Case No: H20CL116 & H02CL117

IN THE COUNTY COURT AT CENTRAL LONDON

Mayor's and City of London Court
Guildhall Buildings
London EC2V 5AR

Date: 07/03/2023

**Before** :

**HHJ BACKHOUSE**

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**Between :**

**ROBERT TAYLOR** **Appellant**

**- and -**

**Respondents**

**(1) PETER JONES**
**(2) LINDA JONES**

**And between:**

**ROBERT TAYLOR**

**Appellant**

**-and-**

**PETER SPRIGGS**

**Respondent**

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**Nick Isaac KC** (instructed by **Cripps Pemberton Greenish LLP**) for the **Appellant**
**Howard Smith** (instructed by **Child and Child solicitors**) for the **Respondents**

Hearing dates: 9-13 January 2023

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# APPROVED JUDGMENT

## HHJ Backhouse :

1. The Appellant, Mr Robert (Bob) Taylor, in these two linked cases appeals against two awards ("the Awards") dated 20 August 2021 made by Rob French as third surveyor under s10(11) of the Party Wall Act 1996. By order of HHJ Parfitt dated 14 January 2022 the appeals proceeded by way of rehearing. Directions including for expert evidence were given by HHJ Parfitt. I gave further directions for additional expert evidence on 29 September 2022. The hearing of the appeals took 5 days. I had the benefit of a site inspection on the second morning.

2. Mr Taylor (A) is the leasehold owner of the lower ground floor flat at 9 St George's Terrace, London NW1 9XH (9SGT) which he purchased on 13 May 2014.

3. Mr & Mrs Jones are the long leasehold owners of 5 St George's Mews, London NW1 8XE (5SGM) which they purchased in 1998. Mr Spriggs has been the freehold owner of 5 and 6 St George's Mews, London NW1 8XE (5SGM and 6SGM) since 2002. In relation to 5SGM, he is entitled to the reversion on the determination of Mr & Mrs Jones' long lease; in relation to 6SGM, he is entitled to an interest in possession. Mr Spriggs' grandmother previously owned both properties.

4. In summary, A carried out substantial works to 9SGT in 2019 by excavating the garden of his property in order to construct a lower ground floor extension with a roof terrace over, leaving a small area of garden at lower ground floor level ("the Works"). The Works involved underpinning part of the rear wall of 6SGM. The Respondents (Rs) contend that the Works caused damage to both their properties, rendering them uninhabitable. A contends that the damage was caused by trees, principally those in the garden of 8SGT.

5. Mr French, as third surveyor, obtained a report from a geotechnical engineer, Prof. Kelvin Higgins, and concluded that the damage to 5SGM and 6SGM was caused by the Works. His awards required A to pay remedial costs, professional fees, loss of rent, plus the costs of the referral. The sums involved are substantial: the award in respect of 5SGM was approximately £190,000 exclusive of VAT and that in respect of 6SGM was just over £142,000 exclusive of VAT.

## Grounds of appeal

6. The grounds for both appeals are in summary as follows:

    i) Ground 1: the damage to 5SGM and 6SGM was caused by tree roots in the rear garden of 8SGT, not by the Works.

    ii) Ground 2: Mr French was wrong to take account of Works to the Stepoc garden wall between 9SGT and 8SGT, since they were not notifiable Works. This ground was not pursued at the hearing.

iii) Ground 3: Mr French was wrong to conclude that the Works were not carried out in accordance with the 2019 Awards, or to conclude that departures from the 2019 Awards caused damage.

iv) Ground 4: Mr French was wrong to award compensation.

v) Ground 5: Mr French was wrong to require A to pay Rs' surveyors' costs and his (Mr French's costs).

vi) Ground 6: Mr French should have ordered that Rs pay A's surveyors' costs.

7. Grounds 4-6 are said to follow from Grounds 1-3 and no further details are given. At the hearing before me in September 2022, Mr Isaac successfully argued that the complexion of the case had been changed significantly by the joint statement of the engineering experts. They had concluded that some of the damage which had been thought by previous experts to have been caused by the Works in fact pre-existed the Works. The Awards had therefore been made on a partially erroneous basis. I directed the joint instruction of a chartered surveyor and quantity surveyor to establish the remedial works required to remedy the damage caused by A's Works (if any) and the cost of the necessary remedial works.

8. A contends in relation to Ground 4 that he should not be required to compensate Rs for pre-existing damage and that the compensation awarded by Mr French was excessive. In his skeleton argument, Mr Isaac raised the issue of foreseeability of damage but conceded at the conclusion of the evidence that it was foreseeable that some damage might be caused by the Works.

9. For their part, Rs have recently obtained up-to-date tenders in respect of the remedial works for which they say A is liable and seek to be awarded sums greater than in the Awards.

## The law

10. The legal framework applicable to these appeals is agreed by the parties and can be stated shortly. Section 7(2) Party Wall Act 1996 provides:

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

11. The effect of s7(2) combined with the dispute resolution mechanism in s10 is to give the surveyors appointed by the parties jurisdiction to award compensation in circumstances where, at common law, the court would normally have jurisdiction to award damages for nuisance or trespass (*Lea Valley Developments Ltd v Derbyshire* [2017] 4WLR 120).

12. The basic test of factual causation is determined by the 'but for' test i.e. but for the Appellant's Works, would the damage have occurred? Where there are two or more potential causes of damage, the court will decide which of them is the

more likely. This applies even where there are two potential causes, both of which are highly unlikely.

13. If Rs have suffered any loss as a result of A's Works, they are under a duty to mitigate their loss. This requires them to take such reasonable steps as are open to them to ensure that the losses are not higher than they could have been limited to.

14. As the appeals are proceeding by way of rehearing, the date for assessment of the quantum of compensation is the date of the appeal hearing, not the date of the Award.

15. The burden is on Rs to prove their losses.

**Location and layout of the properties**

16. St George's Terrace ("SGT") and St George's Mews ("SGM") lie in the Primrose Hill area of London and are both accessed from Regent's Park Road. The Mews lies to the north of the Terrace. Both run broadly from east to west, sloping uphill to the west. The numbering in both roads runs from 1 at the Regent's Park Road end but the properties do not line up with each other. 9SGT is towards the western end of the road. The buildings in both SGT and SGM date from the nineteenth century.

17. Standing in the rear garden of 9SGT and looking towards SGM, the rear wall of the garden also forms the rear wall of SGM. 8 SGT is to the right and 10 SGT to the left. The eastern half of 7SGM ends about half-way along the rear wall of 9SGT's garden where it meets the western half of 6 SGM which runs right/east from there to the mid-point of the garden at 8SGT. 5 SGM runs from there to the mid-point of the garden at 7SGT.

18. In about 2015 the owners of 8SGT remodelled their garden, re-building the garden wall between themselves and 9SGT and planting four acacia trees at the bottom of their garden, three of which were planted very close to the rear wall of 5SGM and 6SGM in a planter and a fourth just outside the planter. The trees are now around 9 metres tall. There is also an older and larger bay tree in the north-western corner of the garden of 7SGT, which is immediately behind the bathroom of 5SGM.

19. The evidence is sketchy, but it appears that some work to convert 5SGM and 6SGM into residential dwellings was carried out in the 1930s and that the conversion into their current form was carried out in 1976. 6SGM is a compact one-bedroom flat which only occupies the ground floor of that building. It comprises a lounge/ kitchen, bedroom, WC and shower under the stairs. 5SGM is a three-bedroom flat on two floors, the upper floor extending into the first floor of 6SGM. The ground floor of 5SGM comprises a hallway, bedroom, bathroom and cupboard containing the central heating boiler and Megaflo water tank. Upstairs are two bedrooms, a large open-plan lounge, the kitchen and a further bathroom. When they bought the property in 1998, Mr and Mrs Jones fitted two new bathrooms, a new kitchen and the boiler and Megaflo.

20. At the time of the Works, both mews properties were tenanted. The damage to the properties caused all the tenants to vacate in 2020. Mr and Mrs Jones live locally; Mr and Mrs Spriggs live in Buxton.

