IN THE COUNTY COURT AT OXFORD **CLAIM No. D00OX202**

Date: 9th May 2019

Before: HHJ Vincent

Between:

MRS TRICIA ANNE ORMISTON-KILSBY

Claimant

and

DR MORTEZA FATTAHI

Defendant/Part 20 Claimant

and

CHARLES GROSVENOR LIMITED

Part 20 Defendant

Mr David Nicholls instructed by Freeths for the Claimant
Mr Philip Williams instructed by Aman solicitors for the Defendant/Part 20 Claimant
Miss Sheila Aly for the Part 20 Defendant

Hearing dates: 4th, 5th, 6th, 7th February and 9th May 2019

JUDGMENT

Introduction

1. I am concerned with a party wall dispute, arising out of a loft extension erected by the Defendant at his property at 22 Islip Road. The Claimant is the owner of 20 Islip Road.

2. In 2016 the Claimant and her husband were living in Goring, and their house was rented out to tenants.

3. The Defendant and his wife purchased number 22 in 2005, shortly after she had received treatment in Oxford for a brain tumour. They built a loft extension shortly thereafter. A few years later they moved to Sheffield to enable the Defendant's wife to study dentistry at Sheffield University and then, after a short stay in Derby, the family returned to Islip Road in August 2014.

4. Thereafter the family were resident at the property, but the Defendant spends most of his time abroad, pursuing his work as an internationally acclaimed research scientist in the studies of earthquakes. His evidence is that since April 2018 his wife has also been living mainly abroad, caring for his father.

5. In January 2015 the Defendant contracted with the Part 20 Defendant (referred to in this judgment as CGL), to build a second small dormer loft extension, adjacent to the existing one, to create an extra room at the back of the house.

6. It is not disputed that paragraph 6 of CGL's terms of business provided that CGL would prepare and submit all necessary applications and plans for planning and building consent. Paragraph 7 of the terms provided that:

   'All other consents reasonably required by the Company to undertake the contract works including Party wall consents and consent or approvals that may be required from the freeholder or mortgagee of the Property shall be the responsibility of the customer. If the Customer fails to obtain any such consents and the company suffers loss as a result, including any loss of profit, the customer shall be liable to the Company for such losses.'

7. The Defendant has honestly admitted that he did not read these terms of business.

8. Nor does he dispute that on 13th January 2015, CGL sent a letter to the Defendant reminding in bold print of his duty to inform his neighbours with regard to the Party Walls etc Act, although the Defendant says he did not read this either. He said in evidence that he is a scientist, very concentrated on his work, he had no interest in the details of the project, and the reason he chose CGL – who had successfully built the previous extension in 2005 – was that he trusted that once he shook hands on the deal and paid the cheque for the deposit, he could leave them to deal with the whole project.

In the circumstances, where he trusted CGL, he did not feel the need to read any of the documents he was provided with, and thus he says, remained unaware of his obligations under the Party Wall etc Act 1996.

9. CGL say they sent a further letter to the Defendant enclosing plans, once again reminding him of the duty to notify his neighbours of the works. The Defendant says that he was subsequently unable to find this letter among his paperwork, but does not assert outright that he did not receive it; he cannot say either way. He does recall that he took a set of the plans round to the neighbour at number 24, which suggests that he is likely at some point to have received them in the post with the covering letter.

10. On 27th January 2015 an application to the local planning authority was made on behalf of the Defendant by Mark Darby (engaged by CGL). A notice relating to this application appeared on a lamp post in Islip Road, and the Claimant was informed that the application had been made by her letting agents, who in turn had been told by the tenant. Details of the application were posted on the Oxford City Council website. This application was refused.

11. Mr Darby then renewed his application on behalf of the Defendant, but this time for an application for a certificate of lawful development, in respect of a smaller extension, comprising a new bedroom at second floor level and a dormer window. This application was made on 26th February 2015. There is no requirement for public notices to be posted in respect of this type of application.

12. On 23rd April 2015 the certificate of lawful development was granted.

13. The Claimant's evidence is that having seen the first application online, she was concerned about what the Defendant may be planning. On 4th June 2015 the Claimant says she wrote an email to Mark Darby, whose details she says she obtained from the local authority website stating, *'for the avoidance of doubt I am writing to inform you that as the owner of the adjoining property I refuse permission for work or any construction on the party wall with number 21. … This means that by law, any construction work carried out must be confined to number 22 and no part of it may be done on the party wall.'* She asks him to forward on her email to the owners. The Claimant says that she followed up the email with a phone call to Mr Darby and he said he would forward on the email. It is now accepted by her that this email was sent to an incorrect email address and was not received by Mr Darby, or the Defendant. The evidence about this email has been extremely controversial and it is now alleged that the Claimant has fabricated this email after the event.

14. The Defendant accepts that he had a conversation with Mr Annis of CGL on 21st October 2015 in which he was asked whether he had notified his neighbours of the proposed works and he said he had. Mr Annis recalls specifically that he asked the Defendant, and that the Defendant confirmed to him that permission had been granted by the neighbours. However, the Defendant said he does not remember whether Mr Annis had asked this, nor whether he had said he did have permission.

15. In fact whether the Defendant was reminded in letters or conversations that he had an obligation to serve a notice on his neighbours or not is irrelevant, because he had signed the contract requiring him to take responsibility for that, and in any event, as a home owner intending to do work to a party wall, he was required by the Party Walls etc Act 1996 to notify the Claimant of his intention to carry out an extension. The Act requires that the notification contains prescribed information, in particular to be addressed to the owner of the property and to provide details of the work to be carried out.

16. The Defendant asserts that he delivered a letter to the Claimant's house in August 2015 addressed to 'the owner' notifying the Claimant of his intentions to carry out work at his house. He accepts that he did this not with the intention of complying with the Act which he says he did not know about, but as a matter of principle and good neighbourliness. There is a dispute as to whether or not the Claimant received this letter, but there is (at trial) no dispute that no formal Party Wall Act notice was served.

17. In the circumstances of this case, it was unfortunate that the Claimant did not have sight of the plans before the work was commenced, because she would have been able to inform the Defendant that the chimney flue for her Rayburn stove did not appear on CGL's drawings. The Rayburn provides heat to the kitchen, hot water to the house and is used for cooking. The flue is situated very close to the apex of the Claimant's roof and very close to the side of the proposed new extension. Had this been identified, discussions could have been had about how to accommodate the flue so as to comply with any relevant gas safety and building regulations. If any modifications needed to be done they could have been planned in discussion with the builder. Having seen the original planning application, the Claimant also had concerns that the size of the new extension may in fact exceed permitted development, as an extension had already been built on the site, and she was worried she might suffer inconvenience if the extension later had to be taken down.

18. Notwithstanding that he had no idea whether or not his neighbour consented to the works, the Defendant agreed with CGL that they would start work in November.

19. Scaffolding was erected on 3rd November 2015, CGL took delivery of materials on 4th November 2015 and work commenced on 9th November 2015. The contractors started work on the extension by erecting a wooden structure on top of the Defendant's side of the party wall. On 11th November 2015 some further scaffolding was erected on the Claimant's extension. It is CGL's case that permission was obtained from a lady at the Claimant's house to erect that scaffolding.

20. The Claimant's evidence is that she did not receive the Defendant's letter dated August 2015, and had no idea the building works were planned, that she was in Oxford for an appointment on 11th November 2015 and decided to drive by Islip Road and it was only then that she discovered that scaffolding had been erected and work started. She emailed Mr Darby when she got home and asked for work to stop pending appointment

of party wall surveyors. Mr Darby forwarded the email to Mr Annis, director of CGL, who contacted the Claimant the next day and the work was stopped.

21. It is the Claimant's case that the builders have caused some damage to her roof including to the flue pipe.

22. There has been no further work on the extension since 12th November 2015. The Defendant and his family have lived with a house open to the elements, insecure, vulnerable to cold and heat, with an unfinished room. The Defendant has a diagnosis of Parkinson's disease which is exacerbated by stress. His scientific research and teaching work has suffered and he says, as a consequence so has his professional reputation. Both he and his wife have suffered enormous levels of stress and anxiety as a result of the continuing dispute with the Claimant.

23. The Claimant's evidence was that she, her husband and children lived at number 20 between 1997 and 2008. In 2008 she and her husband moved to live in service accommodation linked to their jobs as estate managers, but her daughter lived at number 20 until 2011 and thereafter the property was let to tenants. In October 2015 her husband Frank had major surgery but was told that his illness was terminal and he was unable to continue to work. They had to move out of their service accommodation and rented a flat in Goring, which had level access for the Claimant's husband and was close to his medical team. They planned to sell number 20 Islip Road when the existing tenancy agreement expired. In the event, because of the continued dispute with the Defendant they were unable to sell the property. They had given notice to their tenants and the Claimant was no longer working but caring for her husband, so they could no longer rent in Goring. They moved back to number 20 in August 2016. Her case is that shortly after she and her husband moved back the Rayburn was certified as unusable due to the proximity of the flue to the new extension and concerns over damage caused to it in the course of the Defendant's works.

24. The Claimant says hers and her husband's plans have been completely disrupted by this dispute. The Claimant says she too has been put to significant inconvenience and has found the whole episode extremely distressing.

25. Mr Ormiston-Kilsby died in February 2018. He was initially a Claimant together with his wife, but, meaning no disrespect, and on the basis that it was Mrs Ormiston-Kilsby who has been the main point of contact with reference to all matters relating to the claim, I have referred to her as the single Claimant throughout.

26. Mr Annis, director of CGL, has an unfinished job on his books, and is still owed the first stage payment from the Defendant which he says is £3108 plus VAT. He was incurring charges for the scaffold hire – it is still up at number 22 - but told me he has now had to purchase it at a cost of thousands, although he has no use for it. At the time he wrote his statement in April 2018 he said he had sent contractors to site eighteen times to replace the sheeting, and to deal with leaks or other issues, at a cost of £130 a time.

