Neutral Citation Number: [2023] EWHC 1051 (TCC)

Case no: HT-2020-MAN-000057

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KB)

Manchester Civil Justice Centre
Date handed down: 5 May 2023

Before His Honour Judge Stephen Davies sitting as a High Court Judge
Between :

(1) GEORGINA PARTAKIS-STEVENS **(2) LAURENCE STEVENS**	Claimants
- and -	
(1) BALJIT SIHAN (2) LESLEY SIHAN	First and Second Defendants / Defendants to Additional Claim
- and -	
(3) SERGIO ROMERO (4) ELIANA GUERCIO	Third and Fourth Defendants / Claimants in Additional Claim

Ms Nicola Atkins (instructed by **CEL Solicitors, Liverpool L3**) for the **Claimants**
Mr Clifford Darton KC (instructed by **Avisons Solicitors, Leeds LS1**) for the **First and Second Defendants**
Mr Brad Pomfret (instructed by **Eversheds Sutherland (International) LLP, Salford M3**) **for the Third and Fourth Defendants**

Hearing dates: 20-21 April 2023
Date draft judgment circulated: 25 April 2023

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APPROVED JUDGMENT
ON CONSEQUENTIAL MATTERS

Remote hand-down: This judgment was handed down remotely at 10:00am on 5 May 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

A. Introduction and decision

1. After a 2 week trial I handed down a written judgment on 19 December 2022 which can be accessed on The National Archive and elsewhere at [2022] EWHC 3249 (TCC) ("the main judgment"). The parties were unable to agree on consequential matters and, after a protracted delay due to finding a date when all trial counsel were available to deal with the number of outstanding matters, a 2 day hearing took place on 20-21 April 2023 after which I now provide this judgment on consequential issues to resolve the remaining disputed issues.

2. I refer any interested readers to the summary in the main judgment at paragraph 5, where I said that:

   (a) The Stevens succeed in their claim in nuisance against the Sihans, with damages being awarded in the sum of £59,500.

   (b) The Stevens succeed in their claim in nuisance against the Romeros, in that the court will order the Romeros to undertake limited remedial works to no 17 comprising the construction of slot drains around the outside perimeter of the paved areas to the rear and to the no 15 side of the house at no 17, such drains to be connected into the existing public drainage system. There is no separate award of damages against the Romeros.

   (c) The Romeros are entitled to damages for misrepresentation and breach of contract and to contribution under the Civil Liability (Contribution) Act 1978 against the Sihans, amounting to an indemnity against: (i) the costs incurred in complying with the injunction; (ii) the costs incurred in complying with the enforcement notice issued by the local planning authority (to the extent that they are required to do so); and (iii) the reasonable and reasonably incurred costs of defending the claim. These claims will be assessed at a future hearing if not agreed.

3. There is little disagreement as to (a) and (b), save for a very substantial disagreement between the Stevens and the Sihans (and to a lesser extent between the Stevens and the Romeros) as to what consequential costs order is appropriate. As to (c), the Sihans and the Romeros are agreed as to the way forwards as regards the assessment of the compliance costs claims (i) and (ii) but, following the exchange of written submissions for this hearing, it became apparent that there is a substantial disagreement as to the legal costs claim (iii). There were various other matters canvassed which are dealt with in the draft order which I am circulating with this draft judgment but which do not require written reasons beyond the following:

   (1) I accept that the Stevens are entitled to interest on their judgment at 3% p.a. from the date of their letter of claim on the basis that by this date at the latest they had suffered a relevant loss, namely

damage which required remedial works to remedy, regardless of the fact that by such date they had not undertaken or incurred all of the losses the subject of the award.

(2) I accept that both the Stevens and the Romeros are entitled to interest on costs paid at 3% pa.

B The Stevens' costs of the main action as against the Sihans and the Romeros

4. I am dealing with these costs solely in accordance with the costs jurisdiction under s.51 Senior Courts Act 1981 ("SCA 1981") and Part 44 Civil Procedure Rules ("CPR Part 44").

5. It is acknowledged by the Sihans and the Romeros and, insofar as not accepted, it is plain and obvious and I so find that the Stevens are the successful party, so that the starting point under 44.2(2)(a) is that the Sihans and the Romeros should pay the Stevens' costs.

6. However, the argument in this case, as in so many cases, is whether and if so to what extent the court should depart from this starting point when regard is had – as is required by CPR 44.2(4) - to all of the circumstances including the conduct of the parties, success or failure on parts of their respective cases (including the reasonableness, manner of pursuit of, and any exaggeration of, those parts), and admissible offers outside CPR Part 36.

7. I have been referred to what might conveniently and without disrespect be described as the "usual" authorities on the starting point and the 44.2(4) factors and to the detailed and helpful commentary in the notes to 44.2 in the current (2023) edition of the White Book. There is no need for me to prolong this judgment by citation or reference. This case, like most others, involves the application of these well-known principles to the particular facts of the case.

8. The obvious starting point is the extent to which the Stevens failed on parts of their case and the reasonableness and manner of pursuit of their case overall and these particular aspects of their case.