21. Prior to the Works, the garden of 9SGT was terraced down from around first floor level of SGM against the rear wall to lower ground floor level. The garden was lowered by about 3m during the Works. The ground level of the garden to 8SGT is about 1.25m above the ground floor level in 5 and 6SGM.

## The evidence

22. The trial bundle is voluminous, comprising nearly 2900 pages spread over 9 lever arch binders. A great many experts have been involved in this matter, both before and after these proceedings commenced and their reports were before the court. The pre-proceedings experts were:

- Mr James Mahoney of Friend & Falcke, party wall surveyor appointed by Rs
- Mr Charles Couzens of Ecos Maclean, party wall surveyor appointed by A
- Mr Rob French, third surveyor
- Mr Nick Maclean of Ecos Maclean, A's engineer
- Mr Robert Groves, Rs' structural engineer
- Mr Jon Chick, Rs' structural engineer
- Prof Kelvin Higgins, geotechnical engineer instructed by Mr French

23. The experts instructed for the purpose of the appeals are:

- Mr Nick Huband of William J Marshall & Partners, A's expert engineer
- Mr Richard Tant of Richard Tant Associates, Rs' expert structural engineer
- Dr John Heuch, A's expert arboriculturist
- Dr Martin Dobson, Rs' expert arboriculturist
- Mr Mark Ruddell, joint expert surveyor
- Mr Justin Sullivan, joint expert QS

24. It is the opinions of the experts instructed in the proceedings which the court must consider but the parties have relied on various factual matters in the earlier reports. There are about 700 photographs which are useful in showing the progress of the Works and the state of the properties at various stages.

25. Mr Taylor, Mr and Mrs Jones and Mr and Mrs Spriggs all gave evidence in an entirely straightforward fashion and did their best to assist the court. However, as the parties agree, the appeals turn largely on the expert evidence. Mr Maclean gave evidence as to his design of the Works and his monitoring of them and I shall return to his evidence later in this judgment.

## The Works, reports of damage and investigations

26. After purchasing 9SGT Mr Taylor arranged for a geotechnical investigation by Chelmer Site Investigations in October 2014 and obtained a structural design for the Works from Green Structural Engineering and Michael D Morris

Architects, and a basement impact assessment (BIA) by Chelmer Site Investigation Laboratories Ltd in November 2015.

27. Mr Maclean, of Ecos Maclean, was the engineer in relation to the project at 8SGT which involved the rebuilding of the boundary wall between 8SGT and 9SGT. A discussed his proposed project with Mr MacLean and with the agreement of both owners, the work to that boundary wall was carried out in such a way as to facilitate A's Works.

28. Subsequently, A instructed Mr Maclean to act as his engineer. Mr Maclean prepared drawings in January 2018 showing proposed excavations and underpinning, which were attached to party wall notices in April 2018. Mr Taylor instructed Mr Maclean's colleague at Ecos Maclean, Charles Couzens, as his party wall surveyor. Rs instructed Mr James Mahoney as their party wall surveyor. The notices were not agreed, and a dispute was deemed to arise.

29. The Works involved building a new wall on the boundary between 9SGT and 10SGT, Stepoc underpinning of the garden wall between 9SGT and 8 SGT as well as underpinning the rear wall of the garden of 9SGT i.e. under part of 6SGM and 7SGM. Party Wall notices were served on the owners of those properties as well as on 5SGM. The necessary Party Wall Awards were made on various dates.

30. In December 2018, A began extensive excavation of the rear garden at 9SGT, continuing into January 2019. Rs had to rely on their respective tenants to inform them of any cracking appearing in the mews properties. On 3.2.19 Mrs Jones emailed Mr Mahoney to say her tenants had reported that a pre-existing lengthy hairline crack running internally on the rear wall at first floor level from the top bathroom to the boundary with 7SGM had recently got wider. In evidence Mrs Jones said that this crack had existed 'for some time'. She and her husband redecorated every few years between lettings and would repair the crack which opened up again over time. This time it opened up earlier than in the past. Mr Mahoney reported this to Mr Couzens and sought confirmation from Ecos Maclean that the 'excavation which has taken place does not present a risk to the structural integrity of the mews buildings.' Mr Maclean provided reassurance, based on his observations at his site visits.

31. The timeline of the works has been put together by the parties' legal representatives based on the photographs and Mr Maclean's emails. A's contractors had commenced the first underpin beneath the rear wall of 7SGM by 7 February 2019, which was completed by 20 February 2019. A second underpin beneath the rear wall of 7SGM, to the west of the first, was being prepared on 26 March 2019 and was cast by 29 March 2019. Works then continued further away from the mews houses, including preparation for underpinning the front part of the garden wall between 9SGT and 10 SGT.

32. Mr Couzens and Mr Mahoney made the Awards on 3.5.19, which permitted A to carry out his excavation and underpinning work under 6SGM. The casting of the first underpin beneath 6SGM took place on 10 and 11 May 2019 and was complete, including drypacking, by 14 May 2019. The second underpin

underneath 6SGM was said to have been commenced by 14 May 2019 and was certainly completed by 22 May 2019.

33. On 15 May 2019 the bund adjacent to and beneath the Stepoc garden wall between 9SGT and 8SGT was excavated. A berm, albeit steepening over the period, was left in place adjacent to the garden wall from then until around 13 June 2019 and by 20 June 2019 it seems that a further small underpin was cast at the end of the garden wall, to support that wall. The stepoc underpinning of that garden wall was nearing completion on 9 July 2019 and was certainly complete by 17 July 2019.

34. By October 2019, there were further signs of movement – including horizontal cracking in the rear wall of 5/6SGM.

35. Although this was the last of the work which might directly impact in structural terms on 5/6SGM, the final notifiable work to the rear wall was to trim off the protruding sections of original wall and complete the block facing wall built up against the original brick wall. This had not started by 30 August 2019 but was complete by 3 October 2019. Mr Taylor had moved back into 9SGT by the end of 2019.

36. There is an email dated 21 October 2019 from Mr Jones to Mr Spriggs referring to "some cracks which have appeared in our flat" (and some photographs which do not appear to be in the bundle). Mr Mahoney visited the mews properties on 23 October 2019 and took photographs. These show cracks at first floor level in 5SGM, including a new crack above the stair balustrade, as well as separation between partition and boxing along the rear wall at ground floor level in 5SGM, at the foot of the stairs.

37. On 8 June 2020 Mr and Mrs Saliba, the tenants of 5SGM gave two months' notice to quit because of the damage to the property. Their letter of 1 August 2020 to Mr and Mrs Jones refers to the cracking and the dropping of the floor throughout the ground floor which 'began in early 2020 and was pretty sudden'. When those tenants vacated at the beginning of August 2020, Mr and Mrs Jones inspected 5SGM. They noted that the dropping of the floor slab had buckled the connecting pipework to the boiler and Megaflo, which they had disconnected.

38. On 21 August 2020 new prospective tenants were shown round 5SGM. When stepped on, the bathroom floor tiles cracked and the floor partially collapsed, prompting the letting agent to advise that the property was unlettable until it could be repaired.

39. On 22 July 2020 Matt Kelly, the tenant of 6SGM wrote a long email to Mr Spriggs, with photographs, detailing instability in the kitchen floor and evidence of dropping of the bathroom floor. He too gave notice and vacated the property on 6 October 2020.

40. The problems were reported to Messrs Couzens and Maclean in an email dated 21 July 2020 from Mr Mahoney. A meeting was arranged on site on 5 August 2020 for the party wall surveyors (and Mr Maclean) to view the damage. Rs sought advice from Mr Groves who recommended more intensive

investigations. These started with trial pits 1 and 2 dug next to the rear wall in the bathroom and tank cupboard of 5SGM respectively during September 2020 and continued with trial pit 3 next to the rear wall in the bathroom of 6SGM and pit 4 in the middle of the lounge floor of 6SGM dug on 7 October 2020.

