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Neutral Citation Number: [2016] EWCA Civ 1318
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
(HIS HONOUR JUDGE BAILEY)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 3 November 2016

B E F O R E:

LORD JUSTICE JACKSON

LORD JUSTICE McCOMBE

LORD JUSTICE CLARKE

RUSSELL GRAY

Appellant/Claimant

v

ELITE TOWN MANAGEMENT

Respondent/Defendant

(DAR Transcript of
WordWave International Limited
Trading as DTI
8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

The Appellant appeared in person
Mr Crispin Winser (instructed by Child & Child) appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

1. LORD JUSTICE JACKSON: This judgment is in four parts, namely:

Part 1 - Introduction;
Part 2 - The Facts;
Part 3 - The Present Proceedings;
Part 4 - The Application for Permission and the Appeal to the Court of Appeal.

Part 1 - Introduction

2. These are two appeals in proceedings concerning a party wall. In one appeal, the appellant has permission to appeal from the court below. In the other matter, this is a rolled-up hearing, in other words permission to appeal is still required. We have heard full argument from the appellant, so that we are in a position to deal both with the issue of permission, and if permission is granted, the appeal.

3. The appellant is Mr Russell Gray. He owns 7 Ennismore Mews, London SW7. The appellant has had the advantage of being represented by experienced counsel, Mr Nicholas Isaac, throughout the proceedings below and throughout the period leading up to this appeal. Mr Isaac has prepared a full and helpful skeleton argument. Mr Gray has decided, as he is quite entitled to do, to dispense with the services of his counsel this week and to argue his appeal in person. He has duly argued his appeal. The court has from time to time intervened, I hope helpfully, in order to direct his attention to the matters upon which he needs to focus. Mr Gray has been most courteous and most helpful in the presentation of his arguments. He has put before us the points he wishes us to consider with clarity.

4. The respondent is Elite Town Management Ltd, to which I shall refer as "Elite". Elite owns 9 Ennismore Mews, London SW7. Mr Nick Hill owns and controls Elite.

5. A contractor whom Mr Hill has employed to do works at 9 Ennismore Mews is Cranbrook Basements Ltd, to which I shall refer as "Cranbrook". Mr Kevin O'Connor is the Managing Director of Cranbrook.

6. I shall refer to the Party Wall Act 1996 as "the 1996 Act". The following provisions of the 1996 Act are relevant to the present proceedings:

> "2 Repair etc of party wall: rights of owner.
>
> (1) This section applies where lands of different owners adjoin and at the line of junction the said lands are built on or a boundary wall, being a party fence wall or the external wall of a building, has been erected.
>
> (2) A building owner shall have the following rights --
>
> (a) to underpin, thicken or raise a party structure, a party fence wall, or an external wall which belongs to the building owner and is built against a

party structure or party fence wall;

(b) to make good, repair, or demolish and rebuild, a party structure or party fence wall in a case where such work is necessary on account of defect or want of repair of the structure or wall;

[...]

6 Adjacent excavation and construction

(1) This section applies where --

(a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured horizontally from any part of a building or structure of an adjoining owner; and

(b) any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations of the building or structure of the adjoining owner.

[...]

(3) The building owner may, and if required by the adjoining owner shall, at his own expense underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner so far as may be necessary.

[...]

(5) In any case where this section applies the building owner shall, at least one month before beginning to excavate, or excavate for and erect a building or structure, serve on the adjoining owner a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner.

(6) The notice referred to in subsection (5) shall be accompanied by plans and sections showing --

(a) the site and depth of any excavation the building owner proposes to make;

(b) if he proposes to erect a building or structure, its site.

(7) If an owner on whom a notice referred to in subsection (5) has been served does not serve a notice indicating his consent to it within the period of fourteen days beginning with the day on which the notice referred to in subsection (5) was served, he shall be deemed to have

dissented from the notice and a dispute shall be deemed to have arisen between the parties.

[...]

7 Compensation etc.

(1) A building owner shall not exercise any right conferred on him by this Act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier.

(2) 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.

