IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 134 (LC)
Case No: BNO/27/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Mining subsidence – preliminary issue - dwelling house with outbuildings – remedial action – whether demolition and rebuilding is reasonably practicable – remedial works to outbuildings – claim succeeds in part – Coal Mining Subsidence Act 1991

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

MR IAN WHITE **Claimant**

And

THE COAL AUTHORITY **Respondent**

Re: Tidbury Castle Farm
Wall Hill Road
Corley Moor
Coventry
CV7 8AF

Hearing Dates: 5-7 and 9 February 2018

Before: Judge Elizabeth Cooke and P D McCrea FRICS

Royal Courts of Justice, London, WC2A 2LL

Gaynor Chambers, instructed by The Wilkes Partnership, for the claimant
Riaz Hussain QC, instructed by DLA Piper UK LLP, for the respondent

The following cases are referred to in this Decision:

Edwards v National Coal Board [1949] 1 KB 705
Langley and others v Coal Authority [2003] EWCA Civ 204
McGlinn v Waltham Contractors Ltd & others No 3 [2007] EWHC 149 (TCC)
Dixon v Radley House Partnership and others [2016] EWHC 3485 (QB)

DECISION

Introduction

1. The Claimant, Mr Ian White, is the freehold owner of Tidbury Castle Farm near Coventry. He bought the property from his grandparents. In 2008 he demolished the old farm house and replaced it with a new house. He also redeveloped, partly by demolition and re-build and partly by refurbishment, a range of buildings to include a plant room, two-storey annexe, a cinema, a games room, two large garages, office and a gardener's store. The new house, which he has described as a "modern, well insulated palace", and the outbuildings have suffered extensive cracking and are noticeably tilted as a result of coal mining operations in the vicinity during 2010-2011.

2. The Claimant has sought to recover the cost of making good the damage under the Coal Mining Subsidence Act 1991, and because payment has not been made has brought this action for damages. As statutory successor to the British Coal Corporation, the Coal Authority is the responsible person, and is the Respondent to this claim.

3. These proceedings have been brought on the basis that the Respondent has admitted liability for the damage to the Claimant's property, so that only quantum is in issue. Essentially, the Respondent contends that it must pay the cost of remedying the cracks but is not obliged to pay for the much more extensive work required to correct the tilting of the buildings on the property. There is agreement as to the cost of the works that each party says should be done, and accordingly the issue as to quantum is an issue of law. It is not a question of how much the work will cost, but of the extent of the work required by law to be paid for by the Respondent.

4. On 20 July 2017 the Deputy President directed the hearing of a preliminary issue as to the cost of the work for which the Respondent was required by the statute to pay, on the basis that there would be a final hearing later to determine the Respondent's liability, if any, for diminution in value of the Claimant's property after the work was done.

5. A hearing of the preliminary issue was listed for 5 – 9 February 2018; on 2 February 2018 we visited the property, and we are grateful to the Claimant for showing us round. At the hearing the Claimant was represented by Ms Gaynor Chambers of counsel, who called the Claimant, and two experts – Mr Robert Evans who gave engineering evidence, and Mr Nigel Mason who gave evidence as to the cost of works. The Respondent was represented by Mr Riaz Hussain QC, who called Mr Lee Cammack who is a Principal Project Manager within the Respondent's Public Safety and Subsidence department, and Mr Roger Gascoigne who gave expert engineering evidence. Mr Bill Swan provided expert evidence on costs for the respondent but was not called to give oral evidence. We are grateful to both counsel for their helpful arguments.

6. In the paragraphs that follow we determine the preliminary issue; we have also, at the request of the parties, made a finding about the likelihood of future subsidence on the site. That is relevant to the possible future issue of diminution in value, upon which we have not heard valuation evidence, but the parties asked us to make a finding of fact now about the likelihood of future subsidence while the relevant technical expert witnesses were before us.

7. Towards the end of the hearing the Respondent put forward an entirely new case, denying liability on the basis that certain procedural steps had not been taken by the Claimant. We are wholly unimpressed both by that submission itself and by its being put forward in the closing stages of the hearing. We say more about that in the final section of our decision.

8. Accordingly our decision is set out under the following headings:

(i) The law

(ii) The factual and procedural background

(iii) The subsidence damage

(iv) What is "reasonably practicable"?

(v) Will there be future subsidence?

(vi) The Respondent's new case on liability

(vii) The award of damages

(i) **The law**

9. It scarcely needs to be said that where a property has been damaged by subsidence caused by mining, the person or body responsible for the mining is liable in tort to the owner of the property. That liability would be to pay damages in the sum required to reinstate the property as it was before the damage was done.

10. Despite the obvious common law liability in tort there is also a statutory liability provided by the Coal Mining Subsidence Act 1991 ("the 1991 Act"). Liability under the 1991 Act is the same as it would be in tort but there are benefits to both parties where a claimant chooses to proceed under the statute, for reasons that will appear. The 1991 Act makes provision for the Respondent to have a "remedial obligation" in respect of subsidence damage. Key to that provision is the requirement to put the damage right so far as is "reasonably practicable". Provision is also made for the Respondent in some cases to pay for work rather than to do the work itself. We discuss the 1991 Act under three headings accordingly.

The remedial obligation

11. In section 1 the 1991 Act defines "subsidence damage":

> "S.1 (1) In this Act "subsidence damage" means any damage—
>
> (a) to land; or
>
> (b) to any buildings, structures or works on, in or over land,
>
> caused by the withdrawal of support from land in connection with lawful coal-mining operations."

12. Importantly, section 40(2) of the 1991 Act makes a provision about the burden of proof that damage was caused by subsidence:

> "Where in any proceedings under this Act the question arises whether any damage to property is subsidence damage, and it is shown that the nature of the damage and the circumstances are such as to indicate that the damage may be subsidence damage, the onus shall be on the Corporation to show that the damage is not subsidence damage."

13. That provision is a powerful incentive for a landowner to use the 1991 Act rather than suing in tort.

14. The 1991 Act imposes on the Respondent a duty in respect of subsidence damage:

> "S.2 (1) Subject to and in accordance with the provisions of this Part, it shall be the duty of the British Coal Corporation ("the Corporation") to take in respect of subsidence damage to any property remedial action of one or more of the kinds mentioned in subsection (2) below.
>
> (2) The kinds of remedial action referred to in subsection (1) above are—
>
> (a) the execution of remedial works in accordance with section 7 below;
>
> (b) the making of payments in accordance with section 8 or 9 below in respect of the cost of remedial works executed by some other person; and
>
> (c) the making of a payment in accordance with section 10 or 11 below in respect of the depreciation in the value of the damaged property."

15. That duty does not arise until the landowner has given notice of the damage in accordance with the provisions of section 3 (stating that the damage has occurred and containing prescribed particulars). The landowner must do this within six years of discovering the damage (or of the time when he or she could have done so); so the statute replicates the normal rules of limitation. Once the landowner has given notice, section 4 requires that the Respondent reply as soon as reasonably practicable with a notice stating whether or not it agrees that it has a remedial obligation and, where it agrees, a "notice of proposed remedial action" stating the kind or kinds of remedial action that it proposes to take; the words "kinds of remedial action" are a reference back to the "kinds" set out in section 2(2); normally – as in this case – the kinds of action will be the execution of work and the payment of compensation for depreciation, because at this stage the provisions enabling the Respondent to make a payment instead of doing the work – which are essentially in the control of the claimant – will not have come into play.

16. Section 5 provides that

> (1) … where the Corporation have given a notice of proposed remedial action with respect to any damage, they shall meet their remedial obligation in respect of that damage by taking the appropriate remedial action (and not in any other way).
>
> (2) …the appropriate remedial action in relation to any damage is that stated in the notice of proposed remedial action with respect to that damage.

17. The extent of the obligation to execute works (or to pay for them if the relevant provisions are brought into play, as to which see below) is set out in section 6, which requires the Respondent, at the same time as it sends a notice of proposed remedial action, to send to the claimant a schedule of remedial works. Section 6(2) goes on to say:

> (2) A schedule of remedial works shall specify—
>
> > (a) the works which the Corporation consider to be remedial works in relation to the damage, that is to say, such works (including works of redecoration) as are necessary in order to make good the damage, so far as it is reasonably practicable to do so, to the reasonable satisfaction of the claimant and any other person interested; and

(b) in the case of each item of those works, the amount of the cost which the Corporation consider it would be reasonable for any person to incur in order to secure that the work is executed.

(3) The Corporation shall send with a schedule of remedial works a notice stating that, if any other party does not agree that the remedial action to be taken by the Corporation in respect of any damage should be determined by reference (where relevant) to the works and costs specified in the schedule, he should notify the Corporation within the period of 28 days beginning with the date of his receipt of the schedule.

(4) If any other party gives such a notification within that period and he and the Corporation do not agree the schedule, with or without modifications, before the end of the next succeeding period of 28 days, the matter may be referred to the appropriate tribunal, which may determine the works and costs to be specified in the schedule.

18. That of course is where we are now; this is the appropriate tribunal, the parties do not agree the Corporation's schedule because they differ as to what is "reasonably practicable" to make good the damage, and the tribunal's task is to decide what works are reasonably practicable.

19. Insofar as works are not reasonably practicable, the damage will not be made good. Section 11(3) provides that in such a case the Respondent is to pay for any depreciation in value of the property as a result of the subsidence damage:

"Where in the case of any property affected by subsidence damage—

(a) remedial works have been executed; but

(b) there is a depreciation in the value of the property caused by any damage the making good of which to the reasonable satisfaction of the claimant and any other person interested was not reasonably practicable,

the Corporation shall make in respect of the property a payment equal to the amount of that depreciation."

