Neutral Citation Number: [2022] EWHC 3249 (TCC)

Case no: HT-2020-MAN-000057

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

Manchester Civil Justice Centre
Date handed down: 19 December 2022

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

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

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

Hearing dates: 17, 18, 19, 20, 21, 24, 25, 27, 28 October 2022
Date draft judgment circulated: 7 December 2022

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:00am on 19 December 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

A. Introduction and decision

1. The primary claim in this case is a claim brought by the claimants ("the Stevens"), as owners of a substantial detached house and gardens 15 Fletsand Road, Wilmslow ("no 15"), against: (a) the first and second defendants ("the Sihans"), as former owners of the adjacent, equally substantial, house and gardens 17 Fletsand Road ("no 17"), and (b) the second and third defendants, Mr Romero and Ms Guercio ("the Romeros"), as current owners of no 17, alleging nuisance and/or negligence in relation to alleged water ingress from the rear garden area of no 17 onto the rear garden area of no 15, allegedly causing flooding of no 15's rear garden area.

2. In addition to this primary claim there are separate claims brought by the Sihans against the Romeros and vice versa, seeking contribution under the Civil Liability (Contribution) Act 1978. There is also a more substantial claim by the Romeros against the Sihans seeking damages for breach of the terms of the sale contract, for alleged misrepresentation and for breach of an alleged indemnity, all arising out of the purchase by the Romeros from the Sihans of no 17.

3. The case was heard over two weeks with all of the factual and expert evidence and closing submissions being concluded over that period. I am very grateful to all counsel for keeping to a tight timetable in clear and focussed cross-examination and submissions so as to ensure that the case could be concluded in that period.

4. In summary, my decision is as follows:

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

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

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

5. My reasons appear from the following sections.

B Witnesses and other evidential issues

(i) Factual witnesses for the Stevens

6. The Stevens are a retired couple who achieved success and wealth in their previous business enterprises. They are a houseproud couple and Mrs Partakis-Stevens, in particular, is very attached to and proud of the rear garden at no 15 and the pleasures it has afforded for private life with their family with its well-tended lawn, well-stocked borders and adjoining swimming pool and patio. They believe very strongly that if it had not been for the Sihans using the clay spoil from their excavations to raise the ground levels of the rear garden at no 17 they would not have experienced the flooding of which they complain.

7. I do not doubt their essential honesty and, in particular, I reject the suggestion by Mr Darton that they had deliberately withheld documents provided to them by Bartlett Tree Experts ("Bartlett") on the basis that they knew that those documents did not support their case. It is quite clear that the more prosaic explanation is that Mr Stevens was the email addressee but, because he was not particularly involved in the discussions with Bartlett, simply printed out the relevant documents and passed them on to Mrs Partakis-Stevens, who disposed of them once she had dealt with them. Apart from anything else, the documents produced by Bartlett

did not come anywhere close to flatly contradicting their essential case, such as would have provided a strong motive for such conduct.

8. Nonetheless, Mrs Partakis-Stevens in particular came across to me as strong-willed and determined and, having become convinced that the flooding was the result of the Sihans' actions as above, has been unable or unwilling to countenance any different explanation. Mr Stevens, it seems to me, has largely followed her lead in this respect. There were some significant discrepancies in their evidence. They were willing to ask third parties to provide documents or to amend documents to support their case, albeit not in a dishonest way. For all of these reasons I have had to treat their evidence with some caution and do not feel able to accept their uncorroborated evidence uncritically. I have therefore looked for corroboration from other reliable sources of evidence.

9. Importantly, therefore, their evidence as to the causal connection between the Sihans' works and the onset of serious and sustained flooding was supported by the evidence of Mrs Gibbons, a retired teacher who lives in a house opposite no 17. She has been friendly with the Stevens for many years and was friendly with the previous owners of no 17. She seemed to me to be a careful and a fair-minded witness, with a reasonably good recollection of events. She was very clear on the one hand about the causal connection between the Sihans' works and the onset of serious and sustained flooding to the rear garden of no 15 and she did not appear to have any particular axe to grind against the Sihans.

10. However, as regards that evidence (and that of the other corroborative witnesses called by the Stevens to support their case that before the development of no 17 there was no widespread or persistent problem with flooding in the rear garden of no 15 whereas afterwards there was), I must remind myself of the risk that these witnesses, who were all either family, friendly neighbours or persons who had worked for them, may have persuaded themselves to recall events to support the Stevens' case. There is therefore, notwithstanding their honesty and apparent reliability, always room for doubt about the reliability of uncorroborated oral recollection of this kind, comparing the relative frequency and intensity of flooding before, during and after the works to no 17. I must, therefore, look carefully at the contemporaneous documentary evidence and also consider with care whether their oral recollections sits easily with the expert evidence as to the presence or absence of any causal connection between the works to no 17 and the problems at no 15.

11. That applies to Mr Peter Wordingham's evidence, who also supported the causal connection between the Sihans' works and the onset of serious and sustained waterlogging. He had been the Stevens' gardener (as well as the gardener at no 17, no 18 Torkington Road and no 20 Torkington Road) for many years, until around March 2017 when he moved away from gardening to set up a landscaping business. He seemed to me to be a careful and fair minded witness with a reasonably good recollection of events, especially – as might be expected - those relating to the gardens and the trees and plants in them.

12. It also applies to Mr Neil Montaldo's evidence. He is the son-in-law of the Stevens who, together with his wife, their daughter, lives in 18 Torkington Road directly behind no 15. No 18 Torkington had previously been owned and occupied by Mrs Partakis-Stevens' parents. He is a practising barrister and gave evidence in a careful manner, demonstrating a reasonably good recollection of events. He was obviously supportive of his parents-in-law and, not surprisingly, aggrieved by the suggestion made by Mr Sihan, on the slightest of evidence (alleged discussions with a builder who had worked for Mr Montaldo and his wife at their property in a gym, subsequently contradicted by that same builder in a letter), that in the course of construction works they had raised the levels at the rear of their garden in such a

way as may have caused the flooding to the rear garden of no 15. It became clear that his evidence, that what appeared to be spoil at the very rear of the rear lawn was in fact a white coloured tree or shrub, was plainly mistaken by reference to a closer examination of the expanded Google maps views of the vicinity at the time, and he also frankly admitted that his interest in gardens and in gardening was limited. Nonetheless, he was a regular visitor to no 15 with his wife and young family and I have no reason to doubt the essential reliability of his evidence about the general incidence of flooding there before and after the works to no 17.

13. Mr David Johnson's evidence also supported the Stevens' case. He has lived with his wife at no 20 Torkington Road in a substantial new house which they had built after they acquired the property and demolished the existing house in 2012. His evidence in his witness statement was that he also noted a "sharp increase in the amount of flooding at the back of my garden which immediately bordered no 17" during and after the works to no 17 and complained about this to Cheshire East Council in autumn 2017. He also had a supplementary drainage system installed by Mr Dorman in his rear garden in what was a successful attempt to ameliorate these problems. He also seemed to me to be a careful and fair minded witness with a reasonably good recollection of events. He did not come across as vindictive and had not even troubled to seek to claim the cost of the additional drainage works from the Sihans.

14. Mr Dorman, the landscape gardener who had undertaken drainage works to the Stevens' garden, via his company Lindow Landscaping, in 2017 and 2018, came in for serious criticism in cross-examination, based largely upon the defendants' liability expert evidence. The evidence as to what he did was supported by contemporaneous photographs taken by the Stevens. In general terms it seemed to me that he had recommended and installed a scheme which had achieved some success in ameliorating the problems but which did suffer from a number of serious shortcomings which must have significantly impaired its effectiveness. It is always a misfortune for someone in his position to become caught in the cross-fire of a dispute such as this and it seemed to me that he gave evidence in a reasonable and reasonably reliable manner in the face of forceful and sustained cross-examination from Mr Darton.

(ii) <u>The Sihans and their factual witnesses</u>

15. Mr Sihan is the epitome of a successful and hard-nosed property developer. He was determined to achieve his objective in developing no 17 to build a new large detached house to his specification, including a flat lawned rear garden. Because he did not experience any problems with flooding to no 17 he refused to accept that there was any real risk that the works he undertook to his property might cause water ingress and flooding to adjacent properties, regarding Mrs Partakis-Stevens in particular as an interfering nuisance of a neighbour. He also regarded the planning conditions restricting his development of the grounds and the Stevens' complaints as obstacles to be ignored or overcome with the least possible difficulty or expenditure on his part. It is plain, notwithstanding his denials, that he deliberately minimised the true position in order to sell no 17 at a good price to the Romeros. However, in fairness to him, it is clear from the open correspondence (and the limited without prejudice correspondence which I have seen) that he was willing to commit time and money to achieving a resolution of the problem, even though it remained convinced that there was no basis for needing to do any works.

16. He was not a dishonest witness, but he was an unreliable one in my judgment because he said what he wanted to say or what he thought the court wanted to hear. One of many examples in his evidence was his explanation as to why he had installed a french drain at the rear

boundary with no 15 in 2017. He initially denied that it was a response to complaints by the Stevens about water ingress, because it did not suit his case to accept that there had been complaints by this stage. However, his evidence that it was purely for "precautionary" reasons (whatever that meant) was shown to be false by what Mr Briggs had written on his behalf to the local planning authority, in November 2017. Faced with this difficulty, he retreated to saying that the complaints were not about flooding, when it was apparent that they could not have been about anything else. When pressed on this he retreated again to suggesting that the letter had just been written the wrong way, when again plainly it had not.

17. Mrs Sihan was unable to add anything of value, because she left all matters relating to the development and to the dispute to her husband. She appeared to have little interest in the rear garden and, hence, I did not find convincing her evidence as to the state of the rear garden or what she said she could see in the rear garden of no 15.

18. Mr Paul Briggs was the architect retained by the Sihans to draw up plans and deal with planning permission and other statutory approvals. He has been Mr Sihan's architect of choice for many years and it is clear that they work well together on a very informal and largely undocumented basis. He was not asked to design or draw up plans or deal with planning permission or other statutory approvals in relation to the external areas and, hence, had no involvement in such matters. He only became involved in this respect once the local authority had been brought in and were querying the non-compliance with planning conditions. At that stage he was instructed to apply to discharge condition 11 and to obtain the geotechnical evidence necessary to do so.

19. It was clear, despite his demurral, that in his correspondence with the local authority he was acting, essentially, as a mouthpiece for Mr Sihan and, thus, seeking to minimise the extent of the works undertaken in the rear garden and to cast doubt on the complaints made by the Stevens in order to dispute any causal connection between the works and any water ingress or flooding. That is not a criticism of him as such, since he was not purporting to act as an independent expert at the time, but I do not place any real weight on his contemporaneous communications or his factual evidence as to what he observed, both for that reason and for the further reasons that: (a) I do not think that he has any clear recollection now of the details of events; and (b) he was not in the habit of making contemporaneous records of his visits, meetings and discussions which might have assisted his recollection.

20. Mr Heleine was the builder employed by the Sihans to undertake the construction works although he did not, as I understood it, undertake the excavation works and the formation of the rear garden. He readily admitted that certain parts of his witness statement did not represent his true recollection and I do not place much weight on his oral recollection of events going back to 2016-17.

21. A witness statement made by another neighbour, a Mrs Mulchand, was admitted in evidence without her being required for cross-examination subject to certain parts being removed, and I have had regard to it.

(iii) The Romeros

22. Both Mr Romero and his wife Ms Guercio gave evidence with the assistance of a Spanish interpreter. They both came across as honest witnesses doing their best to assist the court. Mr Romero appeared to have a reasonable recollection of key events, although hampered to some extent by his unfamiliarity with written and spoken English, so that much of his understanding of the detail, even at the time, was necessarily second hand and incomplete. Ms Guercio had similar difficulties and her recollection was further hampered by the fact that

she was physically present in the UK for less time than her husband and that she was also contending with the birth of her third daughter and later her son and with having to deal with health difficulties over the same period.

(iv) The liability experts

23. I should begin by saying that all of the three liability experts called were qualified and experienced engineers and experienced also in giving expert evidence in that capacity.

24. Mr James Taylor is the expert engineer called by the Stevens to address the issues of liability and causation. He is and has been involved in this case from a very early stage. He first inspected no 15 in February 2018 and no 17 in March 2018, after which he produced his first report. His second report was produced in May 2018, his third (when instructed on a joint basis) in October 2019 and his fourth on 4 August 2022. He had also participated in joint discussions and joint statements with his counterparts in December 2021, July 2022 and September 2022.

25. He was cross-examined by Mr Darton on the basis that he had started by relying too much on what he had been told by the Stevens in reaching his opinion that the problems with flooding experienced by no 15 were directly attributable to the works to no 17 and, having formed that opinion, maintained it resolutely thereafter despite, said Mr Darton, it becoming apparent that the evidence did not demonstrate any such link and, in fact, the very opposite.

26. I think that there is an element of truth in the suggestion that, having sided with his clients from the outset, he has maintained something of a stubborn attachment to their case and to the views he formed at the outset. However, I do not think that this comes anywhere near to demonstrating that he is an unreliable expert whose evidence I should discount. Instead, what I need to examine very closely is the merit of his explanations as to how the works to no 17 could have – as he insisted - caused, significantly contributed to, or significantly exacerbated water ingress to the rear garden of no 15 and thus flooding when previously there had – on the Stevens' case - been no, or only limited, such impacts.

27. Mr Andrew Grime is the Sihans' expert engineer. His first visit was in December 2020, after which he produced his first report in March 2021, and his second in July 2022. Similarly to Mr Taylor, but to contrary effect, Mr Grime was convinced from the outset that the works to no 17 could not be the cause of the reported problems to no 15 and resolutely maintained that opinion throughout. It seemed to me that the criticisms made of Mr Taylor apply equally to Mr Grime. In particular, he had failed to acknowledge in his report and in his evidence, until pressed, that his alternative explanations could not by themselves explain the claimants' evidence, if correct, that there was a temporal connection between the works to no 17 and the onset of the problems.

28. Again, what I need to consider is the merit of his opinion that a causal connection between the works to no 17 and the onset of the reported continuing problems to no 15 cannot credibly be explained from a drainage engineering perspective, and how it could be that temporary flooding problems could well have been caused by the works themselves but that the finished works could not explain continuing problems, so that the most likely explanation was that the claimants and their witnesses had convinced themselves that there was a continuing problem due to the works when in fact there was none.

29. Mr Michael Barber is the Romeros' expert engineer. He was not instructed until later, in November 2021, and his report is dated August 2022. He had the benefit of seeing more of the prime material when producing his first report than did either Mr Taylor or Mr Grime when producing theirs, including the jointly agreed and instructed Geocon ground

investigations. He came across as rather more willing to accepts points made for and against his clients' case than either of the other experts and I was impressed by his evidence overall. However, again I need to consider the merits of his view, shared with Mr Grime, that no causal connection could be explained between the works at no 17 and the onset of the reported problems.

(v) The valuation experts

30. Mr Raine was well-qualified and well used to giving expert evidence. There were four principal criticisms of his opinion. The first was that he had no knowledge of the local property market and that his evidence was directed to the question of diminution in value almost as a theoretical exercise rather than by reference to the circumstances of the particular case. The second was that he had revised his initial assessment of the percentage diminution in value quite considerably from his first report to his second report without providing any convincing explanation for that revision. The third was that he had failed to step back and consider the amount of the diminution in value by reference to the likely cost of the necessary remedial works. The fourth was that he had failed without good reason to consider whether there would be any diminution in value if the remedial works were carried out at no 15 rather than at no 17, when it was the risks associated with the latter which appeared to drive his assessment of diminution in value even after such works had been undertaken.

31. In my judgment all of these criticisms had force. I was far more impressed by the central plank of the evidence of Mr Lowe, the expert valuer for the Romeros, that the obvious approach any sensible prospective purchaser would take would be to deal with the problem, i.e. continued water ingress onto and flooding of no 15 on the Stevens' case, by adopting a solution at no 15, and to seek a reduction in price based in the cost of such a scheme and a factor which represented the risks and inconvenience of having to do so. On this basis, the question of any residual diminution in value to no 15 simply did not arise.

32. Mr Lowe struggled rather more to articulate and justify his opinion as regards diminution in value of no 17 in relation to the Romeros' claim against the Sihans, because it was subject to a number of complications which would tax any valuation surveyor. However, he had at least attempted to engage with these complications, unlike the Sihans' expert, Mr Naylor, who had produced little more than a straightforward valuation of the properties without engaging in any obvious way with the difficult issues of seeking to assess diminution in value in a case such as the present. Even though he presented himself as having detailed knowledge of the local area, any advantage that might have given him was undermined when it became apparent that his valuation in his report was only £1,350,000, whereas by the time of the joint statement it had increased to £1,800,000. Whilst no judge should be too ready to criticise any expert for being willing to reconsider his views in appropriate circumstances, such a dramatic increase did indicate very strongly to me that his first valuation had really been so unreasonably low as to invalidate his opinion. For that reason, and also given my overall impression of his evidence, I do not place any weight on his opinions.

(vi) Other evidential issues

33. Various issues as to the adequacy of disclosure arose during the course of the trial. There is no need to rehearse them all, because I am satisfied that none of the parties deliberately failed to comply with their disclosure duties. However, two particular points need to be recorded

34. The first is that there was a pre-trial issue as to whether or not the Sihans were entitled to rely on certain without prejudice correspondence passing between the three parties, in circumstances where their entitlement to do so was challenged by the Romeros. It was the

subject of a relatively late-made application, expeditiously resolved by a different judge (His Honour Judge Pearce), so that I did not see all of the disputed material but did see some of the without prejudice correspondence. Whilst it may be difficult to be certain since I have not seen the correspondence, given the clear conclusions I have reached in relation to the claim by the Stevens against the Sihans it is difficult for me to see how the withheld material could have changed my views even had I been allowed to see it

35. The second is that the Sihans and the Romeros had agreed to disclose documentation held by their respective conveyancing solicitors and had done so. However, there was little or very much by way of internal files notes and the like. In the absence of any evidence to the contrary, I have assumed that this is because the solicitors had taken the view that the internal file notes were their property and not the property of their clients, rather than because they did not exist. Neither party called their solicitors to give evidence and it follows that I have little insight, from the solicitors' files or from any evidence they might have been able to give, as to any instructions or advice given by client to solicitor and vice versa.

C. Relevant facts

36. This is through necessity a relatively detailed chronology, largely uncontentious where based on contemporaneous documents, but including some findings of fact along the way on matters relevant to the issues in the case.

37. Both properties, together with a number of other properties to which reference has been made, are located in what is a desirable area of Wilmslow containing a number of large detached properties, many of which are more recent replacements for the more modest properties originally constructed on each site. No 15 lies to the north-west, no 17 to the south-east. The natural direction of fall of the land slopes down along Fletsand Road from the south-east to the north-west, so that before the works to no 17 were undertaken the land sloped down in a relatively steady direction from the rear of no 17 to the rear of no 15[1]. Running to the north-east of Fletsand Road, roughly parallel with it, lies Torkington Road. No 18 Torkington Road lies directly behind no 15 and no 20 Torkington lies directly behind no 17.

38. The Stevens purchased no 15 in 1990 and have lived there ever since. It consists of a 1930's era house with a large, mature, well-stocked rear garden and a patio and swimming pool area to the rear on the side closest to no 17.

39. The question as to whether, and if so to what extent and why, no 15 suffered from flooding[2] before the works to no 17 is in issue. There is an associated issue as to the nature, extent and condition of the drainage systems in existence in no 15 over this timescale although, for reasons I shall explain, I am satisfied that none are of any relevance to this case.

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[1] The existing site plan submitted with the planning application by the Sihans showed a high point to the no 19 side of around 82m and a low point to the no 15 side of around 80.6m, thus a total fall of some 1.4m.

[2] There are various references to flooding and to waterlogging in the evidence, although not I suspect often consciously chosen. Where I refer to the Stevens' complaints, because this has been described as a case about flooding I use that term as encompassing either flooding or waterlogging or both unless the context otherwise appears. However, there is of course a difference. In broad terms, and as I understand it, waterlogging is the saturation of the ground by water, which may or may not also be visible as standing water above ground level, whereas flooding (or ponding) refers to the presence of standing water above ground level, which may be at differing depths and over differing areas and last for differing periods.

40. Since 2014 no 18 Torkington has been occupied by the Stevens' daughter and son-in-law. It was extended by them to the rear from 2014 onwards.

41. No 20 Torkington has been occupied by a Mr and Mrs Johnson since 2012. In what has become a familiar pattern of development in this area, where the existing houses are relatively modest compared to the size of their plots, they demolished the existing house and built a much larger property on the site.

42. The Sihans purchased no 17 in December 2013 with the same intention of constructing a much larger house on the site. They were engaged in property development and no 17 was one of a number of properties they had developed since 2000. Their plan was to demolish the existing property and build a new, larger property. Although they say that they intended no 17 to be their permanent family home I am satisfied that they also contemplated selling it at the right time and the right price and moving on to another development opportunity, as they had done in the past, not least since they appear to have first put it on the market as early as October 2016, before it was even completed.

43. They instructed an architect, Mr Briggs of Northern Design Partnership ("NDP"), to undertake the necessary design work and to secure the necessary statutory approvals. In November 2015 he secured planning permission from the relevant planning authority, Cheshire East Council ("CEC"), to demolish the existing house and to rebuild a larger new house. The footprint of the new house was to be some three times larger than the size of the previous house. Together with the paved areas to the sides and the rear, the effect would be to substantially reduce the distance of the house and side paved area to the boundary with no 15 and to substantially reduce the size of the rear garden. There was no suggestion of any change to the levels of the rear garden as part of any landscaping of the site.

44. The planning permission included a number of conditions, including condition 4, which required a landscaping scheme to be submitted to and approved in writing before development commenced, and condition 11, which required details of existing and proposed ground levels to be submitted before development commenced and which also required approved details to be implemented in full, the stated reason being: "To ensure that any change in ground level is acceptable given the nature of the site and adjoining uses".

45. The following month NDP submitted discharge of condition information which attached a site plan with relevant site and building levels and the original topographic survey, saying that the Sihans intended to "leave the rear garden as existing". CEC responded to say that the conditions were discharged on the basis that landscaping and levels were to be implemented in accordance with plan 1511 03 C. This did not show any alteration to the rear garden levels.

46. In late February 2016 the demolition works began and were completed very swiftly, by early March 2016. The foundations were begun in late March 2016 and the construction of the new property followed. The building itself was substantially completed by October 2016 and from around March to around May 2017 the rear garden was altered and the lower parts raised so as to make a flat surface for the lawn, thereby eliminating the existing downwards slope towards no 15. As well as increasing the height of the lawn and in order to do so they constructed a retaining wall of large stones along a line parallel with the boundary with no 15. They also installed a french drain arrangement along the boundary with the rear of no 15 and no 20 Torkington. The property was completed in May 2017 and the Sihans moved into the new house in June 2017.

47. I will refer in much more detail to what was done and where and when in the later section of this judgment where I address the cause(s) of the flooding experienced by no 15.

