IN THE COUNTY COURT sitting at BIRMINGHAM **Case no B50BM 004**
TECHNOLOGY & CONSTRUCTION COURT

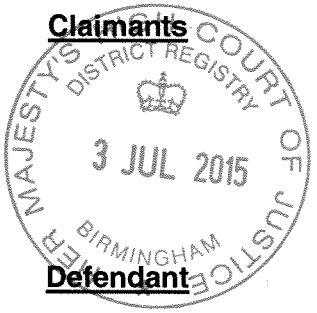
BETWEEN:

ANITA & ANTHONY BRIDGLAND

Claimants

-v-

EARLSMEAD ESTATES LIMITED



Defendant

JUDGEMENT

Draft made available to the parties on	24.06.15
Judgement handed down on	01.07.15

1. The application

This is an application to strike out paragraphs 15 (i) and (ii) of the amended particulars of claim; alternatively for summary judgement in respect of the claimants' claim for breach of statutory duty. The application notice is dated 26 February 2015.

2. Background

As set out in the amended particulars of claim, the defendant owned a substantial piece of land in Hanley in Stoke-on-Trent, upon which were situated some factory units known as the Trafalgar Works. Part of the Trafalgar Works comprised the building which had a gable roof ("the gable building"). The gable building abutted against part of the flank wall of 31 Trafalgar Street, which the claimants owned as an investment property, and which they let out to tenants.

3. It is common ground that there came a date when the defendant demolished the gable building, thereby exposing the lower part of the flank wall of 31 Trafalgar Street.

4. However, a difference has emerged between the parties as to the date when the gable building was demolished. In the initial particulars of claim dated 20 November 2013 (pages 6 to 13) the claimants asserted that "the Trafalgar Works were demolished by the defendant in 2009". In the original defence dated 16 January 2014 (pages 53 to 61) the defendant agreed that the demolition occurred that year; in paragraph 3 of its defence it admitted that the Trafalgar Works were demolished by independent contractors acting for the defendant in 2009.

5. The claimants repeated the assertion that the Trafalgar Works were demolished in 2009 in the amended particulars of claim dated 19 November 2014 (pages 72 to 79). However in paragraph 3 of its amended defence dated 16 March

2015 (page 80) the defendant resiled from its prior admission that the demolition had occurred in 2009, and asserted instead that the demolition had occurred on 11 and 12 August 2007, and thus raised a defence of limitation.

6. In the draft re-amended particulars of claim, which are the subject of a separate application by the claimants for permission to re-amend dated 29 May 2015, the claimants seek to re-amend paragraph 2 in order to state that "on 9 August 2008 the claimants visited the property to discover that the Trafalgar works had been demolished by the defendant". That application is yet to be determined.

7. As regards matters which occurred at 31 Trafalgar Street after the demolition of the Trafalgar Works, the claimants' case as asserted in the amended particulars of claim is as follows:

> "6. The claimant had owned the property since 2004 and in the period between her acquisition of the property and the demolition of the Trafalgar Works there had been no difficulty with damp in the boundary wall with the Trafalgar Works.
>
> 7. The demolition of the Trafalgar Works exposed the full amount of the flank wall and gable of the property to the elements. The demolition of the Trafalgar Works also left in place a hard standing on which the Trafalgar Works once stood.
>
> 8. Shortly after the demolition of the Trafalgar Works the property began to experience severe damp along the internal wall of the wall now exposed to the elements by the demolition of the adjoining Trafalgar Works.
>
> 9. On discovering the damp problems in 2009, the claimant stopped renting the property and carried out redecoration in the hope of

resolving the problems. The property was let to tenants once more, but when they left in June 2010 the claimant found again that damp had penetrated through the boundary wall.

10. At or shortly after this time, the claimant attempted to engage with the defendant in order to resolve the problems with damp ..."

