IN THE COUNTY COURT AT CENTRAL LONDON Claim No. D20CL027

TECHNOLOGY AND CONSTRUCTION LIST

His Honour Judge Edward Bailey

BETWEEN

JENS WELTER

Appellant

- and -

(1) RAYMOND JOHN McKEEVE
(2) BELINDA LUCY McKEEVE

Respondents

JUDGMENT

Background

1. In this Party Wall Award appeal the Appellant is the owner of 5 Earls Court Gardens, London SW5 (No.5) and the Respondents are the owners of the adjoining property, 6 Earls Court Gardens (No.6). The properties are separated by a party wall. Both properties have been developed by their respective owners, the development works including both rear and basement extensions in each case.

2. As building owner, the Appellant, on 20 December 2012, served notices on the Respondents under both sections 3 and 6 of the Party Wall etc Act 1996 relating to works to construct a basement extension at No.5. The works included the underpinning of the party wall. The Respondents did not consent to the notices and deemed disputes arose under sections 5 and 6(7) of the 1996 Act. Mr Peter Davies FRICS was appointed as party wall surveyor for the Appellant and Mr Nigel Acres of Party Walls Ltd was appointed as party wall surveyor for the Respondents. Mr Toogood FRICS was selected as the third surveyor. On 3 April 2013 Mr Davies and Mr Acres made an Award under section 10 of the 1996 Act which authorised the Appellant to carry out the works necessary for the construction of a basement at No.5, including the underpinning of the party wall.

3. The Appellant engaged an independent building contractor, Penn Contracting Limited, to carry out the basement extension works. These works were to be carried out to a design by the consulting engineers The Wilde Carter·Clack Partnership ('Carter·Clack'). Penn Contracting finished the underpinning works to the party wall on about 27 August 2013 and completed the basement extension to No.5 in April 2014.

4. Meanwhile, on 6 and 30 September 2013, the Respondents had served notices under sections 3 and 6 of the 1996 Act in relation to the proposed basement extension (and other works) at No.6. It was intended that the basement at No.6 would enclose upon and make use of the underpinning recently carried out at No.5. The Appellant did not consent to the notices, and deemed disputes arose under sections 5 and 6(7) of the 1996 Act. As before, Mr Acres was appointed as party wall surveyor for the Respondents and Mr Davies was appointed for the Appellant. The surveyors then selected Mr Trevor Orpwood FRICS as third surveyor. Before an award was made however, Mr Acres deemed himself incapable of acting under section 10(5) of the 1996 Act and he was replaced as the Respondents' party wall surveyor by Mr Mark Williams FRICS.

5. To determine the deemed disputes arising on the notices served by the Respondents, Messrs Davies and Williams made an award on 25 June 2014. This award authorised various works including the enclosure on the underpinning carried out for the basement extension at No.5, and required the Respondents to pay £50,000 to the Appellant under section 11(11) of the 1996 Act for making use of the underpinning.

6. The Respondents engaged Cranbrook Basements Ltd ('Cranbrook'), to carry out their basement extension works together with extensive works of refurbishment to No.6 generally. These works included an extension under the front garden, essentially independent of the basement extension under the house, itself extended. Cranbrook were formally engaged on 30 April 2013, and all the contract documentation bears this date. The contract documents included a set of 33 general terms and conditions. Condition 9 provided that additional works would be the subject of a written agreement, and that "Wherever possible [Cranbrook] will attempt to provide lump sum prices for additional works which will include labour and materials… Under certain unusual circumstances it may be necessary to carry out works on an hourly basis. The company's hourly rates are as follows: Foreman - £59 per hour plus vat, Underpinner / Tradesman - £51 per hour plus vat, Labourer - £39 plus vat per hour, Project Manager £64 per hour plus vat, Director £110 per hour plus vat. Plant and Materials – Manufacturers/Suppliers list price plus 15%".

7. By the time the award was made on 25 June 2014 the works at No.6 were well underway. The Respondents had met Mr Kevin O'Connor, Cranbrook's managing director, on 21 March 2013 and had received an extensive proposal for the 'Technical Design and Construction of Basement, Extensions and associated alterations at [No.6]' both by email and by letter dated 30 April 2013. The First Respondent returned a signed contract to Cranbrook on 14 May 2013 expressing the hope that the works would start in August 2013. The date on which the works did in fact commence is of no immediate relevance, but by 22 November 2013 Cranbrook were in a position to invoice the Respondents for some £63,000 worth of work, comprising stripping out, site enabling works, and lightwell access formation works.

8. None of these works required party wall authorisation, but plainly an award covering the party wall works on both sides of No.6 was a matter of some priority. For the Respondents, Mr Acres had been pressing ahead with party wall awards both with Mr Davies for the Appellant and with the party wall surveyor at No.7 since September 2013. By 15 November 2013 Mr O'Connor was concerned that he was unable to make progress with the excavation

and he emailed Mr Acres to ascertain the position as to the party wall awards. Mr Acres responded the same day to report that he had concluded a party wall award with the surveyor for the adjoining owner at No.7, but that he was finding Mr Davies to be moving rather more slowly.

9. Over the following months progress to an award in respect of the party wall at Nos 5/6 moved only gradually to resolution. It is evident that the two party wall surveyors had very differing approaches. Mr Acres, now for the building owner, was anxious to proceed with all possible haste. Mr Davies took a rather more measured, meticulous approach, careful to adhere to the legal niceties. As a consequence matters did not proceed as speedily as they might have done. There was a great deal of frustration expressed on both sides, particularly at No.6, with suggestions made within the Respondents' team both of incompetence and of possible lack of integrity on the part of Mr Davies.

10. Neither was progress to an award assisted by the fact that Cranbrook began excavation of the basement before an award was in place with No.5. This was perfectly lawful provided the works neither affected the party wall with No.5 nor came within the distance defined by section 6 for adjacent excavation requiring the service of a notice under the Act. (The invoices rendered by Cranbrook indicate that substantial works of basement excavation and steelwork construction were carried out between November 2013 and February 2014, but the extent of that excavation is uncertain). However, these works came to the notice of the Appellant's architect who informed Mr Davies. Mr Davies required reassurance that works had not been carried out in breach of the 1996 Act and threatened to exercise the right of a party wall surveyor under section 8(5) of the Act to inspect Cranbrook's works.

11. In addition to the making of an Award which would permit the Respondents to proceed with their party wall works adjacent to No. 5, the party wall surveyors were also required to make an award setting the amount of compensation to be paid by the Respondents under section 11(11) of the 1996 Act for making use of the Appellant's works of underpinning their joint party wall. In this regard Mr Acres asked Mr O'Connor to provide a cost for carrying out the party wall underpinning work, an exercise which Mr O'Connor undertook and reported on by letter to Mr Acres dated 19 December 2013. In his letter Mr O'Connor noted that "50% of the cost of underpinning the Party Wall should be borne by our client, Mr Raymond McKeeve, and the calculations which we have produced reflect the total costs of that underpinning". The letter continues:

> "For the purpose of calculating the cost of underpinning we have ignored the fact that a basement structure is to be built at No.5 Earl's Court Gardens and have focused solely on the actual cost of underpinning the Party Wall.
>
> In underpinning the Party Wall it is not necessary to introduce reinforcement as this is only required to take up any lateral pressure which exists when a basement is subsequently formed. Our cost focus has therefore been on the underpinning of the wall in mass concrete to the depth indicated on the drawings provided.
>
> In terms of methodology we have allowed for the following stages:
>
> - A simple structural engineering overview and design of mass concrete underpinning

- Temporary engineering works
- Removal of existing lower ground floor slabs local to Party Wall
- Excavation of underpinning pits for access on a "hit and miss" basis
- Shuttering of underpinning base and installation of mass concrete
- Dry packing
- Removal of temporary works and back-filling of individual underpin sections
- Removal of excess spoil from site
-

We calculate the total cost of works at £28,968.48 plust VAT – 50% of this cost should be borne by our client in the sum of £14,484.24 plus VAT.

On a more general note we have dealt with the issue of enclosure costs on countless previous occasions and Party Wall Surveyors generally agree that a figure of between £1,500 and £2,000 per linear metre plus Vat is appropriate. It is interesting to note that our financial computation produces a rate per linear metre of £2,145.81.

We have asked the respected firm of independent Chartered Surveyors – Barrie Tankel Partnership – to check and verify our costings. A copy of their letter is attached."

The attached letter, addressed to Mr Acres and dated 9 January 2014, concurs in the view that the estimate of £2,145.81 per linear metre, ex vat, is a reasonable estimate of cost where the works are procured at market rates.

12. It may be observed that Mr O'Connor's approach to costing the underpinning wall involves an element of hindsight which serves to reduce the overall cost calculation. Mr O'Connor has considered that "it is not necessary to introduce reinforcement" because this is only required to withstand lateral pressure where the underpinning wall has also to act as a retaining wall. As built however, the underpinning was also a retaining wall. It had to be designed and constructed as such even though it would have been envisaged before construction that its days as a retaining wall would be short. Mr O'Connor's was of course a calculation for a specific purpose, the assessment of compensation under section 11(11) of the Act. There was no prospect of Cranbrook having to carry out this work at this price.

13. Mr Acres forwarded the Cranbrook's letter of 19 December 2013 to Mr Davies on 25 January 2014, describing it an 'analysis of the works in connection with Section 11(11) payment due to the A/O'. Mr Davies was not impressed, and he made this clear in his email of 27 January 2014 in response. Noting that the work actually done was steel-reinforced concrete, he continued:

"4. It seems that, in all respects, the submission provided bears no relation to the job actually done and neither you nor anyone else seems to have paid any attention to the fully costed details provided by the Adjoining Owner on 15/11/13, largely by the quantity surveyor of the Adjoining Owner, who was and remains involved with a project in hand and who has figures for costs actually paid out by the Adjoining Owner during 2013 for the work actually done. What is your explanation, as the Building Owners' Surveyor, for having totally ignored this detailed actual information provided and having persons of dubious standing concoct figures for an entirely theoretical alternative project?

5. You will appreciate that Cranbrook Basements are under contract to the Building Owners and have a(sic) work in hand for them. Cranbrook Basements are not bound by

any professional codes and do not necessarily have any understanding of ethics, professionalism etc. in any case….

6. You could have easily obtained from Cranbrook Basements actual costings for the underpinning works they have possibly now already carried out on the 6/7 party wall boundary where, according to the draft award drawings, there is no pre-existing basement at No.7. This makes the exercise in some way comparable to that previously carried out at the 5/6 boundary by No.5, which you and I are concerned with. Why have you not done this and why have Cranbrook Basements been commissioned to prepare a notional calculation instead?

….

14. Mr Acres replied the following day, 28 Janaury 2014, effectively ignoring the substance of Mr Davies' email:

> "I am happy to accept the figures provided by Cranbrook and therefore consider this a reasonable basis on which to Award Section 11(11) compensation. Based on your comments please advise me if you intend to re-submit a revised figure for me to consider …".

15. It would indeed have been instructive to learn what Cranbrook were charging the Respondents for the underpinning wall at No.6/7. It is not clear whether Mr Acres even asked for this information, and there was (as noted) no response by Mr Acres to Mr Davies' direct question on the matter.

16. On 12 March 2014 Mr Acres, who had suffered a very serious family tragedy, declared himself incapable of acting. The Respondents appointed Mr Mark Williams FRICS in his place. It was thus Mr Williams and Mr Davies who made the award of 25 June 2014. This award permitted the enclosure on the existing underpinning, authorised other works with which this appeal is not concerned, and required the Respondents to pay £50,000 to the Appellant as compensation under section 11(11) for making use of the underpinning.

17. By the date of the award Cranbrook had completed all the basement excavation and underpinning works except for the area immediately adjacent to No.5. The award permitted this final area of excavation which then went ahead. However, on exposing the underpinning undertaken by Penn Construction, Cranbrook discovered that the rear aspect of the underpinning wall suggested that the work carried out had been poor and defective, with concrete over-spilling onto the land of No.6. On 21 July 2014 Mr O'Connor emailed the First Respondent with concerns as to the integrity and alignment of the underpinning, and suggested that the necessary remedial works might range from cutting back and making good to wholesale removal and replacement of the concrete underpinning. By 30 July 2014 Mr Williams had inspected the exposed underpinning and concluded that the standard of the Appellant's works raised serious concerns, and on 1 August 2014 Mr Williams wrote to Mr Davies setting out his observations on inspection. Mr Williams concluded his email to Mr Davies with the statement

> "A report is being prepared in respect of the remedial works that will be required. You may wish to wait for this to be submitted, but if you would like to meet on-site, I will make the necessary arrangements".