48. The Sihans accept that they did not seek or obtain written approval for this change in ground levels.

49. The Stevens' case is that water run-off from no 17 to no 15, causing persistent and serious flooding to their rear garden, began to occur from March 2016 and has continued ever since. They say that they complained to the Sihans in March 2016. That is in dispute, although I have no doubt that they did indeed complain. What is not in dispute is that in March 2017 they complained to the Flood Risk Manager with CEC about flooding from no 17, enclosing photographs showing brown coloured standing water to their rear garden. In May 2017 no 17 was visited by a CEC planning enforcement officer in response to the complaint about flooding, who doubtless noted the change in levels to no 17.

50. The Sihans have never accepted that there was any correlation between the works to no 17 and any problems to no 15, which they do not admit. However, the Sihans clearly recognised the need to take action to regularise the planning contravention and instructed Mr Briggs to commission a further topographical survey and to make an application to vary the existing planning permission, seeking consent for the raised ground levels at no 17. The application was submitted in July 2017 and was clearly intended to minimise the position, suggesting that the changes in level were only "minor" and making no reference to the complaint about flooding. They also instructed a firm of geotechnical engineers, Earth Environmental and Geotechnical ("EEG"), who provided a letter in June 2017 concluding, on what can only have been a cursory examination, that it was "highly unlikely that there is a hydrological connection between the two garden areas", which was then sent by Mr Briggs to CEC to support the application.

51. In June 2017 the Stevens obtained a letter, providing information about their garden, from a Mr Hill of Bartlett Tree Experts, a local arboreal consultancy which had inspected and advised about the trees, shrubs and plants in their garden on a regular basis since 2003. Mr Hill expressed the view that what he believed to have been a drastic increase in waterlogging and water levels was connected with the development of no 17.

52. In June 2017 the Stevens, having instructed their then solicitors, Kuits, sent a formal letter of claim to the Sihans, alleging that the flooding complained of had been caused by the raised ground levels at no 17 and the insufficient drainage. They complained that this amounted to a nuisance and alleged that damage had been caused to their garden, including their trees and plants, and their swimming pool. They demanded that the Sihans should abate (i.e. take steps to remove) the nuisance and install a new drainage system, failing which they threatened legal proceedings.

53. The Sihans decided to use litigation solicitors, Kangs, rather than their conveyancing solicitors PLS, to whom they had originally referred the letter. Although Mr Pomfret suggested that this was a deliberate tactic to ensure that PLS could be kept out of the loop, I regard that suggestion as speculative and not made out. There was a response from Kangs, but it was without prejudice, as were subsequent discussions, so all that I know is that nothing was resolved at that stage. However, as Mr Pomfret noted, in July 2017 Mr Briggs wrote to CEC providing further information "to refute some of the claims made by the neighbour at no 15" and stating that: "It was the applicant's intention to live in the property, but due to constant harassment and unwelcome behaviour by the neighbour this will no longer be the case"

54. The CEC Flood Prevention Team visited site on 28 September 2017 and recommended that any variation of the planning conditions should be conditional on the submission of a drainage design that demonstrated "no adverse flooding to existing neighbouring land" so as to manage surface water flood risks to neighbouring properties.

55. In order to address the CEC concerns, the Sihans obtained a report from Mr Briggs in November 2017 which they provided to CEC. It is unnecessary to devote much time to this. It was in the form of a partial and selective submission, rather than a report from an independent expert, which repeated various assertions made by Mr Sihan which I have concluded had no solid factual basis. It provoked an angry response from Mrs Partakis-Stevens to CEC.

56. The Sihans also commissioned a surface water management analysis report from EEG with a view to seeking to demonstrate that any conditions such as had been recommended by CEC would be satisfied. The report was produced in December 2017. It confirmed that the relevant flood maps showed no predicted surface water flooding to no 15 other than in a low probability (1 in 1,000 year) rainfall event. It calculated and compared the pre-development and post-development surface water run-off areas and concluded that because of the greater area of the new house footprint, from which rainfall would drain into the public sewer, when compared with the previous house, there was a 36% reduction in the catchment area flowing towards no 15. It also used software modelling to calculate the run-off rates and volumes pre and post development and advised that the development of No.17 would have reduced both the rate and the flow of surface water towards No.15 in similar proportions to the reduction in catchment area.

57. Although Mr Taylor has certain reservations about this report, specifically the use of greenfield modelling data, and the failure to take into account the impact of surface water run-off from the paved areas, he does not seriously contest the conclusion that there was a 36% reduction in catchment area flowing towards no 15. His opinion is that this general comparison does not deal with the specific impact of water ingress from the rear raised garden area before and after the development of no 17. This, as Mr Grime agreed, was not dependent solely upon catchment area but also depended on the intensity of run-off which depended on a number of factors, including the permeability of the surfaces onto which rain would fall.

58. In December 2017 a local contractor instructed by the Stevens, Mr Dorman trading as Lindow Landscaping, undertook what the Stevens believed were works to provide some reduction of the flooding of their rear garden. He did so by laying a trench along the lawn adjacent to no 17 and constructing a sump at the end nearest the house and installing a pump in it to remove the water thus collected. He subsequently provided an estimate (headed as an invoice, but plainly not such, as he agreed) for a more permanent lawn drainage scheme, which was not undertaken until September 2018 and to which I will refer further below.

59. In February 2018 three things happened at around the same time.

60. The first was that the Romeros became interested in purchasing no 17, their contemplated purchase of a house in the same area having fallen through. Mr Romero inspected no 17 sometime early that month. Ms Guercio did not accompany him to the viewing, because she was in Argentina where she had travelled for the birth of their third daughter, but he was impressed and so was she (having seen the video which he took on his smartphone) so that in the same month they agreed to purchase the property for £2.8 million.

61. The second was that on 6 February 2018 Mr Sihan and Mr Briggs and a representative of EEG met representatives of CEC on site with a view to agreeing whether or not CEC was willing to accept the Sihans' case, based very much now on the EEG report, that there was no need for any further works to no 17 and thus no need for any further planning conditions to be imposed as part of the application of vary. Although Mr Sihan and Mr Briggs suggest that they were given the clear impression that so long as they provided further limited information the application to vary would be approved, it is quite clear from subsequent emails that no such assurance was given and that CEC was determined to receive the information it needed to satisfy itself that it could fully discharge its responsibilities.

62. The third was that on 15 February 2018 Kuits wrote an open letter to Kangs, saying that they had instructed Mr Taylor as their expert and asked for him to have access to no 17 at the same time as he inspected no 15 on 19 February 2018 or, if not convenient, on some other date.

63. It was obvious to Mr Sihan, I am satisfied, that the problems with the planning application and the problems with the Stevens had the capacity to jeopardise the sale to the Romeros. I accept that his view was that this was, in words used by Mr Briggs previously, a vendetta by the Stevens against him and that there was no basis for the claims, but I am also satisfied that this view was simply him believing what he wanted to believe and having found, in Mr Briggs and (albeit to a lesser extent) in EEG, consultants who would sing to his tune.

64. The Sihans instructed their conveyancing solicitors, PLS, to undertake the conveyancing process and the Romeros instructed JMW as their conveyancing solicitors.

65. The Sihans were of course obliged to complete and submit a Seller's Property Information Form ("SPIF") to the Romeros. This was the subject of discussion with Mr Baker, the solicitor at PLS, at a meeting with Mr Sihan on 21 February 2018, after which the completed form was sent under cover of an email to Mr Garvie, the solicitor at JMW, on the same day. The email was not copied to Mr Sihan and there is no specific evidence that it was forwarded to him.

66. It will be recalled that Mr Sihan had sent PLS a copy of the Stevens' letter before action in June 2017, but that in the end Mr Sihan instructed Kangs rather than PLS to deal with that dispute. In the absence of any answer from the PLS file as disclosed and of any evidence from Mr Baker it is not clear whether he was aware of that letter in February 2018 or whether Mr Sihan had shown him the letter from Kuits of 15 February 2018. The emails from Mr Sihan enclosing other documents do not include either letter, but Mr Sihan said that he did discuss the full position, including the letter before action and the more recent letter, with Mr Baker at the meeting and that he filled in and signed the SPIF with the assistance of Mr Baker, who he left to draft the covering letter. He said that he believed that Mr Baker would either send a copy of the letter before action with, or include reference to it in, the covering letter. He said that because he did not see the covering letter at the time he was unaware of its content and the lack of reference to the letter before action or to the more recent letter.

67. It was put to Mr Sihan that he had agreed with Mr Baker what to say about the dispute with the Stevens and that a deliberate decision was made not to refer to the civil dispute and to mislead the Romeros by saying that it was only a planning-related dispute. It was put to him that this was why the PLS invoice included a separate charge for £800 for "our additional charges for advising regarding dispute with your neighbour and dealing with the purchasers solicitor".

68. It was put to him that this explained why the covering email from PLS stated: "We would advise that the neighbour at number 15 Fletsand Road objected to the sellers landscaping scheme at the rear of the property on the basis that it would lead to an ingress of water into her garden. Our client commissioned a report (copy attached) which confirms that the landscaping in no way adversely affected her property's drainage. In fact the report confirms that the landscaping improved the drainage in her garden. The report has been forwarded to the planning officer and our clients await confirmation from him that the landscaping condition has been satisfied".

69. The report attached was the EEG December 2017 report, which had been sent by Mr Sihan to Mr Baker before the meeting. Although there was some suggestion that the email also attached a copy of EEG's earlier email of 28 June 2017 there is no evidence for this and I reject it.

70. As regards the SPIF itself, in answer to standard question 2.1, namely "have there had been any disputes or complaints regarding this property or a property nearby?" the box "yes" was ticked and in the box where details were to be provided, it said "refer to solicitors letter" (which was intended to be and was plainly understood as a reference to the covering email). The decision to tick the yes box seems to me to have been a careful, considered decision. Further, in answer to question 3.1, asking about any notices or correspondence affecting the property or a property nearby, the box "yes" was ticked and the answer given "see 2.1".

71. On 28 February 2018 JMW asked PLS to "supply evidence of the current status of the dispute with the owner of 15 Fletsand Road and let us have copies of all correspondence". In reply, PLS stated that: "Our client commissioned a report (you have a copy), a copy of which has been sent to the planning officer. In the unlikely event of the planning officer requiring any modifications to the landscaping/drainage our client will be responsible for the costs involved. We would normally deal with this type of issue by way of a retention of say £20,000 pending the planning officer confirming there is no issue regarding landscaping/drainage. We await your comments".

72. It is suggested by the Romeros, but denied by the Sihans, that this was a conscious decision taken to avoid directly answering the request but offering to accept responsibility for any costs of compliance to divert attention away from this failure.

73. Mr Darton submitted that the reference by JMW to the "dispute" indicates that Mr Garvie must have understood from what he had been told that there was a dispute. Mr Pomfret submitted, more plausibly in my view, that it was simply picking up the wording in question 2.1 of the SPIF.

74. Matters rested there for the time being. In the meantime Mr Sihan was becoming increasingly frustrated with CEC and, by 5 March 2018, Mr Briggs wrote threatening to demand an investigation if there was any further delay in dealing with the application to vary. By 12 March 2018 he was threatening to lodge an appeal to challenge the failure to determine the application to vary if no response was received by 16 March 2018.

75. On 7 March 2018 JMW replied to PLS, saying: "In view of the potential for major groundworks we would have thought £20,000 is rather light & suggest £50,000. In any event it would be in all parties interests to get this approved by the Council. Can the Council be chased for this? We also await all correspondence in respect of the dispute please".

76. However, no such correspondence was provided and instead these issues were resolved by the insertion of special conditions in the sale contract, exchanged on 14 March 2018, without there being any retention. It is apparent from Mr Romero's email to Mr Garvie that this was

on the basis that his preferred option was for the Sihans to take on this obligation on the basis that Mr Romero trusted him to solve any problem. The special conditions were in the following terms:

"10.1 The Seller will at their own expense diligently and expeditiously carry out all works required to satisfy the local authority/planning conditions relevant to the property, to the Buyer's reasonable satisfaction, in respect of works to the garden/landscaping at the Property ensuring that all works are completed within 28 days of becoming aware of any works required."

"10.2 The Seller will engage directly with the local authority or procure their architect deals with all appropriate communications with the local authority in respect of any outstanding conditions or issues arising from the relevant planning permissions for the property & use best endeavours to bring a conclusion to any outstanding issues with the local authority all such communications being copied to the buyer and being in a format approved by the Buyer provided that if no notification is issued by the local authority within 24 months of the Completion Date then the Seller will be under no further obligation to the Buyer in this regard."

77. Special condition 6 of the sale contract provided: "Neither party can rely on any representation made by the other, unless made in writing by the other or his conveyancer, but this does not exclude liability for fraud or recklessness".

78. Completion took place on 23 March 2018.

79. Two days prior to exchange Mr Taylor produced his first preliminary report, although there is no suggestion that it was provided to the Sihans at that time. He had not inspected no 17 at that point. He recorded that the lawn was "spongey" and there was standing water at the edges of some borders. He noted that the trench dug by Mr Dorman was full of water. He recorded the change in levels in the rear garden of no 17 due to the works there, noting that the fall was now gentle, around 0.2m, across the newly raised lawn and then steeper, around 1m, down the retaining wall to the boundary. He also recorded that he had been advised by the claimants that they had a network of subsurface land drainage for their lawn, which ensured a satisfactory drained condition of the lawn at No 15 and no waterlogging occurred. I shall have to deal with this in section F(ii) below.

80. Importantly, he concluded that "overland flow of surface water runoff from no 17 towards and into no 15 was unlikely to have occurred because the undisturbed soils had an inherent capacity to absorb surface water, there was a certain degree of equilibrium within the soils, assisted by the water demand of existing trees, shrubs, plants and grass of a mature garden at no 17", that "if there were surface water runoff from no 17 towards and into no 15, it was likely to have been slow and insignificant due to the inherent attenuating capacity of the soils at no 17, but towards no 15 due to the natural slope of the landform at no 17" and that "the paved areas which surrounded the [original] dwelling at no 17 were a significant distance from the common boundary with no 15 and, as such, there was a significant zone of soils with inherent attenuating capacity to mitigate surface water runoff from no 17 towards and into no 15".

81. As regards the works to no 17 he recorded that he had been "advised by the Claimants that the Defendants stockpiled excavated material to the rear of the dwelling at no 17, then reused and spread that material to raise ground levels across no 17, then imported and spread topsoil and laid turf", that "the vast majority of the excavated material will have been firm clay which is likely to be very impermeable to water. Clay reused and spread below topsoil and

turf will have resulted in an impermeable blanket above the existing soils. The new topsoil will act as a sponge to surface water runoff, but there will be no, or no significant, percolation of surface water through the clay blanket, but there will be some attenuation in the topsoil", that "the raised ground levels at no 17 down slope in a north westerly direction towards no 15, and seepage of the surface water above the clay blanket will flow towards and into no 15".

82. As regards the new paved areas he noted that "paved areas external to the dwelling at no 17 have a granular stone base and, if the paving is not pointed, then there will be percolation of surface water into the base, as well as surface water runoff, however there will be no, or no significant, percolation of surface water through the clay blanket below the base" and that this was a particular problem "in the area between the side elevation of the dwelling at no 17 and the common boundary with no 15 where, in the gap of between approximately 1.5 and 2.0m, surface water runoff will discharge quickly because of the paved surfaces, and without attenuation, towards the common boundary, and then towards and into no 15".

83. He considered that "with the presence of firm clay soils at no 17, I consider that the soakaway [the french drain installed by the Sihans at the boundary in 2017] is unlikely to be effective, there will be no, or no significant, infiltration into surrounding soils and storage capacity is minimal and unlikely to empty".

84. Having referred to the EEG report he concluded that "it is not rates and volumes that are important in themselves, it is the impact from the changes as a result of the development at no 17 which have altered the overland flow of surface water runoff from no 17 towards and into no 15".

85. His conclusion was that "the development by the Defendants at no 17 has fundamentally altered and destroyed the natural equilibrium and inherent capacity of the soils at no 17 to absorb and attenuate surface water runoff" and that "the Defendants have reused clay and have raised ground levels significantly, which have contributed to, and exacerbated the consequences of, surface water runoff from no 17, towards and into no 15".

86. I have referred to this preliminary report in some detail because it is apparent from his subsequent reports and his evidence that his opinion has remained the same ever since. His second report, written in May 2018 after he had inspected no 17 as well as no 18 and no 20 Torkington and after he had seen a further topographical survey undertaken in late March 2018, was substantially to the same effect. He noted that the slope of the rear lawns at no 18 and no 20 Torkington towards no 17 was gentle, that the rear lawn at no 17 sloped down towards no 20 Torkington as well as towards no 15, and that the rear lawn at no 17 and no 20 Torkington displayed some standing water.

87. He confirmed from his inspection the extent of the material which would have been required to have been excavated to allow the foundations, floor slab and associated works to be undertaken to create a new property with a footprint some 4 times bigger than its predecessor.

88. Having inspected the paved areas at no 17, he noted that "the paving has close tolerance sawn edges with tight joints and percolation of surface water through joints and into the base does not occur in some places, in particular the large rear patio and where surface water runoff will be onto the rear lawn of no 17".

89. He considered that "the appropriate remedy will be for surface water runoff and land drainage works to be undertaken at no 17, because that is the source of the flooding nuisance, and the actions complained of were perpetrated by the First Defendants. In my opinion, the First Defendants' agents should be responsible for undertaking investigations, preparing designs

and specifications for these works, and obtaining relevant approvals prior to construction of these works". He also confirmed that "if instructed, I would be prepared to liaise with the First Defendants' agents to discuss existing technical issues and their proposed works to abate the flooding nuisance".

90. This report was sent at the time to the representatives of the Sihans and the Romeros.

91. Returning to the chronology, in between exchange and completion Kuits wrote to Kangs on 22 March 2018, stating that they had learned about the prospective sale of No 17 from a search at HM Land Registry. They asked Kangs to confirm that the buyers had been made aware of the dispute and that recent correspondence had been disclosed, failing which they would write to the lender's solicitors to make them aware of the dispute on the basis that it was an ongoing nuisance claim. They said that the estimated value of the claim was in the region of £80,000 to100,000, without providing details. Kangs did not respond until 26 March 2018, objecting to any attempt by Kuits to write to the purchasers unilaterally and suggesting that they should agree the terms of a joint letter. However nothing materialised and eventually, on 9 May 2018, Kuits did write to JMW direct to notify them of the Stevens' claim.

92. Before that and quite clearly, I am satisfied, to guard against the risk of any such letter taking the Romeros by surprise, on 5 April 2018 Mr Sihan emailed the Romeros' representative to "confirm the position with the neighbour". This lengthy email referred for the first time to the Sihans being in a "legal dispute" with the Stevens. It referred to the fact that in response to Kuits' letter of February 2018 seeking access for Mr Taylor to inspect this had taken place on 28 March 2018.

93. The email continued: "This legal dispute could lead to a potential civil claim made against me and, if that were to occur, because of the remedial works that might be required the neighbour's solicitors will likely add Mr and Mrs Romero as a defendant for that purpose. I do not think that a claim is likely, but if there is I would like to make very clear that I will indemnify Mr and Mrs Romero of any costs arising from the litigation and I will deal with any case brought. To that end I have been informed by the neighbour's solicitors that the value of any intended claim would be in the region of £100,000. … As you have probably gathered, this is just a further example of my neighbour being awkward and obstructive in a manner that I have experienced before. I welcome your solicitor or yourself to speak with my solicitors who will be dealing with this matter to get any clarification and reassurances you require".

94. Mr Sihan suggested that he had already informed Mr Romero of the planned inspection by Mr Taylor and the potential claim in the course of a visit by Mr Romero to the property to discuss the provision of another bathroom. That was disputed by Mr Romero and I accept that denial, not least because there was no reference to any such conversation in the email. It appears that there was a delay in the Romeros moving in after completion and I am satisfied that Mr Sihan took this opportunity to arrange for Mr Taylor to inspect without the Romeros' knowledge.

95. It is also clear from the language used that this letter was drafted by Kangs; it reads like a letter drafted by a lawyer trying to make it seem as if it was written by their client. It was certainly not written by Mr Sihan. It was clearly intended to reassure the Romeros. The Romeros plead that this letter amounted to a unilateral offer of an indemnity against both the claim and their legal costs of the claim on the basis that they provided consideration for the offer by refraining from rescinding the sale contract for misrepresentation. That is disputed by the Sihans. There is no evidence that the Romeros responded to this email in any way

such as, for example, making contact – directly or indirectly – with Kangs agreeing that they should deal with any claim on their behalf.

96. On 29 March 2018 the Sihans lodged an appeal against the failure by CEC to determine the application to vary. This appeal was not finally determined until September 2020. However, in September 2018 Mr Briggs had informed CEC that the parties had reached an agreement whereby the Sihans would undertake some remedial works. CEC indicated that it was willing in principle for this to be dealt with as part of the application to vary. What happened was that the Stevens and the Sihans had agreed on a without prejudice save as to costs basis to instruct Mr Taylor to provide a further report which would bind them as an expert determination but that the Romeros, not unreasonably in my view, were not prepared to agree also to instruct him on that basis. All three parties did, however, subsequently agree to his being instructed to provide a further report on a joint basis with a view to considering an appropriate remedial works scheme.

97. To assist him in this, it was agreed that a ground investigation should be undertaken to the rear garden at no 17 by geotechnical consultants and this was undertaken in August 2019 by a firm known as Solmek. The boreholes to the no 15 side revealed topsoil to around 0.3m which, it is clear from the evidence was good quality good draining topsoil supplied by a third party, but below that a further layer of made ground to around 2m of "soft consistency … very sandy slightly gravelly clay", below which was found the natural unmade layer of firm consistency clay ground and below that natural unmade sands. The boreholes to the no 19 side and to the middle rear on the no 20 Torkington side had similar, but shallower, layers of topsoil and clay made ground, not surprisingly given the lesser need to increase the levels the further towards the boundary with no 19. The two trial pits also undertaken showed similar findings. The results could be used to assist any soakaway design by providing soil infiltration rate calculations.

98. Mr Taylor's third report was provided on this joint basis on 2 October 2019. He noted that the tests on the made clay layer indicated "very soft uncompacted ground" of low permeability. He suggested that "surface water will run off from the ground surface, some will be attenuated in the grass and topsoil, but only a limited amount will be absorbed in the made ground". He stated that "the cohesive clay deposits are likely functioning effectively as an impermeable layer, and triggering surface water runoff and/or ground water flow due to their low soil infiltration rate". He stated that "therefore a significant amount of surface water will flow from the made ground above the clay either at the interface with the made ground, or at the interface between the former and more recent made ground, especially where the latter has not been compacted and consolidated, which was confirmed by the insitu testing in the made ground".

99. He concluded that because of the impermeable clay soils underlying the properties a soakaway system would not work and that other options were either an interceptor land drainage system within the made ground, discharging "informally to the existing drainage by gravity … or a submersible pump" or a deep borehole soakaway into the natural sand below the clay layers, although he identified the risk that this might cause groundwater to rise through the soakaway and make the problem worse. In summary, he said that the options were limited and that any solution would need to be "designed, specified and scheduled".