20. It will be noted that the obligation to make a payment in respect of depreciation under section 11(3) only arises when the remedial works have been executed. In this case the Respondent's position is that the extent of its obligation to do or pay for work is far more limited than that contended for by the Claimant, but it does not dispute that if its schedule of works is accepted by the Tribunal it will then have to make a depreciation payment once the works have been done; inevitably the extent of such a payment cannot be known at present.

The meaning of "reasonably practicable"

21. The Court of Appeal has decided the meaning of "reasonably practicable" in its decision in *Langley and others v Coal Authority* [2003] EWCA Civ 204.

22. There were a number of claimants in that case; the relevant ones for present purposes were Mr and Mrs Cordery whose house and garden had been significantly damaged by mining subsidence. Their garden was rather special; they had spent some 30 years building it, with nine terracing walls, a garden shed, summer house and pond, stone paths and steps, a rockery, a rose garden, lawns and shrubs and trees. Thanks to a landslip caused by the subsidence it was "effectively destroyed" (Peter Gibson LJ at [51]).

23. The claimants wished to have the garden reinstated at a cost of just over £70,000, around 72% of the value of their property. At first instance the President of the Lands Tribunal awarded a sum of £10,000 which he regarded as the cost of remedial works which it would have been reasonable for the claimants to carry out; that sum would have left the claimants with a grassed garden but without the terracing and other decorative features that they had developed.

24. The claimants appealed and the Court of Appeal disagreed. At [62] Peter Gibson LJ said this:

> "The test of reasonable practicability looks primarily to whether the works are feasible. I accept that cost does fall to be taken into account in considering whether the works are reasonably practicable but only to the extent that making good the damage should not be done in some extravagant way. The owners were entitled to have the damage to the garden as it was before the subsidence made good to their reasonable satisfaction and I can see no reason why they should not be entitled to see the terraces and other features of their garden restored."

25. Accordingly, the Court of Appeal awarded the sum claimed by the Appellants. It is to be noted that there were innumerable cheaper options that would have worked and would have given the Appellants a safe and useful garden; but they were awarded the cost of making good the damage, and restoration as they wanted it was not seen as extravagant.

26. We do not need to say more about the principle here because the parties agree: the work required to make good the damage is reasonably practicable unless it is extravagant. In due course we shall have to assess the works requested by the Claimant on that basis.

27. That, then, is the remedial obligation: to do or pay for such works as are reasonably practicable to make good the damage, and to pay for depreciation in the value of the property where it is not reasonably practicable to do all the work needed to make it good.

28. Before we turn to our assessment of what that means on the facts, we have to say more about whether the Respondent in any particular case is to do the works or to pay for them to be done.

The way in which the remedial obligation is to be met: is the Respondent to do the work or to pay the cost of the work?

29. As we have seen, section 2 of the 1991 Act obliges the Respondent to do one or more of:

a. Doing the work

b. Paying for the work

c. Paying compensation for depreciation in value.

and we have looked at the relationship between doing the work and paying for depreciation.

30. The primary remedy under the 1991 Act is for the Respondent to do the work itself, which in many cases will be another incentive for the landowner to use the statute rather than suing for damages in tort; but there is also provision for the Respondent to make a payment in some cases.

31. First, in cases relating to highways the Respondent must make a payment in lieu of doing the work (section 9). Second, section 8 enables it – and to some extent obliges, as we shall see - to do so in cases where a request is made under section 8(2) or 8(4):

"(2) In any case where the Corporation receive the necessary request for that purpose from the claimant or any other person interested, they may elect to make, in respect of the cost incurred by a person other than themselves in executing any of the remedial works, a payment equal to the aggregate amount of the costs specified in relation to those works in the schedule of remedial works.

(3) For the purposes of subsection (2) above, the necessary request is a request informing the Corporation that the person making the request wishes to execute the remedial works in question himself or to have them executed on his behalf by a person specified in the request.

(4) In any case where it is proposed—

> (a) to merge the execution of other works in connection with the damaged property with the execution of remedial works; or
>
> (b) to redevelop the damaged property instead of executing remedial works,

the Corporation may elect to make a payment equal to any sums from time to time shown to have been expended by any other person in executing the merged works or the redevelopment works, up to an aggregate amount not exceeding the aggregate amount of the costs specified in the schedule of works ("the total scheduled cost").

…

(7) The Corporation shall not unreasonably refuse—

> (a) any request complying with subsection (3) above to make an election under subsection (2) above; or
>
> (b) any request received from the claimant or any other person interested to make an election under subsection (4) above.

(8) Subject to subsection (9) below, the Corporation are to be regarded as acting unreasonably in refusing any request falling within subsection (7)(a) above which is received before they have begun to execute remedial works.

(9) Subsection (8) above does not apply where—

> (a) the Corporation have acceded to another such request made by another person;
>
> (b) the execution of remedial works by a person other than the Corporation would significantly impede the discharge of their remedial obligation in respect of one or more neighbouring properties; or
>
> (c) where the damage has rendered the property structurally unsound, the execution of such works by the person by whom the request was made or, as the case may be, by the person specified in the request would be unlikely to restore the structural integrity of the property,

and (in any case) as soon as reasonably practicable after receiving the request the Corporation give notice to that effect to the person by whom the request was made.

(10) The Corporation are not to be regarded as acting unreasonably in refusing any request falling within subsection (7) above which is received after they have begun to execute remedial works."

32. To summarise, if the landowner asks it to do so under section 8(2), the Respondent may elect to pay for the works rather than doing the works itself; but it does not have a free choice about that because it may not unreasonably refuse the request. Indeed, it is deemed by section 8(8) to be unreasonable if it refuses such a request made before the works have been started – subject to section 8(10) which preserves a right to refuse where other properties are involved or where the Respondent takes the view that the person who would do the works would leave the property structurally unsound.

33. Section 8(4) makes provision for the case where the landowner wants to do other work at the same time, or even to redevelop the property instead of doing the remedial work; again, that request must not be unreasonably refused, although there is no deeming provision to match section 8(8). It is important to note that where the property is to be redeveloped, the result of the Respondent making an election to pay in response to the landowner's request is that it will be paying for work which is not in fact done. In other words, the fact that the landowner chooses to demolish and rebuild his property does not absolve the Respondent from its liability for the damage to the property before demolition.

34. In this case the Respondent has made an election to pay for the work in response to a request made by the Claimant. The request was not made in writing and we have not heard evidence about the terms of the request because its terms were not in issue until after the close of evidence at the hearing when the Respondent put forward its new case on liability (see paragraphs 7 above and 122 and following below). As we have seen in the analysis above, whether a request is made under section 8(3) or section 8(4) the Respondent's liability is to pay the cost of the works – even in the circumstances envisaged in section 8(4)(b) where those works will not in fact be done. The dispute between the parties has been, from the outset, the extent of the works required to make good the damage and therefore the amount that the Respondent has to pay, and we proceed to explain our decision on that issue, deferring for the moment consideration of the Respondent's last-minute new case.

(ii) **The factual and procedural background**

35. The facts we set out under this heading are agreed save where we say otherwise, and where they are not agreed we have made findings of fact.

36. The Claimant bought Tidbury Castle Farm from his grandparents in October 2002. It is located about five miles north-west of Coventry and extends to about 26 acres. The range of buildings is in an elevated position with views over the farm and beyond, accessed from Wall Hill Road by a gated road, with a separate "trade" entrance.

37. In 2008, having obtained planning permission on appeal, the Claimant demolished the original farmhouse and built a new dwelling, at a cost of around £350,000. The new building, completed in 2009, is a two-storey detached house constructed in reclaimed bricks but to a modern standard. It comprises a lounge, dining kitchen, study and utility room on the ground floor, with four bedrooms and two bathrooms on the first floor. It has an elevated garden laid to lawn, encompassed by a circular brick retaining wall.

38. In addition, the Claimant redeveloped the range of original outbuildings, partly by new-build and partly by refurbishment. The outbuildings fall into four groups. Immediately adjoining the main house is a detached utility building which houses the boiler and other plant serving it. Additionally there is a long single barn conversion now comprising a two-storey residential annex, a cinema room, cloakroom and snooker room, two large garages with storage facilities and a further residential building; a separate building housing an office, music room and a gardener's store; and a detached stable block and timber-framed farm buildings.

39. The utility building, the kitchen in the barn conversion, cinema room, office, garage and new barn conversion were all rebuilt on modern strip foundations, largely using the original bricks. The remaining original elements were underpinned, re-roofed, re-floored and a cavity wall created. The reconstruction of these buildings was to a high standard. The floors, together with those of the new main house, were level to within 3mm. The value of the Claimant's property without mining damage, in the opinion of three valuers, would have been in the order of £1.45 to £1.55 million in 2014.

40. Tidbury Castle Farm is situated above the inside edge of a 250m wide coal panel, part of a longwall system of mining from the Daw Mill Colliery. This form of mining is based on the removal of coal from a long face; as extraction progresses the void created is collapsed under controlled conditions, creating a subsidence "wave" at the surface. Between approximately September 2010 and December 2010 there was longwall mining in the vicinity of Tidbury Castle Farm, some 770 m below ground.

41. In November 2010, the Claimant noticed some damage to a retaining wall and paving slab, with some minor fracturing shortly thereafter, but he assumed that this was because of defective workmanship and/or settlement of the new construction, and minor repairs were carried out by his building contractor.

42. In February 2013, a major underground fire broke out, following which the mine's licence was revoked, and responsibility for mining claims passed from UK Coal to the Respondent. Daw Mill was the last working mine in the Warwickshire coalfield, and following its closure no further mining in the county will occur in the foreseeable future.

43. From April 2011 until April 2013 the Claimant was living elsewhere following the breakdown of his marriage. When he returned, his evidence (which we accept) is that he was astonished and very upset to see significant damage affecting the main house and the ancillary buildings, in the form of cracking and of tilting to floors and walls.

