Neutral Citation Number: [2024] EWCA Civ 170

Case Nos: CA-2023-000624
CA-2023-000626

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
Her Honour Judge Backhouse
H20CL116 and H20CL117

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2024

Before :

LADY JUSTICE MACUR
LORD JUSTICE BEAN
and
LORD JUSTICE NUGEE

- -

Between :

ROBERT TAYLOR	**Appellant**
- and -	
(1) PETER JONES **(2) LINDA JONES**	**Respondents**

And between :

ROBERT TAYLOR	**Appellant**
- and -	
PETER SPRIGGS	**Respondent**

- -
- -

Nicholas Isaac KC and **Richard Miller** (instructed by **Cripps LLP**) for the **Appellant** in each appeal

Howard Smith (instructed by **Child and Child Law Ltd**) for the **Respondents** in each appeal

Hearing date: 28 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. These appeals from the County Court concern awards under the Party Wall etc. Act 1996 (**"the Act"**). The Appellant, Mr Robert Taylor, carried out work in the garden of his property. In the language of the Act he was the "building owner" and as such liable to compensate any "adjoining owner" for any damage which might result to them by reason of any work executed in pursuance of the Act. The Respondents, Mr and Mrs Jones and Mr Spriggs, are respectively the owners of two mews properties which lie to the rear of Mr Taylor's garden and which were affected by his works and are adjoining owners for the purposes of the Act.

2. Awards were made by a surveyor under the Act requiring Mr Taylor to pay each of them substantial sums by way of compensation. He appealed to the County Court and his appeals were heard together by HHJ Backhouse (**"the Judge"**). She gave judgment upholding Mr Taylor's liability to compensate the respondents but varying each award by reducing the quantum. She ordered Mr Taylor to pay 75% of the Respondents' costs.

3. Mr Taylor now appeals to this Court on two grounds. One concerns the Judge's decision on costs, the essential point being that since he had succeeded in reducing the quantum of the awards, it was wrong in principle for him to have to bear the majority of the Respondents' costs.

4. The other concerns the calculation of the compensation payable under the Act. Mr Taylor accepts that the Judge found that his works caused damage to the Respondents' properties for which he is liable to compensate them. But he contends that she erred in principle because she has in effect made him pay for the costs of making good defects in the properties which long pre-dated his works and which they did not cause.

The Party Wall etc. Act 1996

5. There is little dispute between the parties in the present case as to the operation of the Act. An explanation of it can be found in the recent judgment of Coulson LJ in *Shah v Power* [2023] EWCA Civ 239, [2023] 1 WLR 2830 at [9]-[19], and it is not necessary to repeat it. As he there explains the Act is the successor to the London Building Acts (Amendment) Act 1939 (itself the successor to a long series of statutes regulating building in London, as to which see the historical survey by Lewison LJ in the same case); this was considered to have worked well in London and it was decided to extend the regime across the country, the Act largely mirroring the essential features of the 1939 Act.

6. In summary the Act provides a statutory code which applies where the owner of a property (the "building owner" as defined in s. 20) wishes to carry out certain works that can affect his neighbours ("adjoining owners" as defined in s. 20), namely where he wishes to build on the line of junction between his property and an adjoining property (s. 1); where he wishes to carry out works affecting an existing party wall or structure (s. 2); and where he proposes to excavate within certain distances of any part of a building or structure of an adjoining owner (s. 6).

7. In each case there is a procedure for the building owner to give notice to the adjoining owner, for the adjoining owner to consent or not to the proposed works, and for any dispute to be resolved in accordance with s. 10. This provides that the parties may either appoint an agreed surveyor, or appoint their own surveyors who then select a third surveyor (s. 10(1)); that in the latter case either of the parties or their surveyors may call upon the third surveyor to determine the disputed matters; and that if they do he is to make the necessary award (s. 10(11)). Such an award may determine the right to execute any work, the time and manner of executing any work, and any other matter arising out of the dispute (s. 10(12)). Such an award is conclusive (s. 10(16)), but may be appealed to the County Court, which may rescind or modify it in such manner as it thinks fit (s. 10(17)).

8. By s. 7(2) of the Act:

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

It is not disputed that the amount of compensation under this provision is one of the matters that can be determined by the third surveyor.

Facts

9. In the light of the legal argument we received it is helpful to set the facts out in some detail. I have taken them from the Judge's judgment which contains an impressively lucid and careful statement of the facts, supplemented by a very useful joint statement prepared for the proceedings in the County Court by the parties' engineering experts, namely Mr Richard Tant, a Chartered Structural Engineer, and Mr Nicholas Huband, a Chartered Civil Engineer (**"the joint statement"**). The engineering experts were agreed in all material respects and the joint statement was in effect accepted by the Judge in its entirety.

10. Mr Taylor is the leasehold owner of Flat 1, 9 St George's Terrace, London NW1, which he bought in 2014. St George's Terrace, which lies just north of Primrose Hill, is a terrace of substantial townhouses constructed around the middle of the 19th century. The road runs broadly east-west, and the houses are on the north side of the road, facing south; they have quite long gardens which run north from the back of the houses. No 9 consists of five storeys, and Flat 1 is the lower ground floor flat and includes the garden. The next house to the east is No 8, and then No 7 and so on.

11. Immediately to the north of St George's Terrace is St George's Mews, a cul-de-sac also running roughly east-west. On the south side of St George's Mews is a terrace of two-storey buildings, also built in the 19th century, originally providing stabling and other facilities for the houses in St George's Terrace, but subsequently converted to residential use. They have been much altered but retain, in the main, their original front and rear masonry (brickwork) walls. One of these buildings now comprises Nos 5 and 6 St George's Mews. The property is divided so that No 5 is a three-bedroom flat on two storeys consisting of the eastern half of the ground floor (that is, if one were standing in the mews and looking at the front, the left-hand side) and the whole of the first floor, and No 6 is a compact one-bedroom flat consisting of the western (right-hand) half of the ground floor. Mr and Mrs Jones are the leasehold owners of

No 5, having bought it in 1998. Mr Spriggs is the freehold owner of the whole building, in part (No 5) in reversion on Mr and Mrs Jones' lease, and in part (No 6) in possession (although both Nos 5 and 6 were at the relevant time let by Mr and Mrs Jones and Mr Spriggs respectively to occupying tenants). Mr Spriggs bought it in 2002 from his grandmother.

12. The Judge said that the evidence was sketchy but it would appear that some work to convert Nos 5 and 6 to residential use was carried out in the 1930s; planning documents indicated that No 6 was converted from garage use to residential use in 1976, and the Judge found that the current layout was adopted then. The back of the building consists of a single rear wall for both Nos 5 and 6, without windows. I will refer to this as **"the rear wall of Nos 5 and 6"**.

13. The rear walls of the mews houses also form the back walls of the gardens in St George's Terrace. As the Judge noted, they do not line up: thus the back wall of Mr Taylor's garden at 9 St George's Terrace is made up (on the west) of about half the rear wall of 7 St George's Mews and (on the east) a part of the rear wall of Nos 5 and 6; the rest of the rear wall of Nos 5 and 6 backs onto the gardens of 8 and 7 St George's Terrace. The relationship between the properties can be seen more easily on the site plan annexed to this judgment (which I have taken from another expert report dealing with trees; the trees can be ignored for present purposes).

