Neutral Citation Number: [2020] EWHC 3023 (Ch)

Case No: BL-2018-002195

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY TRUSTS AND PROBATE LIST (ChD)

Remote Hearing
Date: 12/11/2020

BEFORE:
INSOLVENCY AND COMPANIES COURT JUDGE JONES SITTING AS A JUDGE OF THE HIGH COURT)

B E T W E E N

CRAZY BEAR GROUP LIMITED

Claimant

- and -

1. JAGRUTI PATEL

2. VIJAY PATEL

Defendants

- and -

JASON ALAN HUNT

Third Party

- -

Ms Emma Read (instructed by **Carbon Law Partners**) for the **Claimant and Third Party**
Mr Jeffrey Terry (instructed by **Colemans Solicitors LLP**) for the **Defendants**

Hearing dates: 20-22 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 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.

............CHJ – 19/11/20.................

I.C.C. JUDGE JONES

I.C.C. Judge Jones sitting as a High Court Judge:

A) Introduction

1. This is a neighbour dispute where the parties have failed to be open with each other about the true facts and have not acted as neighbours should by resolving problems through discussion, negotiation and, if necessary, mediation. At least, not until the morning of the third day of trial when they finally resolved many of the disputes upon terms not disclosed to the court. There remains for me to decide whether Mr and Mrs Patel should be awarded consequential damages for a trespass ("the Basement Trespass") by Crazy Bear Group Limited ("CBG") and Mr Hunt resulting from an extension of an underground kitchen store-room below the land of Mr and Mrs Patel.

2. Whilst that appears to be a concise matter (albeit within the potentially difficult areas of causation, remoteness, mitigation and quantification), the settlement did not include or produce any agreed facts relevant to the decision I am asked to make. It remains necessary to consider the wider scenario presented in evidence during the trial to decide whether the Basement Trespass prevented building works which, it is claimed, would have resulted in a substantial increase in profit for the business of Mr and Mrs Patel. Regrettably, the decision is made more difficult by the failure of openness to which this introduction has referred.

B) Summary of the Claim and Counterclaim

3. CBG owns 73-75 Wycombe Road, Beaconsfield from where it operates a hotel and restaurant within an historic, listed building. Mr and Mrs Patel own an adjoining property, 71 Wycombe Road, from where they have for many years carried on in partnership a newsagent and convenience store known as "Ricki's News".

4. During 2018 Mr and Mrs Patel wanted to expand the floor area of their shop, reconfigure the flat above and at the rear build a single storey extension for additional storage. They wanted the shop to include an area for a sub-post office and for them to become franchised sub-post office Sub-Managers. This, it was anticipated, would increase the shop's footfall, as well as provide a new source of turnover. The new storage area would be significantly larger than the existing shed and would assist them to free up space for the future sub-post office and to meet the anticipated increased turnover. The work above the shop would result in income from the letting of a two-bedroom flat.

5. Their plans involved construction work along the boundary with the Hotel. There would be two phases. "Phase 1" being the construction of the extension and "Phase 2" the work to the shop and to the first floor flat. Access to the extension for the building works and subsequently for deliveries would be through the existing yard onto which the extension's doors would open. The yard has gates leading onto an area of CBG's land over which there is a right of way. The right of way, gates and yard were used for deliveries to the existing shed, which was to be demolished, and for access to the back of the shop.

6. Part of the Hotel's wall marking the boundary along which the works would be carried out is listed. A smaller part towards the northern end of the boundary is a modern blockwork addition. The Phase 1 extension was to lean against the wall and be bolted into the listed part. Both parts of the wall would potentially be affected by the extension's foundations which were to be within 3 metres of the wall. Planning permission was granted on 20 August 2018 for the extension work to begin by no later than 19 August 2021 but subject to conditions ("the Phase 1 Planning Conditions") which had to be fulfilled before the development could start. They included requirements for detailed plans and drawings designed to safeguard the special architectural and historic character of the Hotel, and to accord with section 16(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

7. By letter dated 6 September 2018 Mr and Mrs Patel's architect/project manager, Mr Warwick, gave to Mr Hunt, "part [sic] wall Structure Notice" for works intended to begin on 10 October 2018 if written agreement was received in response. Relevant plans, sections and details of construction were attached showing the Phase 1 and Phase 2 works. It made no reference to the fact that the Phase 1 Planning Conditions had not been fulfilled. Mr Hunt was CBG's predecessor in title and, at the time, one of its two directors. He is now the sole director.

8. During September/early October 2018 Mr and Mrs Patel had the existing storage shed demolished. They also terminated various of the partnership's contracts with existing suppliers/service providers to be able to enter contracts with different parties when the store reopened. Mr Patel identified a number of those suppliers within his evidence. He also explained that stock was reduced in preparation for the building works.

9. By letter dated 4 October 2018 Mr Patel informed CBG that building work would begin on 8 October 2018 in accordance with the plans etcetera included with the 6 September letter to which no response had been received. It also required an access way to the rear currently lined with large plant plots and other items to be kept clear and stated that a brick structure encroaching the northern boundary would be removed together with plumbing and wires trespassing above and below their land. Again, there was no mention of the Phase 1 Planning Conditions having yet to be fulfilled. There was no suggestion that the works to be started were limited to exploratory works to investigate what needed to be done to fulfil those conditions. On the face of the letter, the Phase 1 and Phase 2 works were to be started in 4 days. Indeed, Mr and Mrs Patel had agreed a building contract to that effect.

10. In fact, Mr and Mrs Patel had still had not addressed the Phase 1 Planning Conditions and had not considered or had ignored the application of section 6 of the Party Wall etc Act 1996 ("the Act"). It applies (in summary) when a building owner proposes to excavate for and erect a building or structure within 3 metres of any part of a building of an adjoining owner and when any part of the proposed excavation, building or structure will within that distance extend to a lower level than the bottom of the foundations of the adjoining owner's building or structure.

11. In a claim form issued on 16 October 2018, CBG pleads that on 8 October 2018 Mr and Mrs Patel commenced excavation and construction work in breach of the Act, breached a right of support and committed trespass and nuisance. Final, injunctive relief is sought to restrain trespass and to prevent further construction and excavation in proximity to 73-75 Wycombe Road. In summary the claim in trespass was based

upon proprietary estoppel relying upon agreements or discussions and work carried out. That claim is no longer pursued leaving the claim, as pleaded, relying on the Act. Non-compliance with the Phase 1 Planning Conditions was not disclosed and was not appreciated until shortly before trial. There is also a claim for damage resulting from the works carried out and storage of materials but that was part of the third day settlement.

12. The claim form was issued after an urgent, without notice application before Mr Justice Norris on 12 October 2018. An interim order effective until the return date on 26 October prohibited further building work. At the hearing before Mr Justice Nugee, as he then was, Mr and Mrs Patel's evidence through their solicitor, Mr Hitchin, on instructions, was that the builders had commenced work by digging up the concrete capping to start work on the foundations. They denied they were trespassing and explained that the digging stopped on the day it started when the builders discovered they had broken into the top of a cellar. They asserted that the cellar was being used by the Hotel covertly and was a trespass.

13. At the hearing Mr and Mrs Patel alleged that the injunction sought was in truth intended to protect this cellar not the wall which was undamaged. They complained of non-disclosure because the only reference to the cellar was in paragraph 18 of a witness statement of Mr Flaherty which reads:

> *"For the sake of completeness I should also note, although I do not believe that it is relevant to the claimant's application for an interim injunction, that the concrete pad that can be seen in the photographs forms the ceiling to a basement that was constructed pursuant to an agreement between the parties for the claimant's use. It can be seen from the photographs that the concrete pad has been damaged and the block and beam has been exposed which means that basement is currently open to the elements and will be damaged in the event that it rains."*

14. Mr Hitchin informed the court on instructions:

> *"The reality is that the injunction primarily concerns the cellar, and not the party wall which can be seen in pictures exhibited at pages 7 and 10 and is untouched save for the fact that some of the soil has been removed from the foot of it. The party wall is in no danger at all, and even if it was, clearly by the time the injunction was obtained, my clients had stopped work and given no indication that they were going to restart. However, the cellar had as I say been opened up, was liable to rainwater ingress, and its structural integrity had been breached. Clearly the Claimant could not apply for an injunction for a cellar which they have no legal right to have and which is trespassing on my clients' property."*

15. The injunction was discharged, as I have been told by counsel, for that non-disclosure or inadequate disclosure in respect of the basement and its location in relation to the planned extension. In addition, in submissions before Mr Justice Nugee it was said on behalf of the Defendants that Mr Patel had not refused to give appropriate undertakings but had said his solicitor would deal with the matter and there was no reason to believe the work would restart until after solicitors had discussed the matter at earliest. It is also suggested that the reason may have been because with full disclosure of the extent of the basement and its location in relation to the work on the cap, this could not, of itself, have been an immediate danger to the foundations of the hotel when there was already a void beneath the cap and access through into the hotel below ground level such that the hotel walls in the vicinity of the cap must have been supported by other means.

16. The injunction was also discharged in the context of Mr and Mrs Patels' undertaking ("the Patel Undertaking") pending trial not to carry out excavation or demolition of the concrete pad referred to in the paragraph of Mr Flaherty's witness statement above-quoted *"without (a) the written consent of CBG, or (b) first serving the appropriate notice under section 6 of the [Act] and carrying through the statutory procedure consequent upon service of such notice, or (c) further order of the Court"*. The pad was within *"the area shaded red on the plan"* where Phase 1 works would otherwise take place. In return, CBG continued the usual cross-undertaking in damages first given before Mr Justice Norris. There was still no disclosure of the Phase 1 Planning Conditions being extant and, therefore, of the development being currently unlawful.

17. Mr and Mrs Patel in their Defence (ultimately in Re-Amended form) claim ownership of the land upon which their work had started and deny CBG's claim of trespass. They accept removal of the old shed may have loosened lead flashing, which should not have been there, and that 2 bricks on a pillar of the Hotel's wall may have loosened. However, they deny there was any further damage. Those matters were resolved on the third day of trial.