100. He was asked to explain his views further in a telephone meeting with all three solicitors present. He confirmed that any pumping of water from the soakaway would be intended to channel the water into the main drain. He acknowledged that in his opinion the deep borehole soakaway would not work due to the risk of encountering groundwater. He said that

the existing drainage system (at no 15) could assist in alleviating the water rising to a detrimental level. It was suggested by the Stevens' solicitor that the pump at no 15 was "failing on a daily basis".

101. He is recorded as saying that "the redevelopment at number 17 has disturbed the site below ground level. He said he doesn't know what has happened there but it had changed the equilibrium. He said that it may be that that has disturbed and aggravated the situation. He said the water is sitting on top of clay and wants to seep out to the sides. He said that the land at the side is lower and so the water can get out that way". This is important because it shows that Mr Taylor was frankly admitting that he did not know precisely what had happened but was nonetheless clear that in his opinion there was a cause and effect between the works to no 17 and the flooding experienced by no 15.

102. He was asked whether restoring the land to its previous levels would resolve the situation. He said not, because "the water has to go somewhere and it wouldn't take away the water ingress. He said that we cannot overcome the disturbance that has already been made from the building of the property by the side of the house and the works etc".

103. In answer to the question why he had not provided a clear recommendation for a remedial works solution at that point he explained that following the meeting he was awaiting further instructions to proceed with the design of the remedial scheme but that none were received. I am unable to know why that did not happen, because the correspondence is privileged, save that I have been told by agreement that the Sihans did say in December 2019 in without prejudice save as to costs correspondence that they were content to proceed on advice of Mr Taylor.

104. Negotiations continued and a mediation took place in February 2020 which was ultimately unsuccessful but, after which and in expectation of a settlement, the Sihans made an on account payment of £40,000 which was reclaimed in the counterclaim and which must be set off against the Stevens' claim.

105. After this it appeared that litigation was inevitable and this claim was issued, inexplicably, in the London Queen's Bench Division in June 2020 and, after some delays, duly transferred to the Manchester TCC after which the first case and cost management hearing took place in September 2021 at which directions down to trial in October 2022 were given.

106. In the meantime, on 10 June 2020 the Romeros had written to the Stevens saying that they had decided to "engage contractors at their own cost to review what works will be appropriate to resolve any issues there may be in relation to water run off and to undertake those works" and then to seek to recover the costs from the Sihans. They said that they had "engaged a project manager, a specialist ground engineering consultant and a landscape architect" who were attending site that month and that an update would be provided after they had reported back. They made it clear that this was without admission of liability.

107. Throughout this period of time there was an ongoing correspondence between Mr Briggs and CEC which shows that both hoped that the appeal could be dealt with on an agreed basis so long as the parties to this claim were able to agree on a remedial works scheme. By December 2019 CEC was pressing Mr Briggs for details, saying that unless provided it would have to make a decision. They were reassured by Mr Briggs that it was expected that a solution would be agreed. By 2 March 2020 the position was reached whereby Mr Briggs was advising Kangs that "the only solution that guarantees complete and final closure is to reduce the garden levels and withdraw the planning application. I recommend Cheshire East Council are instructed accordingly this week. The work can then be carried out in a relatively

short period of time without any impact on the structural integrity of the house". The alternative was to submit further information for a remedial scheme in support of the appeal.

108. However, the Sihans did neither, despite Mr Briggs assuring CEC on 20 March 2020, just 3 days before the expiry of the two year longstop date in clause 10.2 of the sale contract, that a schedule of works to reduce levels was being drawn up.

109. In September 2020 the Sihans' application for retrospective permission for the change in levels was refused. The planning officer's report recommended refusal on the basis that the Solmek report substantiated the view that the works to no 17 had caused flooding to no 15 and that the Sihans had provided insufficient evidence to prove the contrary.

110. The Sihans had a right of appeal to the Secretary of State but chose not to exercise it. There is no evidence of any open communications between the Sihans and the Romeros concerning any appeal and who might do so. It is, however, apparent from communications between the Romeros' solicitors and CEC that the Romeros were aware of the position and, by December 2020, were also aware that CEC was to proceed with formal enforcement action unless action was taken.

111. In February 2021 a company known as Invek Surveys were instructed by the Sihans' solicitors to survey the drainage layout of no 15. The Sihans contend that it showed blockages and root infestations in the drains and pipes at no 15 and that the land drainage system installed at no 15 in 2018 by Lindow was ineffective because it was too low down and within the impermeable ground strata

112. On 1 March 2021, CEC issued an enforcement notice in respect of the property on the basis that "due to the increase in levels to the rear of the property there has been a detrimental impact on the immediate neighbouring property number 15 Fletsand Road and potentially other properties in the vicinity as a result of the inadequate surface runoff[3] that is being caused by the development". The work required to comply was effectively to reinstate the rear garden to its pre-development levels.

113. On 30 March 2021 the Romeros submitted an appeal. The single ground of appeal was under ground (f), to the effect that "the steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections". No appeal was submitted either under ground (a) (that planning permission should be granted for what is alleged in the notice) or ground (b) (that the breach of control alleged in the enforcement notice has not occurred as a matter of fact). The appeal statement of case, drafted by P4 Planning, planning consultants engaged by the Romeros, argued that: (a) the question of the impact of the works on no 15 should be determined in the civil litigation; (b) there was no evidence that restoring the levels would affect any flooding to no 15; (c) there was no evidence or rationale for the individual steps required.

114. On receipt, the planning inspectorate noted that the Romeros had not appealed on ground (a), making the point that this meant that the planning inspector could not consider the planning merits. This appears to have been a standard rather than a bespoke response. P4 Planning explained in an email to CEC, copied to the Romeros' solicitors, that the decision not to appeal on ground (a) was made in order to avoid "undermining" the ongoing litigation proceedings.

115. This explanation makes some sense at a basic level. At this stage the Romeros had not obtained their own expert evidence and were seeking to adopt an essentially neutral position

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[3] This must in context mean either excessive surface runoff or inadequate mitigation against surface runoff.

in the litigation. I can understand a concern that any appeal on the basis of a positive case, either that the works had not caused the flooding to no 17 or that the works had caused flooding but that a remedial drainage scheme was all that was needed, might be used against them in the litigation. However, as against that the Romeros had already stated, in open correspondence, that they were going to undertake remedial works and seek to recover the cost from the Sihans, so in that respect they had already committed themselves.

116. They must have been aware that they had a duty to act reasonably to mitigate their loss. The evidence indicates that by this stage all that the Romeros had done was to obtain two alternative remedial works schemes for works to no 17 from a company known as Saville Landscape Design ("Saville") which had been costed by a local landscaping contractor known as Peter Ashley Limited ("Ashley").

117. Option 1 involved maintaining the current levels at no 17 and providing: (a) a perimeter french drain to run around the perimeter of the new garden, with a pumped connection into the existing drainage system; and (b) a slot drain to run around the perimeter of the existing external paved areas, again connecting into the existing public drainage system. It was costed by Ashley at £55.020. However, it is common ground that discharging land drainage from the proposed french drain serving the rear garden into the public drainage system is not permitted without the consent of the water undertaker, which is unlikely to be granted. In the circumstances none of the experts have been able positively to recommend this as an option.

118. Option 2 involved reducing the ground levels to the rear garden of no 17 to accord with the original planning consent and, thus, comply with the enforcement notice. In order to maintain the new house and paved areas at their as-constructed height there would have to be a retaining wall to accommodate the drop in height from the house and paved areas to the rear lawn. This option would therefore allow the lawn to remain level across its width and depth. There would again be the same french drain around the rear garden perimeter and the same slot drain around the paved area, with the same problem that both are shown as connecting to the public sewer. It was costed by Ashley at £171,614, reflecting the substantial increased costs associated with the levelling and construction of the retaining wall.

119. Both, however, were subject to detailed specification from an engineer and porosity tests. The obvious inference from this, and the absence of any evidence that the Romeros had obtained any investigative work or professional design input, is that Saville had just been asked to come up with some proposals as landscape designers.

120. It is reasonably obvious, therefore, that the Romeros had no convincing evidence to put before the planning inspector to support any positive case on ground (a) or indeed any ground. It seems clear that they continued to see this as Mr Sihan's problem to resolve and were not keen to undertake any works to the rear garden which would result in the loss of the flat rear lawn.

121. Since it is pleaded by the Sihans that their failure to appeal on ground (b)[4] amounted to a failure to mitigate or to a break in the chain of causation, on the basis that had it done so and provided the evidence set out in Mr Barber's report the appeal would probably have succeeded, it is worth noting that: (i) the Romeros did not instruct their own expert until November 2021; whereas (ii) the Sihans had obtained a report from Mr Grime on 16 March 2021, but did not write to the Romeros to say that they should appeal on ground (a) or ground

[4] In closing submissions Mr Darton sought to argue that the Romeros ought to have appealed on ground (a), and that the reference to ground (b) was an error. It was clearly not an error, since the terms of ground (b) were expressly pleaded. I shall address later whether the Sihans should be permitted to argue ground (a) as a further or alternative argument.

(b), whether at all or on the basis that they could use the Grime report to support the appeal, and notwithstanding that they were sent the appeal and supporting statement of case on 13 April 2021. Mr Grime's first report was not sent to the Romeros until August 2021 and then only on a without prejudice save as to costs basis.

122. On 11 October 2021 the Romeros' appeal against enforcement was dismissed. The reasons are short and succinct. Given the limited basis of the appeal, the planning inspector had no difficulty in concluding that the works specified were necessary to remedy the breach of planning permission by importing materials with resulting raised levels. She concluded that lesser steps, i.e. the construction of land drains and/or a pumping station, might mitigate the effect of the unauthorised development but would not remedy the breach of planning control.

123. On analysis, given that the Sihans' appeal against the refusal to vary the conditions had failed on the basis that the evidence submitted by the Sihans was not sufficient to support their case that the works to no 17 had not led to flooding to no 15, it is obvious that the appeal against enforcement could only have succeeded had it been made on the basis of ground (a) and the appellant had been able to satisfy the planning inspector either that: (i) the works had not caused or contributed to or exacerbated any flooding to no 15; or (ii) that there was an acceptable remedial scheme which could be implemented without the need to reinstate the previous levels and made a condition of such permission, which was of course the option suggested by CEC as long ago as September 2017. It is difficult to see how (i) could have succeeded in the face of the reports submitted by the Stevens from Mr Taylor unless the planning inspector also had reports equivalent to those now produced by Mr Grime and/or Mr Barber and was satisfied, following an investigation, that they were to be preferred to Mr Taylor's opinion. It is also difficult to see how (ii) could have succeeded without a properly designed scheme supported by a reputable engineer, which is what Mr Taylor had suggested as long ago as October 2019 but which had not been taken up by any party. The Saville drawings were plainly insufficient for such purpose.

124. Following the unsuccessful appeal the Romeros suggested to CEC that it should suspend enforcement pending the outcome of this litigation. CEC was unwilling to do so, on the perfectly understandable basis that there is no direct connection between the breach of planning control and this litigation, but neither have they taken any positive steps to compel the Romeros to comply.

125. In April 2022 the Romeros wrote to CEC, saying that they had identified a contractor to carry out the works, which were scheduled to commence sometime after the end of August 2022 with an estimated duration of 6 to 8 weeks. This, presumably, was a reference to Saville. At trial I was told that the works were currently scheduled to take place the following month, in November 2022.

126. However, as I observed at trial, that seemed unrealistic given that following receipt of Mr Barber's report of August 2022, explaining why both options 1 and 2 could not be implemented in their current form, and suggesting various options, in September 2022 the Romeros had obtained 3 alternative proposals, following the various options identified by Mr Barber. In his report Mr Barber identified three alternative variants on option 1 which did not involve connecting into the public drainage system.

127. The first variant was to discharge water from the french drain into a vertical borehole drilled down to a more impermeable layer. This, however, according to Mr Taylor has the disadvantage that if, as seemed likely, there was groundwater standing in the layer of sand below the layer of clay, the effect of puncturing the impermeable clay layer would be to allow groundwater to rise to the surface which, clearly, would not be appropriate. Whilst the

other experts said that since the Solmek investigation did not include porosity tests at depth this option could not be positively ruled in or ruled out without further investigation, it is clear that they are unable to recommend it on current information.

128. The second variant was to discharge water from the french drain into an underground storage vessel from which it could be pumped into an above ground irrigation system as a rainwater harvesting for re-use in watering the garden during dry periods. The experts all agreed that this would require detailed engineering design to confirm that the system would have sufficient rainfall catchment and storage capacity, in terms of the size and extent of the french drainage system, and sufficient capacity within the underground tank and the irrigation tank.

129. It appears likely that to design and specify such a system a drainage engineer would first need to know what the design was intended to achieve in terms of catchment and storage capacity. It is common to do so by reference to the rainfall return events against which protection is sought. Whilst it might be possible to do so by reference to the highest rainfall events suffered over the period from the beginning of 2016 to the end of 2021, as being the rainfall levels which, on the Stevens' case, have led to flooding, that is not something which has been investigated by the experts or canvassed at trial.

130. The third variant was to discharge water from the french drain into a stone catchpit. This was not recommended by Mr Taylor on the basis that the limited attenuation volume of such a catchpit would make it a less reliable or certain long-term method of holding such water. The other experts also considered that this would not provide a sufficient soakaway, given that it would be formed in the relatively impermeable clay layer.

131. Mr Barber also considered alternative methods by which in his opinion the enforcement notice could be complied with. In the end he agreed that option 2, or some variant of it, with a suitable drainage scheme as discussed above, would be the most appropriate.

132. Mr Barber also considered what remedial works would be needed to no 15 if the problems with flooding were not caused by the works at no 17. In short, he considered that it would be necessary to strip the top level of grass, topsoil and unmade clay down to a suitable depth which allowed a land drainage system to be installed in replacement free-draining material. Again, however, there would be a need to identify an option to the unlawful connection to the public sewer. He suggested as an alternative a borehole, subject to a satisfactory porosity test. Again, however, this would have the disadvantage of the risk of introducing groundwater to the surface and cannot therefore be recommended in my view on current information.

133. Following service of Mr Barber's report the Romeros instructed Saville to prepare revised detailed proposals on the basis of option 2 with each of the three alternative drainage schemes identified by Mr Barber. Although each is the subject of a detailed drawing produced in September 2022, each drainage design shown is not worked out – not surprisingly again since it has effectively been "lifted" from Mr Barber's report and not made the subject of a detailed design or specification from an engineer. Thus, each is said to be subject to the final specification of an engineer and to porosity tests. Ashley produced a costing for these works, including undertaking porosity tests after which the appropriate drainage works could be identified and costed, in the sum of £159,227. In his report Mr Barber had suggested that the indicative costs of whichever drainage works was carried out was likely to amount to some £27,000 (if one was to include a slot drainage scheme around the paved areas, which he agreed was appropriate above the retaining wall if levels had to be reduced, but not otherwise). He had also queried some of the costs quoted by Ashley on the basis that some –

relatively modest – savings could be made. Neither Mr Taylor not Mr Grime had been asked to or had undertaken any similar exercise.

134. It was in those circumstances that in closing submissions I suggested, and the parties agreed, that if I was to decide that in principle one of these options should be the subject of an injunction or an award of damages it would be necessary to adjourn the determination of the precise terms of any injunction and/or any assessment of damages, given that until the scheme had been the subject of an engineered design and specification and costing and until the parties had been able to comment thereon it would be premature to make any such order.

135. In closing submissions I also suggested, and the parties also agreed, that I should write to CEC suggesting that they considering pausing any enforcement action until I had produced my judgment in this case. Although there is no legal or direct connection between this civil action and the planning enforcement notice, it seemed to me to be desirable that CEC should have the benefit of seeing this judgment before deciding whether or not to require the Romeros to comply with the existing notice as is or with modification. CEC agreed, in my view sensibly and pragmatically, to do so.

D. Pleaded cases

136. The Stevens' pleaded case, in summary, is that:

(a) Since shortly after the works began there has been consistent and severe flooding to the garden of no 15 as a result of surface water runoff from no 17, that they made the Sihans aware of the problem shortly after it first occurred, that they made the Sihans and the Romeros aware of the continuing problem and what needed to be done later, and that nothing sufficient has been done ever since to control or mitigate the surface water run-off.

(b) In the circumstances, the Sihans are guilty of having caused a nuisance which they failed to take reasonable steps to abate before selling no 17 to the Romeros and for which they remain liable. They are also guilty of negligence by raising the ground levels without regard to its impact on surface water run-off and by failing to take effective remedial steps once it became apparent that the french drain was ineffective.

(c) In the circumstances the Romeros are guilty of having continued or adopted the nuisance by failing to take steps to prevent, control or mitigate the surface water run-off.

(d) Their primary case is that the ground levels should be returned to the levels as they existed before the works to no 17 and/or that proper remedial works are required to prevent, control or mitigate the surface water run-off and that the Romeros ought to be ordered by injunction to undertake or to allow access to undertake the necessary works. They seek damages against both the Sihans and the Romeros for the cost of the remedial works and for distress, inconvenience and loss of amenity.

137. The Sihans' pleaded defence, in summary, is that:

(a) The works which they undertook to no 17 did not have any material impact on no 15.

(b) The cause of any problems to no 15 was its existing location and condition, in short the fact that it is at a lower level to surrounding properties, including no 17, so that there is a natural surface water run-off and percolation effect, coupled with its pre-existing poor natural drainage.

(c) The Stevens' complaints about the nature and extent of the flooding and other problems are over-stated insofar as they allege that they were not present before the works to no 17 and present to such a serious extent thereafter.

(c) The Sihans cannot be liable at law for natural surface water run-off or percolation. The Sihans were entitled to landscape their garden as they chose. It is the Stevens' responsibility to provide sufficient drainage for their own property.

138. The Romeros' pleaded defence, in summary, is that:

(a) They have no knowledge of events preceding their purchase of no 17.

(b) The Sihans failed to disclose the Stevens' complaints to them before their purchase of no 17 (other than a historical objection about the initial planning permission application).

(c) They have always been ready, willing and able to permit a suitable remedial works scheme to be undertaken at no 17 but have never been presented with any such scheme. They contend that they have reasonably relied on the Sihans' assurance that they would resolve the problem.

139. As between the Sihans and the Romeros there are rival additional claims both ways.

140. The Romeros contend that as between them and the Sihans it is clearly the latter who created the nuisance and caused any damage to no 15 so that they ought to fully indemnify the Romeros under the provisions of the Civil Liability (Contribution) Act 1978 ("**CLCA 1978**").

141. The Romeros also contend that the Sihans are in breach of the sale contract.

142. The Romeros also contend that the Sihans are guilty of fraudulent or negligent misrepresentation and that these induced them to enter into the sale contract.

143. Finally, the Romeros rely on the assurance given by the Sihans in the email of 5 April 2018 as constituting an indemnity for which the former gave consideration by refraining from rescinding the sale contract.

144. The Sihans dispute that they did not provide a reasonable answer to the pre-contract enquiries.

145. The Sihans contend that insofar as they are held liable for damages for the period after March 2018 they are entitled to an indemnity or a contribution under the CLCA 1978 on the ground that the Romeros have failed to abate any nuisance after they acquired no 17. They argue that the Romeros came under a measured duty of care to the Stevens after they acquired no 17 to take reasonable steps to abate any nuisance and that they have failed to do so.

146. The Sihans also seek to rely on special condition 10.2 as providing a "longstop" contractual end date to their obligation to take any steps under clause 10 and contend that as at that date they were not in breach of any obligation under that clause.

147. In their response the Romeros take issue with the Sihans' construction of and reliance upon special condition 10.2.

E Relevant legal principles

148. Counsel were largely agreed as to the relevant legal principles, so that there is no need to make extensive reference to those which are well-known and not in dispute. There was, however, a lively dispute between Ms Atkins and Mr Darton as to whether any liability for nuisance on the part of the Sihans could be strict or based only on breach of the measured duty of care and I will examine this topic first.

(i) The nuisance claim

149. Rather than refer extensively and unnecessarily to authority for well-established propositions, it is most convenient to refer to the summary in *Clerk & Lindsell on Torts (23rd edition) chapter 19 – Nuisance and Rylands v Fletcher* for the key principles.

150. Mr Darton's starting point is that since this case is all about the discharge of water falling as rainfall from no 17 down onto no 15, it is a case of a natural nuisance in respect of which the Sihans owed no more than a measured duty of care to the Stevens. This measured duty was summarised by Jackson LJ in *Vernon Knight Associates v Cornwall Council* [[2013] EWCA Civ 950 (see *Clerk & Lindsell* at 19-20) as follows:

> (i) A landowner owes a measured duty in both negligence and nuisance to take reasonable steps to prevent natural occurrences on his land from causing damage to neighbouring properties.
>
> (ii) In determining the content of the measured duty, the court must consider what is fair, just and reasonable as between the two neighbouring landowners. It must have regard to all the circumstances, including the extent of the foreseeable risk, the available preventive measures, the costs of such measures and the resources of both parties.

151. Mr Darton relies upon *Clerk & Lindsell* at [19-124]. As relevant to this case, it says that:

> "Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land on a lower level cannot complain of water naturally flowing or percolating to his land from a higher level[625]. Nevertheless, the higher proprietor is liable if he deliberately drains his land on to his lower neighbour's land, and this appears to be so if the water is caused to flow in a more concentrated form than it naturally would as the result of artificial alterations in the levels and contours of the higher land[627] … But if rainwater happens to overflow on to the claimant's land, as a result of an obstruction on the defendant's land, there will be no liability providing that the obstruction did not constitute non-natural user and that what occurred had not been foreseeable[629]."

152. The case cited in footnote 625 is the decision of the Court of Appeal in *Palmer v Bowman* [2000] 1 WLR 842 which is indeed, as Ms Atkins accepted, authority for the proposition stated.

153. Mr Darton also relied on two of the cases cited in footnote 629, *Arscott v the Coal Authority* [2004] EWCA Civ 892 and *Ellison v Ministry of Justice* [1996] 81 BLR 101.

154. *Arscott* was a case about flooding to houses adjacent to the River Taff in South Wales which, it was accepted at trial as a result of computer modelling, had been caused by the defendants depositing coal waste upon a field adjacent to the river to create a playing area. The claimants lost their claim on the basis that it had not been reasonably foreseeable at the time of the works that they would cause flooding. Mr Darton relies on the legal analysis contained in the judgment of Laws LJ (with whom the other members both agreed) at [23] – [31], in particular [27] – [28] where Laws LJ referred to the relation between the notion of a natural use of land and the notion of a reasonable use of land, saying that "it may broadly be said that

a landowner will not be liable in nuisance for the consequences of what would be recognised as a natural use of his land by him, unless the quality or extent of that use by him was unreasonable". The correctness of this proposition cannot be and is not disputed – see *Clerk & Lindsell* at [19-35].