14. Mr Taylor wished to extend his flat by building out into his garden. He served notices under the Act on the owner of 8 St George's Terrace, and on the owners of 5, 6 and 7 St George's Mews (as among other things he was proposing to excavate within the requisite distances of these properties). We are not concerned with either 8 St George's Terrace or 7 St George's Mews, but only with 5 and 6 St George's Mews.

15. Before Mr Taylor's works, the back of his garden was terraced down in a series of steps from about the first floor level of St George's Mews to lower ground floor level. His works involved the removal of this terracing, the excavation of his garden, and the construction of a new living room with a garden terrace over. An open space was left between the new living room and the back wall of the garden to form a new low-level garden. The new level of the garden was about 2.5m lower than the previous level.

16. The extent of the excavation was such as to require underpinning not only under the wall between Mr Taylor's garden and that of 8 St George's Terrace, but also along the length of the back wall of his garden, that is under the eastern half of the rear wall of 7 St George's Mews, and under the western end of the rear wall of Nos 5 and 6 (the level of the new lower ground floor being below the underside of the foundations of the rear wall of Nos 5 and 6). It may be noted that the underpinning did not extend beyond the garden to 9 St George's Terrace so that it was only the western end of the rear wall of Nos 5 and 6 that was underpinned.

17. The excavation started in December 2018, continuing into January 2019. On 3 February 2019 Mrs Jones e-mailed her surveyor to say that her tenants had reported that a crack in No 5 had widened. This crack pre-existed the works as a lengthy hairline crack running internally on the rear wall at first floor level, and had existed "for some time".

18. Underpinning took place to the boundary wall with No 8 St George's Terrace, the

eastern half of the rear wall of No 7 St George's Mews, and then to the western end of the rear wall of Nos 5 and 6, the latter in May 2019. By October 2019 there were further signs of movement, namely broadly horizontal cracks in the rear wall at the first floor level of No 5, including a new crack above the stair balustrade, and separation between partition and boxing along the rear wall at ground floor level in No 5, at the foot of the stairs.

19. The works were complete, and Mr Taylor moved back into his flat, by the end of 2019.

20. In June 2020 however the tenants of No 5 gave Mr and Mrs Jones notice to quit because of damage to the property, referring in particular to the dropping of the floor throughout the ground floor, which "began in early 2020 and was pretty sudden". In August 2020 prospective new tenants were being shown around No 5, but the bathroom floor tiles on the ground floor cracked when stepped on, and the floor partially collapsed. Mr and Mrs Jones' letting agent advised them that the property was unlettable until it could be repaired.

21. In July 2020 the tenant of No 6 also gave Mr Spriggs notice to quit, referring to instability in the kitchen floor and evidence of dropping of the bathroom floor.

22. Investigations revealed two significant problems, which the experts concluded in the joint statement had pre-dated Mr Taylor's works, but which were unknown to anyone. First there was a very large horizontal crack in the rear wall of Nos 5 and 6 at the level of the damp proof course (**"the dpc crack"**). This was near the floor level of Nos 5 and 6 and extended from a point approximately where the boundary wall between the gardens of 8 and 9 St George's Terrace met the rear wall of Nos 5 and 6 (**"point A"**) all the way east to the boundary between No 5 and No 4 St George's Mews (**"point B"**), and varied in width from 20mm at its ends to 80mm in the middle. The effect was that the rear wall was unsupported by its foundations along a length in excess of 6m, and that an arch had formed between point A and point B. The experts considered that the dpc crack had developed prior to the conversion of Nos 5 and 6 in the 1970s, probably as a result of desiccation of the subsoil caused by trees and vegetation in St George's Terrace. This caused subsidence under the foundations of the rear wall, which led to the dpc crack and creation of the arch.

23. Second, voids had developed beneath the floor slabs in Nos 5 and 6, and beneath the internal masonry walls where they abutted the rear wall. The floor slabs and foundations to the internal walls would have been intended as ground bearing, but the voids had developed since the 1970s conversion and probably over 10 years before the joint statement (dated October 2022), as a result in part of desiccation from trees and vegetation and/or in part due to settlement of the sub-base. In oral evidence the experts said that these voids were extensive – they had been able to insert a metal bar into the voids in various locations up to 1.5m to 2m without impediment. Until Mr Taylor's works the ground floor slabs were in fact being unintentionally supported by the interaction with the internal walls, which in turn were unintentionally cantilevering from solid bearing towards the mews.

24. The joint statement contained an analysis by the engineering experts of what they thought had happened. This was as follows:

(1) Exposure of the subsoil in the course of Mr Taylor's works caused an outward rotation and modest downward movement of the rear wall of Nos 5 and 6. The maximum extent of this occurred at the left-hand end of the arch at point A.

(2) The additional soil removal (excavation) to facilitate the underpinning resulted in the arch increasing its span to find a new point of support further west.

(3) This resulted in the existing hairline crack at first floor level widening (seen in February 2019), and to the new cracking (seen in October 2019), with downward movement of the panel of brickwork below the crack. The Judge records in her judgment that the cracks indicate the top of the arch, and that the new crack indicates the widening of the arch to find a new support. She also records that the experts were agreed that the movement caused by the works was only 2mm (based on the width of the internal cracking at first floor level).

(4) Then in 2020 the floor slabs dropped (first reported in May 2020). The experts concluded that it was likely that the downward movement of the panel of brickwork beneath the cracks at first floor level resulted in the failure of the brickwork and footings at around ground floor level of the walls abutting the rear wall. This broke the cantilevering action of the lower part of the walls which separated and dropped, allowing the floor slabs to drop. The extent of the drop in the floor slabs varied but was greatest near the rear wall, where it was about 40mm.

(5) The slab adjacent to the part of the rear wall which had been underpinned (the western part of No 6, where the lounge was) did not drop, but there were voids of up to 100mm beneath the slab.

25. The Judge, who heard oral evidence from the engineering experts, found them to be impressive witnesses who gave their evidence in a careful, measured and thoughtful way. She considered their explanation for the damage to be cogent, and concluded that Mr Taylor's works caused the necessary movement to break the arch, which allowed the internal walls and floor slab to drop.

26. The parties agreed that the dpc crack, the dropped foundations below that crack and the voids under the floor slabs pre-existed the works and were not caused by them.

27. In summary therefore the essential facts are that Mr Taylor's works caused the rear wall of Nos 5 and 6 to drop by a very modest amount (2mm), but this in turn caused the internal walls and floor slabs to drop by a more significant amount (40mm). His works did not cause the long-standing problems that the rear wall is unsupported by its foundations and operates as an arch over the dpc crack, or that there are extensive voids beneath the floor slabs and the internal walls.

The proceedings

28. The question of compensation payable by Mr Taylor to Mr and Mrs Jones and Mr Spriggs respectively as adjoining owners, was in each case referred to the third surveyor, Mr Rob French. He issued his awards under s. 10(11) of the Act on 20

August 2021. In each case he found Mr Taylor responsible for the full extent of the subsidence to the adjoining owners' properties, and awarded sums representing the cost of repairs/reinstatement works, associated professional fees, loss of rent, the adjoining owners' surveyor's referral costs, and his own fees.

29. He gave his awards without the benefit of the joint statement by the engineering experts, and neither party before us referred to his reasoning. But it is potentially relevant to Mr Taylor's appeal on costs to note the total sums which he awarded, which were £189,727.12 + VAT (£215,316.28) in the case of Mr and Mrs Jones and £142,105.62 + VAT (£165,873.54) in the case of Mr Spriggs.