18. Their defence accepts they had planning permission for a single storey structure extension and that its building would be subject to the Act. It is stated there was and remained no intention to carry out works to which section 2 of the Act applies. The notice by letter dated 6 September 2018 was a mistake. They assert in the Defence that they will give notice pursuant to section 6 of the Act *"if and when [they] intend to commence excavations within 3 metres of the Hotel"*. They deny the Act applied to the works started on 8 October because they were only exploratory. Their purpose was to break up a concrete cap and *"ascertain the ground conditions beneath in order to inform the best mode of constructing foundations"*. Their defence is that the claim form should not have been issued. It was unnecessary and premature.

19. As a result, they claim at trial that it should be decided that CBG was not entitled to the Patel Undertaking given in lieu of an injunction pending trial and they seek to enforce CBG's cross-undertaking in damages. It is claimed that the Patel Undertaking prevented Phase 1 and Phase 2. Their plans for the store, the sub-post office and the flat have been consequentially delayed. They can only restart following judgment and compensation for their consequential loss should be awarded.

20. Mr and Mrs Patel's Defence altered their position concerning the 8 October 2018 work. The evidence from Mr Hitchin on their behalf, in accordance with their instructions, had stated in opposition to the interim injunction on the return day that the concrete cap had been dug up *"to start work on their foundations"*. The work is now said to have been exploratory and this remained the position down to trial. They did not disclose that the work on 8 October was the start of all Phase 1 and Phase 2 works pursuant to a building contract they had agreed. They still did not disclose the existence of the Phase 1 Planning Conditions and the fact that they had not been fulfilled.

21. It may be noted at this stage, although dealt with in further detail below, that this theme of exploratory works was relied upon on instructions during the trial to explain (for the first time) that the 8 October works were carried out to enable Mr and Mrs Patel to comply with the Phase 1 Planning Conditions by the submission of plans and

drawings which could only be drafted once the results of the exploration were known ("the Compliance Explanation"). This was relied upon to suggest that the failure to meet the Phase 1 Planning Conditions was attributable to the Patel Undertaking. That it was the stopping of the works by CBG through their legal proceedings which caused Mr and Mrs Patel not to be able to earn the profits they would have done if the Phase 1 and Phase 2 works had been completed, the sub-post office franchise had begun, the store had increased its turnover and profits and the flat had been let.

22. Mr and Mrs Patel counterclaimed for damages resulting from the Basement Trespass, described as a covert and unlawful trespass. Mr Hunt was joined as a third party for the period of his ownership and as the person originally responsible for the trespass being built. Consequential loss is claimed as damages because the covert trespass prevented construction of the extension and, therefore, the implementation of their business project. Their further claim for exemplary damages was withdrawn during the trial.

23. By email dated 5 October 2020 CBG and Mr Hunt conceded the Basement Trespass. Mr and Mrs Patel's claim for mesne profits was settled on the third day. It is now accepted by CBG that the area of trespass should be sealed and reinstated by backfilling. Mr Patel in evidence stated that he wished to carry out that work and not leave it to CBG. That too has been resolved by agreement on the third day.

24. As a result of the concession, CGB's claim was reduced to the following (summarised) issues: (i) whether works commenced by Mr and Mrs Patel on or about 8 October 2018 were subject to the Act; if so, (ii) whether the Act was breached; and/or if not, (iii) whether they were part of a larger development intended to be carried out which was in breach of the Act necessitating injunctive relief; and (iv) whether the works damaged the wall and damage was also caused to a fence as a result of building materials being stored against it. The fourth issue was settled on the third day of trial. As previously explained, the claim does not refer to the Phase 1 Planning Conditions because of lack of disclosure/knowledge.

25. This neighbour dispute was further expanded by Mr and Mrs Patel's counterclaim. They alleged interference with the above-mentioned right of way, other trespasses and nuisance. CBG in response also asserted that an additional area of land occupied by Mr and Mrs Patel as their own, described as "the Green Land", is in fact part of its garden and sought to reduce Mr and Mrs Patel's damages for the Basement Trespass by set off. All these matters were settled on the third day of trial and need not be referred to in any detail.

C) Consequential Loss Claimed

26. Mr and Mrs Patel's Schedule of Loss pursuant to the order of Chief Master Marsh made on 31 October 2019, which as originally served sought £369,821 as compensation for the Basement Trespass, is presented with annexures which include the following assumptions and explanations for the individual heads of loss claimed:

    a) Annexure 2: The development started in October 2018 and would have been finished at the latter end of November 2018. The flat should have been

available from December 2018 and a tenant was lined up. Builders started work on the flat but had to abandon it due to the injunction to stop all building works. This has lost rental income set at £1,250 per month. Council tax and utilities in the meantime, have been paid out from the business.

b) Annexure 3: Delay in building works caused by the injunction and consequent actions by CBG have resulted in retail losses incurred not only short term but also long term. The business had previously enjoyed gradual growth as shown in the accounts for the financial years ending 31 May 2017 and 2018, as well as in previous years. Mitigation of loss involved: increasing stock levels close to their level before 1 October by when they had been reduced pending the development. In addition, all 3 partners in the business increased their working hours equating to 42 hours per week combined with extra working hours. This has included time spent travelling to collect stock, the majority of which had previously been delivered when there was a shed for storage. The loss of customer base due to lack of stock has caused short-term and long-term financial loss. Gaining customers takes years to achieve but losing them can, and will be, instant.

c) Annexure 4: A sub-post office franchise business plan now relied upon for the claim was created by the partners with support of an accountant. Further investment was required to structurally extend the retail property and flat. This included the cost of providing disability access. The retail space would increase in size from approx. 2000 square foot to 2500 square foot with a further 500 square footage in storage. Extra goods could be sold as well as stored to maximise profits. Assumptions were made that the increase in sales would amount to 35% for the first year, increasing by a further 10% year on year. Further forecasted revenue would be created by the sub-post office from commissions/salaries for the services it would provide. Post Office Limited's promotional material identifies the benefits of a franchise. Benefit would also be gained from entering arrangements with Bestway Wholesale Limited, which the expansion would enable. Since the injunction, the business has been set back 2-3 years from the original business plan.

d) Annexure 5: Loss also resulted from: (i) builder delay costs which include storage and transport costs of materials specifically ordered for our project; (ii) architectural consultation involving re-amending the plans around the basement; (iii) structural consultations to gain information about the basement as no planning or building regulatory notes are available; (iv) surveyor costs used to determine function and size of basement breach; (v) accountant fees incurred due to additional financial advice/work concerning the business impact of the delays; and (vi) bank loan interest incurred. The bank loan was initially used for investment into the business. All funds and further borrowing have since been diverted into paying all fees incurred due to the ongoing litigation.

27. The individual heads of loss during the years 2018 – 2022 are: (i) current sales' losses; (ii) loss of income from future store sales; (iii) loss of income from future sub-post office sales; (iv) loss of rental from the flat including council tax; (v) cost of building delays; (vi) building and accountancy fees; (vii) loan interest. During trial, a revised Schedule reduced the loss claimed to £269,953. There is no accompanying

explanation either to explain the change or to set out the circumstances requiring that alteration and none was provided during the trial. Neither Schedule contains a statement of truth but Mr Patel stated the facts and information were true to the best of his knowledge and belief when giving evidence. He explained he had not produced an expert's report, as the order of the Chief Master permitted because of cost.

D) Proposed Re-Re-Amendment of the Defence and Counterclaim at Trial

28. When on the first day of trial CBG identified that the Phase 1 Planning Conditions had not been complied with, it was submitted on behalf of Mr and Mrs Patel that the onus had been upon CBG to discover and raise this matter and that it was too late to do so now. Whilst it is correct that it is for CBG to decide whether to rely upon the fact that commencement of Phase 1 was prohibited by the terms of the planning consent, the fact that it was is plainly relevant to Mr and Mrs Patel's claim for damages. It should have been disclosed by them. The submission that a party is entitled to hide a material adverse fact, wait and see if the other side manages to spot it and proceed without reference to it when claiming damages if they fail to do so is plainly wrong.

29. When this matter came to light, it raised the question of how the undertaking in damages could be enforced when Phase 1, at least, could not have been started in any event. The Compliance Explanation was presented on the instructions of Mr and Mrs Patel but that would require amendment. Amendments were proposed orally before Mr Patel was tendered as a witness. They were based upon the instructions that the Compliance Explanation applied to the works carried out on 8 October 2018. Ms Read, on behalf of CBG and Mr Hunt, quite properly wished to see a written amendment and required time to take instructions. In the circumstances it was agreed that Mr Patel's evidence and cross-examination would proceed and the issue of permission to amend would be addressed the following day. Mr Patel could be recalled if appropriate and necessary. In fact, no such application was pursued. As will be seen, it could not be in the light of Mr Patel's evidence during Ms Read's cross-examination.

E) The Witnesses

30. The first witness for CBG, Mr Marler, is a building design consultant who has carried out a substantial amount of work for Mr Hunt/CBG over the years. He was asked to investigate what Mr and Mr Patel were doing when the works started on 8 October 2018. I found Mr Marler to be straightforward. His evidence was generally clear and concise. Whilst I was not always convinced that he was remembering events, as opposed to setting out what he was (with the passing of time) now convinced occurred, that is a problem for most witnesses and I have taken it into consideration in respect of all the evidence I have heard. However, overall, I am satisfied that he had a good, general recollection of the events on 8 October 2018.

31. In summary, that evidence is that he was called to and attended the Hotel, found builders breaking open the concrete cap on No 71 and asked them to stop digging

because of the Hotel's foundations. He was obviously concerned for the listed part of the wall. There were mechanical breakers, wheel-barrows, shovels and spades on site leading him to the conclusion that they were digging foundations. As he said, he has had enough experience "to know when building work is going on". He recollects being told by the foreman that this was the purpose of the work and he recollects offering talks that afternoon to resolve how this could occur without risk to the Hotel's wall. He remembers the foreman being unwilling to stop work because he had a contract and contractors to pay. He also recollects a conversation with Mr Patel and/or his son during which he also discussed the possibility of finding a solution to protect the Hotel's foundations. His evidence was that he expected the matters to be resolved quickly during the afternoon, although I think that and possibly the conversation as a whole is an area of false memory due to lapse of time and how the memory works. He remembers the work nevertheless continuing, that recollection being based upon vibrations he noticed whilst in the Hotel. That too may be false memory but nothing turns on it.