18. Mr Davies, having first raised the fact that Mr Williams had no authority to act in respect of the award permitting the underpinning works in question, (Mr Acres having declared himself incapable of acting in respect the No.6 works but not in respect of the No.5 works), inspected the underpinning on 20 August 2014. By then, Mr Davies had both been informed that Cranbrook were proposing to test the concrete (at a cost of £2,500) and had seen photographs of the underpinning taken by Cranbrook. Mr Davies' observations on the photographs, by email of 7 August 2014, were that "what has been dug out looks like a fairly normal situation where concrete is cast against earth". Mr Davies concludes his email by stating that

> "In all the circumstances, I do not endorse any expenditure of resources on these matters at this stage until I have myself, possibly with others, made an inspection and seen the written proposals for the works the Building Owners now desire to carry out. These proposals need to take account of the realities of the situation which does not necessarily depend on any scientific analysis partly because the wall in question is no longer a retaining wall (with the ground at No.6 now removed) and will probably be fully functional, as a 500mm thick structure, even if it were of mass concrete. It may need some cosmetic trimming, dubbing out and finishing to turn into an internal wall surface, which is entirely normal where a retaining wall is dug out".

19. Cranbrook proceeded to obtain an analysis of some eight samples from the underpinning wall. This analysis was provided by Sandberg LLP in a report dated 3 September 2014. Cranbrook also commissioned a report from the civil engineering consultants R.H.Horwitz Associates dated 8 September 2014. This latter report considered the Sandberg results and compared them with the specified design strengths on the Carter·Clack construction drawings prepared in connection with their design of the basement construction at No.5. Mr Horwitz concluded that the underpinning concrete failed to comply with the specified strength to a 'significant magnitude' and that the poor standard of workmanship and loss of concrete cover to the embedded reinforcement gave rise to concern as to the wall's ability to meet recommendations for robustness, durability and fire resistance.

20. For his part the Appellant obtained a report from Mr Tim Smith of Carter·Clack following a visit on 18 September 2014. Dated September 2014 (but received in early October 2014) this report concludes that the work done by Penn Construction was very poor, noting as defects that:

    i. the concrete was under-strength;
    ii. the concrete was of insufficient durability;
    iii. some pins were of insufficient width and some were too wide;
    iv. steel reinforcement was exposed in some locations, and there was excessive cover to the reinforcement;
    v. the joints between the pins were opening and inadequate;
    vi. the dry packing was of poor quality;
    vii. there was a lack of lateral bond.

    Nevertheless, despite these defects, the Carter·Clack report concluded that since the wall was no longer acting as a retaining wall but simply operated to transfer vertical loads to the ground it did not require replacement. The wall was capable of supporting the load upon it

subject to some remedial works, a scheme for which was prepared and attached to the report. It is proper to conclude that the Carter‧Clack report vindicated Mr Davies in the views he had expressed on seeing photographs of the underpinning wall on 7 August 2014, see paragraph 18 above.

21. While the parties were awaiting the Carter‧Clack report there was correspondence between the party wall surveyors in connection with the resulting delay and its implications, Mr Acres resuming his role as the adjoining owner's surveyor under the No.5 award alongside Mr Williams continuing his role as the building owner's surveyor under the No.6 award. Plainly any delay to the works at No.6 was a serious matter, (although the extent to which works other than basement construction works needed to be delayed because of the state of the underpinning is an investigation for another occasion), and it is understandable that the First Respondent contributed to this correspondence. Less understandable however is the contribution of Mr O'Connor who wrote in very forceful terms directly to the Appellant on 29 September 2014:

> "I am writing to you directly because I can only assume that you have not been made fully aware of your responsibilities in connection with your defective underpinning of Party Walls at 5 Earls Court Gardens
> …
> You have entered into a Legally Binding agreement to modify the Party Wall at your home. You are in breach of that agreement and the personal undertakings that you gave
>
> The workmanship is of an appalling standard – this was acknowledged by your Engineer Carter Clack during a site visit.
>
> The materials used are sub-standard and do not comply with your legally binding agreement – this had been proved via independent laboratory testing
>
> In constructing your basement using sub-standard and defective concrete – you exposed the owners and families of 4 and 6 Earls Court Gardens to danger of significant harm.
>
> Quite simply the manner in which you have constructed your Basement left the entire building in danger of collapse
>
> Perhaps the most astonishing matter is that you have so far failed to do anything to engage with either of our Clients with a view to rectification
>
> Your surveyor has sought to avoid all responsibility and has failed to come forward with any plan to remedy the situation
>
> In view of your total lack of cooperation we have strongly recommended to our Clients that they instruct Lawyers with a view to protecting their respective interests. So far as we can see you have left our Clients with no alternative option."

The facts do not begin to justify the language used by Mr O'Connor.

22. Mr Davies, in an email sent on 6 October 2014, notified both Mr Acres and Mr Williams that Mr Tim Smith of Carter‧Clack had reported and communicated the substance of his conclusion that the wall was adequate subject to some works to increase its durability, in

respect of which a design scheme had been prepared. Mr Davies did not send a copy of the Carter·Clack report, noting that Mr Williams had stated back on 1 August 2014 that the Respondents were obtaining a report on the remedial works required. Mr Davies suggested that the two reports be exchanged simultaneously. Mr Davies did however take up the question of the cost of the works with Oliver Morgan, the Appellant's architect. Mr Morgan arranged for Mark Steeds of Sheer Projects Limited ('who carried out a similar excavation project for clients in Belgravia') to carry out a deskbound exercise, and was given an approximate cost of £7,000 to £8,000 on 20 October 2014.

23. Subsequent communication between surveyors over the next two weeks did nothing to progress matters. On 22 October 2014 Mr Williams informed Mr Davies that he had been asked to take over from Mr Acres, and asked to see the Carter·Clack report. Mr Davies stuck to his suggestion that each side's reports should be exchanged simultaneously, and a meeting was agreed for exchange and review on 29 October 2014. This date which was postponed to 4 November 2014 at Mr Williams' request, when Mr Davies handed over a copy of the Carter·Clack report and, to his surprise, received 'yet another copy' of the Sandberg test results in exchange. Mr Davies was entitled to be surprised. He had been told that a report was being prepared on behalf of the Respondents in respect of the remedial works required, and it had been suggested that he might wish to wait for this report to be submitted. Three months later he was merely given the test results which had already been circulated and which by no stretch of the imagination could be described as a 'report in respect of the remedial works that will be required'.

24. Mr Williams raised ten matters of concern on the Carter·Clack report in a letter dated 18 November (sent in an email dated 19 November 2014), in which he also rejected the suggestion from Penn Construction that they return to remove any overspill which might be trespassing on No.6. Mr Davies raised these concerns with Mr Smith of Carter·Clack, and then responded to Mr Williams on 1 December 2014 dealing with each of the matters raised and indicating that it would now be possible to move on to carry out the remedial works scheme proposed by Mr Smith if these works had not already been carried out. Mr Williams remained unconvinced, and on 16 December 2014 raised the possibility that the concrete might be defective on the No.5 side and asked whether the surveyors should be looking to expose the underpinning works on that side. This email made no positive suggestions and was roundly criticised by Mr Davies in his response dated 29 December 2014:

> "3. You express repeated but vague "concerns". You say you are "not entirely convinced by the assurances" (of Tim Smith, Consulting Engineer). You postulate circumstances which "might be the case". You also use the term "we" but I am not sure who you refer to apart from yourself or perhaps you and the owners of No.6. Your style is collegiate, however, I am left unsure as to what you are trying to say, what you are proposing or what you expect to happen next, if anything, and almost everything I have said previously still seems to apply.
>
> 4. A well qualified and highly experienced Consulting Engineer, who I believe can also be considered professionally competent and independent and who also has the advantage of more familiarity than anyone with the intended design, because he did them himself, and the general circumstances and situation, has inspected everything that is open for inspection, has reviewed the laboratory analysis of samples selected by the owners at

No.6, has done structural calculations to ascertain the functional requirements of the now non-retaining wall structure and has reported with constructive proposals for building work to provide No.6 with what they apparently desire.

5. The owners at No.6 did say on 1/8/14 that they were obtaining their own report "in respect of the remedial works that will be required" but this has never been disclosed to me or anyone on No.5's side. I suspect that, in fact, the owners at No.6 may simply be relying on casual information from the contractors they have had on site since at least 1/8/14, Cranbrook.

6. In the circumstances, I still have no idea what works have been or are being carried out inside No.6, but I have passed on to you the reports of vibration and the sound of drilling received from the occupiers at No.5. You and I inspected No.5 on 13/10/14 to update the Schedule of Condition at No.5 under our joint Award relating to works at No.6 and I am still waiting for you to send me a copy of your draft and record photographs. Please now do so.

7. I look forward to hearing from you when you have reviewed matters, perhaps obtained some factual information about work in progress at No.6 and possibly have some instructions from those who appoint you or suggestions as to what you and I might usefully do next, if anything.

With kind regards and my best wishes for the New Year"

25. There was then no apparent movement forward to resolving the undoubted problem posed by the state of the underpinning wall exposed back in July 2014 until, on 30 January 2015, Mr Williams informed Mr Davies that he had asked Cranbrook to provide a quotation for 'the remedial work as indicated on the Carter Clack report as a starting point'.

26. On 11 February 2015, Price & Myers, engineers instructed on behalf of the Respondents, inspected the party wall and in a report dated February 2015 advised that once the Carter Clack remedial proposals had been completed the reinforced concrete underpins should perform satisfactorily.

27. On 1 April 2015 Cranbrook provided a quotation for the remedial works "based upon the specification and detailed design prepared by Carter Clack" in the sum of £148,882.32 plus vat. The quotation came by way of a letter accompanied by two sheets of priced sub-headings of works, with no indication as to how the prices given were arrived at. No quotations from other contractors were sought by the Respondents.

28. On 13 April 2015 Mr Williams informed Mr Davies that he had received confirmation that the Carter·Clack remedial scheme was an appropriate way of stabilising and repairing the defective underpinning, although without explaining that the Respondents had obtained a report to this effect from Price & Myers, and added that he had received costings for the work in the sum of £148,882.32 plus vat. Over five months had passed since the meeting on 4 November 2014 when Mr Davies had handed over the Carter·Clack report expecting to receive an engineer's report in exchange. Mr Williams suggested that the two surveyors 'should now formalise the compensation for the damage by way of additional award'. The

following day Mr Davies asked for a detailed breakdown of the quoted figure, in response to which Mr Williams sent him a copy of the two-page breakdown which accompanied Cranbrook's letter of 1 April 2015. Mr Davies was not impressed. Describing the information given as 'plainly only a summary' Mr Davies asked Mr Williams to provide the detailed costings behind the quotation. Mr Williams demurred, but Mr Davies repeated his request (on 20 April 2015) suggesting that Cranbrook must have prepared the summary they had provided from supporting documents and must have supporting calculations from which they generated the summary; 'could you please procure that the full supporting information is now provided so that you and I can see how each item has been arrived at'.

29. Mr Williams would not (or could not) play ball. On 23 April 2015 he responded to Mr Davies stating that he was uncertain what additional information he could need, and ended his email with the comment "unless you can convince me that what has been submitted is not wholly acceptable, and I don't think you can, I would suggest that we now agree an award for compensation using the figures I have submitted".

30. The response from Mr Davies on 27 April 2015 shows his customary attention to detail. After two introductory paragraphs where he takes Mr Williams to task for not having replied effectively to Mr Davies' two earlier emails and points out that the pricing information came from Cranbrook with whom neither he nor Mr Williams had any relationship, he continued:

> "3. The owners at No.6 do though have a relationship with [Cranbrook] although the full details are not known to me except that they are, apparently, in the middle of carrying out works at No.6 of an extensive kind largely unrelated to the works which you and I are discussing. I also respectfully suggest that, in your position, you do need to be mindful of the interests of your appointing owners vis a vis Cranbrook Basements, who do not appear to be under independent or professional design or construction supervision or cost control.
>
> 4. Referring again to the two page breakdown which the owners of No.6 have provided to you and you passed on to me on 15/4/15 and, while everything I have said previously still applies, I think, on reflection, you will find it obvious that almost every item in that breakdown derives from its own breakdown which will include materials, man-hours at varying rates, hired equipment invoices etc. These need to be detailed for you and me to seriously consider this submission from the owners of No.6. I also note three items exceeding £15,000 namely numbers 41, 60 and 61 for which no explanation has been given other than two to six word descriptions. In my view, your appointing owners need to provide you and me with more details of such items in particular
>
> I hope this assists and look forward to hearing from you when your appointing owners are able to assist us in making some progress".

31. Mr Williams was not prepared to take the question of a detailed breakdown further. He plainly wished to proceed to make an award based on Cranbrook's figures without any investigation by the party wall surveyors into how these figures were arrived at. In his reply to Mr Davies on 29 April 2015 Mr Williams expressed the view that they would not reach agreement (ie agreement on the proper figure for the remedial works, although he does not state this expressly) and that the matter should be referred to the third surveyor.