30. Mr Taylor appealed each award to the County Court under s. 10(17) of the Act. By an Order of HHJ Parfitt dated 14 January 2022 the appeals proceeded by way of complete rehearing, with directions for expert evidence. The appeals were heard together by the Judge, and in the event she heard from no less than 6 experts, namely the two engineers, two arboriculturists, a joint expert surveyor and a joint expert quantity surveyor, as well as from the parties. The hearing took place over 5 days in January 2023, and the Judge handed down her judgment on 7 March 2023.

The judgment

31. I would like to pay tribute to the Judge's judgment which dealt with a large number of issues, and is exceptionally clear and well-structured, explaining each of the issues, the relevant evidence and her conclusions in exemplary fashion. After an introduction (at [1]-[5]) she identified the live issues on the appeals (at [6]-[9]). These were as follows:

    (1) Whether the cause of the damage to 5 and 6 St George's Mews was in fact tree roots in the garden of 8 St George's Terrace rather than Mr Taylor's works.

    (2) Whether Mr Taylor should be required to compensate Mr and Mrs Jones and Mr Spriggs for pre-existing damage, the engineering experts having concluded in the joint statement that some of the damage that had been thought by previous experts to have been caused by Mr Taylor's works had in fact pre-existed them.

    (3) How much should be awarded. Mr and Mrs Jones and Mr Spriggs had recently obtained up-to-date tenders in respect of the remedial works for which they said Mr Taylor was liable and sought to be awarded increased sums.

32. She then set out the agreed legal framework (at [10]-[15]), noting among other points that the basic test for factual causation was the "but for" test, that the respondents were under a duty to mitigate their loss, and that since the appeals were proceedings by way of rehearing the date of assessment of the quantum of compensation was the date of the appeal hearing, not the date of the awards.

33. She then gave, as I have already referred to, a lucid and careful account of the facts, dealing in turn with the location and layout of the properties, the works, reports of damage and investigations, and the evidence of the engineering experts (at [16]-[71]).

34. In the course of this survey she made findings in relation to the remedial works required (at [61]-[63]). For reasons that I explain later, this is to my mind the key passage in her judgment for the purposes of this appeal and it is helpful to set it out in full, as follows:

> "61. In cross-examination the experts agreed that although the rear wall has been stable for many years, it was and remains unsupported. This is an unacceptable state of affairs as any slight movement at either end of the arch could cause the panel of brickwork under the arch to crack and possibly collapse. Mr Huband described the building as 'on a hairtrigger' and a minor trigger could have initiated damage, such as drilling through the floor slab to fit a new bathroom outlet. Mr Tant accepted 2mm of movement could arise just by thermal movement or seasonal movement according to climatic conditions.
>
> 62. In terms of remedial work, the experts consider that the remaining part of the rear wall under 5 and 6SGM needs to be underpinned, which is a preferable solution than stitching. That would have been their recommendation had the damage to the walls and slabs not occurred. The internal walls should be underpinned or the foundations thickened. The voids under the slabs should be filled and the slab relaid. The Graphic Structures scheme allows for half of the concrete slab nearest the rear wall to be replaced.
>
> 63. Theoretically, the remedial works to the internal walls and the slabs could be done without underpinning the rear wall but the experts' view was that no engineer would approve such a scheme on health and safety grounds and no contractor is likely to agree to carry out the work in those circumstances."

35. She then considered the evidence of the arboriculturists as to whether the cause of the damage was tree roots (at [72]-[85]), and found that it was not (at [86]-[95]). That led her to conclude, as I have already noted, that it was indeed Mr Taylor's works that caused the necessary movement to break the arch, which allowed the internal walls and floor slabs to drop.

36. She then turned to quantum. The first issue that she dealt with was whether Mr Taylor's liability extended to paying for the underpinning of the rest of the rear wall of Nos 5 and 6 (at [101]-[114]). She concluded that it did, largely by analogy with the decision of this Court in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 (***"Harbutt's"***). Mr Taylor challenges this conclusion in Ground 2 of his appeal, and I will come back to her reasoning below.

37. She then conducted a detailed item by item analysis of the sums claimed. Mr and Mrs Jones and Mr Spriggs had obtained a new tender which led them to claim higher figures than in the awards. But she largely accepted the lower figures put forward by the quantity surveyor whom she found to be an impressive witness; she also reduced the figures for loss of rent, holding that the respondents had failed to mitigate their losses by having the work done once the awards had been made.

38. The overall result was as follows:

Respondent	Original Award	Sought by Rs	Judge's award
Mr and Mrs Jones	189,727.12	263,844.07	147,540.01
(with VAT)	215,316.28		**166,374.19**
Mr Spriggs	142,105.62	186,596.29	115,361.88
(with VAT)	165,873.54		**135,085.80**

She therefore made an order in each appeal dated 7 March 2023 substituting the figures in bold above for the higher figures in the awards.

39. She also gave an unreserved judgment on costs on 7 March 2023 and ordered Mr Taylor to pay 75% of each of the respondents' costs.

Grounds of appeal

40. Mr Taylor appeals, with permission granted by Asplin LJ, on two grounds:

(1) The decision of the Judge to award the respondents 75% of their costs of the appeal below was wrong in principle and/or irrational.

(2) The Judge erred in holding Mr Taylor liable for the cost of repairing pre-existing damage to the respondents' properties.

41. Although pleaded in this order, and although Mr Nicholas Isaac KC, who appeared with Mr Richard Miller for Mr Taylor, told us that Ground 1 was more important financially from his client's point of view, logically Ground 2 comes first (as he accepted), and I propose to consider it first.

Ground 2: is Mr Taylor liable for the cost of making good pre-existing damage?

42. Mr Isaac's central submission was that the compensation payable by Mr Taylor was subject to what he called the overarching principle of reasonableness, and that it was not reasonable for him to have to pay for the cost of making good damage which he had not caused. He referred us to a statement in *McGregor on Damages* (21st edn, 2021) at §39-003, in a section concerned with the measure of damages in tort for damage to land, as follows:

> "The principal issue is whether damages should be measured by diminution of the value of land or by the cost of reinstatement. The discussion which follows illustrates that this question is "highly fact sensitive". However, the historical treatment by the courts of the distinction between the two measures reveals the relevant factors and

> guidelines which inform the appropriate measure. The overarching principle is one of reasonableness."

I do not think that the last sentence of this passage is directly in point. I read it as saying no more than that such an overarching principle applies when deciding whether damages should be measured by reference to the diminution in value of the land or the cost of reinstatement. That I have no difficulty with as a general proposition: thus for example in *Hollebone v Midhurst and Fernhurst Builders Ltd* [1968] 1 Ll Rep 38 a plaintiff who reasonably intended to make damage good to his house was awarded damages based on the cost of repair, whereas in *Hole & Son (Sayers Common) Ltd v Harrisons of Thurnscoe Ltd* [1973] 1 Ll Rep 345 a plaintiff whose cottage was damaged but who had intended to demolish it anyway was not.