32. Mr Marler was cross-examined as to why his 12 October 2018 witness statement failed to refer to the void area of the basement and its structure below the concrete slab. He explained that the point of concern was not the foundations in that basement area, which were new, but with the adjoining foundations to the south, under the Hotel's original, listed wall (shown orange in the exhibited plan). The foundations by the basement had been built when the Hotel extension was built and should not be a problem. It was the old foundations with which the Act would be concerned in practice. They were an unknown quantity because of their age. They were within 3 metres of the intended foundations and had not been opened or explored. This was the whole emphasis of his evidence.

33. That evidence was not challenged, although that may simply be because there was no expert evidence before the court to enable challenge to be considered. In any event I found it a truthful response. His answers were consistent with his original witness statement and make sense. It is not surprising that foundations to be carried out within 3 metres of the wall of the listed building were of concern. As he stated in that witness statement, the age of the Hotel's foundations meant, although their depth is not known, that they are likely to be shallow. It appears clear to me that his statement in support of the interim injunction was directed at the old foundations.

34. Mr Hunt also came across as a straight-forward person, openly acknowledging difficulties remembering matters due to lapse of time. He may not be identified as "sophisticated" (not that there is anything wrong in that) but he was one of those witnesses whose answers lie in the foundations of good common sense. For example, lawyers may argue whether he was right to allow Particulars of Claim to refer to the damaged wall as "demolished" but his answer was refreshingly straight-forward (as I noted it): *"you saw the [photograph] – it was not intact – what else can you call it than demolition when my wall is not intact and was damaged".* Similarly when dealing with the right of way and whether the log store was built over it or a delivery van could reach the end, he made the simple points: (i) No 71 is accessed by two gates and the log store does not block their access. (ii) Vans have not gone as far down as the log store but if they did, they would block those gates. (iii) You may not be able to get a seven-ton lorry down there but who wants to. Obviously, his evidence would

have needed to be applied to the law absent the settlement, but I found him to be a truthful witness subject, as everyone is, to the complexity of memory.

35. Unfortunately, Mr Patel was not a good witness. His credibility suffered from the beginning because of his defence that the works begun on 8 October 2018 were only exploratory and deteriorated further during the trial because of the Compliance Explanation. For reasons which will appear further within my findings of fact, that defence and explanation are plainly untrue. Indeed, Mr Patel accepted during cross-examination, as he had to do when the evidence was presented to him by Ms Read, that the 8 October 2018 works were the beginning of the performance of a contract to complete the whole of Phase 1 and Phase 2, starting with the extension and a week later with Phase 2's works to the shop and flat. In addition, there is the problem, as mentioned above, that he did not disclose that the Phase 1 Planning Conditions had not been met when work started on 8 October 2018 under a contract for the Phase 1 works to be completed. There is also the late disclosure of the building contract.

36. The troubling features of his evidence do not end there. I will not list every matter but draw attention to three further points in the context of the loss of profits being claimed:

a) First, despite his statement that the Schedule of Loss and Annexures were true and that he could not afford an expert, it became clear not only that this document had been prepared by his son and the partnership's accountant but that he had little knowledge of how the figures proposed had been reached. Yet he was the only witness.

b) Second, when Ms Read took him to figures for the future cost of employees and put to him that they did not include the wages for additional employees needed because of the increase in turnover, his answer was that the figures were for those wages because his son's wage was excluded on the basis that he is a partner. The problems with this are both that he did not know how the figures were compiled and that his son is still not a partner. It is true Mr Patel said at the beginning of his evidence that his son is now a partner but he retracted that evidence having later referred to his son still receiving a wage. Mr Patel subsequently accepted that his son was not yet a partner but will become an equity partner at some time in the future. His son remains an employee paid a wage. The reference to three parties in Annexure 3 is also noted in this context (see paragraph 26(b) above).

c) Third, the claim for loss of rental from the flat was based upon it being a 2-bedroom flat and valuation evidence of loss of rental from a 2-bedroom let was presented. Yet, the planning permission was for a 1 bedroom flat. That is a poor reflection upon his credibility. His purported explanation that as a retailer for the last 20 years he knew the rental would be the same because the size of the flat was the same smacks of a witness willing to say anything for the benefit of their own case. That is of particular concern when it arises for the purpose of obtaining financial benefit through an award of damages.

37. None of that necessarily leads to the conclusion that all his evidence will be unreliable. It means that it must be approached with caution taking into consideration the finding of unreliability in respect of the matters referred to above.

F) Expert Evidence

38. Mr Ciesielski inspected the properties on 14 May and 5 June 2020. He observed in his report in respect of the Hotel that:

> *"there is a substantial basement used in connection with the hotel as a commercial kitchen with ancillary preparation and storage areas. My inspection has revealed that the basement extends beyond the location of the disputed basement. Accessed through the kitchen is the "additional land". There is no other access into this area. It is currently used as a store although due to problems with the roof and ingress of water, it is only capable of partial use as at the date of my inspection …. The measurements of the store [are] 2.45 metres wide and 2.65 metres deep with a floor to ceiling height of 2.5 metres ...".*

39. As to the works carried out by Mr and Mrs Patel, his report records:

> *"7.3 Following commencement of the excavation works, the Defendant proceeded with the construction of the foundations but not the superstructure of the proposed storage building … [noting in the 7 July email that the foundations referred to could not have been created when the basement was originally built because they would have been located beneath the basement floor] ...*
> *7.4 During my inspections I inspected the works undertaken by the Defendant, however my inspections were limited by the presence of various building materials, which were being stored by the Defendant within his rear yard. The rear part of the yard, where the disputed basement structure is located, was also covered with tarpaulins and sheets of plywood.*
> *7.5 Where possible, I removed the tarpaulins and plywood sheets to reveal the uppermost sections of the foundations. Where inspected, I confirm the presence of solid mass concrete foundations. As the foundations have already been cast, I am unable to confirm the depth of the excavations and thus whether the works would have triggered the Party Wall Act."*

40. In a 7 July 2020 email response to post-report questions and after a further visit on 5 July 2020, Mr Ciesielski stated that he could not measure the depth of the excavations undertaken because the yard was covered over. He also stated that during his second visit, Mr Patel had told him the foundations had already been cast. He referred to Mr Patel having informed him that the excavations and foundations had been carried out around the perimeter of the rear section of the yard. If that were so, he opined in the email, *"a large proportion of the works would have been undertaken within 3m of [CBG's] left side flank wall"*. This led to further questions in correspondence and resulted in a third visit on 10 August 2020 and email correspondence of even date which need not be detailed. Ultimately, he stated he had found no evidence of foundations and this is no longer in issue but it raises concern over Mr Patel's statements to him.

41. As a chartered building surveyor, not structural engineer, he opined in the 7 July 2020 email in answer to questions as to whether the presence of the basement might have any material effect on the ability to build the proposed extension or increase cost that:

> *"… traditional strip foundations can still form the majority of the structure for the proposed single storey extension, with a [steel] beam [at increased cost, later estimated at a cost not exceeding £1500, rather than excavation] extended to span over the location of [CBG's] basement structure. Whilst the design of the sub-structure would have to change somewhat, the ability to build an extension does not …".*

To seal off and assuming the extension has not been built with the result that this could be achieved from No.71:

The reinstatement works would involve an internal strip out of all surfaces and fixtures (including electrical installations) (say £500), removal of the concrete structure and associated foundations in their entirety (£8k, allowing for installation of temporary supports and removal of waste from site), followed by blocking up and making good of the Claimant's flank wall at basement level (£2k), followed by re-filling of the void and compacting the fill (£2.5k). No allowance would be made for provision of any ground coverings, on the basis that the Defendant would be constructing a new extension. Approx total cost = £13k.

To seal off and assuming the extension has been built with the result that access would be through CBG's land:

The scope of works would be the same, however due to the methods of working and the complicated logistics related to access, allowing for working out of hours so not to disturb the Claimant's business operations, the cost of the works would quadruple, thus approx £50k."

G) The Facts

42. I have reached the following findings of fact based upon the oral and written evidence: During 2006 Mr Hunt was responsible for building works which resulted in the Basement Trespass. The area of trespass was used by the Hotel as an additional store area for its restaurant's kitchens until about October 2018. When Mr Ciesielski inspected in May / June 2020 he found that it was currently being used as a store although due to problems with the roof and ingress of water, it was only capable of partial use as at the date of his inspection (see paragraph 38 above). The measurements of the area are 2.45 metres wide and 2.65 metres deep with a floor to ceiling height of 2.5 metres.

43. Partnership accounts for the financial year ending 31 May 2018 show the business's turnover was primarily attributable to shop sales of just over £268,000. The income from a cash machine, lottery and "paypoint" commission and stamps was relatively nominal. Rent of just under £12,000 was received from the flat. The partnership produced a gross profit of just over £107,000 and a net profit of £60,811 before tax. The main expenses were wages and salaries of £17,000 odd, which based on Mr Patel's evidence, will presumably have been paid principally to his son. All other expenses are below £6,000 each. The expenses total £46,275. The accounts show an increase in gross profit of some £6,000, primarily attributable to a combination of increased sales and reduced purchases. Expenses were also reduced from the previous financial year, in particular wages and salaries in the 2017 financial year had been just over £21,500. As a result, the net profit before tax was increased from £46,737 in the 2017 financial year.

44. The first work to be carried out by Mr and Mrs Patel was the demolition and removal of the existing shed. This occurred during September 2018 and resulted in damage to the brickwork of the Hotel's modern extension of the boundary wall and to its flashing. The damage is evident from the photographs. Removal of the shed was to make way for the Phase 1 extension. The plans for which conditional planning permission had been obtained show that the extension would use the same right of

access via the existing gates as had been enjoyed for the old shed. Not only would the old shed not have to be removed but a wall of the extension would run along-side it.