41. Three boreholes were sunk, labelled (unhelpfully) borehole 1 in trial pit 3, borehole 3 in trial pit 1 and borehole 2 in trial pit 4. Soil samples from these boreholes were taken by Fastrack on 12 November 2020 and their geotechnical survey report is in the bundle.

42. The trial pits revealed a very large crack at the level of the slate damp proof course to the rear wall. This runs for about 6m from the boundary wall with 4SGM across the width of 5SGM and half the width of 6SGM. The width of the crack varies from 20mm at its ends to 80mm in the middle. There are intermittent voids beneath the foundations to that part of the rear wall of up to 90mm. In addition, significant voids were found beneath the concrete floor slabs of both 5 and 6SGM of up to 100mm deep.

43. Mr Groves recommended that the dpc crack should be filled with dry pack for stability. Around 23 September 2020, the crack was partially dry-packed in 500mm sections with 400mm gaps in between. By 17 June 2021 Mr Jones was reporting to Messrs Mahoney and Spriggs that "the dry pack we put in is now showing a further 3mm gap" which can be seen in some of the photographs.

44. The engineers who initially reported after the trial pits were opened up – Robert Groves and John Chick on behalf of the Respondents, Nick Maclean on behalf of the Appellant and Kelvin Higgins instructed by the third surveyor – all concluded that both the very large crack at the level of the slate damp proof course and the significant voids beneath the concrete floor slabs of 5/6SGM and foundations of the rear wall were new and had been responsible for the primary damage caused to the flats, namely the dropping of the ground floor slab where it adjoined the rear wall.

45. The surveyors could not agree on the cause of the damage to 5 and 6SGM. Mr Mahoney contended that the damage was caused by the works; Mr Couzens contended the damage was caused by tree roots. The dispute was referred to the third surveyor.

46. Rs obtained advice from Mr Jon Chick, which formed the basis of Mr Mahoney's submissions to the third surveyor. Mr Couzens obtained a report from Mr Maclean, which formed the basis of Mr Couzens' submission.

47. On behalf of Rs Friend & Falcke prepared a specification of remedial works, based on a remedial design by Graphic Structures. The specification was put out to tender. The tenders received, from Big Bean Construction and Coyle, were submitted to Mr French.

48. Mr French, as third surveyor, obtained a report from a geotechnical engineer, Prof. Kelvin Higgins, and concluded that the damage to 5SGM and 6SGM was caused by the Works.

## Evidence of the engineering experts

49. Mr Huband and Mr Tant have only provided a joint statement dated 6 October 2022 as they are in almost total agreement, save for some occasional differences in emphasis. Mr Huband was initially of the view that the damage was caused by the trees but now agrees with Mr Tant's analysis. They gave their evidence at the same time. Mr Tant set out their analysis with the assistance of a 3D scale model showing the rear wall with the gardens on one side and the interiors of the mews properties on the other. They were each cross-examined.

*Pre-existing damage*

50. Their suggested mechanism of movement is set out in paragraphs 5.1 – 5.8 of the joint statement, with their analysis in paragraphs 6.1 – 6.11. To summarise, they consider that the evidence points to subsidence beneath the footings of the rear wall prior to the construction of the intersecting (cross) walls of 5SGM and 6SGM, i.e. pre-conversion in the 1970s. This subsidence caused the horizontal dpc crack. The subsidence is likely to have been caused by a combination of desiccation of the subsoil by vegetation in the gardens of SGT and consolidation of made ground.

51. A significant area of brickwork forming the rear wall above the 6m dpc crack is unsupported by the foundations. An arch developed in the rear wall to carry the wall over the crack. As part of the adaptation of the wall to the new loading conditions, a crack developed in the wall at first floor level in 5SGM, and it was that crack which opened up in February 2019. The spring points (end points) of the arch were in the part of the wall facing 7SGT (point 'B' in the diagram at Appendix C2 to the report at page 538 of the bundle) and the part of the rear wall abutting the boundary wall between 8SGT and 9SGT (point 'A').

52. In addition to dropping, the brick corbeling and mass concrete foundation below the dpc crack had rotated out about 30mm. This had occurred before the Works.

53. The voids seen beneath the concrete floor slabs also pre-date the Works. They developed after the conversion works in the 1970s and probably more than 10 years ago. The experts consider that the voids are extensive, including under those parts of the internal walls abutting the rear wall. They said that they had been able to insert a metal bar into the voids in various locations up to 1.5m – 2m in all directions without impediment. The voids have been caused partly by desiccation from trees/ vegetation in the gardens of SGT and/or partly by settlement of the subbase. Boreholes 1 and 3 reveal that the slabs were laid on made ground which had no doubt been dug out from the higher ground under number 6 and spread out downhill under number 5. Borehole 2 shows that the floor slab of the western half of number 6 lies on clay, with some voids beneath the slab even in this area.

54. The experts consider that the slight cracking around the boxing close to the ground floor bathroom of 6SGM, which was identified in the pre-works schedule of condition, indicates possible historic movement of the slab.

55. The ground floor slabs and the foundations to the internal walls were intended to be ground bearing. The appearance of the voids meant that the slabs which are over those voids were, and still are in some cases, being supported by the unintentional interaction with the internal masonry walls and in turn these walls were unintentionally cantilevering from solid bearing towards the Mews street. In cross-examination, Mr Tant clarified that the internal walls acting as cantilevers were only the wall between the bathroom and tank cupboard in 5SGM and the foundation of the wall at the bottom of the stairs in 5SGM, most of which (save for 1m) was cut away to form the staircase during the conversion. Mr Tant agreed that that wall used to provide support for the rear wall and its removal removed a degree of stability from the rear wall, making it more prone to damage.

56. Mr Tant also agreed that the primary pre-existing damage to the mews properties was the subsidence under the foundations and the creation of the arch. This led to secondary damage, namely the dpc crack and the cracking internally at first floor level.

*Mechanism of movement*

57. The experts' opinion is that the exposure of the subsoil beneath the rear and boundary walls during the Works resulted in outward rotation and modest downward movement of the rear wall. The maximum extent of this movement occurred at the left-hand support of the arch (point A). The additional soil removal (excavation) to facilitate the underpinning resulted in the arch increasing its span to find a new point of support (A1 in Appendix C2). This resulted in the lengthening and widening of the pre-existing crack at first floor level and a new crack also at first floor level further west of the original crack, both in 5SGM. The cracks indicate the top of the arch and the new crack indicates the widening of the arch to find a new point of support.

58. The downward movement of the panel of brickwork beneath the cracks at first floor level resulted in the failure of the brickwork and footings of the internal walls abutting the rear wall. This broke the cantilevering action of the lower part of the walls which separated and dropped, allowing the floor slabs to drop. That drop was about 40mm. The slab in 6SGM has not dropped due to the underpinning carried out during the Works.

59. They see the underpinning work done at the junction of the rear wall and the boundary wall with 8/9SGT as crucial. The factors involved in leading to the movement include the removal of the overburden, in other words the reduction in the pressure of the soil as it was removed and the width of the vertical face of the soil exposed when the soil was excavated under the Stepoc boundary wall (despite the presence of the reinforced Stepoc wall above acting as a beam). The wall was gradually unsettled during the Works and the arch started to spread, which explains why the full extent of the damage only became evident over a number of months.

60. The experts agree that the movement caused by the Works was only 2mm, based on the width of the internal cracking at first floor level. They emphasised that the rear wall is constructed of lime mortar brickwork which is plastic in

character and very forgiving of movement. Such a wall can tolerate 15mm of movement without damage, but the internal plaster finishes would crack. There is no evidence of any cracking in the rear wall as a result of the Works. It has achieved a new equilibrium and the rear wall is in the same structural condition it was in before the Works were carried out.

*Remedial works*

61. In cross-examination the experts agreed that although the rear wall has been stable for many years, it was and remains unsupported. This is an unacceptable state of affairs as any slight movement at either end of the arch could cause the panel of brickwork under the arch to crack and possibly collapse. Mr Huband described the building as 'on a hairtrigger' and a minor trigger could have initiated damage, such as drilling through the floor slab to fit a new bathroom outlet. Mr Tant accepted 2mm of movement could arise just by thermal movement or seasonal movement according to climatic conditions.