32. Following an exchange of emails in which Mr Davies pointed out that the third surveyor in respect of any award would be the third surveyor for the No.5 works not the third surveyor for the No.6 works, Mr Davies, on 5 May 2015, returned to his objections:

> "2. I fear that your mistake and information [ie regarding the identity of the third surveyor] illustrate a possible lack of motivation on your part to apply the necessary attention or to engage effectively to understand or deal with matters of detail in this case, which may be a concern to both owners. In your email of 29/4/15 you jump to several other conclusions, which save you having to do work, but do not advance the substantive matters.
>
> 3. I therefore repeat my request of 27/4/15 for supply of the better information which must be in the hands of the owners at No.6 or, if not, in the hands of the contractors under their control. If the information remains in the hands of their contractors, I suggest that the owners at No.6 need to secure it in their own interests as well as to enable you and I to proceed effectively.
>
> 4. As to your comment that you "feel now that we must refer the matter to the Third Surveyor …" I am bound to say that you speak only for yourself when you say "we". I suggest that the first question a Third Surveyor would put to you is the question of why you have not provided to me the information requested which the Third Surveyor, undoubtedly, would then himself seek from you in any case. You, I and the Third Surveyor are a quasi-judicial tribunal and we, individually and collectively, cannot function effectively without proper disclosure. (See note on Gyle-Thompson v Wall Street attached)."

33. At this stage no decision had been taken by the Respondents to proceed with the works on the basis of Cranbrook's quotation, or on any other basis. The First Respondent met Mr O'Connor on site on 7 May 2015 to view the works to the house, which were continuing, and it is evident that over the next week or so there was discussion with regard to the commencement of the remedial works, which involved the First Respondent, Mr O'Connor and Mr Williams. However, the emails passing between them suggest that the concern was rather more who should pay for the works than the cost to whoever did pay. Mr O'Connor did not start work "in view of the magnitude of the sums involved" but he did stress that it was urgent that the work was carried out because it was holding up the refurbishment of the property. The villain of the piece from the Respondent's perspective was Mr Davies. It may be that Mr Williams did not pass on Mr Davies' concerns as to the cost of the works and the need for a detailed breakdown of these costs, and that because Mr Williams had not done so and because Mr Davies, as a stickler for propriety, did not take it upon himself to contact either Mr O'Connor or the First Respondent to press for the information he was after, it was never made clear to the Respondents what it was that was holding up a further award. However, I express no concluded view on this point. It is equally, if not more, likely that the Respondents were kept fully informed of the email exchanges with Mr Davies.

34. On 11 May 2015 Mr Williams informed the First Respondent that he had a call outstanding to the third surveyor and that he was hopeful for a response the following day, but no referral to the third surveyor for an award appears to have materialised.

35. By email sent on 19 May 2015 Mr O'Connor provided the First Respondent with a summary of the current financial situation concerning the refurbishment of No.6. Mr O'Connor also suggested that it may be some time before matters were resolved with the owner of No.5 regarding the defective underpinning, "despite their agreement that the work is not fit for purpose. You are faced with a difficult decision – namely whether to press ahead with the remedial works to the underpinning (and seek to recover the costs) or to wait patiently many months for the adjoining owner to agree to pay for the works". Mr O'Connor then proceeds to stress the effect of delay on the works and suggests that the house is not structurally stable because it is still propped up, a suggestion that was not sustainable in the light of the opinion of Carter·Clack, endorsed as it was (effectively if not expressly) by Price & Myers, opinions of which Mr O'Connor was surely perfectly well aware.

36. It was against this background that the First Respondent emailed Mr O'Connor on 19 May 2015 to ask how they might force the agenda ("surely there is a legal basis for getting them to the table or getting a judge to determine quickly that they are responsible for the remediation works" – this incidentally from a solicitor to a building contractor) a query to which Mr O'Connor gave no substantive reply. On 20 May 2015 however Mr O'Connor asked "in view of all the circumstances" for confirmation from the Respondents that Cranbrook had authority to proceed with the remedial works, and in reply was told to 'crack on asap'.

37. It is very understandable that the Respondents wished to proceed with the works. They had been living in temporary accommodation since autumn 2013, and they wanted their house finished, something which they were being told might be delayed for some considerable time as a consequence of intransigence on the part of Mr Davies. At all events Cranbrook appear to have commenced the remedial works straightaway. There were complaints of very loud noise and a lot of vibration from No.6 the following day, 21 May 2015.

38. Although Mr Williams had done nothing to assist Mr Davies in his attempts to obtain the information necessary to assess the reasonableness or otherwise of the Cranbrook quote, and might (possibly) have failed to make clear to the Respondents or Mr O'Connor the real nature of Mr Davies' concerns, he did himself appreciate the true position. On 27 May 2015, a week after Cranbrook had commenced work, Mr Williams emailed Mr Davies suggesting (correctly) that they were in agreement over the extent of the remedial works, noting that they were likely to differ as to the level of damages to be claimed, that they disagreed as to whether Cranbrook's breakdown of costs was sufficiently detailed, and suggesting that they prepare a further award based on the Carter·Clack schedule of works with a reference of the question of cost to the third surveyor. Additionally, Mr Williams noted that Mr Davies had not expressly indicated that he considered the Cranbrook estimate to be excessive.

39. Since 21 May 2015 the residents of No.5 had been subjected to what they considered an excessive level of noise and vibration, together with cracking to floors and walls at No.5 a matter which Mr Davies took up with Mr Williams. Such matters are outside the scope of the present appeal. In an email of 8 June 2015 Mr Davies did however point out to Mr Williams his view of Cranbrook's status as contractors:

> "4. You are aware that they seem to be design and build contractors operating without professional oversight or cost control and you personally may be the only independent professional standing between them and the owners of No.6 or in the position to give informed, independent and impartial advice to your appointing owners. I trust you will bear this in mind because it is the owners of No.6 who are primarily and immediately responsible to the owners of No.5 for the actions and inactions of the contractors they have allowed onto their premises."

40. Mr Davies replied to Mr Williams' email of 27 May on 9 June 2015. As to his position as to the Cranbrook estimate Mr Davies makes his view very clear:

> "The Owners of No.6, through the offices of Cranbrook Basements, first issued to me on 13/4/15 a single unexplained figure of £148,882.32 plus VAT. At the time of writing, you have still not provided the further breakdowns of this sum requested and I have so far declined to comment on it accordingly. Having said this and because you pointedly comment on 27.5.15 that I have "… not indicated that you consider the estimate provided by the contractor on site as being excessive…", I do therefore, here, note very clearly that my impression of the Cranbrook figures are that they are grossly and extremely excessive and probably bear no relationship to the true costs of carrying out the actual work properly required and anticipated in the report by Carter Clack Consulting Engineers of 3/10/14".

Mr Davies then repeats a concern already expressed that Mr Williams copied Cranbrook into email exchanges between the party wall surveyors and reminded Mr Williams of his duty to his appointing owners, and continues:

> "I have noted in the past that you have copied emails to Cranbrook Basements Limited, who work for the Building Owners at No.6. I have also expressed concern that you disclose material to them so extensively. You are appointed by their employers and the interests of Cranbrook and the owners of No.6 will not align exactly at all times. You will appreciate the risks to your clients where their contractor has responsibility for design, construction, supervision and costs control working for a lay employer with, apparently, no independent consultants involved, apart from you. This, of course, increases your responsibility to advise and warn those for whom you act of various risks. I suggest that you need to be concerned about the possibility that the owners of No.6 are not being best served by their own contractors and that the information provided from their contractors may lack credibility. In addition you need to remember your own duties under the Act and the nature of the work of our Tribunal which is quasi-judicial in nature. I attach again a copy of a case note from Gyle-Thompson v Wall Street (Properties) Ltd. as Brightman J. usefully explained what is meant by "quasi-judicial".
>
> The point is that you and I need to exercise judicial discretion and apply judicial standards to our deliberations. I now also attach for your reference a previous estimate the same owners at No.6 provided from their same contractors relating to the historic underpinning costs which Cranbrook Basements priced at £28,968.48 plus vat for the entire construction of the whole underpinning between Nos. 5 & 6 (the 100% cost)."

Mr Williams may not have appreciated being lectured in this way, but it would be difficult for him to suggest that the inherent criticism was misplaced. Neither could Mr Williams have failed to appreciate the disparity between Cranbrook's price of £28,968.48 for the construction of the entire underpinning wall and its price of £148,882.32 for the remedial

works scheme to that wall. Stressing the fact that as party wall surveyors they were a quasi-judicial tribunal was undoubtedly merited. Mr Davies continued by suggesting that

> "… what our Tribunal now needs to do is to obtain independent costs from other contractors to provide a genuine market price for the actually relevant works. Please therefore confirm that access will be made available for other contractors to inspect and price this work".

This suggestion was perfectly apt, although he could equally properly have suggested obtaining an opinion as to a genuine market price from a quantity surveyor with experience of basement work in this area of London. Mr Davies informed Mr Williams that the owner of No.5 had already received an indicative quote (from Sheer Projects Ltd) of £7,000 to £8,000 plus vat on a desk based analysis of photographs drawings and the Carter·Clack report. Until the work of obtaining independent costings had been done Mr Davies was not willing to proceed to make an award. Mr Davies ends his email with some forceful comment on the cost of the involvement of the third surveyor, and a complaint that Mr Williams is seeking to avoid his 'primary duty to perform simple tasks and instead try to pass the burden on to the Third Surveyor and me to perform complex tasks'.

41. Mr Williams' response to this email was to seek a costing of the work from Barrie Tankel Associates, without, it seems, informing Mr Davies that he was doing so. Mr Williams was awaiting this costing when he emailed the First Respondent to update him on progress on 29 June and again on 13 July 2015. It is not clear whether Barrie Tankel Associates ever did provide a costing of the work. If they did, their costing was not drawn to Mr Davies' attention either before the matter was referred to the third surveyor the following year or at any time, and it is not in the trial bundle. It would have been instructive to learn of their opinion.

42. In the event it appears that no substantive step was taken to assess a proper quantum of the work the subject of the Carter·Clack report before, on 15 January 2016, Mr Williams presented a claim by the Respondents against the Appellant in the sum of £507,931.71. This claim included the Carter·Clack remedial works costs carried out by Cranbrook, now increased to £151,904.54 (from £148,882.32) plus vat and added claims for Cranbrook general delay costs, additional rental costs, a loss of amenity claim, additional borrowing costs and professional costs.

43. Mr Davies requested supporting documentation for these claims, and some was provided, but it would have been abundantly plain to Mr Williams that there would be no ready agreement to the new claims. Accordingly, on 7 July 2016, Mr Williams referred the matter of an appropriate award for the various claims made by the Respondents on 15 January 2016 to the third surveyor Mr David Toogood.

The Third Surveyor's award

44. Mr Toogood made his award on 22 February 2017, this correcting his award of 14 February 2017 where he got the parties back to front, an understandable mistake where both parties had at different times been building owners and adjoining owners. By February 2017 Mr

Toogood had been asked to restrict his award to the sole issue of the remedial work, ie the Carter·Clack remedial scheme.

45. The only indication as to the material before Mr Toogood in making his award is in the final recital:

> "AND having heard the views of both surveyors, examined supporting correspondence and papers and having inspected the properties."

It is possible, although unlikely, that the papers before the Third Surveyor included material not in the trial bundle. It is, however, apparent that Mr Toogood neither obtained quotations from other contractors nor sought the opinion of a quantity surveyor. What, if any, efforts Mr Toogood made to analyse the estimate provided by Cranbrook on 1 April 2015 is uncertain. The wording of the award:

> "THAT the building owner shall pay the adjoining owner the sum of £148,882.32 plus VAT being the sum charged by Cranbrook Basements for remedial work"

is not altogether encouraging.

46. Mr Toogood also determined that the Appellant should pay his fees as third surveyor in the sum of £2,127.60 together with the fees of Mr Williams, once agreed or determined.

The Second Award in February 2017

47. Mr Howard Smith of Counsel, who appeared for the Respondents, acknowledges that it is arguable that Mr Toogood was not able to correct the mistake in the 14 February 2017 Award by issuing the 22 February 2017 Award. However, the mistake is plainly a slip, and the Appellant has very sensibly agreed that the 14 February 2017 award, the award against which he appealed, should have directed that the payments awarded should be made by the Appellant to the Respondent. To that extent therefore the Court will Order that the Award of 14 February 2017 be modified as appropriate.

The present appeal

48. The Appellant issued this appeal on 8 March 2017, it being accepted that the appeal was brought within the 14 day period from service of the Award allowed by section 10(17) of the 1996 Act. The Appellant raised 2 grounds of appeal:

    (1) The Respondents are not entitled to any compensation from the Appellant since any loss was caused by the Appellant's independent contractors for whom the Appellant is not liable.
    (2) The Respondents are not entitled to £148,882.32 + vat because they failed to mitigate their loss.

49. The first ground of appeal, that the Appellant may not be held responsible for the acts of his builder by reason of him being an independent contractor, is misconceived. This is because

the claim made by the adjoining owner is made under section 7(2) of the 1996 Act, which provides that "the building owner shall compensate any adjoining owner … for any loss or damage which may result … by reason of any work executed in pursuance of this Act". The statutory remedy is against the building owner, who is liable for any loss or damage which the adjoining owner can establish resulted by reason of any work executed in pursuance of the Act. To the extent that the common law protects a person from liability for the actions of his independent contractor, protection incidentally which is not provided in all circumstances, there is no such protection in respect of the statutory claim for compensation.

50. Mr Nicholas Isaac, who appears for the Appellant, and who was not responsible for drafting the grounds of appeal, has not pursued this first ground.