44. On 29 April 2013 the Claimant's agent, Mr Andy Ambrose of ALP Ambrose Minerals Planning and Development Consultancy ("ALP"), served a Damage Notice under section 3 of the 1991 Act (see paragraph 15 above) on the Respondent, in which the damage was listed as "cracking to walls, damage to surface finishes, lifting tiles, splitting of slates on terrace, slope within rooms of house and buildings". The date when "damage was first recognised (approximate date if appropriate)" was stated to be "2012".

45. In or around August 2014 some flooding occurred at the property, affecting primarily the stables; emergency work was carried out to remedy the damage and was paid for by the Respondent. Those works do not form part of the remedial works that are the subject of this action.

46. The Respondent responded to the Damage Notice by letter dated 27 November 2013, admitting that it had a remedial obligation under the 1991 Act in respect of works which it set out in two schedules. It set out the statutory options for the kinds of remedial actions (doing the work, paying for work, and/or paying for diminution in value to the property; see paragraph 15 above) and said that what it proposed to do was to carry out the works itself. It confirmed that if the Claimant requested, it might, instead of carrying out the work itself "agree to reimburse the costs incurred by you in having the works carried out yourself, equal to the costs indicated in the enclosed schedules". There was no mention of a depreciation payment. The works identified were costed at £12,278.27 for repair work, and £8,518.75 for redecoration, therefore totalling £20,797.02.

47. In its reply of 30 December 2013, ALP indicated that while the schedules described some of the damage to the property, they did not cover all areas of concern, and it would revert to the Respondent shortly thereafter.

48. "On or around March 2014" (we quote from Mr Cammack's witness statement) the Claimant asked the Respondent to elect to make a payment in lieu of the cost of remedial works. The request was not made in writing. By letter dated 2 April 2014 the Respondent elected to make a payment in respect of the cost of remedial works, together with a payment in respect of diminution in value under section 11(3) of the 1991 Act. In that letter it offered a payment of £185,000 in respect both of the cost of works and of depreciation, plus professional fees.

49. Whilst the deprecation in value of Tidbury Castle Farm, if any, is beyond the scope of our determination of the Preliminary Issue, for completeness we note that the Claimant had his own valuation carried out, and the parties jointly instructed a third valuer, but despite continued discussions agreement was not possible.

50. In December 2014, the Claimant applied for planning permission to demolish the new farmhouse, and build a new house, which would be turned to sit across the subsidence panel, with a view to minimising any further tilt. Planning permission was granted by Coventry City Council on 4 February 2015. The new house would be constructed on a raft foundation, so as to enable it to be more easily jacked if necessary in the future. It was larger than the existing property, and its construction would entail the demolition of the plant room building, and the office/gardener's store building.

51. The Claimant says that on 26 July 2015 there was a loud bang, and that further cracking and damage took place, which we deal with below. Since the Respondent had elected in 2014 to make a payment under section 8 of the Act in 2014, the Claimant should have served a further damage notice under section 18; Mr Hussain indicated at the hearing that the Respondent did not take this point.

52. On or around 26 July 2016, the Claimant resubmitted his planning application, for an even larger house, to include a basement games room/cinema complex. Planning permission was granted by the Local Planning Authority on 19 September 2016.

53. Following a further period of communication, and a site visit on 16 November 2016, on 6 December 2016 the Respondent served an updated Schedule of Remedial works, totalling £54,089.20. Ms Chambers confirmed that the Claimant did not take any point regarding the Coal Authority's obligation to serve a fresh notice when varying the Schedule of Works referred to in paragraph 46 above.

54. This was rejected by the Claimant, and the Reference to the Tribunal was made on 30 March 2017.

55. The sum now claimed for the cost of remedial work is £954,642.71 excluding VAT. Following meetings between the experts during the trial, the Respondent's schedule of works now stands at £68,086.68.

(iii) The subsidence damage

56. Tidbury Castle Farm has suffered significant subsidence damage. By the time of the hearing, it was agreed that the nature and extent of all of the damage is subsidence damage under s.1(1) of the 1991 Act.

57. The extent of the damage is largely agreed. The main house suffers from external and internal cracking, its walls are no longer vertical, and its floors, and in many cases window and door frames, are no longer horizontal, with doors that swing open or closed of their own accord. On our site inspection, we detected notable slopes across some of the floors and window frames, particularly in the kitchen.

58. We can describe briefly the extent of the cracking, which is not in dispute, and the tilting of walls and floors which is also agreed. We have to make findings of fact, however, about some further damage in 2015, because although the extent of the current damage is not in dispute there is an issue as to how much of it took place as a result of further movement in 2015, and that is relevant when we come to the question of future subsidence.

59. Helpful engineering evidence was provided by Mr Robert Evans, a director of Robert J Evans Ltd, for the claimant, and Mr Roger Gascoigne, of Studio-G Associates LLP, for the Respondent. Both experts are chartered engineers, and Members of both the Institution of Civil Engineers and the Institution of Structural Engineers. They were able to agree many matters, including the levels of tilt, and nature and extent of cracking at the property. They also agreed that, currently, there was no threat to the *stability* of the buildings, but Mr Evans could not rule out further movement occurring.

Cracking

60. It is agreed that the cracking affecting the buildings was to an extent that fell within Categories 0-2 in Table 1 of the publication BRE Digest 251 – "Assessment of damage in low-rise buildings". In broad terms, category 0 referred to hairline cracks, category 1 to fine cracks which could be remedied by redecoration, and category 2 to cracks that could easily be filled or masked by suitable linings. The heading to the table contained a caveat that "Crack width is one factor in assessing category of damage and should not be used on its own as a direct measure of it."

Tilt

61. The levels of tilt of both the floors and walls throughout the complex were also agreed. Across the main house, the tilt of the ground floor was more significant north-south (left to right when viewing the property from the front) at 1/79 to 1/91, than west to east (back to front) at 1/137 to 1/150. Across the apartment building, cinema and games room, and garage, there were south-west to north-east tilts of 1/83, 1/112, 1/95 and 1/85 respectively. All other tilts, both of those three buildings in a north-west to south east direction, and all other buildings irrespective of direction, were less steep than 1/100.

62. A document of significance throughout the trial was the BRE Digest 475 – "Tilt of low-rise buildings", dated March 2003 ("BRE 475"). It helpfully sets out different degrees of tilt and categorises them as follows:

Classification	Tilt	Comment
Design limit value	1/400	The maximum acceptable differential settlement across the building is related to the design limit value for tilt. If the building is likely to tilt more than this limit value, ground treatment of deep foundations may be required.
Noticeability	1/250	The point at which the tilt of a building becomes noticeable will depend on the type and purpose of the building, and the powers of observation and perception of the occupiers. Typically, tilt of low-rise buildings is noticed when it is in the region of 1/250 to 1/200.
Monitoring	1/250	When tilting is noticed it is advisable to make some measurements to confirm that the building has tilted. If the measured tilt is greater than 1/250, monitoring should be carried out to determine whether the tilt is increasing.

Remedial action	1/100	Where levels of this magnitude are measured, or the measured rate of increase of tilt indicates that this degree of tilt will be exceeded, some remedial action should be taken. This is likely to include re-levelling the building, perhaps by grouting or underpinning or jacking.
Ultimate limit	1/50	If tilt reaches this level, the building may be regarded as in a dangerous condition, and remedial action either to re-level or to demolish the building will be required urgently.

63. All the tilt measured at the property falls within the range of what, according to BRE 475, is noticeable and requires monitoring; much of it falls within the range where "some remedial action should be taken".

(iv) What is "reasonably practicable"?

64. It is agreed that work to make good the subsidence damage in this case is reasonably practicable if it is feasible and not extravagant.

65. The essence of the dispute between the parties is this. The Respondent's schedule of works sets out what needs to be done to remedy the cracks. But the Claimant wants his buildings to be level. The parties agree that this could be done by jacking up the main house, but should not be as it would risk further damage. It is agreed that the only way to get make good the tilt is to demolish and rebuild the main house, though not the outbuildings. The Claimant seeks £954,642.71 plus VAT in damages, of which the majority relates to the cost of demolition and rebuilding of the main house. The Claimant says that this is reasonably practicable, and the Respondent says that it is not. There is also some dispute about the extent of work to be paid for in relation to the outbuildings as the Respondent regards some elements of the claim as extravagant, again largely in connection with levelling out floors etc which are currently tilted.

66. This then is the dispute about quantum. We address it in two parts. First, is demolition and rebuilding of the main house reasonably practicable? Second, we look at the detail of the Claimant's schedule so as to make a decision on individual items of work for which payment is claimed, because aside from the work to be done to the main house there is dispute as to the extent of the work to be paid for on the outbuildings.

What is reasonably practicable: (1) demolition and rebuilding of the main house?

67. The starting point is the statutory requirement that the Respondent should do or pay for works that "make good the damage, so far as it is reasonably practicable to do so, to the reasonable satisfaction of the claimant".

68. As regards cracking, Mr Gascoigne's view was that the damage could be repaired by a competent builder. Mr Evans did not disagree but was of the view that cracking should not be considered in isolation, but formed part of a global picture of damage. We accept Mr Evans' view, which is consistent with the caveat to Table 1 in BRE 251 referred to in paragraph 60 above.

69. The Claimant wants to demolish and rebuild the main house because it now tilts, both from horizontal and vertical planes. Although it is possible to make good the tilting of the main house by jacking, it is common ground that that is likely to lead to further damage and is impracticable. But the Respondent says that to demolish and rebuild is extravagant and therefore not reasonably practicable within the meaning of the statute.