155. *Arscott* is also a helpful authority in fleshing out the requirement that damage be reasonably foreseeable as a condition of establishing liability in nuisance. This requirement was authoritatively recognised by the House of Lords in *Cambridge Water Co v Eastern Counties* [1994] 2 AC 264 – and see again *Clerk & Lindsell* at [19-38]. It is particularly useful because it contains some helpful observations about how a court should approach the issue of reasonable foreseeability. It confirms that: (a) the issue of reasonable foreseeability is a question of fact not one of law; (b) the question is what was reasonably foreseeable at the time of the nuisance, not at a later date; (c) it is reasonable to enquire what those involved at the time did in fact foresee; (c) Laws LJ plainly approved the succinct statement by the trial judge that "there is a difference between what is theoretically capable of being foreseen and what is reasonably foreseeable"; and (d) an event may be reasonably foreseeable even though the precise mechanics of its causation are not, but that there must be "some understanding of the chain of events which is putatively foreseen; otherwise we are looking not at foresight, but divination" [58].

156. In this case, as well as in the earlier decisions of HHJ Bowsher QC in *Ellison v Ministry of Justice* (above) and the Court of Appeal in *Holbeck Hall Hotel v Scarborough Borough Council* [2000] 2 All ER 705, the court was not persuaded that it was reasonable for the defendants at the time to have undertaken the further investigations which would have revealed the reasonably foreseeable risk and, hence, they were not held to have presumed knowledge of such risk.

157. However, Ms Atkins submitted, correctly in my view, that in a case such as the present which involves, on her case, a continuing problem, the question of reasonable foreseeability is not a once and for all question, because knowledge gained after a first flooding event may be relevant to the reasonable foreseeability of continuing flooding.

158. Returning to [19-124] of *Clerk & Lindsell*, footnote 627 refers the reader to [19-131] of the same publication, entitled "Construction work". Ms Atkins referred and relied upon what is said there which, as relevant to this case, is that:

"Where the occupier of land placed a quantity of earth against the wall of his building, so as to cause rain-water to percolate through the wall of his neighbour, he was held liable on the ground that, "if any one by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured[650]".

159. The footnote refers to *Hurdman v North Eastern Railway Co* (1878) 3 C.P.D. 168, a decision of the Court of Appeal which, as Ms Atkins observed, was cited by Viscount Maugham in *Sedleigh Denfield v O'Callaghan* [1940] AC 880 as one of three cases in support of the proposition that: "The distinction between a natural use of land or of water flowing through it and the consequences of constructing some artificial work on land which alters the flow of water and causes damage to a neighbour has been drawn in a number of cases".

160. In short she submits, and I accept, that since the essence of the Stevens' case is that the flooding to no 15 is caused by the increase in water flows from no 17 due to the Sihans'

construction works this principle will apply and enable her to establish her case without needing to prove breach of the measured duty if she can prove her factual case.

161. Ms Atkins also referred to the three-pronged distinction between liability for causing a nuisance, liability for continuing or adopting a nuisance and liability for omitting to remedy a nuisance arising without any act of the defendant within a reasonable time after becoming or ought to have becoming aware of it. This three-pronged distinction was drawn by Rowlatt J in *Noble v. Harrison* [1926] 2 K.B. 332 at p. 338, referred to by Megaw LJ in his judgment in *Leakey v National Trust* [1980] Q.B 485 at p.516.

162. *Clerk & Lindsell* refers to liability for creating a nuisance at [19-39] to [19-41], distinguishing between three different situations, the third of which, the rule in *Rylands v Fletcher*, is not relevant here. As regards one and two the author says this.

163. First, "If the defendant deliberately or recklessly uses his land in a way which he knows will cause harm to his neighbour, and that harm is considered by a judge to be an unreasonable infringement of his neighbour's interest in his property and therefore an unreasonable user by the defendant of his property, the defendant is liable for the foreseeable consequences. This proposition covers all those cases of obvious or "patent" nuisances, and they are peculiarly the cases which call for prevention or prohibition by injunction. It is no defence that the defendant believed that he was entitled to do as he did or that he took all possible steps to prevent his activity from amounting to a nuisance. In this sense, and in this context, it is correct to say that "at common law, if I am sued for nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it …"

164. Second, "If the defendant knew or ought to have known that in consequence of his conduct harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In such case the defendant is liable because he is considered negligent in relation to his neighbour, and here nuisance and negligence coincide. Whether his liability is described as falling under one legal rubric or the other would seem to be only a difference of words".

165. This passage is useful in demonstrating that it is important to consider the defendant's actual state of mind and also what a reasonable person in his position ought to have foreseen when deciding whether or not he is liable in nuisance. However, the second situation is not a measured duty of care case as opposed to a case where the existence and extent of the duty is referable to what is reasonably foreseeable as at the time of creation of the nuisance.

166. The case of creating a nuisance is distinguished from the case of adopting or continuing nuisances, which is considered at [19-42] on the basis that the measured duty of care applies to such cases. It is further discussed in the section entitled "Occupier" at 17-75 and 17-76, where it says that: "A person who becomes the occupier of land with a nuisance already upon it is liable for the continuance of the nuisance, if he knows or ought to have known of its existence", that "this amounts to a duty to abate the nuisance, which is in the nature of a duty of care to neighbours" and that "the standard of care is, exceptionally, measured subjectively with reference to the defendant's actual capacities and circumstances and not with reference to those of the "reasonable man"". It is common ground that if the Romeros are liable to the Stevens it can only be on this basis.

167. The further question which arises is whether, if the Sihans caused a nuisance, they remain liable for that nuisance even after selling no 17 to the Romeros. *Clerk & Lindsell* considers this question at [19-70] and says this:

" … the person who originally created the nuisance remains liable for all the damage flowing from its continuance, even though by reason of his not being in possession of the premises he is unable to prevent their continuance. "If a wrongdoer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it.": *Roswell v Prior* (1706) 12 Mod. 635 at 639.

168. Further, it is clear in my judgment that clause 10.1 of the conveyance gave the Sihans sufficient right and control to enter onto the land and undertake the necessary works so long as they fell within the scope of that clause and so long as the Romeros did not object. Thus, this is not a case where once the Sihans had conveyed the land to the Romeros they had no continuing rights or obligations in relation to any nuisance which they had created or adopted or continued before the conveyance and which fell within the scope of clause 10.1.

(ii) Injunction

169. There is no significant dispute between the parties in relation to the applicable principles. Since, however, the grant of an injunction is a discretionary remedy, in deciding whether or not to grant an injunction and, if so against whom and on what terms, I need to refer briefly to the principles.

170. In this case the primary relief sought by the Stevens is the grant of a mandatory injunction requiring the Romeros to undertake works to no 17, as to which *Clerk & Lindsell* says this (at paragraph 28-05): "The grant of a mandatory injunction, which is an injunction in positive terms requiring the defendant to take some specific action involving, typically, the carrying out of certain works, on the other hand, can never be "as of course" and depends upon a number of factors in addition to those which may affect the grant of prohibitory injunctions". A number of general principles as relevant to this case are found in the judgment of Lord Upjohn in *Morris v Redland Bricks* (1970) AC 652, helpfully set out in *Clerk & Lindsell* at paragraph 28-14 ff.

171. First, a mandatory injunction can only be granted where the claimant shows a very strong probability that grave damage will accrue to him in the future if the intervention of the court is denied.

172. Second, the damage which will follow a refusal of an injunction must be such that damages awarded in respect of it would not be a sufficient remedy.

173. Third, relief will be refused where compliance by the defendant would be illegal.

174. Fourth, relief will be refused where the cost of compliance by the defendant would be excessive.

175. Fifth, the defendant must know exactly what he has to do, not just as a matter of law but as a matter of fact, so that in carrying out the order of the court he can give his contractors the proper instructions.

176. A further point arises because, although the Romeros have since May 2020 indicated a willingness to undertake remedial works, they have not done so. In her opening submissions Ms Atkins referred to *Snell's Equity* 34th edition at paragraph 18-028 for the proportion that: "In cases where the defendant has already infringed the claimant's rights, it will normally be appropriate to infer that the infringement will continue unless restrained: a defendant will not avoid an injunction merely by denying any intention of repeating wrongful acts".

(iii) The Romeros' contribution claim

177. Again there is no significant dispute in relation to the relevant principles but because there are three separate claims, all disputed, for misrepresentation, breach of contract and under an alleged indemnity, I need to refer briefly to the principles.

(iv) Misrepresentation

178. Both Mr Darton and Mr Pomfret referred me to *Chitty on Contracts* 34th edition paragraphs 9-006 onwards for a convenient summary.

179. The starting point as to what constitutes a misrepresentation is relevant here, given the dispute as to whether or not what was said (and not said) by the Sihans amounted to a misrepresentation. At 9-006 *Chitty* explains that it is necessary to look not only at the words used but at how they would be understood by a reasonable person in the factual context, and that a statement will be treated as true if it is substantially correct and if the parts which are incorrect are not such that they would have induced a reasonable person to enter into the contract.

180. It is also well-established that a misrepresentation must be a false statement of fact, but that a statement of opinion may amount to or include a statement of fact in certain circumstances: *Chitty* 9-008. This is relevant to what is referred to below as the planning permission issue misrepresentation.

181. It is also well-established that a representation may be implied as well as express (*Chitty* 9-018), where the court must consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context and should not be too ready to find an implied representation.

182. It is also well-established that in general mere non-disclosure does not constitute misrepresentation for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances (*Chitty* 9-021). However, there may be a duty to disclose where failure to disclose some fact distorts a positive representation (*Chitty* 9-024). Nonetheless, as Jonathan Sumption QC, sitting as a Deputy High Court Judge, said in *Safehaven Investments Inc v Springbok Limited* (1996) 71 P. & C.R. 59 at page 66, the question is not whether the undisclosed information was "material" but whether its omission "distorted" the effect of what was actually said. In other words, this principle cannot be used to impose a duty of disclosure into a contract, such as the present, where none is imposed by the general law.

183. Implied representations and distorted representations may overlap, as was explained by Lewison LJ in *Mellor v Partridge* (2013) EWCA Civ 477 at [17].

184. Representations are treated as continuing until exchange of contracts but not beyond exchange until completion, since it is on exchange when the contract is made.

185. A representation may be made by the defendant or by their agent acting within the scope of his authority (*Chitty* 9-030). Thus in a conveyancing case the defendant may be liable for a misrepresentation made by his solicitors and the knowledge of the solicitor will be imputed to the party instructing him, since once the matter has been handed over to solicitors, they become: "the normal channel for communication between vendor and purchaser in all matters relating to that transaction": *Strover v Harrington* [1988] Ch 390 per Browne-Wilkinson V.-C. at 408H.

186. Inducement is an essential requirement of a misrepresentation (*Chitty* 9-041). The burden of proving it did not is on the defendant (*Chitty* 9-044). Where the representation is material there is a presumption of inducement (*Chitty* 9-048).

187. As regards fraudulent misrepresentation, "… fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false." *Derry v Peek* (1889) 14 App Cas 337 at 374 (Lord Herschell). The converse of this is that however negligent a person may be, he cannot be liable for fraud, provided that his belief is honest; mere carelessness is not sufficient, although gross carelessness may justify an inference that he was not honest: *Chitty* 9-056. Although it is not necessary to establish that the defendant's motive was dishonest, it must be shown that the representor intended the representee to act on the representation: *Chitty* 9-059. To hold a person guilty of fraud it must be shown that he intended, or at least was willing, that the representation should be understood in a sense which is false: *Chitty* 9-060.

188. In relation to liability for fraudulent misrepresentation, although there is no conception of "composite fraud" (i.e. an action in fraud will not lie where a statement is made by an agent who honestly believes it to be true, merely because the principal knew the statement to be false), nonetheless a principal is vicariously liable for the fraud of an agent, so that if an agent makes a statement in the scope of his authority, and the agent is himself fraudulent, the principal will be liable: *Chitty* 9-061. In this context, where a conveyancing solicitor gives an untrue answer to a pre-contract enquiry, that may either be because they are passing on information from the client or because they have not made enquiry of his client. In many cases it will not on proper analysis matter which is the case. There is a succinct analysis in this respect by HHJ Cooke sitting as a High Court judge in *Morrell v Stewart* [2015] EWHC 962 (Ch) at [19]:

"The statement that there had been no work done [at the property] must either have been given by the solicitors without the instruction of their clients, in which case it would have been reckless of the solicitors to have made that statement without having checked with the client and the defendants would be responsible for that reckless representation by their agent, or alternatively the solicitors must have checked with their clients, in which case they passed on the clients' response and that response must plainly have been known to be untrue because the work that Mr McGuire was doing was either current or had just been finished."

189. The measure of damages for fraudulent misrepresentation are discussed in *Chitty* at 8-063 to 9-081. The relevant principles for assessing such damages were discussed in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* (1997) AC 254 at 267, where they were summarised by Lord Browne-Wilkinson as follows:

"(1) The defendant is bound to make reparation for all the damage directly flowing from the transaction;

(2) although such damage need not have been foreseeable, it must have been directly caused by the transaction;

(3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;

(4) as a general rule, the benefits received by him include the market value of the property acquired at the date of the transaction; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;

(5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff

to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property;

(6) in addition, the plaintiff is entitled to recover consequential losses caused by the transaction;

(7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

190. At 9-063 *Chitty* observes that this means that where a person is induced by fraud to buy some property, the proper measure of damages is prima facie the difference between the price paid and the fair value of the property. However, at fn.313 it also says that: "When there is no evidence as to values, the cost of making good the representation may be taken to represent the difference in value: *Jacovides v Constantinou*, The Times, 27 October 1986".

(v) Claim for breach of the sale contract

191. There is an issue as to the proper construction of the sale contract, as to which I apply the well-known and well-established principles of contract construction as summarised in *Chitty*, which I need not set out or attempt to summarise in this judgment.

(vi) The alleged indemnity

192. As I have said, Mr Sihan's email said that if the Romeros were joined to any action as defendants he would "indemnify Mr and Mrs Romero of any costs arising from the litigation and I will deal with any case brought".

193. It is pleaded that in consideration of the said indemnity the Romeros refrained from rescinding the sale contract on the grounds of the Sihans' prior misrepresentation. It is pleaded that under this indemnity the Romeros are entitled to be indemnified against the Stevens' claim and against the Romeros' own legal costs of the claim.

194. The case is argued on the basis that the email was an offer of a unilateral contract, described in *Chitty* 4-102 as made where one party promises to pay the other a sum of money (or to do some other act, or to forbear from doing something) if the other will do (or forbear from doing) something without making any promise to that effect, and where the offer is accepted by fully performing the required act or forbearance.

195. The Sihans' case is that the statement was not intended to and did not have contractual force or, if it did, was not accepted by the Romeros who did not in any event provide consideration for it. The Sihans' alternative case is that if it did have effect it was only on the basis that Mr Sihan would indemnify the Romeros against the costs of any such claim if they agreed to his solicitors dealing with the claim. Their fallback case is that if the email did have any effect, either as alleged by the Romeros or as admitted as a fallback by them, it was repudiated by the Romeros alleging in their letter before action that the sale contract was rescinded or by the Romeros choosing to instruct their own solicitors.

196. These arguments raise a number of legal issues, but there is no need to address them here as opposed to when I deal with his aspect of the case.

F The cause(s) of the flooding experienced by no 15

F.1 The rival positions of the experts summarised

197. Before delving into the detail, it is helpful to begin by summarising the areas of agreement and disagreement as between the respective experts in the run-up to the trial, which appears most clearly from their third joint statement made 30 September 2021.

198. They agreed that: (a) the made ground at no 17 was identified by Solmek as "broadly consisting of slightly sandy gravelly clayey topsoil underlain by sandy slightly gravelly clay with the gravel comprising brick and natural mixed lithologies"; (b) the natural deposits at no 15 and no 17 are "very similar and are clay which will inhibit natural drainage".

199. Mr Taylor's conclusion was that the combination of the made ground and natural ground at no 17 and the downwards slope from no 17 to no 15 means that surface water run-off will flow towards and into no 15. He concluded that before the works to no 17 that was unlikely to have occurred because the undisturbed soils had an inherent natural capacity to absorb surface water, with surface water run-off also being assisted by the water demands of the mature rear garden of no 17.

200. Mr Grime's conclusions were that: (a) the topsoil to the no 17 rear garden would help decrease surface water run-off; and (b) in fact post development there was a reduced risk of surface water run-off, because there is less area of surface water run-off since rainfall landing on the roofs of the new, much larger, house is discharged into the public sewer. Mr Barber's conclusion was to the same effect, emphasising what he saw as the benefit provided by the increased volume of more permeable material in the made ground added to the rear garden of no 17. Mr Taylor emphasised the lack of surface water drainage provided for the rear and side patios and paths which in his view resulted in surface water run-off from those areas also discharging towards and onto no 15.

201. There was broad agreement that the french drain soakaway installed in the no 17 rear garden was of little or no effect because of its location in the impermeable clays with no outfall to allow water collecting in it to be discharged away.

202. Mr Grime placed some emphasis on evidence as to increased rainfall over the last twenty years or so due to climate change, whereas Mr Taylor and Mr Barber did not consider that this was likely to be relevant.

203. There was broad agreement that the condition of the piped surface water drainage system to the rear of the house and around the swimming pool of no 15 was irrelevant to the issues in the case. The experts also agreed that if, as the Stevens and Mr Wordingham said, the pre-existing drainage to the rear lawn of no 15 was limited to around a tree close to the boundary with no 13 that was also irrelevant to the issues in the case. They agreed that the land drainage system installed by Mr Dorman to the rear garden of no 17 in 2017-18 was intended to address the flooding complained of by the Stevens, but they disagreed as to whether or not it had any material impact on water in that area.

204. As regards the works proposed to be undertaken by the Romeros at no 17 to comply with the enforcement notice, Mr Taylor and Mr Barber agreed with the proposal to drain the rear garden and the rear and side patios and paths whilst noting that the design as shown in the drawings was subject to engineering detail and porosity tests which were both required and disagreeing as to the various discharge options from the rear garden. Mr Grime considered both these works and the proposal to remove the fill from the rear garden to be unnecessary as regards any benefit to no 15.

F.2 The position before the works to no 17

205. As already indicated, it is common ground that the natural slope of the land is down from no 17 to no 15. The undisturbed natural slope immediately to both sides of the boundary shows a gradual slope with no sudden level changes.

206. The evidence of Mr Stevens in his witness statement, confirmed by Mrs Partakis-Stevens in her witness statement, was that prior to the works to no 17 no 15 never suffered from flooding or waterlogging. This was doubted by Mr Grime and Mr Barber on the basis that the combination of the natural slope and the relatively thin layer of topsoil over relatively impermeable clay ground must have meant that the rear garden was susceptible to flooding after periods of heavy rainfall.

207. This indeed was confirmed by Mrs Partakis-Stevens under cross-examination, when she accepted that after heavy rainfall over the winter months the rear garden would suffer from pooling. Nonetheless, it remained her evidence, supported by the claimants' witnesses, Mrs Gibbons, Mr Wordingham and Mr Montaldo, that there was no regular, widespread or persistent problem of flooding to the rear garden before the works to no 17.

208. Mr Wordingham, as the gardener who had gardened for no 15, no 17, no 18 Torkington and no 20 Torkington before the works to no 17, said that to his recollection none of these gardens suffered from anything other than temporary waterlogging after heavy rainfall before around 2017, when he stopped gardening to set up a landscaping business. I was particularly impressed by this evidence because Mr Wordingham is a gardener who might be expected to have known the state of the gardens he looked after and because he had no particular axe to grind, no longer working for any of the parties or their neighbours. I would be prepared to accept that the evidence of Mrs Gibbons and Mr Montaldo might be a little more impressionistic, but I also bear in mind that: (a) Mrs Gibbons came across as a very sharp minded woman, with a previous career as a geography teacher, and a regular visitor to no 15; and (b) Mr Montaldo, whilst not particularly interested in gardening, did use the rear garden on a regular basis because there was a door in the fence between no 15 and no 18 Torkington to allow the two families to visit each other without having to take a long route round.

209. As against this, Mr Darton has sought to make much of the late disclosed reports produced by Bartlett but in my view they provide scant support for the defendant's case. They indicate some possible waterlogging related problems as long ago as 2009 to some plants but with no evidence of recurrence. Thus, a diagnostic report from January 2009 refers to a problem of needle cast on a spruce tree which disease, it said, was "associated with periods of environmental stress such as drought, severe winters or excess water". It was accepted by Mr Wordingham that this was in the rear garden, although he thought it was on the side adjacent to no 13. A report from November 2009 on a laurel and a griselina referred to root hypoxia "caused primarily by excess soil moisture (waterlogging) which suffocates the root system", but Mr Wordingham gave convincing evidence that this related to trees in the front garden which were caused by a faulty surface water drain.

210. Mr Darton was able to point to two places in which it had been recorded that a drainage system had been installed in the rear garden before the works to no 17, whereas the Stevens' evidence, supported by Mr Wordingham, was that until December 2017 the only drainage works installed in the rear garden was to install a drain around a tree bordering no 15 and no 13.

211. The evidence is clear that it was not until December 2017 that Mr Dorman had dug a trench in the rear lawn adjacent to the no 17 boundary in order to reduce the water levels in that area of the rear garden as a temporary measure. Further, it was not until September 2018 that Mr

Dorman had undertaken a full scale drainage scheme in the rear garden to provide more permanent drainage protection.

212. However, Mr Darton pointed to the content of the Bartlett letter dated 7 June 2017, which the Stevens had relied on in support of their case and which was clearly obtained following a request from Mrs Partakis-Stevens for a letter for that very purpose. It referred to the fact that the Stevens had instructed Bartlett on a regular basis since 2003 to undertake annual inspections and undertake works to trees and plants. It then said this:

"… Over the last couple of seasons issues of waterlogging seem to have increased drastically within the garden. I had discussed this issue with Peter as I am well aware that he installed a drainage system in the garden approximately 7/8 years ago. The waterlogging / level of water has increased since the development took place in the neighbouring properties, potentially because of disturbance of original drainage systems. Development at 17 Fletsand has taken the property back beyond its original elevation with a raised area being created at the rear, which is likely to increase the level of water in your garden."

213. The Stevens' evidence and case was that this could only have been a reference to the limited drainage system Mr Wordingham had installed around a willow tree to the no 13 side of the garden due to a worry that water might leak from a swimming pool being installed to the rear garden of no 13.

214. That evidence was supported by Mr Wordingham and there is no reason to think either that this evidence was untrue or that Mr Wordingham or anyone else installed a wider drainage system in the rear garden in around 2009. Mr Wordingham was adamant, convincingly so, that he would not have told Mr Hill, the writer of the letter, anything different. Mr Hill has not been called by either party to give evidence. The letter is ambiguous about whether Mr Hill is actually suggesting that Mr Wordingham had said that the drainage system was more extensive than had actually been installed. In the circumstances I am satisfied that this was simply a misunderstanding on the writer's part about what Mr Wordingham had done.

215. Mr Darton points to the fact that this is not the only such apparent inconsistency. Of more apparent significance is the fact that in paragraph 5.3 of his first report dated March 2018, after having recorded in the preceding paragraph the Stevens' instructions that they had not previously experienced flooding to no 15, Mr Taylor recorded that "I have been advised by the Claimants that they have a network of subsurface land drainage for their lawn, which ensured a satisfactory drained condition of the lawn at no15, and no waterlogging occurred".