8. As regards paragraph 8 of the amended particulars of claim, it is to be noted that in paragraph 2 of the amended particulars of claim the claimants had alleged that demolition had occurred in 2009; thus - by inference - in paragraph 8 the claimants were also alleging that 31 Trafalgar Street " ... began to experience severe damp along the internal wall of the flank wall ..." shortly after such demolition in 2009. However, as noted above, in their draft re-amended particulars of claim (permission for which is not yet been given) the claimants now allege that demolition had occurred by 9 August 2008.

9. By the order for directions made on 10 March 2015 (pages 103a-b) the trial of this action has been listed for five days commencing on 11 January 2016.

10. <u>The alleged statutory duties</u>

In paragraph 15 of the amended particulars of claim, particulars of breach of statutory duty are stated as follows:

"(i) The defendant failed to serve on the claimant a notice of the kind described in section 3 of the Party Wall Act 1996, thereby depriving the claimant of the opportunity to avail herself of the counter-notice regime described in section 4 ... Had the claimant been afforded this opportunity she would have been able to require the works to be performed in such a way as to prevent the issues of damp arising.

(ii) In breach of section 7 (1) ... the defendant failed to demolish the Trafalgar Works in such a way as to avoid unnecessary inconvenience being caused to the claimant."

11. The application in more detail

The defendant seeks either to strike out those paragraphs as disclosing no reasonable cause of action, or for summary judgement on the basis that the claimants have no reasonable prospect of success in relation to those matters. It is therefore necessary to consider first the allegation of breach of statutory duty alleged in paragraph 15 (i) which concerns sections 3 and 4 of the Party Wall Act 1996; and secondly the allegation of breach of statutory duty alleged in paragraph 15 (ii) which concerns section 7 of the Party Wall Act 1996 ("the 1996 Act").

12. The relevant provisions of the Party Wall Act 1996

Section 2, headed "Repair etc of party wall rights owner", provides:

(1) This section applies where lands of different owners adjoin and at the line of junction the said lands are built on or boundary wall, being a party fence wall or the external wall of the building, has been erected.

(2) A building owner shall have the following rights –
...
(n) to expose a party wall or party structure hitherto enclosed subject to providing adequate weathering

Section 3, headed "Party structure notices", provides:

(1) Before exercising any right conferred on him by section 2 a building owner shall serve on any adjoining owner a notice (in this Act referred to as a "party structure notice" stating –
(a) the name and address of the building owner;
(b) the nature and particulars of the proposed work including, in cases where the building owner proposes to construct special foundations, plans, sections and details of construction of the special foundations together with reasonable particulars of the loads to be carried thereby; and
(c) the date on which the proposed work will begin.

(2) A party structure notice shall –
  (a) be served at least two months before the date on which the proposed work will begin;
  (b) cease to have effect if the work to which it relates (i) has not begun within the period of 12 months ... and (ii) is not prosecuted with due diligence.
  ...

Section 4, headed "Counter notices", provides:

(1) An adjoining owner may, having been served with a party structure notice, serve on the building owner a notice (in this Act referred to as a "counter notice") setting out –
  (a) in respect of a party fence wall or party structure, a requirement that the building owner build in or on the wall or structure to which the notice relates such chimney copings, breasts, jambs or flues, or such piers or recesses or other like works, as may reasonably be required for the convenience of the adjoining owner;
  ...

(2) A counter notice shall –
  (a) specify the works required by the notice to be executed and shall be accompanied by plans, sections and particulars of such works, and
  (b) be served within the period of one month beginning with the day on which the party structure notice is served.

(3) A building owner on whom a counter notice has been served shall comply with the requirements of the counter notice unless the execution of the works required by the counter notice would
  (a) be injurious to him;
  (b) cause unnecessary inconvenience to him; or
  (c) cause unnecessary delay in the execution of the works pursuant to the party structure notice.

Section 5, headed "Disputes arising under sections 3 and 4", provides:

If an owner on whom a party structure notice or a counter notice has been served does not serve a notice indicating his consent to it within the period of 14 days beginning with the day on which the party structure notice or counter notice was served, he shall be deemed to have dissented from the notice and a dispute shall be deemed to have arisen between the parties.