70. The Claimant's unchallenged evidence is that all the buildings at Tidbury Castle Farm were "level to within 3mm" when the rebuilding was completed (second witness statement, paragraph 8). All the buildings now tilt and he wants that to be made good. At paragraph 39 of his first witness statement he says "I had built a new house which had the benefit of (NHBC) insurance and other warranties and that is what I wanted back". In paragraph 18 he said "I cannot live in a house where the floors are as tilted as those in the main House. I don't think anyone else would want to live in it with that degree of tilt either". Consistent with this view is the fact that the Claimant has not lived in the main house since 2013, although his son has lived there during breaks from university and his step-daughter has also been living there. He has had one of the barns converted to residential use, at considerable expense (for which he does not claim in these proceedings) and is living there now.

71. Mr Hussain QC challenged the Claimant's statement that the main house is "uninhabitable". He pointed out that the Claimant's family lived there without complaint from 2011 until 2013, and that the Claimant's son had lived there since last July and his step-daughter too. Mr Hussain QC put it to the Claimant in cross-examination that in fact he wants to rebuild because he has re-married and wants a bigger and better house in preference to the one in whose construction his former wife had been involved.

72. The Claimant agreed very frankly that he has wanted a bigger house every year of his life; but he says it is not the case that he wants to rebuild because of his divorce and re-marriage. He wants to rebuild for precisely the reasons he sets out in his witness statement. We accept what he says; the alternative view of his motivation put forward by the Respondent is not particularly plausible and the Claimant's response to the extensive damage to his very new home is perfectly reasonable. The absence of communication about the damage from the family during the period 2011 to 2013 is unsurprising in the light of the breakdown of the Claimant's relationship with his then wife, as is the absence of complaint from two young members of the family who are being provided with accommodation there. The Claimant makes no secret of the fact that the house he will rebuild will be bigger than the current one, but the cost he claims is for rebuilding the house in its current form.

73. The Claimant does not have to show that the house is objectively uninhabitable, nor even that he is not himself prepared to live there, although we accept his evidence that that is the case. The issue is whether it would be extravagant to make good the damage in the way that he seeks to do so.

74. The Respondent relies first on the opinion evidence of Mr Cammack and of Mr Gascoigne on this issue, and then on legal argument.

75. Mr Cammack's evidence relates largely to the history of the dispute. As to the tilting of the buildings, he says in his witness statement:

> "Whilst there are areas of tilt greater than 1:100, the property has not suffered a great deal of structural damage, and in my view the tilt does not have a significant detrimental effect on the reasonable enjoyment of the property. In such circumstances, demolishing the house would appear to be unnecessary and I instead propose that the reasonable course of action would be to undertake repairs to each area of damage within the property, but without the need to eliminate the tilt."

76. Mr Cammack does not engage with the legal test, which is not one of necessity but depends upon whether the proposed work is extravagant. In any event Mr Cammack is a witness of fact and his opinion, surprising as it is, does not assist us.

77. Mr Gascoigne by contrast is an expert and entitled to express opinions about matters within his expertise. At paragraph 62 above we reproduced the tilt classification table in BRE 475. Mr Gascoigne says at paragraph 5.3.7 of his report:

> "The Digest indicates that the level for remedial action is when the tilt has reached 1:100. The main house tilts greater than this but in our opinion, the damage does not warrant extensive disruption and reconstruction of the building as it is not in imminent danger of collapse now or in the foreseeable future. The tilts are noticeable in some of the rooms and it is the perception of individuals as to whether these are acceptable or not."

78. Mr Gascoigne, like Mr Cammack, writes without reference to the legal test. Moreover he disagrees – and confirmed in cross-examination that he disagrees – with BRE 475's view that remedial action should be taken when tilt exceeds 1:100. He laid some stress, when cross-examined about this, on the observation in BRE 475 that

> "… sensitivity to tilt will differ between individuals. For example, in regions where mining subsidence is commonly encountered, a small tilt is less likely to be noticed and more likely to be tolerated than in other parts of the country."

79. In cross examination, Mr Gascoigne accepted that, whilst in the joint experts' statement he indicated that remedial action "may" be taken at a tilt of 1/100, the BRE guidance (in the table above) is that action "should" be taken, and that this is "likely" to include relevelling. He agreed that if the main house at Tidbury Castle Farm could be jacked without causing further damage, this would be suitable remedial work. When Ms Chambers then took him to a further section of BRE Digest 475, which said that "it needs to be established that there is a feasible form of remedial work that can rectify the problem at an acceptable cost. With low-rise buildings the cost of remedial work could exceed the cost of demolition and rebuilding", Mr Gascoigne accepted that the Respondent's schedule of proposed work did not contain work to remedy the tilt in either the main house, or the outbuildings where the 1/100 tilt had been exceeded, but said that the tilt should be dealt with by way of the compensating provisions of the 1991 Act. In answer to a question from the Tribunal, Mr Gascoigne said that he would depart from the guidance given in BRE Digest 475 whether or not the affected property was in a mining area.

80. In cross-examination Mr Gascoigne said that he would be happy to live in a house that tilted to the extent that Tidbury Castle farm does. He would be unconcerned by self-opening and self-closing doors. He was untroubled by the tilt of the kitchen and felt that problems would be overcome by kitchen furniture having adjustable feet; he felt that it would be perfectly acceptable to have work-tops that did not tilt alongside a windowsill that visibly does. He confirmed that his opinion would remain the same even if the property were not in a mining area.

81. As regards vertical tilt, Mr Gascoigne accepted that the main house walls were out of true by between 22 and 61mm, whereas the BRE guidance was that the external masonry of a two-storey building should, at worst, not be out of plumb by more than 20mm at the time of construction. Mr Gascoigne accepted that the vertical tilts affecting the property were out of tolerance, but maintained his view was that the BRE guidance was not relevant for a building which had been affected by mining subsidence.

82. We accept that Mr Gascoigne gave his opinion evidence honestly but we wonder whether his many years' experience of working in mining has perhaps dulled his perception of the aesthetic and

practical effect of tilt, where it is well beyond the level that BRE 475 says is noticeable and well within the range where BRE 475 says remedial action is needed. We think that he may be failing to take into account the normal and reasonable expectations of the owner of a brand-new house or the purchaser of one just a few years old. The idea that the Claimant's "modern, well-insulated palace" is perfectly acceptable with tilted floors and self-closing doors is nonsense; Mr Gascoigne's opinion is unrealistic. It is in any event irrelevant to the legal test which is whether or not the work proposed is extravagant. We take the view that Mr Gascoigne, like Mr Cammack, misunderstood the legal test. His views are as surprising to us as are Mr Cammack's, but they are in any event irrelevant.

83. Turning to the law, Ms Chambers naturally relied upon the *Langley* case (paragraph 21 and following, above), and it is fair to say that Mr Hussain QC was bound to have an uphill struggle in the face of that decision. The Court of Appeal made it clear that there was no question of balancing risk and cost, as might well be done in other contexts (for example in *Edwards v National Coal Board* [1949] 1 KB 705); it rejected the first instance decision about the Corderys' garden, based as it was upon a judgment about reasonableness, and instead endorsed the Corderys' wish to have the damage made good – even though the landscaped garden was not necessary, and even though the cost was some 70% of the value of the whole property. It was not critical to their decision on quantum that the garden was totally destroyed, as Mr Hussain QC argued, because there were other, cheaper ways in which it might be restored. The first instance award of £10,000 would have produced a safe garden, and no doubt there were many other intermediate ways of producing a garden that was pleasant and interesting as well as safe; like for like restoration was not the only option but that was what the Corderys were found to be entitled to.

84. Mr Hussain QC relied on a number of decisions which demonstrate, he said, the law's preference for not demolishing useful and habitable buildings. He cited *McGlinn v Waltham Contractors Ltd & others No 3* [2007] EWHC 149 (TCC) where demolishing and rebuilding a structurally stable but aesthetically damaged building was said to be an "extreme course", to be considered only as a last resort. The cost was recoverable as damages for breach of contract only if it was reasonable. But that is not the test here.

85. We observe that in this case a public authority is statutorily liable for damage inflicted on private property; this is not a case where damage has resulted from a consensual project. The Respondent must make good the damage, even in a case like *Langley* where the remedial work was not to a building and was going to cost a far greater proportion of the value of the property than is the case here. The test is not the same as the one applied in *McGlinn* – although if it had been, we would have found it satisfied. In *McGlinn* there was a cheaper repair alternative available; here there is no other way to get rid of the tilt, and it is plainly reasonable, as well as being the Claimant's entitlement under the statute, to have the damage made good even if there is only one way to do it.

86. If there was a practicable cheaper alternative then no doubt the cost of that alternative would be claimed. The Claimant's entitlement in this case is to have the damage made good and it is agreed that the only way to put right the tilt is to demolish and rebuild. The fact that a less dramatic option is unavailable has, we suspect, rather clouded the discussions in this case. Thus Mr Hussain QC says in his written opening submissions that the Claimant's position is "unusual to say the least"; he describes the tilt, being 1:86 at its highest in the house, and says "Mr White is asserting that the perception of the tilt of such a magnitude means that the reasonable remedy is for the Property to be entirely demolished." That is to mischaracterise the Claimant's claim. He is entitled to have the damage made good, and his perception of the tilt and his wish for it to be remedied is entirely consistent with the authoritative guidance given by BRE 475. The fact that the only way to do so is by demolition and rebuilding does not make his position unusual or unreasonable, and he is entitled to have that done unless it is extravagant to do so, and no real argument has been made about extravagance.

87. Clearly the Claimant is entitled to have the damage made good. It is feasible to do so, for the main house, only by demolishing and rebuilding. It is not extravagant to do so. The cost of basic

demolition and rebuilding in the Claimant's schedule is listed as just over £334,000; other items on the schedule relate to the rebuilding although they would also probably be needed if only the cracks were to be fixed (for example, removing furniture); at most the cost is within £400,000 and the value of the property without mining damage was estimated in 2014 to be at least £1.455m (see paragraph 39). Accordingly demolition and rebuilding of the house, if it is restored on a like-for-like basis, would cost something in the order of 27% of the value of the whole property – compare the cost of the restoration of the garden in *Langley*, at around 70% of that property's value.