9. Three features were rightly emphasised by Mr Darton KC in particular: (a) the unsuccessful pursuit of the claim for an injunction requiring the Romeros to reduce at their own expense the levels of the no 17 rear garden to the original pre-works levels; (b) the unsuccessful pursuit of the alternative claim for an injunction requiring the Romeros to install at their own expense an extensive drainage system to the no 17 rear garden; (c) the largely unsuccessful pursuit of the claim for consequential damages, including the very substantial claim for residual diminution in value assuming no levels reduction was ordered and a substantial claim for damage to the Stevens' swimming pool. He contrasts this with the judgment, under which the Stevens obtained an order for a far more limited remedial works scheme comprising remedial works at no 15 of £40,000 plus VAT and a limited slot drainage scheme to the paved areas to two sides of the no 17 house at a cost which at trial was thought to be only £7,250 plus VAT (although the revised quote is now said to be £30,230 plus VAT). They obtained nothing for diminution in value or for the swimming pool and modest consequential damages amounting to under £20,000.

10. It cannot be disputed that there was a substantial difference between the value and significance of these claims as advanced and the end result. It cannot sensibly be disputed that if the claim had been pleaded from the outset on the basis of the eventual outcome: (a) the parties ought – acting sensibly – to have approached the claim in a far more constructive way and, probably, resolved it without the need for a trial; and (b) the court would have been far more ready to cut down the directions and the allowable budgeted costs to a level commensurate with the real value and significance of the case.

11. However, it is also true, as Ms Atkins submits, that the actual time and cost of these unsuccessful claims was relatively limited compared to the time and cost of investigation of all of the issues in the case, including the significant issues which were vigorously contested and on which the Stevens

succeeded, namely breach and causation. The victory was far from pyrrhic in that the Stevens have achieved a judgment of real benefit to them.

12. When it comes to consider the reasonableness of pursuit of the claim as advanced, the position is not entirely straightforward. Points in favour of the Stevens include that: (a) whilst the claim for levels reduction was not supported by their liability expert, the original works were undertaken in breach of planning permission and have been the subject of an enforcement notice; (b) the claim for substantial drainage works to no 17 was supported by their (competent and experienced) liability expert, as was the claim for the swimming pool; (c) the claim for diminution in value was supported by their (also competent and experienced) valuation expert.

13. However, in my view the Stevens' determined pursuit of these claims had something of the nature of a crusade. It was not until cross-examination at trial that they accepted for the first time that: (a) their rear garden had suffered from occasional waterlogging (judgment, paragraph 206-207) or that the situation had much improved as a result of the remedial works already undertaken by them to no 15 (main judgment, paragraphs 244-245, 260 and 278). This was a key factor in my raising with the experts (main judgment, paragraphs 299, 302) whether or not a more limited remedial scheme, involving further works at no 15 and no 17, would restore the position to its pre-works condition, and my determination (main judgment, paragraphs 305-314) that this would indeed be the most appropriate solution. I am satisfied that the Stevens' determined pursuit from the outset of the levels reduction or extensive no 17 remedial scheme schemes, without acknowledging that: (a) there had always been a historic problem of occasional waterlogging in no 15; and (b) the remedial works already undertaken had had a significant beneficial effect, was unreasonable and also contributed to the situation where the case as presented before and at trial was argued by all parties as binary, i.e. either the works had caused very serious and continuing flooding where none had previously existed or that the works had had no effect at all on no 15.

14. However, the impact of these findings must be balanced against what I am satisfied was a similar dogged and unreasonable defence by the Sihans, in that: (a) they resolutely denied that their relevelling works (which had not, contrary to the requirements of the planning permission, been designed and submitted for approval before being undertaken) had any impact at all on no 15; (b) they resolutely denied that they were in breach of any duty owed by them to the Stevens or that any remedial works were required. Had they been willing to accept that the evidence did show that their works had had some impact, for which they were legally responsible, and that some reasonable remedial works were required then this would undoubtedly have enhanced the prospects of a resolution or reduced the time and cost of the litigation. Their liability expert was at least as, if not more, dogged than the Stevens and was led into placing undue reliance on the selective and partial previous reports obtained by the Sihans from their architect and others. Their valuation expert did not engage in any meaningful way with the key issues on which I rejected the diminution in value case.

15. The Romeros' approach was very much to seek to sit on the fence on the key issues in relation to the main action, with considerable justification in my view given the difficult position they had been placed in. It was not until late on that they instructed a liability expert and a valuation expert, whose evidence I was favourably impressed by notwithstanding that I did not accept it on key points in the case and they at least attempted to undertake the exercise of specifying and costing a remedial scheme. I have no doubt that they would enthusiastically have agreed to the remedial scheme which in the end I decided was appropriate, not least because it would not have affected their ownership and enjoyment of no 17 by requiring either a levels reduction or an extensive and expensive remedial drainage scheme with ongoing maintenance obligations to no 17. The only area where they can be criticised was by jumping on the diminution in value bandwagon and by seeking to make a substantial claim against the Sihans for general and special damages, the latter which were not supported by the requisite necessary medical evidence.

16. It follows that some reduction from the costs otherwise recoverable by the Stevens is undoubtedly required by reference to their lack of success on all issues and the extent to which their conduct of their case was unreasonable.

17. Before seeking to arrive at a figure however I should also address the fiercely contested issue of the without prejudice save as to costs ("WPSC") offers.