Section 7, headed "Compensation etc", provides:

(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."

13. General points as regards the approach to be taken to the application

(1) No amendment sought in connection with paragraph 15

In paragraph 11 of his written submissions, Mr Hackett on behalf of the claimants referred to the text in the notes at paragraph 3.4.2 in the 2015 'Civil Procedure' which provides:

> "Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend."

The decision in *Soo Kim v Yong* [2011] EWHC 1781 is cited as authority for that proposition. However, in the course of his oral submissions, Mr Hackett informed me that he had no draft amendment to produce in the event that either paragraph 15 (i) or (ii) were struck out, and he did not intend asking for the opportunity to make such an application. Accordingly, I conclude that, were I to consider that either of paragraph 15 (i) or (ii) were liable to be struck out, then absent any proposed amendment to cure such defect, I should proceed to strike out such at this interlocutory or interim stage.

(2) Whether suitable for determination at an interlocutory or interim stage

In paragraph 10 of his written submissions, Mr Hackett referred to the decision of the Court of Appeal in *Richards v Hughes* [2004] PNLR 35 and cited an extract from paragraph 22 of the judgement in a case, which was as follows:

> " I start by considering what is the correct approach on a summary application ... when the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care. The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out."

On behalf of the defendant Mr Taylor referred me to the text in the notes at paragraph 24.2.3 in the 2015 'Civil Procedure' which provides:

> "Where a summary judgement application gives rise to a short point of law or construction, the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an adequate opportunity to address the point and argument. The court should not allow case to go forward to trial simply because there is a possibility of some further evidence arising."

The note then cites an extract from the judgement of Moore-Bick LJ in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725:

> " ... If the respondents case in bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

Mr Taylor went on to submit (DG/173) that these applications, certainly so far as the interplay between sections 3 and 4 was concerned, involved a short point of statutory construction, and was thus appropriate for determination at an interlocutory or interim stage of the proceedings. I generally accept that submission. My approach will therefore be that, if I come to the view that either limb of the application is susceptible to determination as a short point of statutory construction, then it will be appropriate to determine the application at this interim stage of the proceedings.

(3) Novel point of law

In paragraph 30 of his written submissions Mr Hackett submitted that "... claims turning on novel points of law are not appropriate to be struck out, and novel law is a compelling reason for trial ...", citing *Farah v British Airways* 'The Times' 26 January 2000 as authority for that proposition.

Mr Taylor responded by submitting (DG/173) that such an approach might be appropriate in an area where the law was developing on an incremental, or case-by-case, basis. But he submitted that was not the position in the present case. Instead he submitted that the test for the court was not whether the claimant has a reasonable prospect of success in establishing the law is what the claimants contend; instead the question for determination is: what is the law? I generally accept

that submission. In paragraph 42 of his judgement in *Farah*, Chadwick LJ referred to the speech of Lord Browne-Wilkinson in the earlier decision of *Barrett v LB Islington* [1999] 3 WLR 83 and held:

> "As Lord Browne-Wilkinson observed in *Barrett v LB Islington* ... unless it is possible to give a certain and affirmative answer to the question whether the claimant would be bound to fail, the case is not one in which it was appropriate to strike out the claim in advance of trial. Lord Browne-Wilkinson went on to point out that in an area of the law which was uncertain and developing, it would not normally be appropriate to strike out. He emphasised the importance of the principle that the development of the law should be on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed (possibly wrongly) to be true on hearing of the application to strike out."

My approach will therefore be that, if I come to the conclusion that the law is clear, i.e. that it is possible to give a certain and affirmative answer to the question whether the claimant would be bound to fail, then even if (and particularly in this instance as regards the construction of section 7) it appears that there is no reported decision on the matter, I should be able to deal with the matter at this stage of the proceedings, if I consider it appropriate to do so having regard to all the relevant circumstances.

