IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2018

Before :

Miss Alison Foster QC Sitting as a Deputy Judge of the Chancery Division

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Between :

APEXMASTER LTD	**Claimant**
- and -	
(1) URC THAMES NORTH TRUST	
(2) THORNSETT RESIDENTIAL LTD	**Defendants**

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Jonathan Seitler QC (instructed by **Howard Kennedy LLP**) for the Claimants
Tamsin Cox (instructed by **Stevenson Harwood LLP**) for the **First and Second Defendants**

INTRODUCTION

1. Following a hearing on 9 February 2018, on 23 February 2018 I read out judgment in this matter in open court for reasons which appear at the end of this judgment. In order to save the parties' from having to make a verbatim note, on 23 February 2018, I gave a copy (corrections have now helpfully been added), to the parties' representatives.

2. This is the inter partes hearing of an application, dated 24 November 2017, for an interim injunction arising out of the Claimant freeholder ("Apexmaster")'s claim in respect of trespass to its property by the Second Defendant ("Thornsett"), development contractors, during development works carried by Thornsett adjacent to Apexmaster's property in East London.

3. The central complaint of trespass, the essence of which is admitted, involves the oversailing by approximately 1 metre of the Claimant's property by Thornsett's scaffolding. Complaint has also been made about an element of debris and items of hoarding also alleged to constitute a trespass by Thornsett.

4. The Claimant was represented before me by Mr Jonathan Seitler QC and Miss Harriet Holmes, the Defendants by Ms. Tamsin Cox.

5. This application came before Mann J on 24 November 2017 without notice and prior to the issue of any Application Notice or Claim and was dealt with by him as a Mention. On undertakings, the detail of which will be dealt with below, it was adjourned for a mediation, which failed. Further evidence was filed, and

the case set down for hearing for one day. The argument before me took a full Court day.

6. Apexmaster is the freehold owner of 85 Upper Clapton Rd, London E5, ("the Adjoining Building") a residential property, which is arranged as three flats. Flats A and B are studio flats on the ground floor, and flat C is larger and located on the first and the second floor. The Claimant owns the building as an investment property, letting the flats to tenants on Assured Shorthold Tenancies. The First Defendant ("URC"), a charity, is the freehold owner of 85A Upper Clapton Rd, London E5, also known as Upper Clapton United Reformed Church ("the Building") which is undergoing development. Thornsett, who have entered a joint development venture with URC, was granted a 252 year lease of the Building by them on 14 August 2017, they also had the benefit of an agreement for a lease from an earlier date. The evidence on the Defendants' behalf states that Thornsett have at all material times been in sole possession and control of the Building and have full responsibility for the development of it. The issue as to who is/are the appropriate Defendant/s, is one which I shall need to return to, and the Defendants raise a question whether Apexmaster has proved it is in possession of its relevant land, entitling it to bring its claim in trespass.

7. The evidence suggests that until May 1991, URC was in fact the freehold owner of both the Building and the Adjoining Building and that construction work to convert the ground floor and upper floors of the Adjoining Building into flats appears to have been completed in around April 1998. Between 2011 and 2015 URC applied to Hackney Borough Council for planning permissions to

undertake works including demolition and the construction of three blocks of accommodation. The matters which concern this application began on about 24 November 2015 when URC obtained planning consent to demolish the buildings then at 85A Upper Clapton Rd, and to erect a new church worship space, 27 new residential apartments and community facilities at the Building.

8. It is clear that the relationship between these neighbours has deteriorated considerably. It is also clear that the progress of development of the site has been hampered by this deteriorated relationship: Apexmaster accuse Thornsett of, at best, deliberate and cavalier disregard of their legal obligations, Thornsett accuse Apexmaster of delaying tactics, aggressive and oppressive behaviour and more.

9. Since this application was first made and proceedings commenced, and most of the evidence sworn, events have moved on. The offending scaffolding has now been removed, as have other certain other elements of which complaint had been made. Nonetheless, Apexmaster persists with its application for injunctive relief on the basis it claims to be entitled to a quia timet injunction in the light of its troubled history with Thornsett, and what is said to be a justified lack of trust. Thornsett vigorously opposes the grant of an injunction, as it has done throughout, stating any remedy for the accepted trespass, which is minor, should, if given, be reflected in damages at trial.

10. Not all of the copious material before the Court is relevant to what has to be decided on this application, but a picture emerges of the course of dealing between the parties which is relevant to my overall conclusion. I do not cite every instance of interaction between the parties emerging from the many

hundreds of pages before me, nor quote from every one of the dozen statements sworn by the parties but set out the gist of the history between them.

11. I turn first to the background and must descend into some detail although the issues of law arising are not themselves essentially complicated. Apexmaster say that the previous history is relevant to their entitlement to an injunction and underlines their need for a quia timet remedy in this case; Mr Seitler QC describes the scaffolding issue as "the last straw" for his clients who have, he says, "run out of road" in neighbourly goodwill. He urges me to consider the apparently small issues of scaffolding and rubble and so forth of which he complains here in the context of what he submits to be an intolerably trying history.

12. By the same token, Thornsett say that the historical behaviour of the Claimant, including the manner in which this ex parte application came to Court, is such as to deprive it of any entitlement to an injunction even if it were otherwise able to show it. They suggest that the Claimants have shown themselves to be oppressive, and strikingly unreasonable.

BACKGROUND

13. In April 2015, when the redevelopment works were in contemplation, Carlisle Associates, surveyors on behalf of URC, contacted the Claimants and served Notices under the Party Wall etc Act 1996, indicating an intention to carry out various works involving the party wall between the Building and the Adjoining Building and necessary incidental works. Apexmaster appointed Anstey Horne as their own party wall surveyors, and drawings and plans were exchanged;

there was considerable correspondence over the ensuing months. The Party Wall Act Notices were re-served by Carlisle Associates in November 2016.

14. By email of 13 May 2015 Carlisle Associates indicated to the Claimant's surveyor that scaffold access was highlighted as a boundary matter. It is clear that at this time various details were being examined and finalised for the works. In April 2016 it was thought that building would commence during the summer of 2016. In the event, works first commenced in November 2016 when some demolition was accomplished; the works which have stimulated this application began around March 2017.

15. The correspondence between Carlisle Associates and Anstey Horne in the course of 2015 shows that Thornsett gave the usual, appropriate information as to the likely commencement of works and discussed issues of boundaries and Party Wall Awards matters with Anstey Thorne.

16. By 4 January 2016 Chris Shattock of Carlisle Associates was able to email Graham North of Anstey Horne indicating that progress had been made since Carlisle Associates would soon have sight of the proposed drawings/plans and they would be forwarded to Anstey Horne as soon as possible.

17. On 20 July 2016 the proposed scheme drawings relating particularly to the boundary and Adjoining Owner issues were sent by Mr Shattock to Anstey Horne. By 22 July 2016 a draft party wall award had been prepared by Mr Shattock, but there followed some further requests for plans, drawings and details from Anstey Horne.

