(ii)	hire of specialist propping equipment	£3,500.00
(iii)	weekly site attendance to maintain propping	£1,500.00
(iv)	remobilisation and site preparation	£11,000.00
(v)	uplift in contract price due to delay	£4,757.64

(B) Loss of amenity / loss of rent

(vi)	loss of amenity through Mr and Mrs. Hill living in a property subject to incomplete building works between 28 June 2015 and 25 September 2015	£5,590.00
(vi)	loss of rent for 39 weeks less expenses	£27,144.00
		£62,041.64

Arguments on causation

75. Mr Gray raises 6 matters which he argues go to defeat ETML's claim for compensation either in whole or in part for reasons of causation. There are:

(1) The need for ETML to give security for expenses.

(2) The impossibility of proceeding with the Crowley Award without a shuttering award.

(3) The need for ETML to obtain an award to remove the 'concrete installations' and to remove those installations before proceeding with any further basement works.

(4) The need for ETML to obtain an award to resolve the engineering and construction issues arising from the fact that the underpins to the front and rear walls have been constructed some 600mm below their designed depth. In this position, maintains Mr Gray, these underpins are in 'horizontal conflict' with the reinforced concrete underpinning to the rear wall, and will be in conflict with the underpinning when properly installed to the party wall.

(5) The need for ETML to obtain building regulation consent for the works proposed in the Crowley Award.

(6) Any suggestion that the costs of demobilisation and remobilisation must be awarded founders on the fact that the Crowley Award works could not have been undertaken immediately. Any remobilisation carried out in October 2014 was premature and would have had to have been reversed.

76. (1) <u>The need for ETML to give security for expenses</u>

This is a matter commented upon in my judgment of 30 June 2016. Mr Crowley was satisfied that there was sufficient notice for the making of an award that ETML give security for expenses before his award of 3 October 2014. In that award Mr Crowley decided that there should be an award of security for expenses in relation to the underpinning but made no specific award as no information had been provided to him as to the level of security. In the event it was not until over a year later, on 19 October 2015, that Mr Crowley made the award for security in the sum of £30,000, the security to be released on the completion of the underpinning.

77. With the award in place ETML provided the required security on 4 November 2015. This date, as Mr Gray points out, is some 15 weeks after discharge of the undertakings. He argues that the determination and provision of security would have held up the recommencement of any work for 15 weeks.

78. I do not follow this argument at all. Had ETML been pressing on with the works in November 2014 after completing remobilisation, there would have been an appreciation that security needed to be quantified and given. The necessary information would have been available and a further Award made and the sum awarded paid in no more than, say, two weeks. Any delay above that would almost certainly have been the responsibility of Mr Gray, and no reliance can be placed on that. ETML would have been able to provide the necessary security by return.

79. The making of the further Award and the provision of security would have held up the works by no more than two weeks.

(2) <u>The impossibility of proceeding with the Crowley Award without a shuttering award.</u>

80. Here Mr Gray is on firmer ground. On the face of it the Crowley Award could not have been proceeded with by ETML as it stood. The Award did not take into account the fact that ETML's contractors could not lawfully pour their concrete up against Mr Gray's piles. That would have been a trespass. A small trespass in physical terms (200 to 350 mm.) but a trespass nevertheless. In his submissions Mr Gray reminds me, perfectly properly, of the disarming of my concern on this score by Mr Winser at the 2015 trial and my observations at paragraphs 32 and 33 of my judgment on the 2016 application. Whatever might have happened 'in real life' as I commented, the court cannot proceed to assess compensation on the basis that Cranbrook would have acted illegally and got away with doing so.

81. Mr Winser submits that "but for the undertaking there would have been no need for a shuttering award, because Mr Gray had not at that time cut holes in the Piled Wall; this was only done in mid to late December 2014". This submission misses the essential point. Namely that it was not open to ETML to proceed with the Crowley Award in October 2014. By proceed is meant lawfully proceed. It is quite plain on the evidence, and I so find, that pouring concrete against the entirety of the piled wall would have constituted a trespass, and a trespass for which there was no express warrant in the Party Wall Award. Neither could there be authorisation by Award. The trespass is not to Mr Gray's land directly under the party wall, ETML's case in opening, but to Mr Gray's land beyond the line of the party wall.

82. Mr Crowley's award, authorising as it does the Packman Lucas design and method statement, proceeds on the basis that Cranbrook would excavate right up to Mr Gray's piles with concrete poured up to the piles with only a polythene membrane between the piles and the concrete. Neither the Award nor the method statement specifies the precise position of Mr Gray's piles, and there can be no criticism in that regard because the precise position of all the piles was not known. But in authorising the pouring of concrete up to the piled wall, or up to a polythene sheet hard against the piled wall, the Award ignored the possibility that there were individual piles wholly within the land of 7EM no part of which were positioned underneath the party wall. This might be seen as an inherent defect in the Award.

83. Any careful consideration of the position of the piles in situ should have resulted in an appreciation of this inherent defect. The whole aim of Mr Gray's 2002 contiguous piling system was that it should be set within the line of the party wall and so not interfere with the foundation provided by the base of the party wall. The likelihood that there would be space between the edge of the non-deviated piles closest to 9EM (and even this edge of deviated piles at their top ends) and the line of the party wall at its 7EM side was very high indeed. This is a matter that should, in retrospect, have been considered at the July 2015 appeal. The point was raised but rather brushed aside, and as the Appeal proceeded on the basis of defined issues (a helpful approach generally but with the disadvantage that it constrains consideration of additional matters) no time was spent on it.

84. It is safe to say that the importance of the need for a shuttering award was not appreciated at the time of Mr Crowley's Award and the issuing of Mr Gray's appeal against that Award. Mr Gray did suggest in an e-mail to Mr Hill of 2 November 2014 that the Crowley Award was not 'sustainable' but without an explanation as to why this is so. Mr Gray does not rely on trespass and this is not a matter raised in the Grounds of Appeal. Strictly, it might be argued that there is no need to appeal a Party Wall Award which authorises works beyond the party wall; such works may be prevented by common law action. But it is plainly good practice to raise such a matter in an appeal and have the Award duly corrected.

85. Accordingly had there been no undertaking given in November 2014, and had ETML proceeded with the Crowley Award works, it is reasonable to suppose that Mr Gray would not have sought injunctive relief to prevent the works continuing on the ground of trespass. It was not a point to which he was then alive. Whether it would be right for a court to award compensation to a party for not being able to carry out work which would itself, in part, have been unlawful (because it

constituted a trespass) is a difficult question. It may be that ETML would have got away with the trespass had it been in a position to proceed immediately with pouring the concrete authorised by the Crowley Award. Either the trespass would not have been discovered, or, if it had, Mr Gray would have been left with a very modest award of damages to reflect the value of the very small slivers of land which he had lost.

86. In the event however Cranbrook had to remobilise before there was any question of pouring concrete and ETML were prevented from proceeding with the work by Mr Gray cutting holes in his piled wall. In this regard Mr Winser's submission, quoted in paragraph 81 above, is optimistic in the extreme in that it suggests that Cranbrook would have been able to pour the concrete before Mr Gray cut holes in the piled wall. Mr Gray would have known what was going on. He might not have appreciated that there would be a trespass involved, but he was not prepared to allow ETML to make use of his contiguous piling by pouring concrete against it. Mr Gray knew what was being planned. He was vigilant, and it would not have taken him long to cut the holes in the piles once he appreciated that works were underway next door. Mr Gray fully appreciated the problem that the holes would cause to any contractor wishing to pour concrete against his piled wall. On a strong balance of probability I find that Mr Gray would have acted sufficiently promptly to prevent Cranbrook trespassing on his land by pouring the concrete.

87. ETML make the point that Mr Gray did not in the event serve notices under ss 2 and 6 of the Act indicating his intention to remove the contiguous piling until 10 December 2014. But that does not assist ETML. Once the undertakings were given the pressure to move speedily was off. It cannot be taken as the date on which the notices would have been served had the undertakings not been given. If anything is clear in this history it is that Mr Gray has throughout been fully determined to prevent ETML from constructing its basement in accordance with the Crowley Award or any Award like it. He is a resourceful and energetic man. It simply was not open to ETML to proceed with the Crowley Award without obtaining some form of Award, whether strictly a "shuttering award" or not, which dealt with the fact that no concrete could be poured directly onto the piled wall, nor onto any membrane or other physical object (Mr O'Connor referred to a cementitous grout) placed against that Wall.

88. For completeness I should refer to the fact that there was some discussion in the course of the hearing as to the possibility of leaving the necessary sliver of soil up against the piled wall enabling Cranbrook to pour up to the soil and not thereby trespass on Mr Gray's land. Mr Derby's attempt to support the proposition that a thin band of soil would remain in position against the piles in oral evidence was singularly unimpressive; he really did not believe it himself. Mr Clark was firm in his view that the soil would fall away and rejected the suggestion that the soil would stay in place for, and support, a concrete pour as a viable possibility. As did Mr Bradshaw and Mr North. The possibility that a sliver or thin band of soil would both stay in place against the piled wall and support the pressure of the Crowley Award mass concrete pour so as to prevent a trespass is no more than an Alice in Wonderland suggestion. As to the problems involved ETML might usefully read its own pleading in the trespass claim, quoted at paragraph 156 below.

89. Mr Winser’s submission that ‘the fact that the removal of the piles was a deliberate spoiling tactic is a further reason the Court should not take account of this in the assessment of damages’ (§70) raises an interesting point. The use of phrases such as ‘spoiling tactic’ does not assist, however. An adjacent owner who wishes to frustrate a proposed development by a building owner is perfectly entitled to take action or, in Mr Winser’s words, adopt a deliberate spoiling tactic, provided that it is not an unlawful deliberate spoiling tactic. The reasonable objective observer may not be impressed by the behaviour, there are many things that individuals and corporations do with which we are not impressed, but if the behaviour is lawful we cannot prevent it. The Court has to ask itself whether Mr Gray would have adopted such a tactic and if so the consequences of his doing so, taking into account the lawfulness or otherwise of the tactic.