43. In the present case by contrast there is no dispute that Mr and Mrs Jones and Mr Spriggs are entitled to the cost of repairs. The question is a rather different one, which is what repairs Mr Taylor is liable for. That is not something that I consider can be resolved simply by appealing to what is "reasonable". It is no doubt the case that the amounts awarded should be reasonable, as it can scarcely be suggested that the Court should award an unreasonable amount: compare *Lagden v O'Connor* [2003] UKHL 64, [2004] 1 AC 1067 (***"Lagden"***) at [6] per Lord Nicholls ("the common law ought never to produce a wholly unreasonable result"). But what is reasonable or unreasonable seems to me to depend very much from whose viewpoint one looks at it. Thus the effect of the Judge's order is to make Mr Taylor pay for the cost of underpinning the rear wall of Nos 5 and 6 all the way from points A to B. We have not been given any figures as to how much that might cost, but one would have thought it might be a substantial amount. It no doubt seems very unreasonable to Mr Taylor that he should be required to pay for that when the reason the underpinning is required is because of the dpc crack and the fact that the wall is unsupported by its foundations, something which has probably been the case since the 1970s, and which his works certainly did not cause. On the other hand there is no real dispute that the underpinning does now have to be done, and if Mr Taylor does not pay for it, the cost will fall on Mr and Mrs Jones and Mr Spriggs, and it would no doubt seem equally unreasonable to them if they were required to spend money on something which they might well not have had to do at all if Mr Taylor had not carried out his works.

44. In those circumstances I do not think the appeal can be determined by reference to Mr Isaac's touchstone of reasonableness. That would run the risk of the answer depending to an unacceptable degree of how the case struck a particular court. We should instead try and identify a principled answer.

45. I find it helpful to start with the wording of the relevant statutory provision, namely s. 7(2) of the Act. I have set it out above but I repeat it here for convenience:

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

46. We heard some limited argument as to whether the compensation payable under s. 7(2) is to be measured in the same way as damages for tort at common law. Mr Howard Smith, who appeared for Mr and Mrs Jones and Mr Spriggs, submitted that the wording of s. 7(2), which refers to "any loss or damage" is widely expressed and

not limited by any common-law rules, but means what it says, the Act being a statutory code which supplants or supersedes the common law: see *Group One Investments Ltd v Keane* [2018] EWCA Civ 3139 at [2] per Hickinbottom LJ and cases there cited. I agree that where the Act is operated the parties' rights are to be found in the statutory code which supplants their common law rights, but it does not necessarily follow that the common law principles for assessing damages have no application when assessing the compensation payable under s. 7(2), and to be fair to Mr Smith he accepted that common law principles of fairness did apply.

47. It would appear that there is very little authority on the point, but in *Lee Valley Developments Ltd v Derbyshire* [2017] EWHC 1353 (TCC), [2017] 4 WLR 120 at [34]-[35] Mr Adrian Williamson QC, sitting as a Deputy High Court Judge, accepted that common law principles applied, as follows:

> "34 In these circumstances, the claimant submits that the common law principles which apply to the assessment of damages for torts to land should apply under the subsection. The defendant, by contrast, submits that the 1996 Act provides a comprehensive statutory code, and that common law principles are not relevant.
>
> 35 On this issue I prefer the claimant's submissions. As the claimant points out, but for the 1996 Act many of the activities permitted by the 1996 Act would constitute, for example, nuisance. In those circumstances one would expect similar principles for assessing damages to apply. Moreover, if Parliament had intended that the expression "loss or damage" should have some different meaning from that generally understood, it would no doubt have said so."

I would add to that a point made by Mr Isaac, namely that if the quantum of compensation payable under the Act were assessed on more generous (to the adjoining owner) principles than common law damages, it might act as a perverse incentive to a building owner not to operate the statutory code but to take his chances on being sued for nuisance. That would not I think be a welcome development. In those circumstances I am inclined to agree with Mr Williamson, although I do not think we need to decide the point finally in the present appeal.

48. Before coming to the relevant principles, I think it is helpful to be precise about what questions arise. I think a number of questions can be identified in a case such as the present.

49. First, the Act by s. 7(2) requires the building owner to compensate an adjoining owner for "any loss or damage" which "may result by reason of" any work executed in pursuance of the Act. This is of course the language of causation. So where, as in the present case, the issue is one of physical damage to the adjoining owner's property, the first question is to identify what damage has been caused by the works.

50. The Judge has given clear answers to that question in the present case. The works caused (i) the rear wall to drop by a minimal amount (2mm); that resulted (ii) in some fairly minor cracking; it also however caused (iii) the internal walls to separate and drop. That in turn caused (iv) the floor slabs to drop by up to 40mm. Those are the items of "damage which result[ed] by reason of" Mr Taylor's works. On the other

hand there is now no doubt that the dpc crack (and the fact that the rear wall is unsupported by its foundations) and the voids under the floor slabs were not caused by the works.

51. That leads to the next question which is how the adjoining owners (Mr and Mrs Jones and Mr Spriggs) should be compensated for the relevant damage. As I have already said in some cases there is an issue whether damage to property is to be compensated by reference to the diminution in the value of the property or the cost of repair, but that is not, and never has been, an issue in the present case. There is nothing unreasonable in Mr and Mrs Jones and Mr Spriggs wishing to repair their properties. There is no suggestion that they were about to demolish them, or wished to do anything other than go back to letting them as they had previously done, and the evidence was that repairs needed to be done before they could be re-let. So the answer to that question in the present case is also clear: they are to be compensated by awarding them the cost of repairing the damage caused by the works.

52. The next question is what work needs to be done in order to repair the relevant damage. I will come back to this question, which seems to me the decisive issue in the case.

53. Once the necessary works to repair the damage have been identified, there is then a further question which is whether any deduction or allowance should be made for "betterment", that is for the fact that the repairs will give the adjoining owner something better than they had before the damage occurred. Here I consider that the law is relatively clear and well-settled as I will explain shortly.

54. The final question is to put a figure on the cost of carrying out the relevant repairs. That does not arise in the present appeal. If the Judge is right on the question of pre-existing damage, there is no challenge to her figures. If the Judge is wrong, it is not disputed that the matter will have to be remitted for the figures, if not agreed, to be found on the correct basis.

The law on betterment

55. I said that the law on betterment appeared to me to be relatively well settled. It can be found in two decisions of this Court, namely *Harbutt's* and *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd* [2020] EWCA Civ 308, [2020] Bus LR 1729 (***"Sartex"***).

56. In *Harbutt's* the plaintiff company's factory was destroyed by fire. The trial judge found the defendant company to have been in breach of contract, and assessed damages by reference to the cost incurred by the plaintiff in building a new factory. On appeal the defendant argued that it should not be liable for more than the difference in value of the old factory before and after the fire. All three members of the Court rejected the argument. Lord Denning MR said (at 468A):

> "The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine

> company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case. I think the judge was right on this point."

Widgery LJ said (at 473B):

> "The plaintiffs rebuilt their factory to a substantially different design, and if this had involved expenditure beyond the cost of replacing the old, the difference might not have been recoverable, but there is no suggestion of this here. Nor do I accept that the plaintiffs must give credit under the heading of "betterment" for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them."

Cross LJ said (at 476A):

> "Further, I do not think that the defendants are entitled to claim any deduction from the actual cost of rebuilding and re-equipping simply on the ground that the plaintiffs have got new for old. It is not in practice possible to rebuild and re-equip a factory with old and worn materials and plant corresponding to what was there before, and such benefit as the plaintiffs may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendants are not, as I see it, entitled to any allowance. I can well understand that if the plaintiffs in rebuilding the factory with a different and more convenient lay-out had spent more money than they would have spent had they rebuilt it according to the old plan, the defendants would have been entitled to claim that the excess should be deducted in calculating the damages. But the defendants did not call any evidence to make out a case of betterment on these lines and we were told that in fact the planning authorities would not have allowed the factory to be rebuilt on the old lines."

Although that was a claim in contract, there is no reason to think that any different principles apply in assessing damages for tort.