45. At some time before work started on 8 October 2018, Mr and Mrs Patel entered into an undated agreement with "Pro Builder Group". The brief description of the "project scope" refers to (amongst other matters) the "back extension including internal walls and ceilings … Structural work inside shop area and above according to the plan …". This covered Phase 1 and Phase 2. The total price for work which included all materials except for flooring for the shop area was £89,500. Mr Patel stated that he had negotiated finance with National Westminster Bank to pay for this work and it was ready to be drawn down.

46. The contract's term began, at latest, when the work started and would continue until the building work and services were completed. A deposit of 25% was required and 10% of the contract price would be payable in instalments at the end of each week. Reasonable and necessary expenses incurred by the builder would be reimbursed. Time was of the essence. The contract could be terminated by 3 days' notice. If terminated by Mr and Mrs Patel when the services were partially performed, they would pay a pro rata sum of the deposit and instalments. Any late payments would trigger a fee of 35% a month on the amount due.

47. Mr Patel took steps to reduce stock and to terminate various contracts before this work began. This was in preparation for new arrangements when the store re-opened as a newsagents, general store and sub-post office. Mr Patel accepted during cross-examination that the work which started on 8 October was under the contract for Phase 1 and Phase 2. Phase 2 was to have started about a week later. The work would have taken about 4 months and he expected to be up and running with a new store lay-out, the addition of the sub-post office, the extended storage space and the renovated flat by February 2019.

48. This is entirely inconsistent with his Defence that the works were only exploratory and with the Compliance Explanation. It is also inconsistent with the Schedule of Loss in which it is assumed the works would have been completed by the end of November 2018. Even if this assertion in Annexure 2 was intended to be limited to Phase 2, there was no evidence to explain how that would be possible.

49. The fact that the works were not simply exploratory is also entirely consistent with the terms of Mr Warwick's 6 September 2018 party wall structure notice and with the letter from Mr and Mrs Patel dated 4 October 2018 (apparently written and sent in their name by Mr Warwick, according to Mr Patel). It is also in accordance with the fact that the work was being caried out pursuant to a contract, belatedly disclosed during the second day of the trial, to carry out Phase 1 and Phase 2. Mr Patel sought to suggest during cross-examination that Mr Warwick had sent a notice under section 6 of the Act. This had not been previously asserted, there is no evidence to support that recollection and I reject his evidence taking into consideration his lack of reliability as a witness.

50. There is now no dispute that the Act applies to Phase 1. The extension for the new storage building would be attached to the Hotel's listed building wall, in effect as a lean to building. The structure would be within 3 metres of the Hotel's wall and the foundations within that area below the level of the Hotel's listed building foundations.

No notice was given under section 6 of the Act. The attempt by Mr and Mrs Patel in their defence to avoid the conclusion of breach under the Act by asserting the 8 October 2018 works were exploratory was disingenuous. Even if there had been a technical defence based upon the limited amount of work carried out, they should have disclosed that the works were intended to continue through to completion of Phase 1 and Phase 2. The works started by the builders under contract were not limited to exploration and the Compliance Explanation is embarrassing.

51. The Phase 1 Planning Conditions are clear and expressly provide that the development should not start until they were fulfilled (my underlining):

> *"2 Prior to the commencement of development, full details of any proposed foundation or engineering works affecting the historic fabric shall be submitted to and approved in writing by the local planning authority.*
> *Reason: To safeguard the special architectural and historic character of the building, and to accord with Section 16(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990.*
> *3 Prior to the commencement of development, detailed plans and elevation drawings (including sections), showing accurately the proposed extensions, including, doors, valley gutters, abutment to the wall of No 73, eaves and verges etc shall be submitted to and approved in writing by the local planning authority.*
> *Reason: To safeguard the special architectural and historic character of the building, and to accord with Section 16(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990.*
> *4 Prior to the commencement of development, the external materials shall be submitted to and approved in writing by the local planning authority.*
> *Reason: To safeguard the special architectural and historic character of the building, and to accord with Section 16(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990."*

52. During cross-examination Mr Patel accepted that he was in a rush to have the works started and completed to be able to advance the plans for the business and to obtain a sub-post office franchise. He said he did not consider the terms of the planning permission and did not address the Phase 1 Planning Conditions. I find that he had the store demolished, terminated some of the partnership's existing contracts, reduced stock, raised building work finance and entered the building contract without being able to carry out Phase 1.

53. I note for completeness that during cross-examination Mr Patel referred to planning officials having informed him that the planning issues would be resolved as the development progressed. His evidence was confused but I understood him to be referring to listed building consent not to the Phase 1 Planning Conditions. If I am wrong about that, I reject his evidence on the balance of probability. He had not provided that evidence before, he provided no details, there is no documentary evidence to support the statement and such a proposition is in sharp contrast to the Phase 1 Planning Conditions. This conclusion is consistent with the finding of unreliability above.

54. There is no dispute the Phase 1 Planning Conditions were not fulfilled by 8 October 2018 or by the date of the hearing before Mr Justice Nugee. Unfortunately, this was not disclosed to the Judge and nor was it disclosed that the works were started under the terms of a contract to carry out and complete Phase 1 and Phase 2. In addition, Mr and Mrs Patel did not admit that even if the Phase 1 work could have been started

under planning terms on 8 October 2018, the required notice under section 6 of the Act had not been served. Nor did they provide disclosure of these three matters by the date of trial. Mr Justice Nugee awarded costs in favour of Mr and Mrs Patel.

55. Nevertheless, it is the case that the Phase 1 digging stopped when it exposed the Basement Trespass. It is not now in dispute that Mr and Mrs Patel were unaware of the Basement Trespass before this occurred. It is plain from the evidence, including the building contract and Mr Marler's evidence (summarised above), that Phase 1, to be followed by Phase 2 a week later, would have been continued by Mr and Mrs Patel had the Basement Trespass not been discovered. However, this continuation would have been in breach of planning permission and in breach of the Act.

56. The "without notice" injunction granted by Mr Justice Norris on 12 October 2018 prohibited building work within an area shaded red. For these purposes this can be read as a prohibition of Phase 1. Work would have had to stop if that had not already occurred. The superseding Patel Undertaking were more limited. It too applied to the area shaded red. It restrained excavation and the demolition of the concrete pad already broken but the prohibition would not apply if Mr and Mrs Patel followed the Act's procedures, as they had to do in any event. It would also not apply if there was consent from CBG or further order from the court.

57. Mr and Mrs Patel chose not to pursue Phase 1 rather than rely upon one of the exceptions within the Patel Undertaking. They also chose not to take steps to satisfy the Phase 1 Planning Conditions (although this decision altered later, possibly in 2020) and/or to proceed with the requirements of section 6 of the Act in the meantime. They reached that decision in the context of CBG's claim that the work would be carried out on its land and therefore would be a trespass. Also, in the context of the Basement Trespass, they chose not to alter the Phase 1 plans and build over the basement with the result that the void would have to be filled in from CBG's land if their Basement Trespass claim is successful. The adaptation was possible but the expert advice estimates a cost of about £50,000 (see paragraph 52 above).

58. The site on which the extension was to have been built pursuant to Phase 1 was left empty and that remains the position. There was no longer a storage shed and it was not replaced. No steps were taken to install a temporary shed for storage or an equivalent building or other storage facility, whether in the same place as the old one or elsewhere in the yard, smaller if necessary.

59. Phase 2, however, started. It continued at least into the second half of November. There is no evidence to suggest Phase 2 was restarted at any stage. The relevance of Phase 1 to Phase 2 and the consequential profits is an important feature of the claim. Phase 2 was critical because without it the store and flat would not have been altered. Phase 1 was relevant because it would provide additional storage space. Its absence, subject to mitigation, would reduce the stock capable of being kept on site and, therefore, potentially reduce the profits to be made after Phase 2 was completed. However, there does not appear from the evidence to be any other reason why completion of Phase 2 without Phase 1 would adversely affect Mr and Mrs Patel's plans for the partnership's business. Nor does there appear to be any reason from the evidence why the area for Phase 1 could not be used for temporary storage pending resolution of the Basement Trespass if Phase 2 had been completed.

60. Mr Patel's evidence during examination concerning the Phase 2 work lacked clarity and its full extent has not been established but certainly it was considerable. The flat's flooring has been removed and a replacement staircase has been inserted. The position, as Mr Patel described it, is that the first floor is vacant and unusable. It is unclear whether that means the store itself remains the same size, but it does not include a sub-post office. Mr Patel's evidence in cross-examination was that sub-post office counters now take up very little space and it has not been explained why the franchise could not be operated. In any event, the building contract was terminated and the cost of termination is put at about £25,500.

61. Mr Patel's explanation during cross-examination for stopping Phase 2 was a lack of funds due to the expense of this litigation. There is no reference to this in the Re-Amended Defence and Counterclaim, his witness statement or in the Schedule of Loss. There is no evidence from Mr Patel adding any detail to that explanation. Also, no evidence addressing the thoughts behind and reasons for concluding that the litigation meant Phase 2 should cease. The Re-Amended Defence and Counterclaim refers to an inability to proceed with the intended construction until the Basement Trespass is resolved but that addresses Phase 1. So too does its reference to the Patel Undertaking being the cause because it prohibited the intended construction to the rear. Annexure 3 to the Schedule of Loss attributes termination of Phase 2 to the injunction.

62. At the time of the decision to stop Phase 2: The litigation was at an early stage and a costs order in favour of Mr and Mrs Patel had been made by Mr Justice Nugee. The works to which the Patel Undertaking referred were restricted to Phase 1. Phase 2 was the key component of their plans and to their anticipation of a future increase in turnover and net profit including rental income. Mr and Mrs Patel had already demolished the storage shed, terminated business contracts and reduced stock in anticipation of the completion of, Phase 1, Phase 2 and the sub-post office franchise. They had a building contract in place for Phase 1 and Phase 2 and finance agreed with the Bank to pay for it. It was foreseeable that considerable loss would result from stopping Phase 2. Damages for breach of contract would result. The business would need to continue with or without taking steps to return the business assets to those that existed before 8 October 2018. It was also foreseeable that the partnership faced expensive litigation not only concerning the Basement Trespass but all the other issues previously identified above which did not depend upon the outcome of the Basement Trespass claim.