27. There was some initial correspondence between all parties but they were not able to resolve the disputes between them. Solicitors were instructed, experts have been appointed, and offers traded, but most unfortunately for all concerned, the parties have remained in dispute, incurring potentially ruinous levels of legal fees, incalculable damage to their health and welfare, and untold stress and anxiety. The Claimant blames the Defendant for this sorry state of affairs. Both the Defendant and the Part 20 Defendant blame the Claimant. I have been invited to read and consider over four hundred pages of *inter partes* correspondence to investigate and form a view about who is to blame for the continuation of this dispute.

The proceedings

Particulars of Claim

28. Proceedings were eventually issued by the Claimant on 27th March 2017.

29. The Claimant's pleaded case is that the Defendant should not have authorised the works to start on the construction of the extension without prior notice to the Claimant, without seeking consent to carry out works to the party wall and without complying with the relevant provisions of the Party Wall etc Act 1996.

30. The Claimant seeks the following remedies:

    (i) A mandatory injunction requiring the Defendant to remove the extension;

    (ii) Damages for the cost of remedial work required to the Claimant's property as a result of the trespasses which is claimed to include the cost of replacing the roof including the skylight (this was not pursued at trial), compensation for lack of heating and hot water from the Rayburn, cost of repairing chimney, flue and pipe, diminution in value of the property, and general damages for stress and inconvenience;

    (iii) If an injunction is not granted, then damages in lieu of an injunction which would have to be determined in the future having regard in particular to the consequences of having the fully completed extension adjoining her property. The significant claim in this respect would be in respect of extending the flue pipe for the Rayburn to the required height of at least 600 mm above the highest point of the extension. This is suggested would require planning permission, and she would require to be indemnified for the costs of any appeals for example if not granted, or any modifications to the design to enable permission not be granted, or the installation of an alternative system for providing a range cooker and hot water heating;

(iv) Damages for trespass in respect of the installation of and presence of scaffolding on her property, damage to her roof, including to the roof slates and the flue, damage and building on the party wall;

(v) Damages in respect of alleged damage to her property in particular to the party wall itself, to the roof slates and ridge tiles, and to the flue, with alleged consequential loss because the Rayburn is deemed to be an immediate danger as a result; , and nuisance;

(vi) Damages for loss of mortgage interest.

Defence

31. The Defence is dated 24th April 2017. The Defendant asserts that he did give written notice to the Claimant on or about 18th August 2015 by delivering a letter to number 20 Islip Road.

32. The Defendant alleges that it was CGL who should be responsible for any damage caused to the Claimant's property. At paragraph 12 of the Defence it is asserted that the Defendant sought to resolve the dispute essentially by seeking to facilitate meetings between the Claimant and CGL, who he regarded as responsible for rectifying any damage caused. The Claimant is criticised for not providing clarification in respect of what damage had been caused by the works, the Defendant's position having been that if she could demonstrate that any damage had been caused to her property then, without any admission of liability, he would have ensured that the necessary remedial work would be carried out accordingly.

33. It is asserted that any trespass as the Claimant might prove would only entitle her to nominal damages.

34. So far as the insertion of joists through the party wall is concerned, it is asserted that such trespass is not causing any damage to the Claimant, would have been permitted under the Party Wall Act 1996, that the Claimants have in the past inserted joists into the party wall without invoking the Party Wall Act procedure and therefore it would be inequitable for injunctive relief to be granted. In any event, it is pleaded that if any actual damage has been caused, it is the responsibility of CGL.

35. The Claimant is put to proof in respect of any continued trespass and any damages caused. It is denied that any damage suffered is serious as alleged or at all and in the circumstances the injunctive relief sought would be oppressive in all the circumstances.

Part 20 Claim

36. On 26th April 2017 the Defendant's Part 20 Claim against CGL was issued, seeking an indemnity in the event that the Claimant was successful against him. This claim alleges

that if the construction works were proved to have caused damage to the Claimant's property, then such damage was caused by CGL failing to exercise reasonable care, skill and expertise in carrying out its work.

Defence to Part 20 Claim/Counterclaim

37. In its Defence and Counterclaim, CGL asserts that it was the responsibility of the Defendant to obtain Party Wall consents from their neighbours and that if the customer fails to obtain such consent and CGL suffers loss as a result, then the customer is liable to CGL for such losses. It is averred that the claim is misconceived and 'circular in nature'.

38. In any event, CGL denies causing any damage to the property. It is asserted that CGL did not know the Claimant did not consent to the works, because they never received the email sent to Mark Darby by the Claimant; the email address was wrong. Trespass is denied because CGL say they obtained permission from a person at number 20 before erecting the scaffolding.

39. The Counterclaim is limited to a claim for the costs of defending the action, described as, 'compensation for losses caused as a result of the claim and any costs payable to third parties involved in the build as necessary.'

Reply to Part 20 Defence and Counterclaim

40. In his reply to the Part 20 Claim the Defendant says that he was unaware of the need to serve Party Walls etc Act 1996 notices until after the dispute had arisen with the Claimant. It is asserted that CGL owed a duty to the Defendant to ensure that a Party Walls Act notice had been served, alternatively to have made enquiries directly with the Claimant as to whether such a notice had been served. Without being satisfied that a notice had been served it is pleaded that CGL should not have commenced work. It is repeated that if any damage is proved to have been caused to the Claimant's property then it is the responsibility of CGL to compensate her.

Case management hearings

41. On 25th July 2017 District Judge Matthews made directions, allocating the claim to the multi-track and providing that a single joint expert in chartered surveying be instructed to report (Mr Redler was subsequently instructed). He then provided for a stay following receipt of the report for the parties to engage in mediation.

42. A case management hearing was listed for 11th September 2017 but appears to have been adjourned or vacated.

43. I am not sure why the next hearing was not listed for nine months. The next order is dated 21st June 2018 made at a hearing before District Judge Devlin to consider two applications made by the Claimant and an application by CGL for CCTV investigation

of the condition of the flue liner. Permission was given to put further questions to Mr Redler. The parties were given permission for Mr Redler to carry out a CCTV investigation of the condition of the flue liner. A second single joint expert was ordered to be instructed in respect of potential replacement or repair works to the pipe and flue. The matter was listed for a four-day hearing towards the end of 2018.

44. The matter came before District Judge Devlin for a telephone hearing on 19th October 2018 as the parties had been unable to agree the identity of the second expert. Mr Lambert was directed to report. The CCTV investigation had not been carried out and a direction was made that if Mr Lambert regarded it as necessary then the parties had permission to instruct him to carry it out.

45. The costs of and occasioned by the Defendant's refusal to agree the identity of the second expert were to be dealt with at the pre-trial review, alternatively by the trial judge if that hearing were vacated.

46. District Judge Devlin did see the parties for pre-trial review on 14th January 2019. Mr Lambert had informed the parties by letter dated 21st November 2018 that he was unable to attend the trial commencing 4th February 2019 but this does not appear to have been drawn to the Court's attention before then. Mr Lambert had prepared a report and been asked questions but had not answered all the questions put by the Defendant and the third party.

47. Mr Lambert was directed to reply to the unanswered questions. Permission was given to the parties to agree the identity of a surveyor to take measurements and give evidence of fact in respect of the height of the pipe and its distance from other structures, the cost to be paid for by the Defendant. The costs in respect of the Defendant's refusal to agree the identity of the second expert was directed to be considered by the trial judge.

48. The Claimant was ordered to pay the Defendant's and Third Party's costs of and occasioned by the second pre-trial review, to be the subject of a summary assessment by the trial judge.

49. The trial was listed for four days commencing 4th February 2019.

Parties' positions at trial

The Claim

50. The Claimant was represented by Mr Nicholls, who has been instructed throughout the case. The Claimant's position at trial remains as pleaded; she seeks a mandatory injunction to remove the extension and for damages in respect of damage caused to her property as a result of the building works, alternatively damages in lieu of an injunction. Mr Nicholls had prepared a case summary, chronology, and comprehensive skeleton argument, setting out the Claimant's claims, facts and law relied upon in support of

each remedy sought. These documents are accompanied by a bundle of legal authorities, and Scott schedule.

The Defence

51. In his two-page skeleton argument for the Defendant Mr Williams did not deal with the issue of service of the Party Wall Act notice, nor the claim for an injunction, nor each of the heads of loss claimed by the Claimant.

52. He writes that he will not regurgitate the contents of the pleadings. He then reminds the Court that *'those that seek equity must do so with clean hands'.* He asserts that the Claimant does not have clean hands, having, *'deliberately procrastinated and sought damages that are unsustainable.'* Furthermore, *'the Defendant* [he means Claimant] *has sought to rely upon an email and telephone call that was not sent or made, is false in its representations and/or in reality is a fraudulent email that was created retrospectively for the purposes of furthering this litigation.'* He does not explain in what way he says the Claimant has sought to rely upon the email or telephone call in support of her claim. The Claim is founded on the Defendant's actions in commencing building works potentially affecting the party wall, without first serving a Party Wall etc Act 1996 notice, not the existence or otherwise of this email. Mr Williams does not explain how the law would operate so as to defeat the claim in the event of a finding that the email was fabricated. Fraud was not pleaded against the Claimant.

53. I accept of course that the claim for an injunction is an equitable remedy, which remedies are not granted to those without 'clean hands', but this did not appear to be Mr Williams' concern, he does not mention the injunction at all in his document. His exposition of the law is one short paragraph, as follows:

    'The Party Wall Act etc 1996 contains no enforcement procedures for failing to comply with a notice, there must be evidence of damage by the works; there is none, just simple supposition and assertions. However, there is evidence that there was damage to the Claimant's property prior to the works of November 2015.'

54. It was not pleaded in the Defence that the Claimant's property was already damaged prior to the works of November 2015.