90. I have already found that Mr Gray would have adopted the tactic, and ETML’s submissions in this regard only confirm me in the correctness of the finding. What would have been the consequences? Was it lawful for Mr Gray to cut holes in the piled wall? The piled wall was not a party wall, and while, because of the deviation of piles from the vertical some part of this wall was under the original footprint of the party wall, there were vertical piles wholly within Mr Gray’s land. The Crowley Award could authorise incursion onto that part of Mr Gray’s land which was under the footprint of the original party wall, (Mr Gray’s land extending to the centre line of the original party wall), but the Award could not authorise incursion into Mr Gray’s land beyond that footprint, even if the incursion involved was measurable in millimetres.

91. Whether it was lawful for Mr Gray to remove parts of his own piles depends on both party wall issues and whether in doing so he was committing a nuisance. Mr Gray had had to obtain a Party Wall Award for his original excavation and piling. This Award is dated November 2001, and it authorises installation of the piles creating the piled wall with a reinforced concrete capping beam together with other work at first and second floor levels with which this case is not concerned. Clause 3 of the November 2001 Award provided “THAT no material deviation from the agreed works shall be made without prior consultation with and agreement with the Adjoining Owner’s Surveyor”. This is a common provision in party wall awards and reflects the provisions of s 7(5) of the 1996 Act, although it may be noted that the statutory prohibition is to any “deviation” from the plans etc, not any ‘material deviation’.

92. ETML submit that Mr Gray’s removal of sections of the piled wall amounted to:

(a) an unauthorised departure from the 2001 Award as a material deviation from the agreed works without consent;

(b) a breach of s7(5) of the 1996 Act entitling ETML to compensation; and / or

(c) a private nuisance “in that it is an unauthorised interference with ETML’s right under s 2(2)(a) of the Act to underpin the party wall as set out in the Crowley Award and/or was an act done with the intention of annoying a neighbour and as such was not a reasonable use by Mr Gray of his own land.

93. It is not obvious that the cutting of holes in the piled wall did indeed constitute a material deviation from the agreed works. The essence of the 2001 Award was that there would be contiguous piling which provided lateral support to the structure of 9 Ennismore Mews after the basement at 7 Ennismore Mews was constructed. Such support could be and was provided notwithstanding the holes cut by Mr Gray. The evidence for this is empirical. ETML refers to the agreement of the engineers that "if the piles were removed before the eccentric underpinning was built the party wall would collapse", but the engineers are here referring to the entirety of the piling, not just the cutting of holes in two or three piles. The better view, it seems to me, is that while the cutting of holes in the piled wall was an alternation to the agreed works it was not a material deviation.

94. As the statute prohibits any deviation without a requirement of materiality ETML may be on stronger ground with the complaint under s 7(5) of the Act, although, as I observed in paragraph 128 of my judgment in of 23 July 2015, there is little if any difference in practice between a "deviation" and a "material deviation". ETML may therefore have a claim for compensation under the Act. But that does not take ETML very far, because the natural answer to the problem resulting from the holes, the inability to pour concrete directly up against the piled wall, is answered by having a Shuttering Award. Providing the shuttering, an Award ETML needed in any event, was work it had to do for a lawful construction of a party wall under the Crowley Award. ETML sustained no loss.

95. The need for a Shuttering Award also disposes of the suggested claim in private nuisance. The holes do not interfere with ETML's rights under s 2(2)(a) of the Act. The party wall can be underpinned, but shuttering is required for the work to be done lawfully. The claim in nuisance is doubted. It is the case that acts done with the intention of annoying a neighbour and actually causing annoyance do constitute a nuisance. But the intention in the present case was to prevent an unlawful pouring of concrete up against the piled wall. Even if (as here) there was the further intention of causing annoyance, it would be strange were the law to extend to making unlawful an act which caused annoyance by preventing the claimant from pursuing a course of action which itself was unlawful.

96. The next question to consider is whether Mr Gray required a Party Wall Award for the work of cutting holes in some of his piles. Mr Gray's case is that he did not. As it happens Mr Gray did serve party wall notices under both s 2 and s 6 1996 Act on 10 December 2014, but those notices were in respect of a proposal to remove the contiguous piles, the piled wall, in its entirety.

97. For the work of cutting holes in a few piles, Mr Gray would not have required an Award under s 2 of the 1996 Act. The piles were not part of a party structure. Mr Gray would however have required an Award under s 6 of the 1996 Act if the cutting through the piles amounted to excavation. The piles were within 3 metres of 9 Ennismore Mews. 'Excavation' is not defined in the 1996 Act, and I am unaware of any authority directly on point. In the ordinary course it is to be expected that excavation starts at ground level and works down. But excavation, a word with a Latin root, means making hollow, and if there is access to subsoil or underground structures from below ground, the works involved are perfectly well described as 'excavation'. Such approach also accords with the purposes of the 1996 Act, the

immediate purpose being the maintenance of the stability of the adjoining owner's building or structure.

98. In the course of correspondence in August 2015 after the hearing of the Appeal against the Crowley Award Mr Gray argued that the cutting of holes in the piles was a 'trial removal of part of the piled wall'. I am uncertain whether Mr Gray maintains for the purpose of the present hearing that the cutting of the holes was a trial removal of part of the wall, and that this was a justifiable exercise. Were it to be made, such an argument would not be sustainable.

99. Mr Gray should therefore have served a notice under s 6 of the 1996 Act and obtained consent or an Award before drilling holes in the piled wall. He did not serve a notice and neither sought nor obtained consent on the part of ETML, the Adjoining Owner. But in the circumstances Mr Gray committed no trespass and caused no actionable nuisance. The court cannot assess compensation on the wholly false premise that Mr Gray should be taken not to have cut holes in his piles because he should have but did not serve a s 6 notice. It certainly does not lie in the mouth of ETML to suggest this; ETML had no compunction when it came to excavating 2 metre holes at each end of the party wall to see whether there was a trespass by Mr Gray's piles, an excavation which should have been proceeded by a s 6 notice. The matter cannot be taken further.

100. The upshot is that ETML was in no position to proceed with the works after October 2014 without obtaining a shuttering award. It is understandable that ETML should feel so strongly about Mr Gray's behaviour. But at the heart of the concern must be the fact that in making his award Mr Crowley had not taken into account the fact that all the concrete envisaged in his Award could not be lawfully poured against the piled wall, with or without a polythene membrane. Doubtless in 99 cases out of 100 the Building Owner would have poured without the Adjoining Owner being aware of the position. Once the concrete was in place, had the Adjoining Owner complained of the trespass in legal proceedings, the minor and inconsequential nature of that trespass would almost certainly have ensured that the Court would have refused any injunctive relief and awarded a very modest sum by way of damages based on the value of the land over which the Adjoining Owner had trespassed with concrete. But this was the 100th case. Mr Gray was alive to the situation and succeeded in preventing the trespass.

101. The answer, simply, for ETML in October 2014 would have been to seek a shuttering award from the party wall surveyors or from Mr Crowley. ETML was in the same position in July 2015. Yet no award was sought. It is extremely difficult to understand why ETML did not just proceed to obtain an Award. It was advised to do so. Obtaining such an award should not have taken long. As Mr Winser suggests in his closing submissions at §76 "the shuttering necessary to cover the gaps in the piled wall is not a matter of any great significance", and at §77 "…if it were proper to have regard to the holes that had not then been cut in the piles, the resolution of the shuttering would have taken no more than a fortnight". So why was an award not sought? A fortnight incidentally is an underestimate of the time a shuttering award would have taken to prepare and publish, but it should not have taken longer than two, perhaps three, months, had ETML been determined to press ahead.

102. Following the hearing of the appeal in July 2015 the parties engaged in great deal of, eventually, fruitless correspondence. It is not unfair to suggest that ETML had allowed Mr Gray to get under its skin. The straightforward option of proceeding with the Crowley Award, coupled with the necessary shuttering award, whatever the reason for the need for such an award, was something which ETML lost sight of. The need for a shuttering award was attributed to Mr Gray's holes in the piles, whereas in fact such an award was needed primarily to prevent a trespass on Mr Gray's land. It merely carried with it the additional advantage that it solved the problem posed by the holes in the piles. ETML's position that the shuttering award was required because of Mr Gray's holes is the more understandable given the assertion in correspondence by Mr Hearsum, Mr Gray's solicitor, that this was the case, an assertion that was repeated on a number of occasions. In this respect Mr Hearsum may have served to mislead ETML. But ETML cannot realistically complain if this was in fact the case. ETML could and should have worked the position out for itself. In any case, whatever the reason behind the need for a shuttering award, ETML did not proceed to get one.

103. Furthermore, Mr Gray had thrown a substantial spanner in the works with his party wall notices served on 10 December 2014 envisaging the complete removal of the piled wall. The asymmetric (or 'eccentric') underpinning envisaged by the Crowley Award would no longer succeed in providing the necessary support to the party wall were the piles to be removed. On this the expert engineers were agreed (Joint Statement 19.12.16 item 30), and this was plain to the professionals, and to Mr Gray, at the time. Of course, until Mr Gray obtained an Award permitting him to remove the piles he could not so do, and ETML could have proceeded to seek a shuttering award sufficient to allow work to progress on the Crowley Award. Had ETML obtained a shuttering award and commenced work on the Crowley Award there would presumably have been an application by Mr Gray for injunctive relief, an application which may have caused no small difficulty for the court to determine, but the issue never arose.

104. In the event ETML did not obtain a shuttering award and did not proceed with works to implement the Crowley Award before, on 21 January 2016, Mr Gray obtained an Award (the Grove / Levy Award) authorising Mr Gray, as building owner, to remove his piles and underpin the party wall with mass concrete foundations. Mr Simon Levy had been appointed Mr Gray's party wall surveyor in respect of the dispute deemed to have arisen under Mr Gray's party wall notices of December 2014, Miss Murthy having declared herself incapable of acting. Mr North was (re)appointed as ETML's party wall surveyor for the December 2014 notices. Mr Crowley declared himself incapable of acting as third surveyor by letter dated 7 August 2015. Unsurprisingly, the parties did not agree a nomination and referred the appointment to Mr Fenton of Westminster City Council. Mr Fenton appointed Mr Maycox, who shortly after deemed himself incapable, and in due course Mr Richard Grove was appointed third surveyor.