216. The Stevens were at a loss to explain this and Mr Taylor was unable to shed any light on the question, since he had produced his report from his rough site notes which he had not kept once his report was issued.

217. At that time it is quite clear that the only drainage systems present were the limited drainage around the willow tree on the no 13 side and the relief trench dug by Mr Dorman on the no 17 side in December 2017. There is photographic evidence of the digging of this trench and it is inconceivable that Mr Dorman could have been unaware of any drainage system already present had one been there at the time.

218. Mr Darton submitted, however, that this information can only have been provided to Mr Taylor by the Stevens and that it must have been given with the intention of misleading Mr Taylor to assist in persuading him to support the Stevens' case. I see the force of this argument. However, on balance I do not accept the submission. There is no evidence that the Stevens had made a similar comment to anyone else. The Bartlett letter of 7 June 2017 is very clear that the information was provided by Mr Wordingham. Furthermore, it is very

difficult to see what the Stevens could have hoped to gain from making such a statement at that stage. It is more probable in my view that Mr Taylor wrote this either due to a possible misunderstanding, similar to that of Mr Hill, or that he took it from the Bartlett letter of 7 June 2017, which he had at the time (see paragraph 1.11 of his report).

219. Indeed, the clear evidence that no such drainage system was ever installed pre 2016 brings me to another significant point. As I have said, Mrs Partakis-Stevens in particular was very proud of the garden and was plainly willing to spend considerable amounts of money on maintaining it, employing not just a gardener but a tree consultancy on a regular basis. The evidence is clear that she did have both an irrigation system and a limited drainage system installed pre the works to no 17. If there had been a serious and persistent problem to no 15 before that time there seems little doubt that she would have done something about it. But on my findings the evidence is clear and compelling that she did not.

220. Both Mr Sihan and Mr Grime were inclined to speculate that the works which had been undertaken to no 18 Torkington had caused surface water run-off and flooding to no 15 either before or at around the same time as the works to no 17. It is true that the Google maps photograph of the area (dating from around summer 2016, given that the works to no 17 are still underway with the roof tiles not yet up) shows what appears to have been builders rubble deposited at the rear of no 18 Torkington. However, there is no evidence that there was any water ingress from no 18 Torkington into no 15, whether photographic or otherwise, and there is no evidence that there is a slope of any significance running down the rear lawn of no 18 Torkington towards no 15. Further, neither Mr Grime nor Mr Barber (nor indeed before them Mr Briggs or EEG) had inspected (or asked to inspect) no 18 to see if there was any evidence of surface water run-off. Finally, as Mr Montaldo observed with some annoyance, if it had been the case that it was obvious to all concerned that surface water run-off from his property was causing a problem with the rear garden of no 15, it is inconceivable that something would not have been done by them to deal with it, rather than to seek to blame no 17 for something which was not their responsibility.

221. The other significant evidence is that of Mr Johnson. He had said in his witness statement that "during the course of the garden works [to no 17] and after the redevelopment works had finished, I noticed a sharp increase in the amount of flooding at the back of my garden which immediately bordered 17 Fletsand Road". He was cross-examined on the basis that this must have meant there was some flooding in his rear garden before then. Although he was disposed to disagree, I think that must be right and this is consistent with his having had a drainage system installed in his rear lawn at the time of his original building works around 2012 and his further statement later on in his witness statement that the rear garden suffered from "very little waterlogging". What, however, is perfectly clear from his evidence, including his contemporaneous complaints, is that he experienced a significant increase in the amount of flooding at the time of the works to no 17 and subsequently, and was sufficiently concerned to engage Mr Dorman to enhance the existing drainage system in October 2017 by providing additional soakaways, after which things improved the following year.

222. Thus, his evidence was consistent to a significant degree with the evidence of the Stevens, both as to the absence of any serious problem with flooding to his rear garden before the works to no 17, the causal connection between the works to no 17 and the onset of significant flooding, and – in his case – the almost complete resolution of those problems after enhancing the drainage system in late 2017.

223. In contrast, I did not find convincing the evidence of Mr Sihan and his groundworks contractor Mr Heleine that at an early stage in the works Mrs Partakis-Stevens had engaged

them both in conversation and volunteered that her rear garden had always been wet and mossy. Indeed, in cross-examination Mr Heleine largely disclaimed that part of his witness statement and clearly had no real recollection of these events, not surprisingly.

224. Nor did I gain any real assistance from the witness statement of Ms Mulchand, who had no direct knowledge of the condition of the gardens in either no 15 or no 17, or in no 18 or 20 Torkington for that matter.

225. The experts were unable to offer any clear opinion as to the extent of any flooding or waterlogging experienced by no 15 before the works to no 17. The most that the defendants' experts could say is that the natural slope of the land down to no 15 and the relatively thin layer of topsoil over the relatively impermeable clay beneath rendered it liable to flooding.

226. Mr Grime also drew attention to the fact that part of the rear garden of no 15 was identified as having a "low" risk of surface water run flooding according to the Environment Agency map and at risk of being affected by low probability events (an annual probability of between 1 in 100 and 1 in 1,000) and that local rainfall data showed an average monthly increase from 60mm to 75mm from 1990-2000 to 2010-2020. None of this was disputed by Mr Taylor, who accepted that over this period incidents of severe rainfall had been more frequent, but none of this is of any real assistance in my judgment when deciding whether there was in fact a greater incidence of flooding in no 15 before the works than the Stevens and their witnesses stated.

227. As Ms Atkins submitted, it is a cause of some concern that Mr Briggs in his submissions to CEC referred to and relied, seemingly uncritically, on the reports from Mr Sihan about what he was told by Mrs Partakis-Stevens and of his alleged conversations with Mr Montaldo's former builder in support of the suggestion that no 15 did suffer from pre-existing flooding. It is a source of even more concern in my view that this information was repeated by Mr Grime in his report and used to suggest, with no qualification or investigation, that: "based on this evidence, it appears that there were issues at no 15 before the construction works had begun at no 17. Information has not been provided on whether the existing surface water drainage system at 18 Torkington Road was reinstated once it was found not to be 'working efficiently'".

228. Mr Grime then appears to have added to this the content of the Bartlett letter of 7 June 2017, including what appears to me to be a misinterpretation of the reference in that letter to waterlogging as having increased over the past couple of seasons as including a reference to the position prior to the works to no 17, to reach a conclusion in his principal report at [4.1] that: "The fact that there was a pre-existing drainage/flooding problem at No 15 appears beyond question". In my judgment, that conclusion was not justified by the material before him, at least in the unqualified terms in which it was expressed, and is not made out on the basis of my factual findings after trial. The same is true in my judgment of his "general conclusion" at paragraph 5.0 to the effect that: "There was a pre-existing drainage problem at No 15 which has been exacerbated by climate change impacts".

229. In his second report his summary at section 4 included the following: "It is my professional opinion that, if there has been increased flooding at No 15 and if that continues then it is attributable to a combination of the following factors.

• The poorly draining nature of the superficial geology at No 15 and that of the wider natural catchment above.

• The propensity for others higher up in the catchment to try and drain their gardens and thereby transmit water to properties lower down

• The cumulative impacts of the recent redevelopments, both large and small, in the natural catchment above No 15.

• The gradual impacts of climate change."

230. Under cross-examination it became clear that he had no real evidence, based on any examination of the relevant properties or otherwise, for his conclusion that the owners of higher properties had drained their gardens by diverting water to properties lower down or for his conclusion that recent redevelopments of such properties had had some cumulative impact on water discharge down to no 15. Indeed, it appears from the evidence that the only garden which has been shown to be directly adjacent to no 15 and at a significantly higher level within a reasonable distance from the mutual boundary is no 17. It also appears that whilst no 20 Torkington is higher than no 15 it is lower than no 17, so that water discharge from no 17 onto no 20 Torkington may then itself discharge onto no 15. It follows in my judgment that if Mr Grime's suggestion is correct, the obvious implication is that no 17 is itself receiving surface water run-off from higher up gardens and discharging it onto no 15, directly - or possibly indirectly via no 20 Torkington - which in my view supports the Stevens' essential case and Mr Taylor's view.

231. In the circumstances I am satisfied that the Stevens have made out this first limb of their case on causation.

F.3 The works undertaken by the Sihans and subsequently

232. I have already said that Mr Briggs did not undertake any responsibility for any external works, excluding this element from the planning permission application and leaving it entirely to Mr Sihan. This of course explains why the planning permission included the conditions referred to above.

233. Mr Sihan accepted that Mr Briggs had explained the conditions to him and also accepted that he had not complied with these conditions because he had not submitted any plans showing any change to the external ground levels, either before development began or before he started or completed the external works. It is clear that at this initial stage he had not really given any thought to the external works. It is also clear that he gave no thought whatsoever to any risk that any external works to no 15 might impact on surface water flows down the natural gradient from no 17 to no 15, even though he was aware of the slope (which is why he decided in the end to level the rear garden) and was also aware, as an experienced property developer – as he accepted in cross-examination, that site drainage issues were important given the slope of the site. His answer was that he did not think that there was a problem with water drainage on site or any problem of surface water run-off. In fairness to him I accept that there was no obvious patent problem with water drainage or surface water run-off prior to the development.

234. It is common ground that in around March 2016 the existing house was demolished and the foundations dug for the new house on a significantly larger footprint. It is also clear from contemporaneous photographs that the spoil was stockpiled and stored along the rear boundary and also in heaps along the side boundary with no 15. It is also clear that the spoil comprised largely the natural clay soils which underlay the existing house and paved areas and underlay the topsoil in the garden areas. Although Mr Sihan initially disputed that spoil had been stored along the side boundary with no 15 and alleged that the clay soils had been removed off site, it was plain that he was wrong on both points. The photographic evidence showed the soil stored in heaps along the no 15 boundary and his evidence that it had been

removed cannot be accepted, given the absence of any phase 1 contamination desktop study report or other documentary evidence of this spoil being removed off site.

235. I accept that Mr Sihan did import good quality topsoil to lay on top of the newly constructed flat rear lawn. That is consistent with the documentary evidence and is supported by the evidence of Mrs Gibbons.

236. These findings are also consistent with the findings of the subsequent Solmek ground investigation and the experts' joint statement at paragraph 8.3, which records that the soils used to level the rear garden included clay soils. Indeed, it is plainly inherently improbable that a developer like Mr Sihan would have paid for clay soils to be removed and for topsoil to be imported simply to make up levels in the rear garden unless he had received advice – which he had not, because he had not sought advice – that this was inappropriate. Mr Taylor was rightly genuinely incredulous when it was suggested to him that this is what Mr Sihan as an experienced developer would have done in such circumstances. As Mr Sihan came close to admitting in cross-examination, he left it to the groundworks contractor, and it is entirely unsurprising in my judgment that they used as much of the clay as they could without undertaking any compacting and without providing anything above other than topsoil.

237. An issue arose as to whether, after heavy rainfall when the foundations became waterlogged, the builders had chosen to direct the water onto no 15. Although this was denied by Mr Sihan and Mr Heleine I am satisfied – largely on the very clear and compelling evidence of Mrs Gibbons – that it did happen, probably because the main sewer into which it would normally have been discharged was full. The contemporaneous photographs of the brown coloured water on no 15's land are also compelling. The photographs from June 2016 also show that the problem was continuing. Nor can there be any doubt that Mrs Partakis-Stevens complained to Mr Sihan, so that he was aware of the problem. I am fairly sure that he believed it was a temporary issue and dismissed it.

238. By around February 2017 the new property was approaching substantial completion and Mr Sihan had decided to level the rear garden. To that end, at the same time as the groundworks contractors were installing drainage around the exterior of the house and the external paved areas, they began to build a rockery style loose stone retaining wall along the no 15 boundary to support the external paved areas and extended it along the length of the rear garden. The photographs attached to the letter from EEG dated June 2017 show the way in which the rockery wall slopes up steeply from the boundary to the level of the paved areas and the raised rear garden, with exposed fill between the top of the rockery and the paved areas and with what appears to be self sown grass between the top of the rockery and the new laid turf, both rising at the same steep gradient.

239. Again Mr Sihan ought to have submitted details for planning approval but again, as he admitted, he did not. He claimed it had slipped his mind but I am satisfied that he never had any intention of spending time and money on what he regarded as an unnecessary interference with his right to do what he wanted in his own property with no interference from anyone else. His repeated answer was that because he had not had any problems with water on no 17 he had no reason to believe there would be any problem with no 15 as a result of the works to the rear garden.

240. I do not accept this, not least because he did arrange for a French drain to be laid along the corner area where no 17 adjoined no 15 and no 20 Torkington. Although he initially denied that this was a response to the complaints already made by the Stevens, saying that it was for purely "precautionary" purposes, that answer never really made any sense given his previous evidence that he had no reason to think that there would be a problem, and was directly

contradicted by what Mr Briggs had written (plainly on Mr Sihan's instructions) to CEC in November 2017, where he said that the "main reason for this work was to ensure that the neighbour, based on previous complaints, could not blame the developer of no 17 for increased flooding in the garden of no 15". He accepted that the drain had been installed by the groundworks contractor without any ground investigation or design. It was plainly Mr Sihan doing the bare minimum at least expense to give the impression of taking steps to address any complaints about continuing water ingress. Indeed, as he admitted, the drain was not even provided with an outfall, so that it served little if any useful purpose insofar as it was constructed in clay soils of low permeability.

The extent of any flooding experienced by no 15 during the works to no 17

241. The Sihans have provided photographic evidence of flooding in March and June 2016 and in March 2017. Mr Grime noted that on his first inspection in December 2020, after a period of typical rainfall, the rear lawn was very wet but that there was no visible issues of water from no 17.

Relevance of other works to other adjacent properties and/or of waterlogging experienced by other properties

242. It was suggested that works undertaken by the Stevens' daughter and son-in-law to no 18 Torkington may have caused water ingress to and waterlogging of no 15. There is no evidence whatsoever to back this up and I reject it, based on the evidence of Mr Montaldo, supported as it was by that of Mr Wordingham, and that of Mr Taylor, who was the only expert who inspected No 18. It is plain that the levels adjacent to the boundary between the two properties form no more than a gentle slope and there had been no works undertaken in the rear garden; all that had happened was that it was used to store some builder's rubble. This is a completely different exercise from the site strip and extensive regrading works at no 17 and under cross-examination Mr Grime accepted that based on Mr Montaldo's evidence he did not pursue any suggestion that this was a relevant factor requiring further investigations.

243. So far as no 20 Torkington Road is concerned, again there is no evidence whatsoever to support any suggestion that any works undertaken by Mr Johnson to install land drainage in his rear garden in or around 2012 when his property was built had any impact upon the incidence of flooding to no 15. Neither Mr Grime nor Mr Barber suggested any explanation as to how this could have occurred. To the contrary, it is plain in my judgment that as a result of the works to no 17 surface water run-off from no 17 was discharged onto no 20 Torkington and caused flooding problems there in the same way as it did to no 15. It appears wholly implausible that the two occurrences were causally unconnected. What is tolerably clear is that the works to no 17 caused flooding problems to no 20 Torkington even though that had already had a drainage system installed in the rear lawn during the course of the original works which had prevented any serious flooding problems until the works to no 17.

Flooding post the works to no 17 and the adequacy / efficacy of the Dorman drainage system

244. Nothing in the Stevens' pleaded case or in their evidence produced pre-trial indicated that they accepted that the flooding had significantly diminished after autumn 2018, when Mr Dorman undertook the second tranche of the remedial works. In her witness statement Mrs Partakis-Stevens had said nothing about any improvement and all that Mr Stevens had said was that "these measures have had little to no impact", although he also referred to it as "only a temporary solution". However, when she was challenged in cross-examination about the criticisms of the Dorman works she said that it had "definitely improved the situation" and

she repeated that evidence later, although she also stated that "it is not perfect. It hasn't stopped".

245. Mr Stevens gave evidence to the same effect, saying that: "I'll be honest with you, because since Mr Dorman put the drains in and relaid the lawn, and also put in the pump to pump away next door's water, the garden is much better than it was before".

246. This evidence appears consistent with the photographic evidence which, although the Stevens were at pains to emphasise was not intended to provide a contemporaneous record of every flooding incident, especially since post-retirement they have been fortunate enough to enjoy regular lengthy holidays, is the only reliable evidence which there is in addition to the snapshots as recorded by the experts on their inspections. Thus, there are photographs of flooding from December 2017, from March 2018 and from October 2019 but not again until January 2021. There are then photographs in February 2022 and again in May - June 2022.

247. Mr Taylor was asked to explain why - on his analysis - the Stevens gave evidence that the flooding had reduced since the works to no 17 had been completed and following the works undertaken by Mr Dorman. He was not willing to say that the Dorman works had probably caused the improvement, but he did consider that it was a real possibility.

248. He was asked whether the real cause was that the original flooding was caused by the works themselves and once they were completed the problem ceased. He was not prepared to agree to this, saying that this ignored the continuing impact of the paved areas.

249. The key issues appear to be what the Dorman scheme was intended to do, whether it was properly designed and installed to protect no 15 from water ingress and flooding, and whether it could have been designed and installed so as to achieve this objective. There is also an issue about its maintenance.

250. I largely accept Mr Dorman's evidence and Mr Taylor's explanation, consistent as they are with the contemporaneous photographs and Mr Dorman's contemporaneous estimate (albeit described as an invoice) of what he did. In December 2017 he dug a trench along the lawn adjacent to the no 17 boundary and constructed a sump and installed a pump in order to remove the water thus collected. In autumn 2018 he then dug trenches in a herringbone pattern over the rear garden, to a greater depth and number in the wetter area adjacent no 17 than elsewhere, connecting these satellite trenches into the original trench.

251. He lined the trenches with a geotextile membrane and then laid stone aggregate in the base. He then placed a 100 mm perforated land drain on top of the aggregate (all experts agree that it should have been put at the bottom, to allow water draining through the aggregate to drain into the pipe), covered the pipe with more aggregate and then closed off the membrane and laid a free draining sandy topsoil above that[5] and, finally, new turf above that. As he said, and as the experts agreed, it is clear that the trenches were dug in the unmade predominantly low permeability clay.

252. I accept the criticism that this was not an engineer designed drainage system, being undertaken without any prior site investigation to provide information about ground conditions to assist in the design and without the input of an expert on drainage. I also accept the criticism that he embarked on the works without any real appreciation of the risk that the trenches might extend down below any overlying clay layer and thus strike any subjacent water table. However, I accept his essentially pragmatic explanation, which is that what he

[5] Insofar as he suggested that he laid topsoil across the whole area, that is inconsistent with what Mr Barber takes from the evidence including the Geocon findings and I agree that he did not do so.

was doing was to install a relatively shallow, conventional garden drainage scheme with modest falls so that surface water would drain into the land drains and thence down into the sump where it would be pumped away. As he said, it would become apparent within a short time thereafter if the drainage system was working or not or, indeed, whether it had worsened the position.

253. His evidence and that of the Stevens and their other witnesses was that it improved matters. In contrast, the views of the experts differed.

254. Mr Taylor explained that although water entering the trenches would largely bypass the pipe, explaining why it showed no evidence of having carried water, nonetheless it would drain down through and along the aggregate into the circular annulus, also containing aggregate, surrounding the sump and then into the sump itself where it would be pumped away. In short, although it did not work as intended and designed, it still worked in his opinion. He said that if he had been asked to recommend a scheme in no 17 at the time he would have recommended an essentially similar scheme, albeit more extensive and better designed. He suggested that if it was not to be connected into the public sewer, which he would not condone doing, then another option would have been to connect it into the existing irrigation system, providing an attenuation tank to retain the water and to feed it into a holding tank for the irrigation system. He explained that he would have wanted to have a duplicate pump in case of breakdown and an alarm and monitoring system as well as a maintenance programme. He had not been asked to and had not attempted to design such a scheme and he disclaimed any ability to give any indication as to the costs of such a scheme.

255. Mr Grime accepted that the Dorman scheme would have some effect but that it would not be particularly effective, both because of the level of the pipe and the fact that the trenches were dug in the relatively impermeable clay level beneath the topsoil. Mr Barber was of the same opinion. Mr Taylor did not disagree with this criticism. However, I do not think that this point should be overstated in the context of the more limited issue of its impact on water run-off from no 17 to no 15, because it ignores in my view the positive impact that trenches of this nature would have in relation to water run-off from no 17 running down the natural slope across the boundary into the rear garden of no 15, i.e. its interceptor effect.

256. An issue arose as to whether or not the sump as constructed allowed water to penetrate through from the annulus into the manhole itself. Mr Grime believed, based on his inspection in May 2022, that the holes drilled through the manhole rings, intended to allow water to pass through into the manhole, did not show any evidence of water having discharged through them. On that basis he concluded that any water passing along the stone in the drainage system into the annulus would simply remain within the ground rather than be pumped away. He considered that the water in the manhole was probably standing groundwater. It is clear that Mr Taylor did not consider this to be the case. Mr Barber did not address this particular issue. Since neither Mr Taylor nor Mr Grime were asked about this in cross-examination it is a little difficult to form any clear conclusion about this. However, in my view the inspection undertaken and photographs taken in May 2022 do not provide a sufficiently clear basis for Mr Grime to reach this positive opinion on this point.

257. Mr Barber described in his report how on inspection both by Invek in February 2021 and by Geocon on June 2022 the pump was found to be switched off. Although Mrs Partakis-Stevens denied that this was the case to her knowledge, it is plain from these two sources that it must have been turned off. She was cross-examined about the content of the file note dated 12 November 2018 which records the respective solicitor's discussions with Mr Taylor, in particular the suggestion by the Stevens' then solicitor that the pump serving the system was

"failing on a daily basis". She was unable to say much about this other than to say that she would have left it to the gardeners to undertake checks and that she recalled asking Mr Dorman to repair it when it broke down. It is plain that someone had taken the decision to turn off the pump, whether with or without her knowledge, possibly because of concerns about a blockage to the pipes further downstream.

258. Mr Barber also noted that the connection of the land drainage system through the pump to the public sewer, via the property drainage system, was one which was not permitted by law. This appears to be common ground, although Mr Taylor suggested that in practice such connections did occur – presumably because the statutory undertaker would simply never know that they had happened. Mr Dorman said that it was only intended to be a temporary connection. I am unable to accept this explanation and I am satisfied for the purposes of this case that it was an unsanctioned connection.

259. As to maintenance, there is no evidence that any inspection of the Dorman land drainage system (as opposed to the property drainage system) recorded blockages or tree root growth.

260. Pulling together this evidence, in my judgment the most likely explanation, which reconciles the views expressed by the factual witnesses with those expressed by the experts, is that whilst the Dorman land drainage system as a whole does not work as intended, for the reasons described by the experts, the trench initially dug in December 2017 does work at a basic level to intercept and divert water run-off from no 17 across the boundary to no 15.

F.4 Discussion and conclusions on causation

261. This is the key issue as between the experts. Having already referred to the salient facts in some detail and made detailed findings above I can state my conclusions and my reasons relatively speedily.

262. I have already referred in section B above to the material sections of Mr Taylor's report. He was cross-examined on it by Mr Darton and I asked him some supplementary questions.