55. At the outset of the trial I had read all of the first bundle and most of the second containing all the pleadings, witness statements, expert reports, including plans and photographs. I had not yet read the third bundle containing around four hundred and fifty pages of parties' and solicitors' correspondence. In the circumstances, it was news to me that the Defendant was alleging the Claimant's conduct of the litigation was in issue and in particular that she was alleged to have fraudulently concocted an email. Having read the skeleton argument a number of times, I was still at somewhat of a loss to understand the Defence and the legal basis for it.

56. The remainder of the skeleton argument sets out the Defendant's case in respect of the claim for damages. It is asserted that the Claimant is *'utilising a technical mishap of*

the Defendant to force inflated monetary demands from the poorly Defendant and his wife'. It is asserted that there is no independent evidence of damage to the Rayburn flue, and in any event the Claimant's property/flue is not in compliance. It is asserted that the Claimant has had years to prove the damages and has manifestly failed to do so.

57. Finally, Mr Williams drew my attention to an offer made by the Defendant, it appears at that time representing himself, in January 2018. The offer is preceded by a summary of the Defendant's position, as follows:

    - He apologises for being unaware of the Claimant's objection to the works and of the Party Wall Act but says that nevertheless, he did serve a notice meeting the requirements of the Party Wall Act 1996 upon the Claimant;

    - If the Claimant had wanted a surveyor to be appointed under the Party Wall Act he says she only had to communicate with him before the works started, but she did not;

    - He says that the failure of the Claimant to inform him directly of her objections to the extension is central to his case and in his view the whole case could have been avoided, because he says if he had known about the Claimant's objections, he would have abandoned the whole project;

    - He asserts that if the Claimant could prove to the Defendant that she informed CGL of her objection to the works then this would be sufficient to proceed against CGL *'for failing to inform me and for letting me down on other issues'.*

58. The Defendant then goes on to say that he is making an open offer, subject to the following condition:

    'I need the Claimants to prove that they informed Charles Grosvenor of their intention to object so that I can proceed against Charles Grosvenor. For this I would respectfully suggest that the Court demand sight of the relevant e-mail and phone records. To establish certainty, it may also be necessary for the caller to swear to the content of the calls.'

59. He asks the Claimant to prove: (i) that she sent an email to CGL on 4th June 2015; (ii) that as asserted in solicitor's correspondence, the Claimant contacted Mr Darby after sending the email and he told her that he had sent it on to Charles Grosvenor; (iii) that when the Claimant phoned Mr Darby, she did not know that Dr Fattahi resided at the property, and the only detail she had was that of the planning agents.

60. Strictly subject to this proof being provided, the Defendant offered to pay the Claimant's legal costs to date, to pay for repair of damage identified in Mr Redler's report based on his estimate and that he would either remove the extension altogether or complete it in compliance with planning and building regulations.

61. In his skeleton argument, during the course of the evidence and closing submissions Mr Williams returned again to this letter, asserting that this offer was a good offer, and had the Claimant only told the truth about the email and telephone call, the dispute could have been resolved at least by January 2018. It is asserted that the Claimant has acted not just unreasonably, but dishonestly, in refusing to accept this offer, and that the only reason she cannot provide the assurance requested is that she must have been lying when she asserted through her solicitors that she had informed the builders of her objections in June 2015.

62. The Claimant's case is that this offer asked something of her that she could not do. By then it had become apparent that the email she had sent to Mark Darby had not been received because she had mis-typed the email address. She has maintained her position that she did telephone him and that he said he had or would forward her email on to the builders She maintains her position that whether or not CGL received this email is irrelevant to the claim.

63. The Defendant's offer was repeated by the Defendant on 19th January 2019, introduced by the following statement:

'Mr Williams of counsel, who will also be trial counsel, has clearly indicated that your client's claim is legally, equitably, regulatorily and factually flawed. It is our client's position that it is doomed to failure and she will be liable for a substantial costs order which we will ask is paid on an indemnity basis for obvious reasons. Our client now has a new legal team who are confident in obtaining a just and equitable result from the Court.'

64. The Claimant is reminded that all that was required of her in January 2018 was to confirm on oath or in writing what she had stated as being true, but she had failed to do so, and had relied upon *'an untrue and concocted email from 4th June 2015'.* I believe this to be the first time that it was alleged to the Claimant that she had concocted the email.

65. It appears to be the case therefore that in January 2019 the Defendant was still positively asserting that he had served the appropriate Party Wall etc Act notice, and that he regards the Claimant as liable to him for failing to notify him through his builder, before he started the works, that she wished to object to his proposals and/or to engage the services of a surveyor.

66. Mr Williams said that the reason for the brevity of the skeleton argument prepared for a four-day trial, was *'due to the evidence that shall be brought to the Court's attention via cross examination.'* During Mr Williams' cross-examination of the Claimant, it is likely that I at times looked puzzled as I tried to understand exactly what the Defendant's case was. It is right that I did also intervene and ask him at times where he was going with a particular line of questioning, and whether that line of questioning was in accordance with the pleaded case, which puts the Claimant to proof, and does

not assert dishonest or fraudulent conduct on her part. It is likely that I might have been seen to wince at the strength of the language of the letter of 19th January 2019, when I remained unclear as to the factual and legal basis for the Defence, and in particular, why it was said that responsibility lay with the Claimant to inform the Defendant of her objections, notwithstanding she had received no formal Party Wall etc Act notice from him of his plans and was not therefore in a position to say whether she objected or not.

67. In written submissions prepared at the end of the trial, Mr Williams asserted that the way Mr Nicholls presented the case in opening was wrong in law and on the facts. However, he provided no further written or oral submission to tell me in what way he says Mr Nicholls was incorrect as to the law I should apply. He attached government guidance in respect of the Party Wall etc Act 1996 and some 'FAQs' to his submissions. He reiterated a number of points about the Claimant's conduct of the litigation, identifying areas where he said her evidence was weak or non-existent in respect of damage to the flue or Rayburn, and alleging that she refused to allow CCTV investigation of the flue liner. It was asserted that evidence given by her that she met with a planning officer at her home in around April 2015 to discuss the Defendant's application could not possibly be true. Further points were made about the email and phone call to Mr Darby. It is suggested that the Claimant was lying to the Court when she said the first time she was aware of the works was 11th November 2015 and that she had in fact monitored the work, effectively lying in wait until such time as the works were nearly completed so as to cause maximum inconvenience to the Defendant when she asked for them to be stopped.

68. Mr Williams did not refer to the claim for the injunction in his closing submissions but when asked by me for his client's position, he said that he accepted it was a discretionary remedy, but he thought pulling down the extension should generally be avoided. He said there was no need to pull the extension down because it complied with building and planning regulations. He said if it did have to come down, it did not mean the Claimant would get her costs. He did not suggest that the Claimant was not entitled to this equitable remedy by means of her conduct. Following the Claimant's closing submissions Mr Williams asked permission to make some further submissions about the injunction and invited me to conclude that the Defendant had not had 'wanton disregard' for the Claimant's rights. Informing me of his extensive experience as a planning lawyer, he cautioned me to tread carefully and not make the mistake of importing a misconceived understanding of planning law into my considerations. He suggested I might mistakenly direct myself that the Claimant should be entitled to a right to a view, and therefore be inclined to make the mandatory injunction. It is possible that I might have betrayed a look indicating I was not overly impressed with the relevance of this submission.

The Part 20 Claim and Defence

69. The Defendant's primary case is that the Claimant cannot prove any damage has been caused to her property or else the damage is *de minimis*, and she has exaggerated the

extent of it for the benefit of her claim. If there is any damage, it is maintained that it is the responsibility of the Part 20 Defendant.

70. Mr Williams conceded that the Defendant did not serve a notice which complied with the Party Walls etc Act 1996. In his witness evidence the Defendant repeated that he had no idea himself about the need to serve the notice. I did not understand from him or Mr Williams however that at trial the Defendant's pleaded case was being maintained that CGL owed a duty to the Defendant to ensure that a Party Walls Act notice had been served, alternatively to have made enquiries directly with the Claimant as to whether such a notice had been served. It did not appear to be asserted upon the part of the Defendant that CGL should not have started work without first satisfying themselves about the notice.

71. Nowhere in his submissions did Mr Williams elaborate as a matter of law why the Defendant maintains that if damage were proved to have been caused to the Claimant's property then the Defendant would be entitled to be indemnified by CGL.

72. CGL's primary position, advanced by Miss Aly, was to side with the Defendant against the Claimant, asserting firstly that they had received all necessary consents to start work, and that they had not received notice of any objection from the Claimant. In the event that it was proved that consent had not been obtained, then it is averred that the terms of the contract between the Defendant and CGL are such that the Defendant would bear responsibility.

73. So far as the Claimant's claim for damages is concerned, it is alleged that the work was carried out with reasonable care and skill. In submissions, both the Defendant and Part 20 Defendant asserted that the Claimant's claim for damages was *de minimis* and she was seeking to profit from the Defendant's technical default by seeking to better her property at the expense of the Defendant. It was asserted that she has exaggerated the extent of any difficulties, and suppressed information about the pre-existing state of her property, in particular the flue pipe. Miss Aly asserted that the Claimant has failed to mitigate her losses by allowing the work to be completed, or by making repairs to pre-existing conditions.

74. No mention of the Part 20 Defendant's counterclaim was made in the skeleton argument or closing submissions. No Scott Schedule has been filed. Some evidence came from Mr Annis about monies paid for scaffolding and call-out charges to contractors but there was no documentary evidence filed. As far as I am aware the counterclaim is limited to costs.