18. I begin by observing that this is not a case where either party made any Part 36 offers on which they could place reliance. Mr Darton submitted that his clients could not have made a Part 36 offer. Whilst I am not convinced that it was not possible to do so, I accept that on the rather complex facts of this case, where on the Stevens' case the Sihans were primarily responsible for the problem but had then largely placed it outside their control to resolve it by selling no 17 to the Romeros, it made obvious sense to seek to resolve matters by WPSC offers.

19. The position is also complicated by the fact that whilst it would have been possible for one of the parties to make an offer which addressed the main action and left the additional claim to be resolved separately, it would obviously have been far preferable for all claims to be resolved by one overall settlement. To take the position of the Sihans in particular, whilst they could have made an offer to the other parties to settle the main action which anticipated my judgment by agreeing to pay the Stevens the cost of the necessary works to no 15 and by agreeing to fund the Romeros the costs of the works to no 17 and to pay their respective costs of the main action, that would still have left unresolved with the Romeros the problem of compliance with the enforcement notice.

20. Whilst I have been referred in some detail to the copious WPSC correspondence, it is sufficient for present purposes for me to summarise what happened and its relevance to the costs issue at a relatively high level.

21. It is common ground that in June 2018, two years before proceedings were issued, the Stevens and the Sihans had reached agreement WPSC to instruct Mr Taylor to provide an expert determination as to what remedial works were necessary and for the Sihans to fund the whole process and, in addition, to pay the Stevens £85,000 as damages and £31,000 for costs. It is also common ground that to be effective it was necessary for the Romeros to agree and in August 2018 draft agreements were sent to JMW Solicitors, then representing the Romeros, for their consideration, which included a process for seeking to deal with any ongoing maintenance costs and the outstanding planning permission issue. In a letter dated 3 December 2018 JMW explained that the Romeros were not prepared to agree for a number of reasons, including that: (a) the draft did not require the Sihans to accept responsibility for any remedial works required by the local planning authority, Cheshire East Council ("the LPA"); (b) they were not prepared to bind themselves to an expert determination process; and (c) they were not prepared to have a deed of covenant registered against the title to no 17.

22. As I said in my main judgment at [96], without knowing the full picture, that did not seem to me to be unreasonable and I remain of that view having seen the correspondence in full. As I also noted in my main judgment at paragraphs 96-103, the parties nonetheless agreed to instruct Mr Taylor to provide a report on a joint basis to see if agreement could be reached on a way forward, he did so and suggested that he needed further instructions to work up a detailed remedial scheme, and that the Sihans stated that they were content to proceed on that basis.

23. However, no settlement was reached on this basis. From the evidence I have been shown, that appears to have been for the following reasons:

    (i) First, because the Stevens, having instructed Mr Raine their valuer, disclosed a copy of his report and, in January 2020, said that whilst they were willing to negotiate they considered that if works were to be undertaken to no 17 they would be seeking an additional payment representing the

10% diminution in value identified by Mr Raine (or, alternatively, a levels reduction or a very substantial one-off payment).

(ii) Second, because the Romeros, whilst between their former solicitors JMW and their current solicitors Eversheds, said that they were unwilling to accept any change in the appearance of their rear garden (i.e. no levels reduction) and were seeking substantial compensation.

(iii) Third, because although the parties engaged in a mediation on 20 February 2020, no settlement was reached.

(iv) Fourth, because although the parties remained willing to and did continue to negotiate after the mediation, on 15 April 2020 the Sihans, having themselves changed solicitors, wrote WPSC to say that they were withdrawing from any previous offers. No proper explanation has ever been given as to why they did so and it is a very powerful point against them in seeking to rely upon their earlier willingness to settle before proceedings were issued.

(v) No further progress was achieved before proceedings were issued in June 2020, although in May 2020 the Romeros made clear their willingness to consider any suitable scheme if funded by the Sihans. After proceedings were issued no further WPSC offer was made by the Sihans. The Romeros made a WPSC offer in May 2021, whereby they offered to undertake remedial works to no 17 (involving a drainage scheme to no 17 either with or without a levels reduction, where the levels reduction would involve significantly greater expense) on the basis that they were paid for by the Sihans, who would also make a compensatory payment to the Romeros (which did not include any diminution in value) as well as paying their costs. The Sihans' preference was for the scheme without levels reduction, whereas the Stevens' preference was for the scheme with levels reduction. The Stevens were willing to engage, however, there was no WPSC response from the Sihans and no agreement was forthcoming, for reasons which are not explained in WPSC correspondence.

(vi) The Stevens also proposed a joint settlement meeting ("JSM") on a number of occasions from June 2021, but the Sihans were unwilling to do so until the liability experts had completed their discussions and evidence and, eventually, in August 2022 refused to agree on the basis that they were confident that the expert evidence of their expert and that of the Romeros would be preferred.

24. Mr Darton sought to present this correspondence as showing that in 2018 and 2019 the Sihans were willing to and had made an offer to settle which was: (a) better than the outcome achieved by the Stevens in the litigation; and (b) unreasonably refused and/or torpedoed by the other parties, leaving the Sihans unable to settle because they were between the rock of the Stevens' insistence on achieving a levels reduction and the hard place of the Romeros' refusal to agree to a levels reduction, and the insistence of both on securing an unjustifiable substantial diminution in value payment.