62. In terms of remedial work, the experts consider that the remaining part of the rear wall under 5 and 6SGM needs to be underpinned, which is a preferable solution than stitching. That would have been their recommendation had the damage to the walls and slabs not occurred. The internal walls should be underpinned or the foundations thickened. The voids under the slabs should be filled and the slab relaid. The Graphic Structures scheme allows for half of the concrete slab nearest the rear wall to be replaced.

63. Theoretically, the remedial works to the internal walls and the slabs could be done without underpinning the rear wall but the experts' view was that no engineer would approve such a scheme on health and safety grounds and no contractor is likely to agree to carry out the work in those circumstances.

*Manner in which the Works were carried out*

64. The experts' joint statement makes a number of criticisms of the way in which the Works were designed/ carried out. It suggests that the width of the two pins under the rear wall was excessive. They estimate the pins to be 1.9m wide; Mr Maclean said they were no more than 1.75m but in any event, they were wider than the 1.4m specified in the Ecos design. Mr Maclean said that he had taken the decision to install two wider pins under both 7SGM and 6SGM to avoid the need for one very short one to fill the gap if 1.4m pins were used. He judged by his experience that it was safe to use wider pins as on excavation they found natural clay and the wall appeared to be intact on sound foundations. The experts also considered that the 3.2m width of the last pin under the boundary wall with 8SGT was excessive, notwithstanding the Stepoc wall over. Mr Huband suggested that the widths were unusual, but it was a matter of judgment for Mr Maclean.

65. The experts both said that they had never seen a pin in excess of 1.2m and considered that the wider the pins, the greater the risk of movement. Mr Tant told the court that a 1m pin produces 33% additional stress but a 2m pin produces an additional 77%. However, he accepted that even if 1m pins had

been used (as in the original Green design), the underpinning might have caused enough movement to result in the collapse which occurred.

66. Further, in the joint statement at paragraph 6.10 the experts say that 'notwithstanding the above [the criticisms as to the width of the pins], it appears that the movement in the rear wall resulting from the excessive width of underpinning and absence of propping together with the bedding in of the underpinning was limited to cracking within No.5 and No.6 SGM up to 1.5mm in width including jamming doors and some movement in the rear wall'. That movement was enough to trigger the loss of support to the ground floor slab.

67. There was considerable cross-examination in relation to the Chelmer Building Impact Assessment ("BIA") which predicted a net vertical settlement of 1mm (2mm of heave less typical settlement of 3mm following underpinning). The joint statement says at paragraph 4.1(h) that this is in accordance with their estimates of the downward movement of 2mm as a result of the underpinning. The BIA suggested a damage category of 0/ negligible on the Burland scale. However, the experts noted that the width of the cracking internally was consistent with category 2 on the Burland Scale (cracks up to 5mm) and Mr Maclean said that was what he expected.

68. I considered Mr Tant's evidence in relation to the BIA was somewhat contradictory. He accepted that the BIA could not be relied on as it related to a different design. The assessment assumed that the rear wall was monolithic and sound. Further, as noted in the joint statement, clause 10.5.5.3 in the BIA states 'it is not known whether there are any internal walls within the mews houses in the locations, aligned from front to rear, so these findings may be entirely academic'. There are, of course, such internal walls. (The experts seemed to disagree on the effect of the internal walls, with Mr Tant saying that the presence of internal walls would reduce movement and Mr Huband saying that shorter walls can be suffer more damage as there is less distance to spread any movement over).

69. Mr Tant's main criticism was the failure to monitor cracks which developed. Mr Maclean said there was no need to do so. Mr Tant contended that had the first floor crack been monitored, mitigation measures could have been taken which could have avoided the slab collapse. However, the parties agree that the monitoring referred to in the BIA was of external cracks. None opened up during the Works. The BIA also recommended that any existing external cracks be repaired prior to the work being carried out. The only such crack was a vertical gap in the rear wall on the boundary between 6 and 7SGM where two different types of finishes meet. It was not repaired but the experts do not consider there has been any change in it or that it has had any impact on the damage suffered.

70. It is not necessary for the court to make findings as to whether the manner in which the Works were done was defective, since pursuant to s7(2) of the Act, the Building Owner must compensate any adjoining owner 'for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act'. A finding of negligence is not required, and I make no such findings.

71. I would observe, however, that the experts' criticisms do not appear to carry much weight given (a) Mr Tant's acceptance that there is no evidence that the movement from the Works was greater than that predicted in Chelmer; (b) the experts' opinion that only minimal movement was needed to cause the damage; and (c) the experts do not suggest (and it has never been suggested) that the pre-existing damage to 5 and 6SGM could have been known to any of the parties or their advisers before the Works. (Mr Isaac submitted in closing that the dpc crack may have been visible when Mr and Mrs Jones had the new flooring installed to the ground floor bathroom in 1998, but there is no evidence that their contractors did see it or report it to them).

## The trees and the arboricultural evidence

72. Mr Isaac accepts that the agreement of the engineering experts as to the causation of the damage presents his client with difficulties, but he nevertheless seeks to persuade the court that there are good evidential reasons for concluding that tree root action is a more likely cause of the damage than the Works. He criticises the engineers for closing their eyes to the possibility of trees being the cause; their joint statement merely says at paragraph 5.6 'The Experts have seen no evidence that the effects of vegetation in the vicinity of the rear wall were a contributory factor in the current movement of the structure'. Mr Tant was cross-examined extensively on this issue.

73. A's evidence is that two of the four mimosa (acacia) trees were planted directly against the rear wall, one within one metre and the other 3-4 metres from the wall. They have grown significantly since they were planted in 2015 and have been pruned substantially every spring since 2019. A and his experts point out that the trees are next to the areas of maximum movement/ damage in 5/6SGM.

74. The arboricultural experts have prepared a joint statement of issues agreed and not agreed dated 7 October 2022 and their own individual reports dated 21 October 2022. They also gave evidence together, but their conclusions are very different. There was some measure of agreement between them. They agree that the vertical movement of domestic property attributable to trees rarely exceeds 40mm and is typically 1-20mm over a period of a few years. Such movement is typically seasonal and cyclical. They consider it unlikely that the dpc crack and the voids were attributable to trees.

75. Mimosa tree roots were found in boreholes 1 and 3. It was agreed that fine roots, such as were found, are the ones which extract more moisture from the ground. The foundations of the mews properties are about 0.5m below ground level. There is some debate as to whether the Fastrack diagrams of a cross-section of those two boreholes show the tree roots at 0.5m below ground level i.e. just below the foundations or 0.5m below the top of the borehole i.e. up to 0.5m below the foundations. I note that the previous experts differed in their reading of the diagram. Looking at the scale markings on the right of the diagrams, it seems to me that the former interpretation is correct but for the purposes of this judgment, I shall assume that the latter interpretation (favoured by Mr Isaac) is correct. Dr Heuch's view is that it is unusual to sink boreholes internally and that it is surprising that any roots were found in the boreholes.

76. Mimosa trees are not commonly planted in this country and as their properties are unknown, NHBC guidance advises that acacia should be regarded as a moderate water demand species. There are no recorded instances of mimosa trees causing subsidence.

77. In cross-examination the experts agreed that soil moisture content is a crude measure (soil suction tests are more reliable) and so the best that can be said is that the ground in boreholes 1 and 3 by the rear wall was more desiccated than in borehole 2 in the middle of the property. However, all the ground internally was dry. The experts would have expected to see borehole logs, but none seem to have been created. They would have wished to have seen the results of various other tests such as pedometer testing, crack monitoring and level monitoring to get a better picture of what was happening.

78. In terms of the main issue of causation of the damage following the Works, Dr Dobson agrees with the engineers' conclusion that there is no evidence of a contribution from trees. He considers that the mimosas were too young and too small and the foundations of 5/6SGM too deep for the trees to impact the mews properties. Although the foundations are 500mm internally, due to the height of the soil in the garden of 8SGT, the effective foundation depth is 1.75m. Dr Dobson's main reason for discounting the trees as a cause of the movement is that there is no evidence of seasonal movement i.e. cracks opening during summer and closing during winter as the soil is rewetted. Although a slight gap opened up above the dry pack in the dpc crack in 2021, there is no evidence that gap has reduced or widened since then; the ground seems to have stabilised.