75. At times during the case I am aware that I looked somewhat perplexed as I tried to understand the Defendant's case. It was presented very much in line with the Defendant's position in the offer letter of January 2018, essentially that the notice he gave in August 2015 should be taken as complying with the Party Wall etc Act in spirit, that responsibility should lie with the Claimant for failing to inform him and the builders of her objections before the project works commenced, and that the damages

she claims are so small as to be insignificant. In his closing submissions, Mr Williams did accept that the notice given by the Defendant did not comply with the requirements of the Act. However, during evidence the Claimant was cross-examined about these matters, and it remained the Defendant's evidence that he had done nothing wrong because he knew nothing about the requirements of the Act, and that the letter he put through the letterbox in August 2015 should be regarded as complying with the Act in spirit. He apparently continues to feel, as set out in his letter of January 2018, that it was the Claimant's responsibility to inform him and/or his builder of her objections, and had she only done so, he would not have built the extension.

76. The Defendant's position ignores the requirements of the Party Wall etc Act and seems concerned only in respect of any obligation to put right damages caused by the works. He does not appear to have hauled in the consequences for the Claimant of his actions in erecting an extension without giving her the opportunity to participate in the process, as the Party Wall etc Act 1996 provides. His failure to provide notice is described only as a *'technical mishap'*. No consideration is given at all to his interference with her rights as his neighbour, and her issues in respect of the flue pipe are interpreted only as concerns about damage which may have been caused to it. Her case that if the extension remains up, then there are potential significant consequences for her in terms of the positioning of the flue pipe and planning required to obtain it, was shrugged off. It was suggested instead that the existing flue pipe did not comply with regulations, was not damaged by CGL but had pre-existing damage, and the Claimant had falsely claimed that the CGL had caused damage, in order to profit from the Defendant by having it replaced and thereby improve her property.

77. The Part 20 Defendant supported the Defendant in this allegation, and also blames the Claimant for allowing matters to escalate to a four-day trial. Mr Annis is clearly one of life's problem-solvers and is wholly perplexed by the continuation of this dispute. He says if he had only been given the opportunity to discuss with the Claimant and the Defendant together he could have provided any number of solutions to the difficulties and found a way to build the extension so that everybody was happy and all building regulations complied with.

The Law

The Party Wall etc Act 1996

78. The Party Wall etc Act 1996 encourages co-operation between neighbours around building projects and to provide a means of dispute resolution. It enables a building owner to carry out works on the property which might otherwise constitute a trespass or nuisance by virtue of their interference with a party wall, and prevents his neighbour from having a veto on carrying out such works, provided that the requirements of the Act are complied with. If a notice is served beforehand (as is required by the Act) the neighbour has the opportunity to see the plans, make comments and ask for any changes to be made, and then they may either consent or serve a counter-notice. If consent is given or no response is received within a specified timescale, the building owner may

proceed. Otherwise there is a process whereby surveyors can be appointed to carry out a survey of the state of the properties before work commences, to make determinations about the scope of works. If things have not gone to plan, surveyors can be appointed to assess any award of damages or rectification as the situation may demand.

79. Mr Nicholls refers me to a text book, Bickford-Smith on *'Party Walls Law and Practice',* of which both Mr Nicholls and Mr Redler are co-authors. Chapter 3 discusses the rights of building owners. Unless and until an initiating notice under the Party Wall etc Act 1996 has been served, and, if a dispute ensues, until an award has been made under section 10 of the Act, the building owners must rely upon their common law rights. Once the statute is invoked, common law rights are supplanted or substituted by the Act, but if the procedures required by the Act are not strictly complied with, the building owner will be liable for any tort (e.g. trespass or nuisance) against which the Act would have protected him.

Trespass and nuisance

80. Trespass is the unjustifiable intrusion by one person upon land in the possession of another. It is a direct infringement of another's right and is actionable without damage. Damages for trespass are usually assessed by reference to the value to the Defendant of the benefit of his use of the Claimant's property.

81. A nuisance is an act or omission which is an interference with, disturbance of, or an annoyance to, a person in the exercise of his ownership of land. Mr Nicholls argues that the continuing presence of the Defendant's incomplete extension is a nuisance that prevents the Claimant from enjoying her property because it means that the flue and the pipe for the Rayburn gas appliance will have to be replaced in such a manner as to disfigure the Claimant's property, or else the Rayburn will have to be taken out altogether and a different heating and water system installed.

Injunction

82. I was referred to the case of *Morris v Redland Bricks Limited* [1970] AC 652, which is concerned with *quia timet* injunctions i.e. an injunction to restrain a wrongful act which is threatened or imminent but has not yet happened. In that case the Claimant farmers had suffered loss of support of their land as a result of their neighbouring quarry owners' excavations underneath it, but their cause of action only arose each time a landslip occurred and thereby caused damage. They applied to the Court for injunctions to prevent the quarry owners from withdrawing support from their land without leaving sufficient support. In order to establish that they were entitled to an injunction in those circumstances i.e. before any damage had occurred, it was held that a Claimant must establish the following:

    (i) a very strong probability that grave damage will accrue in the future if the injunction is not granted. *'It is a jurisdiction to be exercised sparingly and with caution, but in the proper case, unhesitatingly'* (per Lord Upjohn at [665G]);

(ii) that damages will not be a sufficient or adequate remedy to the Claimant if such damage does happen;

(iii) the cost to the Defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account. Per Lord Upjohn at [666A-E]:

(a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff';

(b) but where the defendant has acted reasonably, though in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only upon a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudiced for he has his action at law and all his consequential remedies in equity;

83. Lord Upjohn continues, *'so the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damage to the plaintiff and if, on such balance, it seems unreasonable to inflict such expenditure upon one who for this purpose is no more than a potential wrongdoer then the court must exercise its jurisdiction accordingly. Of course, the court does not have to order such works as upon the evidence before it will remedy the wrong but may think it proper to impose upon the defendant the obligation of doing certain works which may upon expert opinion merely lessen the likelihood of any further injury to the plaintiff's land.'*

Nuisance/Damages in lieu

84. Where a Claimant has established that the defendant's activities already constitute a nuisance, on the face of it the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future.

85. Where the Court refuses the injunction, the damages in lieu are usually based on a reduction of the value of the claimant's property as a result of the continuation of the

nuisance, see *Lawrence v Fen Tigers Limited* [2014] AC 822 per Lord Neuberger at 851.

86. Lord Neuberger goes on to consider the principles to consider when deciding whether or not to award damages rather than an injunction.

87. Referring to the case of *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, he reminded himself that the Courts have been reluctant to allow a wrongdoers' illegal acts to be allowed to continue just because the wrongdoer may be willing to pay out for it. Interference with your neighbour's rights cannot always be bought off.

88. Lord Neuberger described the 'good working rule' set out by A.L. Smith LJ in *Shelfer* as follows, *'(1) if the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) 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.'*

89. Lord Neuberger then reviews further cases where the four-test working rule was applied, but concludes that a mechanical application of the four tests should be discouraged. Instead he emphasises that the Court's power to award damages *in lieu* is an exercise of the Court's discretion, which should not be constrained by the application of any specific test. Each case is to be decided on its own facts.

90. At paragraph 121 Lord Neuberger again stressed 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.'* Lord Neuberger noted that the conduct of the defendant may be relevant, and cited with approval the observations of Lord Macnaghten in *Colls v Home & Colonial Store Ltd* [1904] AC 179:

'In some cases, of course, an injunction is necessary – if, for instance, the injury cannot be fairly compensated by money – if the defendant has acted in a high-handed manner – if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. 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.'

91. I take from my review of the authorities that when deciding whether or not to award damages in lieu of an injunction for nuisance, the Court must have regard to all the circumstances, which is likely to include the conduct of the defendant, and the impact upon the defendant and claimant respectively if the injunction is or is not granted, but I am not required to apply any rigid checklist test, such as the one set out in *Shelfer*, although that may be a helpful starting point. It does not need to be established that the Defendant has acted in a high-handed manner before an injunction is granted, nor does the fact that damages may be quantifiable and the defendant able and willing to pay

mean that damages will always be awarded in lieu. The Court must look at all the circumstances of the particular case, weigh the factors in the balance and come to a view.

Damages

92. If damages in lieu of an injunction are awarded then as well as awarding the claimant the value of the consequent reduction in the claimant's property, the damages might also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction (see *Lawrence* at [857D].

93. Mr Nicholls refers me to the case of *Roadrunner Properties Limited v Dean* [2003] EWCA Civ 1816 per Chadwick LJ, which he relies on to assert that the court should take a '*reasonably robust approach*' in light of a Defendant's failure to serve a notice under the statutory scheme. If it can be shown that the damage which has occurred is the sort of damage which one might expect to occur from the nature of the works that have been carried out, then the court must recognise that the inability to provide any greater proof of the necessary causative link is an inability which results from the building owner's failure to comply with his statutory obligations.

94. In relation to the claim for damages for trespass where actual damage was caused, the Claimant is entitled to recover the costs of repair and reinstatement where they are reasonable in all the circumstances and where the Claimant intends to do the work and make good the harm to the property (see **Clerk & Lindsell** at 19-69). The overriding principle is to put the Claimant back in the position she would have been in prior to the infliction of harm.