25. However, as the above review shows, the picture does not support this one-sided version of events. Initially, the Stevens were willing to negotiate and accept the Sihans' proposals, but the Romeros were – not unreasonably – unwilling to agree them as proffered. It is true that in early 2020 both the Stevens and the Romeros introduced further demands, but it is plain that they were prepared to discuss at the mediation and, more importantly for present purposes, thereafter in continued negotiations. It was in April 2020 that the Sihans brought those negotiations to an end. That then led to the issue of proceedings, after which both of the other parties sought to re-open negotiations at various stages but the Sihans were unwilling to do so, at least in WPSC correspondence.

26. In the circumstances, it does not seem to me that this WPSC correspondence shows that the Sihans acted reasonably whereas the Stevens and/or the Romeros did not. Instead, it shows that the parties attempted in good faith to achieve a settlement but were unable, for a number of different reasons, to

do so. In particular, it cannot be said that the Stevens were ever presented with a clear and unqualified offer, whether jointly by the Sihans or the Romeros, or individually by the Sihans, which offered them more than they have achieved from this trial. As I have said, the Stevens were prepared to and did accept the Sihans' offer in 2018 and 2019 and it is not their fault or responsibility that it was not accepted by the Romeros, against whom there is no evidence for concluding that they acted unreasonably in refusing the offer, and whilst there is some room for criticising both the Stevens and the Romeros for their correspondence in early 2020 there is just as much room for criticising the Sihans for their stance a few months later. Thereafter, it appears to have been the Sihans who were the major block on settlement.

Conclusions as to the costs of the main action

28. The Stevens should recover a proportion of their costs of the main action against the Sihans, reflecting a reasonable discount for their relative lack of success and unreasonable conduct. I am satisfied that they should receive 75% of their costs against the Sihans.

29. Given the more limited nature of the case against the Romeros, as well as the same points in relation to relative lack of success and unreasonable conduct, I am satisfied that the Stevens should receive 50% of their costs as against the Romeros.

30. What this means is that the Stevens can recover up to 75% of their costs against the Sihans and up to 50% of their costs against the Romeros they may not recover more than 75% in total.

Payment on account

31. I accept Ms Atkins' submission that the Stevens are entitled to an interim payment on account of costs as against the Sihans of £275,672.77 (being 75% of £367,563.70, itself being the total of £284,138.10 {90% of the approved budgeted estimated costs of £315,709} and £83,425.60 {55% of the incurred costs of £151,682.92}) and against the Romeros of £183,781.85 (being 50% of £367,563.70 as above).

C. The Romeros' costs against the Sihans

32. There are three separate sets of costs which have to be considered, namely:

(a) The Romeros' liability for the Stevens' costs of the main action.

(b) The costs incurred by the Romeros in defending the main action.

(c) The costs incurred by the Romeros in bringing the contribution claim.

33. It is also necessary to keep clearly in mind whether these costs are claimed, recovered and assessed on the basis of damages or on the basis of costs. As will appear, this may make a significant difference and there is a divergence of judicial opinion as to whether or not costs recoverable as damages are to be assessed on the standard basis of detailed assessment under CPR 44.3, on the indemnity basis of detailed assessment under CPR 44.3, or on what used to be the "solicitor and own client" assessment of basis but subject to conventional principles such as foreseeability, remoteness, reasonableness and mitigation of loss applicable to the assessment of damages.

34. As to (a), the Romeros' case is that they are entitled to a full indemnity against their liability for the Stevens' costs of the main action, whether as damages or under the costs jurisdiction. Since those costs are going to be subject to a detailed assessment on the standard basis in the main action anyway no issue arises so far as their quantification is concerned as to whether they are regarded as damages or costs. The only potential issue is as to whether or not the arguments deployed by the Sihans under Part 44.2 as to the Romeros' partial lack of success and/or conduct are as applicable to assessment as damages as to determination under the costs jurisdiction.

35. The Sihans' case is that the only proper basis for determination, assessment and payment of these costs is under the costs jurisdiction and that such costs should be: (i) subject to reduction by reference to the Romeros' partial lack of success and/or conduct; and (b) assessed on the standard basis of detailed assessment. They argue that insofar as they are wrong then they are entitled to raise issues of causation and reasonableness in relation to their award as damages. However, their ability to raise these arguments may depend on my being willing to reconsider my main judgment.

36. As to (b) and (c), the Romeros' case is the same as under (a) above, save that for pragmatic reasons the Romeros do not seek a "solicitor and own client" assessment and are content to seek an assessment by a costs judge under the indemnity basis. Similarly, the Sihan's case is as under (a) above.

37. I have already referred (paragraph 2(c) above) to the summary in the main judgment. I should however also refer to paragraph 366, where I said this:

> "366. It follows in my judgment that the Romeros are entitled as damages for misrepresentation amounting to a full indemnity in respect of the losses which they have incurred or will incur as a result of the misrepresentation, subject to questions of causation, reasonableness and mitigation. That will include the costs of complying with the injunction which I have decided should be ordered against the Romeros. It will also include all of the costs of this litigation, subject of course to any counter-arguments which the Sihans may be able to assert in relation to causation, reasonableness and mitigation (and in particular those which may be raised by reference to without prejudice subject to costs correspondence which I am not entitled to see at that point)."