18. Amongst the discussions, an issue had arisen concerning removal by Apexmaster of an extraction unit and pipework on the flank wall of the Adjoining Building which it was said constituted a trespass, and was impeding progress. This request was repeated in correspondence through 2015 into 2016. In August 2016, Apexmaster formally asserted an easement though long user – which was denied by Thornsett. Enquiries were made of the London Borough of Hackney to ascertain whether or not the pipes and services predated a 1997 Building Control Application. Following disclosure of Hackney's documentation, an email dated 17 January 2017 suggests that there may have been an oral concession on behalf of Apexmaster that these elements did constitute trespass against the Building, and steps were being taken. However, later correspondence suggests the matter may remain live. The relevance of this incident, however, is the manner in which Thornsett sought to engage and negotiate with Apexmaster concerning it, to which I will return.

19. Between 2016 and early 2017, the issue as to the Party Wall Award continued, and requests as to access in order to review the Schedule of Condition which had originally been prepared in May 2015 were made. It is evident Thornsett were extremely anxious to achieve a signed Party Wall Award as soon as possible in order to progress and commence the works, aware of the potential for delay, and urging a speedy agreement on Anstey Horne.

20. By early February 2017, Anstey Horne had reviewed the draft Award, drafts passed between them and by 24 March 2017 it is clear that Mr Grieve of Carlisle Associates understood that Security of Expenses was the only outstanding item, following engineering confirmation. The effects of certain damage possibly

sustained during previous demolition works were discussed; although pressed for by Thornsett on a number of occasions, the Final Party Wall Act Award was not signed off until 2 May 2017.

21. It is the case, and Thornsett accept, that at some point in March 2017 they started work at the Adjoining Building in spite of the fact that there was no Party Wall Award signed. This incident is described by the Claimants as "the first trespass."

22. Mr Grieve states in evidence that he had understood that the wording of the final draft had been agreed, and the only outstanding issue was between the two assisting Structural Engineers acting on behalf of each party.

23. Declan Ryan, a development manager with Thornsett, explains that Thornsett's contractor on Site took the engineers' sign off to the works as being all that was required for work properly to commence, believing that a Party Wall Award had been signed, which he says was an honest mistake.

24. It would appear from correspondence from Richard Newman of Anstey Horne to Michael Grieve, on 10 March 2017 that no particular exception was taken at the time, amongst surveyors, to the fact that work appeared to have commenced before the signing of the Award, it being just one of a list of items to note following a meeting between Anstey Horne and Carlisle Associates two days before.

25. That email also records that on about 8 March 2017, cracking had appeared within the rear ground floor flat in the Adjoining Building. It is not suggested that the damage (the existence of which is agreed), was connected with the fact that access by Thornsett had not been authorised by a signed Party Wall Award.

It is also not contested that the works which caused damage had been approved by both sides' engineers, who had not foreseen the risk of damage.

26. By about 12 April 2017 further cracks had appeared, and a site meeting was arranged as soon as possible as a matter of urgency between Carlisle Associates and Anstey Horne. Carlisle Associates forthwith agreed that all notifiable works within 3 metres of the boundary would stop, and a report would be obtained from the Claimant's structural engineer.

27. Nonetheless, a solicitor's letter from Trowers and Hamlin's (solicitors then acting for the Claimant) entitled "URGENT LETTER BEFORE INJUNCTION" dated 18 April 2017 was sent on behalf of Apexmaster to Thornsett Group Plc. The letter stated that works being carried out by Thornsett were being carried out without a Party Wall Award in breach of the Party Wall, etc. Act 1996, and had caused damage to their property in the form of cracking in the walls. The letter required that all work stop immediately until the structural engineer had completed his inspection and until "you have complied with the Act", in default of which an injunction would be sought from the Court.

28. A further letter in similar terms setting out complaints about the work, and its apparent continuation was sent on 20 April 2017, adding claims that Thornsett Group Limited had trespassed over their clients' roof during demolition, left debris on it. It also made complaint of a number of other items of alleged encroachment. It threatened an injunction at 10 AM the following morning in Birmingham County Court unless an acceptable response was received by 4 PM. Shortly after 4pm, on 20 April 2017, Declan Ryan explained by email, that site the meetings had already been held, and work suspended within the

party wall notice zone of 3 metres. The solicitors however demanded that all works stop, and were given an undertaking to that effect from Mr Ryan until an Award was in place and confirmation that no works would be carried out at all "that could possibly affect your client's property or worsen the cracking that had already taken place."

29. Next day, on 21 April, Carlisle Associates responded to each of the points raised in Trowers and Hamlin's letters of 18 and 20 April 2017. With reference to the debris left on the roof complaint, Mr Grieve for Carlisle said he believed it had been cleared. He continued, in what in my judgement were moderate and appropriate tones: "if it is still in existence can you please advise when the Building Owner's Contractor can gain access to clear the remaining debris and clean the area", saying, "I inspected the rear courtyard last week and this area was clear so the only debris that could be remaining is the flat roof to the small rear kitchen extension."

30. There followed correspondence between the surveyors to both sides regarding the obtaining of an Award so that work, including remedial works, could start. As stated, it was finally signed on 2 May 2017. The award catered for the fact that work had already started, before the Award was signed, and also catered for the damage that had been caused.

31. There is a body of correspondence in the bundles indicating that from April 2017 Thornsett made a number of attempts to gain consent to access to the Adjoining Building in order to inspect damage and resolve the issues outstanding. By email dated 26 April 2017 Mr Grieve corresponded with Anstey Horne in the following terms: "… my Appointing Owner is keen to

progress matters, not only to complete the piling, but also to get your Appointing Owner's building repaired, and as such we are keen to arrange access to the property again so that we can prepare a specification of remedial works. Can this be arranged please?" On suggesting a meeting he continues "We can also incorporate the issues that we spoke about previously regarding the oversailing easements (soil pipe and extract flue, oversailing access for Building Owner's contractor to complete his works, etc.) and get all matters wrapped up in one go?"

32. Other correspondence in the bundle shows an issue arose on access to right to light documentation. In June 2017 litigation was again threatened by Trowers and Hamlin if certain materials concerning a right to light were not disclosed. Few details appear, but an email from Bernadette Cunningham, a director of Thornsett, disputed any disclosure, explaining that in fact the Adjoining Property would benefit from the improved light from the development. A subsequent solicitor's letter from Stephenson Harwood on behalf of Thornsett appears to have brought the matter to a close without litigation, but I do not know. Stephenson Harwood made plain their disapproval of what they described as an entirely inappropriate threat.

33. On 24 August 2017 Carlisle Associates raised again, the question of a licence for oversailing scaffolding. Mr Grieve explained that he awaited a commencement date and detailed drawings, but would like to get an agreement in principle as to whether Apexmaster would enter into a licence. A fee cap agreement was made in principle and Carlisle Associates sent marked - up sections plans indicating where the scaffold was going to physically be located,

and its approximate duration namely the 3 months from 9 October 2017 until 31 January 2018. Apexmaster were expressly asked whether they would be willing to enter into an agreement as to what any Licence Fee might be. Again Carlisle Associates pressed for access to inspect so a Schedule of Repairs might begin.