57. As Mr Isaac pointed out, and as the Judge accepted, *Harbutt's* was not a case of remedying pre-existing damage. But it does establish the principle that if the owner of destroyed property (reasonably) rebuilds it, he does not have to give credit for the fact that he gets a new property instead of an old one. The same must apply where the owner of damaged property (reasonably) repairs the damage. Any repair will involve replacing old materials with new, but, as Cross LJ said, in practice you cannot do anything else and the defendant is not entitled to an allowance for that.

58. *Harbutt's* was referred to by Lord Hope in *Lagden*. In that case the claimant's car was damaged by the defendant's negligence. He hired a replacement car, but was unable because of his financial circumstances to afford to pay spot hire rates and so took out a more expensive credit hire agreement. The question was whether he could recover the greater cost of doing so. That is some way removed from the present case, and raised rather different issues, and the House of Lords only decided that he could by a majority of 3 to 2. But Lord Hope, who was one of the majority, in the course of his speech discussed both *Harbutt's* and an earlier decision of Dr Lushington in *The Gazelle* (1844) 2 W Rob 279, and at [34] said this:

> "Of course, the facts in these two cases were quite different from those in this case. But I think that the principles on which they were decided are of general application, and it is possible to extract this guidance from them. It is for the defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted."

59. The principle that whether the claimant has to give an allowance for betterment depends on whether he had a choice in the matter was further refined by Leggatt LJ (with whom Dingemans and McCombe LJJ agreed) in *Sartex*. This was a claim on an insurance policy by the owner of a property which was seriously damaged by fire. The expert quantity surveyors had agreed that where an old building is replaced by a new one there will inevitably be an element of betterment such as better thermal insulation as a result of using modern materials: see at [86]. The judge had however declined to make a deduction for betterment in the absence of any attempt by the insurer to identify and justify any particular reductions for betterment. That was upheld by this Court.

60. Leggatt LJ considered the principles at [90]-[98]. The whole of this passage contains valuable guidance but I can summarise it as follows:

    (1) There are different types of betterment. One type of betterment is where an insured chooses to make improvements rather than simply reinstate property as it was before. The additional cost of doing so is not part of the cost of reinstatement and is not recoverable [90].

    (2) A second type of betterment is where an insured derives a benefit as an incidental consequence of adopting a reasonable reinstatement scheme, for

example by using modern materials, or replacing an old machine with a new one on the basis that this is unavoidable [92]. Here a distinction needs to be made between benefits that take the form of money (or which the claimant could reasonably be expected to realise in terms of money) and non-pecuniary benefits [93].

(3) In the case where the insured will save, or can reasonably be expected to save, money as a result of getting something better, a deduction should be made: see the leading case of *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 where new turbines bought by the plaintiff railway company were more efficient than those they replaced and the savings which the railway company made as a result had to be brought into account [94]-[95].

(4) With non-pecuniary benefits the position is different:

> "In such circumstances to make a deduction for betterment from the damages awarded would be unjust, as it would force the claimant to pay for an advantage which it has not chosen and which makes it no better off in money terms."

Leggatt LJ referred to *Harbutt's* as an illustration of that [96].

61. In effect therefore Leggatt LJ identified three classes of case: (i) where the insured chooses to carry out improvements not needed for reinstatement; (ii) where the insured does not have a choice but derives a money benefit from an improvement; and (iii) where the insured does not have a choice but derives a non-money benefit from an improvement.

62. Two other points can be noted. First, it was submitted that the position was different in insurance cases, but Leggatt LJ held that the position was the same as in other cases of contractual liability, saying (at [97]):

> "In particular, it is no more just in a case where the defendant is an insurer who has promised to indemnify the claimant against loss than it is in any other breach of contract case to force the claimant to pay for a benefit which it did not choose to receive and which does not save the claimant any money."

He did not refer to tortious liability but again there is no reason to think the same would not apply.

63. Second, the burden of proving that damages should be reduced on the basis that the insured will save money as a result of reinstatement lies on the insurer [98].

64. In the present case Mr Isaac did not seek to establish that underpinning the rear wall of Nos 5 and 6 was within the first class of case. The evidence of the experts, accepted by the Judge, was clear: theoretically the remedial works to the internal walls and slabs could be done without underpinning the rear wall, but no engineer would approve such a scheme and no contractor was likely to agree to carry out the work (see her judgment at [63], set out at paragraph 34 above). Mr Isaac therefore

accepted in terms that the underpinning was "non-optional". I agree.

65. He did submit however that the case came within the second of Leggatt LJ's categories because Mr and Mrs Jones and Mr Spriggs would have had to carry out the underpinning sooner or later in any event, and hence carrying out the work now would simply save them the expense of carrying it out later. Mr Smith disputed this. The wall had remained in much the same state for some 50 years, and if Mr Taylor had not carried out his works and the defects come to light, there is no reason to think that it would ever have been necessary to carry out the work.

66. On this point I prefer the submissions of Mr Smith. As he said, if a case was to be made that underpinning the wall saved his clients money because they would have had to do it sooner or later, then it was for Mr Taylor to prove this. But there was no evidence, let alone a finding by the Judge, that in the absence of Mr Taylor's works the dpc crack would have come to light and Mr and Mrs Jones and Mr Spriggs would have had to underpin the wall anyway. It was Mr Taylor's works which led to the collapse of the floor slabs; and it was the collapse of the floor slabs which led to the investigations which ultimately revealed the true state of the rear wall of Nos 5 and 6. Once that had been discovered – and the engineering experts had concluded that although the wall had found a new equilibrium, it remained unsupported and that this was unacceptable – then the need for the underpinning became manifest. But it was common ground that until Mr Taylor carried out his works the defects in the rear wall were unknown to everyone. It is true that there was the hairline crack at first floor level, which occasionally opened up, but the evidence was that Mr and Mrs Jones simply redecorated every few years between lettings, and would repair the crack from time to time. There is no reason to think that this would not have continued in the absence of Mr Taylor's works. Mr Isaac said that the expert evidence was that the 2mm movement which had been caused by the works could have been caused by other, quite minor, works such as drilling through a floor slab to fit a new bathroom outlet (see the judgment at [61], set out at paragraph 34 above). That is so, but the evidence did not support, and the Judge did not make, any finding that in the absence of Mr Taylor's works the wall would probably have collapsed within one, two, five or whatever number of years. In those circumstances I think Mr Smith is right that it has not been shown that underpinning now is a pecuniary benefit to his clients on the ground that they would have had to carry out the work sooner or later anyway.

Is the underpinning needed to remedy the relevant damage?

67. I therefore conclude that (i) the underpinning is now in practice required – whatever the theoretical position, Mr and Mrs Jones and Mr Spriggs have no real choice in the matter; and (ii) it has not been shown that to do the work now saves them the cost of having to do it later. Mr Smith submitted that it followed that his clients were entitled to recover the cost of the underpinning from Mr Taylor.

68. That was the view reached by the Judge. It would appear that she had much less full argument on the point than we did, being simply referred to *Harbutt's* and to *Jobling v Associated Dairies Ltd* [1982] AC 794 (***"Jobling"***). *Jobling* was a case where the plaintiff was injured at work and claimed damages for loss of earnings, but before trial was diagnosed with a condition that meant he would have had to stop working even without the accident. The Judge found it of no real assistance beyond the general point that damages should not be excessive (see per Lord Wilberforce at

804B). I am not surprised that she took that view as the issue in that case was the impact of a supervening event on the assessment of ongoing damages, which is a very different question from any in the present case.