38. Whilst the Sihans did not seek any clarification or reconsideration of this paragraph before it was handed down, notwithstanding that they had seen it in draft for well over a week, Mr Darton now submits on their behalf that:

    (i) Insofar as the reference to "all of the costs of this litigation" includes the Romeros' costs of the additional claim, that is not a pleaded part of the Romeros' case on which they succeeded, is inconsistent with paragraph 5(c) and is wrong in principle to award such costs as damages.

    (ii) Insofar as it includes the costs of the Stevens and the Romeros in relation to the main action, it is wrong in principle to award such costs as damages.

    (iii) Insofar as such costs are recoverable as damages, there is a need to prove causation and also the basis of assessment should be the standard and not the indemnity basis.

39. It is convenient to deal with point (i) first. I agree that if paragraph 366 is read as extending to the Romeros' costs of the additional claim that is inconsistent with the summary at paragraph 5(c), which does not refer to such costs. I also agree that the Romeros did not plead a claim for their costs of the additional claim as damages in their statement of case, save in relation to the claim under the alleged indemnity in the email of 5 April 2018 which failed (see paragraphs 387 to 393 of the main judgment). I also agree that it would be wrong in principle to award as damages the costs incurred by the Romeros in bringing the additional claim, since such costs can only be awarded under s.51 SCA 1981 in respect of the additional claim. These are all points which could and should have been made earlier but I clearly have jurisdiction to address these points, given that paragraph 366 of the judgment has not yet been the subject of an order, sealed or otherwise, and I should do so to avoid any injustice. Indeed I confirm that it was never my intention to include these costs as damages and that paragraph 366 is in error in that respect. It follows that these costs can only be awarded under s.51 SCA 1981.

40. The same objection does not arise as regards point (ii), since these claims were clearly pleaded as claims for damages both in relation to the neighbour dispute misrepresentation (addressed in paragraphs 341 to 351 of the main judgment) and in relation to the claim for breach of clauses 10.1 and 10.2 of the sale contract (addressed in paragraphs 369 to 386 of the main judgment).

41. However, it is fair to point out that what I said in relation to paragraph 366 only related to the neighbour dispute misrepresentation and that I did not say in relation to the breach of contract claim at paragraphs 385 - 386, where I addressed the issue of damages, that the Romeros were entitled to the costs of the Stevens and their own costs in relation to the main action as damages. Moreover, there is a good reason for that, since it is obvious that the Stevens did not, and nor could they realistically, have claimed an order for restoring the existing levels on the basis that they had any right to enforce the planning permission by way of the nuisance claim, such that there could be no causative connection between the breach of contract claim and the costs incurred in relation to the main action.

Costs as costs

42. I will begin by considering what orders I would make if I was simply dealing with costs under the costs regime in CPR 44. I do so because as is apparent from the above the only costs incurred by the Romeros which are capable of being claimed as damages are their costs of defending the main action on the basis of the neighbour dispute misrepresentation. It is realistically impossible to separate out in any precise way the costs of defending the main action from the costs of pursuing the additional claim. Both involved a detailed factual investigation into all events and dealings as between the three parties since the Romeros came onto the scene. The Romeros' liability expert had to consider issues relating both to the main action and the additional claim, given the difficulty of separating out the need for works to deal with the nuisance and those to deal with the enforcement notice and what works were needed in each case. The diminution in value claim was claimed by the Stevens against both the Sihans and the Romeros, so that the valuation evidence was directed to both properties.

43. The same is true of any attempt to separate out the costs of the additional claim between the separate claims made therein. That is because:

    (i) It is virtually impossible to separate out the factual investigation required as between the separate claims, since the detailed investigation of what was done, both pre and post purchase, was relevant to the Civil Liability (Contribution) Act 1978 ("CLCA 78") claim, to the neighbour dispute misrepresentation claim, to the planning permission misrepresentation claim and to the breach of contract claim. The factual investigation relevant to the 5 April 2018 email indemnity claim was virtually non-existent.

    (ii) Whilst it might be said that the factual issues relevant to the planning permission claims can be separated from the factual issues relevant to the CLCA 78 and neighbour misrepresentation claims, that does not really assist since the factual investigation relevant to the planning permission claims straddles both the planning permission misrepresentation claim (on which the Romeros failed) and the breach of contract claim (on which they succeeded). On any view, the costs of the expert liability evidence related to the CLCA 78 claim whereas the cost of the valuation expert evidence related to both of the misrepresentation claims. The legal issues related to all of the issues.

44. As is well established, applying the guidance at CPR 44.2(6) the court will consider the practicability of making a percentage based order before making an issue based costs order, and this is a paradigm case for so doing given the difficulties referred to above. It is well-established that the court is entitled to arrive at and make a percentage based order on the basis of a very broad brush assessment: see the cases referred to in the notes at 44.2.8 and 44.2.10 to the current White Book on this point and, in particular, the observations of Simon Brown LJ in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 there cited.