105. The Grove/Levy Award of 21 January 2016 authorised the symmetrical underpinning with mass concrete proposed by Mr Gray in his notices of 10 December 2014. This proposal had been incorporated into a draft award dated 5 March 2015 on which Mr North had commented on 9 March 2015. Cranbrook had been asked to consider the viability of the work envisaged by Mr Gray after the July

2015 hearing, and had prepared a preliminary report on 29 July 2015 which concluded that the proposal could be completed successfully 'but the complexity should not be underestimated'. It was an award which could have been obtained and proceeded with within a relatively short time after the conclusion of the July 2015 appeal. Mr Gray may have been rather optimistic in suggesting in his e-mail of 5 August 2015 that there had been three issues in dispute on his proposed Award, all of which had been effectively resolved during the July 2015 hearing, but had the parties been so minded progress to an agreed Award could made, and made swiftly.

106. Unfortunately this was prevented by the state of the relationship of the parties. Mr Hill was, understandably, very suspicious about Mr Gray's motives in putting forward the proposal behind the December 2014 notices, the 'symmetrical mass concrete' proposal. Mr Hill thought that Mr Gray was posturing, explained in his e-mail of 6 January 2015 as putting forward a proposal diametrically opposed to Mr Gray's original request that ETML copy his in-board contiguous piles construction, and at the same time refusing to commit himself to proceeding with the new proposed works as soon as possible. Whether a commitment to carrying out the symmetrical mass concrete proposal within a specific time of it being agreed by ETML would have resulted in agreement is however very uncertain. A reading of the e-mail traffic between the parties throughout 2015, 2016 and into 2017 is a depressing exercise. Even the agreement which was reached and signed during the recent hearing may have run into difficulty. The parties do appear incapable of focusing on what is necessary to achieve a viable scheme for mutual basement construction, or preventing their mutual antipathy from causing time and energy to be expended on what, on reflection, should be seen as inessential matters.

107. For example, a fair amount of energy was expended on the so-called jurisdiction issue; restated by Mr Hill on 8 May 2015 as "can conflicting awards relating to the same or partially the same works in favour or more than one party lawfully exist at the same time?" There is nothing in the 1996 Act to prevent the making of inconsistent awards on behalf of different parties, and the matter is surely one of sensible award writing not jurisdiction. The width of the proposed mass concrete underpinning and the need to make allowance for flood risks involved less energy but still engaged the parties. These matters should have been capable of being dealt with by a short reference to the third surveyor, and surely would have been resolved in this way had both parties been more prepared to commit to a symmetrical mass concrete solution.

108. The upshot was that no decisive action was taken to further any particular scheme, and although it is understandable that ETML became embroiled in discussion and argument it must tell against ETML when considering what would have happened had there been no undertakings in October 2014. For present purposes it behoved ETML to act decisively.

109. Mr Hill's e-mail of 12 August 2015 suggested that ETML would indeed act decisively. Noting that Mr Gray was 'sitting on the fence' with regard to the provision of a further undertaking in damages in return for ETML not commencing work on the Crowley Award Mr Hill observes: "… I cannot make you act rationally so I shall instruct Cranbrook to proceed unless I receive the undertaking by close of business on Friday 14 August 2015".

110. The time limit passed without the required undertaking being given and on 15 August 2015 Mr Hill, while still expecting Mr Gray to provide an undertaking, instructed Cranbrook to mobilise to carry out the Crowley Award works. Mr Hill was aware that ETML needed to 'address the shuttering issue', and on 19 August 2015 he asked Mr North to prepare a draft award to this end. By this time Mr David Maycox had been nominated as third surveyor, and he soon found argumentative e-mails in his inbox. On 20 August 2015 he wrote to both Mr Gray and Mr Hill:

> "The personal vitriol between the two of you as the parties to this dispute is perfectly obvious in the recent emails. I would urge you both to simply concentrate on the matters in hand and not waste energy in the personal jibes and unnecessary rhetoric which only serves to cloud the issues.
>
> …. Mr Gray requests that I give both parties a deadline to produce submissions. I will not do this until I am provided with the matters in dispute agreed by both parties."

111. On 21 August 2015 Miss Nithya Murthy wrote a letter to Mr North stating that she was stepping down as party wall surveyor in accordance with s10(5) of the 1996 Act, the reason being that I had ruled that she was not a party wall surveyor in accordance with the Act. In fact I had made no such ruling, as Jackson LJ pointed out in paragraph 50 of his judgment on the application for permission to appeal. But nevertheless Miss Murthy deemed herself incapable and stepped down as Mr Gray's party wall surveyor. In her letter of 21 August 2015 Miss Murthy helpfully set out four issues which she saw as needing resolution before works could proceed on underpinning the party wall 'for the benefit of my successor'. These four were (1) security for expenses, (2) a section 11(11) payment to Mr Gray, (3) a new schedule of condition, and (4) the need to amend the design drawings to take account of (a) the holes cut in the contiguous piled wall, (b) the 'un-notified and unspecified deep excavations from the No. 9 side' (the Second Excavation), and (c) the end detail at the junction of the Party Wall with the existing underpinning in the front and rear of No.9. It might be objected that she was wrong to consider that a payment was due under s 11(11), but she was certainly correct with regard to security for expenses and her comments as to the extent of the necessary re-design were very much to the point.

112. Mr Maycox had asked for agreed matters in dispute to be referred to him, but none were. After an exchange of e-mails with Mr Gray on Friday 21 August 2015, in which Mr Gray complains of Mr Hill's reference to the number of previously nominated third surveyors and of tactical delay by Mr Hill/Mr North, Mr Maycox deemed himself incapable of acting on Monday 24 August 2015.

113. This is unfortunate as far as it goes, but did not have to impact on ETML's ability to proceed with the works, and any preliminary re-design work that might be required. Indeed on 25 August 2015 Mr Hill addresses Miss Murthy's points in an e-mail to Mr Gray suggesting that in this respect at least, Mr Hill was closely engaging himself with the works and the associated design. Mr Hill informs Mr Gray that Mr North is preparing an award for the necessary shuttering, point 4a. As to points 4b and c, the un-notified deep excavations from No.9 and the end detail at the junction of the Party Wall with existing underpinning in the front and rear of No.9, Mr Hill states that nothing further is required on these points, expressing the view, the

incorrect view, that these are ‘prior matters’ which had been approved by the Crowley Award and therefore required no further attention.

114. It is not obvious either that Mr Gray and his advisers were not acting rationally. On 11 August 2015 Mr Hearsum had sent an e-mail to Mr Smith of Child & Child repeating the views he had expressed on 6 August 2015 that before ETML could remobilise its works there was a need for a new party wall award addressing (a) the modifications to the works necessitated by the removed piles, (b) the deeper excavation (the Second Excavation), as to which Mr Hearsum complains that ETML had yet to confirm how and whether the excavations had been backfilled, and (c) the quantum of security for expenses. Mr Hearsum also assured Mr Smith that Mr Gray was willing to work with ETML and agree a design “that meets both or their requirements and is more rational, efficient and equitable”. Pending a response Mr Hearsum enclosed a proposed foundation detail for consideration, but added “Please note that my client will implement this design even if your client does not agree to it”.

115. There was no response to this e-mail and on 26 August 2015 Mr Gray took the matter up with Mr Hill asking for a response ‘to unlock the present impasse’. Unfortunately the e-mail Mr Gray sent was abrasive in tone, describing the Packman Lucas design as ‘seriously flawed, inelegant and inherently unstable’ and describing Mr Hill’s approach as a ‘cut-your-nose-to-spite-your-face’ designed to inflict maximum injury on Mr Gray. But behind the rhetoric there was a sensible proposal. Mr Hill’s response on 29 August 2015 was to hold to the Crowley Award, but he did express a willingness to consider alternative proposals. Less helpful was Mr Hill’s statement that Mr Gray had not sent a proposal but only a Method Statement, and asserting that “A proposal will have to deal with numerous other matters, such as the timing of the works, who does the works, who does the contractor report to, the financial arrangements etc.”, and complaining that any alternative design should be raised in Without Prejudice correspondence. A more helpful response would have recognised that the Method Statement indicates an alternative design and that consideration of matters such as timing, contractors, reporting and finance, are premature until an alternative design is agreed. Mr Hearsum took up the proposal with Mr Smith on 2 September 2015, but appears not to have received a response.

116. There is little purpose my following the e-mail traffic over the remainder of 2015 and throughout 2016 and 2017. The hard fact of the matter is that Cranbrook did not mobilise, Mr North did not prepare, or at least did not proceed to obtain, a shuttering award, and ETML did not proceed with the works. ETML can and do complain of the manner in which Mr Gray dealt with them and their team, and that he continued to advance his alternative symmetrical concrete foundation proposal. But ETML did not proceed with the work after July 2015. There is no proper basis on which the court can find that ETML would have proceeded with the work after the October 2014 mobilisation but for the undertakings.

I do not overlook ETML’s complaint in the present proceedings that Mr Gray misled Mr Dust, the third surveyor appointed by Westminster City Council to replace Mr Crowley on ETML’s notices, as to what this court had held on the appeal against the Crowley Award, whether there was a dispute for Mr Dust to

adjudicate upon, and, in effect, prevented Mr Dust making a shuttering award. This was not a matter investigated at the oral hearing, but there is an e-mail thread which can be followed from Mr Dust accepting appointment as third surveyor on 2 September 2016 through to Mr Dust's attempt to summarise for confirmation the various matters which had been referred to him for resolution on 22 December 2016, and the abortive attempts to meet and for ETML to secure a shuttering award in 2017. No conclusion is arrived at, and certainly no shuttering award is made. I can well see that ETML hold Mr Gray responsible for there being no shuttering award. However Mr Gray was pressing his agenda, and, so far as I can see, did nothing which can be classed as improper. The hard fact of the matter was that with the active participation of Mr Gray, and (I suspect) the doubts and uncertainties inevitably thrown up in the mind of any independent surveyor given the background to the dispute and the difficulties posed by the Packman Lucas design and the piled wall, the Crowley Award was for all practical purposes incapable of implementation whatever might be said about it in theory. Now of course, following the agreement reached during the July 2017 hearing (a very sensible agreement) the Crowley Award will never be constructed.