(3) Where a building owner in exercising any right conferred on him by this Act lays open any part of the adjoining land or building he shall at his own expense make and maintain so long as may be necessary a proper hoarding, shoring or fans or temporary construction for the protection of the adjoining land or building and the security of any adjoining occupier.

(4) Nothing in this Act shall authorise the building owner to place special foundations on land of an adjoining owner without his previous consent in writing.

[...]

10 Resolution of disputes.

(1) Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either --

(a) both parties shall concur in the appointment of one surveyor (in this section referred to as an “agreed surveyor”); or

(b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as “the three surveyors”).

[...]

(11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary award.

(12) An award may determine --

(a) the right to execute any work;

(b) the time and manner of executing any work; and

(c) any other matter arising out of or incidental to the dispute including the costs of making the award;

but any period appointed by the award for executing any work shall not unless otherwise agreed between the building owner and the adjoining owner begin to run until after the expiration of the period prescribed by this Act for service of the notice in respect of which the dispute arises or is deemed to have arisen.

(13) The reasonable costs incurred in --

(a) making or obtaining an award under this section;

(b) reasonable inspections of work to which the award relates; and

(c) any other matter arising out of the dispute,

shall be paid by such of the parties as the surveyor or surveyors making the award determine.

[...]

(16) The award shall be conclusive and shall not except as provided by this section be questioned in any court.

(17) Either of the parties to the dispute may, within the period of fourteen days beginning with the day on which an award made under this section is served on him, appeal to the county court against the award and the county court may --

(a) rescind the award or modify it in such manner as the court thinks fit; and

(b) make such order as to costs as the court thinks fit.

[...]

11 Expenses.

(1) Except as provided under this section expenses of work under this Act shall be defrayed by the building owner.

(2) Any dispute as to responsibility for expenses shall be settled as provided in section 10.

[...]

(11) Where use is subsequently made by the adjoining owner of work carried out solely at the expense of the building owner the adjoining owner shall pay a due proportion of the expenses incurred by the building owner in carrying out that work; and for this purpose he shall be taken to have incurred expenses calculated by reference to what the cost of the work would be if it were carried out at the time when that subsequent use is made."

7. Having set out the relevant statutory provisions, I must now turn to the facts.

Part 2 - The Facts

8. In 2001 Mr Gray constructed a basement at 7 Ennismore Mews by excavating the subsoil beneath the ground floor and installing rows of contiguous piles around the four sides of the newly created space. On the north side, the row of contiguous piles stood just to the south of the party wall between 7 and 9 Ennismore Mews. On the south side, the row of contiguous piles stood just to the north of the party wall between 7 and 5 Ennismore Mews. Mr Gray also owns 5 Ennismore Mews.

9. This design had two consequences. First, there was no need to underpin beneath the two party walls; the newly installed piles provided sufficient support for the structure above basement level. Secondly, the floor area of the basement was somewhat less than the floor area of the ground floor. This was because the rows of contiguous piles occupied some space behind each of the four interior walls of the basement.

10. In 2006, Elite bought 9 Ennismore Mews. Mr Hill and his wife, Ms Choo, lived there during periods when they were in England. In 2011, they decided to construct a basement. They proposed to provide the necessary support for the superstructure by underpinning the four external walls of their house, including the party wall between 7 and 9 Ennismore Mews. The advantage of this method, from their point of view, as opposed to the contiguous piling method is that there is no loss of space. That is a matter to which Mr Hill says he attaches particular importance. By adopting the underpinning method, the basement is the same area as the ground floor.

11. On 23 February 2012 Elite served a party wall notice on the owners of 7 Ennismore Mews, nominating Mark Williams as their surveyor. The design documents attached showed that the underpinning would comprise reinforced concrete. Mr Gray did not respond to that notice. The default provisions of the 1996 Act operated; Mr Robert Hopps was appointed to represent the interests of adjoining owners. On 22 August 2012 Mr Williams and Mr Hopps published an award approving the proposed works. This award has been referred to in the proceedings as the "First Award".