The evidence

The Claimant

95. The Claimant gave her evidence calmly, directly, and consistently with the evidence in her two witness statements. She has a clear understanding of all the issues, was wearily familiar with the details of all relevant expert reports and the Party Wall Act etc 1996 process, both from her own experience and reading and absorbing various documents for the purpose of these proceedings. She maintained her composure, despite being accused of dishonesty and of pursuing this litigation only for her own desire to profit from the Defendant and to cause him maximum stress and misery. It was put to her that:

- she was lying when she asserted she had written an email to Mark Darby the architect in June 2015 stating her objection to any planned works and asking for service of a party wall notice;

- she was lying when she said she had a meeting with someone from the council in around April 2015 about the Defendant's plans;

- She knew in February 2015 about the works because her tenant informed her agent;

- she knew about the planned works, knew they had started, but deliberately waited until the scaffolding was up and work nearly completed before, with precision timing, she made a call, thereby intending to cause maximum distress and damage;

- That the extension she and her husband had built on their property in 2000 was not in fact completed until 2007 and that they had not given the appropriate party wall notice to their neighbours at the time it was built;

- she is lying when she says that gas engineers told her in 2016 that she should take her Rayburn out of commission because of the proximity of the flue to the extension;

- she is now seeking to cover up the fact that her Rayburn already had problems and she is seeking to profit from the Defendant by requiring him to replace the chimney and flue which, it is now alleged, would have required replacement in any event due to already being defective and/or not complying with existing building regulations;

- she has steadfastly refused to negotiate with the Defendant or to accept any offers of resolution from him, solely with the purpose of driving him and his family through the ruinous process of litigation and with the intention of making a profit for herself;

- she persisted in requiring the Defendant to serve a Party Wall Act notice even after the structure was completed and it was, on the Defendant's case, too late to do so, and to appoint a surveyor, but when he offered to do that, she refused;

- she has exaggerated the level of her claim for damages.

96. Following extensive cross-examination by both Mr Williams and Miss Aly, and having regard to all the evidence in the case, I was satisfied that the Claimant was giving her evidence honestly, had not fabricated any documents, was relying entirely upon information received from experts in the way she presented her claim, and was not seeking in any way to mislead the Court, the Defendant or the Part 20 Defendant. Each of the matters raised above by the Defendant had the characteristic of conspiracy theory, and was unsupported by any objective evidence. Each of these allegations is consistent with the approach taken by the Defendant and then on his behalf, his lawyers, in correspondence. Every time he was asked to acknowledge his responsibility for creating the difficult situation between them and to take some action, he demurred, demanding instead some information from her, which in each case appears to be nothing more than a fishing expedition to see if he can get some leverage in their negotiations. I have in mind his suggestion, pursued at trial, that she and her husband had not in fact completed their own loft extension until 2007, and had not notified the

Defendant under the Party Wall etc 1996 Act. It was quite obvious that it was in situ at the time the Defendant purchased the property in 2005. Later, he became preoccupied with his demand that she must prove to him that she had sent an email to his builders. It has now been suggested to her that her own extension and in particular the position and height of the flue pipe did not meet appropriate building regulations. The evidence does not support such an assertion which in any event is an allegation which is irrelevant to the present claim.

97. The Claimant has accepted she sent her email to Mark Darby to the wrong email address. I fully accept her evidence that this was an innocent mistake on her part. I found her to be a straightforward and truthful witness. She says she recalls a phone call to Mark Darby and that he said he had or would forward on her email to the builders in June. That he has said in an email that he has not had any dealings with her of course does not prove that she is lying. The Defendant did not seek to bring Mr Darby to Court to give evidence to that effect. In an email to the Defendant Mr Darby made emphatically clear that he has no desire at all to become caught up in a party wall dispute and says he had no email contact with the Claimant at all. This is not a correct statement, in fact he had received an email in November 2015, as it was to him she wrote in the first instance upon discovering the scaffolding. I do not regard this email as objective evidence that undermines the Claimant's stated position.

98. It is only the Defendant and his legal team who appear to be under the misapprehension that there is any significance in this email. Whether it was sent or not, received or not, it has no legal significance. The Claimant has no incentive to lie about it. She had not at that stage (even on the Defendant's case) received any notification from the Defendant that the works were planned to start, even if she had, she was not obliged to inform him of her opposition to the project unless and until she had received a formal Third Party Walls etc Act notice.

99. The extension at the Claimant's house was clearly built in 2000 as she says and the building certificate shows. It is clear that the building works were completed in 2000, but the certificate of completion was not obtained until 2007. There is nothing irregular or sinister about this. It is plain from the witness evidence of all parties, and the documents in the bundle, including the Defendant's own plans in respect of the extension he built at 2005, which clearly include the Claimant's existing extension that the extension was completed by the time the Defendant moved in. However, for a reason known only to the Defendant and his legal team, this remained an issue at the start of trial as set out in Mr Williams' skeleton argument and it was only on the third day of the trial that he confirmed he did not need to call a witness who had been due to attest that she had slept a comfortable night in the Claimant's extension at a time after 2000 and before 2005. Whether or not the Claimant had served a Party Wall Act notice to the Defendant's predecessors is plainly irrelevant to this claim, but has nonetheless been an allegation pursued vigorously by the Defendant in correspondence.

100. The Claimant accepts that she heard via her agent from her tenant in around February 2015 that the Defendant was planning a further extension. She explains in

her witness statement that she then looked at the plans on the local authority's website. I accept the Claimant's evidence that she did meet with someone from the council at her property in or around April 2015, to discuss her concerns about the application for planning that had been put in on behalf of the Defendant. That she was concerned having seen the planning application online is consistent with her evidence, unchallenged, that at the time the Defendant carried out their previous extension in 2005 he did not serve a Party Wall etc Act notice and that this had caused her worry at the time. Mr Annis accepted that some replastering of a wall in her house had been carried out by him at the time this extension was built. The Defendant sent an email to someone at the council asking whether it was usual for a visit of this nature to take place where the application was for permitted development and they replied that it was not. This email was triumphantly presented to the Court as proof that the Claimant must have been lying when she said she met with someone from the council to discuss her concerns about the Defendant's plans. I have assessed the evidence before the Court and I am satisfied to the standard of a balance of probabilities that she is not lying. Again, however, this is another wholly irrelevant allegation.

101. I accept the Claimant's evidence that upon returning to the property in the summer of 2016 and on the recommendation of her surveyor Mr Hodges she arranged for a gas engineer to attend an inspect the Rayburn. I accept that she was told that due to the proximity of the flue to the Defendant's newly constructed extension she could not use the Rayburn. This advice is consistent with the expert opinion of Mr Lambert and with common sense. Mr Williams insisted that the Rayburn could not have been taken out of commission without a written report, but has no expert or lay evidence to submit to the Court supporting that contention. Mr Lambert agreed with him in cross-examination that one might expect a written report but that is a long way short of establishing the Defendant's case that the Claimant has fraudulently obtained or produced the gas safety notice which has been affixed to her Rayburn stove for two and a half years. It is an extraordinary allegation to make that the Claimant, upon returning to the property, spotted an opportunity to profit from the Defendant and chose to switch off her source of hot water, heating in the kitchen and cooking, so as to falsely present to the Defendant that it was out of commission. It is alleged that the Claimant has fabricated or somehow falsely obtained the gas safety notice that is affixed to her Rayburn. The allegation as a whole is not supported by any objective evidence, and in my judgment it is unfounded.

102. There is no objective evidence from an expert or lay witness to establish that the Claimant's Rayburn gas heating system was defective before November 2015. The Claimant's tenant described entirely standard issues experienced as a tenant and said that he and his wife chose not use the Rayburn as they were not familiar with cooking with this type of stove. There is no other evidence of problems. Mr Aldred's measurements are not reliable and Mr Lambert's clear evidence was that even if the flue pipe was 70 mm too short as the Defendant now asserts, it is highly unlikely that this would have been picked up on at any inspection as an issue. In any event there is no evidence to suggest that the Claimant was aware of any issues with the Rayburn or

flue in the weeks, months or years before the Defendant started his work, whether in respect of how it was working or its compliance with planning.

103. There is no evidence to suggest that the Claimant knew in advance of 11th November 2015 that the Defendant's building works were starting. The Defendant says he put a letter through the letterbox in August 2015 but the Claimant's tenant has no recollection of seeing it. The Claimant has no recollection of receiving such a letter, notwithstanding she had particularly asked through her agents that the tenants keep an eye out for a Party Wall etc Act 1996 notice when it came as she was aware of the relatively short time limits for responding. That she laid in wait for the scaffolding to be put up is an utterly ridiculous allegation and there is no evidence at all support it. It is just another wild assertion.

104. I do not accept that the Claimant's position in pre-proceedings negotiations has been unreasonable. The Defendant has from the start refused to take responsibility for his failure to follow the statutory regime. Although he initially took responsibility and said he was keen to put matters right, he did not serve the notice as required, he did not appoint a surveyor, and very shortly thereafter, he started raising a number of allegations against the Claimant, which were baseless and irrelevant. He has approached the case only on the basis that the limit of his obligations to the Claimant would be to put right any damage caused by his builder. His offer in January 2018 was based on the premise that he had done nothing wrong, and that he would only make amends to the Claimant if she provided evidence to him that would found a claim against his builder. But the Claimant could not have assisted him in this for reasons given.

The Defendant and his wife, Ms Gita Nejad

105. The Defendant and his wife presented as honest, kind, highly anxious individuals, who are utterly perplexed by the continuation of these proceedings.

106. I accept Ms Nejad's evidence of the difficulties she had experienced as a result of her property being exposed to the elements, the concerns she felt for her safety and that of her children. I accept from both she and her husband have found the dispute with their neighbour extremely distressing and they cannot understand how they have found themselves involved in Court proceedings.

107. The Defendant gave his evidence honestly and answered questions fully and directly. He accepted that he had not read his contract with his builder nor the correspondence that followed it. He told me that although he had initially agreed to instruct a surveyor, he then spoke to Mr Hodges, the surveyor engaged by the Claimant. He was alarmed that the estimated costs of hiring Mr Hodges, around £4,000 would fall at his door. He regarded the builder to be responsible for any damage. CGL had told him there was no damage. In the circumstances, he told me he did not know who or what to believe. It appears that at this very early stage, he simply misunderstood the nature of the request for the surveyor, and interpreted the dispute then, as he and his legal team apparently do now, as only a question of working out the cost of putting

right any damage caused in the process of the building works. In the circumstances, he felt that £4,000 was an excessive cost to incur in circumstances where the builder could simply be asked to come round, look at the damage and put it right.

108. He repeated a number of times that if only the Claimant had told him or the builder of her objections then he would never have commenced the building work.