79. Dr Dobson pointed, in particular, to the fact that there has been no evidence of seasonal movement following the extremely hot and dry summer of 2022. In other buildings suffering from tree-related subsidence, cracks have opened up two to three times as much in 2022 as in previous years and foundations have dropped significantly. No such movement has been seen in the mews properties. Tree-related subsidence goes on being cyclical. In the absence of such seasonal movement this cannot be tree-related subsidence.

80. Mr Tant agreed that the absence of evidence of seasonal movement was the critical factor in ruling out tree-related subsidence.

81. Dr Dobson also made the important point that even if tree roots were affecting the ground below the foundations of 5/6SGM, this would have no impact on the buildings themselves as the foundations are severed from the rear wall because of the dpc crack.

82. Dr Heuch agreed that following the extreme conditions in the summer of 2022, the degree of subsidence seen in other properties has 'fallen off a cliff'.

83. Dr Dobson's conclusion in the joint statement is that the engineering experts 'have offered a well-reasoned mechanism for the damage which does not include a contribution from trees. I have seen no evidence that causes me to contradict them'. Dr Heuch on the other hand is less convinced by the engineering evidence, although he defers to them on engineering issues. His conclusion is 'that the level of movement – a few mm – shown in their diagram

in Appendix C2 in the Engineering Joint Statement is now well within the range that could have been generated by the trees present.' He goes on to note that the area of maximum movement, according to the engineers, was adjacent to borehole 3 which is itself closest to the trees, rather than to the areas where underpinning was carried out.

84. Dr Heuch suggested that there are three key pieces of evidence that appear to have been overlooked or not given sufficient attention in the engineers' statement:

    a. The soil in borehole 3 (nearest the trees) was even more desiccated than in the other two boreholes. However, in cross-examination he accepted (as set out above) that the method used for measuring soil moisture content in this case was too crude to make such comparisons.

    b. Dr Heuch pointed to three photographs, labelled in the bundle as taken on 4 February 2021, 24 October 2021 and May 2022. In his view they appeared to show the dpc crack open in the February 2021and May 2022 but closed in October 2021. This would be suggestive of seasonal movement, albeit the reverse of the usual pattern which is that cracks open in summer and close in winter. However, the first photograph was wrongly dated and was in fact taken in August 2020. In cross-examination Dr Heuch accepted that the photograph dated October 2021 was not very clear and that by comparing other photographs, no movement in the dpc crack could be seen between October 2021 and May 2022. He accepted that there was in fact no evidence of seasonal movement.

    c. Lastly, he pointed to the hot, dry summer of 2018 and the consequent significant rise in domestic subsidence cases. He accepted that there were no reports of damage in 2018 but suggested that delayed reporting of damage can occur for various reasons. As I have said, he did concede that there was no evidence of cracks widening following the 2022 drought.

85. Mr Isaac cross-examined both Dr Dobson and Mr Tant on the application of the NHBC guidance 4.2 'Building Near Trees'. They agreed that the guidance for new buildings on greenfield sites with normal moisture content is not to plant trees within a distance of half the maximum height of the tree. Further, with trees planted this close to the rear wall, the recommended depth of the buildings' foundations would be 2.2m. They both considered that the guidance was not directly applicable as the ground under the mews properties is already desiccated and less prone to movement. Dr Dobson called it 'looking at it through the wrong end of the telescope'. However, Mr Tant accepted that if he had been acting for the owner of 8SGT, he would have advised him not to plant the acacia trees so close to the rear wall of the mews properties because they would increase the risk of ground movement.

## Conclusion on causation

86. The parties agree that the usual test of factual causation applies in this appeal, namely the 'but for' test. It is for the Respondents to prove that but for the Works, the damage would not have happened.

87. I consider that Mr Tant and Mr Huband provided a cogent explanation for the damage. They gave their evidence in a careful, measured and thoughtful way and were impressive witnesses. I do not accept that they closed their eyes to the possibility of impact by the trees. Rather they considered it and rejected it for the same reasons as given by Dr Dobson.

88. It is indeed the case, as Mr Isaac emphasised, that 5/6SGM were suffering from serious existing subsidence damage, probably as a result of ground settlement before the Works. (The suggestion of tree root desiccation by the engineers was ruled out by the arboriculturalists). Mr Isaac also suggested that there may have been some washing out of fines in the soil. This was prompted by the observation of a damp patch in one of the trial pits during the site inspection. The experts agreed that such washing out would only occur if there were running water.

89. The mews properties are built on clay soil which is particularly prone to volume movement. The rear wall has a strip foundation laid directly on made ground. The structure had been weakened by the partial removal of the party wall between 5/6SGM for the stairs.

90. Mr Smith took issue with the suggestion that only the tiniest thing could have triggered the damage, pointing out that the properties had remained sound for 50 years since 1976 despite various works being done such as drilling through the floor slab in 5SGM to connect the toilet waste and despite the potential 10mm of seasonal movement which London experiences every year. However, he accepted that the buildings had a vulnerability and that an interference at either end of the arch could have broken the arch.

91. In my judgment, the engineers' explanation was not shaken, despite lengthy and detailed cross-examination. It explains the available evidence, in particular the opening up of the crack at the top of the arch on 5SGM and the new crack which appeared in the same area. Mr Isaac suggested that the fact that more cracking was noticed in October 2019 is consistent with tree root damage which tends to be worse at the end of the summer and he suggests this was the delayed impact of the 2018 drought. However, the evidence suggests that the damage was observed earlier than that by the tenants, from about June 2019 onwards. In addition, that explanation does not account for the opening up of the first floor crack in February 2019.

92. The difficulty for A is that the alternative explanation of tree root damage has only qualified support from Dr Heuch whose three key points fell away in oral evidence. In truth, it rests on a common-sense suggestion that it must be the tree roots because the worst damage was nearest the trees, which ignores the point made above about the disconnected foundations. In my judgment, the lack of evidence of seasonal movement deals a fatal blow to this argument.

93. I have covered most of the points put forward by Mr Isaac as to why the trees are the more likely cause in the preceding discussion of the evidence. He made a number of other discrete points:

a. A stepped crack appeared in the rear wall of the bathroom of 5SGM in August 2020. Mr Tant said that 'at first glance it appears to be typical tree-related damage' but concluded that it was not so, because the area below the crack is detached from the foundations and therefore any tree-related movement.

b. Mr Isaac posited a theory that the drying effect of tree roots on the soil in the garden of 8SGT could exert friction on the rear wall, leading to the movement. None of the experts supported that theory.

c. There is a long horizontal crack in the garden wall between 8SGT and 7SGT which could indicate tree-root damage. This wall was rebuilt on old foundations during the work to 8SGT's garden in 2015. Dr Dobson was of the view that this is not typical tree-related damage, being a straight and not stepped crack. He suggested, and I accept, that it is difficult to draw any conclusions from a garden wall built on limited foundations.

94. For all the reasons given, I am satisfied that the Works caused the necessary movement to break the arch which allowed the internal walls and floor slabs to drop.

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

**Quantum**

96. I now turn to the issues of whether A is liable for pay compensation for all the remedial work required to 5/6SGM and whether the amounts claimed in the specification prepared by Friend and Falcke and awarded by the third surveyor represent reasonable compensation or should be adjusted either upwards or downwards.

97. Before doing so, I would like to make some general observations. The damage caused by the Works, the ensuing dispute and these legal proceedings have undoubtedly been extremely unfortunate and no doubt highly stressful for all the parties. Mrs Spriggs' statement sets out the pressures the situation has put on her and her husband and their financial resources. It is particularly unfortunate that Mr Taylor does not have insurance to cover his liability in respect of the Works (despite it being a condition of the Party Wall Award), believing that it was sufficient for his contractors to have third party insurance.