12. Elite's contractors then set to work. By 8 November 2012 three of the four external walls at 9 Ennismore Mews had been underpinned and some 50 per cent of the subsoil had been excavated and moved. At this stage two problems came to light; one was practical and the other was legal. The practical problem was that some of number 7's piles deviated from the perpendicular; the lower sections of certain piles appeared to approach or possibly cross the mid-line of the party wall. The legal problem was that

because of the use of reinforced concrete, the underpinning constituted "special foundations". Section 7(4) of the 1996 Act prohibited the placing of special foundations without the adjoining owner's consent; Mr Gray did not consent.

13. In those circumstances, work came to a halt at the end of November 2012. Cranbrook supported the ground floor slab on props. The newly installed concrete underpinning was held in place with props and shuttering.

14. On 15 January 2013 Mr Williams and Mr Hopp published an addendum award modifying the existing design to overcome the projecting piles from number 7. That modified design did nothing to overcome the legal difficulties under section 7(4) of the 1996 Act. After a brief round of litigation in the Central London County Court, the parties entered into a consent order declaring that the addendum award was ultra vires and a nullity.

15. A separate development during this period was that cracking appeared in 7 Ennismore Mews at the junction between the party wall and the front wall, and also at the junction between the party wall and the rear wall. Mr Gray engaged builders to repair this cracking at a cost of £1,320. He notified Mr Hill that he required reimbursement of this sum.

16. During 2013, Elite engaged a new professional team and started the statutory process afresh. Elite served a party wall notice on Mr Gray on 20 November 2013. This proposed excavating within three metres of 7 Ennismore Mews, underpinning the party wall with mass fill concrete, and doing work as necessary to the projecting piles.

17. For this round of the statutory process, Elite appointed Graham North as its surveyor. Mr Gray nominated Ms Nithya Murthy to act as his surveyor. Ms Murthy was not a surveyor; she was a trainee architect who for the most part simply did what Mr Gray told her to do and wrote what Mr Gray told her write. She did, however, bring to bear some of her professional skills. In particular, as Mr Gray explained this morning, Ms Murthy produced some excellent drawings. Indeed Mr Gray tells us that they were better than many of the drawings produced by experienced surveyors.

18. Mr North and Ms Murthy were unable to agree on a third surveyor. They therefore approached Westminster City Council, which appointed, James Crowley for that purpose. Mr Gray put forward his views through Ms Murthy for consideration by Mr Crowley.

19. Mr Gray believed that the best and least disruptive course would be for Elite to install contiguous piles in the same way as he had installed for the purposes of his own basement at 7 Ennismore Mews. If that approach was rejected, then Mr Gray advocated a scheme for symmetric underpinning of the party wall. That particular scheme has been referred to in the proceedings as "Scheme D", and it is illustrated in a most helpful document which Mr Gray and his lawyers – and possibly Ms Murthy - prepared for the purposes of the litigation.

20. An alternative scheme which would have been acceptable to Mr Gray was a design often used in Kensington and Chelsea which has been referred to as "Scheme F". That is also shown on the document before us. Indeed, this is a document which shows Schemes A, B, C, D, E and F. Whether Scheme F was put to the three surveyors back in 2014 appears to be a matter of some dispute. It was, however, certainly before the judge when the matter proceeded to litigation.

21. Returning to the narrative, the three surveyors duly got to work. On 3 October 2014, Mr Crowley issued his award. This has been referred to as the "Third Award". This award authorised Elite to underpin the party wall in accordance with Basement Engineering Method Statement version 3(c) dated 31 July 2014 and Packman Lucas drawing number 5221\SK\-\01\C6. The Method Statement and the Packman Lucas drawing show a mass concrete underpinning of the party wall which is linked into the foundation slab of the proposed basement. This design has been referred to as "Scheme C", and it is illustrated on the drawing to which I have referred earlier.

22. Mr Crowley held that this design did not make use of works previously carried out by Mr Gray. Accordingly, said Mr Crowley, Mr Gray was not entitled to receive any payment under section 11(11) of the 1996 Act. In the fourth part of his award, Mr Crowley held that Mr Gray was entitled to recover his costs in connection with the statutory process under section 10 of the 1996 Act, but that Mr Gray had not yet furnished sufficient particulars of those costs.