34. Further discussion in correspondence canvassed the issue of what are referred to as the "oversailing soil and waste pipes, ventilation and flues", which Thornsett had argued was a trespass, requiring remedy so as not to impede the works. It is instructive to note the moderate tone of the correspondence emanating from Thornsett on this issue of potential trespass by Apexmaster. Carlisle Associates said the following on 8 September:

> "The Developer working with the United Reformed Church has, as always, wanted to be Neighbourly with the Adjourning Owners and as such, and without prejudice, has been able to redesign his proposals to accommodate the retention of the existing soil and waste pipes, and if agreeable perhaps this could be offset against any Scaffold Licence fee he may wish to charge. I must however remind you that no assessment of any ventilation grills or boiler flues have been carried out and therefore Apexmaster needs to review these for compliance…
>
> … The Developer will permit free access to Apexmaster's Consultants and Contractors onto their site up until 13 October 2017 in order to carry out any repairs, adaptions or alterations that they may wish to carry out to the services, after which time these construction works will have progressed to such an extent that these areas will be enclosed by the new development. This access is subject to the proviso of normal working hours and compliance with the Developer's Site Rule and Conditions."

35. On 28 September 2017 another draft scaffold licence was sent to Anstey Horne for review and on 3 October 2017 a method statement risk assessment and scaffolding sketch was sent by Thornsett's surveyor to the Claimant's surveyor inviting comments. Numerous chasers were sent in the course of October. A

further set of chasers and a number of offers were made by Carlisle Associates personnel to visit and discuss, with little substantive response.

36. Declan Ryan in his evidence expressed surprise at the absence of response given that he recalled, in late September, that Anstey Horne's attitude to achieving an assigned licence was different and he thought Anstey Horne hoped it might be achieved within a week. He put down the lack of response to what he regarded as a generally slow operating speed.

37. Declan Ryan frankly admits that he thought there was no disagreement in principle to the scaffolding and, so, realising that after three months' abortive attempts to agree a licence, that delay would be caused, he decided the scaffolding ought to be erected in any event - and it was, sometime in early November 2017.

38. It is not a matter of serious dispute that, as described by Declan Ryan, the scaffolding would be cantilevered off Thornsett's building, thus deriving no support from the Adjoining Property nor placing any weight upon it; it oversailed the top of the flat roof, taking up no usable space by, at the most, 1 metre. It covered up a small part of the boundary of the Adjoining Property and was being primarily used to achieve a better finish on the side of the wall that faces the Adjoining Property, and it would be there for approximately three months.

20 NOVEMBER THREAT OF INJUNCTION

39. After 10 PM on 20 November Howard Kennedy, the solicitors to the claimants sent a letter to URC, the First Defendant, stating URC had "committed a further trespass over our clients property in that you have erected scaffolding over the flat roof", and threatening injunction proceedings unless an undertaking was given by return and latest by 3 PM on the following day. The letter continued:

> "Your continued breach and trespass is unacceptable to our client and in the circumstances it requires from you an undertaking by return (and in any event by no later than 3:00pm tomorrow) that you will remove the offending scaffolding immediately (and in doing so ensure that no further trespass is committed) and that you will not re-erect any scaffolding that oversails our client's property, as well as an undertaking that you will not commit any further trespass.
>
> If you fail to provide such an undertaking and forthwith to take such steps in conjunction with our client, then our client will seek an injunction requiring you to do so and in those circumstances our client will seek an injunction that you cease all further work on site until such time as you have regularised your breaches and complied with your statutory obligations (including H&S legislation), together with a claim for damages, legal costs (including the costs of professionals incurred in connection with your breaches) and interest. …"

40. It is noteworthy that the injunction required was that Thornsett cease all further work.

41. Certain other issues were expressed to remain unresolved; it was also alleged that URC had permitted workmen to walk/stand on the roof - so the structural engineer would inspect for damage. This allegation is accepted to be based on inference not evidence, and has always been hotly denied by Thornsett. Apexmaster complained of debris, wooden planks attached to a fence and alleged that airbricks had been blocked up and also that external pipework had been interfered with. URC was told that if access were required, it should be

arranged likewise, in respect of "the offending debris" an appointment to remove the rubbish and debris was required.

42. In response, a letter of 21 November 2017 from Stephenson Harwood explained that in their view Thornsett had behaved entirely reasonably and in a neighbourly fashion, carrying out its development, expressing regret that it was inevitable that minor inconveniences might be caused to neighbouring properties, but that the majority of them were capable of being dealt with in a neighbourly fashion and they had attempted to liaise in such a way for some time. They said:

> "The matters that you set out in your letter have become issues primarily due to your client's refusal to engage in that process. In that regard and as set out below, our client would be happy to liaise with Gary Field to discuss any debris that may have been left on your client's property and the removal of the wooden cladding on the fence (which was installed for your client's benefit). Producing a solicitor's letter threatening an injunction for these minor matters is disproportionate and is not conducive to the amicable neighbourly relations that our client has attempted (unsuccessfully) to have with your clients."

A short substantive response to each of the allegations was made.

43. Stephenson Harwood drew attention to the fact that Apexmaster had raised no objections, and in those circumstances it was not open to them now to seek an injunction "*if they had any objections to the scaffolding proposed in the licence, your client should have made these known previously. The threat of an injunction is completely disproportionate*". They also made it clear that the appropriate defendant was Thornsett and not URC.

44. By further letter of 21 November, (also to URC), Howard Kennedy indicated that Declan Ryan had in fact been in contact to arrange access to remove the hoarding, the wooden planks and the building materials of which complaint had

been made. However, the letter reiterated the requirement for an undertaking, setting a noon deadline and again threatening an injunction. Further email correspondence from Stephenson Harwood once more stated that the correct defendant for the trespass-based allegation, was Thornsett, who held a lease of the Building, not URC and it was "misguided" to issue proceedings against URC.

45. On 23 November 2017 at 19:16 pm, Howard Kennedy emailed again - this time threatening proceedings against the Second Defendant Thornsett, indicating they would attend before Mann J the next day at 10:30 AM for an interim injunction to remove the scaffolding, debris and materials and to "restrain and prohibit your client from committing any further trespass." Stephenson Harwood reiterated that this deadline was unreasonable and it was not believed any ongoing damage was suffered as a result of the scaffolding.

46. A further letter of 23 November 2017 explained in detail Thornsett's position that Howard Kennedy's actions were in their view wholly unnecessary, improper and inappropriate.

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47. When the application came on before Mann J at 10:30 AM the only document before the Court was a skeleton argument on behalf of Apexmaster. Counsel for Apexmaster had no papers himself. They arrived later and comprised a number of statements with exhibits, suggesting they had been in preparation for some time. It is not disputed that the Claimant's skeleton argument failed to contain any suggestion of the Defendants' case even though the application was made ex parte. It did not reveal that Stephenson Harwood had made plain it did

not consider the matter to be urgent. Furthermore, it contained, it is not disputed, a number of material errors. Mr Gary Mark Field, a surveyor and asset manager who manages property on behalf of Apexmaster has stated that had that hearing taken place the Court would have been taken to the relevant matters including correspondence from Thornsett. He accepts he made errors in his statement to the Court.

48. Thornsett discussed the matter outside Court with the Claimant and agreed to give certain undertakings in relation to the scaffolding and in respect of trespass. Their evidence is that they believed it necessary to do so in order to secure the Claimant's agreement to attend a mediation. The undertaking given at Court by Thornsett, was in the following terms:

> "until the next hearing in this matter or further order of the Court, not without the express permission of the Claimant to enter onto or encroach onto the Claimant's property (including for the avoidance of doubt the airspace) known as 85 Upper Clapton Rd, London E5 9BU and registered at HM Land Registry under title number EGL288444 ("the Property) whether by itself or by its servants or agents or otherwise SAVE THAT and as long as it is not used the scaffolding currently erected over the Property ("the Scaffolding") shall not constitute a breach of this undertaking, nor shall the Second Defendant be obliged to remove or otherwise alter the Scaffolding in order to comply with this undertaking."

