PT-2020-000942

Neutral Citation Number: [2022] EWHC 303 (Ch)

Case No: PT-2020-000942

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 14th February 2022

Before :

MR NICHOLAS THOMPSELL

sitting as a Deputy Judge of the High Court

- -

Between :

PRIME LONDON HOLDINGS 11 LIMITED

Claimant

- and -

THURLOE LODGE LIMITED

Defendant

- -
- -

Mr John de Waal QC (instructed by Dentons UK and Middle East LLP) for the **Claimant**
Mr Mark Warwick QC (instructed by Kennedys Law LLP**)**
for the **Defendant**

Hearing dates: 14 January 2022, 17-19 January 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Contents

Heading **Commencing Paragraph**

Mr Nicholas Thompsell :

1. Background

1. This judgment deals with an application made under section 1 of the Access to Neighbouring Land Act 1992 ("**ANLA**" or "**the Act**"). Although the Act has been in force for almost 30 years, I understand that this is the first time that its provisions have been considered in the High Court. I believe it may have been considered a number of times in the County Court, however, the only published decision to which counsel were able to refer me was a decision of HHJ Bailey in the Central London County Court in *BPT Ltd v Patterson [2016]* All ER (D) 229.

2. The fact that it has not been necessary to bring this matter to the High Court before is a testament to the sound principles on which the Act has been drafted, and perhaps also to the common-sense and neighbourliness of most landowners in England and Wales (the jurisdictions where the Act applies). It may be hoped that this common-sense and neighbourliness will continue for another 30 years, in which case this judgment may remain the sole authority on the Act for some time. Bearing this in mind, I will do my best to set out fully my understanding about how the Act should be interpreted and applied.

3. Prime London Holdings 11 Ltd ("**the Claimant**") is the owner of the property called Amberwood House (and for the purposes of ANLA is referred to as the "**dominant property**"). This property sits in a prime position in South Kensington at the end of a private road opposite the Victoria & Albert Museum. Whilst the building was used in the 19th century as a school, it was substantially redeveloped in the 1920s or 1930s as a private house and its inhabitants have included some well-known residents including Dame Margot Fonteyn.

4. Amberwood House is currently being redeveloped by the Claimant to become what Estate Agents call a "super prime" property – it was recently featured on the television programme "*Britain's Most Expensive Homes*". The redevelopment has involved removing all of the interior walls and fittings, leaving only the external walls, digging out two or three levels of basement and then refitting it to a very expensive standard. This substantial project is now reaching its end. The Claimant will look to sell the property at a profit, although it is possible that any sale may be delayed until the Claimant has settled its differences with Thurloe Lodge Limited ("**the Defendant**").

5. The Defendant is the owner of the adjacent property, which is known as Thurloe Lodge (and which for the purposes of ANLA is referred to as the "**servient property**"). This is the subject of a similarly scaled project, again involving the substantial rebuilding and enlargement of the original building. This project is not as advanced as that at Amberwood House. Broadly it is at the stage where the so-called "shell and core" works have been completed and the contractors are starting to turn their attention to the internal fit out.

6. Up to the middle of 2019 the two parties were on good terms and cooperated with each other. However, they have fallen out and now are deeply mistrustful of one another. They are in dispute about rights over the short private road which gives access to both properties, which is owned by a sister company to the Claimant. At one point the matter that I am now considering was being case-managed alongside this dispute.

2. The access order requested

7. The Claimant has requested access to the Defendant's land under ANLA in order to carry out works on the north wall of Amberwood House. This wall is set right on the boundary of the land on which Amberwood House sits. Its exterior can only be worked on from a narrow passageway between the two buildings ("**the Passageway**") which is on land in the ownership of the Defendant.

8. The Claimant says that this access is needed in order to re-render and repaint the wall.

9. The precise details of what the Claimant wishes to do and why the Claimant needs access are not spelt out on the face of the Claim Form served by the Claimant. This only requests access *"to carry out certain works reasonably necessary for the preservation of the Claimant's property"*.

10. As the claim was commenced in the County Court, and has throughout been dealt with under Part 8 of the Civil Procedure Rules ("**CPR**"), the matters in question have not been the subject of formal Particulars of Claim and Particulars of Defence which would have served to clarify the matters in issue between the parties had the action been pursued under Part 7 CPR. However, the Claimant did provide a form of particulars of claim which set out the grounds on which the Claimant claimed to be entitled to the order and which had attached to it a Method Statement explaining the work to be done and the method proposed for doing it. Although headed as *"Draft Particulars of Claim"* this document was signed on behalf of the Claimant and included a statement of truth on the part of the Claimant. The document was accompanied by a method statement drafted by the proposed scaffolding contractors, which included a description of the works to be done, an explanation of how these works were proposed to be carried out, and a risk assessment, method statement and rescue plan.

11. Before the Claimant began working at the property, the wall was a rendered wall. After both parties had dug their respective basements it was found that the render had cracked. The Defendant allowed the Claimant onto its property to deal with this. The Claimant's contractor determined that the damage to the render was so extensive that it should not be patched, but rather should be removed in its entirety and proceeded to remove this render. Not long after this removal was completed, the parties fell out and the Claimant was ordered off the Defendant's land. Consequently the wall has remained unrendered since then.

12. Since the service of the original Claim Form the Claimant has amended its proposals for how the works are to be done, responding to objections made by the Defendant.

13. The original method that it proposed **("Method 1"**) involved:

    (a) taking scaffolding materials through Thurloe Lodge;

    (b) constructing a scaffold in the Passageway ("**the Scaffolding**") which would be accessible from a roof on the Claimant's own property which would be used as a means of access while the work is undertaken for the Claimant's workforce and building materials;

    (c) undertaking the work from the Scaffolding;

(d) dismantling the Scaffolding and removing it through Thurloe House; and

(e) making good any damage caused to the Passageway before leaving the site.

14. In response to objections to the Defendant about the blocking of the Passageway and the proposed passage of scaffolding materials through Thurloe Lodge, the Defendant clarified that it would expect the Scaffolding to be designed so as to allow the Claimant's workers to pass underneath it and also offered to adopt a different method ("**Method 2**") for undertaking the works. This would operate as follows:

(a) taking scaffolding materials over a roof on the Claimant's own property using a cantilevered scaffolding bridge ("**the Cantilever**");

(b) constructing the Scaffolding which would again allow access to the Passageway from a roof on the Claimant's own property for the Claimant's workers and building materials;

(c) undertaking the work from the Scaffolding;

(d) dismantling the Scaffolding and removing it via the Cantilever; and

(e) making good any damage caused to the Passageway before leaving the site.

15. The essential difference between the two methods was that Method 2 would not involve any access through Thurloe Lodge. Both methods would involve the Defendant's workers being entirely denied the use of the Passageway for three or four days at the commencement of the works and a similar period at the end of them.

16. The Claimant argued that except for during these short periods the Defendant would still have use of the Passageway at ground floor level. This is disputed by the Defendant.