23. Mr Gray took exception to the way matters were proceeding; in particular he was aggrieved by the First and Third Awards. Accordingly, he commenced the present proceedings.

Part 3 - The Present Proceedings

24. By a claim form issued in the Central London County Court Technology and Construction list on 18 June 2014, Mr Gray claimed the following relief: one, a declaration that the party wall award of August 2012 is ultra vires and invalid; two, damages for trespass and/or nuisance of £1,320; three, an injunction requiring the defendant to fill in the open excavations under the party wall or damages in lieu of that injunction; four, an injunction restraining the defendant from continuing or repeating the trespass upon or causing nuisance to the claimant's property.

25. By an appellant's notice issued in the same court on 20 October 2014, Mr Gray appealed against the Third Award. He challenged the following aspects of the award: one, Mr Crowley's determination that Elite is entitled to underpin the party wall at all; two, Mr Crowley's determination that Elite is entitled to underpin the party wall in the manner set out in drawing 5221\SK\-\01 revision C6 and the supplemental sheets 1 and 2; three, Mr Crowley's determination that the appellant is not entitled to a payment under section 11(11) of the Party Wall Act 1996; and four, Mr Crowley's refusal to determine the quantum of the appellant's costs.

26. Mr Gray sought, and on 4 November 2014 obtained, an injunction from Elite not to proceed with the basement works until the party wall appeal had been determined. Mr Gray give an undertaking in damages in the usual form.

27. The two actions proceeded in tandem and came on for hearing before his HHJ Bailey in July 2015. The judge heard oral evidence from Mr Gray, Mr Hill, Mr O'Connor and two expert witnesses. The two expert witnesses, both structural engineers, were Mr Michael Clark on behalf of Mr Gray, and Mr David Derby on behalf of Elite. They gave their evidence concurrently in accordance with the procedure set out in section 11 of Practice Direction 35. The judge commented that this was "another example of the usefulness of the practice known as 'hot-tubbing' in TCC matters."

28. The judge handed down his reserved judgment on 23 July 2015. I would summarise that judgment and the order made consequent upon it as follows: one, the judge refused to grant a declaration that the First Award was ultra vires and invalid; two, the judge refused to grant an injunction since the various claims for injunctions were no longer pursued; three, the judge awarded £1,320 to Mr Gray in respect of the cracking; four, the judge dismissed Mr Gray's appeal against Mr Crowley's decision that Elite could underpin in accordance with Scheme C; five, the judge varied the second section of Mr Crowley's award to read:

> "That the Adjoining Owner is entitled in principle to payment under section 11(11) in relation to the proposed underpinning.
>
> Reason:
>
> It is considered that the works previously carried out by the Adjoining Owner are being used by the building owner."

Six, the judge varied the fourth section of Mr Crowley's award to read:

> "The Building Owner shall pay the Adjoining Owner one-third of the costs claimed in respect of Nithya Murthy's fees, namely £1,218.33."

Seven, the judge ordered Mr Gray to pay 75 per cent of Elite's costs in order to reflect the fact that Elite had won on the principal issues. In relation to Ms Murthy's fees, the reason why the judge only allowed one third was this: for the most part, Ms Murthy was simply doing what Mr Gray told her to do rather than exercising her own independent professional skills.

29. In the light of that judgment, Elite became entitled to claim compensation under the cross-undertaking in damages which Mr Gray had given on 4 November 2014. The judge duly gave directions for the proceedings to assess the amount of compensation due to Elite. Those fresh proceedings concerning the assessment of compensation have acquired a life of their own. The parties have thrown themselves into that round of the litigation with as much enthusiasm as they did at earlier stages. The parties have served their evidence. Mr Gray has made an application to strike out Elite's claim for compensation or damages under the cross-undertaking. The judge heard and dismissed that application in a judgment dated 30 June 2016. There has been occasional reference

made to that judgment; therefore it is only right that I should mention it in the course of this narrative.