263. In answer to Mr Darton's questions he said that the principal difference between the clay as removed during the site strip and excavations and after it had been re-laid was that it had been reworked and disturbed during that process. He accepted that it had not been compacted on being re-laid and that it was less impermeable than it had been before it had been disturbed.

264. He also emphasised the effect of the paved areas to the side and rear of the new house at no 17. Both Mr Briggs and, to some extent, Mr Grime and Mr Barber had suggested that because the paving stones were open jointed (i.e. the gaps were not sealed) they would allow rainfall to soak down through the gaps into the stone fill below and thus any surface water run-off would be minimised. However, in my judgment Mr Taylor was plainly right to emphasise the fact that the paving stones were close tolerance sawn joints, so that the scope for water penetration through the joints was very significantly reduced, and also to emphasise that their direction of fall was towards the lawn at the rear and the no 15 boundary on the side, so that water falling onto the paved areas would naturally shed onto the rear lawn and the drop down to the boundary with no 15 at the side. The former was apparent from the photographs, in particular those showing standing water bridging the joints. As to the latter, I do not accept the suggestion that the rear paved area falls towards the house or, thus, the suggestion that rainfall onto the paved areas would be channelled into the stone fill surround between the house and the paved area rather than spilling onto the rear lawn. I am satisfied

from the topographical survey undertaken for the Sihans post-construction that at the rear patio surface water will run onto the lawn rather than back towards the house and into the stone surround.

265. Moreover, although Mr Grime suggested that there was not much difference between the size of the previous paved areas around the previous house at no 17 and the current paved areas around the current house I am satisfied from the before and after plans and photographs that he is plainly wrong about that. In his second report Mr Taylor had estimated that the paved areas had increased in area by some 100% compared to their previous area and are now much closer to the boundary with no 15 than previously, and I accept and prefer that evidence.

266. Finally, although Mr Darton suggested that this point about the paved areas was something of an afterthought and a makeweight it is clear, as I have said, that it was referred to in Mr Taylor's second report after he had inspected no 17, so that I reject this criticism.

267. As regards the causative effect of the works to the rear lawn, in answer to my questions Mr Taylor emphasised the difference between the natural dense clays originally present and the made clay layer comprising more mixed up and disturbed clays above it. He suggested that at the interface between the two water would seep out at the side and then pass down the slope towards the lower levels at no 15. In his third report he had referred to the raising of the levels at no 17 as resulting in the risk of more and faster surface water run-off from no 17 towards no 15, compared to what he regarded as having been slow and insignificant run-off prior to the works, due to the less steep natural slope and the inherent attenuating capacities of no 17. He said that the rear lawn in this disturbed condition could not cope with the natural rainfall and the increased run-off from the rear patio, so that it was becoming saturated, as he had noted on his inspections and shown on photographs and about which the Romeros had also given evidence.

268. The essential building blocks for Mr Grime and Mr Barber were twofold. First, the EEG report, confirming the significant overall reduction in the surface area from which water could run off to no 15. Second, the impact of the works to no 17 operated, if anything, to enhance the rainfall attenuation capacities of the remaining lawn to attenuate rainfall. The two factors together meant that it was inherently improbable that the works to no 17 could have caused, contributed to or exacerbated water run-off from no 17 to no 15. Whilst they both had to accept, rightly, that the reduction in surface area did not necessarily equate to a reduction in water run-off onto no 15, and that they could not quantify the extent of any attenuation, their clear view was that at no point could the works to no 17 have made matters worse. Thus, whilst they eventually accepted – as they had to – that a considerable volume of relatively impermeable clay had been used to raise the levels of the lawn, their view was that the effect of reducing the slope down along the lawn towards no 15 was to enhance percolation down into the topsoil below the lawn and – albeit to a lesser extent – the made clay layer beneath - rather than to run off the lawn down to no 15.

269. It did not seem to me, however, that this opinion was consistent with the evidence of the Romeros and Mr Taylor that the rear lawn to no 17 does indeed show considerable evidence of waterlogging, and not just during or after heavy rainfall events, which demonstrates in my judgment that the made clay below the topsoil has little percolation capacity as, indeed, would be expected. Although it appears that this is mostly towards the no 19 side I accept that it is not limited to that side but is universal across the lawn.

270. Thus, a weakness in my view of the opinions of Mr Grime and Mr Barber was that whilst they relied very strongly on the enhanced opportunity which rainfall would have to land on a relatively flat lawn surface and then percolate through into the soil beneath, that explanation

did not really sit comfortably both with the composition of the made clay layer beneath and the evidence of its relative impermeability.

271. A further weakness of their opinions was that, whilst emphasising the benefit of the flat lawn, they conspicuously did not address the countervailing impact of the steep slope thus formed, dropping down from the no 15 side of the rear lawn and side paved areas to just short of the actual boundary. They appeared more intent on stressing the lack of any steep slope at the boundary itself.

272. The final principal weakness of their opinions in my view was their unconvincing attempts to minimise the impact of the sizeable and relatively impermeable paved areas which would shed water onto the rear lawn at the rear and down the steep slope to no 15 at the side. In fairness to Mr Barber, he recognised this implicitly at least by agreeing that remedial works should include the provision of slot drainage at the outer perimeter of the paved areas to prevent this from occurring.

273. Nonetheless, whilst Mr Taylor did provide what appear to me to be rational and cogent explanations for how the works to no 17 had altered the previous conditions in such a way as to cause water run-off from no 17 to no 15 to an extent which had not previously occurred, his explanations were nonetheless essentially theoretical, in that there was no actual evidence of water ingress from no 17 to no 15, whether surface water run-off or below ground ingress, and no actual evidence from investigation of the rear lawn as to whether his explanation was occurring in fact. In contrast, Mr Grime and Mr Barber's opinion had the benefit of starting from the proposition of a significant reduction in overall surface drainage area towards no 15 and that raising the level of no 17 by adding a layer of relatively less impermeable clay and a layer of well-draining topsoil above that was not self-evidently such as to lead to significant water run-off and flooding where none had previously existed.

274. It might also be said that there is a potential inconsistency between his opinion as to cause and effect and his further opinion, as recorded in his telephone discussion with the parties' solicitors in November 2019, that reinstating the land to its previous levels would not resolve the problem. However, that was not explored in cross-examination and, more importantly, his opinion was clearly based on the fact that this would not be realistic anyway, given the disturbance caused by the construction of the house and paved areas and drop down to no 15.

275. Drawing all of these competing strands of evidence and argument together, I have to weigh the cogency of the factual evidence adduced by the Stevens which, I am satisfied, provides a clear and strong correlation between the absence of significant flooding prior to the works to no 17 and the presence of such flooding during and after those works, against the fact that the explanations provided by Mr Taylor are not manifestly stronger than those of Mr Grime and Mr Barber, bearing in mind that in my judgment neither Mr Grime not Mr Barber have provided any satisfactory credible explanation for the temporal connection which the Stevens and their witnesses have observed. In the end, I have to decide on the balance of probabilities whether the Stevens and their witnesses have satisfied me that there is a clear causative link between the works to no 17 and significant flooding to no 15, notwithstanding the evidence relied upon and the opinions expressed by Mr Grime and Mr Barber.

276. In the end I am satisfied that they have so satisfied me, in summary for the following reasons.

(1) I regard it as inherently unlikely that all of the witnesses called by the Stevens are simply mistaken when they make a clear temporal connection between the works to no 17 and the flooding. It is not just the Stevens themselves, about whose evidence I am cautious, but that of Mrs Gibbons, Mr Montaldo, Mr Wordingham, Mr Johnson and Mr Dorman, coupled with

the documentary evidence of Bartlett as to the absence of evidence of a previous persistent problem with flooding, and the absence of any evidence which demonstrates that the Stevens saw the need to undertake any works to address any such problem before 2017, which persuades me that this consistent account cannot be rejected as simply wrong and mistaken.

(2) By contrast, I am unimpressed by the factual evidence from Mr Sihan and his witnesses, for the reasons I have already given, as providing any evidential foundation for the lack of a connection. Indeed the positive evidence of Mr Sihan that there was no prior problem with waterlogging to the lawn of no 17 and the positive evidence of the Romeros that there was a problem with waterlogging of the rear garden to no 17 provides support for the Stevens' case.

(3) I am unimpressed with the alternative explanations ventured by Mr Grime in particular as to cause and effect given that I accept the Stevens' factual case as to the temporal connection. In particular, I am wholly unimpressed with the suggestion that any works to no 18 Torkington could provide an alternative explanation for the temporal connection between the works to no 17 and the flooding to no 15, let alone that any pre-existing flooding problem or works to no 20 Torkington might have done so. I am also unimpressed with any more general suggestion that a combination of works to other properties in the area, upstream of no 17 or otherwise, did so or that some temporal connection between the impact of climate change (or even just a bad few years of intense rainfall – which is a thesis which Mr Grime had never propounded, even though he had obtained rainfall data from a nearby gauge at Prestbury) and the onset of flooding to no 15 provides a credible explanation.

(4) The essence of Mr Taylor's explanation seems to me to be a credible one, which is that before the works to no 17 there was a relatively gentle consistent slope down from no 17 towards no 15, over a large area of established lawn with trees, shrubs and other plants, both to the perimeters and in the middle, which provided a sufficient degree of attenuation to prevent flooding save in very heavy or persistent rainfall events, whereas afterwards a large volume of disturbed, but still relatively impermeable, clay was spread in layers over the lawn to increase its height quite substantially at the no 15 side, with an equivalently steep drop down in a rockery type fall towards the actual boundary, and with a large area of relatively impermeable paved area to rear and side discharging water either onto the lawn to the rear or towards the boundary and down another relatively steep slope at the side. The fact that Mr Taylor is unable, whether through ground investigations or otherwise, to identify the precise mechanism, does not mean in my view that the core hypothesis, of water either running off the lawn surface or, if percolating into the topsoil, moving horizontally and downwards through the made clay at higher level than previously and out through the sides and down a steeper new constructed slope onto no 15, is not entirely plausible.

(5) Similarly, the opinions of Mr Grime and Mr Barber, whilst having a more satisfying initial plausibility, do not really engage satisfactorily with the evidence of the causal connection between the works to no 17 and the onset of flooding (because they are unable to provide a plausible alternative explanation), with the evidence of the impact of the paved areas, with the evidence of the Romeros, and with the alternative analysis that laying a layer of clay to raise and to level the previously gently sloping lawn down to no 17 whilst creating a new high steep slope down with no effective drainage system at the bottom is also intrinsically likely to cause a problem where none previously existed. Indeed Ms Atkins made a telling point in cross-examination of Mr Grime, when she compared his apparent willingness to entertain the possibility that development works in other properties uphill of no 15 had caused or contributed to flooding of no 15, without any exploration or explanation as to how that had happened, with his unwillingness to accept that the development works to no 17 had had a similar effect.

277. I have considered the further possibility that, even if there was no substantial flooding problem before the works to no 17, the flooding problem which did occur was caused by the construction works themselves and that what the Stevens attribute to the improvement caused by the Dorman drainage works was in fact the return to normal conditions caused by the completion of the construction works. Mr Grime for example was quite prepared to accept, being shown the photographs of the flooding to no 15 in 2016 and 2017, in particular the silty brown colouration of the water, that this was due to the ground at no 17 being stripped of its previous coverings and thus allowing water to run off to no 15 direct from the exposed impermeable clay levels. He accepted that this should not happen but did happen in these construction phases. However, the difficulty with this theory is that, as the photographic evidence and the oral evidence of the Stevens and their witnesses confirmed, the flooding continued even after the construction works had completed.

278. In the circumstances I am satisfied on the balance of probabilities that the Stevens have satisfied me that it is the works to no 17 which led to a significant increase in the flooding to no 15 during and after the completion of those works, that the Dorman works led to a substantial diminution in the flooding in the period after December 2017, but that there was and has continued to be – albeit ameliorated - a continuing problem with flooding due to the works to no 17 even after those works were completed.

G. The principal claim against the Sihans

279. To summarise the relevant findings I have already made, Mr Sihan: (a) in March 2016, caused the spoil from the excavations to be stockpiled adjacent to the boundary with no 15; (b) in March 2016, was also aware that his works had led to water being discharged onto no 15; (c) thereafter, took no remedial steps to prevent water from continuing to discharge onto no 15 during the course of the construction works; (d) in around March 2017, decided to, and subsequently did, cause the spoil to be used to build up the levels at the rear lawn to create a flat lawn with a steep rockery type slope leading down towards the boundary with no 15, either instructing the contractors to use the excavated spoil to build up the height or not caring what they used or making any enquiries as to whether it was appropriate to use that excavated spoil; (e) at around the same time, decided to, and subsequently did, have a french drain installed along part of the rear and no 15 side of the law, without instructing the contractors to provide any outfall from the french drain.

280. All of these steps were taken without the benefit of advice from Mr Briggs or any other professional, in circumstances where I am satisfied Mr Sihan: (a) knew that he ought not to have undertaken any of the works without first obtaining approval in accordance with the planning permission conditions; (b) knew, as a professional developer, that causing heaps of excavated soil to be piled up and left adjacent to a boundary where the adjoining property was lower and where there had already been a complaint of water spillage could lead to a foreseeable risk of continuing water spillage; (c) knew, as a professional developer, that there was enough of a risk of water run-off in building up the raised lawn with spoil and in creating a steep slope down to the adjoining boundary to no 15 to cause a french drain to be installed along the boundary, albeit that this was done without professional advice or design and without an outfall.

281. Further, having been made aware of the Stevens' formal complaint in June 2017, he: (a) failed to arrange for a suitably qualified professional to undertake a full or proper investigation as to whether the works to no 17 had led to the flooding to no 15; (b) instead, engaged Mr Briggs to make an application to vary the conditions, which he knew or ought to

have known was made on a partisan and selective basis, enclosing a one page letter from EEG which did not provide any significant evidential platform for the application; (c) having become aware of CEC's concerns and recommendations in September 2017, took no further action other than to engage Mr Briggs to write another partisan and selective letter to CEC and to instruct EEG to prepare what was, effectively a desktop analysis to support his application, which he knew or should have known did not involve any actual investigation of the raised lawn, the newly created steep slope, the paved areas which drained towards no 15 and the lawn, or the inadequately designed and constructed french drain. In short, he did not arrange for a genuine and open-minded investigation to be conducted so as to ascertain whether the complaints and concerns were merited and whether any remedial works were required.

282. At no point prior to the sale of no 17 to the Romeros did he either accept in open correspondence the Stevens' case that the works to no 17 had caused or were continuing to cause flooding to no 15 or undertake a remedial scheme of works to address the problem. Nor did he instruct a suitably qualified professional to undertake a detailed investigation if he was not prepared to accept the Stevens' case. He took no positive steps to abate the nuisance or to investigate the nuisance or remedy the nuisance. Nor did he agree to do any of these things in open correspondence or in any other correspondence to which I have been referred.

283. Having sold no 17 to the Romeros and undertaken the obligations contained in clause 10, the only overt step taken by Mr Sihan post-completion was to instruct Mr Briggs to appeal the failure to determine the application to vary. In particular, notwithstanding the clear conclusions reached by Mr Taylor, of which he was aware from around May 2018 onwards, Mr Sihan did not, unequivocally and in open correspondence, agree to undertake the works required to resolve the continuing problem of flooding or commission an alternative investigation or report, whether as to the correctness or otherwise of Mr Taylor's views or as to the necessary remedial works. Over the whole period of time from March 2018 to March 2020 nothing was achieved except a further instruction to Mr Taylor and a further report and an attempt to settle at a mediation which did not bear fruit. Nothing at all was done by Mr Sihan prior to the issue of proceedings in June 2020 and nothing has been done since, other than to contest the Stevens' claim on a basis which I have ultimately rejected.

284. The reality is that from March 2016 Mr Sihan has simply refused to accept that the works to no 17 have caused any flooding problem to no 15 and at all relevant times subsequently has adopted a strategy of seeking to deal with this problem by achieving a solution which involves him in the last possible difficulty or expense.

285. Having chosen to delegate her obligations as co-owner to Mr Sihan, Mrs Sihan can be and is in no better a position than Mr Sihan.

286. Mr Darton submits that foreseeability of damage has not been established. In my judgment, however, on a proper application of the relevant principles (as summarised above) and on the basis of my findings as to what Mr Sihan knew or could with reasonable diligence have ascertained, the harm suffered was plainly foreseeable, even if the precise mechanism by which the harm was suffered may not have been. This is not a case, like *Cambridge Water*, *Arscott* or *Ellison*, where the harm was simply not foreseen at the time and was not reasonably foreseeable because it depended on a combination of circumstances which could not have been foreseen without knowledge not then reasonably available to the defendant or anyone else. This, in contrast, is a far simpler case.

287. It follows, in my judgment, that the Stevens have made out their case on the straightforward basis that, having caused or created the acts which have caused nuisance, where harm of the

kind suffered was foreseeable in the same broad way that it has in fact happened, the Sihans are liable. Insofar as it is necessary to show more than this, in my judgment the Sihans were clearly culpable in undertaking the works to no 17 without having sought or obtained professional advice and without having complied with the conditions of the planning permission, instead proceeding to instruct their groundworks contractor to undertake the works to the rear lawn using spoil from the excavations and creating a steep slope close to the boundary to no 15, providing a french drain as little more than a figleaf.

288. They were also culpable thereafter in failing to take any or any sufficient, prompt or effective steps to abate the nuisance for which they were responsible, whether before or after their sale of no 17. In closing submissions Mr Darton submitted that the Sihans had done enough by participating in the joint instruction to Mr Taylor and saying that they were content to proceed on his advice, in circumstances where by this stage the Romeros' consent was needed and was not forthcoming. Apart from the fact that this latter submission appears to refer to without prejudice communications which I have not seen, this submission fails to engage with the rights and obligations which the Sihans had under clause 10, where what the Sihans ought to have done was to do what CEC had advised as early as September 2017 (i.e. obtained and submitted a drainage report which either clearly demonstrated "no adverse flooding to existing neighbouring land" or which contained a design to manage surface water flood risks to neighbouring properties and then undertaken such works) either before the sale to the Romeros or pursuant to the rights and/or obligations under clause 10[6].

289. Mr Darton has argued that this conclusion cannot stand unless the court is able to conclude with reasonable confidence what it is that the Sihans ought to have done. He submits that the Stevens cannot overcome this evidential hurdle in circumstances where the professional advice actually obtained by the Sihans at the time was that nothing was needed ,because there was no problem for which they were responsible, and where even after the litigation had been brought reputable drainage engineers instructed by both themselves and the Romeros came to the same firm view. He submits that this difficulty for the Stevens is exacerbated by the fact that even now the Stevens have been unable or unwilling to design and specify a scheme, endorsed by their own expert, let alone by the Sihans' and the Romeros' experts, which can confidently be predicted to be acceptable and to work. He submits that the scheme actually installed by the Stevens, i.e. the Dorman drainage scheme, was patently inadequate.

290. As to this, the Sihans first difficulty is that the advice obtained by Mr Sihan from Mr Briggs was plainly not advice, as opposed to partisan and selective advocacy, and the desktop report obtained from EEG was plainly not a sufficient investigation which could have been relied upon to satisfy him that Mr Taylor's opinions, arrived at with the benefit of much fuller investigations, were wrong. They did not obtain a report from Mr Grime until March 2021, so that I am unable to accept Mr Darton's submission that they should be treated for these purposes as being entitled to conclude from March 2016 onwards that any proper advice which they might have obtained would have reassured them that there was no problem anyway or, if there was, it had nothing to do with them. As Ms Atkins submitted, it would be a curious result if a defendant to a nuisance action was able to rely upon the opinion of an expert commissioned for the purposes of litigation after the claim had been issued, which was rejected by the trial judge, so as to acquit them of fault in doing nothing at any time before the litigation to obtain a report or at any time thereafter to take any steps to abate the nuisance.

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[6] If the Sihans had requested that the Romeros allow access to no 17 to undertake such works and the Romeros had refused that might have involved different considerations, but there is no suggestion let alone evidence in open correspondence that this was the case.

291. As Ms Atkins also submitted, it would be wrong to find that the Sihans were entitled to do nothing on the basis that there has been, at trial, a lively dispute between experts as to the cause of the flooding, as to the efficacy of the works undertaken by Mr Dorman for the Stevens, and as to what further remedial works are now necessary. This is not a case where the Sihans have said, consistently in open correspondence, that even in the absence of agreement between all three parties they would be prepared to commission and undertake (or fund the undertaking of) a remedial works package, whether at no 17 or no 15, which they have demonstrated at trial was a sufficient solution to the flooding problem at no 15 as caused by the works at no 17. For the reasons set out below I am satisfied that what the Sihans ought to have done, as a minimum, was either to have provided a proper drainage system to no 17 as part of the initial works or subsequently, or to have proposed and accepted a liability to fund the equivalent works to no 15.

292. Thus I am satisfied that the Sihans are liable to the Stevens for nuisance and negligence on the alternative bases identified above.

H. Remedial works – scope of works - injunction or damages?

293. Whilst the claim for an injunction is made only against the Romeros – understandably, given that the Sihans are no longer in occupation of no 17 - it is convenient to deal with the issue at this point because it is plainly relevant to the basis and quantification of the damages which are claimed against the Sihans. For the purposes of this section I am anticipating my finding in the following section that the Romeros are liable to the Stevens in nuisance.

294. As I have said, the Stevens' primary case is that an injunction should be ordered requiring the ground levels to the rear of no 15 to be returned to the levels as they existed before the works to no 17 and/or requiring proper remedial works to prevent, control or mitigate the surface water run-off, alternatively that the Romeros should be ordered to allow access for the Stevens to undertake the necessary works.

295. As I have also already said, it is a curious feature and in my view a shortcoming of the Stevens' claim for an injunction that they have never instructed Mr Taylor to design and specify the remedial works which they say that the Romeros should be ordered to undertake.

296. I infer that this is because the Stevens' preferred outcome has always been that the owners of no 17 should restore the rear garden to its pre-existing levels, because they believe that this is the only suitable solution so far as they are concerned, in circumstances where they have no wish to undertake further works to their property and where they do not wish to have to rely on a remedial works scheme undertaken on no 17 which depends on the owners of no 17 ensuring that the drainage system is properly operated and maintained.

297. However, although this option is pleaded as an option on the Particulars of Claim, it is not one which is realistically open to the Stevens given what I have already referred to as Mr Taylor's clear opinion, as recorded in his joint discussion with the solicitors for the parties in November 2019, that this would not resolve the situation.

298. In the same joint discussion Mr Taylor stated that in his view the only option was to construct an interceptor drain around the perimeter of the rear garden of no 17 which would intercept water at no 17 and thus minimise water ingress to no 15. He noted that the other properties, including no 15, were "always going to be a little bit vulnerable to the higher water" and emphasised that it would be necessary to ensure that the existing Dorman drainage scheme should be self-sufficient and working properly. He noted that there were various options in

terms of conveying water away from the new interceptor drain, but did not feel able to plump for any one of them.