88. Accordingly, we determine that the Respondent shall pay the Claimant the cost of demolishing and rebuilding the house in accordance with his schedule of costs.

What is reasonably practicable? (2) the detail and the outbuildings

89. Having determined that demolition and rebuilding are required to make good the damage to the main house, we turn to the detail of the Claimant's schedule of works in order to determine whether all the other items claimed can be allowed or whether any of those works is outwith the limits of what is reasonably practicable. In other words, is there anything extravagant on the list?

90. In essence we find that the majority of the items of work required by the Claimant are appropriately claimed and within the "reasonably practicable" category. In principle he is right about the extent of work needed to remedy the cracking, and about the need to eliminate tilt in most of the outbuildings for reasons of convenience, practicality and aesthetics. The tilt is for the most part noticeable and it is reasonable to require it to be remedied in these new buildings which were, prior to the damage, level to within 3mm. We therefore determine that the Respondent shall pay for the works as claimed, with the exception of the items which we set out below in our discussion of the different groups of outbuildings.

91. In our view, the claimant should be entitled to the cost of work that would rectify the damage, including tilt, to the apartment building, utility building, cinema and games room complex, all of which are residential or quasi-residential in nature, and which in our judgment the claimant is entitled to have properly rectified, so as to eliminate all mining-related damage, including tilt. As regards the apartment building, we place little weight on the fact that the apartment building was occupied by one of the Claimant's employees who would be unlikely, in our view, to complain about tilt.

92. As regards the garage building, whilst Mr Evans accepted that the tilt did not prevent the use of the garage for storage, and that he had not carried out a test to see if water collects, during our site visit we detected a prominent slope into the building, and note that the agreed tilt of the garage floor, away from the door, is 1 in 85 – well within the 1 in 100 category. In our view the claimant is entitled to have the floor re-levelled as part of the work to this building.

93. As regards the stable block, Mr Evans accepted that there was no evidence of a problem with the floor in the stable block, and on that basis accepted that breaking out the floor and re-screeding was unnecessary. We agree; whilst there was some late evidence about pooling within the stable blocks, there was insufficient evidence to justify relevelling the floor of the stable block, which we disallow, but the remainder of the claimed remedial work to the stable block is justified and not extravagant.

94. As regards the boundary walls, we accept that they had cracked in various places adjacent to the structural piers, but we are not satisfied that there is sufficient evidence to justify the demolition and rebuilding of all of the boundary walls, nor digging out and re-laying all of the foundations. Mr Evans accepted that the walls would need rebuilding "in part at least", and in our view that is right. We prefer the Respondent's evidence and costs for this work.

95. The gardeners' shed is a building which also includes an office and adjoining music room. We allow the claim to re-level the floor to the office and music room, but not to the smaller gardeners' shed

itself, the utility of which in our judgment is unaffected despite suffering from tilt, unless the building is constructed in such a way to make it sensible and cost effective to remedy the tilt to that element as well.

96. We have not overlooked the fact that this building and the utility building will in fact be demolished and will not be replaced in their current form, but that is consistent with the scheme of the 1991 Act which ensures that the Respondent must pay the cost of making good the subsidence damage even if in the end a claimant decides to redevelop the property and does not want the remedial works themselves to be done; see paragraph 33 above.

97. Finally, there is the claim to repair the electric gates, the operation of which has been affected by mining. During our site visit we observed that the gates struggled as their piers have been misaligned. Whilst this, in Mr White's words, could be thought of as a "first world problem", it is damage that should be made good and the Respondent should pay for the gates to be repaired.

98. Owing to the way in which the Claimant's schedule of works was drawn up, we are not able to allocate the costs with sufficient accuracy to avoid the parties undertaking further discussions. The reason is that some of the individual lines of the table, of which there were 96 even after some culling by the Claimant, may cover more than one building, or may partly cover the house, and partly the outbuildings. Accordingly, following our necessarily high-level findings, we invite the parties to agree a revised version of the Claimant's schedule of costed work, which we consider is well within the capabilities of the experts, acting in line with their obligations to assist the Tribunal. We would be surprised if they cannot do so, but in that event we will make an Order for the further exchange of evidence, following which we will require a short joint report with a revised joint Scott Schedule showing figures agreed, figures not agreed and the reason for disagreement. If that is necessary it would be helpful for the Claimant's schedule to be re-drawn on a building by building basis. We note that the appropriate percentages for preliminaries, overheads and profit and contingencies are agreed.

99. That is going to take some time; we say more about our award of damages below (see paragraph 155 and following) which includes provision for a payment on account to be made within 28 days of this decision.

(v) Will there be future subsidence?

100. As we indicated above, the likelihood or otherwise of future subsidence is not relevant to the determination of this preliminary issue, but at the parties' request we have made a finding about it because we have heard the relevant evidence. The importance of this to the parties is that it may be that the Claimant is entitled to a payment in respect of depreciation in value of the property at a later stage, under section 11(3); see paragraph 19 above. That value might be affected if the property is likely to suffer further subsidence in the future.

101. In essence, the Respondent says that all coal mining has ceased, and there is no likelihood of subsidence damage in the future. It is common ground that mining ceased in December 2010, and that the initial subsidence at Tidbury Castle Farm occurred in late 2010. The Claimant, supported by Mr Evans, says that the building is still moving, and Mr Evans' view is that further subsidence damage cannot be ruled out. We have to decide who is right about this. In doing so we look first at what happened in July 2015, and then at the expert evidence about the future. Our conclusion is that some of the damage to the property did occur in 2015, and was not confined to the period around 2010 and 2011; but that even so, future subsidence is unlikely.

The events of 26 July 2015

102. The Claimant's evidence is that late on the evening of 26 July 2015 there was a loud bang, and the buildings shook. Upon inspection there were obvious signs of movements – cracks had widened,

patio doors and surrounds had distorted, and pipework had been pulled apart. He was particularly concerned about the gas supply pipe to the Aga. The building containing the gardener's store had twisted, with one end having visibly moved and a hump being now visible in the roof. The cracking to the garden's retaining walls had got worse.

103. The Claimant emailed Mr Cammack on 28 July to tell him of this further damage, and expressed his concern that the buildings were structurally unsound. He also asked Survey Solutions to carry out a further survey of the land and buildings.

104. Mr Cammack's evidence was that this further damage would be most unlikely to have resulted from mining subsidence. He said that the Claimant's description of what happened is not consistent with mining subsidence from coal mining 766 metres underground which occurred five years previously and that he would have expected all mining subsidence, including residual subsidence, to have ended by October 2011.

105. In order to come to a conclusion as to what is likely to have happened, if anything, on or around 26 July 2015, it is necessary to consider the evidence produced by Survey Solutions. The company carried out measured surveys of the buildings at Tidbury Castle Farm between May 2013 and November 2013. As is well known, heights above sea level, by which changes in level over time can be assessed, can be measured using benchmarks (similar to "trig points" as they are often known).

106. In this case, Survey Solutions used a benchmark on Wall Hill Farm. At the start of each survey, the surveyors used GPS to measure the height above sea level at the benchmark and compare this with the benchmark's recorded height. This discrepancy was then shown on the survey drawing. A second, temporary benchmark was also established near to the buildings to be surveyed. It was common ground that the tolerances (or margins of error) in each case were 20-25mm in the GPS measurement against the Wall Hill Farm benchmark, 10mm in the transferral to the temporary benchmark, and then 5mm in the measurements taken around the buildings. Accordingly there was a total possible discrepancy of 40mm, but that would need each discrepancy to be in the same direction – either high or low.

107. During the hearing one of the internal reference points in the main house was used as an illustration. It was denoted point A1, and was located in the hall of the main house. We outline below the recorded levels for this point, measured in metres, together with, where we know them, the benchmark figures recorded at each survey.

Date	Level at A1 (m)	Benchmark discrepancy
Mar-13	153.187	
May-13	153.187	
Oct-13	153.186	-1.618
Aug-14	153.185	-1.598
May-15	153.185	-1.574
Aug-15	153.184	-1.587
Jun-16	153.113	-1.641
Oct-16	153.116	-1.649
May-17	153.117	-1.636
Nov-17	153.116	-1.643

108. It will be seen that between March 2013 and August 2015, the recorded height on point A1 varied to a small degree - remaining within a range of 3mm. The recorded data taken between June 2016 and November 2017 was also within a small range, 4mm, but sometime between August 2015 and

June 2016 there was a recorded drop of some 71mm. Similarly, the biggest change in the benchmark measurement, a drop of some 54mm, was between the same dates.

109. The Claimant's case is that between August 2015 and June 2016, the ground upon which the benchmark was located physically dropped, as did all of the levels around the buildings at Tidbury Castle Farm. For the Respondent, Mr Gascoigne thought it more likely that these apparent dramatic changes were due to surveying tolerances or inaccuracies rather than physical subsidence.

110. Mr Gascoigne had taken the Survey Solutions measured data and calculated the relative change between each successive reading. Ms Chambers took him to point A11 – in the lounge of the main house – where the apparent drop in floor level between August 2015 and June 2016 was 74mm. The change in the benchmark height for the same period was a drop of 54mm meaning that the relative movement between the benchmark and the house was a further 20mm. Mr Gascoigne accepted that, even allowing for the 10mm and 5mm tolerances of benchmark to temporary benchmark and then temporary benchmark to the house, this showed a minimum movement of 5mm. At another location, where the relative difference was 78mm, there would have been movement of 9mm after allowing for tolerances.