51. This appeal has been pursued under the second ground of appeal, 'Failure to Mitigate Loss'. In support of this ground five matters are raised, three of which are more concerned with questions of delay and disruption than with the issue immediately before the court, namely the proper sum to be awarded for any loss or damage arising from the admittedly defective nature of the underpinning wall constructed by the Appellant's contractors in the course of the basement construction at No.5. The remaining matters specifically raised in support of Ground 2 are the Respondent's failure to accept the offer of Penn Construction to attend site and remove any overspill without charge, and the failure of the Respondents to obtain quotations from contractors other than Cranbrook for the implementation of the Carter·Clack remedial scheme.

52. The first of these matters, the failure to have Penn Construction back on site, takes the Appellant nowhere. Putting aside the reasonableness or otherwise of allowing contractors who have already performed poorly back on site to carry out remedial works, the Penn Construction offer was restricted to overspill; it did not cover the implementation of the Carter·Clack remedial scheme. The second matter goes to the heart of the argument. Is the sum charged by Cranbrook for carrying out the Carter·Clack remedial scheme a proper assessment of the compensation due to the Respondents under s.7(2) of the 1996 Act?

53. In his supplemental skeleton argument Mr Isaac for the Appellant contends that common law principles apply to the calculation of compensation under s.7(2) loss, for which contention he relies on the decision of the Deputy Judge in *Lea Valley Developments v Derbyshire* [2017] EWHC 1353, [2017] 4 WLR 120. Mr Smith doubts that the Deputy Judge's approach is strictly the correct way of putting the matter, and I agree with him, but this is of no consequence. Plainly in assessing statutory compensation the court should have regard to common law principles as they may apply to individual claims for compensation. These principles include those relating to questions of mitigation.

54. As the author of McGregor on Damages states (19th edn at 9-002) while the term 'mitigation' is used to cover disparate concepts, the principal meaning (and he suggests the only proper use of the term mitigation) comprises three different, but interrelated rules. The three rules are these

    (1) The claimant must take all reasonable steps to mitigate the loss consequent on the defendant's wrong and cannot recover damages for any such loss which he could thus

have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss.

(2) Where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss.

(3) Where the claimant does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful the defendant is entitled to the benefit accruing from the claimant's action and is liable only for the loss as lessened. Put shortly, the claimant cannot recover for avoided loss.

55. The primary criticism of the Respondents in this appeal is that they did not investigate the reasonableness of Cranbrook's quote and seek other quotes but simply authorised Cranbrook to carry out the work. It follows from the second of the three rules quoted that had the Respondents incurred loss and expense in obtaining additional quotations for the works, they would have been entitled to recover that loss and expense even if the additional quotes were the same as or higher than Cranbrook's quote.

56. But on the facts of this appeal such considerations do not arise. We are here concerned with the first rule, the 'no recovery for avoidable loss' rule. The classic statement of this rule is that of Viscount Haldane LC in the case of *British Westinghouse Co v Underground Railway* [1912] AC 673, at 689, where he said:

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

That this rule applies equally to tort was made plain in *The Liverpool (No.2)* [1963] P.64 at 77 Lord Merriman P said, "The classic statement [of Lord Haldane], although made in an action arising out of a breach of contract, applies equally, mutatis mutandis, to tort". It is important to note that the issue is not whether work could have been done more cheaply or loss avoided, but whether the claimant has acted reasonably in all the circumstances, *Banco de Portugal v Waterlow* [1932] AC 506. It is a question of fact whether, in all the circumstances, a loss was avoidable by a Claimant. The onus of establishing that a loss was avoidable rests with the defendant, in the present case the Appellant.

57. The effect of the rule is frequently described as a *duty* to mitigate, but there is no duty imposed by law. As Sir John Donaldson MR stated in *The Solholt* [1983] 1 Lloyds Rep. 605 CA:

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable

> for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty."

Put very simply a claimant who loses a Mondeo through the actions of a defendant may decide to replace it with a Rolls-Royce, but he will only recover the cost of a Mondeo.

Factual consideration

58. Mr Smith submits that the loss in relation to the direct cost of remedial work was £148,882.32 + vat because that is the sum which Respondents, acting reasonably, paid to Cranbrook to remedy the defective work in accordance with the Carter‧Clack scheme, a scheme which the Respondents' own engineers endorsed. In the event the Respondents state that they paid £151,904.54 + vat, but do not claim the extra £3,000 odd. The manner in which the Respondents paid Cranbrook, namely against invoices specifying the work at No.6 to which they relate only in the most general of terms, leaves it uncertain when this sum was paid, and thus the question of payment for this particular work open to doubt, but for the purposes of this appeal I accept that the Respondents have paid Cranbrook for its remedial scheme work.

59. The critical part of Mr Smith's submission is the contention that the Respondents were acting reasonably in paying this sum. As Mr Smith acknowledges, a claimant cannot recover for losses which he could have avoided by taking reasonable steps.

60. As to the alleged over-payment, Mr Smith submits that the Respondents acted reasonably. They had been entitled to assume that the Appellant's contractors had done their job properly and had constructed the basement wall in accordance with the party wall award made only the previous year. The Respondents had, with care, selected Cranbrook as their preferred contractor for their extensive development. By the time the problem arose they were in the middle of a very substantial development being carried out by Cranbrook. Accordingly, it was reasonable to instruct Cranbrook to carry out the necessary remedial works and so far as the Respondents were aware the price quoted had been calculated at Cranbrook's usual rates and was reasonable.

61. Cranbrook's quotation for the underpin remedial works was sent to Mr Williams as an attachment to an email dated 1 April 2015; "Please see attached the build up to costs associated with Underpin Remediation in the sum of £148,882 plus Vat". It is unnecessary to set out this document in full, for it appears, item by item, in the discussion below on the analysis of this document undertaken by the experts in this appeal. However I set out the first five of the 62 items, including two items for totals, to give a flavour of its contents.

1.0	Concrete Sampling & Testing – including Sandberg Testing and analysis		£8,529
2.0	Survey for Vertical alignment – produce results in plan form for distribution		£1,647
3.0	Review of Repair Works scheme	8 hours at £95	£760
4.0	Risk Assessment	8 hours at £95	£760
5.0	Method Statement	16 hours at £95	£1,520

62. Mr Kevin O'Connor has been the managing director of Cranbrook since 1 March 1995. He describes Cranbrook in his witness statement as "a company which specialises in the

construction of basements and we provide a complete package which involves full design and construction. We have broad in-house expertise, including architectural and engineering staff, tradesmen and labourers and extensive plant and equipment". Mr O'Connor rightly stresses that basement work is a specialist field and can present pitfalls and dangers if not properly carried out or supervised.

63. Mr O'Connor states that he was closely involved in all key matters in connection with Cranbrook's work at No.6, and that cannot be doubted. Mr O'Connor did not recommend Mr Acres as party wall surveyor, his appointment followed a recommendation from the Respondents' architect, but the email correspondence shows that Mr O'Connor and Mr Acres (and subsequently Mr Williams) had a very close relationship. Mr O'Connor soon took against Mr Davies. Mr O'Connor formed the view that Mr Davies was not cooperating as had Mr Acres when preparing an award for the works at No.5, and complains in his statement that

> "The unreasonable delays that arose because of this lack of reciprocal cooperation led to significant disruption to the usual process of basement construction…. It was clear in my view that Mr Davies was frustrating the process and issuing unnecessary and lengthy objections for little purpose".

Only one example is given of these 'unnecessary and lengthy objections', namely 'requesting documents from Mr Acres that I had already provided' and it is by no means clear from the documents in the bundle that this is a valid complaint. This adverse view of Mr Davies continued in the Respondents' camp throughout the relevant period. Mr Davies was the object of some vilification in the inter-Respondent camp correspondence, and while it is impossible to identify any particular consequence as a result Mr O'Connor's view of Mr Davies, and by extension the Appellant as Mr Davies' appointing owner, the approach of the Respondents' camp to any matter concerning Mr Davies and the remedial works could not help but be coloured.

64. Mr O'Connor describes the costing provided by Cranbrook in the remedial works schedule as a fair reflection of the works required to remedy the defective underpinning. Mr O'Connor states that he regarded the Schedule as 'competitive'. He states that the individual items were 'generally' priced on the basis of the estimated time required to complete each task at the contract rate for the relevant operative, plus an additional sum for the cost of any materials, delivery costs etc. Mr O'Connor asserts that Cranbrook would have been happy to charge on a time-spent and materials-supplied basis but did not do so because the Respondents "wanted to know in advance what liability they faced. Quite understandably, [the Respondents] did not want an open-ended commitment and therefore needed a fixed price". This is a somewhat surprising comment given that from the start Mr O'Connor had no doubts that liability for the cost of the works would fall on the Appellant, and made his views in this respect perfectly clear both before and after preparation of the schedule. Indeed, in his statement Mr O'Connor says that he had in mind that the figure might be challenged at some point by the Appellant.

65. The fact that a contractor is working to a fixed price does not preclude him keeping records of the time spent on the job. Many, I would suggest most, contractors would have such records in any event as part of their internal management and payment procedures. But

plainly there is no contractual need for time sheets and other time-spent records and Cranbrook apparently kept none. Mr O'Connor says at paragraph 45 of his statement:

> "45. As a result of the fact that the contract was based on a fixed price for the job rather than on a time-spent basis, Cranbrook has not kept time records of the time spent in relation to items in the Schedule".

66. The absence of any records of any sort from Cranbrook has made an investigation into the sum which would represent a reasonable cost for carrying out the remedial work comprised in the Carter·Clack scheme by reference to Cranbrook's work impossible.

67. Expert evidence from quantity surveyors was adduced by both parties to the appeal. Mr Justin Sullivan BSc FRICS of Adair Limited was instructed by the Appellant. Mr Tony Hunter MRICS MCIOB, a partner in Burke Hunter Adams LLP, was instructed by the Respondents. Both are experienced quantity surveyors who engaged well with each other when giving evidence concurrently ('hot tubbing'). Both experts had been asked to consider the Cranbrook Schedule of remedial works and concurrent evidence was given on those items where, in their joint expert report, the experts had not been able to reach agreement. This exercise was the more useful because the experts had approached their commentary on the Cranbrook Schedule from differing viewpoints. Mr Sullivan based his assessment on the hourly rates provided for in the contract Cranbrook had with the Respondents for the overall works. Mr Hunter approached the assessment on the basis of rates which he had obtained from specialist basement contractors, rates Mr Hunter considered to be reasonable market rates.

68. Mr Hunter restricted his written expert evidence to the Cranbrook Schedule. Mr Sullivan was invited to report a little more widely and it is helpful at this point to identify matters touched on by Mr Sullivan outside his analysis of the Cranbrook Schedule. Mr Sullivan was perfectly content to endorse the Carter·Clack scheme of remedial works. He was firmly of the view that the contractor on site was the appropriate contractor to engage for the remedial works. This would avoid any risk of difficulties arising through, as he put it, 'split liability' for defects. He would not expect the employer to obtain quotes from other contractors. There was a contract in place, with rates for additional works, and Mr Sullivan would expect the existing contractor to do the work at those rates. Obtaining other quotations would be likely to take time, cause delay, which in turn would result in additional costs. Of course, Mr Sullivan was expecting the contractor on site to charge appropriately and in accordance with the rates agreed in the existing contract with the employers. On his analysis Mr Sullivan considered that using the Cranbrook additional-work rates, and omitting those items included by Cranbrook which were outside the scheme prepared by Carter·Clack, the cost of the remedial works should have been £42,504. In this connection Mr Sullivan allowed for temporary works and preliminary items which he would not necessarily expect to see included within an engineer's design, but which would be included in a contractor's quotation.

69. Consistent with this approach Mr Sullivan expressed the view that he would expect the contractor on site to create and keep records of the work it carried out. "I would expect to see daily records of the operatives on site, a record of what they are doing and photographs of the progress of the work. I would expect Cranbrook to have kept a record of wages,

invoices for materials, subcontractors and suppliers. I would expect to see daywork sheets recording the activities of the operatives." Mr Sullivan had visited the site and noted the working space and level of access. He expressed the view that four weeks would be a reasonable time within which to complete the works, bearing in mind that Cranbrook were on site already and would have been able to start the remedial works immediately. Mr Sullivan reviewed the scope of the works and concluded that there were no materials with long lead-in periods which might impact on the length of time the work would take.

70. Further, Mr Sullivan doubted that the delay between the availability of the Carter‧Clack scheme in early November 2014 to the commencement of the work on 21 May 2015 had any significant impact on the cost. The labour rates remained the same. Any increase in the cost of materials would be negligible, but from among the preliminary items Mr Sullivan accepted that there may be additional costs for the hiring of props and scaffolding.

71. The Cranbrook Schedule was analysed by both experts and the differences in their evidence considered in the witness box. I will cover all the various items in the Cranbrook Schedule.