69. The Judge was therefore left with little other guidance than *Harbutt's*. She accepted (judgment at [109]) that *Harbutt's* did not directly deal with the question of pre-existing damage, but continued at [110]:

> "As Mr Smith accepted, now that the arch has spread, the rear wall is again in equilibrium and it can be said that in that respect, the properties are in the same condition as before the Works. On the other hand, as in *Harbutts*, there is only one possible course of action; underpinning the rear wall is the only possible way in practice of carrying out the other repairs to the mews properties. To require [the respondents] to pay for the underpinning would be the equivalent, as Widgery LJ said, of *'forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them'*."

70. I think that was an understandable conclusion in the light of the argument she appears to have received. But to my mind there is, as I have suggested above, a further question that needs to be asked. It is not enough to ask whether it is necessary to do any particular work when carrying out the repairs. I think it is also necessary to ask whether the work that now needs to be done has to be done *in order to repair the relevant damage*, that is the damage caused by Mr Taylor's works.

71. I can illustrate this point by reference to the voids under the floor slabs. There are four relevant slabs on the ground floor of Nos 5 and 6. Taking them in turn from the westernmost, the first is in the western half of No 6 (the lounge). This adjoins the part of the rear wall which forms the back wall of Mr Taylor's garden and which he underpinned in May 2019. It has an extensive void underneath it but the floor slab has not dropped, no doubt precisely because the rear wall at that point has been underpinned. The other three slabs are respectively the eastern half of No 6 (the bathroom), the western half of the ground floor of No 5 (tank room and toilet) and the eastern half of the ground floor of No 5 (bathroom). In each case there are voids under the slabs and they did drop by up to 40mm.

72. Mr Taylor's works therefore caused damage to each of the three eastern slabs. He is therefore liable for the cost of repairing or replacing them. The floor slabs are intended to rest on solid ground not over a void. So to repair or replace them it is necessary to fill in the voids. The cost of filling in these voids therefore has to be borne by Mr Taylor as it is necessary to fill them in as it is the only practical way in which the floor slabs can be re-laid, and hence it is needed in order to repair the damage to the slabs which his works caused.

73. Suppose however that Mr Spriggs was advised that it would also be sensible to fill in the void under the westernmost slab, now that it has come to light, on the basis that it was unsatisfactory for the slab to be left hanging over a void rather than sitting on solid ground. That would not in my view be work for which Mr Taylor would have to pay, even if the advice was that it was both reasonable and in practical terms necessary to do it. This is because Mr Taylor's works did not cause any damage to

that slab, nor did they cause the void. So filling in the void, however sensible or necessary, would not be something required *in order to repair the damage caused by Mr Taylor's works*. It would be work required to remedy a defect (the void) which has come to light as a result of the investigations carried out as a result of his works; but it would not repair any damage for which he was responsible.

74. I think the same question has to be asked of the underpinning. There is no doubt that the experts advised that once the lack of foundations to the rear wall between points A and B had come to light, it was in practical terms necessary to do the work. But that does not to my mind answer the question whether it was necessary to do the work *in order to repair the relevant damage, that is the damage caused by Mr Taylor's works*. The relevant damage caused by Mr Taylor's works was the dropping of the internal walls and the dropping of the floor slabs (see paragraph 50 above where these are items (iii) and (iv)). What the experts recommended by way of repair of these items was that "the internal walls should be underpinned or the foundations thickened" and that "the voids under the slabs should be filled and the slab relaid" (judgment at [62], set out below).

75. The critical question to my mind is whether the underpinning of the rear wall was also needed in order to repair the damage to the internal walls and the floor slabs. This requires a close analysis of the relevant findings of the Judge. These are at [61]-[63] of her judgment. I have set them out at paragraph 34 above, but repeat the relevant parts here for convenience:

> "61. In cross-examination the experts agreed that although the rear wall has been stable for many years, it was and remains unsupported. This is an unacceptable state of affairs as any slight movement at either end of the arch could cause the panel of brickwork under the arch to crack and possibly collapse…
>
> 62. In terms of remedial work, the experts consider that the remaining part of the rear wall under 5 and 6SGM needs to be underpinned, which is a preferable solution than stitching. That would have been their recommendation had the damage to the walls and slabs not occurred. The internal walls should be underpinned or the foundations thickened. The voids under the slabs should be filled and the slab relaid…
>
> 63. Theoretically, the remedial works to the internal walls and the slabs could be done without underpinning the rear wall but the experts' view was that no engineer would approve such a scheme on health and safety grounds and no contractor is likely to agree to carry out the work in those circumstances."

76. To my mind this falls short of a finding that the underpinning of the rear wall is needed in order to repair the damage to the internal walls and slabs. The underpinning of the rear wall is needed because it is unacceptable that the rear wall should be left in its unsupported state in which the panel of brickwork under the arch could crack and possibly collapse. That is why no engineer would approve a scheme which merely carried out remedial works to the internal works and floor slabs; that could be done in theory but would not be acceptable in practice.

77. As I read these careful findings, the Judge has accepted that the remedial works required to remedy the damage to the internal walls and the floor slabs are the underpinning of the internal walls or thickening of their foundations, the filling of the voids and the re-laying of the slabs. The underpinning of the rear wall is not needed to remedy this damage. It is needed to remedy the unacceptable state of affairs with the rear wall. But that, as is common ground, was not something caused by Mr Taylor's works.

78. In my judgement it follows that Mr Taylor is not liable for the cost of underpinning the rear wall of Nos 5 and 6 any more than he would be liable for the cost of filling the void under the floor slab in the lounge of No 6. The underpinning is needed, but it is not needed to remedy the damage caused by his works. It is, as Mr Isaac submitted, needed to remedy pre-existing defects which his works did not cause. There is therefore no reason why he should be required to compensate Mr and Mrs Jones and Mr Spriggs for the cost of the underpinning as he would not thereby be compensating them for damage caused by the work he carried out. The reality is that they had a defective building long before Mr Taylor carried out his works; his works have brought the defect to light which has made it necessary for them to do something about it, but the defect was not caused by him or his works, and I do not think the Act requires him to pay for remedying it.

79. I would therefore allow the appeal on Ground 2.

80. It follows that the case will have to be remitted to the County Court for a finding as to how much of the cost of the works allowed by the Judge was attributable to work which Mr Taylor is not liable for. In that case however I would very much hope that the parties would be able to agree the figures to avoid the necessity of any further hearing.

Ground 1 – costs

81. Since the appeal is allowed on Ground 2, it will be necessary to re-consider the costs of the County Court proceedings in any event. But I think it is still helpful to address Ground 1 of the appeal because it makes a fundamental challenge to the Judge's whole approach to costs, and it is necessary to decide if this is well-founded or not.

82. The Judge's costs judgment can be summarised as follows:

(1) She started at [4] with the fact that the appeal to the County Court proceeded by way of re-hearing: see *Zissis v Lukomski* [2006] EWCA Civ 341, [2006] 1 WLR 2778. There Sir Peter Gibson at [39] cited the judgment of May LJ in *E I Dupont de Nemours & Co v S T Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 at [96] to the effect that on such a rehearing the Court will hear the case again; that it will if necessary hear evidence again, and may well admit fresh evidence; and that it will:

> "reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court such weight as it deserves."

(2) She said that although Mr Taylor did not formally raise quantum as a separate

ground of appeal, the quantum of the awards was always an issue that the Court would have to consider and an issue that the respondents would have to prove, the burden of proof being on them to prove all parts of their case at the rehearing [5].