111. Mr Gascoigne said that, even had a 5mm drop occurred, it would be unlikely to cause significant damage. He also referred to his table of relative changes between successive readings, which in some cases fluctuated between positive and negative numbers, which suggested that there were discrepancies within the tolerances. He thought it likely that the tolerances were greater than those suggested by Survey Solutions, but accepted that if the data was correct, the changes in level would be due to mining subsidence .He accepted that, if there was residual subsidence of 5% of the original movement, which he said was in the order of 1.7m, it was possible that movement of up to 85mm *might* have occurred at the house,

112. Nevertheless, Mr Gascoigne said that he did not consider there to be any risk of further significant movement based on the survey levels taken since 2015, and that even had there been 9mm of movement between August 2015 and June 2016, that would not give him cause for concern in the future.

113. We accept the Claimant's evidence, which was not challenged, about what happened on the evening of 25 July 2015. As regards the apparent drop in levels of around 78mm, we note that the survey taken in August 2015 showed little change, but the more dramatic change was shown by the subsequent survey in June 2016. We are satisfied that between August 2015 and June 2016, there was a significant drop in levels across the site. The difficulty with the Respondent's premise – that "this can't have happened" – is that it would not only require each of the three tolerances to be at their maximum extent, it would also require them to be each in the same direction. And even on that basis, as Mr Gascoigne accepted, there would have been further movement of 5-9mm. We think, on the balance of probabilities, that the drop in levels is likely to have been more than that. It is not necessary for us to decide precisely how much, but the combination of the Claimant's evidence as to further damage occurring following 25 July 2015, and the survey data from the following 12-month period, leads us to conclude that further movement occurred during that period and that it was caused by mining subsidence.

The expert evidence about future subsidence

114. Mr Evans' view was that residual subsidence can continue for years after coal mining ceases. This was because when coal is extracted the strata above collapses into the space created, and as a result the material is no longer in a naturally compacted state, its strength is reduced and its propensity to settle is increased. It is likely that deflection from the weight of soil will result in a subsidence effect extending to the surface, or collapse can continue to the surface which is what appears to have occurred

at Tidbury Castle Farm, based on the magnitude of distortions. The loosened ground would potentially be susceptible to creep. Mr Evans said that it would be naïve to think that when a 4.5m strata of coal is extracted, the effects would not extend to the surface. An indication of residual subsidence was given in the Survey Solutions data which showed significant further movement as outlined in paragraph 108 above.

115. Mr Evans said that because of the progressive movement shown by successive levels taken on the ground floor of the house, in his view there was a significant risk of further subsidence – he put the risk at greater than 50%.

116. In cross examination, he conceded that the likelihood of this further subsidence causing cracks to go beyond category 2 (set out in the Table 1 in BRE 251, and therefore exceeding 5mm in width) was less than 50%. He also accepted that he had no knowledge of that occurring in other cases. It would not happen as a matter of course and might not happen at all.

117. Mr Evans was taken to the 1989 academic publication "Subsidence: Occurrence, Prediction and Control" by Whittaker and Reddish of the University of Nottingham. The authors drew together the results of various studies of subsidence from the 1950's onwards. They concluded that:

> "Longwall operation appears to have a virtually instantaneous response regarding the transmission of mining extraction effects to the surface according to mining subsidence studies in relatively shallow conditions in UK coalfields. The magnitude of the residual subsidence appears to be in the general order of 5-10% of the maximum subsidence, and is it likely to be frequently less than this amount. Residual subsidence is at its maximum immediately after the longwall face halts. There is a gradual decay in the magnitude of this value of subsidence and appears to be of exponential form. It is over the edges of the longwall extraction that the greatest residual subsidence effects are observed, and such effects gradually decrease to zero as the subsidence limits are approached. UK experiences indicate that the duration of residual subsidence is likely to be up to 12 months or so after the mining operations halt. In many situations it is likely to be much less, namely up to 3-4 months only. A few isolated situations can result in the residual subsidence extending to as much as 4 to 6 years."

118. Mr Evans said that this document did not alter his view. He felt that the periods of time examined by the studies in the book were too short and that there was an assumption that the subsidence would cease after around six years, but from a geotechnical aspect the fact that there had been disturbance of the ground would affect the soil's factor of safety, making it more susceptible to other factors, for instance water ingress. Mr Evans said that he had looked at the risk as a geotechnical engineer, rather than a mining engineer, and given that there had been an alteration to the soil strata, which was now in a non-natural condition, he would not "sign off" the house as being stable. He agreed that it was not at risk of imminent collapse, but in his view it was still moving.

119. Mr Gascoigne accepted that in certain circumstances residual subsidence can occur four to six years after mining ceased, and observed that the further damage which the Claimant described as occurring in 2015 was within that window.

120. We concluded above that between July 2015 and August 2016 further movement occurred which resulted in further damage. That would put the residual subsidence within the 4-6 year period identified by Whittaker and Reddish, and in the window accepted by Mr Gascoigne within which residual subsidence could occur.

121. What is more difficult to judge is whether residual subsidence will occur beyond that period, into the future. Mr Evans, looking at the issue as a geotechnical engineer, could not rule it out. That is of little assistance. There was no evidence before us of cases where residual subsidence had occurred

more than 6 years after the mining ceased. In cross examination Mr Evans accepted that he had never come across such an example. No-one can state that further subsidence will not occur, but on the evidence it seems to us unlikely that it will and therefore we find on the balance of probabilities that it will not.

(vi) The Respondent's new case on liability

122. We now address the entirely new case put forward by Mr Hussain QC for the Respondent at the end of the morning of Wednesday 7 February, after the close of evidence at the hearing. We had agreed for the convenience of counsel to hear closing submissions on the morning of Friday 9th. Before we adjourned, however, Mr Hussain QC told us that he needed to raise a new issue.

123. The issue, in summary, was this. Mr Hussain QC explained that the case had proceeded on the basis that the Respondent has agreed that it is liable to make a payment for the remedial works to be executed by or on behalf of the Respondent, following his request under section 8(3) of the 1991 Act. However, it was now clear that the Claimant was not going to re-build like for like. He was going to build a substantially different house. In short, he was going to re-develop, and he should therefore have given notice under section 8(4) and not under section 8(3). As a result, the agreement to pay, made in response to the section 8(3) notice, fell away and the claim must be dismissed.

124. It is a principle of modern litigation that neither party should be ambushed during a trial. Mr Hussain QC's submission amounted to a wholly new case for the Respondent, and it took both Ms Chambers and the Tribunal by surprise. Even if it had merit it would have to be rejected because it was made so late in the day, but in any event it has no merit and could not have succeeded even if made in good time. In the paragraphs that follow we discuss the timing of Mr Hussain QC's submission, and then the reasons why it must fail as a matter of law.

Why the Respondent's new case must be rejected because it was made too late

125. The Respondent has been aware for some time that the Claimant intends to build a bigger house. It was from Mr Hussain QC's own skeleton argument that the Tribunal had understood that the Claimant was not going to rebuild like for like; paragraph 74 of that skeleton reads: "It is … understood … that Mr White has applied for planning permission for a much larger dwelling…" It is clear from correspondence in the bundle that the Respondent was aware of the Claimant's intentions at least from November 2016 Likewise, Mr Cammack's witness statement at paragraph 26 says "regardless of the state of repair of the existing property, the claimant would like to demolish the main house and replace it with a new, larger, improved version." The two planning permissions have been disclosed and are referred to in the chronology agreed by the parties in January 2018 at the Respondent's request. To suggest that the new case could not have been made before the Claimant's evidence was given is incorrect, because of the Respondent's longstanding awareness of the Claimant's new plans.

126. Mr Hussain QC said in closing that the Claimant had been lacking in clarity and forthrightness. We reject that. His position has been clear for the last eighteen months or more and if the Respondent sought to deny liability on the basis that the Claimant had made the wrong request it should have done so many months ago, either in its Defence or, if the point only occurred to it after pleadings closed, by making an application to amend the Defence.

127. The consequence of the new case being raised at this stage is that the Claimant was prevented from meeting it (in case it had merit) either by simply serving a fresh notice prior to the hearing, or by calling evidence that his notice was made under section 8(4). The notice was not given in writing and we have heard no evidence about the circumstances in which, let alone the words in which, it was given, and we have not been asked to make a finding of fact about its content.

128. We note the Respondent's argument that the Claimant has conceded that the request was made under section 8(3). We do not accept that argument. The Claimant's reference to the Tribunal did indeed, as Mr Hussain QC points out, refer to payments claimed in respect of remedial works executed by some other person (paragraph 10.1), as it naturally would whether the request had been made under section 8(3) or section 8(4)(a). We do not take anything said by the Claimant, or any failure by the Claimant to challenge what the Respondent says about the notice, as an admission that he served a request under section 8(3) *and not under section 8(4)*. It would be unfair to do so in the absence of any suggestion by the Respondent that it was minded to take a point about the particular notice served.

129. Whether the request was made under section 8(3) or under section 8(4) is not known. There is after all a grey area between section 8(3) and section 8(4)(a); it is not the case that the Claimant is not going to execute any of the remedial works. He is going to demolish the house and build a new one, albeit that he has claimed only for the cost of building the same house, on a different orientation so that it is not sitting across the line of the subsidence. He is going to do the levelling work in the outbuildings and the work needed to repair the cracking; as he says, he is going to do further work as well but has been careful not to claim the cost of that.

130. In reality we expect that in March 2014 no-one gave the 8(3)/8(4) question any thought. The scheme of the Act is that the Respondent has to pay the cost of remedial works whether or not the Claimant seeks either to merge them in other work or to redevelop; in either of the latter two cases the 1991 Act envisages that the money will be spent and then reimbursed up to the full amount set out in the Schedule of Works. There is no requirement for that money to actually be spent on the remedial works themselves. Accordingly there was no reason for the Respondent to take the section 8(3)/8(4) point and equally no reason for the Claimant to be specific about the form of the request in his pleadings. Until the very end of the hearing he could not have had any idea that it mattered.