(3) <u>The concrete installations / temporary concrete pads</u>

117. At some point in time Cranbrook carried out excavations beneath the party wall. It is Mr Gray's complaint that these excavations were not only beneath but extended beyond the party wall. Cranbrook maintains that these excavations comprised trial pits, and that these pits were authorised by the First Award. Cranbrook relies on General Note 15 to the notes to the drawings which provides:

> "Trial pits are to be dug prior to the commencement of the main works to expose the existing foundations and any possible historic underpinning which may exist – The design and details of the proposed underpinning may need to be revised to suit and should be reported in writing to the engineer prior to any modification being agreed".

118. Mr Gray acknowledges that Clause 1(c) of the First Award, dated 19 July 2012, provided that "the drawings and Method Statement held on the surveyor's files listed on the Document Issue Register attached hereto" should form part of the Award. The Method Statement is the Cranbrook Engineering Method Statement issued on 30 May 2012 and attached to the First Award. This Method Statement provides at section 4.00 that a 'hand excavated trial pit was constructed at the location indicated on Drawing 2105-120 Existing' and that the trial pit indicated a traditional corbel step brick foundation to a depth of approximately 600mm below ground level. The depth of the trial pit is not given. This Drawing shows the position of the trial pit just to the right of the front door to 9 Ennismore Mews where the front wall adjoins the pavement; that is nowhere near the party wall with 7 Ennismore Mews.

119. Mr Gray asserts in his closing submissions that 'the trial pit referred to in note 15 had, by the time of the method statement, already been dug'. This is, I suggest, a misunderstanding of Note 15. The trial pit referred to at paragraph 4 of the Method Statement merely exposed the nature of the foundation employed in the construction of the Mews House, it did not attempt to expose any historic underpinning to individual walls. The trial pits (plural) called for in note 15 are to

be dug in an endeavour to discover whether the type of foundation ascertained in the original trial pit represented the foundations on all four walls or whether there were any additional foundations (‘historic underpinning’) with which the contractor had to contend. It was perfectly proper therefore for Cranbrook to dig one or more additional trial pits along the party wall between 7EM and 9EM.

120. Additional trial pits along the party wall were therefore authorised by the First Award to the extent that they were genuine attempts to ascertain the ground conditions at and beneath the foundations to this wall. Mr Gray accepts that Cranbrook might discover some issue not apparent from the trial pit, and suggests that Cranbrook encountered problems in October 2012 as a result of excavating some 2 feet deeper than the Award allowed. Mr O’Connor’s e-mails to ETML on 19 October and 20 October 2012 refer to encountering significant quantities of water and exposing significant quantities of mass concrete, the latter having been ‘added at some point in the last 30 years’ and requiring removing to allow the basement to be constructed.

121. Cranbrook had in fact encountered Mr Gray’s piles, or at least those which deviated from the vertical. In doing so they may have strayed into land beyond the footprint of the party wall, but excavations, particularly in the conditions encountered in basement construction, cannot be carried out with any high degree of precision. As Mr Gray pointed out in his e-mail to Mr O’Connor on 30 November 2012 he had informed Mr Hobbs of the construction methods he had employed with his contiguous piling, but he had been ignored and there had been no communication with him as to the construction plans. Mr Gray complains of the un-neighbourly attitude shown by ETML’s agents, a complaint which cannot be wholly discounted.

122. Mr Gray now concludes that the excavations being carried out were not trial pits dug in reliance on general note 15, but were undertaken for the purpose of installing unlawful reinforced concrete underpins. The trial pit explanation, says Mr Gray, is “obviously wrong”. It is far from obvious to the court, although the fact that the depth of the excavation was appreciably more than it need have been is concerning. Mr O’Connor’s explanation is that Cranbrook were looking for firm ground off which to found their construction, but it is not easy to accept this account at face value given the depth of the basement excavation overall. If firm ground was only to be found 600mm (2 feet) or more below the level to which excavation was authorised by the Award, a further Award should have been sought on this basis to cover the lower excavation.

123. However deep Cranbrook went in the October and November 2012 excavations and for whatever reason, there were further, deeper, excavations undertaken in February 2013. These were carried out after the e-mail exchange between Mr Hill and Mr O’Connor on 13 February 2013. On 13 February 2013 at 04:39 Mr Hill was keen to explore making Russell Gray liable for everything, because

> “it will provide … a compelling reason to come to the negotiating table to agree to an alternative design. (Forcing the bastard to eat humble pie is of course not a motive). On the trespass point are we able to be sure that the piles of 7 Ennismore Mews trespass on 9 Ennismore Mews below where had been excavated to date easily and cheaply? This would be very useful information”.

The same day at 08:16 Mr O'Connor replied that he had arranged for a further 1m of excavation to take place in each corner of the party wall to 'assist in establishing the pile drift'.

124. In the course of his oral evidence Mr O'Connor maintained that he undertook the additional metre of excavation in order to ascertain the positioning of the contiguous piles where they had not been fully exposed. Mr O'Connor expressed concern that there might be damage to 7 EM if he imposed loads on the base of the piles:

> "So I wanted, as the constructor, to understand what was going on, and so we dug another pit … we deepened the pits. The consequence of Nick Hill's request is convenient for him, but … I'm not concerned, other than at a sort of sociable level, that he suffers a loss or not financially. That's not my position. He talks about trespass and things like this; they are matters for him, and any litigation he has with the adjoining owner.
>
> I went back to Nick and said "I've arranged for another metre to be excavated. The purpose of that excavation was not to tell Nick Hill "I'll dig an extra hole for you, to find out for you whether the piles have come across the boundary". I wanted to find out whether the piles came across the boundary, but that was for the purpose I alluded to in the early part of what I just said". (Day 4 page 215)

125. The context of this excavation was the publication by Williams and Hopps of their Addendum Award on 15 January 2013 (the "Second Award") which permitted ETML to carry out the works under an amended Method Statement and amended engineering plans. Mr Gray complained that the foundations authorised by the Second Award constituted special foundations, and he threatened to seek an injunction to restrain work that was in breach of s 7(4) of the 1996 Act. Although ETML did not publicly accept that the foundations were such, there is no doubt that the foundations being constructed were special foundations. This is succinctly explained by Michael O'Regan, Mr Gray's consulting engineer in his e-mail of 20 February 2013 to Mr Gray. It is evident that the true position was understood by ETML. On 15 February 2013 at 04:30 Mr Hill wrote to Mr O'Connor:

> "I would like to consider our tactics going forward. If we proceed with the works before the appeal is decided, Russell Gray may seek an injunction to stop ETML from proceeding with the works. However if we have already built the foundations that he maintains are Special Foundations the injunction application would not succeed (although he would have other remedies). Therefore there is quite a narrow window for his injunction application; the period between him discovering that we have re-commenced work and the completion of the foundations that he is alleging are Special Foundations. How long will it take to build these foundations?"

Mr O'Connor's reply is in the same spirit:

> "The vertical element would take approx 10 days.
>
> Prior to that we would do other related works – although he would find it difficult to time them into the "non special foundation".
>
> I am uncertain as to how often he visits the site. So far as he can tell we have been on site continuously throughout the process.
>
> I do not see how he would be in a position to determine what works we were carrying out."

126. I do not accept that Mr O'Connor carried out the additional excavation for the reason he suggests in his oral evidence, and that he did so under the authority of note 15. Mr O'Connor was fully engaged in the conspiratorial element demonstrated in these exchanges. The additional excavation was undertaken for Mr Hill's purposes.

127. At the end of the day however while it matters for the purposes of Mr Gray's claim of fraud, it matters little in a consideration of what would have happened had the undertakings not been given. The excavations were backfilled with high strength (not lean mix) concrete which became, on ETML's case, temporary pads. This case is supported by the Grove Award of 12 January 2017 which has not been appealed. I should add that the Sandberg's report of 22 June 2017 found variable concrete compaction with excess voidage, albeit with even distribution of aggregate, which is more indicative of temporary works than a permanent pour. Whether this concrete was intended to be rather more than temporary propping pads when it was poured is not relevant in this context.

128. This concrete / these pads would have required trimming if the Crowley Award was to be implemented in October 2014. If the Crowley Award was to be implemented as shown on the drawings (rather than the lower depth to which there had been excavation) it would appear that, as Mr Derby states, only some 302 mm would need to be trimmed and not the entirety of the 900 mm depth of the back-filled excavation. How long the removal would have taken was an issue explored at trial, with Mr O'Connor and Mr Derby suggesting that the entire concrete installation could be removed within one day, revised to a day and a half, and Mr Clark assessing the time required at 7 days. Given the working conditions and the high strength concrete which was required to be removed I prefer Mr Clark's estimate, but the difference is small and, as Mr Winser points out, there is no reason to conclude that the necessary work could not be undertaken simultaneously with other work, provided always that this was carefully planned.

129. The important question is whether a further party wall award was required before this work could be carried out. ETML argue that no award would have been needed. Cranbrook would have been entitled to modify its own temporary propping works without an award. When the possibility of Mr Gray removing the concrete was being considered ETML insisted on Mr Gray obtaining an award, to include a fully detailed method statement. But the point is made by ETML that there is considerable difference between Cranbrook removing its own temporary pads and allowing another contractor to enter 9EM and carry out the same work. Mr Clark's suggestion that an award would be required, argue ETML, is to be discounted because he was basing his view on the full depth of the excavation, whereas only the top 302 mm required removal. Such a removal would however have left the trespassing concrete in place.

130. In arguing that an award would be required Mr Gray refers to Mr North's agreement that this was the case in oral evidence and Mr Derby's e-mail to Mr Hill dated 7 December 2016 setting out the difficulties involved in the work, this in the context of criticism of Simon levy's method statement. Mr North's agreement was

somewhat cautious, and his further comments on page 125 show that his answer was given in relation to the cutting back of more than the top 302mm of the concrete backfill. Mr Clark's view, expressly qualified by his being an engineer not a party wall surveyor, was that an award would be required. As in the case Mr North's evidence, Mr Clark's evidence is that it is the depth of the excavation which necessitates an award.