(3) She then referred to the fact that the parties had had to grapple with an unusual and fundamental change in the understanding of the case as the appeal unfolded and more expert evidence had been obtained [6].

(4) She then considered a number of the factors referred to in CPR r 44.2(4), starting with offers. Both sides had made offers but none of them had been beaten and she regarded the making of the offers as neutral [11]-[12]. So far as conduct is concerned, she pointed to Mr Taylor continuing to contest causation despite the agreed engineering evidence [14]; and to the respondents failing to pay sufficient attention to the need to both prove their loss and mitigate it [15]. Overall therefore she thought there were conduct points going both ways, but did not place very great weight on any of them [16].

(5) She then considered the extent to which the parties had succeeded. Mr Taylor had succeeded in reducing the amounts originally awarded. By her calculations the award in favour of Mr and Mrs Jones had been reduced by about £43,000 (excluding VAT) or roughly 23%, and that in favour of Mr Spriggs by about £27,000 (excluding VAT) or roughly 19%. She also noted that the amounts awarded were considerably lower (by some 44% and 38.5% respectively) than the final amounts contended for by the respondents [17].

(6) The respondents on the other hand had succeeded in fending off a number of robust legal challenges to the proposition that Mr Taylor should pay them for the damage at all, or to any significant extent. They had succeeded on "the central issue of causation" and the pre-existing damage point as well as on other points raised in the grounds of appeal that were abandoned shortly before trial [18].

(7) She continued:

> "19 Standing back and looking at all the circumstances, I consider that the respondents are overall the successful party. In my judgment, it would be profoundly unfair and artificial for the court to follow the course proposed by Mr Isaac and award the appellant his costs simply because he has succeeded in paying less to the respondents than the initial award.
>
> 20 Nevertheless, I consider that it is right in this case to make a different order from the general rule because of the reduction in quantum which the appellant has succeeded in achieving. In my judgment the correct and fair order is that the appellant should pay 75 per cent of the respondents' costs."

83. Mr Isaac submitted that the Judge had erred. His central submission was that she had

wrongly identified the respondents as the successful party. Where a claim was solely about money, and an appeal is brought, the question of who has won and who has lost was to be determined by a comparison of the outcome on appeal with the outcome below. If the appellant had succeeded in increasing the amount payable to him, or decreasing the amount payable by him, he was the successful party. Here Mr Taylor had succeeded in reducing the amounts payable by him by some £80,000 and on any view, Mr Isaac said, he had therefore been the successful party.

84. The starting point is the terms of CPR r 44.2(2), which provides as follows:

> "(2) If the court decides to make an order about costs–
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order."

That means that if the Court is going to make an order for costs, it will normally be necessary to identify the successful party.

85. It is of course possible for the Court to make an order for costs that is not based on the general rule, for example an issue-based costs order, in which case it may not be necessary for the Court to identify the successful party at all. But that is not what the Judge did here. What she did was identify the respondents as the successful party at [19] and then reduce their recovery to 75% at [20]. I think Mr Isaac is right that the essential question on this ground of appeal is whether she was right, or at least entitled, to regard the respondents as the successful party. If she was, then the award of 75% was plainly within the generous ambit of her discretion over costs.

86. Now in the present case the factual position is not difficult to identify, namely that, as in most cases of any complexity, each side won on some points and lost on others. Mr Taylor did win on showing that the amounts awarded by Mr French as third surveyor were too high, both in respect of various items of work and in respect of the loss of rent; he also of course succeeded in defeating the respondents' claim for the still higher amounts sought by them on appeal. But he lost both on the issue of causation, and on the issue of whether he was liable for the cost of repairing pre-existing defects. The respondents were conversely successful in establishing that Mr Taylor's works (rather than the tree roots as he had suggested) were the cause of the damage; and also that he was liable for the cost of remedying the pre-existing defects. But they were unsuccessful in their claims to increase the quantum, and unsuccessful in maintaining the full awards Mr French had made.

87. In such circumstances the law might have taken the view that for the purposes of CPR r 44.2(2)(a) neither party was "the" successful party and the general rule could not be applied. But this is not in fact the view that has been taken. It is well established that in commercial cases that are solely about money the party that ends up receiving payment is generally to be characterised as the overall winner of the litigation: see *Multiplex Constructions (UK) v Cleveland Bridge* [2008] EWHC 2280 (TCC) at [72] per Jackson J, *Fiona Trust & Holding Corporation v Privalov* [2011] EWHC 664 (Comm) at [36] per Andrew Smith J, *F&C Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 2807 (Ch) at [20] per Sales J. Or, as it was put by Ward LJ in *Day v*

Day [2006] EWCA Civ 415 at [17], the unsuccessful party is the person "who has to write the cheque at the end of the case."

88. That produces a clear principle for trials and other litigation at first instance. It is of course not absolute as costs are peculiarly fact-sensitive and litigation is endlessly variable, and there are well-known exceptions where even though the claimant ends up receiving something they are not really to be regarded as the successful party; but it is a good working rule that applies in the majority of cases. And I think it is not difficult to understand why this should be the position. If a claimant succeeds in obtaining judgment for a sum of money against a defendant, it means that the claimant had to sue the defendant and prosecute the proceedings to judgment to recover what he was owed. The defendant having put him to that expense, it is not surprising that the general rule is that the defendant should have to pay the costs that he has caused the claimant to incur.

89. All of this is well established and was not in dispute. The next step in Mr Isaac's argument is that the principle that in a case about money the loser is the party that writes the cheque has to be adapted for appeals. On appeal, he said, the question should be whether the appellant has succeeded in improving their position as compared to the judgment under appeal. If the appeal fails and the judgment below stands the appellant is obviously the unsuccessful party, but if the appeal succeeds and the judgment below is replaced with one more favourable to the appellant (either, if the appellant is the receiving party, providing for him to recover more, or, if the appellant is the paying party, providing for him to pay less, than in the judgment under appeal) then the appellant is to be regarded as the successful party.

90. As a statement of the general position that proposition seems to me to be right. In the general run of appeals to this Court these are indeed the ordinary principles by which the successful party on appeal is identified. And again it is not difficult to understand why that should be so. If an appellant succeeds on appeal in establishing a better position than below in the face of opposition from the respondent, then the respondent has put him to the expense of appealing to establish the true position and as a general rule should have to pay the costs he has caused the appellant to incur.

91. The next question therefore is whether these ordinary everyday principles applied to the proceedings before the Judge, or whether there were particular features which mean that the Judge was entitled nevertheless to identify the respondents as overall the successful party.

92. I think there were. The considerations which I regard as most significant are those succinctly identified by the Judge herself at the beginning of her well-reasoned analysis. First, the appeals proceeded by way of rehearing not review. And it was common ground that on such an appeal the burden on all issues lay on the respondents. This seems to me to make the nature of the proceedings before the Judge very different from an ordinary appeal. In an ordinary appeal (such as an appeal to this Court, for example) the appeal proceeds by way of review. It is for the appellant to make out one or other of his grounds of appeal. Unless he persuades the Court that the judge below has erred in one or more of the specific ways he has identified, he will fail and the appeal will be dismissed. It is the appellant therefore who bears the burden on appeal (technically I think not a burden of proof, as this is not a question of proving anything, but certainly a burden of persuasion).