14. <u>The respective cases on sections 3 and 4: ground (a)</u>

In paragraphs 8 to 23 of his written submissions Mr Taylor sets out the defendant's case. He submits that the way the claimant's state their case in paragraph 15 (i) has no reasonable prospect of success, and that - in the first instance - is for two principal reasons. They are:

(1) the claimants misunderstand the nature and purpose of a counter notice served under section 4 (see paragraph 11 of his written submissions); and

(2) the claimant's case is incorrectly based on the premise that, had they served a counter notice, then they "... would have been able to require the works to be performed in such a way as to prevent the issues of damp arising" (see paragraph 14 of his written submissions).

15. As for the first reason, Mr Taylor developed his submission in paragraph 11 as follows: "The purpose of such a notice is not to enable an adjoining owner to require that the building owner's proposed work shall be carried out in a particular manner, but rather to enable an adjoining owner to require that additional work shall be carried out by the building owner, for the benefit of the adjoining owner, at the same time as he carries out his own proposed works. Consistently with Parliament's intention, the expense of these additional works falls upon the adjoining owner: see section 11 (9) of the Act." He developed that point in oral submission by submitting (DG/174) that "a counter notice is a notice whereby the adjoining owner can ask for additional works to be carried out of the type described; such additional works can only be carried out on the party wall itself, and not on the building owner's land; a counter notice is not a medium or a vehicle for objection to the manner in which the building owner proposes to carry out his works".

16. As for the second reason, Mr Taylor developed his submission in paragraph 14 as follows: "The second flaw in the claimants' argument is that it assumes that if they could have served a notice under section 4 ... requiring that the proposed work should be carried out in a particular manner, this would enable them to ensure that the proposed works were carried out 'in such a way as to prevent the issues of damp arising'. This begs two questions. First what would the specific requirements of the claimants had been in their hypothetical counter notice? Second, in the event of disagreement in relation to their requirements, could a surveyor appointed under the Act have made an award by which he directed the defendant to meet those requirements, and to carry out the works in the manner required by the claimants?" He developed that point in oral submission by submitting (DG/175) that " if one assumes that a section 4 counter-notice could have been served requiring French drains to be dug on the claimant's property, then that would have been outside the provisions of the Act".

17. In his written submissions, Mr Hackett focused rather on the point of what constituted "loss" caused by the failure to comply with the provisions of sections 3 and 4 (see his paragraphs 18 & 19); and that the decision of HH Judge Thornton QC in *Crowley v Rushmoor BC* [2009] EWHC 2237 (TCC), to which I shall refer below, was authority for establishing that a failure to comply with the provisions of sections 3 and 4 "is actionable as a breach of statutory duty" (see paragraphs 19 and 20 (i) of his written submissions). These are materially different points from those advanced by Mr Taylor in respect of ground (a) of the application.

18. Conclusion as regards ground (a) of the application

I have come to the clear conclusion that the provisions of section 3 and 4 of the 1996 Act do not enable the claimants to state a case in the manner set out in paragraph 15 (i). Section 3 requires the building owner to serve a party structure notice (often referred to as a "section 3 notice") on an adjoining owner before exercising any of the rights set out in section 2. A party structure notice relates to the building owner's proposed works. Following such service, an adjoining owner may (but does not have to) serve a counter notice. But such a counter notice relates to other work to be carried out on the "party fence wall or party structure" (see the opening phrase of section 4 (1) (a) of the 1996 Act) which "may reasonably be required for the convenience of the adjoining owner" (see the closing phrase of section 4 (1) (a) of the 1996 Act). Such other work which is the subject matter of a counter notice is not the same as the proposed work which the building owner intends to carry out, and the purpose of function of a counter notice does not concern or relate to the manner in which the building owner's proposed work is to be carried out. Further, such other work can only be carried out on the "party fence wall or party structure"; it is not the same as any further work which the adjoining owner might

wish to carry out, or have carried out on his own land. A counter notice therefore cannot, and does not, relate to such further work.