49. It is to be noted that in addition to an undertaking not to trespass, Thornsett's obligation was not to remove the scaffolding, rather, it was not to use it.

50. Again, there was vigorous disagreement between the parties, this time as to the terms and effect of the undertaking agreed between them outside Court on 24 November 2017.Nothing turns on that disagreement for my purposes today.

51. A vigorous protest was made in December on behalf of Thornsett to this manner of proceeding by a detailed letter exhibiting a "schedule of untrue statements"

contained in the Claimant's skeleton argument, including an assertion that no licence or consent had been sought or given for the scaffolding to oversail the Adjoining Building, and stating that rather than seeking to negotiate the licence the Defendants "followed the pattern which they hitherto adopted, and simply proceeded with their development regardless of C's legal rights and ignoring C's concerns". It protests the failure to reveal any of the materials supporting Thornsett, characterising the Claimant's application as hasty and one-sided, showing utter disregard for its legal duties.

52. Thornsett advanced in this correspondence a view which was repeated before me, that the true motivation for the injunction application was financial: Thornsett believe that Apexmaster wish to create a ransom position against them. They point to the fact that in the claim form served on 24 November 2017 the Claimant has ascribed a value in excess of £200,000 to the claim, paying the appropriate £10,000 Court fee.

FURTHER MATERIAL DEVELOPMENTS DOWN TO APPLICATION

53. On the morning of the hearing an application in writing was before me on behalf of Thornsett to adduce updating evidence from Bernadette Cunningham. I acceded to that application. There was also an application, made orally in Court by Mr Seitler to adduce new evidence. To the extent it was updating evidence, I agreed to admit it. To the extent it was quasi expert evidence – for which no permission had been sought or granted, I refused it.

54. A second witness statement of Bernadette Cunningham dated 6 February 2018, which I admitted, deposed to the fact that in the interval between the close of the evidence and the hearing, Thornsett had been considering their position and

had concluded it was possible to complete the development at the Building without the need of the complained-of scaffolding. An overhand method of wall building would make completion of the wall possible, although use of scaffolding would produce a neater finish. A statement of methodology and an explanatory note was sent to Howard Kennedy on 22 January 2018. That letter explained the appearance from Apexmaster's side would be rougher than if a scaffold had been used. That could be achieved with a scaffold cantilevered off Thornsett's property – and would require a scaffolding licence, for which Thornsett remained willing to pay a reasonable fee. Apexmaster's preference was asked.

55. By letter of 26th January Apexmaster stated that they simply wanted no trespass; they wished for the proceedings to come to an end - but with a permanent injunction and payment of their costs. No objection was taken to the overhand method in this letter although they describe it as "frankly inexcusable" that the alternative method was not undertaken sooner. Stephenson Harwood responded substantively a few days thereafter with a reiteration of their position as to the unreasonable and aggressive approach of Apexmaster, also explaining that the overhand approach produces a less desirable finish than the scaffolding method. This open letter also offered to dispose of the proceedings on the basis of no order as to costs and a payment of £1,000. A number of letters were then exchanged, but no agreement reached. On 26 January 2018 Howard Kennedy state that Thornsett should agree to pay Apexmaster's costs on the indemnity basis.

56. In rejecting Apexmaster's proposals Stephenson Harwood said the following on 1 February 2018:

> "Your demand for a permanent undertaking or injunction is unnecessary and oppressive. Thornsett has no intention of trespassing. The undertaking or injunction is unnecessary in that no further complaints have arisen since issue of your client's proceedings, when our client became aware of how strongly your client felt on the subject, and there is therefore no reason to expect there to be any further problems. Further an undertaking or injunction would be oppressive in that it would mean that committal proceedings could be brought against our client in the event of the most minor of trespasses. We are confident that no Court would award such an onerous injunction. This is particularly so in circumstances where our client has gone to great lengths to ensure that there is no trespass and given your client's aggressive and highly litigious conduct to date, including its flagrant disregard for court rules, which could result in our client being terrorised by your client."

They continued:

> "Our clients do not have a history of trespassing. Aside from the scaffolding (for which a licence was being negotiated), your client's only complaints of trespass are a very small amount (one dustpan's full) of debris that was present or at least 7 months before your client raised a complaint, a small amount of hoarding whose purpose was to protect your client's property, and a minor oversail in the airspace above the roof of your client's building by beams which had been laid flat on our client's floor slabs awaiting use and slightly stuck out over the boundary. The latter were present for a very short time and caused no damage and were removed as soon as a complaint was made. Our client offered to remove the debris and hoarding within a day of being asked. Your client has not yet allowed it permission to do so. These are trivial matters such as may be encountered on many construction sites and do not require court action.…
>
> …Please let us know who our client should contact to arrange for access to remove the scaffolding. Given the serious consequences of breach of the undertaking, please also confirm that person has the necessary authority on behalf of your client to grant our client permission to access your client's land."

57. By a letter of 2 February 2018 Apexmaster suggested an adjournment again, in order for it to consider whether the new overhand method will or will not commit any trespass and also the further work planned by Thornsett. However, they also suggested on this occasion that Thornsett be released from their undertaking, the matter be adjourned, with costs reserved "on the basis of your client's clear commitment that there will be no further trespass". At the end of

the letter Howard Kennedy state that Mr Field of Apexmaster would be on site on Monday, 5 February to provide access for the removal of the scaffolding. In the event, as explained by Ms Cunningham, it was impossible to complete the removal operation within one working day. Indeed, by letter dated 5 February 2018 further complaints are made regarding the failure to remove by 5 February and also concerning the manner in which the scaffolding was removed. Breach of the undertaking and consent given the previous day is asserted. "The scaffolding has been used for your clients' convenience without consent and for advantage". Howard Kennedy assert that the limited consent appears to have been used for the wider purposes of the development.

58. A vigorous denial and explanation was sent the following day by Stephenson Harwood to the effect that all that was done was to ensure the safe expedition of the scaffolding removal which could not properly or safely be accomplished within one working day. Thornsett indicates in the same letter the wish to remove the debris and hoarding of which Apexmaster complained notifying its intention of doing so the following day.

59. As at 6 February 2018, when Ms Cunningham's Statement was sworn, there had been no complaint about the putting into effect of the overhand methodology from Apexmaster although on the express wish to consult their absent expert.

60. At the hearing, Mr Seitler sought to persuade me to admit quasi-expert opinion as to Apexmaster's view on the overhand method and its risks. I declined to admit it. There had been no direction for expert evidence, the expert was, on his own admission, parti pris, and it did not constitute evidence updating the factual position before me.

SUBMISSIONS

61. The case for the Claimant was put simply, to the effect that Apexmaster, as landowner, was prima facie entitled to restrain a trespass by injunction even if the trespass did not harm him and no damage was done. He said "the principle is that an Englishman's home is his castle and that you cannot buy your way out of trespassing." He submitted that the authorities supported a proposition to the effect that before the Court considers *not* making an Order for an injunction, the Defendants have to establish that there is a serious arguable case that there is a right, in them, to trespass. He referred me to Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd [1987] 2EGLR 173 concerning oversailing booms and the passage of Mr Justice Scott (as he then was) at page 7 of 12 where he held in the context of the permitting of trespass by the use of oversailing cranes that, it was not a case of judging the balance of convenience at that interlocutory stage, rather the plaintiffs were entitled at that point to injunctive relief which they would be entitled to at trial. Mr Seitler referred to the case of Patel v WH Smith [1987] 1W. L. R. 853, which Scott J especially considered and followed, for the proposition that prima facie a landowner was entitled to restrain trespass on his land if it did him no harm in the absence of exceptional circumstances and that, only if the defendant could show an arguable case that it had a right to do what was said to constitute a trespass, should the Court go on to consider the balance of convenience.