63. Whilst it is not difficult to understand that Mr and Mrs Patel would have been concerned by future litigation costs, it is reasonable to expect any decision based upon financial means to address some, if not all, of those matters. There is no evidence from Mr Patel that this occurred. That together with the circumstances identified in the paragraph above and the finding that his evidence must be considered with caution raise issues of credibility in respect of this evidence. It also means, for example, that there is no explanation from Mr and Mrs Patel as to why they did not decide to complete Phase 2 and obtain rental from the flat and improved trading from the store with or without the addition of temporary storage. There is also no disclosure of their personal finances outside of the partnership. Their evidence does not even refer in any form of commentary to the partnership accounts disclosed with the Schedule of Loss.

64. The partnership's profit and loss accounts for the financial year ended 31 May 2019 show a net loss of £(30,504). Sales totalled just under £234,000 and the gross profit was near to £90,000. Expenses had increased significantly to just over £120,000. It is to be noted that this was largely attributable to legal and professional expenses in the region of £57,000 together with interest totalling just under £10,500. Wages and salaries totalled £17,285. These accounts provide a reasonable indication of the amount of the litigation costs for that period even though they do not distinguish them from other professional expenses or break down the amounts attributable to the Basement Trespass. However, they do not assist with the matters referred to in paragraphs 62-63 above.

65. I am informed by counsel, following consideration of Mr and Mrs Patel's belated disclosure during trial, that the Phase 1 Planning Conditions were finally met during March 2020. The evidence shown to me does not disclose when or in what circumstances steps were taken to achieve that result or how long the process took. Listed building consents were also obtained in August 2020, although their coverage and relevance has not been addressed.

66. Profit and loss accounts for the financial year ended 31 May 2020 show the partnership's turnover as being primarily attributable to shop sales of just under £260,000. The income from lotteries' commission and stamps is relatively nominal. It produced a gross profit of just under £90,000 and a net profit of just over £46,000. The main expenses were wages and salaries of £15,000 odd, which based on Mr Patel's evidence will presumably have been paid to his son, and interest of just over £13,000 out of a total for expenses of nearly £43,500. Legal and professional fees totalled £1,750. The reason for this significant reduction from the previous year is not explained. In the context of ability to pay, it might indicate a generous willingness on the part of the lawyers to confer credit. That is speculation but it is another example of why a mere statement during cross-examination that work stopped because of litigation costs is inadequate. The availability of credit could be a relevant matter for causation and/or mitigation.

67. In any event, I have no reason to conclude from the evidence other than that, finances allowing, Phase 2 could have been completed, the store could have continued in business as redesigned, the sub-post office opened and the flat let despite Phase 1 having been stopped. Mr Patel's Schedule of Loss in fact claims the new business could have started from December 2018. That is the date from which the claim for consequential loss attributable to retail sales, sub-post office sales and rent starts without further explanation in the Schedule of Loss.

68. Mr Patel was cross-examined upon the content of the Schedule of Loss. I am satisfied that he was not responsible for its compilation and that he had little knowledge to provide to assist the court to understand its methodology or factual bases. He explained that it was compiled by his son and the partnership's accountant but they have not provided evidence and they cannot be cross-examined.

69. Mr Patel could not explain why loss was being claimed in respect of potential sub-post office sales from December 2018 when, on his own evidence, the work would have taken 4 months for Phases 1 and 2. He did not know. A potential answer is that Phase 2 could have been completed and the sub-post office opened before the completion of Phase 1. This would be consistent with the assumption in Annexure 2

to the Schedule of Loss that the development would finish at the latter end of November 2018, which appears to be restricted to Phase 2 without Phase 1. On the other hand, that period appears unrealistic and would be inconsistent with Phase 2 stopping towards the end of November.

70. Mr Patel's evidence was generally opaque when addressing the Schedule of Loss. He explained that the "current retail losses" claimed arose whilst the back of the shop was being used for storage. He stated that there was no alternative storage in Beaconsfield. I am sceptical about that as a fact but there is no evidence to the contrary. Mr Patel also said that the flat was unusable for that purpose. That would be so absent floorboards not being replaced. However, there is no evidence to explain why some form of temporary shed or other form of storage could not have been placed in the yard. It is also noted that the Schedule of Loss refers to additional time spent collecting stock, which evidences that additional stock could be obtained when needed.

71. Mr Patel accepted during cross-examination that he could not verify the figures within the business plan sent to Post Office Limited and relied upon in the Schedule of Loss. He first suggested that the figures came from Post Office Limited before accepting that this was incorrect. They must have been provided by the partnership's accountant but he could not assist further. Mr Patel was able to propose that it was right to have assumed a loss of profit from future sales in the region of 30%, a figure calculated by Ms Read, because of the partnership's experience of growth after extension works in 2004/6. This may explain why accounts relevant to that period were included within a supplementary bundle of disclosure from Mr and Mrs Patel during the trial. No such assertion is made in the Re-Amended Defence and Counterclaim, the Schedule of Loss or Mr Patel's witness statement. Whilst that experience provides background information, I find it is not a proper basis for assessment taking into consideration the different economic environment and the simple fact that the alterations would be different. The evidence should have explained what the changes to the store to be achieved by Phase 2 would be, how that would affect the sale of products, what additional products would be sold and which, if any, would no longer be sold, the effect of the sub-post office upon space and the data relied upon to sustain a conclusion that additional sales would be generated. A similar approach should have been taken to the sub-post office claim. This detail is simply absent and for all these reasons the figures as presented by Mr Patel cannot be accepted as realistic projections.

72. That conclusion is sustained by the fact that his figures for increased expenses appear unreliable. The percentage increases proposed appear small in relation to the increased turnover but the underlying point is that there is no evidence explaining or justifying the calculations. In the absence of such evidence, the figures for projected loss of profit presented by Mr Patel in evidence are unreliable.

73. That conclusion is enhanced by the unreliability of Mr Patel's evidence. I have already provided examples. However, in this context it is of extreme concern that he should be representing to CBG and to this court that the partnership lost rental from a 2 bedroom flat when the planning permission was for a 1 bedroom flat. Even if the valuation obtained from the estate agent was in error, that should have been explained in evidence. In fact, there is no evidence to state it was an error and Mr Patel sought to maintain this misrepresentation under cross-examination.

G) Submissions

74. Mr Terry's oral submissions were as follows (although obviously I will also bear in mind his skeleton argument):

a) The Patel Undertaking resulting from CBG's claim for interim injunctive relief and/or the Basement Trespass prevented building. As a result, Phase 1 and Phase 2 could not take place or be completed. This meant the plans for the business were placed on hold and Mr and Mrs Patel incurred losses and lost the profit they would otherwise have made from October 2018 to the date when they will be able to complete the work and run a business as intended.

b) They could do nothing to mitigate this consequential loss. Whilst the expert evidence is that Phase 1 could be carried out whilst the Basement Trespass subsisted, it would produce extra cost including an estimated £50,000 to infill the void via the Hotel. It would be unreasonable to proceed because of cost and in circumstances of the existing litigation, its costs and the risk that CBG's claim that Mr and Mrs Patel were trespassing might succeed.

c) That also means there was no point in satisfying the Phase 1 Planning Conditions or in serving the notice required by s.6 of the Act. They are irrelevant to causation. In any event a s.6 Act notice was not required as at 8 October 2018 because the works were not "excavations". Even had one been served, it would not have produced an agreement. Further, the development would still have been objected to because of CBG's allegation of trespass. Mr and Mrs Patel acted reasonably in stopping their work and in not pursuing the planning and statutory requirements.

d) The loss and damage is foreseeable whether claimed pursuant to CBG's cross-undertaking in damages or by reason of the Basement Trespass. The expert evidence establishes that it was too expensive to change plans for Phase 1 to work around the Basement Trespass and infill from the Hotel's land. The fact that Phase 2 works ceased was attributable to the cost of the litigation generated by the Basement Trespass. It does not matter whether CBG had notice or otherwise had knowledge of the intention for the shop to also become a sub-post office. The authorities relied upon are ***SCF Tankers Ltd (formerly known as Fiona Trust & Holding Corpn. v Privalov*** [2016] EWHC 2163 (Comm), [2017] EWCA Civ 1877, [2018] 1 WLR 5623, ***UYB Ltd v British Railways Board*** , CA (20 October 2000 and ***Allied Maples Group Ltd v Simmons & Simmons (a firm)*** [1995] 1 WLR 1602).

e) As to quantum, whilst the Schedule of Loss has deficiencies, it is based upon a business plan presented to Post Office Limited. It should be treated as a document drawn in good faith and case law recognises that a liberal approach should be taken to such claims. The figures present a loss of a chance. There is a realistic, substantial prospect that the chance would have eventuated. The test applies a relatively low threshold. When reaching an assessment, the court should adopt a common-sense approach to arrive at a fair and reasonable result. The judge may use his own experience and judicial knowledge in doing

so insofar as the evidence is deficient. "The baby should not be thrown out with the bathwater" insofar as the Schedule of Loss is deficient. If the figures are accepted, there might be a deduction of 10-20% to recognise "chance" but the deduction should only be 50% or slightly more if the figures are considered speculative because of the deficiencies.