19. In my judgement the application under ground (a) involves a relatively short point of statutory construction. In so far as it engages a novel point of law, in my judgement the position is clear, namely that the claimants are bound to fail on the claim as advanced in paragraph 15 (i). In those circumstances, my decision is that paragraph 15 (i) discloses no reasonable cause of action, and accordingly that subparagraph should be struck out; in the alternative, my decision is that the claimants have no reasonable prospect of success as regards paragraph 15 (i), and accordingly the defendant is entitled to summary judgement in respect of that subparagraph.

20. The respective cases on section 7: grounds (c) & (d)

Mr Taylor takes three points of substance, and one procedural or supplementary point, in support of his general submission that section 7 (1) does not provide for a statutory duty, a failure to comply with which enables an aggrieved adjoining owner to bring court proceedings for breach of statutory duty.

21. The points of substance are:

(1) on its proper construction, section 7 (1) operates as a restriction or qualification to any right conferred by section 2 on a building owner by the 1996 Act; and accordingly - by inference - section 7 (1) does not impose on the building owner a separate duty, breach of which gives rise to an action for breach of statutory duty: see paragraphs 37 and 39 of his written opening submissions;

(2) given that section 7 (2) provides that the building owner is to compensate an adjoining owner ... for "any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act", there is no need to construe

section 7 (1) so as to give rise to a separate and additional statutory duty: see paragraph 38 of his written opening submissions;

(3) on its proper construction, and in particular in conjunction with a proper construction of the whole of the 1996 Act, section 7 (1) does not provide an aggrieved adjoining owner with a separate or additional means of recourse beyond the dispute resolution mechanism or procedure provided for in section 10: see paragraph 42 of his written opening submissions.

22. The procedural or supplementary point is:

(4) unless the building owner has served a party structure notice under section 3, any work which he then carries out is not work done in "exercise (of) any right conferred on him by this Act", with the consequence that the provisions of section 7 (1) are simply not engaged: see paragraph 40 of his written opening submissions.

23. It is convenient to deal with the additional point first. In order to construe section 7 (1) it is first necessary to consider what is meant by the phrase "... exercise any right conferred on him by this Act". The issue is thus whether the building owner has such rights irrespective of whether or not he serves a party structure notice under section 3; or whether, if he does not serve a party structure notice, the building owner does not in fact have such rights. In my judgement there is a distinction to be drawn between the <u>having</u> of such rights - which is the subject matter or province of section 2 - and the <u>exercise</u> of such rights - which is the subject matter or province of sections 3 (1), 7 (1), and indeed also section 3 (3) (a), which provides that a building owner may exercise such rights without serving a party structure notice if he obtains the written consent of the adjoining owner etc. Section 7 (1) thus provides for further matters which govern the <u>exercise</u> of such rights. In my judgement the provisions of section 3 (1) and section 7 (1) are disparate and independent of each other; each applies to the way in which such a right is to be exercised. A building owner is

subject to the separate requirements of section 3 (1) and section 7 (1): the fact that he has failed to comply with the service requirements under section 3 (1) does not absolve him from the separate requirement not to cause unnecessary inconvenience under section 7 (1). I therefore reject Mr Taylor's submission that the consequence of a failure to serve a party structure notice is that a building owner is not then "exercis(ing) any right conferred on him by this Act", and as a result is absolved from the requirement not to cause unnecessary inconvenience to an adjoining owner.

24. As a preliminary or incidental point: section 7 (1) provides that "the building owner shall not exercise any right ... in such a manner or at such time as to cause unnecessary inconvenience" either to an adjoining owner, or to adjoining occupier. Mr Taylor submits that, on its proper construction, what section 7 (1) provides is that a building owner is not to do work in such a way so as to cause a nuisance: see paragraph 37 of his written opening submissions. In my judgement the term "unnecessary inconvenience" is not synonymous with the term "nuisance". The former may be rather wider than the latter, which has particular and specific characteristics of its own.