45. Adopting such an approach, I am satisfied that the Romeros' costs of defending the main action were probably about one third of their total overall costs and, of the remaining two thirds, the additional costs attributable to the planning permission misrepresentation claim and the 5 April 2018 email indemnity claim represented no more than 15% of those costs.

46. The Romeros were undoubtedly successful in establishing that but for the neighbour dispute misrepresentation they would have sought and obtained suitable undertakings and indemnities in relation to the costs and other consequences of becoming embroiled in the neighbour dispute (see in particulars paragraphs 363-364 of the main judgment). The Romeros were also undoubtedly successful in recovering their CLCA contribution claim against the Sihans (paragraph 335 of the main judgment). I am also satisfied, by reference to the facts and matters relevant to the reasonableness of their defence of the main action and their conduct in relation to settlement, that there is no basis for reducing their recoverability of their costs incurred in relation to their defence of the main action.

47. It is plain that the Romeros were perfectly entitled to say that they were not required to submit to the enforced reduction in levels in order to achieve a settlement, in circumstances where that was neither necessary nor something which they were obliged to concede. It was sufficient for them to say, as they did, that they were prepared to consider a suitable remedial drainage scheme to no 17 if carried out at the Sihans' expense. Indeed, despite Mr Darton's submissions based on what Mr Romero said in cross-examination, the reality is that what was said in WPSC correspondence in 2020 and 2021 was not that the Romeros were never prepared even to consider any solution which involved a levels reduction. I accept that Mr Romero was clear in cross-examination that what he and Ms Guercio always wanted was to keep the garden at its existing level but I do not accept the submission, if made, that what was said in the WPSC about their willingness to consider all possibilities was not genuine.

48. In submissions Mr Darton also made much of the argument that – as I found at paragraph 353 of the main judgment – at the time the Romeros entered into the sale contract they knew that there was a risk that the LPA would insist on a relevelling. However, I also found that the Sihans failed in serious respects to take the action which they had agreed to take under the sale contract to mitigate this risk and – as all parties knew from Mr Taylor's discussions with the solicitors in November 2019 – no expert was actually suggesting that reducing levels would have any impact on addressing the continuing nuisance. It follows in my judgment that seeking to castigate the Romeros as unreasonable for not agreeing to reducing levels, in circumstances where it plainly suited the Sihans to suggest this because it meant that their liability to the Stevens would be far less if that was done and since they had no continuing interest in no 17, is simply not justified.

49. It follows in my judgment that if I was dealing with the costs of the main action and of the additional claim solely under the court's costs jurisdiction then my assessment is that: (a) the Sihans ought to indemnify the Romeros against their liability for the Stevens' costs; (b) the Sihans ought to pay the Romeros all of their costs of defending the main action, amounting to one third (33%) of their overall costs; (b) the Sihans ought to pay the Romeros 85% of the remaining two thirds of their costs (in broad terms, another 57%). It would follow that overall the Sihans should pay the Romeros 90% (i.e. 33% plus 57%) of their total costs in addition to indemnifying them against their costs liability to the Stevens.

Indemnity costs

50. I should also consider the question as to whether or not I should award indemnity costs in relation to the Romeros' costs of the main action and/or the additional claim in the exercise of my costs jurisdiction.

51. As to this, the principles applicable to the exercise of the costs jurisdiction to award indemnity costs are well known and well summarised in the notes at 44.3.8 and 44.3.9 of the White Book, which I need not repeat. There must be some conduct on the part of the paying party outside of the ordinary and reasonable conduct of proceedings. Although advancing a dishonest case and supporting it by dishonesty may be said to be outside of the ordinary and reasonable conduct of proceedings, it is not necessarily sufficient to justify an award of indemnity costs against an unsuccessful defendant that the claimant has established a claim in fraud against them or that the defendant had persisted to deny the claim and thus lied at trial.

52. In this case the Romeros have of course established their fraudulent neighbour misrepresentation claim. However, they have not established their fraudulent planning permission misrepresentation claim and the breach of contract claim involved no allegation let alone finding of fraud or dishonesty. My assessment of Mr Sihan was that he was an unreliable, but not a dishonest, witness (paragraph 16 main judgment). I found that he took a deliberate decision to word the email as a high risk strategy so as to avoid disclosing information which he did not want to disclose and which he feared might lose him the sale (paragraphs 346-349). I do not consider that this is conduct which of itself justifies an award of indemnity costs in relation to the additional claim, even though I also did not accept his evidence that he had provided the relevant information to the conveyancing solicitors and had assumed that they would refer to it.

53. Although in his oral submissions Mr Pomfret identified various other matters as supporting the claim for indemnity damages, they did not in my view provide any real basis for an award of indemnity costs, even taken together and even when added to the fundamental point about the success of the fraudulent neighbour misrepresentation claim. Perhaps most importantly, this is not a case where it can confidently be said that the Sihans' defence of the main action or the additional claims was so obviously weak and doomed to failure, and where it was so obviously unreasonable to refuse the settlement offers made by the other parties, so as to justify an award of indemnity costs.