93. In the appeals to the County Court in the present case the position was very different. Although technically such appeals are governed by CPR Part 52 (this was one of the points decided by *Zissis v Lukomski*), and hence by CPR 52.21(3) the Judge could only allow the appeals if the awards made by Mr French were "wrong" (or unjust because of an irregularity, but that was not suggested), the effect of the appeals being by way of re-hearing was that the way in which the Judge decided whether the awards were wrong was to re-hear the entire case from scratch with oral evidence both from the lay witnesses and from the experts.

94. It is not disputed as I have said that on the re-hearing it was the respondents who bore the onus of proof on all issues. They therefore had to establish (i) that they had suffered damage to their properties, (ii) that that damage had been caused by Mr Taylor's works, and (iii) how much they could recover from him as a result. That required them to call evidence on each of these matters, and if they had failed to adduce sufficient evidence on any one of them, their claims would have failed. The point is illustrated by the Judge's decision on quantum. Mr Taylor's grounds of appeal did not in fact raise quantum as a separate issue, and the respondents at an interlocutory stage argued that that meant they did not need to deal with quantum. But the Judge disagreed on the basis, as she says in her costs judgment, that quantum was always in issue. In other words once Mr Taylor had appealed the respondents had to establish their claims both as to liability and quantum.

95. As Mr Smith submitted, that meant that the proceedings on appeal to the County Court were in practice almost indistinguishable from a trial. As he neatly put it, what Mr Taylor did, by exercising his right of appeal against the awards under s. 10(17) of the Act, was opt to have his case tried in court.

96. Moreover that was especially so in the present case where, as the Judge points out, the nature of the case had fundamentally changed by the time of the hearing before her. The awards made by Mr French in August 2021 were on the simple basis that he had to choose between the cause of all the damage to the rear wall of Nos 5 and 6 being tree roots or Mr Taylor's works. It was not until the engineering experts produced the joint statement in October 2022 that it became apparent what the extent of pre-existing damage was, and what the actual mechanisms involved were. So although in principle an appeal court on a re-hearing will give the decision appealed against "the weight it deserves", in the present case it was common ground that Mr French's awards had been overtaken by developments in the evidence and neither side appears to have placed any weight on them at all. That reinforces the point that the task for the Judge was not, as it would be in an appeal by way of review, to rule on specific criticisms of the decision appealed against, but was to start again and reach her own view.

97. In these circumstances I think the Judge was right, or at the very least entitled, to regard the respondents as the successful party. They succeeded in establishing that Mr Taylor's works had caused the relevant damage to their properties in the face of a sustained attempt by him to persuade the Court that the real cause was tree roots. The Judge described that as "the central issue", and we are in no position to say that she was wrong about that. (In fact Mr Isaac gave us a breakdown of the time spent in court on various matters which suggests that she was indeed justified in that conclusion). If the respondents had failed on that issue they would of course have recovered nothing. As it was they recovered substantial amounts. Had the hearing in

fact been a trial I think there is no doubt that they would have been regarded as the successful parties, Mr Taylor being the one to write the cheques, and in circumstances where the proceedings before the Judge, although technically appeals not a trial, were in practice very similar to a trial, there was nothing wrong in my judgement in the Judge concluding that they were the successful parties despite Mr Taylor's success in reducing the quantum from the amounts awarded by Mr French. Indeed I would again pay tribute to the Judge's judgment on costs, which explained the basis for her decision in a succinct and lucid way.

98. I would therefore dismiss this ground of appeal.

Conclusion

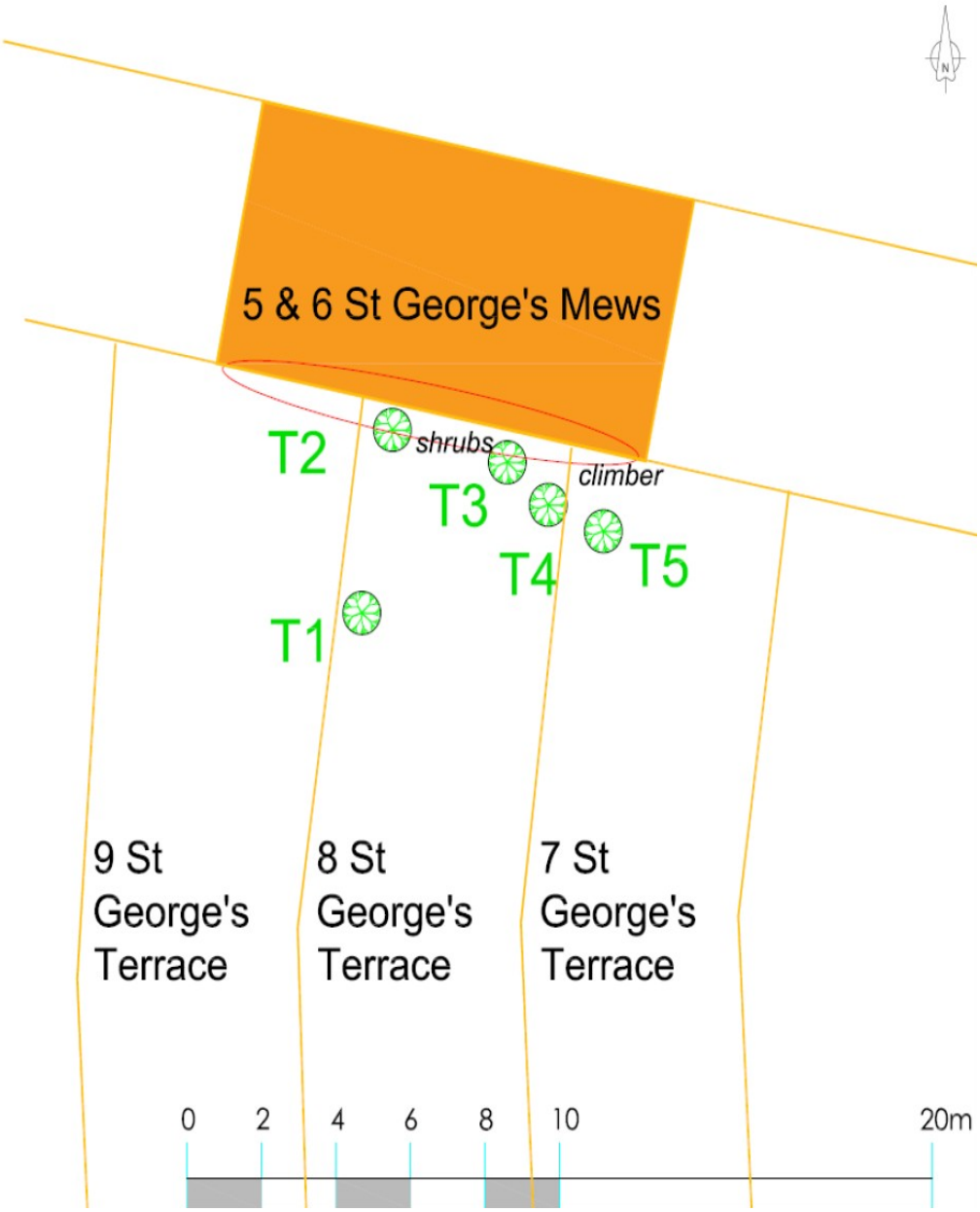
99. I would allow the appeal on Ground 2.

100. It follows that the costs of the hearing below will have to be revisited, and on this I would invite brief written submissions (if not agreed), but I would not accept the criticisms of the Judge advanced in Ground 1.

Lord Justice Bean:

101. I agree.

Lady Justice Macur:

102. I also agree.

Annex – location plan