30. Mr Gray was aggrieved by the judge's order and judgment dated 23 July 2015. Accordingly, he applied for permission to appeal to the Court of Appeal. The judge below gave permission to appeal in respect of the proceedings brought concerning the validity of the First Award. The judge also purported to give permission to appeal in respect of the party wall appeal brought by Mr Gray. However, that second grant of permission was invalid because the appeal from the decision of the party wall surveyors to the county court was a first appeal; the appeal from the county court to this court is a second appeal. Therefore the provisions of Rule 52.13 apply.

31. If a judge inadvertently grants permission to appeal when he has no jurisdiction to do so, that grant of permission is a nullity (see the decision of the Court of Appeal in Clark (Inspector of Taxes) v Perks [2001] 1 WLR 17 at paragraph 60). In those circumstances, the proper course is clearly to deal with all matters together, namely the appeal in respect of the litigation where no permission is required, the application for permission in respect of the second appeal concerning the party wall decision and, if permission is granted, the appeal to the Court of Appeal. Against that background, let me now turn to the application for permission and the appeal to the Court of Appeal.

Part 4 - The Application for Permission and the Appeal to the Court of Appeal

32. By two notices of appeal, Mr Gray appealed against the judge's various decisions contained in his judgment on grounds which I would summarise as follows: one, section 7(1) of the 1996 Act imposes a duty on party wall surveyors to authorise a solution which avoids unnecessary inconvenience to the adjoining owner. The judge erred in failing to so hold; two, Mr Crowley ought to have authorised Scheme F. Accordingly, the judge erred in upholding Mr Crowley's decision to authorise Scheme C; three, the judge ought to have allowed the entirety of Ms Murthy's fees under section 10 of the 1996 Act because she was a validly appointed party wall surveyor; four, alternatively if Ms Murthy was not a validly appointed party wall surveyor the judge should have declared the Third Award to be ultra vires and invalid; five, the judge erred in failing to declare that the First Award was ultra vires because it authorised special foundations without consent.

33. So, those are the five grounds of appeal which have been raised. Grounds one to four are matters which require permission to appeal; ground five is a matter for which Mr Gray already has permission. As I indicated earlier in this judgment, we decided to hear full argument on those matters which required permission in a rolled-up hearing so that we could consider the questions of permission and appeal together in the round.

34. This appeal has been argued today by Mr Gray with great skill and courtesy. We have not in the event found it necessary to call upon Mr Winser, who is counsel for the respondent. We have, however, taken into account Mr Winser's skeleton argument. We have also taken into account the skeleton argument prepared by Nicholas Isaac, Mr Gray's former counsel. From time to time Mr Gray relied upon that skeleton argument and said that he could do no better really than to adopt what counsel had written. Of

course, we accept that and I have carefully considered both the skeleton argument of Nicholas Isaac, counsel, and the oral submissions which Mr Gray made to this court today.

35. Let me now turn to the first ground of appeal. Mr Gray argues that section 7(1) of the 1996 Act imposes a duty on the party wall surveyors and in particular on the third surveyor, which Mr Gray formulates as follows, and here he relies upon his counsel's skeleton argument so I shall read out the relevant passage:

> "The Appellant submits that the Act does indeed impose a duty on the part of the surveyors to authorise an alternative scheme which avoids unnecessary inconvenience, certainly if they are aware of such an alternative scheme and/or if such a scheme has actually been suggested by the adjoining owner or his surveyor."

What Mr Gray argues and what his counsel had previously maintained was that section 7 of the 1996 Act is of a wide ambit. It does not just require the manner of work to be such as to avoid causing unnecessary inconvenience to any adjoining owner or adjoining occupier. Section 7(1) also requires the surveyors not to approve a design which is likely to cause unnecessary inconvenience to an adjoining owner or occupier.

36. Mr Gray complains that the judge rejected that argument. He treated this as a matter of good practice, not a matter of binding obligation. In support of this argument, Mr Gray relies upon the decision of the House of Lords in Barry v Minturn [1913] AC 584. This was a case which proceeded under the London Building Act 1894. That is a statute which imposed obligations on the building owner similar to the obligations imposed by the 1996 Act. The 1894 Act also set up a surveyor procedure similar to that which applies under 1996 Act.