Expert evidence

Mr Redler

109. Mr Redler has prepared a report and replied to a string of questions from both parties. His oral evidence was authoritative and consistent with his report and answers. Mr Nicholls did not put any questions to him, accepting his report. Mr Redler was cross-examined by the Defendant and Party 20 Claimant.

Mr Lambert

110. Mr Lambert was jointly instructed by the parties. He has not inspected the property and he was initially instructed only to deal with the question of what works would be required to ensure that the chimney and flue for the Claimant's Rayburn could effectively co-exist with the new extension. He was subsequently asked questions by the Defendant which he had initially declined to answer on the basis of an objection from the Claimant's solicitors because they were not copied to all parties. This issue was dealt with by District Judge Devlin. I have reviewed the correspondence. There are a number of emails which are administrative in nature between the Claimant's solicitor and him, enquiring as to his availability to be instructed. There is an attendance note of a phone conversation in which Mr Lambert queried how he should answer questions sent to him by the Defendant but not copied in to other parties, and not part of the original instruction. He was correctly told that if he had any difficulties he should refer back to the Court.

111. At the hearing before District Judge Devlin Mr Lambert was directed to answer a further list of questions. I have found it impossible to identify any impropriety in this course of events.

112. Mr Lambert's evidence was consistent with his report. He explained his opinion clearly, and he had prepared detailed plans which assisted matters further. He had not been instructed to report about whether or not any part of the flue system was damaged, the cause of any damage, or whether or not the Claimant's property complied with existing building regulations. He was however asked about all these matters and did his best in the circumstances to answer the questions put to him.

113. I reject any suggestion that his evidence was vague or that his work was shoddy. I found him to be a knowledgeable expert, thorough and precise in his reporting to the Court, and I consider that his opinion may be relied upon.

Mr Aldred

114. Mr Aldred was recruited on the suggestion of Mr Williams, to carry out some measurements of the chimney flue. In the event, he was not able to access the roof safely, so he only did two measurements himself, and relied upon a contractor, Billy, who happened to be at the site at the time, to carry out the rest of the measurements under his direction.

115. The measurements are not accurate. Mr Aldred did not provide any scale plan to show from what point of the chimney the measurements were taken.

116. Mr Aldred was in Court throughout the whole four days of evidence and submissions and was assisting Mr Williams, who conferred with him a number of times. He appeared to be very much a part of the team. His report says that it was Mr Williams who instructed him. Mr Williams tells me that Mr Aldred was known by him to be looking to get some experience as an expert witness and so he invited him to participate in this case.

117. The order directing his instruction provided that his costs would be covered by the Defendant. His evidence has not proved to be crucial to the determination of the claim and so there was in my judgment no need for me to carry out further investigation into the circumstances of Mr Aldred's instruction as a jointly instructed expert. However, it is likely that while these circumstances were explained to me, I looked somewhat quizzical.

Bob Annis

118. Mr Annis has been building loft extensions for fifty-four years. His evidence was given with assurance and confidence and I was satisfied that he was truthful and doing his best to assist the Court. He explained how he would rectify the various areas of minor damage identified by Mr Redler, and the various ways in which he would arrange for the Claimant's flue pipe to be extended so as to co-exist safely with the new extension and comply with relevant building regulations.

119. He was perplexed and frustrated that he had not been allowed to send contractors back to site to finish the project in circumstances where it has always been his approach to sit down and find solutions. I accept that he has long experience of dealing with such issues which arise fairly regularly in his line of work and, that he would not have continued so successfully in the business for so many years if he did not have very good communication and problem solving skills. His frustration that he had not been able to use these skills so as to resolve this dispute was understandable.

120. He accepted that the drawings his contractors were working on did not have the Claimant's flue pipe marked on the roof. He also fairly accepted that his contractors may have caused some very minor damage to the Claimant's property but was very

clear that none of the building works had encroached past the half-way line of the party wall.

Javier Lezaun

121. Mr Lezaun and his wife were the Claimant's tenants until July 2016. He gave evidence that was consistent with the witness statement he produced. He had notified the Claimant's agent in February 2015 having been told by the neighbour at number 24 of the Defendant's plan. The system of keeping mail in a particular place worked, he was not aware of a letter addressed to 'the owner' of the property, but he would not have opened it in any event.

Conclusions on liability

122. The Defendant did not serve a Party Wall etc Act 1996 notice on the Claimant. He did not have her consent to the works and therefore is liable to her for the trespass which occurred as a result of the presence of scaffolding on her property, and any damages caused to her as a consequence.

123. The ongoing presence of the extension in my judgment amounts to a nuisance. Although none of the extension now encroaches upon the Claimant's property, its continuing presence is a nuisance which prevents her from fully enjoying her rights as its owner. Firstly, because she cannot use the Rayburn gas system for heating water, for cooking and for heating the kitchen. Secondly, because if the extension remains up, she has no choice but to alter that system, either by engaging with a process to extend the pipe beyond the height of the extension, which will involve applying for planning permission, and is likely to alter the appearance of her house. This may not be to her liking or may reduce the value of the house. Alternatively, she may have to remove the Rayburn altogether and replace it with a different system. Her right to make her own choices has been restricted and compromised. She cannot realistically sell her property while these matters remain outstanding, again in this way her enjoyment and freedom to do with her own property as she chooses is constrained. In my judgment these circumstances constitute a nuisance.

124. The Defendant and his wife are decent people who never meant any ill-will to their neighbours, but sadly the Defendant has apparently proceeded with this case under the misapprehension that as he regards it, his innocent lack of knowledge of the requirements of the Party Wall etc Act, means that he cannot be liable to the Claimant. That is not the case as a matter of law.

125. He was advised at a very early stage by Mr Annis to instruct a solicitor on 18th November 2015, but he did not want to pay for one. The Claimant also suggested immediately that they appoint a surveyor under the Party Wall Act procedure. He did not do so, but procrastinated, and instead of simply accepting full responsibility, sought instead to improve his negotiating position by raising unfounded and irrelevant issues

with the Claimant. Every offer by him to negotiate or to resolve disputes is conditional on her satisfying him as to some matter which is irrelevant to his liability to her.

126. The Claimant's response to the Defendant's offer letter of January 2018 was not unreasonable. His offer was based on the wrong premise, still maintained at trial, that the Claimant bears responsibility to the Defendant for failing to notify him or the builder of her objections to the work. She was not required to notify him unless and until a Party Wall etc Act 1996 notice had been served. There is no evidence that she had received the August 2015 letter, but it would have had no legal effect even if she had.

127. As to the assurance that she prove to him that she had notified his builder, she could not as a matter of fact have given him the assurance that he wanted. But even if she had, it would not have afforded him any Defence to the claim, nor founded a claim against CGL.

128. It is not a Defence to say as seems to be asserted on his behalf, supported by the Part 20 Defendant, that the Claimant knew of his proposed works but wilfully chose to allow him to get on with it, only maliciously interrupting him at the most inconvenient moment, with the intention of taking advantage of the situation so as to require the Defendant to pay for improvements to her property. In any event, I have found there to be no factual basis for these allegations against the Claimant, whose motives I am satisfied have at all times been genuine and honest.

129. The Defendant's position, shared by the Part 20 Defendant, is essentially overbearing. They say the failure to serve the notice was a mere *'technical mishap'*, there was nothing much to object to in this project, and the damage caused was minimal. In the circumstances, they say any difficulties could easily have been solved with amicable discussion and co-operation. So really, the fact of not serving the notice is irrelevant, because if the Claimant were a reasonable person she would just get over it, allow the extension to be completed and the small amount of damage caused rectified.

130. I note from the correspondence that the Claimant's position at the outset was that she was not necessarily objecting to the extension remaining, but she wanted there to be in place the process envisaged by the Party Wall etc Act, starting with the service of the notice and the appointment of a surveyor. This is in my judgment a reasonable position for her to have adopted. The extension is small, and it could well have been that solutions were found that met with her and her husband's approval so as to allow it to be completed. However, the fact of not serving the notice means that the Claimant was deprived of any opportunity to have a voice and she is completely at the mercy of the Defendants as to the potential consequences of the extension for her property. I have no doubt that Mr Annis could in time offer a solution to any problem including the flue pipe, but whatever solution he is offering is one that is premised on the extension remaining up, the flue pipe being extended to a significant height and planning permission required to be obtained. It is a solution that the Claimant has to

suffer and have imposed upon her and she remains at risk that it is something that devalues her property to an unacceptable level for her, both financially and emotionally.

131. The Defendant's claim against the Part 20 Defendant to be indemnified, alternatively for a contribution to any damages he is required to pay to the Claimant must fail. It is the Defendant who is liable to the Claimant for the trespass and nuisance caused by the works on his property. A homeowner who causes work to be undertaken to a party wall owes his neighbour a non-delegable duty of care (*Alcock v Wraight* [1991] 59 BLR 61), so he could not have delegated to CGL. In any event, he has entered a contract with CGL which provided that it was his responsibility to provide the relevant notice and obtain relevant consent from his neighbour under the Party Wall etc Act. To the extent that it is relevant, I accept on a balance of probabilities the evidence of Mr Annis that the Defendant did tell him that he had obtained permission from his neighbour. The Defendant has no positive evidence to the contrary, he says he cannot remember. The contract provided that the Defendant would indemnify the Part 20 Claimant for any damages payable as a result of Party Wall Act issues.

132. The evidence as to whether or not CGL obtained permission from 'a lady' at the Claimant's house to put up scaffolding is equivocal. Mr Annis says one of his workers told him that permission had been given, although the identity of the lady is not known and no evidence at all is given about the extent of permission requested and given. I am not satisfied to the standard of a balance of probabilities that CGL or the Defendant had obtained the relevant consent from the Claimant to erect scaffolding in circumstances where it could have affected her property.

Remedies

Injunction

133. I have found that the Defendant has trespassed upon the Claimant's property causing damage, and that the continuing presence of the extension constitutes a nuisance.