17. The Defendant has refused the Claimant's request for access and has stoutly resisted the claim under ANLA.

3. Evidence considered

18. In considering this matter, I have been greatly assisted by the helpful submissions by Mr de Waal on the part of the Claimant and by Mr Warwick for the Defendant and would like to extend my thanks to them.

19. The evidence to be considered in this matter was substantial and these whole proceedings have involved a level of effort on behalf of the parties that seems out of proportion with the importance and value of the matter in question. In normal circumstances it would be hoped that neighbours would be able to reach an accommodation on this sort of matter without spending four days in the High Court as well as producing some 14 witness statements and at least four expert reports.

20. In fairness to the parties, this matter has been complicated by the fact that the Claimant's application is likely to have an effect on the Defendant's own programme of works and also by some uncertainty as to how issues regarding consideration for access should be

applied under the Act. Nevertheless, one would hope that in future disputes the parties could work harder to reach agreement on at least some matters so as to limit the use of the court's time, and the expense to themselves.

21. In addition to the witness statements filed, the court has had the benefit of hearing oral evidence from certain witnesses including Mr David Canfield, a director of the Claimant; Mr Andrew Morton, the project manager at Amberwood House; Mr Ian Laverick, an architect supervising the work at Amberwood House; Mr Alan Sharrocks, who acted as project manager at Thurloe Lodge; Mr Mohammad Chbib, CEO of Brompton Cross Construction Ltd ("**BCC**"), the Defendant's building contractor; Mr Mark Green, a chartered building surveyor and the Defendant's project manager; Mr Christopher Sullivan, a building surveyor who acted as an expert witness on behalf of the Claimant in relation to the Claimant's works and their likely effect on the Defendant's building project; Mr Timothy Murdoch, the Defendant's expert on delay; Mr Ruaridah Adams-Cairns, the Claimant's expert witness in relation to valuation; and Mr Justin Sullivan, a chartered quantity surveyor who provided expert evidence in valuing the likely effect of the Claimant's works on the Defendant's rebuilding project.

22. Whilst it is clear that this case has got as far as the High Court as a result of a falling out between the parties themselves, I found little or no evidence of this causing any of the witnesses who appeared before me to be doing anything but answering questions put to them honestly according to his own best understanding.

23. In view of the complicated layout at Amberwood House and at Thurloe Lodge, I acceded to Mr Warwick's suggestion that I undertake a site visit to the properties, appropriately chaperoned by Mr Warwick and Mr de Waal. This was invaluable in aiding my understanding of the issues in question.

4. The legal test for granting an access order

24. The Claimant makes its claim under section 1 of ANLA. This section is in the following terms

> "1.— Access orders.
>
> (1) A person—
>
> (a) who, for the purpose of carrying out works to any land (the "dominant land"), desires to enter upon any adjoining or adjacent land (the "servient land"), and
>
> (b) who needs, but does not have, the consent of some other person to that entry, may make an application to the court for an order under this section ("an access order") against that other person.
>
> (2) On an application under this section, the court shall make an access order if, and only if, it is satisfied—

> (a) that the works are reasonably necessary for the preservation of the whole or any part of the dominant land; and
>
> (b) that they cannot be carried out, or would be substantially more difficult to carry out, without entry upon the servient land; but this subsection is subject to subsection (3) below.

(3) The court shall not make an access order in any case where it is satisfied that, were it to make such an order—

> (a) the respondent or any other person would suffer interference with, or disturbance of, his use or enjoyment of the servient land, or
>
> (b) the respondent, or any other person (whether of full age or capacity or not) in occupation of the whole or any part of the servient land, would suffer hardship,

to such a degree by reason of the entry (notwithstanding any requirement of this Act or any term or condition that may be imposed under it) that it would be unreasonable to make the order.

(4) Where the court is satisfied on an application under this section that it is reasonably necessary to carry out any basic preservation works to the dominant land, those works shall be taken for the purposes of this Act to be reasonably necessary for the preservation of the land; and in this subsection "basic preservation works" means any of the following, that is to say—

> (a) the maintenance, repair or renewal of any part of a building or other structure comprised in, or situate on, the dominant land;
>
> (b) the clearance, repair or renewal of any drain, sewer, pipe or cable so comprised or situate;
>
> (c) the treatment, cutting back, felling, removal or replacement of any hedge, tree, shrub or other growing thing which is so comprised and which is, or is in danger of becoming, damaged, diseased, dangerous, insecurely rooted or dead;
>
> (d) the filling in, or clearance, of any ditch so comprised; but this subsection is without prejudice to the generality of the works which may, apart from it, be regarded by the court as reasonably necessary for the preservation of any land.

(5) If the court considers it fair and reasonable in all the circumstances of the case, works may be regarded for the

> purposes of this Act as being reasonably necessary for the preservation of any land (or, for the purposes of subsection (4) above, as being basic preservation works which it is reasonably necessary to carry out to any land) notwithstanding that the works incidentally involve—
>
> (a) the making of some alteration, adjustment or improvement to the land, or
>
> (b) the demolition of the whole or any part of a building or structure comprised in or situate upon the land.
>
> (6) Where any works are reasonably necessary for the preservation of the whole or any part of the dominant land, the doing to the dominant land of anything which is requisite for, incidental to, or consequential on, the carrying out of those works shall be treated for the purposes of this Act as the carrying out of works which are reasonably necessary for the preservation of that land; and references in this Act to works, or to the carrying out of works, shall be construed accordingly.
>
> (7) Without prejudice to the generality of subsection (6) above, if it is reasonably necessary for a person to inspect the dominant land—
>
> (a) for the purpose of ascertaining whether any works may be reasonably necessary for the preservation of the whole or any part of that land,
>
> (b) for the purpose of making any map or plan, or ascertaining the course of any drain, sewer, pipe or cable, in preparation for, or otherwise in connection with, the carrying out of works which are so reasonably necessary, or
>
> (c) otherwise in connection with the carrying out of any such works, the making of such an inspection shall be taken for the purposes of this Act to be the carrying out to the dominant land of works which are reasonably necessary for the preservation of that land; and references in this Act to works, or to the carrying out of works, shall be construed accordingly."

25. Section 1 has been very carefully crafted. It requires the court to approach the matter by considering five questions in a particular order. I will summarise the required approach in broad terms before dealing in more detail with each of these questions.

26. The section requires the court first to ask itself two questions:

> **Question 1:** Are the works reasonably necessary for the preservation of the whole or any part of the claimant's land?

> **Question 2:** Would it be impossible, or substantially more difficult, to carry out the works without entry to the other land?

27. The court should make an order only if the answer to both of these questions is yes. If the answer to either of them is no, then the court has no jurisdiction to make an order for access under ANLA.