37. Turning to the facts of Barry, a wall which divided the gardens of two adjoining houses in London was utilised for the retaining wall of an extension made to one of the houses. The owner of the extended house complained that dampness of the party wall affected the basement of her extension, and proposed as building owner under the 1894 Act to enter upon the premises of the adjoining owner and make good the party wall on his side. The matter was referred to surveyors. The county court judge, upon an appeal from the surveyors, found that the party wall was defective in that it allowed damp to percolate, but that effective work for preventing the damp could be done on her side of the wall. Accordingly he held that no work should be done on the adjoining owner's side. The House of Lords held that the judge had misdirected himself in looking at the past history but his conclusions were correct, and accordingly the House of Lords reversed the Court of Appeal, which had reversed the trial judge. Thus the decision of the county court judge stood.

38. At page 590 is a passage upon which Mr Isaac relied and, I surmise, Mr Gray also relies. Lord Parker of Waddington with whom the other members of the House of Lords agreed, said this:

> "In as much as a building owner is not entitled to exercise any right given

> him by the Act in such manner as to cause unnecessary inconvenience to the adjoining owner, the tribunal must, in determining the proper way of making good the defect, if there be one, have due regard to the convenience of the adjoining owner."

It seems to me that the surveyors must indeed have due regard to the position of the two parties, both the building owner and the adjoining owner. But there is no absolute obligation on the surveyors of the kind which Mr Isaac in his skeleton argument and Mr Gray in his oral submissions contend for. I do not think that the decision of the House of Lords in Barry supports such a conclusion. There is in the authorities bundle a long line of cases, which I will not go through, in which the statutory provision about not causing undue inconvenience has been treated as referring to the manner in which works are carried out. I also note that in the judgment of Brightman J in Gyle-Thompson v Wall Street (Properties) Ltd [1974] 1 WLR 123, there is a relevant passage at page 130. Brightman J said:

> "Those surveyors are in a quasi-judicial position with statutory powers and responsibilities."

That seems to me to be the position. Neither the 1894 Act nor the 1996 Act imposed on the surveyors an absolute duty of the kind for which Mr Gray contends. The statutory procedure is intended to be a simple, inexpensive dispute resolution mechanism. It enables reasonable and common sense solutions to be reached to the problems which inevitably arise when adjoining owners share a party wall. Whatever the surveyors decide is likely to cause some degree of inconvenience to both parties. The surveyors are not assuming a design obligation towards the adjoining owner. Both the building owner and possibly the adjoining owner may engage their own designers. They may put before the surveyors whatever submissions they wish.

39. Let me now turn to the actual words of section 7, which I have set out in part 1 of this judgment. Section 7(1) reads:

> "A building owner shall not exercise any right conferred on him by this Act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier."

It seems to me that that provision imposes an obligation on the building owner, not on the surveyors. Furthermore, it seems to me that that provision relates to the manner in which works are to be carried out once a specific design has been approved. In short, therefore, I would reject the first ground of appeal.

40. I turn now to the second ground of appeal. In the course of his submissions this morning, Mr Gray advanced a number of criticisms of Scheme C, which Mr Crowley had approved and which the judge had upheld. Mr Gray is very critical of underpinning schemes, which he says are less satisfactory than contiguous piling. If he has contiguous piling in his property and there is underpinning in an adjoining property, then there is a risk of differential settlement. The court put to Mr Gray that that particular argument did not feature in the hearing before the judge. Instead, it can be

seen that the expert engineers, at the hearing before the judge, both agreed that from an engineering point of view Scheme C was satisfactory. Mr Gray very candidly and fairly acknowledged this. He said that because of the soil conditions prevailing in Ennismore Mews there is much less risk of differential settlement as a result of an underpinning solution in that location than there would be in other parts of London. It is not appropriate for this court to comment on ground conditions elsewhere, but I do note that the point about differential settlement is not pursued as a criticism of Mr Crowley's award or the judge's decision.