131. What is of concern is that if only the top 302mm of the concrete backfill were cut back, this would leave some 600mm of concrete in position. Of this concrete some would be trespassing on Mr Gray's land and much would be backfill of an excavation which took place without the authority of a party wall award. To many an independent observer the natural reaction would be to say that such harm as the concrete has done (it may have caused or contributed to the cracking for which I gave judgment in July 2015) has been compensated for and there is little realistic prospect that this concrete will ever cause an owner of 7EM any difficulty for as long as the property stands. But it is not an insignificant matter for a court to overlook the improper excavation and its subsequent backfilling with concrete rather than soil.

132. The appropriate way to deal with the lower 600mm concrete, if not the top 302mm, would be the making of a further award authorising ETML to leave the concrete in place. Seeking such an award is what ETML should have done once it became plain that the presence of the concrete backfill was an issue, and that was the case long before October 2014. Mr Winser submits that the concrete backfill has assumed a much greater significance than would have been the case because the presence of the concrete in the position it is in forms part of Mr Gray's conspiracy theory. That may well be the case, but it cannot detract from the fact that the presence and extent of the concrete was plainly an issue with Mr Gray before October 2014 and that, whatever Mr Gray's position, work was required to remove at least the 302mm before the Crowley Award could be implemented. The concrete backfill could hardly have been overlooked.

133. Accordingly although ETML might like to think that Cranbrook could have got on with the Crowley Award works without concerning itself as to getting an award for the removal of the backfill concrete, that is unlikely to have been the case had the works proceeded after the October 2014 remobilisation. There is no good basis for suggesting that Mr Gray would have let the matter go. In the event ETML have not, even today, sought an award in respect of the concrete. That is surprising. It is implicit in Mr Winser's submissions that obtaining an award would not have been a lengthy or difficult matter. The failure to seek one suggests either supreme confidence that the works could proceed without one, however much Mr Gray may have made an issue of the point, or represents a further symptom of a general reluctance on the part of ETML actually to proceed with the works.

134. Had an award been sought, I would expect the party wall surveyors, probably the third surveyor, to have made a suitable award within, say, two months of being asked to provide one. The surveyor(s) making the Award would have needed to seek submissions, give a fair time for their preparation, and then consider the submissions before proceeding to make the Award.

(4) <u>The engineering and construction issues arising from the fact that the underpins to the front and rear walls have been constructed some 600mm below their designed depth and thus conflict with the 2012 R/C underpinning.</u>

135. The depth of the underpinning and the 'conflict' to which Mr Gray refers is demonstrated, as Mr Gray submits, on the Crowley Award drawing by Packman Lucas 5221/SK / - /01, Rev 6. Neither Mr North or Mr O'Connor saw this conflict as a significant matter, but gave no compelling reason for such a view. Mr Clark expressed the opinion in oral evidence that having mass concrete at a junction with reinforced concrete was a matter that had to be dealt with carefully. The party wall surveyors would need to see a proper specification and design for forming the junction between the mass concrete underpinning as it runs towards the rear wall line, particularly as it is 600mm higher than the concrete to which it adjoins. "That's quite a complicated area". Mr Clark explained that as the reinforced concrete of the rear wall comes well into the zone where there will be mass concrete underpinning, the reinforced concrete base has to be cut out and this would weaken the wall stem that relies on the mass concrete base. This is not therefore a matter which, in Mr Clark's view, could safely be left to the contractor's in-house engineering expertise. It should be dealt with by the engineers responsible for the permanent works of the project.

136. Mr Clark was an impressive witness and, to the extent that it conflicts with ETML's evidence I prefer Mr Clark's evidence. That said, Mr Clark suggested that with everyone's cooperation the necessary work could be done in 7 to 10 days, but if there were a dispute an addendum award would be required. Given time for submissions and consideration, and in the context of this particular party wall matter, I proceed on the basis that obtaining such an award would have taken about 3 months.

137. In commenting upon this causation issue Mr Gray makes the point, correctly, that as the underpinning to the front and rear walls of 9EM extended 600mm below its planned depth, the underpinning within 3 metres of 7EM was notifiable work which was not authorised by either the First or Second Award. A further award would therefore be necessary. Mr Gray also points out that the Crowley Award was in conflict with the underpins to the front and back walls of 9EM as authorised in the First Award and an addendum award would have been required after the Crowley Award even if the 2012 underpins had been correctly constructed in accordance with the First Award, but this is of academic interest only.

(5) <u>Building control</u>

138. Mr Gray, at paragraphs 68 to 70 of his opening submissions, raises the fact that Cranbrook required Building Control approval for their works, and that Greendoor Building Control were appointed to undertake this function. Mr Gray pointed out that there was no evidence that Greendoor had approved the works or even been informed that they had commenced. Accordingly the Court was invited to conclude that no notice was given to Greendoor of the Crowley Award works because any such notice was expected by Cranbrook to "generate difficulties – as a structure dependent upon the readiness of a neighbour to provide support for it with no legal

obligation to do so". In closing Mr Gray observes that no evidence was adduced at trial which changed the position he adopted in opening, but points to the Greendoor letter of 29 April 2016 ("We are still awaiting the re-design for the underpin arrangement in connection with the party wall") which, he suggests, remains unanswered, as evidence that Cranbrook were reluctant to submit the Corwley Award for approval. This because "they knew there was a likelihood the Crowley Award would have be amended (practically, to the Grove-Levy Award)".

139. Whether Mr Gray misunderstands the function of building control or not, as Mr Winser suggests, it would be most unusual for a Building Control officer to require amendments to a party wall award made by a qualified surveyor with the assistance of professional engineers. True, if a Building Control officer had grounds for supposing that the authorised works could not be carried out except in contravention of the building regulations he would be expected to raise his concerns and, presumably in discussion with the surveyor or engineer as may be appropriate, ensure that they were satisfactorily addressed.

140. Mr O'Connor deals with the issue of Building Control approval at paragraphs 14 onwards of his statement dated 23 June 2016. There Mr O'Connor states that an initial notice was served on Westminster City District Surveyor's department on 20 September 2012, a registration number (12.01582.IN) was issued, and that Greendoor have carried out periodic inspections.

141. This evidence of Mr O'Connor was not challenged by Mr Gray. There is nothing in this point.

(6) Any suggestion that the costs of demobilisation and remobilisation must be awarded founders on the fact that the Crowley Award works could not have been undertaken immediately. Any remobilisation carried out in October 2014 was premature and would have had to have been reversed.

142. This matter overlaps with that made in matter (2), the need for a shuttering award before the Crowley Award could be implemented. As pointed out above, the Crowley Award could have been implemented immediately, after mobilisation, although such an implementation would have involved the commission of a trespass, but for Mr Gray's holes. On a practical level therefore there is nothing in this point. The works were prevented by the holes cut by Mr Gray in his piled wall, and it cannot be said that any remobilisation in October 2014 was premature because of work Mr Gray carried out in December 2014, or would have carried out earlier had he needed to do so to prevent Cranbrook implementing the Crowley Award.

Works pending court hearing

143. Had ETML not been given the cross-undertaking in damages it would have had to have taken the risk of carrying out works pending the hearing of the s10(17) appeal, with the possibility that an order might be made requiring works to be undone. The impression gained on reading through the material is that ETML, despite its firm words and strong line in correspondence, and despite Mr Hill being prepared to

consider the possibility of taking of risks of a legal nature, in fact showed itself to be risk averse. A good example is Mr Hill's e-mail to Mr O'Connor on 13 February 2013:

> "The good news is that Andrew Smith believes that Russell Gray's appeal is "most unlikely to succeed", lawyer speak for less than a snowball's chance in hell. Indeed Andrew Smith is suggesting that we plough on with the works (because an appeal, in itself, does not suspend the works). The problem with going ahead is that if Russell Gray succeeds, however unlikely that may be, the whole works will have to be dismantled (at my cost). I therefore need to consider this further and probably obtain a second opinion."

144. It may be therefore that even had Mr Gray not given a cross-undertaking in damages ETML would not have proceeded with its works pending the determination of Mr Gray's appeal. However the risk posed by an appeal causing ETML not to proceed with the works is not a matter raised by Mr Gray and was not actively considered during the evidence. I take it no further. I do however observe that whether because Mr Gray's behaviour amounted to successful bullying, or because ETML was wrong-footed by Mr Gray, or for some unknown internal reason, ETML simply did not get on with Crowley Award works, with such addendum award or awards as were necessary, after the July 2015 appeal hearing or indeed after November 2016 hearing in the Court of Appeal. At the time, I assume, week by week, there was seen to be a reason for not pressing ahead. Nevertheless it is telling that nothing of substance happened.

145. At the end of the day, if the agreement reached during the July 2017 hearing does lead to a completion of the ETML's long overdue basement project, the delay may have been for the best. The proposed scheme is preferable to the Crowley Award scheme, amended as necessary. But the implications for the compensation claim are significant.

<u>Conclusion</u>

146. For the reasons given above I have reached the conclusion that even had the undertakings not been given the Crowley Award works would not have been commenced let alone completed during the period the undertakings were in force. Although I doubt that there is force in Mr Gray's suggestion that the remobilisation was, in effect, an exercise in bluff to persuade him to give an cross-undertaking which might then be used as a negotiating tool, without that cross-undertaking it would very soon have become apparent that the Crowley Award works could not be undertaken without addendum awards. Once that happened even had works been commenced in earnest, which is not at all likely, they would have been suspended and the whole sorry business of e-mail traffic would have resumed and continued through to and beyond the appeal hearing in July 2015 in much the same way as it has from August 2015 to July 2017. In answer to my general question why the basement had not been built Mr North expressed the opinion that the underlying cause was a resistance from Mr Gray and a desire for it not to happen. So there has been, but there is no obligation on an adjoining owner to assist a building owner build his project. The 1996 Act recognises that there may be such difficulties and so provides for an award to be made by a building owner surveyor and the third surveyor or the third surveyor alone. Had the design been perfectly sound, as Mr

North suggested, there would surely have no difficulty in ETML obtaining the necessary award or awards to see it through. But, in difficult circumstances, the design was plainly not sound in the sense of achievable, as events have proved, and the design was no more achievable in October 2014 than it has been since July 2015.