134. In the circumstances, the Claimant does not have to establish the tests set out in *Morris v Redland Bricks* because the actionable wrong has already occurred.

135. On the face of it the Claimant is entitled to a mandatory injunction for the extension to be taken down so that the interference with her property rights that is caused by the continuing presence of the extension is remedied.

136. However, it is a discretionary remedy and the Court must consider all the circumstances of the case, before deciding that an injunction should be granted rather than damages in lieu.

137. The extension is a simple wooden structure, placed onto masonry walls. It is not weather-proof. It is not a usable space to the Defendant at the moment. It took less than a week to build it to its current state and Mr Annis's evidence is that it would take

three to four days to remove it and to rebuild the part of the Defendant's roof that was dismantled.

138. Mr Annis's evidence, which I accept, is that it would take a similar amount of time, probably less, to bring the extension to completion, essentially by insulating, installing the window, and plastering. There would then need to be fixtures and fittings and decorating. The issue of the Claimant's flue pipe could be resolved Mr Annis suggests, by extending it to a height of 600 mm above the level of the extension when completed, and pinning it to the side. He accepts that planning permission would be needed, and the extended flue system must meet with building regulations, but does not consider this would be too complicated.

139. Allowing the extension to be completed would in effect endorse the Defendant's position that the failure to serve the notice is merely an innocent technical mishap, and the Claimant's objections petty and self-serving. I do not find the Defendant's failure to be just a technical mishap. CGL provided him with terms of business stating his obligation then two letters in which his duties were clearly set out in bold print. Mr Annis had a conversation with him in which he reminded him of his duties to notify his neighbours. It is pretty obvious that work done to his property could affect his neighbour, it was in my view incumbent upon him to ensure that he had at the least identified who she was and have a conversation with her, at which point there can be no doubt that she would have informed him of his obligations to serve the Party Wall etc Act 1996 notice.

140. While his disregard for her rights and welfare is perhaps not 'wanton' or 'high-handed' he clearly has persistently disregarded them, both before the extension was embarked upon, and since. His initial instinct was right, he clearly acknowledged her right to have the situation remedied. However, he has never once taken responsibility for this himself, but sought to blame the builder, and then as the proceedings have progressed, he has blamed the Claimant. For the reasons given, I consider the interference with her property rights is more than just causing the minor damage identified to the roof. She is deprived of her statutory rights under the Party Wall etc Act to have a voice in respect of works which have a significant impact upon her ability fully to enjoy her property and make decisions about it.

141. I accept that the Defendant and his wife have suffered significant distress and anxiety over the dispute and during the trial. However, they have not apparently had any regard to the Claimant's distress and worry, and despite there being no evidence to support their case, never previously pleaded, the Defendant persisted in making allegations against her that were unfounded, baseless, and irrelevant to the question of his liability towards her. Defending the case in this way has generated a horrific amount of costs out of all proportion to the original cost of the extension, the cost of appointing a surveyor, and the cost of rectifying damages.

142. If the extension were to be removed, the damages are relatively modest and easily quantifiable. If the extension remains up and is completed, the cost of

compensating the Claimant will be significantly more. The quotation for extending the flue system from A1 Thermoline by using a twin wall insulated chimney system is relatively modest at £2,255 plus VAT, so not a huge expense compared to replacing the existing one. It is consistent with what Mr Annis described he would do. However, the quotation does not take into account the planning in respect of the Rayburn flue and chimney, including obtaining building consent and planning permission, alternatively the installation of a different heating and hot water system. Further, an assessment would need to be made of the potential diminution in value of the Claimant's property as a result of the presence of the Defendant's extension and potentially the impact of the extended flue.

143. The burden is upon the Defendant to establish that the injunction should not be granted. The Defendant has not put forward any positive case in this respect but simply it has been submitted on his behalf that he would rather not. The Defendant himself made clear that he would be prepared to direct that the extension be removed if ordered by the Court.

144. There is more expense and more complexity to going forward with the extension than removing it. There is more delay and potential for more interaction between the parties, and a dispute as to whether or not a Party Wall etc Act notice could still be served. The prejudice to the Claimant of keeping the extension up is far greater than the prejudice to the Defendant of taking it down. She would be in a situation where she would be facing unknown cost and liability of ensuring that her gas heating system complied with building regulations and planning, and the uncertain impact of that upon the value and desirability of her property. Her plan to sell is likely to be delayed further.

145. I have not been provided with any evidence as to the cost to the Defendant of either removing the extension or completing it. If ordered to take it down, he is not permanently prevented from carrying out works to his property in the future, but must do so having regard to the rights of his neighbours and his statutory obligations to serve a Party Wall Act etc notice.

146. Having regard to all the circumstances, I am satisfied that the Claimant is entitled to a mandatory injunction and that the Defendant should be directed to remove the extension so as to put the parties in the position they were before the trespass was committed.

Damages

147. On the basis that the extension is removed, the damages are relatively modest.

148. The parties' starting position was that none of them challenged Mr Redler's assessment of the damage caused to the Claimant's property. However, Mr Williams sought to put some questions in clarification to Mr Redler and ultimately submitted that the Claimant could not establish that any damage had been caused to her property by CGL.

149. I found Mr Redler to be authoritative and clear when he was giving his evidence. His report describes the extent of the inspection of the properties that he carried out. I accept his conclusions as to the damage caused, which are as follows:

- It is clear that the stainless steel flue that projects through the roof is at an angle when it would have been installed vertically. He says that it appears to have been dislodged by scaffold operatives walking on the roof, or by being pushed when the scaffold was erected, but without seeing photographs of the flue before work commenced, he cannot state 'with certainty' that is the case;

- He cannot say whether the flue liner has been bent or has fractured as a result of the stainless steel flue becoming bent. Either is possible. Investigation by CCTV would enable this to be discovered;

- There is a hole through the party wall to the rear of the new extension where the Defendant's chimney was previously removed, which makes the flue unsafe to use as an open flue but the flue is only designed to be used by the Rayburn so the condition of the brick chimney flue structure itself would not affect the use of the Rayburn, assuming the liner is sound;

- On the monopitch roof slope to the back addition of the Claimant's house there are a large number of slates with nail heads showing through the slate surface. The location of these nails is at or very close to the location of the point that the scaffold was bearing on the roof. The load imposed by the scaffold board has pushed the top layer of slates down on to the slates below, causing the nails from the lower course of slates to push through the upper slates. There are other individual damaged slates which are consistent with materials or scaffold equipment dropping on or sliding down the roof from the location of the scaffold;

- There is a noticeable downward bow in the rear addition roof towards the rear of the roof slope, consistent with bowing of the timber battens on to which the slates are hung, at an intermediate point between roof rafters. This is consistent with loads imposed on this part of the roof by the corner of the projecting scaffold that appears to have been imposing load on the roof surface in this area;

- There are four damaged slates on the rear monopitch roof. Three have nailheads from the slates below pushed through and one is damaged and has slipped;

- The damage to the roof is most likely to have been caused by the erection of scaffold on the roof;

- There is a hole in the party wall where a brick has been knocked through. Visible within the hole is the cut end of what appears to be a new timber joist inserted to half the depth of the party wall (i.e. not encroaching into the Claimant's half of the party wall). It appears that when bricks were being removed from the no. 22 side

in order to fit this joist, this knocked bricks clear on the number 20 side. Mr Redler did not identify any roof joists extending through the party wall into the roof space of number 20 and says that it is possible for the hole to be repaired by simply bedding a new brick into the hole.

150. Mr Redler has referred to the BCIS Building Maintenance Price Book 37th edition 2017 in order to achieve estimated prices for small works. He was clear that he is providing estimates and that the actual price of rectifying the damage may be different, depending on local market prices.

151. He concluded that the damaged roof slates on the back addition needed to be replaced and that all the slates would have to be stripped off in order for damaged battens and potentially damaged rafters to be renewed to leave a level roof surface. He suggests the cost of repair and reslating the whole roof would be in the region of £4,500 plus VAT, (subsequently increased by 2% to reflect current prices) including replacement of battens and scaffold access. He says that if slates can be re-used then there may be a reduction in material costs of approximately £1,500.

152. He estimates the cost of replacing the four damaged slates on the rear monopitch roof over the first floor at £100 (provided done at the same time as repair to the back addition roof).

153. If the flue lining for the Rayburn needs to be replaced, then he estimates this would cost £500.

154. He considers the repair of the hole in the wall is a simple matter and says he would expect this to cost £150.

155. Mr Annis was asked in oral evidence how much he would charge to rectify these defects and came up with a cheaper figure, but my impression was that he was generally looking at cost price i.e. what it would cost him in the circumstances of the particular case to sort out the difficulties that had arisen, rather than what he might charge if he had no interest the situation and was engaged as a new builder to carry out the works identified by Mr Redler.

Repairs to the roof

156. The Claimant has submitted a quotation from James Dunn roofing as evidence of the cost of carrying out rectification works. However, as confirmed by both Mr Redler and Mr Lambert, this quotation is in respect of a much greater scope of works than identified by Mr Redler. Mr Dunn envisages removing and replacing all three of the Claimant's roofs (two storey roof and dormer cheeks, lower rear roof and lower level roof). He suggests replacing the battens on the two-storey roof with additional rafters to strengthen the structure. Completing all this work would improve the property and is more than is required to put the Claimant back in the position she was before the tort was committed.

157. Mr Redler was asked in correspondence whether if the slates were not properly affixed, as the Part 20 Defendant suggests, they would be more vulnerable to damage. He said he had not seen any evidence of this and in any event, that would not have prevented damage occurring from the weight of a load being placed upon it – whether scaffolding, scaffolding board or a construction worker standing on it.

158. I am satisfied to the standard of a balance of probabilities that the damage to the roof identified by Mr Redler in his report was caused by CGL in the course of carrying out works on behalf of the Defendant and that the Defendant is liable to the Claimant for the cost of repair.