41. Mr Gray then developed three separate criticisms of Mr Crowley's decision in favour of Scheme C. The first point which Mr Gray made was this: he said that Mr Crowley failed to recognise that Scheme C would cause a huge intrusion of concrete into the territory of number 7 Ennismore Mews. Furthermore, the judge failed to have regard to that, and if he had done so, he would not have approved Scheme C. The interaction between the underpinning involved in Scheme C and Mr Gray's piling was very much a live issue in the hearing below, but it will be recalled from part 3 of this judgment that at the hearing below Mr Gray's complaint was that the proposed underpinning would make use of Mr Gray's piling in the sense that some support for the underpinning scheme would be gained from the piling. It was for that reason that Mr Gray challenged the refusal of Mr Crowley to award any payment or compensation under section 11(11) of the 1996 Act.

42. Mr Gray succeeded on that point at the hearing below. The judge accepted Mr Gray's argument that Scheme C would make use of Mr Gray's piling. Accordingly, the judge set aside that part of Mr Crowley's award and substituted a declaration that the underpinning would make use of the contiguous piles, and the judge substituted an order that Elite should pay compensation to Mr Gray under section 11(11) of the Act in respect of the benefit which 9 Ennismore Mews would gain from the piles under 7 Ennismore Mews.

43. So the way that Mr Gray was presenting his case below was very different from the argument which Mr Gray has put to the Court of Appeal this morning. It was not Mr Gray's contention below that a large quantity of concrete would need to be poured between his underpinning and Elite's piles, and that therefore the Third Award could not stand. Quite apart from that, the argument which Mr Gray has deployed to this court in respect of the interaction between the piles and the underpinning are matters of detail on the evidence where this court will not interfere with the assessment of the judge below.

44. The second argument which Mr Gray deployed was that the award made by Mr Crowley was a shambles and there were inconsistencies with it. He drew our attention in particular to a provision in the Method Statement which permitted the cutting back of Mr Gray's piles and a provision in the award which prohibited cutting back of piles. It seems to me that what Mr Crowley was doing was approving the Method Statement subject to certain qualifications in the Third Award, and that matters relating to the cutting back of piles was one of those qualifications.

45. The third criticism which Mr Gray makes of the Third Award is this: he says that neither the deviated nor the undeviated piles under number 7 allow a construction in accordance with Scheme C. This argument seems to me to get very close to the first criticism which Mr Gray made of Scheme C. Mr Gray put before us a very helpful plan showing what he says is the gap between his piles and the proposed underpinning. These are matters which the judge considered at some length in his judgment dated 30 June 2006 at paragraphs 25 - 28. I do not see how they can possibly warrant an appeal to this court. The judge treated this matter as being of only modest concern, and I do not see how the fact there is a gap which would need to be filled undermines Scheme C or would enable this court to allow an appeal against the decision of HHJ Bailey.

46. Mr Gray developed his third criticism along these lines: he said, I am proposing now to remove my piles. There is a party wall award obtained in January 2016 which enables the contiguous piling by the party wall to be removed. Once that has been done, Mr Hill's proposed underpinning scheme will be unbuildable. Well, that may be so, but at the time of the judge's judgment, Mr Gray had not obtained a party wall award enabling his own piling to be removed. I do not think that the subsequent events undermine the decision of the county court. Mr Gray submitted that what he would like to do is to install symmetrical underpinning after he has removed his own piles. That may well be so, but it is not a ground of appeal against the decision which we are reviewing.

47. I take the view that none of the detailed points which Mr Gray seeks to raise about Scheme C raise any important points of principle or practice which merit a second appeal to the Court of Appeal. I would therefore reject the second proposed ground of appeal.

48. I come now to the third ground of appeal. Mr Gray contends that the judge fell into error in reducing the allowable fees of Ms Murthy by two thirds. He draws the court's attention to the RICS Practice Standard, paragraph 5.3, which says:

> "The appointed surveyor should seek to identify and represent the interests of the appointing owner, but this should not extend to following instructions from their appointing owner where these conflict with their duties under the Act."

Mr Gray submits that Ms Murthy complied with her duties under the RICS Practice Standard. She was validly appointed, everyone treated her as validly appointed. It is therefore too late now for the judge to say that she was not a proper party wall surveyor operating under the Act.