62. Mr Seitler emphasised that, as in Anchor Brewhouse and in Patel, it was no good to say that the trespass caused no harm in this case, and Apexmaster were entitled to an injunction.

63. On the facts of the case, Mr Seitler submitted there was a pattern of wilful trespass to be seen from the history of Thornsett's behaviour. He described "the first trespass/nuisance" as commencing works in breach of the Party Wall Act. He acknowledged that Mr Grieve of Carlisle Associates accepted the breach of the Act pointing out that a draft Award was issued to Apexmaster's surveyors some 8 months before the works were carried out, that drafts were under discussion and it was understood the wording of the final draft had been agreed. The Award was amended to reflect the underpinning works that had been commenced, and was signed on 2 May 2017 and not appealed by either party. His case was, these were not relevant matters, a trespass was a trespass, and Apexmaster was entitled to restrain it.

64. His case before me was, even though the offending scaffolding had now been removed, he was entitled in the light of the behaviour of Thornsett, to the Court's assistance in restraining what were likely to be further wilful breaches of Apexmaster's rights. He relied particularly, on what he described as the "remarkable candour" of Declan Ryan who had deposed to the fact that after 3 months of negotiating for a scaffolding licence, in its absence, fearing delays to the project, he went ahead and erected scaffolding that oversailed Apexmaster's property.

65. Elaborating, by way of submission, (although without the late "expert" evidence which I had disallowed) he submitted that his clients had serious concerns going forward about the ability of Thornsett to carry out the overhand method of wall construction without trespass or otherwise causing damage to his client's property. He supported his submission on the likelihood of deliberate incursion

by reference to the fact that it had happened in the past. He drew my attention to the fact that there had previously been damage caused to the Adjoining Building and that there was still an element of movement to the property which prohibited renovation works at present. He submitted, and this was in many ways the core of his submissions, that the risk of a further trespass would continue to run and that was not fair. He denied that, as was submitted by Ms Cox, it would be oppressive to grant an injunction: it was justified on past experience.

66. He further denied that there was any breach of the provisions of the CPR in particular, as alleged by Ms Cox of r 23.4, PD23A para 3 and r25. 2 (2) (b) which deal with the circumstances in which it is appropriate to bring without notice proceedings, including, where there is "exceptional urgency".

67. Ms Cox also submitted that the behaviour of Apexmaster before and during the first appearance on this application was such as to disentitle them to the equitable remedy they sought, which Mr Seitler denied.

68. The central submission of Ms Cox was to the effect that if there was be any remedy, it would be damages in due course. She said, by reference to the evidence sworn on Thornsett's behalf, had the Claimant made its opposition to scaffolding clear at an early date Thornsett would have stopped and found an alternative methodology. Had they made clear their opposition, the parties could have talked. Thornsett were told they would be brought in to Court the night before the injunction was sought, they admitted the trespass with the scaffolding as soon as they got Court, and they attempted to mediate. She submitted that Thornsett did not need the Claimant's land, they were to stop,

and gave their undertaking to the Court, which was broad, because they accepted there had been trespass. The aspersions cast upon the new methodology were not accepted.

THE LAW

69. I have been helpfully reminded that my jurisdiction on an application for an interim injunction is to be exercised consistently with the principles set out in the case of American Cyanamid v. Ethicon [1975] AC 396,which derive in particular from a passage in the speech of Lord Diplock at page 406B:

> "My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.
>
> ...".

Further, at 407G:

> "The use of such expressions as "a probability", a "prima face case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

Further, at page 408B:

> "... the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure were recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.
>
> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

70. The speech goes on to consider the maintenance of the status quo where factors are evenly balanced.

71. In dealing with what in Cyanamid, is there described as the governing principle, namely of the adequacy of damages as a remedy in lieu of an injunction, recent and comprehensive assistance is to be found in the speech of Lord Neuberger in Coventry and Others v. Lawrence [2014] UKSC 13, where he conducted a *tour d'horizon* of the relevant learning on the principles that govern the exercise of the Court's jurisdiction to award damages instead of an injunction. He cited the well-known passage from the judgment of A.L. Smith LJ in the case of Shelfer v. City of London Electric Lighting Company [1895] 1 Ch. 287 in which he said at 322-323:

> "…[a] person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.
> In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.
> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution.
> ...
>
> In my opinion, it may be stated as a good working rule that –
> (i) if the injury to the plaintiff's legal right is small,
> (ii) and is one which is capable of being estimated in money,
> (iii) and is one which can be adequately compensated by a small money payment, (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction then damages in substitution for an injunction may be given."

72. Lord Neuberger observed that in more recent times the Court of Appeal had assumed that the approach in Shelfer above represented the law and, in effect, set out a series of tests which required satisfaction before an injunction might be refused. Lord Neuberger made reference to the case of Jaggard v. Sawyer

and a group of others which presented, in his judgment, (see paragraph [117]) what he described as a tension between two sets of judicial dicta. He concluded at [119] that:

> "... The approach to be adopted by a judge when being asked to award damages instead of an injunction should, in my view, be much more flexible than that suggested in the recent cases of Regan and Watson. It seems to me that (i) an almost mechanical application of A.L. Smith LJ's four tests, and (ii) an approach which involves damages being awarded only in "very exceptional circumstances" are each simply wrong in principle, and give rise to a serious risk of going wrong in practice. (Quite apart from this, exceptionality may be a questionable guide in any event – see Manchester City Council v. Pinnock (Secretary of State for Communities and Local Government intervening) [2011] 2 AC 104, para.51).
> [120]. The court's power to award damages in lieu of an injunction involves a classic exercise of discretion which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in Regan and Watson. As a matter of practical fairness each case is likely to be so fact sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millet LJ in Jaggard [1995] 1 WLR 269, 288, where he said:
>
> > "Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting injunction, and in others by awarding damages instead. Since they are all cases on the exercise of discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."
>
> [121] Having approved that statement, it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. I would accept that the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not. And, subject to one possible point, I would cautiously (in the light of the fact that each case turns on its facts) approve the observations of Lord Macnaughten in Colls [1904] AC 179, 193, where he said:

> "In some cases of course an injunction is necessary - if for instance the injury cannot fairly be compensated by money – if the defendant has acted in a high handed manner – if he has endeavoured to steal a march on the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

> [122] ... it is right to emphasise that, when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think there should be any inclination either way (subject to the legal burden discussed above): the outcome should depend on all the evidence and arguments. Further the sentence should not be taken as suggesting that there could not be any relevant factors: clearly there could be. (It is true that Colls like a number of the cases on the issue of damages in lieu, was concerned with rights of light, but I do not see such cases as involving special rules when it comes to this issue. Shelfer itself was not a right to lights case; nor were Jaggard and Watson. However in many cases involving nuisance by noise, there may be more wide-ranging issues and more possible forms of relief than in cases concerned with infringements of a right to light."