28. If the answer to both of those questions is yes, then the court should go on to consider the matters dealt with in section 1(3). This leads to a third and fourth question:

> **Question 3.** If the order is granted, would the respondent (i.e. the Defendant in this case) or any other person suffer interference with, or disturbance of, his use or enjoyment of the servient land?
>
> **Question 4.** If the order is granted, would the respondent or any other person occupying the land suffer hardship?

29. If we have got to this stage and the answer to both Question 3 and Question 4 is no, then the court should grant an order, although the judge retains a discretion as to the terms of the order.

30. If the answer to either Question 3 or Question 4 is yes, then the court needs to consider a fifth question:

> **Question 5.** Would the interference, disturbance or hardship occasioned by reason of the entry onto the land occur to such a degree that it would be unreasonable for the court to make the order?

31. The parties dispute the application of four out of five of these questions and it is appropriate to consider each of them separately.

5. Question 1. Are the works reasonably necessary?

32. My summary of Question 1 above does not do justice to the subtlety of the drafting of section 1. This point has relevance to the arguments raised by the parties in this case, so I will analyse the drafting in more detail.

5.1 Ambiguity in section1(2)(a)

33. Section 1(2)(a) first sets out a straightforward test:

> "(a) that the works are reasonably necessary for the preservation of the whole or any part of the dominant land".

34. However, this test needs to be read in the light of section 1(4), which I have set out in full above. There are essentially two elements to section 1(4).

35. The first is a deeming provision such that the works should be deemed to be reasonably necessary for the preservation of the land (and therefore to meet the test set out in section 1(2)(a)) if the court is satisfied

> " … on an application under this section that it is reasonably necessary to carry out any basic preservation works on the dominant land".

36. The second is a definition of the phrase "*basic preservation works*" used in this section. The section lists various types of work that would count as "*basic preservation works*". These include (at section 1(4)(a)) "*the maintenance, repair or renewal of any part of the building or other structure comprised in, or situate on, the dominant land*". It is the Claimant's case that the work that it proposes falls into this category.

37. There is an ambiguity in the opening words of section 1(4) in relation to the use of the word "*it*". At least on a casual reading, the word "*it*" could be read as referring to the phrase preceding it ("*an application under this section*"). Read this way, all the Claimant would need to show is (i) that the works it is proposing to undertake are within the definition of "basic preservation works" and (ii) that the application is reasonably necessary for these works to be done.

38. However, for the avoidance of doubt, the correct interpretation is that the word "it" should be read to refer to the phrase following it (i.e. "*to carry out any basic preservation works*"), so that alternative drafting for the phrase might be "*where the court is satisfied that the carrying out of any basic preservation works is reasonably necessary ...*" Read this way, both the application and the basic preservation works referred to in the application need to be "*reasonably necessary*". On this second interpretation section 1(4) really does no more than to clarify that certain kinds of work (if reasonably necessary) are to be regarded as works necessary for the preservation of the dominant land.

39. The second interpretation is the more natural interpretation of the language used. It accords with the aim of the legislation, which was to create a very strictly limited abrogation of landowners' rights to determine who should be able to come onto their property. Both counsel agreed that it was not enough to demonstrate that the application was necessary in order to undertake "*basic preservation works*": the basic preservation works themselves need to be "*reasonably necessary*". Also, where legislation is ambiguous or obscure the courts may, following the House of Lords decision in *Pepper v Hart* [1993] AC 593 take account of statements made in Parliament in construing legislation and I note that this second interpretation was the one put on this drafting in the speech of Lord Coleraine when the bill that led to ANLA went to the Committee stage in the House of Lords (*Hansard*, HL Vol. 535, col. 879 (February 13, 1992)).

40. Accordingly, I will approach Question 1 in this way

5.2 Are the proposed works "basic preservation works"?

41. The Claimant argues that what is proposed are basic preservation works, within the phrase set out at section 1(4)(a), i.e. that they comprise the *"maintenance, repair or renewal"* of the wall in question. The Claimant argues that it appears that the wall has been rendered for considerable time, before the construction works began and most

probably at least since the 1920s or 1930s. Putting the render back on after it has been chipped off falls naturally within the words *"maintenance, repair or renewal"*.

42. Mr Warwick, on behalf of the Defendant, has raised two points that may be relevant to counter this assertion:

    (a) He has raised doubts about whether it was the case that all the wall has always been rendered; and

    (b) He has drawn attention to the recent history that the render was removed by the Claimant's contractor as part and parcel of the larger development works, and to the possibility that the holes around windows may have been caused by the insertion of the windows rather than the removal of the render. These points are made, I think, with the implication that the current state of the wall has been inflicted by the Claimant itself, and as part of a substantial redevelopment of the property, rather than as part of anything recognisable as "*maintenance, repair or renewal*".

43. Insofar as these points were advanced as arguments that the work proposed does not fall within the category of *"maintenance, repair or renewal",* I find them unconvincing.

44. As regards the first point, there is an overlap between the words "*maintenance*", "*repair*" and "*renewal*" and I consider that these words have been put together within this phrase in order to convey a broad impression of the types of work that are to be considered as potentially justifying an access order. The works proposed by the Claimant could be considered to fall into any of these categories. If one takes as one's starting point the state of the wall before the render was hacked off, the work of repairing cracks in the render and the blown render, can reasonably be described as "*maintenance*" (as it is to be expected that a rendered wall will require maintenance from time to time) or as "*repair*". Even if one takes the starting point as being the state of the wall as it is now, with the render taken off, it is fair to describe the works as "*repair*" or as "*renewal*". On any view the works proposed amount to "*maintenance, repair or renewal*" and accordingly fall within the definition of "*basic preservation works*". The fact that there may have been a period when part of the wall may not have been rendered, perhaps 80 or more years ago, is not relevant.

45. As to the point that the repair or renewal has become necessary as a result of the larger building project, this point might have had validity if it had appeared that the repair had become necessary only because of the Claimant's building project and would not have been necessary at all without it. This might have been so if the wall had been completely destroyed in order to create a completely new building. However, this was not the case here - this wall and the other external walls of the original building have been retained so that the building (at least externally) has maintained a recognisable continuing identity.

46. If the argument is that the Claimant's substantial redevelopment project was the only reason why maintenance or repair to the wall would have been necessary, I consider that this argument fails on two grounds.

47. First I do not think that it is a correct interpretation of section 1 of ANLA to say that works lose their character as "*basic preservation works*" if they otherwise have that

character, merely because the requirement for maintenance, repair or renewal was caused by some voluntary act of the applicant elsewhere on its property that caused damage requiring repair or renewal.

48. Secondly I do not think that any case has been made out that the need for the repair was entirely, or principally the result of the Claimant's redevelopment works. It is in the nature of a rendered wall - particularly on an old building - that cracks will appear and the render will need maintenance from time to time. The original cracking in the render which caused the render to be hacked off might have appeared at least to some extent in the absence of any works. If it has been exacerbated by works being carried on, there was no way to tell whether this was the Claimant's works or the Defendant's works, both of which were of a nature likely to shake the foundations. As regards the insertion of the new windows, the evidence was that it was the hacking off of the render, rather than the insertion of the windows which caused the holes around the windows.