72. <u>1.00 Concrete Sampling & Testing – including Sandberg Testing and analysis £8,529</u>

Although not apparent from the Cranbrook Schedule this item was in fact made up of 13 separate items which are set out in a separate Cranbrook document headed 'Defective Underpinning 4 & 5 Earls Court Gardens – Concrete Core Sample Testing'. The experts had not seen this document before giving oral evidence, but they were able to consider it in the witness box. Of the 13 items the experts were in agreement on items 1 and 2 in allowing 3 hours for a risk assessment and 2 hours for a method statement, but lowered the rate from £95 to £70 per hour. Item 3, erection of access scaffolding to facilitate extraction of core samples was allowed at £664 at the expense of disallowing the removal of this scaffolding, item 4, at £412. Item 5, task lighting at £162 was disallowed. The modification of temporary works to facilitate access for extraction of core samples was reduced from £674 to £300. Items 7, 8 and 9, extraction of core samples, hire of sampling equipment, and delivery of samples to Sandberg were allowed at £720, £368 and £125, respectively. Item 10, temporary reinstatement of core sample holes at £1,224 was disallowed on the basis that it was unnecessary as remedial work was always going to be carried out, and that it was open to doubt (on the photographs) whether or not there had in fact been such reinstatement. The cost of the Sandberg laboratories report, item 11, at £2,505 was allowed in full. The 'architectural drafting' at £760, item 12, was reduced from £760 to £285. Incidentally the transcript records a comment from one of the experts as to the time his 13 year old would have taken to do the sketch in question, a comment which (as part of a private discussion between the experts) should not have been transcribed.

73. The final item, no.13, is the only item on which the experts were not agreed. A charge of £440 for 4 hours' work by a director to review the Sandberg Report and advise the client. The difference between the experts centred on a discussion as to whether a director's work would be chargeable separately or should form part of the company overhead. Whatever the proper resolution of that argument, I will not allow the figure into the calculation. The Sandberg Report is a perfectly straightforward record of the investigation undertaken by consulting engineers into 8 samples. It is, quite frankly, ridiculous that a Cranbrook director,

presumably Mr O'Connor, should spend 4 hours reviewing the report and advising the Respondents on its contents. The First Respondent is a highly intelligent and successful solicitor, perfectly capable of reading and understanding a report of this nature. And what and when was the advice? The Sandberg Report is dated 3 September 2014. It may have been emailed to Cranbrook on 3 September 2014, although there is no evidence of this, but on 4 September 2014 Mr O'Connor attached a copy of the report to an email to Mr Williams timed at 12:33. Part of this email is the comment:

> "Naturally we have advised our Client, Mr and Mrs McKeeve of the situation – bearing in mind that we cannot progress basement works until this matter is resolved. To date the completion of works on site has been delayed by 6 weeks – due directly to the problems associated with underpinning constructed by owners of 5 Earls Court Gardens"

This hardly suggests advice, and certainly not in any detail, on the contents of the Sandberg Report. Item one on the Cranbrook Schedule should therefore be priced at £5,317.

74. 2.00 Survey for Vertical alignment – produce results in plan form for distribution £1,647

The experts agreed this item at nil on the basis that a competent basement contractor would expect to carry out such a survey in any event. As Mr Sullivan pointed out it is unrealistic to expect to excavate existing underpinning and "find it to be like a mirror". In the event the survey carried out by Cranbrook had 54mm as the greatest out-of-alignment figure, which is not that much out with work of this nature. Mr Hunter explained that an alignment survey might be with plumb lines, straight edges or whatever was available on site, but that there are point clouds and other general kit that contractors have nowadays to undertake these exercises; "you can put a thing on the floor now and press a button and it'll do it for you".

75. 3.00 Review of Repair Works scheme proposed by Carter·Clack including site visit, 8 hours at £95 £760

Mr Hunter took the view that it was reasonable to charge for this review as a separate item, but allowed £552 not the £760 claimed. Mr Sullivan allowed nothing on the basis that such a review, and it is accepted that a review was required and took place, would be part of the overhead (item 61.00 rather 1.00 as on the Joint Schedule) and would to an extent be included in the charge for a risk assessment and method statement. As Mr Sullivan put it "We heard that there are 25 people in the office. That's his overhead. So, he's claiming that in his overhead and profit, so if they leave the office to go and do something their cost is being recovered already, so to then charge for it again, they're being paid twice."

76. I have a deal of sympathy with Mr Sullivan's approach. To charge, as Cranbrook seek to do, £22,056.64 for profit and overhead, on top of eight hours' work for a risk assessment and a further 16 hours' work for a method statement (even with a drawing) does seem excessive. However, looking ahead to the overhead and profit item, item 61.00, both experts reject the claim on the basis that 'OHP is included within rates above'. On that basis therefore there must be an allowance for work which is accepted as necessary and as having been done, otherwise there will be no rate in which OHP is included. Mr Hunter's £552 should therefore be allowed.

77. 4.00 Risk Assessment, 8 hours at £95, £760

The experts were agreed that a proper figure would be £250. Challenged on the basis that Mr O'Connor had said that there were particular risks involved in this work, Mr Hunter suggested that any particular sensitivity in connection with the work would have dealt with on the previous item, the review of the repair work required. Mr Sullivan put it more pithily: "We're not building the Gherkin here. It's drilling some holes, putting some rebar in, hanging the mesh and then rendering it… Carter‧Clack said the wall is fine, so I don't know why Mr O'Connor was getting so stressed about that." Mr Hunter pointed out that this was work an experienced underpinning basement contractor would have been very familiar with. I see no basis on which I might properly disagree with the experts' joint figure.

78. 5.00 Method Statement, 16 hours (with drawing time) at £95, £1,520

The experts were agreed that a proper figure was £190. Similar considerations apply in respect of this item as with the last, the risk assessment. I accept the experts' joint figure.

79. 6.00 Scaffolding to wall surface £2,500

The experts agreed £1,000 based on reasonable rates. Mr O'Connor had explained that there was a substantial labour element in the claim because the scaffold did not remain in situ but had to be dismantled and then re-erected for each section. The experts explained that they did not know how Cranbrook had proceeded, either putting up one scaffold to do the whole wall or doing the work in sections. Either way their figure of £1,000 was appropriate. Although it might be made to sound quite time-consuming the wall was about 3 metres high, and work to the first 1.5 metres would be done from the ground. Only one lift would then be required, and then, as Mr Hunter explained, there would be "a hop-up type arrangement so someone can get up and then work at the higher level, and that would be moved around by the operatives as they were doing the work". I accept the experts' joint figure.

80. 7.00 Scaffolding to light well £750

The experts agreed this item at nil, as the cost was included in the previous item. This was an item on which the experts had had private discussions with Mr O'Connor. Given their joint agreement and apparent understanding of what was involved in this item, nothing should therefore be included.

81. 8.00 Protection to surfaces and installed works £1,000

Mr Sullivan was prepared to agree Mr Hunter's figure of £500 after hearing Mr O'Connor's evidence that this item essentially concerned concrete that was in the process of curing. There would be a risk that damage might result to such concrete in the course of the remedial works. Mr Hunter proceeded on the basis that £500 would be ample for protection with a Corex product rather than using 12 mm marine ply which might justify the higher figure. There is no reason for the court to suppose that marine ply would be required, even supposing that it would not be possible to make temporary use of ply for protective purposes. £500 should be included.

82. 9.00 Highways suspension costs – skips £1,512

Mr Hunter allowed £736 to cover extra skips to take away the arisings from the scabbling and overage on the concrete, assuming 2 skips to cover the 40 sq metres of work. Mr Sullivan allowed nothing on the basis that there was always going to be work to the wall, something which Cranbrook accepted on the basis that they always had to scabble concrete, cut away nibs, or remove sacrificial formwork when exposing an existing underpinned wall. The wording of this item is deceptive because it was accepted by Mr O'Connor that in common with their usual practice the local authority would not allow a highway suspension. Accordingly, Cranbrook erected a separate platform on which to place skips and materials deliveries above the lower level platform constructed in the front garden. This item is therefore concerned with the cost of one or more additional skips to take away the additional arisings when preparing the wall over and above the arisings that a basement contractor could expect to encounter when exposing an existing underpinning wall.

83. Mr Sullivan pointed out that there was not a great deal of overspill, the problem was more one of undercutting. By reference to the Carter·Clack drawing an approximate measure of 3.2 cubic metres of cutting back to allow for, and that makes no allowance for what might be expected in any event. As 3.2 cubic metres represents half a skip there is no useful purpose attempting to assess what additional arisings Cranbrook had to cater for as a result of Penn Construction's work as opposed to what they would ordinarily encounter. Mr Hunter suggested £320 per skip. He also suggested that two skips would be required to take away other items of waste disposal, for example bits of reinforcing bar and bits of formwork. This seems to me excessive, and fails to make any allowance for the fact that the amount to be allowed covers additional material not the material actually removed. I will allow £320.

84. 10.00 Highways suspension costs – materials £1,512

11.00 Highways suspension costs – Welfare unit £1,512

12.00 Highways application preparing & submission costs, including 2 site visits, plan drawings and highway officer meeting as required £425

Neither expert made any allowance for these items. Neither should they. These items should never have appeared in the Remedial Schedule. In his witness statement Mr O'Connor explains that these charges were included "on the assumption that we would be able to suspend car-parking bays on the road so that skips could be accommodate within the bays and materials stored in the bays. In the event the local authority was unwilling to agree to the suspension of car-parking". Mr O'Connor must have known of the local authority's attitude well before he prepared the quotation on 1 April 2015. He had after all been on site since October/ November 2013. He had no business putting these items in the quotation. Mr O'Connor explains in his witness statement that Cranbrook erected platforms at garden level in front of the house, ie platforms on scaffolding over the front garden excavation, and materials were delivered to and stored on the platforms. He continues "The costs of these alternative arrangements were higher than the highway suspension costs charged at items 9-12, but Cranbrook absorbed the additional cost because it had agreed a fixed price

contract." This is disingenuous. Doubtless the cost of the platforms was higher than the highway suspension costs, but they were not erected solely for the purpose of the remedial works. Once the front garden had been excavated Cranbrook would have needed the platform(s); there would have been nowhere else to take deliveries or place skips. The platforms were erected, and doubtless used, for the job generally, as the experts explained in the course of their evidence.

85. 13.00 Static Welfare Unit – WC, washing, changing – 4 at £344, £1,376
14.00 Delivery and collection of welfare unit £150

The experts were in agreement that no charge should be allowed for these items. The experts pointed out the Remedial Schedule included a (healthy) item for preliminaries for which a breakdown has been provided. One of the items in the breakdown was welfare accommodation. Another reason for not allowing this item is that it is not justified on the evidence. In his witness statement Mr O'Connor states that an additional welfare unit was required because the number of operatives which Cranbrook had on site had increased on order to carry out the remedial scheme. But, as Mr Sullivan pointed out, it is also Cranbrook's case, for the delay and disruption claim, that Mr O'Connor was struggling to find work for his labour force to carry out while they were waiting for the basement extension to be completed. If that was indeed the case it is difficult to see how there would be a need for additional welfare accommodation. Alternatively, the remedial scheme works did indeed increase the overall labour force on site in which case this aspect of the delay claim may be doubted. The provision of an additional welfare unit would, of course, be a straightforward matter to substantiate by means of documentary evidence from the provider of the unit. No such evidence was provided to the expert quantity surveyors or to the court.

86. 15.00 Electricity generator hire – 10KVA diesel £660
16.00 Generator delivery and collection £100

Mr Hunter allowed £660 and £58 respectively. Mr Sullivan made no allowance. Under the terms of the Respondents' contract with Cranbrook the Respondents were to make available free of charge their 60-amp domestic supply for the works. Mr O'Connor's evidence was that he was concerned that there was a real risk that the domestic supply could not cope with the additional demands of the equipment used for the remedial works so he allowed for a generator. This is logical. However, Mr Sullivan's evidence was that "They had a conveyor belt, a compressor, site lighting, task lighting, site accommodation there, and we did a calculation last night that's 72 amps. So it wasn't enough. It was nothing to do with the remedial works, they needed a generator anyway …"

87. An additional complication considered in the course of the evidence was that the Respondents were proposing to bring in a 100-amp three phase supply in any event, and even if that had not been installed by the time of the remedial works it could have been. Mr O'Connor's concern that the domestic supply might not be able to cope, well placed it seems because there were blackouts on site prior to the remedial works, would have been better channelled into arranging the 100-amp three phase supply in time for the works than in charging for a generator.

88. From a forensic viewpoint the matter of concern is that the hire of a generator for the duration of the remedial works is something that could so easily be established by producing the documentation that such hire would inevitably have generated. It is all very well for Mr O'Connor to say blithely that Cranbrook did not need to keep records and documentation because they were on a fixed price contract. But such documentation would exist if hire charges had indeed been paid, and should be available somewhere in Cranbrook's records even if were not necessary to produce it to the Respondents. The hire charge documentation would be relevant to the calculation of Cranbrook's profit and loss accounts. Its absence at the hearing of the appeal must inevitably arouse suspicion. I will make no allowance under these heads.

89. 17.00 Water £25

    Mr O'Connor's evidence on this point is interesting. He explains that the remedial works necessitated very substantial water consumption, so he agreed with the First Respondent that it 'seemed appropriate' to pay him a nominal figure of £25 for the water used. In his witness statement Mr O'Connor says "This may appear somewhat circular, in that Cranbrook were charging [the Respondents] for the cost of water which Cranbrook was agreeing to pay them as providers of the water, but the intention was to include all the remedial costs within the Schedule."