And finally

> [123] Where does that leave A.L. Smith LJ's four tests? While the application of any such serious tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in Fishenden 153 LT 128, 141. First the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if these four tests were satisfied. Thirdly the fact that those tests are not all satisfied does not mean that an injunction should be granted."

73. He then went on to say it could not be said that there might be elements that were, as a matter of law, not relevant circumstances. For example, the public interest, or the effect upon a particular business.

74. In the case of Jaggard v Sawyer (1995] 1W.L.R. 269 a plaintiff householder appealed to the Court of Appeal against the judge's refusal to grant her an injunction to restrain construction of an access route across her land, in breach of covenant. She appealed the award of damages in lieu, and in the course of refusing her appeal, Sir Thomas Bingham MR surveyed the cases and criticised the findings of Scott J in Anchor Brewhouse (above), where, at page 101, Scott J had held it was difficult to justify withholding an injunction because the Court was allowing a legal wrong to continue unabated.

75. Sir Thomas Bingham MR also set out at page 282F to 283F some of the factors in Jaggard that had influenced the judgement of the judge at first instance, when awarding damages instead of an injunction in respect of continuing infringement. It was relevant that the injury to the plaintiff's right was small. Moreover, the value of the injury to the claimant's rights could be assessed in money. Further, in the light of the circumstances, it would be oppressive to grant the injunction. An injunction restraining use of only part of the already constructed roadway in Jaggard was held to be "… unworkable in practice, a recipe for endless dispute and a remedy that would yield nothing of value to the plaintiff".

76. I have also found assistance in a recent exposition of the Neuberger Coventry principles, as they were applied by Roth J in Brothers Enterprises Ltd v New World Hospitality [2017] EWHC 2455 (Ch). In the context of interference with

an easement in the course of refurbishment works, he rejected a submission (recorded in paragraph [31]) to the effect that, refusing an injunction where breach of property rights was involved, was tantamount to an expropriation.

DISCUSSION

77. When considering the approach I am obliged to take in an application of this nature, I have addressed myself in particular to the dicta of Lord Neuberger set out above. I do not accept the limitations Mr Seitler invited me to place on the scope of my consideration. As Lord Neuberger said in paragraph [123], the application of any series of tests, such as those derived from Shelfer, cannot be mechanical. The application of AL Smith LJ's tests must not fetter the exercise of the Court's discretion. And normally, if those tests are satisfied, it would be right to refuse an injunction. But the fact that the four tests are not all satisfied doesn't mean an injunction should follow.

78. Turning then, to the Cyanamid criteria, in my judgement, there is a serious issue to be tried here, indeed I did not understand that to be seriously in contention. Accordingly, I must address myself to the question of whether damages would be an adequate remedy in the current circumstances.

79. In my judgement the cases considered above, even though in the main, final injunction cases, are helpful to my consideration of whether damages would be an adequate remedy.

80. This is a case where, as a matter of fact, it seems to me that each of the Shelfer "tests" is in fact met. As to (1) whether the injury to the plaintiff's legal rights is small, in my judgement it is. The incursion of scaffolding by 1 m across an area not used, where support is not taken from the Adjoining Building, and small elements of rubble, together with hoarding, in place to protect the Claimant, is likewise. It is further material that this was a time-limited scaffolding incursion: the planned time being 3 months. It is not an intrusion without time limit- although Jaggard shows such circumstances are not necessarily fatal to the suggestion that damages may be an adequate remedy. It is also material in my view that, although offers were made to remedy each of these breaches, those offers were not taken up with any enthusiasm or speed. As to Shelfer's consideration number (2), whether the injury is capable of being estimated in money, in my judgement this is obviously the case: indeed negotiations began for estimating the value by means of a licence, of the (at that stage) necessary incursion with scaffolding. There is nothing intrinsically difficult about estimating the value of the incursion created by a deposit of rubble of the order here complained of. As to (3), whether the injury is one that can adequately be compensated by a small money payment, in my judgement this is clearly so: and the same reasoning regarding item (2) above pertains. Finally, (4) as to whether the grant of an injunction would be oppressive to the defendant; in my judgement it clearly would in this case. It is a matter of common sense that unintentional trespasses may occur in the course of building works; they often do.

81. I regard this as the first stage of my consideration and ask myself, with the flexibility enjoined by the Coventry case, whether, considering all relevant

factors in exercising, what is a pure discretion, there are any matters tending to point in the other direction. I have considered the submission that this is "the last straw" for the Claimant, and that he is, "at the end of the road", and reasonably so. I reject that submission, although attractively advanced by Mr Seitler. In my judgement he over-eggs his case considerably on this point. I am conscious that I am not trying the final case at this point, but examined carefully, the defaults alleged against Thornsett, are not, judged from the correspondence, and the chronology, either in their nature, their duration or their propensity to injure, anywhere but at the lowest end of the scale.

82. In my judgement, there is an intrinsic unreality in Apexmaster's application for an Order, or indeed, an undertaking in terms that Thornsett promise not to trespass in the course of their operations. Thornsett could, of course, promise not deliberately to flout Apexmaster's property rights, and, also, to use best endeavours not to do so by accident. However, to conduct building operations under the threat inherent in any injunction Order or undertaking to the Court in such terms, is likely to be intolerable and practically speaking unworkable, leading to yet more problems. To borrow the words of Sir Thomas Bingham MR in Jaggard it would be "… unworkable in practice, a recipe for endless dispute and a remedy that would yield nothing of value to the plaintiff". In my judgement the mechanism of an injunction is quite inappropriate for mitigating, or indeed policing very minor infringements of rights, such as are seen in this case, carrying no immediate serious threat to Apexmaster.

83. For these reasons, also, I would refuse an injunction in my discretion.

84. The Claimant submitted that his application for a quia timet injunction was based on recent admitted breach from which he was entitled to infer that the trespass may happen again. In my judgement, considering the full documentation on the nature of the trespass and other incursions, it is not reasonable to infer from the facts of this case that anything so serious will happen that it justifies the extreme remedy sought.

85. Inherent in at that conclusion, is the further conclusion that an injunction in the circumstances of this case, would be oppressive and, therefore, inappropriate. It is clear to me that the Defendants, who, in the face of their admitted trespass, bear the burden of satisfying me that this is an exceptional case where an injunction will not lie, have so satisfied me.

86. It was submitted to me with force that this was an inappropriate case for an injunction for the further reason that the behaviour of the Claimants disentitle them from this equitable relief. I deal with that submission, although not strictly necessary given that my conclusion on the second of the Cyanamid considerations, the adequacy of damages as a remedy, means no injunction will lie.

87. Ms Cox draws attention to the aggressive and litigious language used by Apexmaster's representatives, and their use, throughout their relationship with Thornsett, of threats of litigation. I regret to say I agree with her characterisation of Apexmaster's approach as oppressive. Apexmaster have used the threat of injunction in the course of their relationship with Thornsett on more than one occasion.

88. Whilst I am conscious, that on this current application, I am not trying the facts, the submissions made by Ms Cox concerning the effect of the correspondence are in my judgement, well made. The evidence I have seen, in particular, the tone of the correspondence from both solicitors and surveyors engaged on behalf of URC and Thornsett has been measured, polite, and reasonable. I consider certain of the letters written to the Defendants on behalf of Apexmaster in particular of 18 and 20 November 2017 unnecessarily confrontational and aggressive, and, in the context of the other instances of litigation threat within the bundle, in my judgement they were designed mostly to pressurise Thornsett.