49. Accordingly, I accept that the Claimant's proposed works do fall within the definition of "*basic preservation works*".

5.3 Are the proposed works "reasonably necessary"?

50. Mr de Waal on behalf of the Claimant presses the case that these basic preservation works are reasonably necessary. Various reasons have been put forward why work is reasonably necessary:

51. The first point is that the wall in its current state is unkempt and unattractive, showing different types of bricks laid at different times and in different patterns. These aesthetic concerns are mitigated for the Claimant, since the wall cannot be viewed from inside Amberwood House - in fact the wall's aesthetics logically should be more of a concern for the Defendant since it is the occupants of Thurloe Lodge who will spend more time looking at this wall. However, a portion of the wall can be seen from the roadway approaching the property and the appearance of this is entirely out of character with the upmarket finish that has been obtained in the remainder of Amberwood House.

52. The Defendant has sought to establish that the works are required merely for aesthetic reasons and as such cannot be regarded as "*reasonably necessary for the preservation*" of the wall. However this ignores the deeming provision in section 1(4) which, as discussed above, has the effect that if works are within the category of "*basic preservation works*" (which includes works of maintenance, including works of repair or of renewal) and are shown to be reasonably necessary, then the test of "*reasonably necessary for the preservation of the property*" is met.

53. I do not think it is correct that maintenance works that are undertaken for aesthetic purposes, or primarily for aesthetic purposes, can never be regarded as reasonably necessary. It is true that the reasons given for introducing the Act were focused on works necessary to stop a property rotting away, and I would accept that an applicant would not have a right to an access order merely because he did not like the colour a wall was painted if the paint was otherwise in good order. Nevertheless, I think that there may be circumstances where aesthetic issues may have some bearing on the matter. In my view this may be affected by the character of the property and the locale in which it sits. I am reminded of the comments of Thesiger LJ in the well-known case of *Sturges v Bridgman* (1879) LR 11 ChD 852 that

> "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey".

Whilst Thesiger LJ was enunciating this principle in relation to the law of nuisance, which is not in question here, I think something like this principle can be applied by analogy in judging what level of maintenance is necessary for a property. The level of finish that should be judged reasonably necessary for a building to maintain may be dependent on the locale. Certainly here I consider that the Claimant should be considered justified in wanting to restore its property to a state of presentation that is in keeping with the upmarket character of its property and the locale.

54. In any case, I consider that the Claimant has demonstrated that there are good reasons why the rendering needs to be reapplied for reasons that clearly are relevant to the preservation of the wall.

55. First, there also was evidence that the brickwork, or at least some of it, had been erected on the assumption that it would be rendered so that common bricks (not usually used for facing) rather than facing bricks were used in places.

56. Secondly, the brickwork had suffered when the render was removed and some of the bricks had lost their outer skin, rendering them liable to further damage through the ingress of damp and through dilapidation caused by freeze/thaw. There were also large holes around the windows which should be filled by the render.

57. Expert evidence was adduced that the property's position created a moderate risk from driving rain and the Claimant in my view demonstrated concerns that without the protection of the render there was a risk of ingress of water, which would spoil the expensive internal decoration.

58. There was also some discussion in court that there may be other reasons why work was necessary. It was unclear whether the work was necessary in order to comply with planning requirements (which, in a conservation area such as this, generally require the finishes of external walls to be preserved) as it appears there was a mistake on the plan submitted to the planning authority. The plan mistakenly showed the wall in question as being faced in brick rather than in render. One of the witnesses also thought that completion of the rendering might be necessary for the building to be signed off the purposes of building regulations as render would be material to standards relating to the thermal value of the walls and air pressure tests. However, the evidence on these points, was thin and in his closing remarks Mr de Waal accepted that the court should not rely on these points. Accordingly, I will not base my decision on the assumption that there is anything in these points.

59. Mr Warwick advanced various arguments to counter the argument that this work was reasonably necessary.

60. He pointed out that the remainder of the house is faced in brick and the render was applied probably as a decorative measure to cover imperfections in the brickwork. This point does not really address whether it would be acceptable to leave wall as it is. One of the Claimant's witnesses, Mr Laverick, acknowledged that it might be possible to leave the wall as a brick wall but considered that this could only work to create an

acceptable appearance if the gaps were repaired and the wall were re-faced with decorative brick slips. He considered (understandably in my view) that this would not be any quicker or easier than re-rendering the wall.

61. Mr Warwick pointed to the witness evidence (born out by my own brief inspection) that there was no sign that damp had found its way through the wall so far so as to damage the expensive fittings to the interior despite the render having been removed some two and a half years earlier. He noted the evidence of Mr Christopher Sullivan in his expert report produced for the Claimant that it was likely that the wall had been lined and insulated internally. However, there appeared to be a consensus that, even if a membrane had been inserted, this would not be sufficient to prevent the risk that the ingress of damp that might be expected if the wall is not rendered soon. Mr Sullivan was clear about the risks of this and even Mr Green, the Defendant's project manager, appeared to agree that it would be necessary to repair the gaps around window in order to prevent moisture getting into the window reveals, and that this could be characterised as works of "*maintenance, repair and renewal*".

62. I think it is fair to say that Mr Warwick's arguments were aimed more at the proposition that it was not necessary to do the work now (or in the very near future) than that they would not need to be done at some point. He accepted that the appearance of the wall was not as it should be, but did not accept that there was any degree of urgency in dealing with this.

63. From the evidence presented to me, and even from my own site inspection, it seems to me obvious that it is reasonably necessary that these works be done. However, I agree that it is not "reasonably necessary" that these works should be done immediately.

64. The draft Particulars of Claim filed by the Claimant asked for the work to be commenced within two weeks of the order being granted. The Claim Form was filed on 8 June 2020 and at that time no doubt there appeared to be a reasonable prospect that the claim might be determined before the onset of winter. As the case finally came to be considered in mid-January, in the depths of winter, and as there are difficulties in applying render when the temperature might drop to freezing point, the Claimant has amended its request to ask for the work to be done in April or May.

65. During the course of the trial the Claimant accepted that it would not make much difference to the Claimant if the work were ordered to be done sometime between April and the end of September, as the chief concern was that the work should be done at some point and ideally at a point that would avoid the property going into another winter without the protection of the render. If this was necessary because of the Defendant's legitimate concerns, Mr de Waal told the court that the Claimant was prepared to accept that the work could be delayed until after the Defendant had completed its work, although the Claimant put a value of £30,000 on the benefit to it of being able to do the work before the next winter.

66. Mr Warwick argues that the requirement of the Act that the work be "*reasonably necessary*" implies that it was reasonably necessary for the work to be done immediately. If the work in question could reasonably be delayed, then it was not "*reasonably necessary*" for the work to be done now and therefore no order should be given. The implication of his argument was that an applicant faced with the circumstances that there was work that would need to be done but no urgent reason why

it should be done immediately, must wait until the work had become urgent before making a claim under the Act.