90. The experts were in agreement that no charge should be allowed for this item and this is the appropriate position to adopt.

91. 18.00 Task lighting infrastructure £550
    19.00 Task power infrastructure £290

    Mr Hunter has allowed £100 for the lighting infrastructure and the full charge of £290 for the power infrastructure on the basis that some work to the existing wall would have been required within the original contract works. The allowance is for moving lighting (and presumably power) around the basement as the remedial works progressed. Mr Sullivan allowed nothing both because the item is included in the preliminaries and also because lighting and power would be required for the original works. There would presumably have been some additional requirement for infrastructure for the remedial works, as Mr Hunter suggests, but the claim on the remedial schedule is not for moving the lighting or power around; it is for "providing the lighting" and "suitable power infrastructure". Mr Sullivan's argument that these items are included in the preliminaries has some force.

92. Again, these are items which, if expense were in fact incurred, would be simply capable of corroboration by the production of the relevant documentation. None has been produced. Mr O'Connor could argue that he foresaw the need for such lighting and power infrastructure and so included it in his Schedule for a fixed price contract. In the event the infrastructure was not needed but the Respondents remained contractually liable to pay the sums charged. Such an argument is not attractive and, it may be noted, Mr O'Connor's evidence is that "Item 18 *is the cost of* providing the lighting" and, in respect of item 19 "this cost *was incurred* as a result of the remedial works" (emphasis added). In the absence of supporting documentation it is not appropriate to make an allowance for these items.

93. 20.00 Cut back projecting concrete £1,932

Mr Sullivan allowed nothing under this item because Cranbrook would have had to cut back concrete in any event. So they would, but Mr Hunter points out that Cranbrook would not have had to have cut back to the same degree and it falls to the experts to make an allowance for this work in the Carter·Clack method statement. Mr Hunter has allowed for 2 operatives for 2 days at £185 per day, plus £100 for concrete breakers plant plus 15% overheads and profit to arrive at his figure of £987. In the absence of any other assessment that is the figure to allow for the purpose of this exercise.

94. 21.00 Concrete Pull off tensile strength test £1,238

The experts have agreed the figure of £569 as the appropriate figure for this item.

95. 22.00 Water jet cleaning to exposed concrete £684

The experts have agreed that nothing should be allowed for this item as jet cleaning would always have been required to the exposed concrete. There is no basis for suggesting that the state of this wall required jet cleaning that would in some way be more expensive than a wall in better condition.

96. 23.00 Scabble surface of underpin as preparation for Armorex compound £1,684
24.00 Dust extraction £1,200

Mr Sullivan allowed nothing on the basis that this keying of the wall and the extraction of the resulting dust would always be required. Mr Hunter points out that there is a specific requirement in the Carter·Clack method statement for this work, and so he has allowed £484 for the scabbling and £500 for dust extraction, rather lower figures than the £1,684 and £1,200 in the Schedule. The fact that there is a Carter·Clack requirement is no basis for allowing something; Carter·Clack's method statement covered the work that needed to be carried out for the remedial works without reference to whether or not the work would have been required in any event. Mr Hunter's evidence on the need to put in some figure for work he accepted needed to be done in any event was unconvincing. Theoretically, of course, the state of the underpinning wall might have been such that the scabbling work would have been more difficult or time-consuming than reasonably anticipated, and the dust extraction in consequence more onerous. But such a case is not made out, and I make no allowance for these items.

97. 25.00 Remove loose and defective cementous material between vertical underpin joints £2,940

The experts have agreed £624 for this item.

98. 26.00 Provide vertical sealant to rear face of underpin on No.5 side – to prevent material entering No.5 £2,680

Mr Sullivan allowed nothing on the basis that this work was not provided for in the Carter·Clack report and, he assumes, was not carried out. Mr Hunter has allowed £575 on the basis that it is reasonable to assume that this work was required and, by extension presumably, was carried out. The aim of this work was to fill up any holes in the vertical joints between individual pins to prevent water or other material penetrating through to No.5. Mr Hunter suggested that a sand and cement mix with a waterproof hardening additive would be used, minor work for which he felt his £575 was not unreasonable. Mr Sullivan argued cogently that this sealant was not necessary and, in effect, it is no coincidence that Carter·Clack did not specify it. Carter·Clack specified wire brushing to vertical joints but no opening up for voids and sealing them. For his part Mr Hunter suggested that a cautious builder would want to ensure that any visible voids in the wall were filled up before carrying out further work, and also, for a fixed price contract, would be conscious that Carter·Clack might decide that the voids should be filled once the work had commenced.

99. In the ordinary course the contractor would simply price the remedial works for which he had a design and drawings and add any additional work to the cost as an extra. It is somewhat strange that a contractor who insists on a fixed price contract should price for work not specially required in the remedial works scheme because it might possibly be required by the supervising engineer, and then expect to be paid for it even where it is not required. In his statement Mr O'Connor states that this item relates 'to the seal which was installed at the rear of the underpins' which does not obviously match the experts' assumptions that this was sealant in-between the pins. There is too much doubt on this item for it to be appropriate to make an allowance.

100. Item 27.00 Install sealant grout between vertical underpin joints £900

Mr Sullivan makes no allowance for this item, and Mr Hunter includes it in his £575 under the previous item. There should be no allowance.

101. Item 28.00 Set up installation grid for H10 L bars to defective underpins £537.50

The experts both agree this item in full.

102. Item 29.00 Drill holes through reinforced concrete to receive H10 L bars £2,150

The experts are agreed that £1,224 is an appropriate figure for this item.

103. Item 30.00 Install H10 L Bars to surface of Defective Underpin, £5375

The experts are agreed that £3,498 is an appropriate figure for this item.

104. Item 31.00 Supply and installation A393 Fabric reinforcement – cut to size, £1,264

The experts agreed this item in full.

105. Item 32.00 Design of temporary formwork, £500

The experts disagreed on this item, Mr Sullivan suggesting that this work would be included in the method statements and other preliminary documentation, and Mr Hunter saying that a temporary formwork design would have to be considered and reviewed before the commencement of the work. It was not of course possible to consider whether this was included in the method statements, and these (if they existed) were not disclosed by Cranbrook despite a request from the experts. Mr Sullivan stated that he had "never paid for a design of temporary formwork in 30 years. I've never seen someone ask for it before either. If someone's going to design it, it will be the shuttering carpenter, or maybe the site foreman, and they have already been valued elsewhere. There's not a formwork designer that comes down from head office". Mr Hunter stressed that he was valuing a review of a design; "the point I've made here is review, and it may well be that a carpenter or a site agent has [designed the formwork] but it would be sensible to check those proposals to make sure that they are safe and fit for purpose". In the event Mr Hunter allowed 4 hours work at £69 per hour, and he accepted that after taking off overhead and profits and national insurance, this would equate to 4 hours work by an employee paid £70,000 - £80,000 pa. which he accepted was a 'healthy return'.

106. This is all unrealistic. This was not complicated formwork, nor was it to be carried out in such difficult circumstances that an experienced shuttering carpenter, working under the eye of the site foreman, could not be expected to manage without head office assistance. Mr Hunter suggested that this element could be seen in terms of Mr O'Connor anticipating that there might possibly be a problem with the formwork and including this item in the quotation to cover the chance that there was because he was only prepared to give a fixed price quotation. Mr Sullivan's evidence is to be preferred in this respect, and I will make no allowance for this item.

107. 33.00 Delivery of Formwork £160

The experts agreed this item.

108. 34.00 Installation of Formwork £3,324

The experts agreed a figure of £1,907 for this item.

109. 35.00 Delivery of lateral props £145

The experts agreed to price this item at nil.

110. 36.00 Hire of props £840

The experts agreed a figure of £322 for this item. The props were standard props and £322 was a market hire rate, no allowance being made for their delivery because they were already on site.

111. 37.00 Installation of props including sectional assembly £1,694

The experts agreed to price this item at nil. This not because the props did not need installing but that the cost of prop installation has been included in the installation of the formwork, item 34.00.

112. 38.00 Shutter debonding agent £184

The experts agreed this item.

113. 39.00 Water soaking to scabbled surface for 6 hours before Armorcrete installation £390

The experts agreed a figure of £234 for this item. This item involves spraying water onto the wall until the water stops soaking into the concrete and it is saturated enough for the application of the Armorcrete. The work might take anything between two and six hours to ensure the concrete was soaked. The difference between the experts and the Cranbrook quotation was that the latter was based on a project manager's rate; the experts allowed for a labourer.

114. 40.00 Removal of excess water £440

The experts agreed a figure of £150 for this item.

115. 41.00 Supply and install Sika armorex armorcrete £15,492

The experts agreed a figure of £6,460 for this item. Mr O'Connor's evidence was that his figure included the need to manhandle 400 bags of material from the kerbside and carry them all down to the basement on ladders and then to the hopper heads prior to the armorcrete being poured into the shuttering moulds. Mr Sullivan observed that if Cranbrook had indeed carried 400 bags down to the basement it would have had to carry at least 300 bags back up again. The amount required was 3 metres cubed, the bags contain 25 kilos and take up 4 litres of water per bag, so 80 bags should have been sufficient for the entire operation even allowing for some waste and the need to fill up areas of wall which were undercut.

116. 42.00 Removal of shuttering £941

The experts agreed £360 for this item.

117. 43.00 Removal and including sectional dismantling of props £1,384

The experts agreed this item at nil.

118. 44.00 Transport props from site £145

The experts agreed this item at nil.

119. 45.00 Trim edges to surface following removal of formwork £347

The experts agreed this item in full.

120. 46.00 Apply sikafloor proseal to wall surface to aid curing £532

The experts agreed this item at £303.

121. 47.00 Carefully cut away defective dry pack in 500mm sections- removal by hand £4,900

The experts had agreed this item at £950. In arriving at this figure the experts did not allow for the removal of all the dry pack, assuming that this would not be necessary. On it being shown that Carter·Clack had stated that the entirety of the dry pack required replacing, the experts held a discussion and agreed a figure of £1,326. Cutting away dry packing is a job requiring care, but Carter·Clack built that aspect into the specification by requiring only half a metre width to be done at a time.

122. 48.00 Install sacrificial back shutter to rear of drypack – no5 side £5,432

The experts agreed this item at £750, while making the point that this item was not included in the Carter·Clack scheme of work. Mr Hunter explained that the work for this item involved putting a hydrophilic seal or strip at the back of the wall to prevent any material falling out at the back. Hydrophilic strips of ballast cost about £6 or £7 per metre which is pressed into position and as it gets wet it expands to fill up the joint it is covering. The experts proceeded on the basis that it would take an hour or so to position each strip, much less time than the 106 hours apparently allowed for in the Cranbrook quotation.

123. 49.00 Create external head shutter to each location £2,632

The experts agreed this item at £900.

124. 50.00 Provide liquid grout – expansive – installed under head to flood fill void £5,432

The experts agreed this item at £1,714.

125. 51.00 remove head shutter and cut away projecting grout £1,400

The experts agreed this item at £360.

126. 52.00 Small plant hire £984

The experts agreed this item at nil. Mr Hunter explained that there were particular items of small plant required for the armorcrete, mixers, mechanical stirrers and the like, for which allowance has been made in the individual items in question. There was no justification for making an additional charge for small plant hire.

127. 53.00 Consumables and sundries – drill bits, cutting discs £981

The experts agreed this item at £300.

128. 54.00 Installation of props on emergency basis and emergency removal £1,467

The experts agreed this item at £649.

129. 55.00 Delivery and collection of emergency props £250

The experts agreed this item at £92.

130. 56.00 Hire of 7 no Mabey superprops from 21.07.14 to 01.14.15 £6,552.70

The experts agreed a weekly rate of £12 per week per prop, but disagreed as to the number of weeks allowable. Mr Hunter allowed for the 33 week period before the remedial works commenced, as well as 7 weeks for the work, whereas Mr Sullivan suggested that the appropriate period was from when the condition of the wall was discovered down to the date on which Carter · Clack stated that the wall was safe as an underpinning wall. Mr Hunter suggested that once the Mabey props were in place it was not unreasonable for the contractor to leave them in place as a matter of prudence. Mr Sullivan disagreed, pointing out that not only did the props serve no structural purpose they would get in the way of the work once it started and their presence would make the site less safe for working purposes. It was also noted that although Cranbrook had charged for 7 props throughout, there were only 5 mabey props in place when Mr Davies inspected and photographed the site on 20 August, about 4 weeks after the condition of the wall had been exposed. Mr Sullivan adjusted his figure to £1,738.80, ie 18 weeks at £96.60, and that seems to be to be the proper assessment.

131. 57.00 Modification of waterproof membrane detailing to accommodate design change £884
The experts agreed this item at £138.