147. It follows that no compensation is due to ETML from Mr Gray, even the remobilisation costs in October 2014 (as to the incurring of which I share at least some of Mr Gray's doubts for the reasons indicated above) for such costs would have, in the event, been thrown away when the works did not commence or were further suspended.

Mr Gray's Trespass claim : D20CL022

148. Mr Gray's Particulars of Claim, dated 14 February 2017, are drafted by counsel. The claim in trespass is brought in respect of the excavations carried out by Cranbrook in October 2012 after commencing work under the First Award and in November 2012 after excavation, described as trial pits, had discovered the presence of Mr Gray's contiguous piling. This has been described as 'the First Excavation'. There was a meeting on site on 4 December 2012 in which the piling under 7EM was discussed and the fact that at least two of these piles deviated from the vertical and extended under the party wall. Photographs produced by Mr O'Connor at the December meeting demonstrated that Cranbrook had excavated at least one foot beyond the party wall under 7EM. As at 10 December 2012 Mr Hopps was able to state that two bays had been excavated and that no backfill of the First Excavation had taken place.

149. The Second Award, dated 15 January 2013, an addendum award to the First Award, was served on the parties shortly after it was made. Mr Gray appealed the Second Award on 30 January 2013 on the basis that the underpinning the award authorised was properly categorised as special foundations for which his consent had not been obtained.

150. ETML suspended the works in December 2012 and Mr Gray's appeal threatened to hold up progress on the basement extension for some while. On any human level Mr Hill had reason to feel exasperated by Mr Gray, and his refusal to accept special foundations, but Mr Gray was fully within his rights under s7(4) of the 1996 Act. In an exchange of e-mails with Mr O'Connor on 13 February 2013, Mr Hill asked whether it would easy and cheap to ascertain whether or not Mr Gray's deviant piles went so far as to trespass beyond the boundary between 7EM and 9EM (ie the midpoint of the subsoil directly beneath the party wall). Mr O'Connor's reply was that he had arranged for a further 1 metre of excavation at the two corners of the party wall and would keep Mr Hill advised.

151. In giving oral evidence Mr O'Connor suggested that the fact that Cranbrook then did undertake further excavation in the two corners was quite coincidental to Mr Hill's request. This excavation, claimed Mr O'Connor, was in fact undertaken in order to ascertain the precise position of the lower end of the piles, this in order that Cranbrook could ensure that in carrying out their works loads were not placed on

the piles which might generate forces which would operate through the piles and damage the above ground structure of the 7EM building. This evidence was distinctly unimpressive. I have already rejected it when considering causation issue (3) in relation to the claim for compensation under Mr Gray's cross-undertaking.

152. In his pleaded case in trespass, Mr Gray relies on Mr O'Connor's e-mail of 22 February 2013 at 17:58 in which he informs Mr Hill than Cranbrook had excavated two further pits at each end of the party wall to a depth of 2 metres (not just the one metre promised) below the basement floor level. This excavation is described as 'the Second Excavation'. Cranbrook had discovered in completing the Second Excavation that none of the piles exposed on that excavation did in fact trespass onto 9EM land. The most deviant of the deviating piles remained 15 mm within the land of 7EM. As it is apparent from this evidence that the excavation had been taken right back to Mr Gray's piles for that 2 metre depth it followed that Cranbrook had trespassed on the land of 7EM. Furthermore, on a date unknown to Mr Gray, Cranbrook back-filled its excavations with concrete, which involved a further trespass. Neither the First nor the Second Award permitted the Second Excavation.

153. Mr Gray asserts that the fact of the Second Excavation and its back-filling was deliberately concealed from him and the Court. It is Mr Gray's case that he only learnt of the Second Excavation when carrying out works of his own under the Grove-Levy Award of 21 January 2016. Mr Gray seeks a declaration and an order that the back-filling be removed and replaced 'with such material and in such a way' as the Court or an independent engineer may determine.

154. In its defence ETML asserts that the First Excavation involved no more than the digging of trial holes to investigate the ground conditions. As such, while the First Excavation was not expressly authorised by the First Award, there would be an expectation that such holes would be dug to investigate the ground conditions and the nature of the contiguous piled wall. By implication the First Excavation simply followed good practice.

155. Paragraphs 11.4 and 11.5 of ETML's defence comprise calculations which it is stated demonstrate that at some point below the level of the Second Excavation Mr Gray's piles do in fact trespass onto the land of 9EM.

156. ETML accepts that the First Excavation extended beyond the face of the party wall on the 7EM side. The point is made, at paragraph 12.2 of the defence, that it would not have been possible or practicable to avoid the excavation extending to the face of Mr Gray's piles. The point is made that "the bottom of the excavation was filled with water. This would have washed away any soil between the face of the party wall and the piles. Due regard must also be had to the limitations of working on site, underground, with hand tools and without any certainty as to the precise location of the face of the party wall above (which was not visible due to the corbels)." Similar considerations must necessary apply to the Second Excavation.

157. Accordingly the Second Excavation, in respect of which the claim is brought, extended onto the land of 7 EM. Nevertheless ETML asserts, at paragraph 17.3 of the defence, that the Second Excavation was permitted, and indeed was required, by

the Second Award. This is on the basis that the Second Award was an addendum to the First Award, it expressly applied the general conditions of the First Award, and incorporated the Cranbrook Method Statement dated 21 December 2012. Reliance is placed on the notes to two of the drawings attached to the Method Statement which require the contractor to be responsible for maintaining the stability of the existing buildings and for the design and provision of all necessary temporary works including propping, shoring, and needling to support the existing walls and foundations.

158. ETML's defence of the Second Excavation fails for two reasons. First, the authorisation of the Method Statement forming part of the Second Award extended only to temporary works necessary for the stability of the existing buildings required during the performance of the works authorised by the Second Award (and by extension the First Award). There is nothing in either First or Second Award that would authorise ETML to excavate more than a short distance below the depth of the base of the underpinning, that is the distance required to form that base. The works complained of by Mr Gray were works which went 2 metres, or thereabouts, further than necessary to carry out the Award works, and were designed to discover whether the 7EM piles extended onto 9EM land well below the level to which Cranbrook needed to excavate for the purpose of the works.

159. Secondly, the Second Award was successfully appealed by Mr Gray. It was set aside in its entirety after ETML accepted the inevitable and threw in the towel in May 2013. The trespass had of course by then been committed. But on the setting aside of the Second Award any protection it may have given ETML against an action for trespass was lost.

160. As an alternative to the argument that there was no trespass ETML argue that there was no actionable trespass. Four lines of argument are advanced. (1) The Second Excavation was unintentional, without negligence and thus involved involuntary trespass, or (2) was trespass with justification, or (3) was *de minimis*, or (4) it would be unjust ("in the very unusual circumstances of this case") for the court to hold that the Second Excavation and its backfilling with concrete amounted to an actionable trespass.

161. These arguments carry little weight. (1) The trespass was deliberate for the reason already stated. (2) Justification is pleaded in respect of the backfilling not the original excavation. Once the excavation had taken place backfilling was undoubtedly required to ensure the stability of the piled wall. Concrete was the easier option, but why high strength rather than a (more appropriate) lean mix was used has not been satisfactorily explained. But although concrete was the easier option than soil, a trespasser who commits trespass by removing soil ought to backfill the resulting hole with soil not concrete unless there is compelling reason not to do so. No such reason has been advanced. (3) The trespass was relatively small in extent. The maximum encroachment was in the order of 375 mm, and much of the encroachment less than this, about 100mm give or take 25mm. The depth of the encroachment would have been about 3 metres overall. Small the trespass may have been, but it was deliberate. It is surely offensive to the law for a person who deliberately removes his neighbour's soil in the hope to gain an

ancillary advantage in an on-going dispute to suggest that it should not concern the law because it was only a little bit of trespass.

162. (4) The circumstances of this case are unusual (not perhaps 'very' unusual) and ETML can reasonably ask the court to view the trespass in context. But this does not assist ETML. From ETML's perspective Mr Gray was exasperating, seeking to impose his own views on the appropriate way to construct basements which was at odds with the views of most if not all the rest of the world (in this case the rather compact world of basement construction). In so doing Mr Gray threatened to restrict the extent to which a basement under 9EM might be built, 9EM having a modest footprint however desirable a property given its location. But while Mr Gray was difficult, and was content to make difficulties, he was proceeding within the law. ETML went outside the law. Later on, of course, Mr Gray went outside the law when he drilled holes in some of his piles without complying with the provisions of the 1996 Act. However, the common law is not so flexible a tool as to allow a judge to overlook a tortfeasor's breach in February 2013 because his victim would later ignore the provisions of a statute in December 2014.

163. Mr Gray's 'Trespass Claim' also extends to claims in nuisance and breach of statutory duty. A claim in nuisance adds nothing to the claim in trespass. Whether or not the facts in this case amount to a claim in nuisance might give rise to an interesting examination question but it would be disproportionate for it to be argued out in this judgment. The breach of statutory duty relied on is presumably the failure of ETML to obtain an award under the 1996 Act before its Second Excavation. That adds nothing to the claim in trespass.

164. The Trespass Claim is now largely academic. As Mr Gray accepts (§40) the claim has been overtaken by events in the light of the agreement reached during the course of the trial. Mr Gray nevertheless (§41) seeks a declaration that the Second Excavation and its back-filling constitutes a trespass because "I want to avoid any possible future disputes arising from the trespass issue". This is an empty submission for a variety of reasons best not articulated. Mr Gray's real concern, as he acknowledges, is as to costs. Whether or not the court makes the declaration sought will not affect costs.

165. Mr Gray has made good his claim in trespass. However the declaration sought is not necessary. It should not therefore be made.

166. An issue not yet touched on which will have a relevance to questions of costs is that of concealment. Mr Gray asserts that both he and the Court were kept in the dark and misinformed as to the Second Excavation and its backfilling with concrete. The assertion is strenuously denied by ETML. The point is made that the e-mail from Mr O'Connor to Mr Hill of 22 February 2013 was disclosed in both the Part 7 claim and the Party Wall Appeal which were heard in July 2015.