67. I do not accept Mr Warwick's argument on this point. In my view the term "*reasonably necessary*" requires the judge to take a broad view to determine whether the works in question, and the access requested, are necessary. In the current case I have no doubt that the works are necessary. In many cases, including in the one currently before the court, there may be some latitude in how urgently the works are required to be done. The judge should take account of this latitude in deciding the terms of the order to be granted, particularly if ordering the access at one time rather than another imposes more or less inconvenience on one or other of the parties. However, once it is established that the works reasonably need to be done, the fact that the works might reasonably be done at a later time than the Claimant has requested is not material to the question asked at this stage of the analysis. The fact that it might be reasonable to order the works to be done later does not affect the court's jurisdiction to make an order, although it might affect the terms of the order that the court should grant.

6. Question 2. Is access to the Defendant's land necessary?

68. The second question the court must ask is whether it would be impossible, or substantially more difficult, to carry out the works without entry to the other land.

69. This was the only question on which the parties agreed. The Defendant acknowledges that if the works needed to be done, they could not be done without access to the Defendant's land.

7. Question 3. Would the order cause interference with, or disturbance of, the use or enjoyment of the Defendant's land?

70. Having answered both Question 1 and Question 2 in the affirmative, I must next consider section 1(3)(a) of the Act and ask Question 3: if the order is granted, would the Defendant or any other person suffer interference with, or disturbance of, his use or enjoyment of the servient land?

71. Mr de Waal put forward an argument in his closing remarks that at present the Defendant has no use or enjoyment of land whatsoever since its use and enjoyment of land has been suspended while the major building project is in progress. Mr de Waal accepted that, if the order resulted in the Defendant's project being delayed, that delay might amount to interference or disturbance of the Defendant's future use or enjoyment of the land, but it was his contention that the Claimant could do the work without causing any such delay.

72. Section 1(3)(a) requires the court consider not only the position of the respondent (here the Defendant), but also the position of any other person who might suffer interference with, or disturbance of, his use or enjoyment of the servient land. Such a person might include the Defendant's contractor, BCC, which is currently occupying the land in order to carry out the development. Mr de Waal suggested that it would be artificial to suggest that the contractor was "*using*" the land and, whilst I am not sure he addressed this directly, I think he considered that the contractor was not "*enjoying*" the land either.

73. Mr Warwick, in his closing argument, contradicted this view. He considered that the natural use of the terms "*use or enjoyment*" were wide enough to capture both the Defendant's use of the land by getting in a contractor to develop it and the contractor's occupation of the land for the purpose of the building project.

74. On this point I am with Mr Warwick. The intention of the Act is to ensure that the court considers the effect on the owner and any occupier of the servient land, or anyone else who might be affected by the order. In view of this intention of the Act, the court should not construe what might amount to the "*use or enjoyment*" of any party in an overly narrow manner. Accordingly, I will approach this on the basis that during this building phase the Defendant and its contractor do have use or enjoyment that is capable of being disturbed by the Claimant's proposals to undertake works.

75. I will consider in more detail, when I get to Question 5 the extent of the interference or disturbance that the Defendant or its contractor may suffer to their respective use or enjoyment of the Defendant's land.

8. Question 4. If the order is granted, would the respondent or any other person occupying the land suffer hardship?

76. Having answered Question 3 in the affirmative, it is less important to answer the fourth question, posed by section 1(3)(b) of the Act: if the order is granted, would the respondent or any person occupying the land suffer hardship? Nevertheless, as this matter was in dispute, I will give my views on this point.

77. As far as I can discern hardship was not originally part of the Defendant's case. However in his closing remarks Mr Warwick did present an argument that hardship would be suffered by the Defendant by reason of the works, since he considered that the evidence showed that undertaking the works would disrupt the Defendant's building project and might lead to the Defendant having to make a substantial financial payment to its contractor. This would, in his submission, lead to financial hardship.

78. "*Hardship*" is a strong word, connoting more than mere inconvenience. Certainly, I consider that it could encompass financial hardship. However I consider that in determining whether hardship is imposed, and especially in relation to financial hardship, I should do this by reference to the order to be granted, rather than looking just at the proposal for access and the works to be undertaken.

79. Under section 2(3) of the Act the court has wide powers to specify how and when the works are to be carried out; the precautions that the applicant should take; and to require the applicant to pay for any loss, damage or injury, or any substantial loss of privacy or other substantial inconvenience. Furthermore, in some circumstances (which I will consider below) the court may order the payment of a sum that the court considers to be fair and reasonable for the privilege granted to the applicant of entering the servient land. The Act therefore clearly envisages that the court might make an order where the access or the works give rise to loss, damage or injury, substantial loss of privacy or other substantial inconvenience but where the Defendant will be compensated for this.

80. It would be perverse to ignore these provisions when forming a view as to whether the Defendant will suffer hardship through the granting of the order. If the Defendant is

compensated under the terms of the order (as I consider the Defendant should be) then the order cannot have given rise to any financial hardship.

81. My conclusion, therefore, in relation to Question 4 is that I am unconvinced that the order will necessarily give rise to any hardship beyond that occasioned by the interference with or disturbance of the Defendant's and its contractor's use and enjoyment of the land which I am already considering, having answered Question 3 in the affirmative. However, the prospect of financial loss is one that should be considered in framing the terms of any order that the court might grant.

9. Question 5. Would the interference, disturbance or hardship occur to such a degree that it would be unreasonable for the court make the order?

82. Having answered Question 3 with a "yes" and Question 4 with a "probably not", I need to move on to the fifth question, which derives from the words appearing at the end of section 1(3) which qualify paragraphs (a) and (b) of that provision. Would the interference, disturbance or hardship occasioned by reason of the entry onto the land occur to such a degree that it would be unreasonable for the court make the order?

83. This is the nub of the question in this case, and I expect very often will be the main point of dispute in any contested application under ANLA.

9.1 How should Question 5 be approached?

84. Mr Warwick has suggested that the Defendant need show only a minor interference, disturbance or hardship to make it unreasonable to grant an access order. I do not accept that as a general principle it is sufficient for the respondent to show a minor degree of interference, disturbance or hardship to make it unreasonable to grant an access order. The Act is clear that it is not enough to establish that there is some interference, disturbance or hardship, but rather such detriment needs to be of an extent that would cause it to be unreasonable to make the order.

85. To be fair to Mr Warwick, I do not think that he was advancing this argument as a general proposition as to how the Act should be applied. He was making a special case that the court should not adopt a liberal approach to the Claimant's application in circumstances where the Claimant, in relation to the other action, has adopted a technical approach to the Defendant's rights over the access road. I do not accept this argument. I do not think that it is appropriate to link the two actions in this way – they should each be determined on their individual merits (except perhaps that the respective conduct of the parties might have some bearing when the matter of costs comes to be considered).