49. I see the force of Mr Gray's arguments that Ms Murthy was validly appointed. On the other hand, the judge was not saying that Ms Murthy's appointment was invalid. On a fair reading of his judgment, what the judge was saying was this: Ms Murthy was appointed to act as party wall surveyor, but in large part she was doing what she was told rather than exercising her own independent skill and professional expertise. Much of what she produced was the work of Mr Gray rather than Ms Murthy herself. Accordingly, the judge reduced her recoverable fees by two thirds. That seems to me to

be an entirely proper approach. This court will not interfere with the judge's findings of fact in that regard. I would therefore reject ground three.

50. The fourth ground of appeal does not arise because the judge did not hold that Ms Murthy was not validly appointed to serve as Mr Gray's surveyor under the 1996 Act, nor does this court hold that Ms Murthy was not validly appointed. Therefore the arguments which Mr Isaacs mentioned as a fall-back position in his ground four (and adopted by Mr Gray) do not arise.

51. I come finally to the fifth ground of appeal. The complaint here is that the judge ought to have granted a declaration that the First Award dated August 2012 was ultra vires and invalid. Then, says Mr Gray, the judge should have said that the excavations done were a trespass, then the judge should have awarded as damages for trespass the sum of £1,320 as set out in the claim form in the county court. I am not persuaded by that argument. The judge awarded £1,320 in respect of the cracking by a different route. There was no error of principle in the judge taking that course. The judge took the view that there was no useful purpose in granting a declaration in respect of the First Award. Mr Gray was recovering the damages claimed in respect of the cracking. The excavation which had been carried out was permissible under the Third Award. The grant of a declaration is discretionary, and in the circumstances of this case the judge declined to exercise his discretion in favour of granting a declaration. I see no error in that reasoning.

52. Mr Gray developed an argument today based on recent photographs of number 9 Ennismore Mews. He showed us photographs of what can be seen in the excavated areas. This is strictly speaking fresh evidence, but we looked at it *de bene esse*. Mr Gray drew our attention to the concrete at ground level in the excavated areas. He submitted that substantial and unlawful works had been done in putting that concrete down; it is far more than is necessary simply to support the props which must hold up the superstructure of 9 Ennismore Mews while the legal issues are being resolved.

53. In my view, it is too late for Mr Gray to put arguments of that kind before this court. Mr Gray could have sought an order for inspection of the excavated areas beneath 9 Ennismore Mews before the trial in July 2015. Insofar as concrete was there at that time, Mr Gray could have placed reliance upon it. Insofar as any concrete has been put down since the trial in July 2015, that cannot possibly be a reason for interfering with the decision of the judge. As a matter of fact, the concrete which has been placed at the base of Elite's excavations does not appear to be as significant as Mr Gray contends. The judge dealt with this in his judgment of 30 June 2016. He noted that according to Mr O'Connor, the concrete pads were temporary and would simply be removed in a matter of hours. The judge thought that that was an overstatement and that more work would be required in removing the concrete pads than that. The judge considered that any award necessary from the third surveyor in order to facilitate that removal is the sort of award "which one would anticipate a competent third surveyor (and Mr Crowley is such) would have dealt with in a matter of a week or so."

54. The judge did not attribute to the concrete at the base of the excavations in 9 Ennismore Mews the high significance which Mr Gray attaches to that concrete. In my view, what

the photographs reveal as being the position in the excavations at 9 Ennismore Mews cannot be any basis for reopening the judge's decision not to grant a declaration in the first set of proceedings.

55. Let me now draw the threads together. In my view, the arguments which Mr Gray advances in relation to his party wall appeal do not raise any point of principle or practice. Therefore this court should not grant permission to appeal in respect of the party wall appeal.

56. In relation to the proceedings concerning a declaration and an injunction, the claim for an injunction was dropped. The judge declined to grant a declaration in the exercise of his discretion. There is no reason to interfere with that exercise of discretion. Accordingly, in my view that appeal should be dismissed.

57. LORD JUSTICE McCOMBE: I agree with the orders proposed by my Lord for the reasons he gives, and I have nothing to add.

58. LORD JUSTICE CLARKE: I also agree.