167. The distinction needs to be made between the excavation and the back-filling. That there had been excavation at each corner of the party wall was known to the Court in July 2015. Mr O'Connor's e-mail of 22 February 2013 (the distinctive version indicating that it was Mr Hill's own copy) was in the July 2015 trial bundle [at Bundle C:750]. The differentiation between the First and Second Excavation was

not then made, but that is of no immediate relevance. Mr Gray, and his legal advisers, would have been aware of the excavation and its stated depth before the court learnt of it. Neither they or the court was aware of the full extent of the excavation, but that there had been the excavation now called the Second Excavation was not concealed, at least not after disclosure was given of the e-mail of 22 February 2013.

168. The back-fill is another matter. It may be noted that ETML's defence, at paragraph 19.3.1, pleads that Mr Hill was not aware of any concrete backfilling until 2016 or 2017. Paragraph 19.3.3 pleads that the fact that the excavation had been backfilled was obvious, 'and must have been known to the Claimant many years ago' but I do not see how. This bold assertion is apparently given colour by the pleading at 19.3.4 that since at least the second demobilisation of Cranbrook in October 2014 (and probably earlier) there have been acrow props cast into the concrete backfilling, together with short reinforcing bars to provide bracing points for propping. "Thus it should have been obvious to the Claimant (who prides himself on his knowledge of construction matters) that the backfill material was concrete".

169. The difficulty with this argument is that concrete was cast below the water table, and so the base of the acrow props has throughout been obscured in water. The fact that there is propping in place does not necessarily demonstrate that concrete has been poured. The base of a successful prop has to be secure, but it is not unknown for stone pads (paving stones are ideal) or similar material to be placed on soil to form a solid base on which to stand a prop. There is no need to pour concrete.

170. Finally, ETML suggests in its pleading that Mr Gray could have made a formal request for information in relation to the Second Excavation and its backfilling or sought permission to inspect. So he might, but such possibilities do nothing to detract from the allegation of concealment. To the extent that it is necessary to do so I find that the backfilling was concealed but, on balance, I do not consider that this concealment was deliberate.

Mr Gray's Fraud Claim : D20CL037

171. This claim arises out of the Second Excavation and its back-filling with high-strength concrete. Mr Gray relies on the fact, and fact it is, that neither the First or Second Award permitted the full extent of the Second Excavation or its back-filling with concrete. The Points of Claim, at paragraph 24 assert that both Mr Hill and Mr O'Connor knew or were reckless as to the fact that this excavation constituted a trespass, and deliberately concealed the fact of both from Mr Gray and the Court.

172. The essence of the claim is pleaded at paragraph 26 of the Points of Claim:

> "26. But for the Respondent's deliberate and/or reckless concealment of the true extent and reasons for the Second Excavation (and its back-filling) the Court would have reached a different judgment in this claim at the end of the trial (and appeal) in July 2015, which judgment and subsequent order was, in the premises, obtained by fraud."

The 'true reasons' are not pleaded.

173. During the hearing Mr Gray developed a theory which, as understood by the court, predicates that ETML had all along intended to build its basement some 600mm deeper than the drawings which formed part both of the First Award and the Crowley Award. The depth of the high-strength concrete back fill was thus no coincidence. It would enable Cranbrook in due course to cast a slab formed in conjunction with the toes of the underpins on the three walls not adjoining 7EM 600mm deeper than allowed on the drawings. The intention to build a deeper basement is the clearer because in the two underpinning bays excavated by Cranbrook under the Party Wall the toes of the underpins were constructed so as to permit the casting of the deeper slab.

174. ETML's intention to build a deeper basement, suggests Mr Gray, had to be hidden from him and the court. Accordingly, in the various e-mails pleaded in paragraph 25(2) of the Points of Claim, together with the documents pleaded in the other sub-paragraphs of paragraph 25, it should be seen that Mr Hill conspired with Mr O'Connor and Mr Andrew Smith, the litigation partner at Child & Child solicitors instructed on behalf of ETML to keep the deeper basement plan secret and for this purpose mislead the court as to the purpose of the concrete backfill deceitfully calling it (for this purpose) 'temporary concrete pads'.

175. There is thus a two part fraud. First to build a deeper basement than that for which planning permission had been given, and secondly to hide this purpose from the court.

176. This theory is not pursued by Mr Gray in final submissions, and so I will keep my observations brief. It does not come out of nowhere. Mr O'Connor's explanation of the deeper excavation for the two underpinning bays that were excavated (seeking appropriate ground conditions by going down to a level where there was a bearing pressure of 150 kN m^2) given in oral evidence was not impressive, and the court must be cautious overall as to Mr O'Connor's evidence. In his final submissions for ETML Mr Winser comments "Mr O'Connor was a rather defensive witness, but it is submitted that this should not be held against him or relied on to reduce the weight of his evidence. Mr O'Connor was being cross-examined robustly (if not aggressively) by a man with whom he has had a very difficult relationship over the past 5 years…". Extracting the cross-examiner from the witness is often a very difficult task, and the additional problem for the court where there is a litigant in person is the fact that the cross-examiner is known to and has history with the witness. This can impact significantly on the testimony given. But even making allowances Mr O'Connor was a poor witness.

177. Further material for Mr Gray is the apparent extent of the Second Excavation and the fact that it was back-filled with high-strength concrete, the fact that Cranbrook / ETML did not volunteer the concrete back-fill, what might be classed as a general caginess over disclosure and, if Mr Gray's drawings can be accepted, the apparent lining up of what he suggests are elements of the lower basement construction.

178. It is arguable that having a deeper basement is an end in itself, although why Mr and Mrs. Hill, having obtained permission for a basement of perfectly adequate depth, should wish to sneak another 600mm is far from obvious. The primary aim was to have a cinema, not a dance studio. The increased cost of a deeper basement

was unlikely to prove a factor, although the correspondence between Mr Hill and Mr O'Connor does not indicate any disregard by the former as to the cost of the project. Nevertheless, as ends for a conspiracy go, a deeper than necessary basement is not that compelling.

179. And any consideration of the material cannot ignore the depth of feeling between the parties. The depth of the Secondary Excavation is readily explained by Mr Hill wishing to find that Mr Gray's piles had trespassed. This would give him a useful tool to use in his dealings with Mr Gray. This depth is not so easily explained by a deeper basement theory, and if it were the latter how are the e-mails of 13 and 15 February 2013 (clearly suggesting as they do a motive of trespass discovery) to be explained? The subtlety involved in running a diversionary line in e-mails on the basis that on any subsequent disclosure exercise the true intent would remain hidden is considerable.

180. There must be concern on the part of the court that the Secondary Excavation was back-filled with high strength concrete and that this was not made known to Mr Gray or the court at the time of the July 2015 hearing. Nevertheless the conspiracy suggested by Mr Gray cannot be sustained on the material before the court. I should expressly exonerate Mr Smith and Mr Hill from any improper behaviour in connection with disclosure. Such exchanges as are relied on in the Points of Claim can be seen in many a piece of litigation where the sides are engaging in adversarial behaviour without there being anything approaching the ill-feeling that existed here. Mr Gray is a forceful and determined opponent. This engenders caution on the other side, and brings with it the risk that motives and hidden agendas are detected which are not there.

181. In the event Mr Gray, conscious that I had made clear to him that he needed to demonstrate that any wrongdoing on the part of his opponent had actually succeeded in obtaining a judgment which would not otherwise have been obtained, has, in his final submissions, very properly focused on the judgment of 23 July 2015. For that hearing counsel on both sides (Mr Gray then being represented by Mr Isaac) had agreed a list of 14 issues these spread over the Part 7 claim (A20CL070) and the Party Award appeal (A20CL126). Each of these 14 issues was dealt with in turn in the judgment. Mr Gray correctly identifies issues (2) and (3) as to the issues to which the fraud he alleges primarily impacted. These issues were taken together, Issue 2 being whether ETML's works to 9EM caused the crack damage to 7EM and, if so, Issue 3 being what the proper costs of repairing the damage should be, the sum of £1,320 being claimed.

182. In the event Mr Gray won on both those issues. I concluded that there was no obvious reason for the cracking other than the excavation works at 9EM, and so concluded the ETML was responsible for the crack damage. If this sounded "somewhat begrudging" so be it. (I recall no such feelings). Had I been aware that a considerable quantity of high-strength concrete had been poured into the Second Excavation I would doubtless have used more positive language. But the result would have been the same. As for the quantum of damage, I resisted the suggestion that the assessment was referred back to the party wall surveyors for, with so little at stake, that would been disproportionate to an absurd degree.

183. Mr Gray also submits that had the Court known about the Second Excavation concrete backfill a 'slightly but importantly different conclusion in relation to issue (1), which concerned the validity or otherwise of the First Award' would have been reached. Issue 1 was formulated as follows:

> "Whether the party wall award dated 21 August 2012:
> (a) purported to authorise special foundations without the consent of Mr Gray, and
> (b) if this is the case, was the award *ultra vires* or invalid in whole or in part."

There was never much of an issue under (a); the award sanctioned reinforced concrete foundations in terms. No attempt whatever to hide this fact. The more difficult question was whether the inclusion of special foundations without consent rendered the entirety of the award invalid, or whether the invalidity was properly restricted to the special foundations. Put another way can the invalid part of the Award be severed from the remainder. That such severance has been an issue arising in the law relating to party walls for many years is amply demonstrated by the fact that it was considered by McCardle J in *Selby v Whitbread & Co* [1917] 1 KB 736. The observations of McCardle J quoted at paragraph 33 of my judgment of July 2015 were *obiter dicta,* as noted, so not binding, but helpful nonetheless.

184. The importance of the point is amply demonstrated in this case. The Second Award had been declared invalid. The Crowley Award (the third award) had reworked the design to avoid special foundations, but did not itself expressly authorise the work of excavation completed under the First Award and which was the basis of the Second Award. Surveyors tend to be practical men. The works had been completed, and under the terms of an award. There is no reason for a surveyor to be concerned that his further award, in reworking the objectionable parts of the previous award, should reiterate the unobjectionable parts of the previous award and so become a stand-alone award covering all the works which the building owner wished to undertake.