86. Neither do I accept that because the Defendant had already given an opportunity to the Claimant to undertake the works, but the Claimant failed to complete the works during the period of occupation allowed by the Claimant, that this makes it unreasonable now to order that the works go ahead. There is no general test of reasonableness in the Act. Reasonableness is considered in relation to specific questions. It is considered in relation to Question 1 (are the applicant's works reasonably necessary?). It is considered again at Question 5 (is the interference, disturbance or hardship to be suffered by the respondent to such a degree that it would be unreasonable to make the order). Factors which are not pertinent to these two questions do not form a basis for

the court to refuse to make an order if it is satisfied that the applicant's works are reasonably necessary and any interference, disturbance or hardship is not such to make it unreasonable to give the order.

87. In considering whether it is unreasonable to impose the access order on the respondent, the court will need to consider the extent of the interference, disturbance or hardship on the respondent, but this is not to be looked at by itself. It needs to be looked at in the light of the detriment to the applicant if the order is denied, so that the applicant's "reasonably necessary" works are not carried out.

88. To take an extreme example, if the applicant's property contained a nuclear reactor which might explode if some repair was not carried out that required access to the respondent's land, it would take a very high degree of interference, disturbance or hardship for the court to conclude that it was not reasonable for the access to be granted. Conversely, if there were special factors which meant that the proposed access or works would inevitably cause huge disturbance or hardship to the respondent, for example if the works would require the respondent to move out and the respondent were to be frail and infirm, then the applicant would need to show a high degree of necessity and urgency for its works to be done.

89. Mr Warwick suggested that in approaching this question the court should consider strictly only the application in front of it which, Mr Warwick's view, should be regarded as including the timing proposed by the Claimant and the method statement(s) proposed by the Claimant. He considered that it was not for the court to substitute this with some other timing or method statement. Neither would it be legitimate to suggest that the Defendant should rearrange its building programme and schemes of work to accommodate the Claimant's works. If the application as originally framed causes a level of detriment to the Defendant (or anybody else) if they carried on their works in the way that they were intending to before receiving the application, the court should reject the application and leave it to the applicant to frame a new application that would be less burdensome to the respondent (or anyone else unreasonably affected by the original proposal). The court should take this approach even if the court considered that the proposal could be modified in a way that would reduce these effects to a degree where they became acceptable.

90. I do not accept that this is the correct approach for the court to take. As I have mentioned, the Act provides the court with wide powers to make any order subject to conditions that will lessen the impact of the access and the works on the respondent (or any other occupant of the land or anyone else affected by the proposal). The court cannot, and should not, ignore its ability to use these powers when determining whether it should make an order. Accordingly, where it hears a legitimate objection to the proposal from the respondent, the court should consider how these objections could be mitigated through the terms of the order. Both parties, should try to assist the court in doing this. Indeed, before the matter even comes to court, the parties should be expected to seek to find an accommodation that they could both live with.

91. In the current matter, I consider that the Claimant has generally adopted an open and constructive approach and has sought to consider different ways that it could accommodate objections raised by the Defendant for example in coming up with Method 2 and in considering a suggestion that I put forward to accommodate the Defendant's contractors' welfare cabin partly on the Claimant's land.

92. The same cannot be said of the Defendant, which generally has sought to find problems rather than solutions. This, no doubt, is rooted in the animosity between the parties that I have referred to. The Defendant has sought to justify this approach on the basis of the argument that it is for the Claimant, as applicant, to come up with an acceptable proposal, and the Defendant, as respondent, has no duty to cooperate in helping the Claimant to make this acceptable and that it is not for the Claimant to tell it how to run its building project.

93. Of course the respondent must be able to raise its arguments that the threshold questions for the right of access to apply are not met, but where its objections are based on detriment to the respondent or to others, the court will judge such detriment in the light of what detriment can reasonably be expected after the parties and the court have put in place any steps that might be reasonable to mitigate such detriment. The respondent should be expected to try to work constructively with the applicant to see how this detriment could be lessened. A respondent that fails to engage on this risks losing the sympathy of the court and risks facing consequences in costs.

94. In order to answer Question 5, it is necessary to consider in detail the objections that the Defendant has raised to the proposal for access, and the Claimant's response to these matters.

9.2 The objection based on use of the Passageway

95. The Defendant's principal objection is based on it proposed use of the Passageway. The Passageway is quite narrow - around 1.4 to 1.5 metre wide. The Claimant proposes to erect the Scaffolding the length and breadth of the Passageway and to work from the Scaffolding at a level above the Passageway.

96. The Defendant has produced witness evidence from Mr Sharrocks, the Defendant's project manager, that BCC proposes, during the next phase of its build, to use the Passageway as its principal route to bring materials, staff and equipment from the entrance to the site (which is at the front of Thurloe Lodge) to the rear of the site. The Defendant argues that this is an important aspect of its project plan which will be prevented if the Claimant's works go ahead.

97. Mr de Waal argues that this concern is ill founded. He notes that the Defendant has not made much use of this route up to now and questions the sense behind a decision that this would become the principal route for the Defendant's contractor, given the continued existence of two other routes allowing access between the front and rear of the property.

98. The first of these alternative routes is a direct route straight through Thurloe Lodge on the ground floor. This route ("**the Direct Route**") has been the principal route used by the Defendant's contractor up to now. The second route ("**the Basement Route**") involves going down some steps, through the house at the level of the first basement and then up some steps at the rear of the house.

99. The Claimant argues that both of these routes are viable alternatives to the route using the Passageway ("the **Passageway Route**") which involves going down some steps at the front of the house, crossing a light-well at basement level at the front of the house and then making a tight turn up some steps back up to ground level before going along

the Passageway. Whilst this route has the advantage of avoiding going through the house, it has various disadvantages. It involves multiple levels, tight turns and at its narrowest has a width of only around 610 mm, which renders it unsuitable for bringing through large items such as full-length scaffolding poles or full-size plaster board, so that in practice in any event there will be a need to continue to use one or other of the other two routes.

100. The Defendant answers these points by noting that its works are going into a different phase, and it will soon be working on the interior of Thurloe Lodge, installing delicate items such as piping for underfloor heating and delicate surface finishes. It will therefore wish to minimise any traffic through Thurloe Lodge and this is why the Passageway Route is so important to it.