98. I accept that the parties have acted throughout on the advice of their experts and legal advisors. In the light of the engineers' evidence, it is now apparent that all the previous experts were wrong as to the cause of the damage in what were highly unusual and complex circumstances.

99. In submissions, Mr Isaac pointed out that the Respondents have been in charge of the investigations throughout, and it was their choice (no doubt on advice) to remove the ground floor bathroom in 5SGM and the kitchen and shower in 6SGM and to dig the trial pits, including the one in the middle of the lounge

area in 6SGM. It is true that the only damage to that room is to reinstate the floor where it has been excavated for the trial pit. That trial pit was in the event of only peripheral value, but I consider that it would be wrong to penalise Rs with the benefit of hindsight in this respect. It was reasonable to undertake the destructive tests to investigate the cause of the damage, given A's assertions that the trees were to blame.

100. That said, there is some force in Mr Isaac's complaint that Rs have been given to understand that A would pay for all the work needed to their properties and for all their losses. In my judgment, insufficient attention has been paid by those advising Rs to the principle that the purpose of compensation is to put them in the position they would have been in had the damage not occurred; that the court's role is to award compensation which is reasonable but not excessive; that Rs must prove their losses; and that Rs have a duty to mitigate those losses. I shall say more on these points as I go through the individual items in the specification.

*Pre-existing damage*

101. Apart from the primary issue of causation, the other main area of dispute between the parties is whether A's liability extends to paying for the underpinning the rear wall of the mews properties. As set out earlier in this judgment, the wall is unsupported by its foundations, a situation which pre-dates the Works. The unchallenged evidence is that in practice, the rear wall must be underpinned before the remedial works to the cross walls and floor slabs can be done.

102. Mr Smith submitted that as the repairs required as a result of the Works necessarily involve remedying the pre-existing defects, Rs are entitled to the costs of all the repairs. He relies on *Harbutts Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1QB 447 which he contends is authority for the proposition that if the work is reasonable by way of repair, the cost is recoverable, even if that constitutes an improvement. *Harbutts* was a contract case in which a factory housed in an old mill burned down. The claimant claimed the cost of building a new factory; the defendant contended that the proper measure of damages was the value of the building, plant and machinery immediately prior to the fire, a lower figure. There was evidence that the relevant planning authority would not permit the claimant to rebuild the factory to the old design.

103. The judgments on this point are brief. Lord Denning M.R. held at A on page 468:

"*The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that*

*they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case."*

104. Starting on page 472 at H, Widgery LJ said:

"*..each case depends on its own facts, it being remembered, first, that the purpose of the award of damages is to restore the plaintiff to his position before the loss occurred, and secondly, that the plaintiff must act reasonably to mitigate his loss…..It was clear in the present case that it was reasonable for the plaintiffs to rebuild their factory, because there was no other way in which they could carry on their business and retain their labour force. The plaintiffs rebuilt their factory to a substantially different design, and if this had involved expenditure beyond the cost of replacing the old, the difference might not have been recoverable, but there is no suggestion of this here. Nor do I accept that the plaintiffs must give credit under the heading of 'betterment' for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them.*"

105. Finally, on page 475 starting from H Cross LJ held as follows:

"*…but in my judgment the value of the building and of the plant and machinery before the fire throws no light on the true measure of damages in a case like this where it was obviously right for the plaintiffs to rebuild and re-equip their factory and start business again as soon as possible, Further, I do not think that the defendants are entitled to claim any deduction from the actual cost of rebuilding and re-equipping simply on the ground that the plaintiffs have got new for old. It is not in practice possible to rebuild and re-equip a factory with old and worn materials and plant corresponding to what was there before, and such benefit as the plaintiffs may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendants are not, as I see it, entitled to any allowance…..*"

106. Rs' contention is that their properties had been 'sound' (or at least in equilibrium) since at least the 1970s and that, but for the Works, they would have remained so. It is likely that Rs would therefore have remained unaware of the pre-existing damage to the rear wall /foundations and may never have been obliged to repair that damage.

107. Pausing there, as mentioned previously, it was suggested by Mr Isaac that the crack to the dpc was likely to have been visible when the new bathroom floor tiles were installed in 1998 and should have been investigated. Whilst it seems likely that the crack may have been visible, being at the level of the top of the floor, there is no evidence that this was spotted or brought to Mr or Mrs Jones' attention. They denied any knowledge of the dpc crack and I accept their evidence.

108. I accept Mr Isaac's submission that prior to the Works, the mews properties were in a vulnerable condition with significant subsidence and manifestations of that damage internally by way of the first floor crack and the cracking round

the boxing. He characterises the damage caused by the Works as secondary to the pre-existing primary damage. A's case is that he is not liable to pay for the works to repair that pre-existing damage which is independent of the Works. The underpinning of the rear wall (and other associated repairs) is not a necessity arising from the damage caused by the Works (although in practice, a contractor would insist on the underpinning being carried out). A submits that now that Rs know of the defects, it is sensible for them to repair them.

109. As is apparent from Widgery LJ's judgement (and as noted in McGregor on Damages Ch.39-06), the issue in *Harbutts* was whether the measure of damages was the cost of repair or diminution in value. It did not deal directly with the question of pre-existing defects.

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

111. None of the members of the Court of Appeal in *Harbutts* considered that any deduction was necessary for the fact that the claimants in that case ended up with a new, modern factory. According to the authors of *McGregor* (paragraph 39-10) 'The claimant who is allowed the cost of reinstatement is not required to submit to the deduction of the amount by which the property as renewed or repaired is more valuable than it was in its condition before the tort.'

112. Mr Isaac relies on the case of *Jobling v Associated Dairies Ltd* [1982] AC 794. A claimant who suffered personal injuries which reduced his capacity to work was subsequently diagnosed before the trial with a pre-existing condition which would eventually disable him from working at all. It was held that he was only entitled to time-limited loss of earnings. A relies in particular on dicta that the court must take all factors into account so as not to award excessive compensation.

113. Mr Smith responds simply that this case does not fall within *Jobling* territory. In my judgment, aside from the principle that compensation should be reasonable but not excessive, the case does not assist, being concerned with the assessment of damages in a personal injury claim. *Harbutts*, on the other hand, was to do with the measure of damages for damage to land.

114. Whilst I have some sympathy for A's position, for the reasons set out above, in my judgment he is liable to pay for the cost of repairing the pre-existing damage as well as that caused by the Works.

*Evidence from the building surveyor and quantity surveyor*

115. As I have said, Friend and Falcke originally obtained two tenders from Big Bean Construction and Coyle Construction, and it was the Big Bean tender which

formed the basis of the third surveyor's Award. In August 2022 Rs sought updated tenders from those two companies. Alarmed by the large increase in the prices quoted by those companies, they obtained a third tender from Venture Construction in October 2022. This tender was lower than the others and the revised, increased figures which Rs now seek are based on the Venture tender.

116. Mr Mark Ruddell was jointly instructed as a building survey to comment on the remedial works required as a result of the Works, by reference to the expert structural engineers' evidence. He produced a report together with his colleague, Mr Justin Sullivan, quantity surveyor. Mr Ruddell answered questions asked by A in a letter dated 3.1.23 and |Mr Sullivan answered further questions from A in an answer to an email sent on 3.1.23.

117. Unfortunately, Mr Ruddell's evidence was of limited assistance. In his report he listed the remedial works needed and stated that various fixtures, fittings and appliances did not need to be replaced as the existing items could be reused (sanitaryware, boiler and Megaflo and lights switches and ceiling pendants). In his answers to questions, he stated that A should not be liable for pre-existing damage but without giving any reasons. He strayed into opining on the cause of the damage and commented on Mr Chick's report, with barely a reference to the engineers' evidence. As he said, it appears that he misunderstood his brief.

118. Mr Sullivan explained that the process he adopted in his report was to consider each item in the tender which formed the basis of the Third Surveyor's Award and if he thought the cost was fair and reasonable, he allowed it. None of the costs were too low, in his opinion; if any had been too low, he would have said so. Some were too high, and he reduced those figures to a level which he considered fair and reasonable.