89. Ms Cox suggests the real motive behind the correspondence is likely to be to stop development, and/or extract in effect a ransom from Thornsett in terms of payment for incursion over their property. I have come to the conclusion, given the fact of the Claimant's desire to maintain the scaffolding in its trespassing position, following undertakings given to the Court on 24 November 2017, and the failure to allow Thornsett to clear rubble or debris when offers have been made suggest at the lowest, an intention to disrupt, and complicate the task of redevelopment being undertaken. I am not prepared to hold that this application was made for a wholly ulterior purpose, but I do not accept either, that at its heart was justifiable outrage at overhanging scaffolding. I believe that the case for the Claimant was overstated, and over-aggressively pursued. I also accept the criticisms made of the nature and tone of the correspondence. The circumstances did not call for an immediate ex parte application – particularly in the circumstances as to timing which pertained here. This is not an approach to litigation of this nature that should be encouraged, to the contrary in my judgement.

90. Nor do I accept, that there is a pattern of unreliability on the correspondence I have seen in the, as yet untested, evidence submitted on the part of Thornsett.

91. Ms Cox submits, and I accept, that the earlier instance of "trespass" occasioned by beginning works without a Party Wall Award, and presence of rubble, et cetera, are not properly to be connected to the complaints in respect of which Apexmaster went to court in November 2017. As indicated above, there was no connection between the fact that Thornsett commenced works before and Award was signed, and the fact that damage occurred. However, they have been linked by the Claimant.

92. Ms Cox makes the following essential points about the course of dealing between Apexmaster and Thornsett which from my perusal of the documentation, in particular the correspondence, I accept.

i) The scaffolding was admitted early to the Court to be a trespass, but when Thornsett put up the scaffolding they genuinely believed Apexmaster would not object, and they were encouraged in this view by the absence of an in-principle objection even after plans had been delivered and the 3 month time span was given, and the likely positions were communicated.

ii) Declan Ryan understood from his personal dealings there was no in principle objection indeed, his conversations had led him to believe there was a willingness to sign up to a scaffolding licence before long. The fact that the fee undertaking was agreed, nurtured the belief that there was no in - principle disagreement about the placement of scaffolding, in the usual way, for a large building project along a shared boundary.

iii) Carlisle Associates present, in a reasonable fashion, information concerning the location and duration of that scaffold, yet, although aware that time will become of the essence, Apexmaster do not hasten to give their agreement to a licence but rather "go silent" on feedback about it.

iv) Even though not touching the property, it has been accepted that oversailing by the scaffolding constitutes a trespass of which there has been bitter complaint. Yet, the undertaking required by Apexmaster, bizarrely, had the effect of keeping the trespass in place. This suggests that the presence of the scaffolding was not in truth of much moment to Apexmaster.

v) Initially, Thornsett were not allowed to take the scaffolding down, but, finally, a few days before the hearing, permission was given to remove the scaffolding.

vi) The debris was first offered to be removed in April 2017, then again in November 2017. Thornsett have offered to remedy this.

93. It is submitted by Ms Cox that the Claimants sought to present a picture of continuing difficulties with Thornsett. She submits that is not a true picture. She points to the minor nature of the scaffolding breach, the timing issue concerning the Party Wall, and the minor nature, of the rubble, which may have been in place, without complaint, for many months. I accept that submission.

94. As appears from the history above, a dispute arose also as to the involvement of URC in the proceedings at all. All correspondence on behalf of Apexmaster was sent to URC, except for the one letter which arrived the night before the

hearing which was addressed to Thornsett. On 20 November 2017 Apexmaster wrote to URC with the threat that it would seek an injunction unless URC "cease all further work on site". The next day they are informed by Thornsett that they hold a lease of the Building and it would be misguided to issue proceedings against the 1st Defendant. The same information is conveyed 2 days later where Thornsett state in terms that URC is not the correct party for any proceedings and indicate that they, Thornsett, are preparing a full response. Nonetheless, and in spite of the 2nd Defendant's acceptance of involvement, the Claimant issued proceedings against both Defendants. I can see no justification for the maintenance of the action against URC, yet currently, they remain in the proceedings. In my judgment there is nothing, aside, possibly from a one line email by URC to the effect that Stephenson Harwood did act for them, to suggest that it was appropriate to persist in suing URC in trespass in the face of Thornsett's clear statements. The fact that Thornsett were contractors, that they were occupiers of the site, and also held a long lease of the Building made them the obvious defendants, which they did not deny or seek to avoid.

95. It was submitted on behalf of Apexmaster that Thornsett and URC ought to have disclosed any agreement evidencing their relationship concerning the development, since it was asserted that Thornsett was the "development partner" of URC. It was submitted by Mr Seitler that I should draw an inference from this non-production that something sinister lay behind it. Maybe, he speculated, it was to the Second Defendant's financial advantage to put up the scaffolding without a licence? Was there perhaps some incentive payment to Thornsett if they finish the project more quickly? That is what they wanted to find out, he says. He noted, also, that the Claimant has now invited the First

Defendant to stay the action, but did not withdraw his submission that it was reasonable to involve URC also.

96. I do not accept the submissions. It is clear, in my judgement, that by the time Apexmaster had received the email dated 22 of November 2017 from Stephenson Harwood on behalf, expressly, of Thornsett explaining the 252 year lease and inviting communications to Stephenson Harwood as representatives of Thornsett, it was clear that Thornsett and not URC were the appropriate Defendants.

97. An issue also arose about Apexmaster's ability to sue in respect of the trespass. Ms Cox challenged the assertion that Apexmaster was in possession of the Adjoining Building in any way. I am, however, satisfied on the basis of what Mr Seitler QC has told me about the landlord's access to common parts, and also on the basis of that part of the statement of Gary Field dated 24 November 2017 contained in paragraph 15 to 17, (such that from at least 9th of June 2017 Apexmaster has also been in possession of all of Flat C), that Apexmaster could be regarded as being in possession of the Building.

98. I wish to say something further about the context of this application. The application arises in the course of what can only be described as, ordinary development works. The papers disclose that, as is normal in such cases, the detailed mechanism of Party Wall Awards, negotiated plans, appointed surveyors, and engineering experts is in operation. Furthermore, numbers of matters have been dealt with, albeit slowly, in the course of this development. In my judgement, there has been nothing extraordinary, or unusual about the course of these works: movement and/or subsidence in older London properties

is not unknown, the accumulation of some debris over a party wall, or on the property of another, is part of the warp and woof of development life. It is highly regrettable that the damage was suffered, and the Court understands the anxiety and aggravation such damage causes. I say nothing about causes in this current case, but it is a fact that damage may occur without negligence. I do note that the works which may have caused earlier damage had been signed off by both sides' engineers. Contracts and statutes have developed mechanisms for avoiding or minimising expense, aggravation and waste of time in the process of building, and in the process of enduring a neighbour's development which is in my judgement the appropriate mechanism in this context for all but exceptional cases, of which this is not one.