101. The Claimant's response to this argument has been to offer to construct the Scaffolding in such a configuration that the Defendant's contractor is able, once it is constructed, to pass underneath it. This would involve ensuring that it has a minimum height of 2.1 metres from the current ground level and a minimum width of 800mm (i.e. substantially wider than the narrowest point of the Passageway Route). The Claimant would construct a so-called "crash deck" at the 2.1 metre level, which would comprise a platform covering the full width of the scaffold comprising either two scaffold boards or one scaffold board topped with thick plywood, as well as a fire-resistant membrane and padding underneath. Once this is constructed, the Claimant argues that the Defendant's contractor can resume use of the Passageway Route, so that the Defendant's contractor would only be materially inconvenienced during the short period (said to be one or two days) during which the scaffold is being erected at the commencement of the works and the period during which the Scaffolding is being dismantled at the end of the works. During these short periods the Defendant's contractor would need to avoid the passageway, but would still be able to continue work elsewhere within Thurloe Lodge, and still would have use of the Basement Route and would also have use throughout of the Direct Route (except possibly during a period of a few hours while the Claimant's contractor brings the scaffolding materials through using the Direct Route, if this is allowed).

102. The Defendant has raised various points as to why this proposal is impractical.

103. First, it raises doubts about whether there is room to construct the crash deck at the height suggested and still be able to come down to the bottom of the part of the wall that needs to be rendered, which appears to be the bottom of a sill which runs along the wall at a height of about 2.4 metres. It also raises doubts about the construction of the Scaffolding which needs to be set back from the Claimant's wall, in order to be suitable to do the rendering and also needs to be set back, at ground-level from the wall of Thurloe Lodge on the other side so as not to run into a protruding roof parapet on the other side. Also if the Passageway Route is not to be compromised, there could be no bracing across the two sides of the Scaffolding at ground-level.

104. The Claimant is confident that it can overcome these problems of design of the Scaffolding and is prepared to take the risk on this by accepting that the order granted would include requirements in relation to the construction of the Scaffolding.

105. There was a suggestion that a height of 2.3m would be needed to allow full-sized plasterboard sheets to be taken through the Passageway Route but this seemed to me to

be an unlikely use of the route since we were told that at its narrowest point the Passageway Route would not in any case allow passage of such materials. Furthermore as by its nature plasterboard would be used in the house, it would seem likely that in most cases this would most conveniently be taken in via the Direct Route.

106. Having heard evidence from both sides on this point I am unconvinced that the objections raised on this ground are well-founded. As the Claimant is prepared to take this risk on this point I think that I should ensure that any order granted does have the effect of putting these risks onto the Claimant. If the order is conditioned in this manner so that at most the Defendant suffers only a very temporary loss of access via the Passageway Route, I cannot see this detriment amounting to an unreasonable level of that interference, disturbance or hardship while the Defendant's building project is continuing.

107. Furthermore, the Defendant's objections on this ground apply only during the course of the Defendant's building project – once this is completed it is difficult to see that any temporary loss of access to the Passageway of itself causes anything more than a mild inconvenience and some loss of amenity and privacy to any occupant.

9.3 The objection based on Health and Safety responsibilities

108. Secondly, the Defendant raises objections based on health and safety grounds. It points out that under the Construction (Design and Management) Regulations 2015/51 (as amended) (the "**Regulations**") there is an obligation for each project to clearly identify a principal contractor who takes responsibility for the overall health and safety during construction works. It argues that this rule is breached if the Claimant's contractor and the Defendant's contractor are sharing the same site and it considers that the Defendant's contractor could and should not be obliged to take responsibility for the Claimant's contractor for the works. The Defendant's contractor would not have selected and would have no contractual nexus allowing for it to supervise that contractor.

109. The Defendants concerns on this matter seem to be overstated. The Regulations require a single contractor for a "project" rather than for a particular area of land. Clearly the Claimant's project and the Defendant's projects are different projects. There was evidence that it is the common practice within the industry to regard "project" as coterminous with "site" so that a principal contractor took responsibility for the health and safety on the entirety of the site, but even accepting this practice, the Claimant had two proposals for dealing with the concern.

110. The first possibility was that the safety case for the Defendant's project would be amended. The amendment would amend the boundaries of the site for the project. During the period during which the Scaffolding was being constructed the passageway would be regarded as the Claimant's contractor's site (and not as part of the site for the Defendant's project). Once the Scaffolding was constructed, the Claimant's contractor would take responsibility for a site comprising the Passageway except for a tunnel comprising the inside of the Scaffolding at ground level up to the level of the crash deck, and the site of the Defendant's project would be defined as including that tunnel, but excluding the space in the Passageway for which the Claimant's contractor had taken responsibility.

111. The second possibility was to allow the Defendant's contractor to nominate a scaffolding subcontractor that it approved (or a list of such subcontractors from which the Claimant would choose) and then to appoint that firm as its own subcontractor, accepting responsibility for supervising that firm and having the powers to supervise the way that that firm operated (all, of course, at the cost of the Claimant).

112. It seems to me that either of these solutions would address that objection and that if everybody knew that the order was going ahead, this matter would be resolved.

9.4 The objection based on insurance

113. The Defendant also has raised an objection on the grounds of insurance, suggesting that the presence of another contractor on the site would vitiate or invalidate its current insurance arrangements.

114. The evidence produced by the Defendant on this point was thin and it appeared to me that the objection was not so much that it was impossible to retain insurance if this proposal went ahead, but rather that it would take some time to inform the relevant insurers and to obtain their consent to amending the assumptions on which the insurance had been underwritten. This might have been a problem with the original proposal that the works be commenced within two weeks of the order, but I do not see that it would present any insuperable objection on the more relaxed timetable that is now under consideration.

115. Of course if the insurers required any increase in premium to accept a different risk, this would be a matter that the Claimant would need to compensate. Also, it might be appropriate that the Defendant (and the Defendant's contractor) should be noted as having an interest in the public liability insurance carried by the contractors carrying out the Claimant's work.

116. Having regard to the points made on each side, I am not satisfied that the Defendant's objection based on its need for access to the Passageway Route provides a reason to consider that the Defendant or its contractor will suffer from the proposed works in any way which would render the ordering of these works to be unreasonable, even if they were to be ordered to take place during the build phase for this project. Certainly these objections fall away after the build phase for Thurloe Lodge has been completed.

9.5 The objection based on the Defendant's contractor's reaction

117. The points considered above are pertinent to what the Defendant says would or might be the reaction of its contractor if the Defendant was to be obliged to allow the Contractor's works to be carried out during the period of its build. In his witness statement, Mr Chbib, the Chief Executive Officer of the Defendant's contractor, BCC, put these reasons forward as reasons why BCC would have to suspend all works at Thurloe Lodge resulting in substantial delay to the Defendant's works and substantial losses.

118. If true, this seemed to me to be a serious objection to the proposal. However, on cross examination Mr Chbib's evidence appeared to be rather different to that set out in his witness statement. Mr Chbib acknowledged that there could be times during the building programme going forward when he could not make use of the Passageway

Route and agreed that he would be able to work around this. When asked whether the Claimant's work would make it impossible for him to continue he agreed that "*nothing was impossible*".