75. Ms Read's oral submissions (also with her skeleton argument being borne in mind) were:

a) The principles of law to be applied to consequential loss resulting from the entirety of the land upon which a trespass of part occurs are to be found in the decisions of ***Whitwham v Westminster Brymbo Coal and Coke Company*** [1896] 2 Ch. 538, CA, and ***Ramzan v Brookwide Ltd*** [2011] EWCA Civ 985, [2012] 1 All ER 903.

b) As a matter of causation, the development could not proceed because it was prohibited under the terms of the planning consent whilst the Phase 1 Planning Conditions were not fulfilled. In addition, the section 6 notice required by the Act had not been served. As a matter of legal principle, reliance cannot be placed upon a willingness to carry out works without authority. Mr and Mrs Patel chose not to fulfil the Phase 1 Planning Conditions until consent to the further detailed plans was obtained on or about 6 March 2020. It was also not until August 2020 that the listed building consent required was obtained.

c) In any event CBG were entitled to an order in the terms of the Patel Undertaking. It did not prevent Mr and Mrs Patel proceeding with Phase 1 with consent, having served a section 6 notice under the Act and complied with the resulting statutory procedures or pursuant to further order. They chose not to pursue those options. Phase 2 was not prohibited. They cannot claim consequential loss.

d) Even if, contrary to those submissions, the Basement Trespass was the cause of the works ceasing, that could only apply to Phase 1. Insofar as planning consent existed for Phase 2 and there was compliance with the Act, those works could have proceeded both under the terms of the Patel Undertaking and despite the Basement Trespass. In fact, that occurred to some unclear extent. Mr and Mrs Patel also could have taken mitigating steps in respect of Phase 1. For example, implementing the process under section 6 of the Act, building in accordance with any resulting agreement or determination and using alternative storage space temporarily following completion of Phase 2 in the meantime.

e) Should the court decide in principle to award compensation, the evidence relied upon should be rejected. Whilst a claim for consequential loss of profits is based on a projection and, therefore, cannot be founded on precise calculation, the court's balance of probability approach towards its best assessment of evaluation of the lost chance must be based upon the evidence before it. Insofar as that evidence does not enable a fair assessment of the amount of loss, the claim should be rejected (see paragraphs [32-33] of the judgment of Lady Justice Arden, as she then was, in ***Ramzan v Brookwide Ltd*** (above)). This is such a case because of the many reasons from which to

conclude that Mr Patel's evidence cannot be relied upon including its many deficiencies.

H) The Law

H1) Enforcement of Cross-Undertakings in Damages

76. In the case of an award resulting from enforcement of a cross-undertaking in damages, the underlying approach of the court is to achieve justice (see the core of Mr Justice Lightman's judgment in ***RBG Resources v Rastogi*** [2005] EWHC 994 (Ch) at [59]). The following principles were identified by the Court of Appeal within the judgment of Lord Justice Beatson in **SCF Tankers Ltd (formerly known as Fiona Trust & Holding Corpn. v Privalov** (above at [40-43 and 56-57]):

  a) The purpose of the cross-undertaking is to provide a mechanism by which the party subject to interim relief can be compensated for the consequences of that relief if a court decides the relief should not have been obtained.

  b) The court has a discretion whether to enforce the undertaking. The court will consider, for example, whether it is equitable for an award to be made taking into consideration the enforcing party's conduct throughout the relevant stages from when the cross-undertaking was given to the time of its enforcement (see ***F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*** [1975] AC 295, Lord Diplock at 361).

  c) If it is to be enforced, it must be shown by the party claiming damages that compliance with the terms of the interim relief was the effective cause of the loss claimed. The test of causation will be applied in a common-sense way. For example, if the enforcing party can establish a prima facie case of effective cause, that will generally be sufficient unless other material establishes otherwise (see the judgment of Saville J. (as he then was) as approved by the Court of Appeal in ***Tharros Shipping Co Ltd v Bias Shipping Ltd (The Griparion) (No 1)*** [1994] 1 Lloyd's Rep 577).

  d) In the context of mitigation, for which the burden is upon the party asserting a failure to mitigate, the court must adopt a realistic approach when viewing all the circumstances resulting from the interim relief.

  e) The court may apply the "unclean hands" doctrine to refuse equitable relief by reason of misconduct when the party seeking compensation from the court sought to obtain advantage by deception or other conduct with the result that it would be unjust to grant relief (see ***SCF Tankers Ltd (formerly known as Fiona Trust & Holding Corpn. v Privalov*** above per Males J. at [132-133].

H2) Damages for Trespass

77. It is long established that damages for the tort of trespass to land may be claimed by the person in possession not only for its wrongful use but also for the resulting loss or

injury to the land including, when appropriate, any loss of profits or expenses. The claim can extend to the loss suffered for the whole of the land in the possession of the claimant, even if the trespass is limited to a particular area (***Whitwham v Westminster Brymbo Coal and Coke Company*** above).

78. The underlying approach is to place the wronged party in the position they would have been in if the wrong had not occurred. Each case depends upon its own circumstances (see ***UYB Ltd v British Railways Board*** (above) [at 21 and 29]) but it is necessary to prove on the balance of probability that the trespass was a cause of the loss claimed. To the extent that this fact is established from what occurred, damages are recovered in full. When the loss relates to events which it is alleged have not occurred because of the tort, the wronged party must prove on the balance of probability that the events would have occurred and/or (as appropriate) they would have taken the action required to produce the benefit claimed to have been lost (***Allied Maples Group Ltd v Simmons & Simmons (a firm)*** (above).

79. In so far as and to the extent that the decision whether the events would have occurred and/or action would have been taken depends upon establishing the future and/or what the defendant or a third party would have done, the wronged party must prove causation by establishing there was a real or substantial chance, not a speculative one (***Allied Maples Group Ltd v Simmons & Simmons (a firm)*** (above at 1609H-1610B, 1614G per Lord Justice Stuart-Smith, with whose analysis of the law Lord Justices Hobhouse and Millett, as they then were, agreed – see 1620H-1621B and 1622B).

80. Mr Terry has accepted that a test of foreseeability applies to the assessment of damages for trespass. It is a conclusion in line with cases of nuisance to which the rules of remoteness apply as they do with claims of negligence because of the similarity of the two torts. Applying general well-established principles (in summary): the test to be applied, is whether the type of event giving rise to the loss claimed was reasonably foreseeable as a consequence which would arise naturally and directly out of the trespass in the ordinary course of affairs. If so, it will be no defence that the resulting loss was larger than may have been foreseen. However, liability will not extend to loss which is coincidental and the award must not place the wronged party in a better position than they would have been in had the trespass not occurred.

81. If causation is proved, quantification of consequential loss in a claim of projected profits requires the court to do its best to reach an assessment which will evaluate the chance that those profits would have been made. A liberal approach will normally be adopted because this cannot be a precise calculation. The chance may be great or small but not speculative. If the evidence is insufficient to enable a fair assessment of the amount of loss, the claim should be rejected (***Ramzan v Brookwide Ltd*** (above) per Lady Justice Arden, as she then was, at [31-32]). Damages for financial loss should normally be net not only of expenses and tax (provided it is clear the damages awarded will be tax free) but also of any gains made. There may need to be a discount for immediate payment of future gains. The duty to mitigate means the person claiming loss cannot claim damages greater than the sum reasonably needed to make good the loss. It is for the wrongdoer to show any steps taken as purported mitigation were unreasonable not for the claimant to prove the steps taken were reasonable. The above-mentioned "unclean hands" doctrine will also apply.

I) Matters to Consider - Key Issues

82. The facts and submissions raise in the context of causation and (if appropriate) quantification the issue whether consequential loss can be claimed by enforcement of CBG's cross-undertaking in damages and/or as a result of the Basement Trespass when or if (as appropriate):

    a) The Phase 1 Planning Conditions had not been fulfilled and the development was prohibited under the terms of the planning consent;

    b) The Act applied to Phase 1 and no notice had or ever has been served under section 6 of the Act;

    c) Phase 2 was started but stopped by Mr and Mrs Patel before its completion.

    d) Phase 1 could have been carried out by the date of this judgment if Mr and Mrs Patel had chosen to exercise one of the routes permitted by the Patel Undertaking and followed the requirements of section 6 of the Act having satisfied the Phase 1 Planning Conditions;

    e) Phase 1 could have been carried out by the date of this judgment if Mr and Mrs Patel had altered the plans for Phase 1 to allow construction over the roof of the Basement Trespass; and/or

    f) Deficiencies of the evidence of loss and damage prevent a fair assessment of the amount of consequential loss.

83. One of those issues can be resolved in favour of Mr and Mrs Patel quite easily, paragraph 82(e) above. Applying the expert evidence, I do not consider that Mr and Mrs Patel were required to mitigate their loss and damage by altering the Phase 1 plans. Although the expert opines that the cost of carrying out the work differently would be relatively inexpensive, the consequence of building over the roof of the Basement Trespass would be that the void would have to be filled in via the Hotel. This would increase costs in the region of £50,000. That would not be reasonable.

84. At to the remaining issues, the claim to enforce CBG's cross-undertaking in damages and the claim for damages for trespass depend upon Mr and Mrs Patel's assertion that they were unable to carry out Phase 1 and to complete Phase 2 because of (respectively) the Patel Undertaking and/or the Basement Trespass. The principal difference between the two routes is that the claim upon the cross-undertaking in damages depends upon the terms and circumstances of the interim injunction ordered on 12 October 2018 and of the Patel Undertaking given to the Court on 26 October 2018. In practice the outcome depends upon the latter rather than the former. I will deal with that next.

J) The Cross-Undertaking in Damages Claim - Decision

85. The findings of fact within paragraphs 44-57 above establish that Mr and Mrs Patel proposed to carry out Phase 1, starting 8 October 2018, when they were not entitled to do so. They had not satisfied the Phase 1 Planning Conditions and they had not served

a notice under section 6 of the Act. Both requirements had to be met before Phase 1 could start. Those facts entitled CBG (subject to any contrary terms of the settlement on the third day of the trial) to final injunctive relief to prohibit Phase 1 being started or continued whilst there was non-compliance with the Phase 1 Planning Conditions and/or the Act. The Phase 1 Planning Conditions were not met until March 2020 and no notice has been served under section 6 of the Act. CBG remains entitled to claim its injunction. As a result, there is no cause to enforce the cross-undertaking in damages when CBG was entitled at all material times to that final injunctive relief.

86. Mr and Mrs Patel at the hearing before Mr Justice Nugee argued on an interim relief basis, apparently successfully, that the claim was really concerned with the Basement Trespass not the effect of any works upon the hotel's wall. I am satisfied from the evidence at trial that it was not (see paragraphs 32-33 above). The issue for CBG was the effect of the excavation and foundations work in the context of the listed wall's foundations. Indeed, this is reflected within the terms of the Patel Undertaking because it permits the work otherwise prohibited if the requirements of section 6 of the Act are met. The Patel Undertaking would not have prevented Phase 1 had a notice been served under section 6 of the Act and the statutory procedures been fulfilled. That, of course, would be subject to fulfilling the Phase 1 Planning Conditions. It follows, that the cross-undertaking in damages did not cause them loss. Their claim must depend upon the counterclaim for the Basement Trespass.