299. He was cross-examined about this at trial and said that in his opinion the second variant identified by Mr Barber, i.e. the provision of an outfall from the french drain connecting into a below ground attenuation tank from which it could be pumped into an above ground rainwater tank to serve an automated drip feed irrigation pipe, appeared to provide a basis for a viable option. I shall refer to this scheme as the attenuation irrigation scheme. In answer to questions from me he agreed that the same scheme could be undertaken at no 15 if for any reason it was not appropriate to undertake it at no 17, subject to the provision of duplicate pumps and monitoring equipment and a repair system and maintenance programme.

300. Mr Grime did not support any of the proposals because, as he explained in cross-examination, he believed that "changing what is currently there will be to the detriment of the adjacent property. I think more by luck than judgment, perhaps, the solution we have in place now is probably a very effective solution in terms of mitigating the impact of the development and providing significant betterment". He opposed any remedial scheme which was not sustainable. He was concerned that the attenuation irrigation scheme would need to have sufficient storage capacity to hold the water entering the french drain. He was concerned that any scheme which depended on sufficient maintenance was a risk if it was not properly maintained. He believed that the cost of designing and constructing an attenuation irrigation system in no 17 could be as much as £40 – 50,000.

301. In answers under cross-examination from Mr Darton Mr Barber made the point that any decision as to whether any and if so which remedial solution was appropriate would depend on what it was hoped would be achieved and a cost benefit analysis of the benefit compared with the cost. Subject to that overriding point, his preference was for the attenuation irrigation solution, giving compelling reasons as to why the other remedial schemes as proposed by Saville for no 17 were unsuitable.

302. In answer to questions from me Mr Barber explained that in his opinion the only remedial scheme at no 15 which might work to remedy the problem at no 15 would be to undertake a far more extensive and expensive remedial scheme than the one undertaken by Mr Dorman. In summary, he suggested that what would be needed was for the drainage system to be installed in a porous medium, which could only be achieved by a site strip of the existing lawn to allow a drainage system to be installed at such a level that the drains could fall to a suitable ultimate discharge point (he suggested in the middle of the lawn would be the most sensible location) and from where it could be transported to a suitably sized underground attenuation vessel where it could be stored and fed into a suitably sized above ground tank (the existing one, if it was suitably sized) which could then be used to feed the existing irrigation system.

303. His opinion was that this was the only sustainable solution which addressed the technical challenges of the ground conditions at no 15 and which did not involve making an illegal connection to the mains drainage system.

304. I agree that whilst this would, if properly designed and specified and undertaken, provide a suitable remedial solution, I am also satisfied that it would go far beyond what is required to resolve any problem caused by the works to no 17 in isolation and, also, would be extremely expensive and would obviously involve a significant degree of betterment to no 15 as well as completely destroying their existing lawn for a second time.

305. Before looking at what has been done and when and what more needs to be done, it is necessary for me to determine what would have been a reasonable scheme to undertake had either the Stevens or the Sihans or both of them obtained a sensible assessment from a properly instructed drainage engineer in around 2017-1018, on the basis that what was reasonably required was to reduce water run-off from no 17 to no 15 back to a level commensurate with what was experienced before the works to no 17 and thus consistent with natural water run-off down the existing gradient, i.e. intermittent water run-off and intermittent flooding after heavy rainfall events.

306. In my judgment, that would have involved two things.

307. First, the construction of an interceptor land drain along the length of the boundary between the rear garden of no 17 and the rear garden of no 15, either on the no 17 side or on the no 15 side of the boundary, which was sufficient in width and depth and in construction to collect the majority of water run-off from no 17 and to conduct it to a suitably located outfall from where it would be stored in a suitably sized attenuation tank from which it could be transferred to an irrigation tank and used for irrigation purposes.

308. Second, the construction of a slot drain along the outer perimeter of the external paved areas on the no 15 side and the rear of the house at no 17, connected into the existing public drainage scheme, to prevent rainfall falling onto the paved areas spilling down the slope to no 15 or onto the rear lawn.

309. Whilst this would not have prevented all flooding to no 15, I am satisfied that the Stevens could not reasonably have insisted on such an outcome, given the natural slope and the natural propensity of their garden to experience some flooding after heavy rainfall events.

310. In my judgment, from a technical point of view it would not matter whether the french drain was installed on the no 17 side or the no 15 side of the boundary, since in both cases its purpose and function would be the same.

311. From a wider point of view, whilst there is understandably a feeling that it should be the responsibility of the landowner guilty of the creation of the nuisance to resolve the nuisance on their own land, and to undertake the burden of the maintenance and upkeep of the system, there are at least two powerful countervailing considerations. First, the continuing risk to the Stevens that whoever might own or occupy no 17 for the future would not maintain the system, with the risk of further flooding, whereas the Stevens or any subsequent owner or occupier of no 15 would have a powerful incentive to do so. Second, the fact that a well-designed and constructed system ought largely to look after itself and the costs of maintenance and pump operation are not, as the experts confirmed, significant in the context of the overall upkeep of a property such as no 15.

312. In the particular context of this case, there are further powerful countervailing considerations. First, the Stevens have already had drainage works undertaken on their property. As I have found, they have achieved a significant measure of success. The problems with them are due to the defects in the construction of the french drain and, possibly, pump and sump arrangements, and the problems with the prohibited connection into the public drainage system. It is overall both easier and fairer that the Stevens should have to remedy these deficiencies and to extend the system to provide an attenuation tank and a connection into the existing or larger size irrigation system than it is that the Romeros should have to duplicate much of this work at no 17. That is particularly so since: (a) the Stevens ought to have had professional input from a drainage engineer in 2017 before undertaking these works, especially since they were already contemplating legal proceedings; (b) the Stevens have

never formally required either the Romeros - or before them the Sihans – to undertake such works to no 17, preferring instead to have the existing levels restored even knowing that their own expert's view was that this would not overcome the problem. Further, there is no need to re-do the works to the main part of the lawn, since these connecting drainage systems are irrelevant to the need to prevent water run-off from no 17 to no 15. Finally, it makes far more sense for the irrigation system to be used for the benefit of the large mature garden to no 15 than the smaller, essentially decorative, residual garden to no 17.

313. For these reasons I am satisfied that it would not be right to grant an injunction to compel the Romeros to undertake the primary works of the construction of the french drain and attenuation irrigation system on no 17. This conclusion is consistent with the legal principles identified above, since: (a) this is not a case of future grave damage, even on the Stevens' evidence and case; (b) damages to reflect the costs of the works being undertaken on no 15 would be a sufficient remedy; (c) even after an adjournment to settle the precise terms of any injunction there is still a real risk that the Romeros would not know exactly what they have to do as a matter of fact, given the need for a further investigation, design and specification by a drainage engineer and the risk that actual site conditions may differ and require a change to the works.

314. However, no such difficulties arise in relation to the slot drains around the perimeter of the paved areas. What is required is shown in the Saville drawings and is not the subject of any controversy, since there is no suggestion that the drain cannot be connected into the existing public drainage system because the paved areas form part of the footprint of the new house and draining them into the existing public drainage system does not constitute land drainage. This work cannot be done other than on the property at no 17 and, although it might be possible to extend the existing drainage system on no 15 down the length of where the paved areas are present on no 17, it is in this instance far preferable that the potential surface water run-off is drained where it falls. Moreover, taking steps to prevent surface water run-off from the rear paved area to the rear lawn of no 15 of itself reduces the water run-off from the rear lawn onto no 15, which also reinforces my conclusion that it is just not to grant an injunction against the Romeros in relation to the provision of a french drain on no 17 itself. The estimated cost of these works according to Ashley's costing of the Saville proposal is just over £7,250, so that it is not onerous.

I. Damages awarded against the Sihans

315. On that basis it is possible to assess the damages to which the Stevens are entitled as against the Sihans.

Cost of the works and replacing damaged vegetation

316. The starting point is the cost of the works. As I have said, Mr Grime's view of the cost of providing the same system at no 17 was in the region of £40-50,000. Mr Barber records that Ashley's costing for the french drain and pump was £10,767 and his view as to the cost of the attenuation irrigation system (excluding the french drain) is in the region of £15-20,000, thus a total of £25-30,000 excluding investigation and design fees which Mr Grime included. These are all net of VAT.

317. The invoices submitted by Mr Dorman are confusing. Thus his invoice dated 10 February 2018, which he explained was actually an estimate for the works undertaken later that year, amounted to £16,440 inclusive of VAT and his earlier invoice dated 22 February 2018 for the works in December 2017 amounted to £2,500 inclusive. None of these included for the

attenuation tank or irrigation tank. Moreover, he invoiced £2,500 plus VAT on 27 October 2018 for additional drainage and £2,000 plus VAT for draining rear beds and replacing shrubs and conifers in the border. Also in relation to replacing damaged vegetation, he invoiced a further £9,840 inclusive of VAT in the same month for supplying and installing new soil and plants and conifers to the borders. I accept the latter invoice as referable to the no 17 border (in circumstances where the photographs clearly show flooding to the borders and damage to the conifers) but not the former £2,500 plus VAT as it seemingly related to the rear border.

318. In the circumstances it seems to me that a reasonable award for the cost of the remedial works, both as undertaken and to be undertaken, amounts to £40,000 plus VAT, inclusive of investigation and design fees, a total of £48,000. The additional drainage to the lawn itself is not recoverable as not related to remedying the water run-off from no 17 but I allow £10,000 for the remedial works. Thus the total damages awarded under this head amounts to £58,000.

The claim in relation to the swimming pool

319. In his witness statement Mr Stevens had said that he believed that it was problems with the drains to no 17 which were causing the swimming pool wall and liner to buckle and that Mr Dorman advised that the drains were becoming blocked as a result of run-off from no 17. However Mr Dorman is not a drainage expert and his witness statement says nothing about this.

320. Under cross-examination of Mrs Partakis-Stevens it became apparent that the Stevens' case was based solely upon her understanding from Mr Taylor that the pool liner had become detached from the structure due to water pressure from water ingress from no 17.

321. There is no convincing expert support for this theory. Whilst Mr Taylor considered that silt deposits in the drains may have resulted from the works to no 17 and, in particular, the pumping of excess water during construction, Mr Barber considered that the more likely cause was blockage due to root ingress. I am not persuaded that it has been proved on the balance of probabilities that Mr Taylor's opinion is correct. Furthermore, in his May 2018 report Mr Taylor recorded, but did not express an opinion upon, the theory advised to him by the Stevens that the detached liner only occurred after the works to no 17 and thus was attributed to the raised groundwater level and flooding at no 15. Thus, it seems to me that the Stevens case is based on a temporal coincidence and two different theories of cause and effect, neither of which has been made out to the required standard.

322. Still further, the invoice for remedial works from a Mr Huxley in the sum of £25,946 was for a "pool refurbishment" including – but not obviously limited to – a "new on site liner and pool materials". Nor was it a contemporaneous document, being dated September 2022, whereas under cross-examination of Mr Stevens it became apparent that the work had been done in 2020 and that this had been provided at the later date to provide proof of payment. Whilst I accept Mr Stevens' explanation that he did not understand that this provided a misleading impression, it does not help the Stevens' case, in that it does not provide contemporaneous evidence of what was done and at what cost and to what extent it relates to any problem attributable to the Sihans. In the circumstances I would not be prepared to treat this as reliable evidence of the amount claimed and there is no other reliable contemporaneous evidence.

323. Nor is there any reliable support for the claim that the cost of further repairs to the paved area around the swimming pool, said on some unspecified basis to be related to the flooding into

no 15 as a result of the works to no 17, but not yet undertaken, is recoverable. The same applies to the claim for new cabling and lighting to the rear garden.

Loss of market value to no 15

324. This claim is supported by the expert evidence of Mr Raine. It is asserted on the alternative hypotheses that: (a) if no remedial works to no 17 are undertaken there will be a diminution in value of £185,000 (being 10% of the current valuation of £1,850,000); (b) if remedial works to no 17 are undertaken, but require ongoing maintenance and upkeep by the owners of no 17 for their continued efficacy, there will be a diminution in value of £46,500 (being 2.5% of the current value).

325. I have already said that I prefer the approach of Mr Lowe to that of Mr Raine on this point. Further, given that I have determined that the appropriate course is for: (a) the injunction to be limited to the slot drains around the paved areas, which will require nothing other than a simple connection to the existing public drainage system; (b) the Stevens to recover damages which will compensate them for the cost of completing works to no 15 which will give them sufficient protection against the water run-off for which the defendants are responsible, the fundamental basis for considering that there will be any residual diminution in value is removed.

326. Even if there was a theoretical basis for a diminution in value on the basis that the owners of no 15 will be left with a drainage system in their own property which they will have to maintain and pay for the pumping costs, there is no sufficient basis in the evidence for being able to place any value on this, especially where no 15 already has a number of drainage and irrigation systems in place and where the costs of maintenance are not substantial. I reject the argument that there is any convincing basis for a claim for diminution in value on the basis of the remedial cost plus 2.5% of the property value as entirely speculative.

327. Thus, I award nothing for this head of claim.

General damages

328. The Stevens are entitled to general damages for distress and inconvenience. They have claimed £2,500 each. It is well-established that such claims should be modest see the discussion in *Keating on Construction Contracts* 11th edition at 9-083 and the authorities there cited, emphasising that they should not be out of proportion to awards in personal injury cases. Here, I have to be careful to award damages based on the nuisance which I have found proven, recognising that the Stevens cannot have expected to have had a completely water free garden and that there was about two years of significant flooding due to the works to no 17 followed by a further 4 years of occasional such flooding, which could also have been further reduced had the Stevens undertaken a proper remedial solution on no 15 from the start and not held out for a complete relevelling of no 17's rear garden and/or an injunction. In the circumstances I award £1,000 to Mrs Partakis-Stevens and £500 to Mr Stevens.

J. The principal claim against the Romeros

329. I can deal with this much more briefly.

330. As I have said, it is common ground that the Romeros did not cause or create the nuisance and, hence, their liability arises - if at all - on the basis that, having become aware of the nuisance, they failed to take reasonable measures to abate it, judged by reference to their actual capacities and circumstances.

331. It was in May 2018 that the Romeros first became aware of the Stevens' claim, when the Stevens' then solicitors wrote to their then solicitors notifying them of the claim and providing them with a copy of Mr Taylor's May 2018 report.

332. As I have explained in the factual summary, the Romeros initially relied – not surprisingly – upon the Sihans to resolve matters. As I have said, the twin pronged strategy adopted by Mr Sihan was to appeal the non-determination of the application to vary and to engage in tri-partite without prejudice discussions to seek to resolve matters. As I have also said, this did not succeed and although in June 2020 the Romeros said that they would engage professionals to investigate and decide what was required and undertake appropriate remedial works there is no evidence that they ever did so other than instructing Saville as landscape contractors to produce scheme drawings and to have them costed. It was not until November 2021 that they instructed Mr Barber and, on the basis of his opinions, proceeded to defend the Stevens' claim down to trial.

333. Given my findings, I am satisfied that the Romeros were reasonably entitled to refuse to undertake either a re-levelling of the rear garden (at least in relation to the nuisance claim) or to undertake a remedial land drainage scheme to the rear garden of no 17. They were reasonably entitled to say to the Stevens that since they were not liable for the creation of the nuisance and since the sensible course was for the Stevens to undertake – as they had in part done – a suitable remedial scheme on no 15 and recover the cost from the Sihans, their duty did not require them to do anything in that respect. However, what they were not entitled to do, on my findings, was to refuse to do anything about the problem insofar as it was – as I am satisfied it was to a material extent – caused, contributed to or exacerbated by the water run-off from the paved areas, when the solution to that problem, namely the provision of slot drainage connecting into the mains drainage system, was or ought reasonably to have been an obvious and reasonable step to take.

334. In the circumstances I am satisfied, for the reasons I have given, that they were in breach of their duty to the Stevens from June 2020 and that an injunction requiring them to install slot drainage at the perimeter of the paved areas to the no 15 side of the property and to the rear of the property can and should be made against them. That seems to me to be a reasonable application of the measured duty of care imposed upon them as successors in title to the Sihans where they were not guilty of the original creation of the nuisance but equally were not, on my findings, entitled to do nothing on the basis that it was for the Sihans to do anything required on no 17. However, I do not consider that there is any basis for awarding any damages against them, since none of the special damages claimed by the Stevens and awarded against the Sihans are their responsibility and it cannot credibly be said that the facts justify an award of general damages in relation to the contribution of the watershed from the paved areas from around June 2020 onwards.

K. The contribution claims by the Romeros against the Sihans

The claims under the Civil Liability (Contribution) Act 1978

335. I can deal with the claims under the CLCA 1978 briefly. On the basis of the findings I have made it is clear that the Sihans have no basis for any contribution claim against the Romeros, whereas the Romeros are entitled to a full contribution from the Sihans for the reasonable cost of complying with the injunction. As between the Sihans and the Romeros it is the Sihans who are solely responsible for the need for this work to be done and there is no basis for any suggestion that the nature, extent or cost of these works has increased as a result of

any culpable inaction on the part of the Romeros since they purchased the property and became involved in the dispute.

336. The assessment of these costs can be the subject of a separate determination if not agreed after the works have been done, in conjunction with any assessment of any costs required to comply with the enforcement notice – which I deal with below.

337. In his submissions Mr Darton argued that if and insofar as the Romeros chose to undertake both these works and any works to comply with the enforcement order using their own contractors, rather than permitting the Sihans to do so at their own cost, they ought not to be allowed to recover those costs insofar as they are greater than the costs which the Sihans would incur should they do so. In support of this argument he relied on the decision of the Court of Appeal in *Pearce & High Ltd v Baxter* [1999] CLC 749. However, that was a decision about the proper construction and effect of a JCT defects liability clause, where the Court of Appeal held, following an earlier decision of HHJ Judge Stannard the then Liverpool Official Referee, that if the employer unreasonably refused to allow the building contractor to go back onto site to remedy defects arising within the defects liability period the employer could not recover more than the cost which would have been incurred by the building contractor.

338. In contrast, the only argument available to the Sihans in this case would be an argument that if they refused to allow them to do the works the Romeros would fail to act reasonably to mitigate their loss. But this would be a hopeless argument in my judgment. The Sihans have had the opportunity to do or to offer to do works to no 17 over an extended period and have neither done so nor accepted, in open or otherwise admissible correspondence, an obligation to do so in clear terms ever since. The Sihans' own failure to have the external works properly designed or undertaken with the benefit of the required planning permission in place is the fundamental cause of this litigation. Mr Sihan's approach all along was to cut corners to save himself time and money. It could not by any stretch of the imagination be thought unreasonable for the Romeros to wish to employ their own contractors to undertake this work.

339. The other contribution claims brought by the Romeros against the Sihans require more detailed consideration, although I do not need to repeat the relevant facts as referred to above.

The misrepresentation claim

340. It is convenient to start with the misrepresentation claim. There are two separate and distinct misrepresentations alleged, the first being about the nature and extent of the dispute with the Stevens as neighbours ("the neighbour dispute misrepresentation") and the second being about the true planning position ("the planning position misrepresentation").

The neighbour dispute misrepresentation

341. In my judgment, the key question is whether the SPIF, when read with the covering email and the subsequent answers to enquiries, amounted to a misrepresentation because: (a) on a true reading it concealed, by not making any reference to, the existence of an actual or potential civil dispute concerning the complaint by the Stevens that no 17 was causing a continuing flooding nuisance to no 15; and (b) instead, it conveyed the false impression that the only complaint by and dispute with the neighbours at no 15 related to the question of compliance with the planning permission at no 17.

342. In my judgment, the SPIF did amount to a clear misrepresentation on this very basis. To answer yes to the questions about disputes or complaints and about notices and proposals, but

to provide details which clearly represented that this was a planning objection which was being dealt with through the planning process, clearly concealed the existence of the letter before action and the civil dispute which had already arisen even though not gone as far as legal proceedings and clearly conveyed the false impression that the only relevant correspondence and dispute was a planning-related matter.

343. Insofar as there was any initial doubt that this was the effect of the representation, it was removed in my judgment by the answer to enquiry 17 when, in answer to the very clear and specific request for "evidence of the current status of the dispute with the owner of [no 15]", the answer clearly represented yet again and even more clearly that it was solely a planning-related dispute which would be resolved through the planning process and that any retention could be released once the planning officer confirmed there weas no remaining planning issue.

344. In my judgment, there is no basis for the argument that JMW's reference to the dispute being with the owner of no 15, coupled with the failure to pursue the request for further correspondence, shows that the Romeros were not misled. As I have said, the reference to dispute with the owners of no 15 is far more likely to be explained by JMW simply picking up the words used by PLS. Further, the Sihans cannot say that on an objective basis the Romeros, by not insisting on the production of copies of all correspondence, were somehow accepting that there might be correspondence which contradicted what the Sihans had already said. Indeed, it is clear from the Romeros' evidence that they had no inkling that there was anything other than a planning objection and their belief is amply demonstrated by their willingness to accept a contractual obligation from the Sihans to deal with the planning issues rather than even to seek a retention.

345. As to inducement, is always difficult to prove a negative, in the sense that it is difficult for the Romeros to prove that they relied on the representation as meaning that there was no civil complaint or dispute, when the very effect of the representation was to give them no reason to think that there was any such thing. However, I am satisfied that it can be inferred from the way in which the Romeros dealt with the disclosure about the planning objection that they did rely upon what they had been told by Mr Sihan and that they were reassured that the only dispute concerned the planning related matter which they could confidently expect Mr Sihan to resolve in accordance with his undertaking. Additionally, given the reverse burden of proof on this aspect of the case, I accept the Romeros' submission that the Sihans have failed to prove that the Romeros did not rely upon this misrepresentation, when it is obvious that there is a world of difference between a neighbour who has objected to a planning application by the owner and a neighbour who has also asserted a civil claim for flooding nuisance where the owner believes that neighbour is pursuing a vendetta. A purchaser may contemplate with relative equanimity a neighbour who objects to a planning application when that application will be decided by the planning authority as an independent body, but would be very unwilling to have the same relaxed approach to a neighbour who has intimated a civil claim for flooding nuisance and is seeking an injunction.

346. I turn now to the question as to whether the misrepresentation was made fraudulently. In this case it is, I am satisfied, an irresistible inference that the neighbour dispute misrepresentation was made fraudulently. Mr Sihan was fully aware of the letter of claim and had instructed specialist litigation solicitors to deal with it. He cannot credibly say that he genuinely believed that the claim had been withdrawn or compromised. Indeed, he knew days before the meeting with PLS to discuss the SPIF that the Stevens' solicitors were seeking inspection facilities for their expert and I do not accept that somehow he genuinely believed that this was only to do with the planning objection.

347. Instead, I am satisfied that a conscious decision was taken to word the email in such a way that it referred to the Stevens' objections and dismissed them by reference to the EEG report, yet gave the clear impression that it was only to do with the planning objection and issue. I am satisfied that Mr Sihan took the conscious decision that, whilst it was necessary to provide information in relation to the planning permission, not least because this could be obtained via the planning portal anyway, he was consciously unwilling to disclose that the Stevens had written a solicitors' letter before action, alleging that the works at no 17 had caused a flooding nuisance and that the Stevens were seeking an injunction and damages.