132. 58.00 Project management £4,648

The experts agreed this item at nil. The evidence of Mr O'Connor was that there were two levels of project management in place, an on-site team and the 'multi-project project management team above the team constantly on site'. He added that "This level of supervision was essential given that the works were remedial works in a situation which was likely to be litigious and where the work done would be scrutinized and potentially subject to criticism and challenge". The experts were unimpressed. Mr Hunter pointed out that there was included in the preliminaries a provision for site management and visiting management; "I don't know what other site management one would need to allow for [in addition to the preliminaries provision]". Mr Sullivan pointed out that Mr O'Connor in evidence did not know the name of the project manager. No day-sheets had been provided to corroborate two levels of management and there was only one photograph taken over the entire duration of the works. Mr Sullivan could not see that there were two resources applied to this work, and observed that it was difficult to see what they would have been doing if they were there.

133. Item 59.00 in the 'breakdown' is a sub-total.

134. 60.00 Preliminary costs £16,542.48

The appropriate figure for the remedial works preliminaries ought to take account of the preliminaries being charged for the work involved in the project as a whole, which work was being carried out at the same time as the remedial works contract. The difficulty facing the experts was lack of information as to the work that was being carried on simultaneously with the remedial works contract on the overall project as well as uncertainty as to the resources employed on the remedial works contract. Much of the remedial works contract was carried out by two under-pinners and one labourer, but the experts were in no position to assess what proportion of the labour force on site during the time the remedial works were ongoing this labour constituted. The experts were in general agreement as to an appropriate weekly rate, £2,125, but disagreed as to whether 4 weeks' work or 7 weeks' work should be allowed for. I will allow 6 weeks at this rate, £12,750.

135. 61.00 Overheads and profits £22,056.64

The experts agreed this item at nil, as overheads and profit has been included in the rates they allowed for the individual items. Both experts allowed 15% which was the main works profit rate, rather than the 20% claimed by Cranbrook for the remedial works contract. On being pressed both experts said that they would only allow 15% if this were a stand-alone contract.

136. Looking at the matter in the round Mr Sullivan's evidence was that the Cranbrook price was clearly overstated. "If you take the length of the underpinning and divide it by their rate you get …£11,500 a metre, whereas a square metre rate is £3,700 per metre squared. It's ridiculous, for basically it is rendering with some reinforcement". It may be observed that the figure of £11,500 per linear metre for remedying the wall is in stark contrast to that of £2,145.81 per linear metre for constructing the wall (without reinforcement) as assessed by Mr O'Connor in December 2013, see paragraph 11 above. Mr Hunter suggested that Cranbrook had provided figures for all their items each of which brought a sensitivity to bear relating to risk throughout the process, which led to a 'very large compound margin at the end'. He pointed out that normally a contractor at the end of such a process would review the total price if they were in competition. Cranbrook's figure was not one he could support.

137. The evidence of the experts therefore, agreed in the course of giving oral evidence, was that the cost of the works necessary to carry out the Carter · Clack remedial scheme by Cranbrook as the contractor on site and assessed at Cranbrook's contractual hourly rates, amounted to £47,977.30 plus vat.

138. It is reasonable, in the above circumstances, for the court to suppose that had the Cranbrook quotation been reviewed by a competent quantity surveyor at the time it was presented, a very similar exercise would have been carried out as has been undertaken by the two experts in this litigation, with a very similar result.

139. No comparable quotations were obtained at the time, nor subsequently. There was the desk based quotation from Sheer Projects Limited but this give only a very outline guide to the appropriate cost. It is the case however that in reaching the figure of £47,977.30 the experts have followed Cranbrook's approach to the works, albeit with the rejection of a number of items, and have used Cranbrook's rates which are more generous than most other contractors undertaking basement works. It is idle to speculate what quotations would have been given by other contractors had they been asked to quote, but there should have been cost advantages in using the contractor on site engaged in undertaking a great deal of other work on No.6, as opposed to bringing in a contractor fresh to the remedial works.

140. In any event the evidence of Mr Sullivan that the contractor on site was the natural choice as contractor for the remedial works is plainly sensible. Accordingly, arriving at a figure for the works on the basis of Cranbrook's rates for the remedial work which had to be done, while ensuring that the work which would have had to have been carried out in any event is not included in the final total, is the appropriate calculation for the purposes of an award of compensation under s 7(2) of the 1996 Act.

141. For completeness I note that following the conclusion of the evidence Mr Hunter, the expert quantity surveyor instructed by the Respondent, carried out the exercise of assessing the cost of the remedial scheme works using Cranbrook's rates. The resultant figure is £71,202.73 exclusive of vat, which contrasts with his reasonable rate figure of £56,184.50. Mr Sullivan's assessment of Cranbrook's rates, after adjustment to take into account the additional figure allowed under item 47, was £42,880.14.

Did the Respondents fail to mitigate?

142. The Respondents' case is simplicity itself. They had, after some consideration, chosen Cranbrook as their preferred contractor to carry out the works involved in the entirety of their extensive development, of which the basement works were just part. By the time the problem with the underpinning of the party wall with No.5 arose they were in the middle of their redevelopment works. Cranbrook was on site, engaged in both basement and other works. Cranbrook were the obvious contractors to undertake the remedial scheme, and they had no reason to suppose that Cranbrook's price was not reasonable.

143. The court is naturally sympathetic to the predicament the Respondents now find themselves in. They appear to have received no warning that Cranbrook's figure was high, let alone excessively high, or that Cranbrook were proposing to charge very much more than it would have received had it carried out this work at the contractual rates Cranbrook had agreed with the Respondents for the refurbishment works, including the work to the basement.

144. The Respondents are required by the common law to take all reasonable steps to mitigate the loss consequent on the Appellant's works, and cannot recover the cost of any loss which they could have avoided but have failed, through unreasonable action or inaction, to avoid. The onus of establishing both (1) that there was loss which the Respondents could have avoided and (2) that the Respondents failed to avoid that loss through unreasonable action or inaction falls on the Appellant. It is quite evident from the evidence given by both experts

that (1) is made out; there was loss which the Respondents could have avoided. There has been no suggestion that it would have been quite impossible to engage another contractor to carry out the remedial works scheme at a reasonable cost, assuming that Cranbrook would have refused to carry out the works at their own contractual daywork rates had the Respondents, advised by their party wall surveyor, made it clear that their grossly excessive quotation was not acceptable.

145. As for (2), whether there was unreasonable action or inaction on the part of the Respondents, this must be judged in the light of the circumstances in which the Respondents found themselves at the relevant time. For these purposes I put aside arguments that the Respondents really should have approached the matter in a more purposive manner, and should have reacted more timeously to the Carter·Clack report and the remedial scheme proposed in that report. It is fortunate that, on Mr Sullivan's evidence, the delay from November 2014 and May 2015 in the implementation of the remedial works scheme had no significant impact on cost. For present purposes I take the relevant time during which to consider the action or inaction of the Respondents to be the period between 13 April 2015 when Mr Williams confirmed with Mr Davies that the Carter·Clack remedial scheme was an appropriate way of rectifying the defective underpinning and 20 May 2015 when the Respondents authorised Cranbrook to proceed with the works on the basis of their quotation.

146. It should have been clear to the Respondents from the outset that the costs of the remedial scheme would fall on the Appellant. In the event there does appear to have been some uncertainty in this regard, which is difficult to understand, but by the time the contract with Cranbrook was agreed, there could have been no doubt as to whom the expense of the remedial works would fall. The Appellant's engineer had prepared the remedial scheme, it fell to the Respondents' engineer only to approve the scheme, the party wall surveyors acknowledged that the Appellant would have to pay and, indeed, on 13 April 2015 Mr Williams had suggested that the party wall surveyors should 'formalise the compensation for the damage by way of additional award'.

147. Another circumstance, and one of some considerable importance, was the underlying concern as to the reasonableness of the Cranbrook quotation being expressed by Mr Davies. Mr Davies had made it clear that he was not satisfied with the Cranbrook quotation, devoid as it was of any meaningful detail to enable a party wall surveyor to determine whether or not the price quoted was acceptable. On 14 April and again on 20 April 2015 Mr Davies had pressed for a detailed breakdown of the quoted figure of £148,882.32 plus vat, but had been given nothing. On 27 April 2015 Mr Davies had spelled out why Mr Williams should treat the Cranbrook's quotation was caution, and again asked for details. On 5 May 2015 Mr Davies repeated his request for better information and, moreover, had spelled out in clear terms that the two party-wall surveyors were "a quasi-judicial tribunal and we, individually and collectively, cannot function effectively without proper disclosure" followed by a reference to the *Gyle-Thompson* decision a copy of a note of which was attached to the relevant email.

148. Mr Williams approach, as indicated in his email of 23 April 2015, was quite unacceptable for a party wall surveyor. Mr Williams was in possession of only one quotation for works. There was no detailed breakdown or other means of determining how the quotation had

been arrived at, so it was not possible to undertake an analysis of its reasonableness, and his fellow party wall surveyor was calling for that detail. To take the line 'unless you can convince me that what has been submitted is not wholly acceptable, and I don't think you can, I would suggest that we now agree an award for compensation using the figures I have submitted' ie the Cranbrook quotation, suggests that either the party wall surveyor is oblivious to the responsibilities imposed on him by the 1996 Act, or that he is aware of them but is not prepared to exercise those responsibilities in anything approaching a proper manner.

149. On the face of it the above were private communications between the party wall surveyors. There is no clear evidence that they came to the notice of the Respondents. The likelihood is however that they did. Mr Williams does appear to have shared his communications with Mr Davies with 'his side', something about which Mr Davies complained, and although there is no evidence in the bundle that Mr Williams forwarded these particular emails from Mr Davies to the Respondents it is plain that there was discussion about the approach adopted by Mr Davies. On 11 May 2015 the First Respondent emailed Mr Williams to say:

> "Rk – this MUST be sorted asap. It's a bloody disgrace that we have let the pace be set by that cretan Davies. Whatever it takes let's get this sorted NOW"

Again, on 14 May 2015, Mr O'Connor sent an email to the First Respondent regarding financial information but also stating:

> "I have spoken with Mark Williams and asked that maximum pressure be applied to Peter Davies"

150. In his witness statement the First Respondent quotes extensively from the emails passing between Mr Williams and Mr Davies dated 13 April, 17 April, 23 April and 29 April 2015, and makes reference to there being further correspondence between them. He does not say in terms that he was aware of this correspondence as it was taking place, but as he refers to this correspondence in his witness statement it may be concluded that he was aware of it at the time. The First Respondent states that he did not know how detailed a summary should be, but continues "I considered that the endless queries of Mr Davies were no more than a continuation of his constant efforts to argue and frustrate at every possibility". The First Respondent wanted to get on with the work, and he had a party wall surveyor who simply was not doing his job, but there really was no warrant for his view that Mr Davies was seeking to frustrate any progress with the works.

151. Even were I to be wrong in assuming that either Mr Davies' emails of 14, 21 and 27 April and 5 May 2015 were brought directly to the Respondents' attention or the substance of those emails communicated to them (an error which is most improbable) it would surely be an unreasonable inaction on the part of the Respondents to proceed to instruct Cranbrook to proceed with the remedial works scheme without consulting their nominated party wall surveyor. This is particularly so in the light of the fact that there was considerable contact between Mr Williams and the First Respondent over the course of the party wall procedures. Had the Respondents contacted Mr Williams the latter would, or certainly should, have alerted the Respondents to the attitude being taken by Mr Davies as to the need to have a

proper breakdown of the Cranbrook quotation before using it as the basis of an award of compensation under the Act.

152. I well appreciate that the Respondents were anxious to get on with the work, and were accordingly more than irritated with the delay apparently being imposed by Mr Davies. But the answer, for any reasonable man, was not to put pressure on Mr Davies (ie pressure not to do his job properly) but to accede to what was a perfectly reasonable request for details of how the price for each element of work in the quotation had been arrived at. It is unreasonable to expect either a party wall surveyor to make an award, or an adjoining owner to foot the bill, where (a) no competing quotations have been obtained and (b) no detail is given as to how the price is made up of the one quotation that is presented for agreement, so that it may be analysed for reasonableness. Either, in my judgment, will do. Where competing quotations have been obtained from contractors independent of each other, a request for the breakdown of the figures in either or both quotations may or may not be reasonable depending on the precise circumstances. But where only one quotation is obtained, and that is devoid of meaningful detail, a request for a detailed breakdown is perfectly reasonable, and, by the same token, it is unreasonable to refuse to make the request.

153. Of course, the Respondents faced the difficulty that had they been asked (and there is no evidence that they were one way or the other) Cranbrook would simply have refused to provide a breakdown of their pricing. However, not to ask Cranbrook to provide the details requested by Mr Davies was unreasonable, and if Cranbrook were asked and the request refused, the advisability of obtaining an alternative quotation, or of obtaining the views of a quantity surveyor on the Cranbrook quotation, would have been obvious.

154. Before 20 May 2015, when Cranbrook were instructed to proceed, Mr Davies had asked for a detailed breakdown and had not in terms criticised the amount Cranbrook were charging. This is entirely consistent with the care Mr Davies clearly took to act in an impartial manner as a party wall surveyor. Mr Williams made the point in an email on 27 May 2015 that Mr Davies had not said in terms that the Cranbrook figures were excessive. Thus goaded, Mr Davies responded on 9 June 2015 to make his position clear (as quoted above):

> "I do therefore, note very clearly that my impression of the Cranbrook figures are that they are grossly and extremely excessive and probably bear no relationship to the true costs of carrying out the actual work properly required and as anticipated in the report by Carter Clack Consulting Engineers of 3/10/14."