99. That is not to say that an approach which ignores the requirement for a licence, or, even innocently, allows works to start before a Party Wall Award is signed is to be encouraged. However, the instances of failure in this case by Thornsett were in my judgement not of great moment in the context of this case. Indeed, given the chronology of correspondence, and the difficulties in seeking to achieve a scaffolding licence, Thornsett's approach is at least understood, if not endorsed. There is every likelihood in my judgement, that a more conciliatory, more realistic, and less antagonistic approach on the part of the Claimant would have avoided these proceedings.

100. Accordingly, I do not grant the order sought by Mr Seitler. Nor do I continue the undertaking given on 24 November 2017.

101. I should say, that, in any event, the approach of the Claimants would have disentitled them from injunctive relief absent extraordinary and very different circumstances from those in this case.

POSTSCRIPT

102. I reserved judgement after the full days hearing in this matter. I had planned to give judgment in the week beginning 19 February 2017, and, in the usual way, prepare a draft for full circulation before hand-down. However after I had formulated my conclusions in this case, and in the course of drafting my reasons, but before I had completed this written judgement, I received at about 2 PM, on Monday, 19 February, an application to adduce and rely upon supplementary evidence in the form of the 4th Witness Statement of Gary Mark Field and for the Defendants to pay the costs of the application. A hearing by telephone to last one hour, was requested. The application stated that if I intended to hand down judgement imminently, the claimant sought permission for abridged notice of the telephone hearing. I offered Wednesday, 21 February for the one-hour hearing but was told this was not convenient to the parties. In an effort to assist, urgently, I then offered a hearing at 10 AM today, Friday, 23rd of February 2018 with judgement to be read in open court at 2 PM. Again, there were difficulties with counsel availability. In the evening of Tuesday, 20 February 2018, I was told that counsel for the Claimant would be unavailable today, and counsel for the Defendant was in difficulties also.

103. By return I offered a choice, conscious of the time constraints on counsel, thus: either, the Friday morning hearing and afternoon judgment, or, in writing:

(1) Any proposed evidence in response from defendants served by noon Wednesday 21 February

(2) submissions in writing from claimant by 4 PM Wednesday 21 February.

(3) submissions in writing in response from Defendants by noon Thursday 22 February

(4) submissions in writing in response from Claimant by 4 PM Thursday 22 February

(5) judgment 2 PM Friday 23rd February

104. I received a statement and exhibit for the Defendant just before noon on Wednesday 21st, and a message but no documentation from the Claimant towards 5 pm on Wednesday 21st.

105. I received a replacement exhibit from the Defendants at about 1 pm on Wednesday 21st February, and submissions from Apexmaster late early yesterday morning. I received submissions from the Defendants shortly after noon yesterday, and further submissions from the Claimant late in the evening yesterday. I make no complaint about late delivery, but it has meant that I deliver this judgement as a read out rather than a corrected hand-down at this point.

106. The gist of the application is the admission of new evidence as to matters the Claimant alleges have transpired since the hearing on 9 February 2018.

107. Apexmaster relies upon the case of Swift Advances plc v Ahmed & Another [2015] EWHC 3265 (Ch) 17 November 2015

"I shall admit the 2006 Transfer as evidence in the case. The principle that there must be finality in litigation must of course weigh heavily. But at the time the 2006 Transfer was sought to be introduced I had not made my assessment of the evidence and the trial had not concluded. As Lord Wilberforce said in Mulholland v Mitchell [1971] AC 666 (in the context of admitting evidence after the trial had concluded, which is a stronger case than this) at 679-680:—

"..it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

In my judgment it would be an affront to common sense and to any sense of justice to exclude from consideration the 2006 Transfer.

27 Further, I do not consider that Mr Ahmed or Mrs Ahmed can properly object to its being adduced. Their evidence was that the 2006 Deed was a simply an updating of the 1996 Deed to include extra property. That evidence is liable to mislead, because the 2006 Deed was in truth a reinstatement of the 1996 Deed (which had in effect been set aside by the terms of the 2006 Transfer that reconveyed to Mr Ahmed whatever beneficial interest Mrs Ahmed acquired under the 1996 Deed). As Stuart-Smith LJ said in Vernon v Bosley (No.2) [1999] QB 18 at 37D:—

"It is the duty of every litigant not to mislead the Court or his opponent. He will obviously mislead the Court if he gives evidence which he knows to be untrue. But he will also do so if, having led the Court to believe a fact to be true, he fails to correct it when he discovers it to be false. This duty continues…until the judge has given judgment."

108. The circumstances can be seen to be different here, in that what is dealt with in the proposed evidence is new evidence, not available at trial. Further, I had already made my assessment of the evidence, although, the trial had not concluded because I had not given judgement. Further, the document in respect of which leave was given in Swift cast particular light on materials already before the Court. That is not this case.

109. The materials I am asked to consider here are said to be evidence of trespass committed after the hearing. They are alleged to show, by means of photographs, that the overhand method of construction, employed, in the absence of a scaffolding licence signed by Apexmaster, has involved aspects of

trespass. To this extent the Defendant is shown to be wrong, says the Claimant, because they were clear they would not commit any more trespasses – but they have, he says. The trespasses alleged primarily involve the oversailing by a crane hook block into airspace belonging to the Adjoining Property. Mr Field gives a series of measurements on which he relies to say that the photographs demonstrate a trespass.

110. In response, as indicated, Ms Cunningham has, helpfully, put in a short statement in opposition indicating, as before, that Thornsett are committed to building their development without any trespass and are taking all reasonable measures to ensure that no trespass is committed. She reiterates her confidence that it can be completed without any trespass. It is not accepted by the Defendant that the trespasses have taken place. The measurements of the maximum distance between the two properties is not accepted by Thornsett, the maximum distance stated is, she says, not a maximum. A different interpretation of the photographs is accordingly put forward by Thornsett.

111. Without deciding the issue as to whether the statement is truly admissible on the usual principles, I resolved to consider the evidence in any event and de bene esse, and of course, to read the submissions that I have received. This judgment should not be taken as a decision on the admissibility of the materials, but, in light of my judgement and the reasons for it, I am able to reach some conclusions upon the evidence in any event.

112. It is my view, as expressed above in the body of the judgment, that the matters brought before the Court on 9 February 2018 were not such as to make it just or

reasonable to issue an injunction, or receive an undertaking in the terms prayed on behalf of the Claimants.

113. An important part of my reasoning was that, in circumstances of this sort, the law whether in contract or under statute provides mechanisms for resolving disputes concerning minor encroachments of this nature. That is to say, on my findings, this is further evidence of like type to that already before the Court. These are minor trespasses, for which a licence or other financial accommodation should be sought, the greater number of them does not give them, in this case, a different effect.

114. I have asked myself whether, had the trial been heard on, say, 15 February 2018, and this evidence was to hand, my decision would have been different. I would still have been making a decision, on an interim basis, and subject to the guidance from the cases as set out. I have come to the considered conclusion that my decision would not have been different. In my judgement, even if, contrary to the assertions of Ms Cunningham, there is here a provable trespass, it is minor and so transient as not to change my view on the fact that damages is here an adequate remedy, and it is not just or convenient for an injunction to issue on the present facts.

115. Trenchant criticism is made of the Court and generally by Mr Seitler QC of the paucity of time for dealing with submissions. I have sought by every available means to accommodate the parties and ensure that each has had an opportunity to make points to the court. In the event, I considered his submissions carefully, together with those of Ms Cox, and I am not persuaded that a different decision should now be made.

116. I reserve the matter of costs, upon which the parties may, and address me at a different time.