185. Whether the answer I arrived at, namely that the previous award remains valid to the extent that the works undertaken in pursuance of it are subsumed by, or by implication incorporated into, the further award, meets general approval is another matter. It might be suggested that if the works are subsumed in or are incorporated into the further award there is no impediment to declaring the previous award invalid. What needs to be avoided is the risk, small no doubt in the average case, that once a previous award has been declared invalid, that the building owner could be sued in trespass for continuing a construction which depended on works which, although expressly authorised by award when they were carried out, ceased to be so authorised when the award in question was declared invalid.

186. I must take issue with Mr Gray's final submissions at §48:

> "48. I also submit that the Court would almost certainly have reached a slightly but importantly different conclusion in relation to issue (1), which concerned the validity or otherwise of the First Award, and is dealt with at paragraphs 29 to 41 of the judgment. That decision, I submit, was informed and/or coloured by the Court's apparent view that I was attacking the validity of the First Award for not good purpose, or for academic reasons only."

The decision reached on issue 1(b) was not 'informed or coloured by the Court's apparent view that [Mr Gray] was attacking the validity of the First Award for no good purpose, or for academic reasons only'. Paragraphs 33 to 40 of the Judgment deal with issue 1(b), an issue formulated by counsel, not the court.

187. Neither would those paragraphs of the judgment have been in the least different in effect (they would certainly have been different in tone) had I known the full extent of the Second Excavation and the fact that it had been back-filled with high-strength concrete.

188. The point raised by Mr Gray in paragraph 47 of his final submissions is very different.

> "47. Had I (and the Court) been aware that *unauthorised* deep excavations had been carried out immediately prior to the cracks in question being discovered, and that the backfilling, extending as far as my piles followed, this would, I submit, have led to several differences in the court's approach and conclusions, namely the Court would have concluded that: (a) the damage was clearly caused by the trespassing excavations, (b) proceedings were the correct forum for seeking remedy in relation to such trespass, (c) additional orders would be required to deal with removal of the substantial trespassing concrete installations, and (d) that costs absolutely must follow the success of that claim."

In reality the point of concern arises well before the court becomes involved. Had Mr Gray and his counsel been aware of both the extent and nature of the Second Excavation and its backfill, the Part 7 claim in A20CL070 would not have come before the Court in the form that it did. An application would doubtless have been made to amend the Particulars of Claim to plead, in effect, the Trespass claim made in D20CL022, contested alongside this claim.

189. Had an application been made in A20CL070 to amend to plead the D20CL022 trespass claim, it would almost certainly have been successful. Once the additional claim in trespass had been pleaded then, if it had been resisted at trial, the conclusions suggested by Mr Gray would have followed, and an order made in relation to the trespassing concrete. The likelihood is that the order would have required removal for it is unlikely that the court would have thought to broker, let alone succeeded in brokering, a deal such as was made in the course of this hearing. Whatever the precise form of order however is of small relevance. Mr Gray would almost certainly have obtained an order for costs.

190. This is ultimately all about costs. In this fraud claim Mr Gray is seeking an award of damages to reduce the amount of costs he has to pay in the action he did fight to reflect the award of costs he would (in all probability) have obtained in an action he did not fight. The position is made the more complicated because the amount of costs he has to pay in the action he did fight was assessed by reference not only to that action (which he won) but also to the Party Wall Appeal that was heard alongside that action (in which he was less successful). The Party Wall Appeal was not only the proceeding which gave rise to the majority of the issues before the court, it also was the proceeding that involved more court time. As it was the

proceeding on which ETML was rather more successful that Mr Gray, this had its impact on the eventual order for costs.

191. In order to achieve any result at all, Mr Gray has to establish fraud. The fraud he alleges did not influence the result of the Part 7 claim. Rather it prevented the claim being amended to bring in a trespass claim which Mr Gray did not appreciate that he had. This involves rather different considerations to the more usual case where the claimant can establish that the fraud influenced the result of claim. There is however no obvious reason in principle why a party who by fraudulent non-disclosure procures an advantage in litigation should not in subsequent proceedings be held liable for the consequences of his fraud. But fraud must be established.

192. For his case in fraud Mr Gray relies on the following matters:

(i) ETML knew about the Second Excavations at about the date they were undertaken;

(ii) ETML knew or should have known that the Second Excavations were not authorised by any Award because it was known that their purpose was to discover whether or not Mr Gray's piles trespassed on the land of 9EM and not for any construction reason within the ambit the First or Second Award;

(iii) ETML knew that the Second Excavations had been back-filled with concrete;

(iv) Although Mr O'Connor's e-mail to Mr Hill of 22 February 2013 had been disclosed, when (unsurprisingly given the content of that e-mail) ETML were asked whether there were other relevant communications before 22 February 2013, their solicitor asserted that there were no such e-mails. This was untrue. There were e-mail exchanges between Mr Hill and Mr O'Connor on 13 February 2013 (and also incidentally on the 15 February 2013) which should plainly have been disclosed. These exchanges were only disclosed after an application for specific disclosure in ETML's application for compensation, part of the present proceedings. At the time of the claim in A20CL070 Mr Hill's approach to giving disclosure, as stated by him in evidence (see paragraph 195 below) amounted to gross recklessness;

(v) There was (until shortly before this hearing) deliberate concealment of the fact that Cranbrook had constructed the front and back underpinning at 9EM some 600 mm deeper than had been authorised by any party wall award. It is not credible that ETML was not informed about such a significant variation to the works, a variation which would require an award where this construction was within 3 metres of 7EM;

(vi) The evasiveness of both Mr Hill and Mr O'Connor in the witness box.

193. The fraud must be that of ETML. In carrying out the construction work Cranbrook was an independent contractor. But that does not preclude Mr O'Connor being the agent of ETML in appropriate circumstances, for example when undertaking the Second Excavation at Mr Hill's behest in order to discover whether Mr Gray's piles trespassed on the land of 9EM.

194. Mr Gray makes good matters (i) and (ii) above. I have some difficulty however with (iii). Mr Hill denied being aware that Cranbrook had back-filled with concrete until 2016. Mr Gray asserts that Mr Hill must have known, but it is not obvious that this must be the case. I suspect that Mr Hill took a greater interest in the detail of the works than, on occasion, he was prepared to admit. But the material used in back-filling an excavation is not the sort of detail to which Mr Hill descended. There is no e-mail informing Mr Hill of the nature of the backfill. Mr Hill was interested in whether Mr Gray had committed a trespass, and to discover that he knew holes had to be dug. But it seems to me more likely than not that Mr Hill did not give a thought to back-filling let alone the material used for that exercise. I do not however overlook the argument that if Cranbrook were acting as ETML's agent in undertaking the excavation it should also be seen as ETML's agent when backfilling that excavation.

195. Matter (iv) is troubling. The 13 February 2013 e-mails were important and should have been disclosed. Mr Hill's oral evidence was:

> "Q. You did a search for the purposes of disclosure didn't you?
>
> A. What I did was I sent all my emails to Child& Child. I did a search in the sense that I put in a range of fields so dates and names and people and I just send them to Child & Child.
>
> Q. Your practice was to send everything to Child & Child and let them deal with everything accordingly?
>
> A. Yes.
>
> Q. Including in 2015?
>
> A. I was told by Child & Child what was required and I gave them what they asked for, yes."

Mr Gray asserts that there was gross recklessness. Before a failure to give full disclosure is characterised as fraud it would seem appropriate to investigate what the range of fields were that were used to find the e-mails. Mr Gray did not investigate this in course of his cross-examination of Mr Hill. It may well be that had he been asked Mr Hill would have been unable to remember, but he was not asked. How any field could have been selected which threw up the e-mail of 22 February 2013 but not those of 13 February 2013 is difficult to imagine. They have the same e-mail addresses, the same names, the same subject line, the same signature (by which I mean name and description).

196. Yet Mr Gray has to rely on recklessness not wilfulness because it is a strange fraudster who discloses the 22 February 2013 e-mail, as, if not more, telling in its terms, while concealing the exchange on 13 February 2013. The exchange on 15 February 2013 is of a different nature being a discussion as to the prospect of getting on with the works in the hope that once completed a court would be reluctant to order their removal (a futile hope incidentally if the full facts come out),

but this exchange (also not disclosed) does demonstrate a willingness on the part of the authors to conceal their activity from Mr Gray.

197. Matter (v) is very troubling, but does not readily relate to the claim in fraud which Mr Gray is bringing in respect of the 2015 judgment.

198. As for matter (vi) I have commented on Mr O'Connor as a witness and remain concerned as to what Cranbrook were actually doing with regard to the lower construction. But for present purposes it is the evidence of Mr Hill that is the more important. Mr Gray suggests that "Mr Hill denied knowledge of any aspect of building work when it suited him". There were times when the impression was given that Mr Hill knew more of the works than he was prepared to admit. But Mr Hill's evidence overall, coupled with a reading of the e-mail correspondence as a whole, was this. There were times when Mr Hill became involved in some detail. He is a very intelligent man well up to understanding the detail when he wanted. But the times when he became interested himself in the detail were the exception not the rule. On a general level Mr Hill's concern was that there should be progress, and he engaged fully with the difficulties the project was encountering because of Mr Gray. But it would be quite wrong to proceed on the basis that Mr Hill was anything near as interested in the detail as was Mr Gray, and it cannot reasonably be suggested that Mr Hill must have known about, for example, the material used for backfilling, or the methods used for any part of the construction and in particular the excavation.

199. Standing back, and looking at the matter in the round as well as the individual elements relied on by Mr Gray, I conclude that he has not made good his claim in fraud. The claim has been too lightly dismissed by Mr Winser, but it is not made out. Whether making out the claim would have altered my view on the costs order is doubtful incidentally, but the issue does not arise. As for the costs incurred by Mr Gray in making out the trespass claim in D20CL022 the answer is to award him those costs, not interfere with an order for costs in the claim he did bring, and win.

200. Accordingly Mr Gray's claim in fraud must be dismissed.

201. I record that following the service of each sides submissions and cross-submissions, a number of e-mails have been sent to the court. These e-mails appear to relate to difficulties in connection with the agreement arrived at between the parties during the course of the hearing as to the underpinning of the party wall. I wish to make it clear that, for better or worse, I have been careful not to open any of these e-mails during the preparation of this judgment. Further I will not open any of these e-mails until any matters consequential on this judgment have been dealt with and until I am requested to do so by both parties.

HHJ Edward Bailey

27 October 2017