25. As regards the first of Mr Taylor's point of substance: section 7 (1) does not provide for a duty which is expressed as a positive obligation (such as for example many of the obligations contained in the Health and Safety at Work Act), a failure to comply with which would give rise to a cause of action for breach of statutory duty. Instead it is expressed as a negative provision, so as to add a qualification to the right conferred on a building owner by the Act, namely that such a right shall not be exercised "... in such a manner or at such time as to cause unnecessary inconvenience" etc. It is thus a restrictive or qualitative provision, designed to deprive the building owner of a defence which he may otherwise be able to maintain in the face of a complaint by an aggrieved adjoining owner that he has exercised a section

2 right "... in such a manner or at such time as to cause unnecessary inconvenience". Accordingly I accept Mr Taylor's submission that a breach of the provisions of section 7 (1) does not give rise to an action for breach of statutory duty.

26. As regards the second of Mr Taylor's points of substance: in my judgement the terms of section 7 (2) are of wide and general application. They provide that, irrespective of how the building owner carries out "... any work executed in pursuance of this Act ...", if the adjoining owner suffers "... any loss or damage" as a result, then the building owner is to compensate the adjoining in etc for such loss or damage. While such a provision may not strictly be an imposition of strict liability, it nonetheless provides for compensation to be made simply as a result of the fact of work being executed, rather than as a consequence of the way in which any work was executed. Accordingly I accept Mr Taylor's submission that section 7 (2) provides a complete and sufficient remedy to an aggrieved adjoining owner; and it is thus therefore unnecessary to seek to construe section 7 (1) in such a way as to provide a further category of relief available to an aggrieved adjoining owner.

27. As regards the third of Mr Taylor's points of substance: it is relevant to consider the text of section 10 (1) of the 1996 Act which provides that "where a dispute arises or is deemed to have arisen between the building owner and an adjoining owner in respect of any matter connected with any work to which this act relates ..." the parties are to engage in the machinery or procedure then set out in section 10. That text is expressed in wide terms: it provides that the mechanism or procedure set out in section 10 is engaged in relation to "any matter" connected with "any work" to which the 1996 Act relates. In my judgement such a matter would include a dispute as to whether or not unnecessary inconvenience had been caused by reason of the building owner exercising any right conferred on him by the 1996 Act. If a building owner exercises such a right, but in doing so causes unnecessary

inconvenience etc, then a dispute may arise between the building owner and the adjoining owner. If such a dispute arises, then the Act provides for a specific mechanism or procedure for the resolution of such dispute, namely by the mechanism and procedure set out in section 10.

28. It is thus for the adjoining owner, here the claimants, first to exercise and extinguish their remedies provided by the 1996 Act before resorting to court proceedings. Further and/or in the alternative, it is not apparent that, in circumstances where the 1996 Act provides a mechanism or procedure for dispute resolution, that a further or alternative means of obtaining relief is available to an aggrieved party through the medium of court proceedings. The very fact that the 1996 Act provides for a specific mechanism or procedure for the resolution of disputes in relation to "any matter" connected with "any work" to which the 1996 Act relates is of itself an indication that Parliament did not intend to create a separate private law action for breach of section 7 (1): see generally 'Clerk & Lindsell on Torts' 21st edition (2014) chapter 9, especially paragraphs 9.01-03, and 9.12; and also *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 referred to in paragraph 9.13, citing that part of Lord Diplock's speech at page 185 where he stated:

> "... where an Act creates an obligation and enforces the performance in a specified manner that performance cannot be enforced in any other manner ..."

In my judgement, while the 1996 Act does not contain provisions enforcing performance of the obligation in section 7 (1), the fact that it contains a specific mechanism or procedure for the resolution of disputes in relation to "any matter" connected with "any work" to which the 1996 Act relates is a strong indication that a breach of such obligation is not actionable other than through or by such mechanism or procedure.

29. In paragraph 19 of his written opening submissions Mr Hackett referred to the decision of HHJ Thornton QC in *Crowley*, citing paragraph 104 of the judgement where the judge held:

> "Secondly, any failure to serve the requisite notice before work started would amount to a breach of statutory duty which would allow court to award damages representing the compensation that would have been awarded by the surveyors appointed under the Party Wall Act for any damage caused by the work that would have been avoided had the notice provisions of the Party Wall Act been complied with."