155. That Mr Davies was correct has been borne out by the expert evidence in this case. I am quite satisfied that any competent party wall surveyor, or indeed any competent surveyor, would look with surprise, if not amazement, that these figures were being put forward as proper figures for the cost of this work. Such a surveyor would not be able to understand why Cranbrook were charging so much more to carry out a modest remedial scheme than it gave as a reasonable price for constructing the entire wall in the first place. He would also wonder how Mr Williams could press for an award of s 7(2) compensation at £148,000 having previously made an award of s 11(11) compensation on the basis that the cost of constructing the entire underpin in the first place was £100,000. The remedial scheme was relatively modest in comparison with the original construction.

156. By 20 May 2015 the Respondents either knew that Mr Davies was requesting a detailed breakdown of the Cranbrook quotation, or they would have known had they consulted their appointed party wall surveyor, and they either knew or should have known that there were real questions to be asked as to the reasonableness of the quotation before they could expect it to be used as the basis on which the Appellant could be required to make compensation under the Act. In the circumstances the Respondents acted unreasonably in failing either to obtain alternative quotations for the Carter·Clack remedial scheme or in having the reasonableness of the quotation assessed by an appropriate professional.

157. I conclude that in allowing Cranbrook to proceed with the works at the quoted price the Respondents failed to mitigate the loss.

158. That deals with the arguments raised by the Appellants in the Notice of Appeal, but, this being a rehearing, the Court should also consider the matter in the round.

Was the award wrong?

159. This appeal, in common with the large majority of appeals under s10(17) Party Wall etc. Act 1996 has proceeded by way of rehearing, as provided for in the initial Order for directions, and not by way of review. (The Order for directions, unfortunately, although made on 17 March 2017, refers to CPR Part 52.11 which was replaced on 3 October 2016 by CPR Part 52.21, albeit in the same terms). An appeal by way of review will usually be appropriate only where there is some fundamental flaw or technical fault with the award being appealed. For example, where there is a defect in the appointment of the surveyor making the award, or the award purports to cover matters which are outside the ambit of a party wall award as defined in s 10(12) of the 1996 Act.

160. In the majority of cases the owner appealing the award will be concerned with a matter of substance within the award. As the Court of Appeal recognised in *Zissis v Lukomski* [2006] 1 WLR 2779, see in particular the judgment of Sir Peter Gibson at [41], a party wall award appeal will (almost invariably) be against a party wall award which is non-speaking (ie does not give reasons for its conclusions) and which was made without a hearing. This will lead naturally to an "appeal by way of rehearing which will ordinarily require the county court to receive evidence in order to reach its own conclusions on whether the award was wrong". I qualify the reference to Sir Peter Gibson's remarks with 'almost invariably' because I have encountered a few reasoned awards made by an experienced party wall third surveyor after inviting submissions from the owners' appointed surveyors. In such a case the author of 'The Law and Practice of Party Walls' (Nicholas Isaac) suggests, at 13-23, that these will be factors in favour of an appeal being by way of review. So they might. Occasionally.

161. The present appeal comes within the standard; an appeal against the substance of the award. The essential complaint is that in assessing compensation for loss and damage occasioned by the adjoining owner the third surveyor awarded too great a sum. It is a non-speaking award. There is no requirement in the 1996 Act, or elsewhere, that a party wall surveyor should give reasons for his award, and, as noted above, it is rare in the extreme that a party wall surveyor gives his reasons. A party wall surveyor has his own expertise to rely on, and

accordingly, while it does appear from the terms of the Award that the third surveyor did not seek alternative quotations or a quantity surveying opinion, the court cannot state with certainty that no steps were taken by the third surveyor to analyse Cranbrook's quotation, stated in the award to be basis of the sum awarded, to determine whether it was within the bounds of reasonableness.

162. Before me the parties have given extensive evidence, both oral from lay and expert witnesses, and written, in an appeal bundle which extends beyond 1,000 pages. Counsel for the parties, both leading specialists in this field, have made submissions. On this material the court must reach its own conclusion on whether the award should stand or whether it should be rescinded or modified in such manner as the court thinks fit. Unlike the party wall surveyor however I must give reasons for my decision.

163. I conclude that the award should be modified, for the reasons which appear above. There is, and can be, no issue as to whether the Carter·Clack remedial scheme was an appropriate scheme to remedy the underpinning wall constructed by Penn Construction as encountered when it was exposed as part of the basement construction at No.6. The Cranbrook quotation for implementing the Carter·Clack remedial scheme was subjected to careful consideration by two expert quantity surveyors first in their expert reports and then in cross-examination. Their conclusion that the reasonable sum for carrying out the remedial scheme in May and June 2015 is £47,977.30 plus vat is essentially a joint conclusion albeit subject to a few determinations by the court, as recorded above. The conclusion is one based on Cranbrook's rates as set out in its contract with the Respondents; ie it takes into account the fact, accepted by the Appellant and the court, that the natural contractor to carry out the remedial scheme was the contractor in place on site engaged in other works at No.6. That the reasonable sum for carrying out the work at Cranbrook's own rates is over £100,000 less than that quoted by Cranbrook and amounts to 32.22% of Cranbrook's quotation is indeed surprising. But Cranbrook's absolute refusal to allow any insight of any significance into how the quotation was arrived at or into how much the works actually cost to carry out, prevents any meaningful analysis of this surprising disparity.

164. Much as I would wish that a careful analysis had been possible both into the build-up of the quotation and the actual cost of the work, Cranbrook has ensured that neither exercise could be undertaken. Once the work was commenced it was not possible, on any realistic basis, to obtain competing quotations from one or more basement contractors. The court has therefore had to rely on expert quantity surveying evidence in reaching the conclusions which it has.

<u>The approach to their task of the party wall surveyors</u>

165. This appeal presents a perfect paradigm of how a party wall surveyor should and should not approach his task. It matters not whether a party wall surveyor acts in a capacity which is quasi-judicial (per Brightman J in *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 All ER 295, 303a) or quasi-arbitral (per The Earl of Lytton introducing the Party Wall Bill on the second reading in the House of Lords on 31 Janaury 1996, Hansard Col. 1538). The party wall surveyor must act impartially and professionally. He is not an agent of or

mouthpiece for the owner who appointed him. Acting impartially requires the party wall surveyor (whether an owner-appointed surveyor or a third surveyor selected by the owner-appointed surveyors) not to favour either owner over the other. Acting professionally requires the party wall surveyor to carry out such investigation as may be necessary to enable him to be confident that he has reached a proper decision on all the relevant material which is available to him.

166. In summarising the facts of this appeal in the first part of this judgment I have included a number of quotations from the email exchanges between the party-appointed surveyors, sufficient I hope to give the flavour of the exchanges, but I have given merely a short summary of many emails and not commented at all on others. This judgment is already long enough. Mr Davies, the adjoining owner's surveyor, maintained throughout the process both the proper detachment required of an impartial tribunal, and the care and thoughtfulness required of a professional surveyor engaged in the proper performance of the statutory dispute resolution role imposed by the 1996 Act. Mr Davies was conscious that the owners of both No 5 and No 6 had obtained party wall awards to carry out works at their properties and thought through whether, in any particular instance, he was acting as the surveyor appointed by the building owner or by the adjoining owner, a particularly relevant consideration where the third surveyor was not the same for each party wall procedure.

167. More importantly, Mr Davies had due regard to considerations relevant to the proper performance of his task as a party wall surveyor responsible for the operation of the dispute resolution procedure under the 1996 Act. The need to maintain a proper level of detachment from owner and contractor; the status of Cranbrook as contractors engaged by the Respondents; the absence of any independent professional to oversee Cranbrook's work; the need for party wall surveyors to make proper enquiry as to how the Cranbrook quotation for the Carter·Clack remedial scheme was arrived at before it could properly be used to form the basis of an award of compensation for the purposes of s7(2) of the 1996 Act. Mr Davies saw the advisability of checking the appropriateness of the Cranbrook figure for the remedial works by considering what other contractors would charge 'to provide a genuine market price for the actually relevant works'. Mr Davies also used his own expertise as a surveyor to reach a conclusion as to propriety of Cranbrook's figures, but, consistent with his role as an impartial arbiter, he kept that conclusion to himself until goaded into publishing it.

168. In contrast, on a reading of the email exchanges (and I should stress that neither Mr Acres nor Mr Williams gave evidence) both the building owner's surveyors give every appearance of being little more than a mouthpiece for the appointing owner. I would like to think that I was wrong, but in none of the many emails exchanged between him and Mr Davies does Mr Williams give any reassurance to the reader that he is taking his statutory duties seriously. Neither did Mr Acres before him. Both surveyors were, undoubtedly, under a great deal of pressure to ensure that the necessary party wall awards were published as quickly as possible so as to enable the works at No 6 to proceed. But the approach adopted was far more an attempt to bully Mr Davies into doing what the Respondents wanted than to engage with Mr Davies' concerns. Mr Davies is not a man to be bullied.

169. Further to the above, what is so disappointing to a reader of the email exchanges is not just that Mr Williams gives no appearance of undertaking his statutory role properly, but that he ignored the clear warnings presented to him by Mr Davies. Such warnings had been made loud and clear to Mr Williams' predecessor Mr Acres, when he and Mr Davies were discussing an award for s 11(11) compensation, see paragraph 13 above. It may be presumed that Mr Williams read these email exchanges, and in particular Mr Davies' email of 27 January 2014, for Mr Williams took over Mr Acres' work on the s 11(11) award and it was his name together with Mr Davies' on this award when it was made on 15 June 2014.

170. That Mr Williams ignored the clear warning in Mr Davies' email of 5 May 2015 that he needed to act in a quasi-judicial manner, see paragraph 32 above, and the even clearer warning in the email of 9 June 2015, where Mr Davies spelled out the duties of a party wall surveyor and the action that should be taken in consequence of those duties in terms which most party wall surveyors would have found deeply offensive, see paragraph 40 above, is indeed dispiriting. The 1996 Act places quasi-judicial or arbitral responsibilities on party wall surveyors. They are engaged in a statutory dispute resolution procedure. Whatever the individual circumstances and pressures on a party wall surveyor these are not responsibilities to be taken lightly.

171. Both the Pyramus & Thisbe Club and the Faculty of Party Wall Surveyors take great pains to ensure that party wall surveyors are aware of their statutory responsibilities and that there is training available for any surveyor who wishes to practice in this field. Their work is plainly not yet done, and it may be said from the experience of over 100 party wall appeals before this court that Mr Acres and Mr Williams are by no means alone in their approach to their statutory duties. It is perhaps unfortunate that they have been singled out for comment in this judgment, but on the material before the court their approach to their duties cannot be ignored.

172. I anticipate that had either surveyor given evidence the point would have been made that they came under considerable pressure from their appointing owner to secure an award so as to enable the works to proceed as expeditiously as possible, and that Mr Davies unduly delayed in fulfilling his duties as an adjoining owner appointed surveyor. That dispute resolution under the Act might take place under pressure of time is recognised by the extremely short period allowed for an appeal under s10(17) ("…within the period of fourteen days beginning with the day on which an award under this section is served…") and it will be evident to any responsible party wall surveyor that there will be occasions when an award should be produced with expedition. Whether Mr Davies delayed unreasonably in making the award of 25 June 2014 permitting the basement excavation adjacent to No.5 and the use of previous underpinning of the No.5/No.6 party wall is not possible to say on the material before the court, and is outside the scope of this appeal. As to the speed with which Mr Davies undertook his work in connection with the award, eventually made by the third surveyor, the subject of this appeal, it is far from obvious that any criticism may properly attach to him. Undoubtedly an award would have been produced more speedily had Mr Williams cooperated with Mr Davies, whether with regard to his requests for information or his wish to obtain a 'genuine market price for the actually relevant works' by seeking quotations from other contractors.

173. In any event, pressure from an appointing owner or a contractor to produce an award speedily can never excuse the party wall surveyor from a failure to act in a proper manner.

174. I would observe further that while it may well be that an arbitrator or judge who is not required to give reasons for his decision is well advised not to do so, the discipline inherent in the exercise of ensuring that the task has been properly carried out, that the arguments have been considered, and proposals for works or costings duly tested, is always worth undertaking before an award is published.

Conclusion

175. I propose to make an order in the following terms:

(1) The award of Mr D.R.Toogood FRICS dated 14th February 2017 be modified to read:

"THAT the building owner shall pay the adjoining owner the sum of £47,977.30 plus VAT by way of compensation under s 7(2) of the 1996 Act in respect of the remedial work carried out to the underpinning executed to the building owner's property pursuant to the Award dated 3 April 2013".

(2) The award of Mr D.R.Toogood FRICS dated 22nd February 2017 be rescinded.

176. I will consider submissions from Counsel on any issues which may arise as to the wording of the Order, interest and costs.

HHJ Edward Bailey
27 November 2018 Mayor's and City of London Court