K) The Basement Trespass – Matters To Consider

K1) Relevance of the Phase 1 Planning Conditions and the Act

87. Non-compliance with the Phase 1 Planning Conditions and the Act also gives rise to potential causation problems for Mr and Mrs Patel's claim for consequential loss as damages for the Basement Trespass. If their non-compliance with either requirement cannot be linked to the Basement Trespass, they face the conclusion that it did not cause loss.

88. There cannot be a causative link before 8 October 2018 because Mr and Mrs Patel's case is that they were unaware of the Basement Trespass until the builders discovered they had broken into the top of a cellar when digging up the concrete cap. Mr and Mrs Patel were responsible for the failure to comply with the Phase 1 Planning Conditions and the Act. It was their non-compliance that meant they were not able to commence and should not have started Phase 1 on that date. CBG was entitled to an injunction to prohibit Phase 1 because of that non-compliance, which had nothing to do with the Basement Trespass. The argument that the Basement Trespass was the cause because the work would have had to stop in any event does not get off the ground because as at 8 October 2018 there should never have been any work for the Basement Trespass to stop.

89. This also means that the Basement Trespass had no connection with their decisions to demolish the shed, terminate the various agreements with the partnership, reduce stock and enter the building contract at a time when Phase 1 could not start (see paragraph 47 above). No consequential loss can flow without a material change in circumstances affecting causation.

90. Discovery of the Basement Trespass on 8 October 2018 is a change of circumstance which might produce facts to break the chain of causation between non-compliance with the Phase 1 Planning Conditions and the Act and their inability to carry out Phase 1. That is possible because trespass is a continuing tort. To succeed they must prove what would have happened after 8 October 2018 but for the continuing Basement Trespass.

91. Insofar as Mr and Mrs Patel rely upon matters that occurred, those matters will need to be proved on the balance of probability. When they need to establish what would have happened, they must prove there was a real or substantial chance, not a speculative one (see paragraphs 78-79 above). The key future event they need to prove is that Phase 1 would have started at or around a particular date or period but for the Basement Trespass. In addition, they must prove there was a real or substantial chance that the projected profits claimed as consequential loss would otherwise have been made. There are four potential problems for those two tasks.

K2) Potential Problems

92. The first potential problem is that the evidence from Mr and Mrs Patel does not directly address the issue whether Phase 1 would have started at or around a particular date or period after 8 October 2018 but for the Basement Trespass.

93. Their claim is founded on the premise that the work started on 8 October 2018 was exploratory and that the builders had to cease that work because of the Basement Trespass. They have not addressed the case from the premise that that they should not have started those works until compliance with the Phase 1 Planning Conditions and the Act. As a result, their evidence does not deal (or does not deal adequately) with the steps they would have taken to fulfil the Phase 1 Planning Conditions, comply with the Act and start the work but for the Basement Trespass. It was only during the trial that they even disclosed the fact that they obtained Phase 1 unconditional planning consent in March 2020.

94. I have found as a fact that Mr Patel ignored the Phase 1 Planning Conditions as at 8 October 2018 (see paragraph 52 above). However, their existence must have come to mind at some point because they were eventually satisfied in March 2020. When, why and in what circumstances Mr and Mrs Patel decided to fulfil them is unknown. As to the Act, they have never taken steps under section 6. The reason for this, as presented to the court in submissions, is that there would be no point in doing so whilst this litigation is pending. However, that too assumes Phase 1 and Phase 2 could and would otherwise have been carried out but for the Basement Trespass. This assumption is not addressed, at least not adequately, within their evidence.

95. This leads to the second potential problem. Mr and Mrs Patel need to address the facts that (i) they were able to start the Phase 2 works in October 2018 but (ii) chose to stop them in or about late November 2018. As I have found above, the future business and profits, whether from increasing the size of the store, opening a sub-post office or letting the flat, were dependent upon Phase 2. The relevance of Phase 1 was always limited to storage space. There could be no future profits as planned without Phase 2.

Therefore, Mr and Mrs Patel needed to address their decision to stop Phase 2 and its relevance to causation in their evidence.

96. They only did so before trial to the extent that Annexure 2 to the Schedule of Loss asserted that the injunction stopped all building works. This is factually incorrect. It does not reflect the terms of the injunction or, most importantly, the Patel Undertaking. After all, Phase 2 proceeded after the Patel Undertaking was given.

97. During trial, Mr Patel stated in cross-examination, for the first time, that the decision was made because of the cost of this litigation (see paragraphs 61-63 above). It is obviously unacceptable that this attribution was made for the first time at that stage. Also that it was made without any detail to support it other than the facts that there was litigation and the accounts for the financial year ending 31 May 2019 showing significant costs for legal and professional fees (see paragraph 64 above). There are many other factors which should have been relevant to that decision and which Mr and Mrs Patel should have addressed either by setting out their reasoning or stating they did not consider them and, if so, explaining why (see paragraphs 61-62 and 63-67 above).

98. In addition, on the face of it, the decision does not make sense when termination left the business: (i) in breach of the building contract; (ii) needing to replace the shed without continuing Phase 1; (iii) with the consequences of the pre-8 October termination of various contracts; (iv) without a sub-post office; (v) with a store needing outstanding works to be made good (presumably because this too has not been disclosed); (vi) a reduced turnover and net profit due to the outstanding works and the absence of the store shed (again presumably); and (vi) no flat to let.

99. It does not appear to make sense in particular when funding was in place to be drawn down for all the Phase 1 and Phase 2 work and the original Schedule of Loss projected for the first year after the works were completed (albeit with the benefit of Phase 1 storage): additional sales of £35,000, sub-post office sales of £24,583 and a flat rental of £15,000. A total additional income for 2019 of nearly £75,000. This all needs to be considered when deciding whether to accept Mr Patel's evidence.

100. The cost of the building contract for the Phase 1 and Phase 2 work is known but not the cost of the finance. However, it is not difficult to anticipate a secured mortgage with annual repayments in the region of £7,000-8,000 and this does not appear to be overwhelming for the partnership in all the circumstances referred to above and when compared with the consequences of termination. Whilst their ability or inability to pay that finance from profits can be gleaned from the accounts, there is no evidence from them either as to their deliberation at the time or as post event justification for their decision to stop Phase 2 because of financial difficulty. There is also no disclosure of the partnership's banking facility, the potential for its increase or of their financial position outside of the business. If it is truly Mr and Mrs Patel's case that they did not have the finance to continue Phase 2, they should have provided evidence addressing it.

101. In addition, they did not provide evidence to address the possibility that Phase 2 could have been completed without Phase 1. The absence of the intended new extension for storage would be relevant to future trading success but it would not prevent such trading. The effect would be upon the quantum of consequential loss not the loss of

the new planned trading completely. As to quantum, the absence of Phase 1 storage could potentially have been mitigated. There was no evidence to suggest that the storage problem could not be resolved, at least substantially, whether by erecting temporary storage facilities within the Phase 1 area or elsewhere on their land or increasing the trips referred to in Annexure 3 to the Schedule of Loss (see paragraph 26(c) above).

102. The decision to be made, therefore, is whether in all those circumstances Mr and Mrs Patel have satisfied the burden of establishing causation by Mr Patel stating in cross-examination that Phase 2 stopped because of the expense of this litigation when: (a) there is evidence of significant litigation costs to support the belated evidence of Mr Patel; but (b) the belated presentation of this new reason for termination of Phase 2 means it could not be properly tested; (c) there are many reasons to doubt this evidence without it having been tested; and (d) caution must be exercised when addressing Mr Patel's evidence because of his unreliability when dealing with other important aspects of the claim.

103. Reliance on the litigation produces the third potential problem. Namely, whether it can be established that the Basement Trespass was a causative link when the litigation relied upon by Mr Patel to explain why Phase 2 stopped concerns many other issues. Mr and Mrs Patel need to establish a real and substantial chance that the Phase 2 work would not have been stopped in any event because of the cost of the litigation still dealing (in the absence of the Basement Trespass) with: (i) the claim for a final injunction to restrain Phase 1 for non-compliance with Phase 1 Planning Conditions and/or the Act; and (ii) the issues over the use of the right of way; and/or (iii the other trespass claims.

104. The fourth potential problem assumes causation is established and concerns quantification. Mr and Mrs Patel assert that once Phase 1 and Phase 2 were completed, they would have increased turnover by the sale of additional goods, from the sub-post office franchise and from the flat's rental. That being so, one would expect to see, at least as a guide to explain the projections, evidence of: (i) the intended use of the additional selling areas within the shop identifying the bases for the belief that the additional products, as described, would sell and their gross margins; (ii) a description of the sub-post office services to be provided and the bases for the belief that the sales projected and the resulting gross profit margins would be achieved; (iii) allowance for the loss of turnover from the previous sale of goods in the area now being used by the sub-post office; (iv) an explanation of the type of additional expenses which would have resulted from the increased business (from loan repayments to wages etcetera) and for their quantification; (v) evidence of market rental for the 1 bedroom flat and of the likely letting periods during a financial year (obviously depending upon the type of tenancy); and (vi) the effect of tax upon the additional profits.

105. Obviously, it may not be practical or necessary to provide all that evidence/information and the list may be improved. However, the point is that Mr and Mrs Patel's evidence does not explain the projected figures to the extent required. The projections are unreliable for all the reasons appearing within paragraphs 68-73 above. In addition, Mr Patel's attempt to mislead CBG and the court in respect of the loss of rental for a 2-bedroom flat in particular demonstrates and supports not only the

need for caution when considering his evidence but that his evidence of projected loss cannot be accepted in the light of all those reasons.