159. I am satisfied to the standard of a balance of probabilities that the appropriate measure of damages in respect of rectification works to the roof is that given by Mr Redler's estimate. He suggests that the cost of reslating the roof could be reduced by £1,500 if the slates could be reused. I have no evidence one way or the other about this. On a broad brush basis I propose to split the difference. I will award the Claimant the sum of **£4,600** including VAT for the cost of repairing the roof.[1]

160. I will award the Claimant **£100** for the four damaged slates.

161. Mr Redler is the single joint expert who has explained the basis for reaching his conclusion that **£150** is the correct figure for replacing the loose brick which was apparently knocked out of place by the insertion of the joist. It was not suggested to him that he had misinterpreted the BCIS manual, nor were alternative quotations put to him. In the circumstances, while this may seem generous, I accept his assessment and award this sum to the Claimant.

Repair to the chimney/chimney flue

162. The pleadings are a bit muddling in that they suggest it is the damage to the flue that has caused it be out of commission, whereas my understanding, confirmed by the Claimant in evidence and Mr Redler and Mr Lambert, is that it was the proximity of the flue to the extension which is the reason that it is regarded as too dangerous to use.

163. Having considered the evidence of Mr Redler, I am satisfied to the standard of a balance of probabilities, that the stainless steel flue has been damaged by being knocked out of position, so that it now presents at an angle. Without having photos or plans showing the state of this flue before November 2015, Mr Redler cannot be 'certain' that the damage was caused by CGL, but he notes that the flue was positioned where CGL were working. Given that it was not marked on the plans, it is entirely probable that the contractors were not primed to look out for it. There is no evidence of any previously identified difficulty with the flue in the years prior to November 2015 nor any other building works on the roof since it had been installed. In all the

[1] £4,590 less £750 = £3,840 + VAT at 20%

circumstances, I am satisfied to the standard of a balance of probabilities that damage to the flue was caused by CGL when carrying out works for the Defendant.

164. There has been some further confusion about the flue liner. My understanding is that the liner is inside the stainless steel flue and that it is flexible. Mr Redler said that it was possible the flue liner was fractured rather than just bent but this could not be determined without inspecting it via CCTV.

165. It has been suggested that the Claimant was highly resistant to any CCTV inspection of the flue liner and that there was something sinister about her refusal. She said that as she had understood the flue liner would be removed with the stainless steel flue, there was no point in having a CCTV inspection of it, in circumstances where Mr Redler had identified that the stainless steel flue had been damaged and should be replaced.

166. The Claimant has obtained a quotation from A1 Thermoline dated 3rd February 2018. On the basis that the extension is removed, the proposal is that the chimney system would be removed from the existing structure, the chimney would be swept through and inspected by CCTV and providing it was in good order, the system would be replaced. The cost of carrying out such work is put at £1,870 plus VAT. The CCTV inspection here is different from that envisaged by Mr Redler to examine the liner itself.

167. Mr Lambert considers the A1 Thermoline quotation to be reasonable and he does not suggest the scope of works exceeds what would reasonably be required.

168. Excluded from this quotation are any works required in the event that the CCTV survey reveals structural damage to the chimney itself. Also excluded is the cost of scaffold access to gutter level and recommissioning of the gas cooker. It is not alleged by the Claimant that there has been structural damage to the chimney itself, nor does Mr Redler identify any structural damage. So while I would accept that part of replacement of a new flue system involves a CCTV inspection before the new flue can be inserted, any consequential costs as a result of structural damage identified thereafter should not be laid at the door of the Defendant. The cost of erecting scaffold is in principle something the Claimant should be compensated for as part of the work but the burden is on her to prove her claim and I have not been provided with any quotation in this respect. Similarly, I have not been provided with an estimate in respect of a gas engineer to attend, but it is likely that this is a cost the Claimant would have had to meet fairly regularly in any event for the regular servicing of the Rayburn, so I am not persuaded that she should receive an additional sum in this respect.

169. As I intend to order that the extension is to be removed, I have not considered in further detail the alternative proposal for extending the flue using a twin wall insulated chimney system.

170. For all these reasons given I will award to the Claimant the cost of the Thermoline quote of £1,870 plus VAT i.e. **£2,244.00**.

Compensation for lack of heating, less hot water, additional cost of immersion heater, loss of rental income, additional maintenance and travel costs

171. The sums claimed total £18,223.15 in the Claimant's Scott schedule. The claim for loss of rental income is not pursued.

172. The Claimant's evidence in respect of these losses is set out in her witness evidence and this evidence was not challenged by either of the Defendants in cross-examination. The Defence puts her to proof of her losses.

173. The Claimant says that had the dispute not arisen, she and her husband Frank would have remained living in their flat in Goring and they would have put the house on the market once the tenancy came to an end in summer 2016. Her expectation is that the house would have sold in around October 2016. After Frank died in February 2018 she would have anticipated being able to use the proceeds of sale of number 20 Islip Road to purchase a new home mortgage free, alternatively to move to her house in Thames Street.

174. In fact, the Claimant says that because in July 2016 the dispute between her and the Defendant was ongoing and there seemed little prospect of resolution, she and Frank had to abandon the notion of selling the property. With no working Rayburn they could not realistically rent it out. She says she and Frank felt they had no option but to move back to number 20. She says she has been stuck in the house ever since because until the matters which are the subject of this dispute are resolved, she can neither sell it or rent it out.

175. I have not received any evidence to persuade me that the Claimant would, on a balance of probabilities, sold her property in or around October 2016 but for the dispute with the Defendant. Had she moved into her house in Thames Street in April 2018 she would not have continued to receive rental income from that property, but no credit is given in her calculations for that. Although she has paid money towards the mortgage on number 20 for the last few years, that has of course had the effect of increasing the amount of equity that will be due to her upon sale, so there is a risk of double recovery if the Defendant were ordered to compensate her for the mortgage payments she made after June 2016.

176. In all the circumstances, I am not satisfied that the Claimant has proved to the standard of a balance of probabilities that she should recover the £12,803.70 increased mortgage costs from the Defendant.

177. The burden also rests with the Claimant to show that she has mitigated her loss. I am not satisfied that she has satisfied that burden with regard to storage charges incurred of £1,670.76 in respect of items that have been incurred since April 2018, as the Claimant's intention then was to move to a smaller home – either the house at

Thames Street or a smaller mortgage free property, neither of which presumably would be able to accommodate storage of camping, rowing, cycling, gardening equipment and a motor scooter. I am satisfied however that she is entitled to storage charges incurred until April 2018. In the circumstances I award the Claimant pro rata the sum of **£1,113.84**[2]**.**

178. The Claimant claims the sum of £2,511.70 as additional utility costs. She has estimated what she would have spent had she stayed in Goring until April 2018 (£6,618.34) then moved to her house in Thames Street (£2,068.64). The figures entered at paragraph 42 of her witness statement are incorrect, but she does nevertheless arrive at a total of £8,686.98 which is consistent with the totals given earlier in her statement. The Claimant then says that her actual costs of living at Islip Road since July 2016 have been £9,237.82. The difference between £9,237.82 and £8,686.98 is £550.84. I do not know where she has got the figure of £2,511.70 which is what is claimed. Based on her own evidence, which is not challenged, I therefore award her the sum of **£550.84** as compensation for the additional living expenses.

179. I allow the Claimant's claim for additional moving costs in respect of the move to Islip Road in August 2016. I accept her evidence, unchallenged, that had this dispute not occurred, she would not have moved back to the property as it would either have been rented out or sold. I allow the sum claimed of **£837.00**.

180. I allow the Claimant's claim, unchallenged, for additional travel expenses of **£200.00**.

Devaluation of property

181. Given that I am directing the extension to be removed, the Claimant will be put back in the position she was before it was put up and I do not need to consider the impact on the value of her house of the extension together with amended gas heating system. The burden lies upon the Claimant to establish that her house if put on the market following the conclusion of this dispute is less than the value she would have obtained for it in summer 2016, had the dispute not occurred. I have not been taken to any evidence to prove this, nor that any differential in value is caused by the Defendant. In the circumstances, I am not persuaded that the Claimant has satisfied me that she should recover a sum for diminution of value of her property and I do not award any sum for damages under this head.

General damages

182. I am satisfied that the Claimant should be awarded general damages for stress and inconvenience. Having regard to all the circumstances I am consider that the sums claimed of **£1,000** for trespass and **£1,000** for stress and inconvenience are justified and appropriate.

[2] Claimed: August 2016 to February 2019 = 30 months. Allowed: August 2016 to April 2018 = 20 months. 2/3 x £1,670.78 = £1,113.84/

Conclusions

183. The Claimant succeeds in her claim against the Defendant and for the reasons given, I consider it appropriate to exercise my discretion so as to make an injunction requiring the Defendant to have the incomplete extension completely removed.

184. In addition I will direct that the Defendant must not undertake any works on or adjacent to the party wall in future without complying with the requirements of the Party Wall etc Act 1996.

185. I will not make an injunction restraining the Defendant from trespassing upon the Claimant's property in future as in my judgment this does not add anything to the previous injunctions and is only stating what as a matter of law the Defendant is not entitled to do anyway.

186. I will order that the Defendant is to pay the Claimant special damages of £9795.68[3] and general damages of £2,000.

187. The Part 20 Claim against the Part 20 Defendant is dismissed.

188. I will give the parties the opportunity to consider this judgment and to let me know whether they are able to agree an order and if so whether they would like their attendance to be excused at the time I hand judgment down.

Joanna Vincent

HHJ Vincent

Oxford Combined Court Centre

Draft judgment sent by email to parties: 24th February 2019

Judgment handed down in court: 9th May 2019

[3] Damages to roof: £4,850 add replacement flue/liner: £2,244, add additional living costs £2,701.68.