348. I am satisfied that he took the conscious decision that he could get away with not referring to it because it was sufficient simply to refer to the planning application, given his confident (albeit misplaced) belief that the planning issue would be resolved in his favour and that the civil dispute would be resolved along with it or if necessary, being the subject of a separate compromise with the Stevens following the same essential outcome as the planning application which he could always conceal from the Romeros. It is perfectly clear from his subsequent conduct, in particular his subsequent email of April 2018, that he was very keen to get the sale over the line and no doubt took the view that once he had done so he could deal with any problems as and when they arose.

349. I am conscious that in making these findings I am rejecting the evidence of Mr Sihan on an important point. However, in my judgment it is inconceivable that any solicitor would have worded the email in the terms that PLS did, if that solicitor had seen and discussed the letter before action (and the more recent letter from the Stevens' solicitors) with Mr Sihan, unless the solicitor had discussed and obtained his client's express instructions to do so. In the absence of evidence in the form of an attendance note or a letter of advice, things which all seem to me to be very likely for a solicitor to have done in such a case – especially where they have charged a separate fee for this work – and in the absence of evidence from Mr Baker himself and any proper explanation as to why not, in my view it is an irresistible inference that Mr Sihan, advised by Mr Baker, decided that he would take the risk and only refer to the planning dispute. I am satisfied that he knew that he was making the deliberate decision not to refer to the civil dispute and that he knew that he was giving a misleading impression. I accept, as I have said, that he genuinely believed that it was all a try-on anyway, but I am also satisfied that he took the deliberate decision to give a misleading impression, on the basis that if there was ever any dispute about this he could and would argue – as indeed he has – that what he said was not to amount to a deliberate and fraudulent misrepresentation. In short, he consciously took a high risk strategy which has failed.

350. I am also satisfied that Mrs Sihan, having delegated all matters to him, is responsible alongside with him for that misrepresentation.

351. Further, and even if that was not the case, then they would be liable for the recklessness of their solicitors in their answers as given to the Romeros, either on the basis that the solicitors did have the letter before action and took the decision – on Mr Sihan's case – to write the email in the terms they did without reference to him and his authority, or on the basis – which I suspect unlikely – that they wrote the email without asking for instructions about whether there was also any correspondence from solicitors.

<u>The planning position misrepresentation</u>

352. The Romeros' further case is that the SPIF, when read with the covering email and the subsequent answers to enquiries, amounted to a misrepresentation that all that was awaited from CEC following submission of the application to vary and the EEG report was the determination of the application, with no reason to believe this would not be positive,

whereas in fact the application was, and always had been, contentious and there was no good reason to believe that it would necessarily be positive.

353. In my judgment this alternative misrepresentation case fails. The Romeros were told that the Stevens had objected to the landscaping works and that there was an application to vary which awaited determination. There was, I accept, an implication that the Sihans believed that the application would be granted without any modification being required. However, the offer to accept responsibility for any works required, coupled with the offer of a retention, made it plain in my judgment that the Sihans were aware that there was a possibility of a different outcome which was sufficient for them to make proposals to deal with that risk. In my judgment, that fairly reflected the Sihans' view and belief and the Romeros were told enough to be able to negotiate and agree terms which, so far as they and their legal advisers were concerned, protected them from the risk of the planning issue not being resolved swiftly and satisfactorily.

354. Nor do I accept the Romeros' case that events in relation to the application to vary had so changed since 21 February 2018 that as at the time of exchange the answers to the SPIF, even if true at the time, had become untrue to the Sihans' knowledge. The Sihans had provided the further information requested but Mr Keen was saying that he needed to speak to the flood risk team before making a decision. Although Mr Briggs was threatening a complaint and an appeal for non-determination, I am satisfied that this was clearly because Mr Sihan desperately wanted the matter resolved before exchange rather than because he believed that CEC had turned against him and was going to refuse the application to vary.

Damages for fraudulent misrepresentation

355. I have already referred to the relevant legal principles.

356. The starting point is the Romeros' claim for the difference between the price paid for No. 17 by them and what they contend was its true value as at that date, having regard to the true extent of the dispute with the Stevens and the true extent of the planning issue. This is said to amount to £500,000 by reference to paragraph 19.14 of Mr Lowe's report.

357. In fact, the £500,000 was arrived at by Mr Lowe as a valuation for the difference in value for the dispute alone. He arrived at it on the following basis: (a) in his opinion a willing purchaser would carry out due diligence by making enquiries with the Stevens and obtaining legal advice with a view to resolving any disputes preferably before or soon after completion; (b) he took as a starting point for a settlement the claim valuation of £80-100,000 in Kuits' letter to Kangs of 22 March 2018; (c) added a 50% uplift to "insulate from the risk of further dispute"; (d) added to this Mr Barber's estimated cost of undertaking works to no 17 to abate the nuisance by reducing the levels and providing drainage, inclusive of 20% contingency, £245,000; (e) adding a further £105,000 to the subtotal to produce a total reduction of £500,000, on the basis that in his opinion most prospective purchasers would simply walk away so that it would, in effect, be a buyer's market for no 17.

358. Although I agree that his approach (i.e. to ascertain a cost of cure, with some appropriate addition for risk and inconvenience) is entirely sensible in principle, there are a number of difficulties with the application to the facts of this case, as Mr Darton explored with him in cross-examination.

359. The first difficulty is that the £245,000 allowance is the same as the amount he used to assess the difference in price for the planning issue. Whilst he explained why he had included it, on the basis that it represented the cost of cure which the purchaser would wish to buy out, as Mr Darton submitted this ignored the fact that in this case the Romeros had, perfectly sensibly,

dealt with the planning risk – which on Mr Lowe's analysis involved the same risk and the same remedial works – by accepting a direct contractual commitment from the vendors to deal with this risk themselves. They did not seek to obtain any additional discount or to stipulate for a retention.

360. It seems to me that it could not be right in principle to allow the Romeros to obtain difference in value damages based on this cost of cure plus contingency for risk when that would completely cut across the arrangement which they had in fact agreed to enter into instead to guard themselves against essentially the same risk. Put another way, the contractual obligation undertaken by the Sihans represented the parties' contemporaneous valuation of the cost of buying off that risk. Mr Lowe said that the possibility of this being agreed was not something which could be factored into a simple market value figure, because it amounted in substance to a conditional reverse consideration. I am sure he is right, if what must be achieved by the court is an open market valuation which includes everything. But this is not that case.

361. Whilst it is also true that the Romeros entered into the sale contract in ignorance of the neighbour dispute, since Mr Lowe rightly acknowledged that the prudent purchaser would have wanted to make enquiry and take legal advice it cannot be said with confidence that they would on the balance of probabilities have asked for and obtained a discount instead of or in addition to clause 10 just because it was a neighbour dispute as well as a planning issue. That would depend on the presence, nature and extent of any additional risk due to that additional factor.

362. The second difficulty is that the £80-100,000 figure referred to in Kuits' letter was plainly a valuation of costs and losses already incurred. On any view, these could not be claimed against the Romeros as incoming purchasers, as any legal advice taken would have confirmed. The most that could be said, it seems to me, is that there was some risk of being drawn into a complex tri-partite legal dispute and incurring costs and a risk of some liability along the way. However, on the same basis as what actually occurred with the planning issue, I am satisfied on the balance of probabilities that the way the parties would have dealt with this issue in this case, had the Sihans disclosed the neighbour dispute and assuming the Romeros were still willing to proceed, which on balance I am satisfied they would have been had they undertaken the due diligence referred to by Mr Lowe, was to have negotiated clauses similar to clauses 10.1 and 10.2.

363. I appreciate that the Romeros' evidence was that they would not have been willing to complete had they known of the neighbour dispute, but I am not satisfied that this would have been the case. As foreign nationals with no experience of buying or selling property in England or of the English legal system, it seems unlikely that they would have walked away without seeking legal advice. It seemed to me that Mr Romero was a pragmatic man who would, had he received advice (as I am satisfied he probably would) to the effect that whilst this made matters more complex it could still be resolved by suitable contractual provisions as long as he trusted the Sihans to keep his word, he would have been willing to proceed. He clearly liked the house, was not put off by the planning issue, and trusted Mr Sihan.

364. I am satisfied that the most likely outcome is that the Romeros would have accepted an undertaking by the Sihans to resolve the dispute with the Stevens at their own expense and as soon as practicable, including undertaking any works that all agreed should be undertaken at no 17. The Sihans would also, I am satisfied, have undertaken to indemnify the Romeros for any loss and damage suffered as a result of a failure to do so, including the costs of any legal proceedings in which the Romeros might become involved as a result of such failure. It is

possible that a retention might also have been included, although I am not satisfied on a balance of probabilities that it would have been given the difficulty in putting a value on this risk.

365. It is of course always possible for a willing purchaser and a willing seller to reach a compromise on a discount to buy off any such risk, if that is what both parties are determined to do. However, in this case the resolution of the dispute depends on having to deal with two third parties, i.e. the Stevens as well as CEC, in respect of a legal and planning dispute of some complexity in the context of a domestic property, where the seller is convinced that they can deal with it without undue expense, whereas the purchaser does not wish to take any risk of being left having to deal with the problem and being significantly out of pocket. Hence, the obvious attraction of a clause such as clause 10.

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

367. In the circumstances, this is one of those cases where either it is neither necessary nor appropriate to award damages on the basis of difference in value or such assessment should be undertaken by reference to the position at trial and once the position is known as regards the nature, extent and cost of the remedial works, so that in effect difference in value is assessed as being the actual losses sustained by reference to the Sihans' failure to comply with obligations which they would have undertaken had the neighbour dispute been properly disclosed pre-contract.

368. There are also claims by the Romeros for general damages for inconvenience and loss of amenity to be caused by any remedial works to no. 17 and for distress and inconvenience due to the ongoing situation. There are also claims pleaded for Mrs Guercio's medical costs for treatment of an acute anxiety disorder as a result of the stress of the Claimants' claim and for flight costs for travel to and from Argentina and the UK on two occasions for her medical treatment. However, given that the only remedial works are the extremely limited works to provide the slot drains for the pavings, given that the Romeros have not suffered any loss of use of no 17 as a result of any misrepresentation or breach by the Sihans, given that the reality in my judgment is that insofar as they have suffered emotional distress it is due to the effects of being involved in this dispute and the litigation – for which damages are not recoverable, and finally given that Mrs Guercio has provided no medical evidence either as to the nature or extent of her anxiety disorder or that it was caused or materially contributed to by anything other than the stress of the dispute and litigation, I do not consider that I can properly award any general damages in these respects.

<u>The claim for breach of clauses 10.1 and 10.2 of the sale contract</u>

369. There is a dispute as to the proper interpretation of these clauses.

370. The Sihans contend that on the ordinary and proper construction of these clauses they (i) obliged them to lower the ground levels of no 17 if this was required to "satisfy" CEC and (ii) required them to use their best endeavours to "bring a conclusion to any outstanding issues"

with CEC. They also contend that the 2 year longstop at 10.2 applied to the obligations set out at 10.1 and that, in any event, they were only obliged to carry out works 28 days after they became aware that such works were "required". They argue that this period of time could not begin to run prior to the exhaustion of the planning process and/or a request from the Romeros to lower the garden at no 17.

371. As I have said, it is common ground that the usual principles of contract construction apply to the process of ascertaining the true meaning and effect of clause 10.

372. In my judgment clauses 10.1 and 10.2 contain two separate, albeit related, obligations.

373. Clause 10.1 imposes an obligation to undertake the garden and/or landscaping works required to satisfy CEC and/or the relevant planning conditions. These works were to be carried out at their cost, to the Romeros' reasonable satisfaction, and diligently within 28 days of becoming aware of the works required.

374. It is plain from clause 10.2 and the factual matrix as known to both parties, i.e. the dispute about whether or not the landscaping scheme might cause flooding to no 15 and the application to vary, that the parties contemplated that the nature and extent of the works required would not be known until the application to vary had been concluded by a formal notification from CEC, either resulting from an agreement or a determination. It is apparent from the variation application that the default position, i.e. the position if the application to vary was refused, was that the relevant planning conditions would require the existing levels to be reinstated.

375. Although it was argued by Mr Darton that the obligation to do the works did not arise until either: (a) both CEC and the Romeros were satisfied with the works required; or (b) the planning process had been exhausted and the Romeros had requested the Sihans to reinstate the existing levels, that is not what the clause said and nor in my judgment can such an interpretation be inferred.

376. Instead, clause 10.2 imposed an obligation on the Sihans to engage with CEC and use their best endeavours to bring the outstanding issues to a conclusion, unless or until 24 months from completion had elapsed and no notification had been issued, after which this obligation should cease. In the context of this clause and the factual matrix as known to both parties, what this meant was that if no resolution had been received within 24 months then the Sihans' obligation to continue to engage with CEC would come to an end. There was no equivalent obligation on the Romeros to take the Sihans' place in such circumstances. It would follow, in my judgment, that once the formal notification was issued by CEC the works required would become known and the obligation under clause 10.1 would arise.

377. In my judgment that occurred in September 2020, when the Sihans' application for retrospective permission for the change in levels was refused. I accept that clause 10 is silent about the position if any appeal was launched against any notification, but that is irrelevant in this case since the Sihans did not launch an appeal.

378. It follows that the Sihans were obliged to undertake the relevelling works at that point. However, they did not do so and, hence, were in breach of clause 10.1.

379. Furthermore, in my consideration of the relevant facts I have already referred to the steps which the Sihans took prior to the end of the 2 year longstop on 23 March 2020. In the section dealing with the claim against the Sihans, I decided that over this two year period: (a) the only overt step taken by Mr Sihan post-completion was to instruct Mr Briggs to appeal the failure to determine the application to vary; (b) the Sihans failed to agree to undertake the

works required to resolve the flooding problem at no 15 due to the works at no 17 or to commission an alternative investigation or report, whether as to the correctness or otherwise of Mr Taylor's views or as to the necessary remedial works, to put to CEC; (c) achieved nothing concrete, except a further instruction to Mr Taylor and a further report and an attempt to settle at a mediation which did not bear fruit; (d) Mr Sihan simply refused to accept that the works to no 17 had caused any flooding problem to no 15 and adopted a strategy of seeking to deal with this problem by seeking to achieve a solution which involved him in the least possible difficulty or expense and which failed to bear fruit.

380. In such circumstances it is plain in my judgment that the Sihans did not comply with their obligation under clause 10.2 to use their best endeavours to conclude all outstanding issues with CEC. Although Mr Darton submitted that such a conclusion cannot be drawn because the Romeros have not called a planning expert to support a case that Mr Briggs was professionally negligent in his conduct of the appeal, that submission assumes, wrongly in my judgment, that the essence of this complaint is that the appeal was not handled correctly. To the contrary Mr Briggs handled it entirely in accordance with his instructions, which was to seek to blame everyone other than the Sihans to allow a settlement to be achieved which involved the Sihans in the least possible difficulty or expense, and it was precisely those instructions which amounted to a breach of clause 10.2. Tellingly, I have already referred to Mr Briggs' letter of 2 March 2020 where he advised that "the only solution that guarantees complete and final closure is to reduce the garden levels and withdraw the planning application. I recommend Cheshire East Council are instructed accordingly this week. The work can then be carried out in a relatively short period of time without any impact on the structural integrity of the house". That advice was not followed and there is no explanation as to why not.

381. I have already referred in the relevant facts section to the enforcement notice and the unsuccessful appeal. I have also referred to the Sihans' pleaded case to the effect that the Romeros' failure to argue ground (b) was a failure to mitigate their loss or broke the chain of causation. Whilst I am satisfied that the Sihans ought to be entitled to argue a failure to mitigate in relation to the failure to argue ground (a) and ground (b), because the two are closely connected and no prejudice arises, I do not consider that they succeed on the facts of this case.

382. As I have said in the relevant facts section of this judgment when dealing with the appeal, whilst one can criticise the Romeros for failing to take any active steps after June 2020 to obtain appropriate advice to develop a suitable remedial scheme and appoint suitable contractors to implement it, other than the instructions to Saville which were not sufficient in themselves, it must be borne in mind that they were fundamentally the innocent victims in all of this, whereas it was the Sihans who were responsible for the problem and had failed to take proper steps to comply with their obligations under clause 10 or to successfully prosecute the appeal by obtaining advice or proposing a suitable remedial scheme.

383. As I also said, the Sihans themselves had only obtained a report from Mr Grime on 16 March 2021 and even then did not share it with the Romeros or write to say that they should appeal on ground (a) or ground (b), whether at all or on the basis that they could use the Grime report to support the appeal, and notwithstanding that they were sent the appeal and supporting statement of case on 13 April 2021.

384. And as I also said, to succeed, the Romeros could not have hoped to satisfy the planning inspector that the works had not caused or contributed to or exacerbated any flooding to no 15 without expert evidence to persuade the planning inspector that Mr Taylor was wrong.

Whilst of course I have found that he was not wrong anyway, but in any event I do not consider that the Romeros can be blamed for not having obtained expert advice to argue an appeal on that basis at that stage. In relative terms, the Sihans were far more to blame than the Romeros for failing to obtain a fully designed scheme to seek to persuade the planning inspector to accept instead of a full re-levelling, so that I do not consider that the Romeros' failure to do so can be said to have been either a failure to mitigate or a break in the chain of causation.

385. It follows, in my judgment, that the Romeros are entitled to receive damages for breach of clauses 10.1 and 10.2.

386. As I said in the relevant facts section of this judgment, this is an appropriate case for not undertaking the assessment of such damages at this stage. That is because, on the basis of my findings, there is no need in the context of this claim for the Romeros to be required to undertake a re-levelling exercise to no 17 or to undertake any drainage works to no 17. Whilst the latter do not need to be undertaken given my judgment, I have no control over the former, since that is a matter for CEC. If CEC requires the Romeros to comply with the enforcement notice then the Romeros will be obliged to do so. However, if they do not then there would be no basis for the Romeros to do so. As I have said, I have asked and CEC have agreed to pause enforcement to await this judgment. This judgment provides no support for any justification for re-levelling in terms of mitigating the risk of flooding to no 15. It is, therefore, far more convenient to assess the damages to which the Romeros are entitled once they have undertaken the remedial works to no 17 which I have ordered they should do and I know what the position is vis-à-vis the enforcement notice.

<u>The claim under the alleged indemnity in the email of 5 April 2018</u>

387. For the following reasons I am satisfied that the Romeros cannot rely upon this as a separate basis for claiming an indemnity.

388. The starting point is the proper construction of the terms of the letter which are relied upon as constituting an indemnity. It will be recalled that Mr Sihan stated that if a claim was made joining the Romeros as a defendant he would "indemnify them of any costs arising from the litigation" and "deal with any case brought". Whilst the first might naturally be understood as a reference to legal costs, in my judgment there are four good reasons from the wording of the email overall why it refers only to any costs incurred in complying with any injunction or damages awarded in lieu. The first is that the explanation for the Romeros being joined is said to be for the purpose of requiring remedial works to be done. The second is the reference to the value of the intended claim. The third is the statement that he would deal with the case brought. The fourth is the reference to his solicitors who would be "dealing with this matter". Read together, what is being said in my judgment is that the Romeros could, if sued, leave it all to him and he would take care of everything, including the cost of dealing with the claim through his solicitors, the cost of complying with any works required to be undertaken and the cost of meeting any claim for damages.

389. In my judgment the email cannot sensibly be read as including an offer to accept an open-ended liability for whatever legal costs the Romeros might incur if they chose to deal with the case themselves. It follows that the indemnity could only relate to any substantive liability which the Romeros might come under in the litigation.

390. Further, since it is not said nor can it be a bilateral contract, if it is to be a unilateral contract it must be clear from the offer what it is that the recipient is to do or to refrain from doing which entitles that party to the benefit of the promise made in the offer. The Romeros

contend that it was not to rescind the sale contract for misrepresentation. However, there is nothing in the email itself which suggests that this was referred to. Nor is there any evidence based on previous communications to suggest likewise. I am prepared to accept that a motive for sending the email was to reassure the Romeros that they should not worry about being contacted by the Stevens' solicitors and threatened with a legal claim, and that Mr Sihan was probably worried that this might lead to the Romeros seeking to get out of the sale contract, but that is as far as it goes.

391. In his witness statement Mr Romero said that: "Without the reassurances given by Mr. Sihan in the April 5th, 2018 email, we would have done anything in our hands to cancel the contract of purchase of the property and get our money back". However, in the absence of any corroboratory contemporaneous evidence to that effect, such that he made any enquiries of his solicitor about the possible remedies available to him, I am afraid to say that this seems to me to be retrospective reconstruction.

392. If it was a unilateral contract, it seems to me that it can only be on the basis that what Mr Sihan was asking the Romeros to do was to allow him to take over the defence of any legal claim and deal with it through his solicitors. As the Sihans contend, the Romeros never did so, instead instructing their current solicitors when matters became contentious. In the circumstances, there is no basis for any argument that the Romeros performed the act required for acceptance of any such unilateral offer.

393. For these reasons I do not accept the case based upon this email.

L. Postscript – impact of this judgment upon the enforcement notice

394. As I have already made clear, there is no necessary connection between this civil claim and this judgment, which addresses solely the civil claim, and the enforcement notice and the remedial works specified in it.

395. However, rather than requiring the CEC planning enforcement office to wade through this lengthy and detailed judgment, it will - I hope - assist them if I summarise my conclusions insofar as they appear to me to be relevant to their exercise of any discretion they may have to reconsider either the enforcement notice or its terms, insofar as such decisions are based upon the impact of the landscaping works at no 17, carried out in breach of the relevant conditions of the planning permission, upon the adjoining property at no 15, in terms of flooding caused to no 15, both historical and continuing.

396. In short, having heard evidence from a number of factual witnesses and from three expert drainage engineers, I am satisfied that the works undertaken to no 17 have caused flooding to no 15. However, I am also satisfied that: (i) remedial drainage works already undertaken within no 15 have substantially mitigated the flooding impact of those works; and (ii) with the sole exception of the construction of a slot drain around the perimeter of the paved areas to the rear and the no 15 side of the new house at no 17, the most appropriate means for addressing the remaining flooding impact of those works is for the owners of no 15 to extend the existing drainage works at no 15 (and to be compensated by the previous owners of no 17, who undertook the works to no 17, for the costs of the remedial drainage works) rather than to require the owners of no 17 to undertake drainage works at no 17.

397. Further, and significantly, all of the three expert drainage engineers, thus including the drainage engineer instructed by the owners of no 15, agree that reducing the levels to the rear

garden of no 17 to their original levels, as required by the enforcement notice, would not result in any mitigation of the flooding impact of the works undertaken at no 17.

398. It follows that whilst continuing with the enforcement notice in its existing form may well be perfectly justified by reference to planning considerations, about which I express no opinion as not being a matter for this civil action, it would not – on the basis of my findings and on the expert opinion of the expert drainage engineer instructed by the owners of no 15 – have any positive impact so far as mitigating the remaining flooding impact of the works undertaken at no 17.

399. Whether the enforcement notice should include reference to the works to the slot drain around the paved areas is of course a matter for CEC, I should say that: (a) so far as I am aware, the failure to do so was not a breach of the planning conditions imposed on the original planning permission for the works; and (b) undertaking such works will by this judgment be the subject of an injunction to be ordered by the court against the current owners of no 17 but subject to an indemnity in their favour against the former owners of no 17.