131. Accordingly the delay has been extensive (right up to the close of evidence at the hearing), avoidable (because the Respondent has known of the Claimant's plans for so long) and of serious disadvantage to the Claimant because it prevented him from answering the point and calling evidence about his section 8 request. The delay alone means that the new case cannot be entertained.

132. The Respondent was fully aware of the lateness of the hour at which the new case was advanced, and of the disadvantage at which it placed the Claimant. It was also fully aware that it had known of the extent of the Claimant's plans for a long time and could have raised the point earlier; to suggest, as Mr Hussain QC did, that the point could not have been made before the Claimant had given evidence at the hearing is disingenuous. We have been told by Mr Hussain QC that the new case did not occur to him, or to those instructing him, until their discussions after the close of the Claimant's evidence. We suggest that the Respondent and its advisers should not have taken the decision to make this point at this late stage. The introduction of a new point in haste, and without time for either party to consider it or properly to analyse the law, led to the diversion of the hearing in pursuit of what reflection would have revealed to be a bad point. Whilst we accept of course the need to protect the public purse from spurious claims, this was not such a case, and it is particularly unedifying for a statutory body to seek to avoid its obligations to a lay claimant by taking a technical point at the last possible moment.

The merits of the new case for the Respondent

133. The Respondent's new case is, as we say above, a bad point. Let us assume for the sake of analysis that the Claimant's request to the Respondent that it elect to make a payment instead of doing the work itself was made under section 8(3). As we say, that has not been established, but let us make that assumption in order to consider what would be the effect of the Claimant serving the "wrong" notice.

134. Mr Hussain QC says that the effect of that is that the Claimant has no cause of action and his claim fails. He argues that the Respondent's acceptance of liability to pay was made on the basis

explicitly and only that that work and no other was going to be done. It made no admission of liability for work done under section 8(4), whether merged work or redevelopment. If what is going to be done is redevelopment, therefore, the Respondent's admission of liability to pay falls away and the Claimant receives nothing.

135. In order to assess the merits of that argument we have to go back to the scheme of the 1991 Act.

136. Section 2 of the 1991 Act states that the Respondent is under a duty to take remedial action in respect of subsidence damage (as defined in section 1) to any property. That duty is triggered by the service of a notice of damage referred to in section 3; section 4 obliges the Respondent to tell a property owner who serves such a notice whether or not it considers that it has a remedial obligation in respect of all or part of the damage in the notice. The remedial obligation is a duty in respect of damage. It may be accepted or rejected, but if accepted there is then a separate question of how that obligation is to be met.

137. Mr Hussain QC argues that in its letter of 27 November 2013 the Respondent admitted liability only in respect of the works set out in its notice of proposed remedial action:

> "I confirm that The Coal Authority has a remedial obligation under the Coal Mining Subsidence Act 1991 in respect of the works set out in the enclosed schedules.
>
> …
>
> The remedial action or actions available for satisfying The Coal Authority's obligations are as follows:-
>
> a) The Coal Authority carries out the works identified in the schedules, together with any further works which become apparent as the work proceeds if accepted as being due to Coal Mining Subsidence damage for which The Coal Authority has a liability.
>
> b) The Coal Authority may make payments in respect of the costs of the works if executed by yourself or your own contractor.
>
> c) The Coal Authority may make a payment in respect of the depreciation in value of the property.
>
> In this particular case, The Coal Authority proposes to carry out the remedial works identified in the schedules enclosed on the basis set out in paragraph (a) above.
>
> If you so request, The Coal Authority may (instead of carrying out the works itself), agree to reimburse the costs incurred by you in having the works carried out yourself, equal to the costs indicated in the enclosed schedules in accordance with paragraph (b) above."

138. Whatever the wording of the letter of 27 November 2013, and whatever the Respondent understood at that stage, its obligation was to accept, or reject, the remedial obligation in respect of some or all of the damage. It accepted it in respect of all of the damage reported at that stage. There was then, of course, a long-drawn-out argument as to the extent of the work required, but that is a matter of quantum not of liability.

139. There is no scope in the 1991 Act for the acceptance of the obligation conditionally upon certain works, and certain works only, being carried out to remedy it, and in any event that is not what would be understood from the words of the letter of 27 November 2013. Still less is there any scope under the 1991 Act for liability to be accepted or rejected conditionally upon remedial work being done to the property precisely as in the notice of proposed remedial action, as served or as eventually agreed or adjudicated. On the contrary, it is precisely because no claimant is obliged to do just that work and

no other that there is provision for notice to be given either under section 8(3) or under section 8(4). To suggest that a claimant's choice to merge remedial work with other works, or to redevelop the property, nullifies the Respondent's liability is nonsense.

140. It is significant that when the Respondent states, in response to the notice of damage, how it proposes to meet its remedial obligation, it is not open to the Respondent to say that it will make a payment instead of doing work. In the absence of a request under section 8(3) or 8(4), and in the absence of the circumstances to which section 10 applies, the Respondent does not have that option. The Respondent will almost always prefer to pay rather than to do the work itself (save in narrow circumstances where it has safety or other practical concerns, section 8(9)). That way all it has to do is to write a cheque; it does not have the time and administration costs and the practical hassle of actually commissioning and doing the work. But it cannot make that choice of its own initiative. That is because, as we said above, a major advantage to a claimant of using the 1991 Act instead of suing in tort is that the Respondent can be required to do the work. Accordingly, the Respondent does not have the choice; the choice of paying or doing is firmly within a claimant's control.

141. But the matter of whether or not there is an election to pay makes no difference at all to the remedial liability, which remains in any event. That liability arises from the existence of subsidence damage, which is not affected by the form of any later request for an election under section 8.

142. In this case the Respondent accepted the remedial liability in its letter of 27 November 2013. Later, on 2 April 2014, it accepted the request to make an election. In that letter it indicated at paragraph b) that it may make payments in respect of the costs of the remedial works "if executed by yourself or your own contractor. Payment will only be made when the works are complete or by agreement as the work progresses." That is unsurprising. In due course it became aware that the Claimant was planning to rebuild a larger house. Does that wipe out its liability?

143. It cannot be unusual for a claimant to make the "wrong" request for an election, using section 8(3) and then deciding to do work that would take him into section 8(4); materials become unavailable, building regulations change, or the claimant simply decides to go for a different style of windowsill or suchlike. To suggest that that wipes out the remedial liability would be a ridiculous result and contrary to the policy of the 1991 Act, which is that the Respondent should make good the damage caused by coal mining subsidence, by doing the work or by paying for the work (section 8(3)) or by paying an equivalent sum where the claimant chooses to merge the remedial work with other work or to redevelop instead (section 8(4)).

144. Does the service of the "wrong" notice invalidate the section 8(3) election? The 1991 Act is silent on the point. All we can say is that if the election is invalidated in those circumstances then what remains is the remedial liability and the obligation to do what would have been done in the absence of the section 8 request – namely, in almost all cases, the work itself.

145. But that will almost never be in the Respondent's interests. Paying for the work is a privilege, easier than doing the work itself. It may simply not have occurred to the draftsman of the 1991 Act that if the claimant changed his mind after the section 8(3) notice and decided to merge the remedial work with other work, or to re-develop, the Respondent might for that reason prefer to do the work rather than pay the equivalent sum, and that may be why the 1991 Act makes no provision for that circumstance.

146. Crucially the amount the Respondent has to pay is exactly the same whether its election is made under section 8(3) or 8(4), because quantum is generated by the schedule of remedial works, i.e. by what is reasonably practicable to make good the damage. Either that sum is paid when that work is done, or that sum is paid when that sum is spent on the merged works or on the redevelopment.

147. Mr Hussain QC suggested that if the Respondent had known that different works were to be done it might well have refused on the basis that it should not have to pay for work which in fact the Claimant was going to do anyway – for example new flooring in the rebuilt buildings. But that is to misconstrue section 8(4). Under that section the Respondent does indeed pay the cost of the works set out in its schedule, and no more, but equally no less, even if those works are merged with others, even if the whole building is to be knocked down and something completely different built (which is not the case here – it is important to bear in mind that demolition in this case is itself remedial work, in consequence of our decision). The idea that the Respondent might have a reason for refusing on the basis that different works were to be done is misconceived. We observe that had the Claimant sued in tort, he would have been entitled to damages in the sum that it would cost to demolish and rebuild like for like so as to make good the damage. He would then be free to spend that money either on rebuilding like for like or on building something completely different. It is no part of the scheme of the 1991 Act to enable the Respondent to escape liability to which it would have undoubtedly been subject in tort.

148. In practical terms, if we imagine a case where a claimant served a section 8(3) request and then wrote to the Respondent to say it had changed its mind and ask its confirmation that its election held good, one would guess that this simply would not be a problem. Why would the Respondent in those circumstances withdraw its election and insist upon doing the work itself? Why that might be in the Respondent's interests escapes us. But if that did happen then the claimant can simply serve the section 8(4) notice. There is no time limit on his doing so; the "limitation" provision of section 3(3) applies to the notice of damage, not to the request for an election to pay. The Respondent cannot unreasonably refuse to pay (although the deeming provision of section 8(8) is not applicable). If the service of a fresh notice does not resolve matters – for example if the Respondent says the fresh notice is invalid, or where it refuses to make the election - the claimant's recourse under section 40 is to the Tribunal, which has a number of options (discussed below) including the award of damages for the failure to meet the remedial liability.

149. Similarly in this case if the Claimant had served a section 8(4) request either in the first place or at any time after and in substitution for its original oral request, it is simply fanciful to suggest that the Respondent, with the benefit of not being deemed to be unreasonably refusing, would have refused to make an election under section 8(4). It would have made the election, and today we would still be adjudicating the question of what is reasonably practicable. And that is why the issue of the form of the request was not raised until the hearing – it simply was not an issue.