Costs as damages

54. It is now necessary for me to go on to consider whether the Romeros are entitled to a better outcome by reference to their claim for the recovery of the costs of defending the main action as damages. This is a subject which is the subject of a chapter in its own right in *McGregor on Damages* 21st edition (chapter 21). In summary, and as relevant to this case, the position is as follows:

(i) There is usually no difficulty about recovering the costs which the claimant has been ordered to pay in earlier proceedings (21-002). In this case, for the reasons given in paragraph 34 above, there is no issue as to how the costs are to be assessed and, given the conclusions I have reached as to my decision under the costs jurisdiction, no difference between recovery as damages or recovery as costs.

(ii) The long-established position, at a time when there was a significant difference between the recovery of costs as between the parties (party and party costs, which were only allowed when necessarily incurred) and as between the party and their solicitor (solicitor and client costs, which were payable in full), was to allow recovery of solicitor and client costs as damages against a third party whose wrong had caused the loss (21-003).

(iii) In 1986 standard costs were introduced, which allowed the successful party to recover costs reasonably – and not just necessarily – incurred and reasonable in amount, as were indemnity costs, which allowed the successful party to recover costs except where unreasonable in amount or unreasonably incurred (21-004).

(iv) In 1996 Carnwath J relied upon this change in deciding that the costs recoverable by a claimant in such cases were limited to what they would have recovered on the standard basis: *British Racing Drivers Club Ltd v Hextall Erskine & Co* [1996] 3 All E.R. 667 (21-005). In his decision he noted that previously the rule had differentiated between cases where the parties were the same, where only party and party (now standard) costs were allowed, and cases where the parties were different, where solicitor and own client costs were allowed as damages. He noted that, as had been said by Scott LJ in *The Tiburon* [1992] 2 Lloyd's Rep. 26, albeit obiter, even under a claim to recover costs as damages only costs reasonably incurred would be allowed, regardless of whether the case involved one claim with two defendants or successive claims with two separate defendants and this corresponded most closely with an assessment on the standard basis, which is what would be directed. He concluded that "litigation costs have

traditionally been subject to special rules for policy reasons" and that such costs should be subject to a taxation on the standard basis in all cases.

(v) That decision was followed subsequently by other first instance judges, on grounds of judicial comity, but with varying levels of enthusiasm (21-005).

(vi) The editor however considered that this approach was mistaken, not least because of the subsequent change, introduced by the CPR, requiring recoverable costs on the standard basis to be proportionate as well as reasonable, whereas such restriction did not apply to indemnity costs. He also noted that there was also a real difference between standard and indemnity costs, as regards the burden of proof, which also explains why the indemnity basis tends to be more generous than the standard basis, and finally he observed that there was also a potential difference even between indemnity costs and solicitor and own client costs if awarded as damages because the standard of reasonableness is measured by the duty to mitigate loss which is not an exacting duty (21-006 to 0008).

(vii) Eventually, in *Hermann v Withers* [2012] EWHC 1492 (Ch), Newey J consciously departed from the *British Racing Club* case and awarded as damages costs assessed on the indemnity basis incurred by the claimant in obtaining legal advice on a problem arising out of the negligence of his former solicitors (21-011). He essentially agreed with the criticisms expressed by Sir Anthony Colman in *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC to the effect that the change in the method of assessment of standard basis had undermined the correctness of Carnwath's decision and that the decision could not be justified on public policy grounds. More recently, in *Hawksford Trustees Jersey Ltd v Halliwells LLP (in liquidation)* [2015] EWHC 2996, HHJ Pelling QC (sitting as a High Court Judge) followed the approach of Newey J. The editor has suggested that this issue awaits resolution by the Court of Appeal.

(viii) At paragraph 21-037 the editor also considered the cases involving string contracts resulting in one action with the contracting parties being joined in down the line as third and fourth parties etc, where the courts had permitted the recovery of solicitor and own client costs down the line. At paragraph 21-038 the editor considered the decision of the Court of Appeal in *Penn v Bristol & West Building Society* [1997] 1 W.L.R. 1356, where the court allowed the defendant building society to recover in the claim against the third party solicitor to recover no more than the standard basis costs which it had incurred in its unsuccessful defence of the claim brought by it by the claimant. However, the decision turned on a construction of the then costs rule in RSC Ord. 62 r.3(2) which has no place in the CPR.

55. I have already noted the practical difficulties which would flow from holding that the Romeros are entitled to recover their costs of defending the main action as damages to be assessed on the indemnity basis and holding that they are only entitled to recover their costs of the additional claim as costs on the standard basis. If I made an order that the Romeros should have their costs of defending the main action to be assessed on the indemnity basis and their costs of the additional claim to be assessed on the standard basis that would in my view impose a very heavy burden on the unfortunate costs judge who had to conduct the detailed assessment, because they would first have to separate out one set of costs from the other which is, as I have already said, extremely difficult if not impossible other than by adopting the rough and ready basis which I have already undertaken. Second, they would have to conduct one assessment on a completely different basis from the other. Whilst that would be possible if the costs items were separate and discrete, here it would appear inevitable that there would have to be two assessments of the same costs with the Romeros (if the costs judge followed my division) receiving one third on the indemnity basis and two thirds on the standard basis. The position is even more complicated because the Romeros' costs were subject to costs budgeting, with the result that the starting point in the case of the standard assessment would be the approved costs budget, whereas the

starting point in the case of the indemnity assessment would be the costs billed by Eversheds. There is a very substantial difference, because the approved costs budget amounts to £534,559.67, whereas the costs billed amounts to £723,555.60, as can be seen from the Precedent T form produced by Eversheds on 17 April 2023.