119. His company, Adair Limited, does not carry a database of costs. Instead, they use tenders they have obtained for similar projects across London. At any one time they are involved in dozens of projects in various capacities. Mr Sullivan's practice is to benchmark his estimates against figures from three similar projects. If there is no project data for a specific task, he refers to price books such as SPONS and two others. He has a particular knowledge of the cost of underpinning as he previously worked for an underpinning firm.

120. In my judgment, Mr Sullivan's evidence was straightforward, eminently knowledgeable and pragmatic. He was an impressive witness. He made a number of concessions in cross-examination, accepting certain costs which he had previously reduced or disallowed.

121. He made a number of criticisms of the tender documentation and process which I consider well-founded. The specification is generic with a number of items which are merely narrative. There is some duplication e.g. items 4.6 / 4.10 and 4.17/4.18. The actual tenders have not been produced, merely a summary. There appears to have been no analysis by Friend and Falcke of the tenders to check for errors in the calculations and to see if some items are too high or too low. Coyle, for example, have quoted for items 2.1, 2.2 and 2.4 which are just narrative and not work items. Mr Sullivan said that the covenant of the proposed contractors needs to be examined. The lowest tender is not necessarily the best

price. In the absence of an analysis, it was difficult to compare tenders. For example, Venture appeared to have put the cost of digging up the slab in section 2, rather than 4.

122. Mr Sullivan pointed out that the plan accompanying the specification contains an unusual design for underpinning the cross walls and the proposed slab is very thin with no insulation and not compliant with Building Regulations. The plan indicates the engineering work needed but contains no information as to the layout of the rooms and the location of the electrical installations and fittings. This would make it difficult for the contractors to price the making good works. In his experience, poor tender information leads to builders adding in extra to cover unforeseen costs or declining to tender.

123. Mr Sullivan agreed that prices went up in 2019 and were volatile from 2021 to the end of 2022. However, his experience is that prices have settled now, and tenders are coming in with little in the way of price increases. Although materials and energy costs have increased substantially, a lot of the extra costs are being absorbed by contractors.

124. He agreed that various factors can affect the price given in tenders, such as the time of year, the fact that the job is in central London and how busy the builder is. He stressed the importance of seeking tenders from the right people. He described Big Bean as a 'high end residential fit-out' firm who would simply sub-contact the underpinning work to a specialist contractor. He does not know Coyle or Venture. I appreciate that it is preferable to have one contractor with overall responsibility for the job, but Mr Sullivan's view is that a tender should be sought from a specialist underpinning firm which may well be prepared to also do the other work.

125. Mr Sullivan's figures were criticised by Mr Smith as too low and out of step with the 'real world' tenders obtained by Rs. However, Mr Sullivan's figures are based on data from the last quarter of 2022 and so are up to date. They are based on live data from multiple sources and in my judgment are more reliable than those in the tenders. He told the court that tenders are coming back in line with estimates he has given to the client. Mr Smith suggested that Mr Sullivan was surprised by this, which indicated his costs were too low. On the contrary, I took it as evidence that his figures are borne out in reality. As to low prices, he bemoaned the industry's 'race to the bottom', with builders quoting prices which are too low.

126. Mr Sullivan helpfully drew up a Scott Schedule with his figures against those in the Award. I have used that Schedule and amended it to include Rs' revised figures and those which I have allowed. For the large part, I have adopted Mr Sullivan's figures as altered during cross-examination. That Schedule is appended to this judgment. Where necessary, I set out below my reasons for the figures I have awarded.

127. **Item 2.5 removal of general waste**: I have allowed £1500 per property rather than £1000 as suggested by Mr Sullivan on the basis that this is removal of general waste and not of the concrete floor slab which comes within section 4. He accepted that the cost of waste disposal could be higher due to the need to

use mini skips as there is a low entrance to the Mews and limited space outside the properties.

128. **Items 4.6 and 4.18 replacement of ceilings**: I have not allowed for removal of ceilings as Mr Sullivan's evidence is that this is not necessary. Rs accept that evidence.

129. **Items 5.3-5.8 underpinning**: these items relate to the underpinning of the rear wall, internal walls and construction of the new slabs. There is a significant disparity between Mr Sullivan's figures of £12,450 per property and Venture's figures of approximately £39,500 for 5SGM and £41,600 for 6SGM. Mr Sullivan pointed out the disparity between the three tenders: Big Bean £53,000; Coyle £71,000 and Venture £81,500 in total. His view is that all these figures are very high and the variance calls into question the expertise of the contractors. 'Something has gone wrong' he said.

130. He broke down the costs of materials and labour in his oral evidence and suggested that a quote should be obtained from a specialist company, many of which would be prepared to carry out the whole project. I consider that this is a reasonable step for Rs to take, given that most of the work involves underpinning. For the reasons given by Mr Sullivan and in the light of his expertise in underpinning pricing, I have accepted his figures.

131. **Section 6 'Layout and Plasterwork'**: I have allowed the Venture figures in respect of items 6.1 where Mr Sullivan accepted his figure was at the lower end of the range and 6.2 where he accepted that more work was required than he had allowed for. I have also allowed the Venture figures for the doors (items 6.3 and 6.4) as it seemed to me that Mr Sullivan minimised the difficulties of refitting the existing doors.

132. Before going further, I observe that it is in the sections dealing with joinery and kitchen and bathroom fittings that one can see the force in Mr Isaac's complaint that the tender allows for wholly new appliances/ fittings in all instances. There seems to have been no consideration given to carefully removing, storing and reinstating such items. As Mr Isaac submits, A's liability is for the minimum reasonable repair to puts Rs back in the same position they enjoyed before the Works. I accept that damage is often caused by the simple act of removing a fitting. Mr Sullivan said that it can cost more to reinstall sanitaryware than to fit new items. However, I bear in mind that no independent evidence of damage to the items claimed has been produced and that all the court has is some evidence from Rs.

133. **Item 7.1 wardrobe:** Mr Jones' evidence is that the built-in wardrobe in the downstairs bedroom in 5SGM is distorted and needs to be replaced. I accept that evidence. Mr Sullivan said that if the wardrobe needs replacing, the Venture price is not unreasonable. He also agreed that dismantling, storing and reinstating it would involve a similar cost. I have allowed the Venture figure.

134. **Item 7.5 kitchen:** I accept Mrs Spriggs' evidence that there was a row of 3 or 4 units in the kitchen of 6SGM which had been made to fit the space. They had to be removed in order to dig the trial pit and cannot be replaced. I accept her

evidence. I do not think that Rs can be criticised for following expert advice to have destructive tests carried out, since there was a clear dispute as to the cause of the damage.

135. **Item 8.1 boiler and Megaflo**: although it is clear that the movement of the slab has buckled the pipework serving the boiler and Megaflo in the ground floor cupboard in 5SGM, there is no evidence that the appliances themselves have been damaged, preventing them from being reinstalled. I have allowed Mr Sullivan's figure for the pipework which is considerably higher than Venture's figure of £1000 and is sufficient, in my judgment, to cover the costs of reinstalling and recommissioning the appliances. Mrs Jones said that the boiler needs to be replaced because it is over 20 years old but in my judgment that need has not been caused by the Works and is a cost which the owners of 5SGM must bear.

136. **Items 8.3 and 8.5 replacement of sanitary fittings in 5SGM and 6SGM**: Rs claim the cost of replacing all the sanitaryware in the ground floor bathroom of 5SGM and the shower room of 6SGM. I accept that Rs were obliged to strip out the existing sanitaryware to allow the excavations to take place. Mr Sullivan's figures were based on reinstating the existing fittings. Mr Jones said that the items in 5SGM's bathroom were damaged and I accept that. I cannot find any evidence in the Spriggs' statements as to the condition of the shower room fittings when removed but accept that damage is likely to have been caused to those items. I have allowed the relevant Ventures figures. Mr Sullivan thought that £7000 was not unreasonable for 5SGM but was not prepared to 'price on the hoof' in relation to 6SGM's shower room.