106. Ms Read submits that this means the claim should be dismissed and relies upon the judgment of Lady Justice Arden in ***Ramzan v Brookwide Ltd*** (above) at [31-32] (see paragraph 81 above). However, the judgment emphasises that the Court should do its best to reach an assessment which will evaluate the chance that those profits would have been made. A liberal approach is to be adopted. There is other information available potentially to do that. Namely the partnership accounts and the fact that completion of Phase 1 and 2 would have resulted in new facilities and services offering the chance of increased turnover and net profit. The assessment would have to be extremely conservative because of the lack of reliable evidence but rejection of Mr and Mrs Patel's projections does not necessarily mean an assessment should not be made if it can produce a bottom-line figure.

107. A starting point would be the net profits before tax for the financial year ending 31 March 2018. An "educated" estimate based on the nature of the plans for the business would be an increase in net pre-tax profit in the first year of between, say 10-15% and in the second year of between, say 15-20%. There would need to be a loss of chance discount of between, say 25 and 33%. All plans carry risk and an investment of £100,000 will not automatically lead to increased profit. Using a previous net pre-tax profit of £60,000 this would lead to an award over two years of some £21,000 at rates of 15 and 20% but be subject to a deduction of 25% for loss of chance. Consideration could then be given to increasing the resulting figure because of the reduced profits of subsequent years when compared with those for the 2018 financial year end, albeit excluding the costs of litigation. There would then be the issue of tax.

108. However, it must be recognised that this would be only the starting point. There are other matters to consider and any such assessment will be fraught with difficulty. It is all very well looking at existing turnover and adopting a broad-brush figure for increased net profit based upon the fact that the store is larger and includes a sub-post office but there is no guidance to assist in assessing most, if not all, of the matters referred to in paragraph 104 above. In addition, there would be the issue as to when Mr and Mrs Patel would have been able to carry out Phase 1 and complete Phase 2 but for the Building Trespass. They would need to have complied with the Phase 1 Planning Conditions and with section 6 of the Act. They would need to have restarted Phase 2. None of this is addressed (at least not properly) in their evidence.

109. Further, the failure to address the decision to stop Phase 2 also raises problems for the issue of mitigation. In addition, there would also be the claim for loss of rent and the issue whether it should be rejected in the context of the misrepresentation that there would be a 2-bedroom flat. If it were necessary to decide this, I would conclude that Mr and Mrs Patel have failed to provide evidence of loss of rental based upon the letting of a 1 bedroom flat. They chose to present evidence of an alternative 2 bedroom letting, which would not have occurred. That evidence must be rejected and Mr Patel's proposal that he can provide evidence during cross-examination based upon his experience in retail is unacceptable. In addition, the doctrine of "clean hands" would apply when Mr and Mrs Patel have sought to lead the court to an award of compensation based upon a false fact.

110. All those matters affecting quantification mean that the underlying point of Ms Read's submission, namely that there cannot be a fair assessment, will remain to be addressed if causation is established.

L) The Decision

111. I have reached the following decisions taking into consideration the findings of fact, the matters and reasons set out above. For convenience I will start from the beginning even though that repeats decisions already made above.

112. The starting point is, as decided above, that CBG has established that the works required for Phase 1 and Phase 2 were started by Mr and Mrs Patel's builders under contract on 8 October 2018. This was a breach of the Phase 1 Planning Conditions and the Act. Therefore, the Phase 1 works should not have been started that day. CBG, having received the letter dated 4 October 2018, which with its enclosures gave notice that Phase 1 and Phase 2 would start, was entitled to begin its claim for a final injunction based upon non-compliance with the Act. They would have been entitled to also rely upon breach of the Phase 1 Planning Conditions had that been disclosed by Mr and Mrs Patel (see the facts at paragraphs 45-55 and paragraph 85 above).

113. In those circumstances, as also decided above, the claim that the Patel Undertaking resulted in the consequential loss must fail. CBG remained entitled to claim its final injunction because the Phase 1 Planning Conditions were not met until March 2020 and no notice has been served under section 6 of the Act. The reasons set out in paragraphs 85-86 above apply and need not be repeated.

114. The claim for consequential loss must depend, therefore, upon the claim for damages resulting from the Basement Trespass. However, as decided above, the Basement Trespass cannot have caused any consequential loss resulting from the stoppage of the 8 October 2018 work when there should never have been any work to stop in the first place without prior compliance with the Phase 1 Planning Conditions and section 6 of the Act (see paragraphs 48-55 and 87-88 above). It also follows that there can be no claim for consequential loss resulting from the Basement Trespass in respect of any of the steps taken in preparation of the works before 8 October 2012. The reasons set out in paragraph 89 above apply.

115. Potentially, however, as explained at paragraphs 90-91 above, there can be a claim for consequential loss as a result of events after 8 October 2018 if discovery of the Basement Trespass led to the breaking of the chain of causation between non-compliance with the Phase 1 Planning Conditions and the Act and their inability to carry out Phase 1. This may be because of compliance with the requirements of the Phase 1 Planning Conditions and section 6 of the Act or because the Basement Trespass prevented compliance (see paragraphs 90-91 above).

116. However, their evidence does not really address that issue. Their evidence does not proceed from the premise that the work should not have started in any event. It does not address in that context whether Phase 1 would have started at or around a particular date or period after 8 October 2018 but for the Basement Trespass. There is no evidence from Mr and Mrs Patel to establish the above-mentioned break in the

chain of causation either from the facts that occurred or applying a real and substantial chance test. They have not established that the Basement Trespass caused the consequential loss claimed (see paragraphs 92-94 above).

117. In any event, their decision to stop the Phase 2 work in late November 2018 was also highly material. There would be no alteration to their business as planned without Phase 2. No consequential loss could have resulted from the Basement Trespass if it was not the cause of the decision to stop Phase 2.

118. Mr and Mrs Patel's evidence does not address the circumstances and reasons for that decision. Pre-trial, it was asserted in Annexure 2 to the Schedule of Loss that the stoppage was caused by the injunction. That is wrong in fact. Neither the interim injunction nor the Patel Undertaking prohibited Phase 2. They changed their case at trial with Mr Patel's statement during cross-examination, for the first time and without any particulars, that it was attributable to the cost of this litigation (see paragraphs 95-97 above). However, this belated alternative explanation was presented without detail and it produces too many issues which they have not addressed in their evidence (see paragraph 97 above). Those issues are derived from the findings of fact at paragraphs 59-67 above.

119. I will also take into consideration that this belated assertion by Mr Patel that the decision to stop Phase 2 because of the cost of litigation does not appear on its face to make sense (see paragraphs 98-100 above). In addition, not only does their evidence not address this (at least not adequately), it does not consider the possibility that Phase 2 could have been completed and the "new" business started without Phase 1. This is a matter of causation and of mitigation, if causation is established (see paragraphs 109 above).

120. The matters at paragraphs 118-119 above counter and outweigh the limited evidence which can be identified to support Mr Patel's oral evidence that Phase 2 stopped because of the cost of this litigation. It can be inferred from the quantum of the profits made by the partnership before November 2018, in particular for the financial year end 31 May 2018 and the quantum of the legal expenses incurred during the financial year end 31 May 2019 that it will have been difficult to finance the litigation (see paragraph 102 above). However, that is insufficient evidence. I reject Mr Patel's evidence. First because of the circumstances in which the new explanation was advanced. Second because of the lack of evidence in support. Third because of all the factors which weigh against his evidence. Finally, because of his overall lack of reliability as a witness.

121. Even if I had accepted Mr Patel's explanation for the decision, I would not have accepted there was a real or substantial chance that the Phase 2 work would have continued but for the Basement Trespass (see paragraph 103 above). That conclusion is reached by asking what would have happened without the Basement Trespass. The parties would still have been litigating over whether Phase 1 was permitted, whether there had been an infringement of the right of way, whether there was trespass on the "green land" by Mr and Mrs Patel and whether their claim of trespass against CBG would succeed. I have heard no evidence to suggest that those claims would not have been pursued had there been no Basement Trespass. There is no evidence to suggest a real or substantial chance that the cost of litigation would have been reduced to an

extent that would have altered Mr and Mrs Patel's decision to stop Phase 2 had the Basement Trespass not existed and, therefore, not been litigated.

122. The consequential loss claimed by Mr and Mrs Patel results first from their non-compliance with the Phase 1 Planning Conditions and the Act and then from their decision to stop the Phase 2 works. The planned, new business could not exist without Phase 2. In my judgment Mr and Mrs Patel have not established that their decision to stop Phase 2 was caused by the Basement Trespass whether as a matter of fact on the balance of probability or as a real and substantial chance (see paragraph 91 above). No causative link to the Basement Trespass has been established either for the periods before or after 8 October 2018.

123. In all those circumstances I need not decide whether to award compensation in accordance with paragraphs 104-110 above. Any award would have had to have been extremely broad brush for the reasons addressed and would have had to brush over many of the deficiencies of Mr and Mrs Patel's evidence. A fair assessment would not have been possible on that evidence. This is illustrated by the issue of mitigation. Whilst it was not for Mr and Mrs Patel to prove the steps they took to mitigate their loss were reasonable, they have not dealt with the circumstances in which or the reasons why the decision to stop Phase 2 was taken. Nor have they presented evidence which addresses the financial consequences if they had not made that decision. A fair assessment could not have been made when those potentially important factors could not be the subject of submissions or determination.

M) Conclusion

124. The decisions above produce the conclusion that the claim for consequential loss fails. In many ways I reach that decision with regret because it is derived in part from Mr Patel's lack of reliability and the failure of Mr and Mrs Patel to present the evidence required to address the issues. On the other hand, that was their choice and it was also their choice to proceed with the works on 8 October 2018 in the manner expressed within their letter dated 4 October 2018 when they should not have done so.

125. Returning to the introduction, the course that ought to have been taken would have been to explain to CBG at the time that the Phase 1 Planning Conditions needed to be fulfilled and that they would like to discuss Phase 1 and Phase 2 using the procedures required by the Act. This does not mean CBG should conclude that it behaved in a satisfactory manner. The Basement Trespass should not have occurred and its existence should also have been a matter for open discussion and resolution. Instead both neighbours became embroiled in dispute also involving other trespasses and rights of way and failed to act as neighbours should.

Order Accordingly