150. However, the new case has been made at the last minute, and the Respondent has misconstrued the statute. It says that its election was conditional upon the exact works of the schedule being done, it purports to withdraw that election (or it says the election is void) because the exact works will not be done, and it says therefore it has no liability at all. But that is not correct; the remedial liability remains. Prima facie if the election falls away it is obliged to do the work itself, but of course the claim in this case is for damages which, as we explain below, we award.

Conclusion on the new case

151. Accordingly the Respondent's new case is rejected. It is made far too late but in any event it is misconceived in law.

(vii) The award of damages.

152. The Claimant seeks damages. The Tribunal's power to award damages is contained in section 40 of the 1991 Act, which reads as follows:

> (1) Except as otherwise provided by or under this Act, any question arising under this Act shall, in default of agreement, be referred to and determined by the appropriate tribunal.

…
(3) The tribunal, court or other person by whom any question is heard and determined under this Act may make such orders as may be necessary to give effect to its or his determinations and in particular may by order—

(a) require the Corporation to carry out any obligations imposed upon them by this Act within such period as the tribunal, court or person may direct;

(b) award damages in respect of any failure of the Corporation to carry out any such obligations."

153. The Respondent has asked that if it is found that it is liable to make a payment to the Claimant it should do so only after the Claimant has done the work. We take the view that that option is no longer available to the Respondent. The long delay in this case – it is now eight years since the damage first occurred – and the Respondent's almost derisory stance in offering only a fraction of what was required to make good the damage mean that we would not regard it as appropriate to make a mandatory order as envisaged in section 40(3)(a). Such an order could replicate the scheme of the 1991 Act whereby payment is made once work has been done (section 8(3)) or once the equivalent money has been spent (section 8(4)). The Claimant has already had to wait far too long for the Respondent to carry out its obligations; we would have no confidence that an order under section 40(3)(a) would be complied with in a timely fashion in the light of the Respondent's long delay to date. In our view the only effective remedy for the Claimant is the award of damages that he seeks.

154. The total payable will be the cost of demolishing and rebuilding his house on a like-for-like basis, but moved around so as not to lie across the line of subsidence as it does now, and the cost of most of the rest of his claim as agreed or determined in line with the indication we have given at paragraphs 89 to 98 above.

Disposal

155. The Claim succeeds in part. In view of the length time that the Claimant has had to wait, we require the Respondent to make a payment on account of damages within 28 days of £670,000, being a little over 70% of what the Claimant seeks and well within the level of damages to which he will be entitled. The parties shall, within 28 days of this decision, confirm the final amount of compensation agreed, or in the absence of agreement file the joint statement and Scott schedule as requested.

156. The parties may now make submissions on costs, and a letter giving directions for the exchange and service of submissions accompanies this decision.

Dated: 27 April 2018

Judge Elizabeth Cooke

Peter D McCrea FRICS

Addendum

157. Following our invitation to the parties in paragraph 98, we received a very helpful revised joint schedule and explanatory note. Of the original claim of £954,642.71, the Claimant now claims £927,540 or thereabouts, comprising a total for the main work of £558,273.66 together with additional sums for professional fees, utilities and so on and for work on the landscaped area outside the boundary wall (the ménage). The respondent accepts that £797,924 or thereabouts is payable. The remaining £129,616.25 in dispute comprises the following:

Item	Claimant	Respondent	Difference
External Walls	£53,241.53	£2,457.82	£50,783.71
Paved yard	£7,146.00	£0	£7,146.00
Tarmac outside apartment	£6,912.00	£0	£6,912.00
Sub-total			£64,842.47
Overheads & Profit at 4%			£2,593.70
Ménage	£6,363.00	£0	£6,363.00
Sub-total			£73,799.17
Contingencies, Fees and Inflation			£20,817.09
Provisional allowance for Utilities & ME	£35,000	£0	£35,000
			£129,616.25

158. The experts are to be commended in being able to agree the majority of costs as a result of our relatively high-level initial view, but inevitably there are some detailed points which remain.

159. As regards external walls, the Claimant's figure of £53,241.53 comprises £5,294.68 to allow for demolition and rebuilding blockwork walls, including coping and piers; £34,407 for the demolition and rebuilding of the brick garden walls; and £13,539.85 for exposing and removing defective foundations. The Respondent's £2,457.82 comprises £1,725.92 for the garden wall; £375.80 for the children's annex retaining wall and £356.10 for walls to the storage areas, which formed part of the £7,690.90 in its schedule. Mr Mason has submitted that he does not consider that these amounts are adequate to carry out reasonable repairs, and requests clarification as to which boundary walls we were referring to in paragraph 94. In short, we prefer the Respondent's evidence on boundary walls generally, and award to the Claimant the Respondent's sum of £2,457.82, and therefore reduce the claim for the main work by £50,783.71. Mr Mason also raised a new point regarding walls being required to be demolished for access, which we reject as not being raised during the trial.

160. As regards the concrete paved yard, the Respondent queries whether our approach to the floor of the stable block at paragraph 93 should equally apply to the yard immediately outside the block, for which the claimant claims £7,146.76. The Respondent does not attribute a cost to this work, although we note it attracted a figure of £529.60 in its schedule of work. We do not consider the exclusion of the stable floor should be carried through to the external yard – it was not subject to the same concession by Mr Evans. We are satisfied that the Claimant's figure of £7,146.76 is reasonable. Similarly, the

breaking up and relaying of tarmac outside the apartment building is, in our view, a valid head of claim, and we are satisfied that £6,912.00 is payable.

161. The ménage did not feature to any great degree in the trial, although we recall being shown it during our site visit. The Respondent raises the same point, citing our disallowance of the stable block floor, but we are satisfied with the Claimant's approach and award the amount claimed of £6,363.00.

162. Having made these findings, it is necessary to recast the figures to reflect allowances for preliminaries, contingencies, inflation etc as agreed between the parties (both as to rates and as to how they are applied):

Total of main work:	£507,489.95 (being £558,273.66 less £50,783.71 deducted from the claim in respect of external walls).		
Main contractor preliminaries:	£105,000.00		
		£612,489.95	
Overheads and profit at 4%:		£24,499.60	
Menage:		£6,363.00	
			£643,352.55
Contingencies at 10%:			£64,335.26
			£707,687.81
Professional fees at 15%			£106,153.17
			£813,840.98
Inflation at 1.35%			£10,986.85
			£824,827.83

163. As regards the provisional allowance claimed of £35,000 which remains in the Claimant's schedule on the basis that we have not excluded it above, but the Respondent has removed as unproven, we are satisfied that the amount is reasonable given the sums and amount of work involved.

164. We therefore award as damages to The Claimant the sum of £859,827.83. In the event that VAT is payable on all or part of this amount, and he is not able to recover it, it shall be added to the claim.

Costs

165. We now turn to costs. The Respondent accepts that it is liable for the Claimant's costs. There are three matters in dispute. One is whether the Respondent should pay on a standard or indemnity basis; the second is how much should be paid by way of interim payment; the third is the quantum of the amount claimed. As for the latter we order a detailed assessment and it will be for the parties to make their arguments on quantum to the Registrar, although their comments are relevant as to the amount of the interim payment to be made at this stage.

166. As to the question of indemnity costs, we bear in mind the principles on which indemnity costs may be awarded, set out by Stuart-Smith J in *Dixon v Radley House Partnership and others* [2016] EWHC 3485. The pursuit of a weak case will not on its own justify an award of indemnity costs, although the degree of badness of a point may be relevant; something out of the ordinary is required, albeit the conduct may be short of improper, to justify an indemnity award.

167. We say at the outset that we do not regard the Respondent's last-minute submission of its new case as a reason for the award of indemnity costs. This was not a case where a party stored up a potentially fatal weapon deliberately until the last minute. We have said that the point should not have been made, but we do not regard this aspect of the hearing as one that should colour the Respondent's liability for the costs of the entire action. This is a very different matter from the litigation conduct that was in issue in *Dixon.*

168. Aside from that the Claimant's arguments for indemnity are threefold: the Respondent pursued a hopeless defence of the case for the demolition and rebuilding of the house; the Respondent's offers of settlement were derisory and a more realistic offer would have led to settlement; the Respondent delayed inordinately in dealing with the claim.

169. We have given very careful consideration to these arguments. We were unimpressed with the Respondent's stance on rebuilding and its dismissal of the tilt of the house as being perfectly acceptable. But the threshold for the award of indemnity costs is high. There may have been a fear of floodgates on the part of the Respondent, and a concern therefore for the effect of this claim upon other cases – although it may well be that the unusual nature of the Claimant's property means that that was not a realistic concern. On balance we think that although the Respondent pursued a weak defence its doing so was not so far out of the ordinary as to justify an indemnity award.

170. As to the low offers of settlement and the delay, the Respondent's conduct will in any event be penalised by the fact that costs will be far higher than they would have been had the Respondent adopted a more conciliatory approach. And we bear in mind that the Claimant was until a few months ago claiming considerably more than the figure he eventually claimed.

171. Again, therefore, on balance we do not think that an indemnity award is justified and we award costs on the standard basis.

172. The Claimant seeks an interim payment of 70% of the total costs claimed in respect of the preliminary issue, the total claim being £278,702.30 (including VAT). The Respondent in its submissions on costs argues for reductions which would bring down the total to £183,779.30. It is not appropriate for us to make any assessment at this stage of the individual sums claimed but we have to consider whether 70% of the total is too high. We think that to be safe we should make an interim award of costs of £140,000 on the basis that we would expect that to be well within what the Claimant eventually recovers.

173. The Respondent shall therefore pay to the Claimant an on-account sum of £140,000 within 28 days. Costs shall thereafter be subject to detailed assessment by the Registrar.

Dated: 18 June 2018

Judge Elizabeth Cooke

Peter D McCrea FRICS