Mr Hackett then went on to submit in paragraph 20 of that there was therefore "... clear authority that (i) breach of the obligations under the 1996 Act is actionable as a breach of statutory duty; and (ii) the correct measure of damages is compensation for damage caused by the works that could have been avoided ...". The first of those points relates to the present analysis, while the second relates rather more to grounds (b) and (e).

30. In the course of oral submissions, another point arose namely that if I found that the facts in *Crowley* were of direct application to the apparent facts in the present case, whether I was bound by the decision in *Crowley*, as HHJ Thornton QC was sitting as a High Court judge in the TCC in *Crowley*, whereas I am sitting as a County Court judge in the TCC in this case. In my judgement, were I to find that the decision in *Crowley* was of direct application to the apparent facts in the present case, than either I am bound to follow it, or at the very least, it is of most persuasive authority.

31. In the course of his oral submissions (DG/177) Mr Taylor submitted that there was tension between paragraphs 103 and 107 of the judgement in *Crowley*. In paragraphs 102 and 103 HHJ Thornton QC held:

> "102. If, as in this case, where the work proceeded without the adjoining owner serving the requisite notice and it then becomes clear that nature should have been served, (the building owner) had three separate routes by which he could recover compensation for damages for himself ... for the resulting damage.

> 103. Firstly, the relevant arbitration provisions provided for by the Party Wall Act can always be operated retrospectively. These provisions involve the appointment of surveyors to resolve disputes arising in connection with any matter connected with any work to which the Party Wall Act relates. The surveyors so appointed would have jurisdiction to award appropriate compensation of any damage resulting from excavation or demolition work close to the flank wall ... which could and should have been, but had not been, made subject to an appropriate award prior to work starting ..."

HHJ Thornton QC then held:

> "107. ... If a building owner may not claim such loss as damages for breach of statutory duty, it could leave such a party without a remedy as a result of the offending party's failure to operate the mandatory statutory provisions of the Party Wall Act. The these reasons, and assuming that the claim is limited to the sum that the surveyor or surveyors would have awarded as compensation under the Party Wall Act, I conclude that such a claim is one of those rare claims for damages arising from the breach of statutory duty, in this case the failure to engage the Party Wall Act, that permits an affected private individual to claim and recover damages for breach of statutory duty."

Mr Taylor's submission, put shortly, was that while HHJ Thornton QC held in paragraph 107 of his judgement that the claimant could be left without a remedy, he had earlier held in paragraph 103 that such a claimant could in fact operate the dispute resolution provisions of the Act retrospectively.

32. In his oral submissions, Mr Hackett made the general submission (DG/180) that the claimants are in fact doing no more (or less) than following the second and third avenues of relief described by HHJ Thornton QC in his judgement in *Crowley*.

33. I have, however, come to the view that *Crowley* is not of direct application to the facts of the present case. That is primarily for the following reasons:

(1) It is clear from the key section of his judgement (paragraphs 96 - 107, under the heading 'Party Wall Act 1996') that HHJ Thornton QC was considering the provisions as regards section 3 of the 1996 Act, and not the provisions of section 7 (1), with which grounds (c) and (d) of this application are concerned. It is to be noted

that while he referred to section 7 (2) at the end of paragraph 103 of his judgement, HHJ Thornton QC did not refer to section 7 (1).

(2) With all proper respect to the judge, I nevertheless accept Mr Taylor's submission that there is -- or appears to be -- a tension between paragraphs 103 and 107 of the judgement in *Crowley.* It is not, in my respectful judgement, immediately clear how, if a remedy is available to a party through the retrospective application of the provisions of the Act, that such a party would in fact be left without a remedy as a consequence of the offending party's failure to operate the machinery or procedure provided under the Act.