56. It may of course be said that the court should not be dissuaded from making the legally correct order just because that presents complications and itself increases costs. However, it does seem to me that the court should endeavour at least to arrive at an order which reduces the scope for complication, dispute and unnecessary additional costs.

57. It appears to me that there are broadly three options available to me, which are:

    (1) To follows the approach of Carnwath J in the *British Racing Club* case and award only standard costs, on the basis that this is the applicable rule in all cases.

    (2) To follow the approach of Newey J in *Hermann v Withers* and award only indemnity costs, on the same basis.

    (3) To determine the approach which in my view is consistent with principle and meets the practical justice of the case.

58. Whilst I am conscious that I may be accused of resurrecting the old heresy of making a distinction between costs incurred in previous actions and costs incurred in the same actions, it does seem to me that there are powerful arguments of principle and practical justice for awarding standard costs as damages in cases, such as this, where the costs claimed relate to proceedings which have been case and cost managed and have proceeded to a conclusion and even more so where, as here, the claims have proceeded in tandem in the same proceedings. I am satisfied that this should be my approach.

59. As regards principle, in my view a good starting point is to consider what ought reasonably to be in the contemplation of the parties at the time of the commission of the wrong in question. Under the current costs regime they must be taken to know that parties to civil litigation are required to act in accordance with the overriding objective, which means enabling the court to deal with cases justly and at proportionate cost. This is what underpins the principles which apply to the recovery of costs under CRP 44, whereby the expectation is that the parties will only recover standard costs, which are proportionate as well as reasonable, unless the conduct of the other party is such as to justify an award of indemnity costs. It is what also underpins the exercise by the court of its case management powers and its costs budgeting powers.

60. Given that in this case, as in most other cases, the court gives case management directions and makes costs management orders which enable the parties to litigate their dispute in accordance with the overriding objective whilst incurring only reasonable and proportionate costs, it is difficult to see the justification for saying that the party in breach ought to be held liable for costs incurred by the wronged party which exceed those which the court has decided are reasonable and proportionate, unless the conduct of the other party justifies an award of indemnity costs. If the wronged party chooses to instruct lawyers who undertake work which is more extensive and expensive than that which the court has determined is reasonable and proportionate, it is difficult to see why the party in breach should have to subsidise that additional cost.

61. In my view, it is not sufficient for the wronged party simply to say that because it is not uncommon for there to be a shortfall it is not unreasonable for the party in breach to have to absorb that shortfall. If the wronged party is unable to persuade the court to award indemnity costs, or to sanction an increase from the approved costs budget, or to depart from the approved costs budget on detailed assessment for good reason, then it is difficult to see why he should be able to require the wronged party to reimburse him the shortfall. In my view, there is a strong public interest in equating the recovery of reasonable and reasonably incurred costs as damages with what is recoverable by way of costs under

CPR Part 44 on the standard basis and only to award indemnity costs where the circumstances are such as would justify that award under CPR 44.

62. In my view, these arguments apply with even more force where – as here - the costs claimed are costs which have been incurred and cost managed in the same litigation as the claim by the innocent party against the wronged party. The innocent party will know that both sets of costs will be cost managed and, in the majority of cases, there will be an overlap at least to some extent. To have a situation where either the separate costs are assessed on separate bases or, at the most extreme position contended for by the editor of *McGregor*, the subject of an assessment which is not undertaken on the standard or the indemnity basis but – presumably – by the trial judge applying solely common law principles of assessing damages, seems to me to be contrary to the overriding objective and practical justice and not compelled by principle.

63. If there is a justification for sanctioning an increase from the approved costs budget then the Romeros have their remedy under CPR 3.15A. If there is good reason for departing from the approved costs budget on detailed assessment then the Romeros have their remedy under CPR 3.18.

64. It is not necessary for me to consider whether this approach should also apply to all cases. I can see that there are less compelling reasons for adopting the same approach where the costs are not incurred in civil litigation in the courts of this jurisdiction and, hence, subject to the CPR. I leave that argument to a case where it arises.

65. In supplemental submissions seeking permission to appeal Mr Pomfret submitted that even if I was right in my above approach in relation to the generality of cases, that approach should not be applied in cases where – as here – the claiming party is successful in being awarded as damages for fraudulent misrepresentation the costs of defending the claim brought against it. His submission was that in such cases the successful party is entitled to recover all loss caused by its reliance on the fraudulent misrepresentation subject only to the duty to mitigate. I can see the force of that submission but in my judgment it is not a sufficiently strong reason to depart from my decision. In my view the duty to mitigate means that only reasonable and reasonably incurred costs should be recovered as damages even in such cases unless the circumstances are such as to justify an award of indemnity costs under CPR 44.

Payment on account

66. I adopt the same approach as adopted as regards the Stevens' claim for costs and order that Romeros are entitled to an interim payment on account of costs as against the Sihans of £411,257.82 (being the total of £301,500{90% of the approved budgeted estimated costs of £335,000} and £109,757.82 {55% of the incurred costs of £199,559.67}).