137. **Items 9.1 and 9.4 redecoration**: Mr Sullivan's evidence was that there is no need to redecorate the ceilings (which do not need replacement) or the woodwork. I consider it likely that both have suffered and/or will suffer damage during the repair works and will need repainting. I have allowed the Venture figures but have reduced the figure for 5SGM by £800 as there are at least 2 rooms upstairs which have not been affected by the damage.

138. **Item 11 completion**: I have allowed the Venture figure as Mr Sullivan said it is very hard to price for final cleaning and clearing away.

139. **Item 12 contingency**: Mr Sullivan considered that a contingency of 8% on items 1-11 was fair and reasonable.

140. **Item 13 post tender items**: it was suggested in Rs' submissions that 75% of the ground floor slab needs to be replaced in both properties, rather than the 50% specified, based on a visual assessment during the site inspection. I am not prepared to allow this additional cost which is not supported by expert evidence. Those advising Rs have had ample time to assess the work needed.

141. **Item 14 fees**: A figure of 11.5% for contract administration etc is agreed. I accept that party wall awards with 4SGM and 7SGM are likely to be required and I have allowed £2500 for each award.

142. **Item 15 loss of rent**: Rs claim loss of rent from the time that their respective tenants left in 2020 until the likely completion of the repair work. In addition, they seek the additional costs which would have been borne by the tenants such as Council Tax and the gas and electricity standing charges. Save for Rs' statements, the claims for these items are wholly unevidenced. Mr and Mrs Jones produce lettings accounts, but these have not been disclosed. There is no documentary evidence in relation to the additional costs. The gross rent has been claimed, with no deductions for management fees (in the case of 5SGM) or for the costs of repairs and maintenance. In my judgment, such deductions are appropriate to reflect the expenses which Rs would have had to incur. The evidence suggests that Mr and Mrs Jones did rather more to their flat, particularly between lettings, than Mr and Mrs Spriggs who had had the same tenant for at least 10 years and had never increased his rent.

143. The claim for 5SGM is for the passing rent payable by the last tenants, the evidence being that that they wished to stay in the flat and are likely to have renewed their tenancy. The loss of rent for 6SGM has been claimed in the sum of £1500pcm on the basis of evidence that this is the market rate. However, the clear evidence from Mr and Mrs Spriggs is that the tenant, Mr Kelly, wished to go on living in the flat and in my judgment the likelihood is that he would have done so, continuing to pay a rent of £997pcm.

144. For 5SGM I have taken the monthly figure of £3553.33 less an average of 7% for management fees and 10% for repairs and maintenance, giving a net figure of £2931.50pcm. To this must be added the additional costs of £208pcm, giving a total loss of £3139.50 each month. (There is some confusion about the additional costs figure. Mr Isaac's skeleton argument puts the figure at £308pcm but in Rs' amended schedule a figure of £208pcm is claimed).

145. The calculation for 6SGM is £997 less 5% for repairs and maintenance, giving £947.15pcm, together with the additional costs of £169pcm, making a total loss of £1116.15 per month.

146. A contends that Rs have failed to mitigate this head of loss by failing to carry out the necessary works of repair. In his skeleton argument, Mr Isaac suggests that Rs should have been able to complete the works within 6 months of the tenant vacating 6SGM (it being accepted that investigations required both flats to be vacant – and that the works of repair should be done to both flats at the same time). He bases that time period on Mr Sullivan's evidence that 16 weeks are sufficient to assess the extent of remedial works needed, write the specification, put it out to tender, award a contract and have the work carried out. In addition, A accepts that a two month period prior to the 16 weeks would be reasonable for investigation and assessment of the damage.

147. By contrast, the Award allowed for the full loss of rent to the date of the Award and a further 4 months thereafter.

148. In their amended schedule Rs seek loss of rent from the date their tenants vacated to May 2023 being the earliest date by which the works could be completed.

149. Mr Jones said in evidence that he and his wife had not carried out the repair works so far for two reasons. Firstly, he considered it would be foolish to cover up evidence required for their compensation claim as further inspections would be needed during the appeal process. Secondly, the works to 6SGM need to be carried out at the same time as those to 5SGM and Mr and Mrs Spriggs were not in a financial position to fund their share of the works.

150. Mrs Spriggs' witness statement says that their reason for not doing the repairs sooner was because of a lack of financial resources to do so. She says that the escalating cost of the court proceedings has put a strain on their finances, and they have had to borrow to meet those costs. They would have had to re-mortgage their home in Buxton to fund the repairs.

151. The burden is on the Spriggs to prove impecuniosity. They have provided no details at all of their financial position. Save that Mrs Spriggs was, until recently, a chartered engineer, I have no evidence as to their occupations or income. Whilst it appears that re-mortgaging their home was an option, there is no evidence as to why that option was not pursued. In short, I am not satisfied that Mr and Mrs Spriggs have proved that they were unable to fund the works.

152. Mr and Mrs Jones do not claim to be impecunious. They own several other buy-to-let properties apart from 5SGM as well as their home. Their desire to preserve evidence is understandable but looked at objectively, all the investigations had been completed and the evidence obtained by June 2021. Whilst Mr Huband, in particular, and Mr Tant visited the properties on a total of 7 occasions, it was not put to them that they could not have carried out their investigations based on the evidence in the photographs and previous reports, which have been considered extensively during the trial.

153. I have taken into consideration the fact the A did not pay the sums awarded by the third surveyor, meaning that Rs would have had to find the money for the repairs. I also accept that the standard of conduct required of a claimant in mitigating his loss is not a high one (*Banco de Portugal v Waterlow* [1932] AC 452) and that the burden of proving a failure to mitigate falls on A in this case.

154. I consider that it would have been reasonable of Rs to have waited until the third surveyor made his Award on 20.8.21, by which time the evidence had been gathered, but that they should have had the works carried out thereafter. Given that Rs' combined losses were accruing (on my figures) at £4250 approximately every month, I consider that it was unreasonable of Rs to wait for however long it took for the appeals to be determined and I am satisfied that they have failed to mitigate their losses to that extent.

155. Allowing 4 months to put the works out to tender and have them completed, I find that 5SGM is entitled to loss of rent from August 2020 to December 2021 inclusive which amounts to 17 months at £3139.50, making £53,371.50. The loss of rent for 6SGM from October 2020 to December 2021 inclusive is 15 months at £1116.15, making £16,742.25.

156. **Item 16 costs and fees**: I do not consider it reasonable for Rs to have appointed a second structural engineer and I have not allowed Mr Chick's fees. There is

no evidence in relation to the additional costs claimed at 16.7 and 16.8 and I have not allowed those sums.

157. I set out in the table below (a) the Awards under appeal; (b) the final sums sought by Rs; and (c) the sums awarded by the court. All figures are exclusive of VAT.

| ITEM | ORIGINAL AWARD | Rs' FIGURES | COURT AWARD |
|---|---|---|---|
| **5SGM** | | | |
| **CONSTRUCTION COSTS** | £98,871.50 | £118,497.84 | £70,865.28 |
| **FEES** | £15,745.22 | £17,039.95 | £12,774.51 |
| **LOSS OF RENT** | £61,781.28 | £114,977.61 | £53,371.50 |
| **OTHER COSTS AND FEES** | £13,329.12 | £13,328.67 | £10,529.12 |
| **TOTAL** | **£189,727.12** | **£263,844.07** | **£147,540.41** |
| **6SGM** | | | |
| **CONSTRUCTION COSTS** | £90,704.50 | £109,142.04 | £74,856.96 |
| **FEES** | £14,806.00 | £16,326.67 | £13,233.55 |
| **LOSS OF RENT** | £23,266.00 | £48,112.00 | £16,742.25 |
| **OTHER COSTS AND FEES** | £13,329.12 | £13,328.87 | £10,529.12 |
| **TOTAL** | **£142,105.62** | **£186,596.29** | **£115,361.88** |

158. Including VAT where applicable, the total award for 5SGM is £166,015.89 and that for 6SGM is £134,727.51. I vary the Third Surveyor's Awards accordingly and the appeals succeed to that extent.