(3) In the context of the application for summary judgement (but not in the context of the application to strike out, which proceeds on the basis of assumed facts as stated in the amended particulars of claim) the judgement in *Crowley* proceeds on the basis or footing that a party structure notice served under section 3 would have been able to specify work which the building owner required to be carried out; in contrast, in the present case - as set out above - the opposite position obtains.

34. As regards Mr Hackett's general point, as noted above, the 1996 Act makes specific provision for the machinery or procedure for the resolution of a wide category of dispute which may arise under the 1996 Act.

35. Conclusion as regards grounds (c) & (d) of the application

In my judgement the point of statutory construction which arises under grounds (c) & (d), while less short than that under ground (a), is nevertheless still capable of relatively short determination. In so far as it engages a novel point of law, in my judgement the position is clear, namely that the claimants are bound to fail on the claim as advanced in paragraph 15 (ii). In those circumstances, my decision is that paragraph 15 (ii) discloses no reasonable cause of action, and accordingly that subparagraph should be struck out; in the alternative, my decision is that the

claimants have no reasonable prospect of success as regards paragraph 15 (ii), and accordingly the defendant is entitled to summary judgement in respect of that subparagraph.

36. The respective cases on limitation: grounds (b) & (e).

It is common ground that an action for breach of statutory duty is not actionable per se, but only upon the occurrence of damage: see paragraph 24 of Mr Hackett's written opening submissions, and paragraph 27 of Mr Taylor's written opening submissions. The issue between the parties was however precisely what constituted 'damage' for such purposes. Mr Taylor submitted the damage in this case meant the failure to serve a party structure notice under section 3: see paragraph 31 of his written opening submissions. Mr Hackett submitted the damage in this case meant physical damage to the property in question, which in this case was damp penetration to the flank wall of 31 Trafalgar Street: see paragraph 25 of his written opening submissions. At the hearing, Mr Hackett developed his submissions (DG/183) by differentiating between firstly the duty, namely that provided for in either section 3 or section 7 (1) of the 1996 Act; secondly the breach, namely the failure either to serve a party structure notice, or causing unnecessary inconvenience to an adjoining owner etc; and then thirdly the damage, which in this case was damp penetration to the flank wall which occurred as a result.

37. It is not necessary to carry out an analysis of issues of causation in order to determine the present application. Nevertheless I prefer Mr Hackett's submissions on this issue to those of Mr Taylor. As regards section 3 and - were there a cause of action for breach of statutory duty under it, section 7 (1): by applying the basic principle that an action for breach of statutory duty is actionable only when damage has been sustained, I find that damage in the present case would be such relevant physical damage as was occasioned to the property in question, here damp

penetration to the flank wall of 31 Trafalgar Street. In my judgement, as regards section 3, a failure to serve a party structure notice would constitute the relevant act (or rather in this case the relevant omission) which would constitute a breach of the relevant statutory duty; it would not constitute the damage itself. I am fortified in coming to such a conclusion by consideration of that part of Lord Browne-Wilkinson's speech in *X & others (minors) v Bedfordshire CC* in which he refers to the different types of damage which a claimant would have to establish in order to maintain a cause of action for breach of statutory duty: see the report at [1995] 3 All ER 353, and the passage of his speech at page 380 E-H.

38. It is then relevant to consider the issue of when such damage was sustained. In my judgement, while that date is likely to be some time after demolition occurred, precisely when 31 Trafalgar Street sustained damp penetration to its flank wall is a pure issue of fact, which should properly be determined at trial.

39. Accordingly, grounds (b) & (e) of the application are not made out, and I would not neither strike out paragraphs 15 (i) & (ii) on those grounds, nor enter summary judgement for the defendant in respect of those paragraphs on those grounds.

40. Overall conclusion

For the reasons stated above under ground (a) and grounds (c) & (d): paragraphs 15 (i) & (ii) are to be struck out; alternatively the defendant is entitled to summary judgement in respect of the matters stated in paragraphs 15 (i) & (ii) of the amended particulars of claim.

DG

24.06.15