119. His main objection appeared to be predicated on the idea that the Passageway Route would not be available at all for a period of eight weeks - he had discounted the idea that the Passageway Route might still be made available underneath scaffolding on the health and safety and insurance grounds mentioned above. These objections did not appear to be well thought out. Most importantly he agreed that if he were to be faced with a requirement from his client to allow the Claimant's works to proceed, he would not automatically just walk out, but would act like any responsible contractor and try to do the best for his client, and indeed for any neighbour. He would work out how to live with any necessary variation to his project plan, so as to minimise any delay and additional cost.

120. There was some discussion as to what was the contractual basis for BCC's works. The court was told that BCC was operating under a letter of intent, which referred to an intention for there to be a contract entered into under the JCT terms and conditions (assumed to be the JCT Standard Building Contract Without Quantities) but no copy of this letter of intent was available and it was not possible to discern whether or not this gave rise to an enforceable contract on JCT terms.

121. There was no time to consider the precise implications if the contract was a legally enforceable contract governed by the JCT terms and conditions, although after the trial I was helpfully provided with a copy of these standard terms.

122. I note that these provide (at clause 2.33) a possibility for the employer (the Defendant in this case) to take possession of part of the Works during the course of the project, with the consent of the contractor. There are also provisions (in section 5) to deal with "variations". This term is defined to include the imposition by the employer of obligations or restrictions on access to the site or use of any specific parts of the site or our study execution or completion of the work in any specific order. Where the contractor is asked to deal with variation, there is a mechanism for the contractor to provide a quotation for any additional cost that this might involve to the contractor and for a sum to be agreed to cover this, or if not agreed to be determined by an appointed quantity surveyor. If the variation results in a need for more time for the contractor to to complete the works, the contractor is given more time to do this, although the contractor remains obliged to use its best endeavours to prevent delay.

123. The contractor has a right to object to a variation where it has a reasonable objection to the variation but, in view of my findings above, it is difficult to see what might form the grounds of a reasonable objection in this case. If these terms apply, I find it highly unlikely that BCC would down tools if faced with working around the terms of any access order.

124. If BCC is not working under the terms of a legally enforceable contract and it is required to work around an access order, then I find it equally unlikely that BCC would down tools.

125. In either case it seems to me far more likely that BCC would react in the way that Mr Chbib said it would react in his oral evidence. He accepted that if the court gave an

order BCC would work around it in the best possible way to minimise any cost and delay.

126. Taking account of all of the evidence, I consider that the original position put forward in Mr Chbib's witness statement was overstated. I do not think BCC is at all likely to walk off the site if an order is granted, even if the order resulted in works being undertaken during the period of his build.

127. To the extent that the implementation of the order causes loss or serious inconvenience to the Defendant that cannot reasonably be mitigated, it is appropriate that this is compensated, and I will consider that point further below.

9.6 The objection based on use of the Direct Route

128. The Defendant also objects to the feature of the original Method 1 proposal of the Claimant to use the Direct Route to bring the scaffolding materials through the ground floor of Thurloe Lodge and to bring them out again at the end of the project through the same route. The Defendant objects to this on two grounds:

(a) the first is that the work to the construction site will be disrupted while this is happening; and

(b) the second is that before very long, and certainly by the time that the Claimant has suggested for its access, the floor of Thurloe Lodge will be covered in delicate pipework for underfloor heating, and subsequently with expensive and easily damaged stone or wood finishes.

129. The Claimant responds to these objections firstly with the argument that the disruption will be minimal as the scaffolding materials can be brought through, and back through Thurloe Lodge in a matter of hours. Secondly, it suggests that the floor of the building could be adequately protected by covering it in three-quarter inch plywood. As was shown to me when I visited Amberwood House it would be expected anyway, once the floor had reached a state where it required protection that it would be covered at least with a thin layer of hardboard until the building project was completely finished. It would be only a marginal additional expense to use a more robust floor covering. Finally the Claimant offers an alternative proposal in the form of Method 2.

130. This second method statement would involve additional cost to the Claimant, and the Claimant values the benefit to it of having access through the Direct Route at around £10,000.

10. Conclusion in relation to whether an order should be made

131. I have already determined that the Claimant does reasonably require access to the Defendant's property in order to do basic preservation works that are reasonably necessary. I have also determined that the Defendant has not shown that the Defendant or any other person will suffer from the proposed works in any way which would make it unreasonable for these works to be ordered, having regard to the terms which I am consider would be appropriate features for such an access order. Accordingly, I consider that I should make an appropriate order in this case.

132. In framing that order I need to consider three things:

(a) what arrangements should be made to compensate the Defendant;

(b) whether the Claimant should be obliged any consideration for the privilege of entering onto the Defendant's land; and

(c) the precise terms of the order.

11. Compensation

11.1 The courts powers in relation to compensation

133. As regards compensation, the court has power (under section 2(4) of the Act) to impose terms and conditions:

> "requiring the applicant to pay, or to secure that such person connected with him as may be specified in the order pays, compensation for –
>
> (i) any loss, damage or injury, or
>
> (ii) any substantial loss of privacy or substantial inconvenience".

I will refer to the matters listed in this subsection as "**compensatable losses**".

134. The terms of this power are sufficiently wide so as to allow the court to approach the matter:

(a) on a forward-looking basis, by ordering payment of a specified sum, or a sum to be calculated on a specified basis, or

(b) on a backward -looking basis, so that the respondent may be allowed to claim for losses or damage actually incurred once these have been suffered and are quantified; or

(c) through a combination of both approaches.

135. To the extent that the court orders payments that are not made in advance, the court may also order arrangements for the applicant's payments to be secured in some manner.

136. This flexibility is helpful because, as is shown in the current case, there may be types of compensatable loss that are quantifiable in advance, whereas other types of compensatable losses may be quantifiable only in hindsight.

11.2 What types of compensatable loss might be suffered?

137. In the current case I consider that the foreseeable heads of compensatable losses arising from the Claimant's works will differ according to the stage in which the Claimant's works are to be carried on.

138. If the works are being carried on while the Defendant's rebuilding project is still being completed, the foreseeable heads of loss include:

(a) additional costs in undertaking its project so as to accommodate the Claimant's works;

(b) delay to the Defendant's rebuilding project as a result of the Claimant's works;

(c) delay in the Claimant's ability to monetise its investment in the building as a result in a delay in it being able to complete a sale or to commence leasing the property; and

(d) damage to the Defendant's property.

139. If the works are undertaken after the Defendant has completed its rebuilding project, but before the property is occupied – i.e. during a period where nobody could be said to be having any use or enjoyment of the property - then the foreseeable heads of loss would be limited to:

(a) delay in the Claimant's ability to monetise its investment; and

(b) damage to the Defendant's property.

140. If the works are undertaken after the Defendant has completed its building project and the property is occupied, then the foreseeable heads of loss would be limited to:

(a) damage to the Defendant's property; and

(b) substantial loss of privacy or other substantial inconvenience to the occupant.

141. In framing these lists, I have considered not only the effect of the access itself and the undertaking of works under that access, but also the effect of the works to be carried out under the order. I accept the approach of HHJ Bailey in *BPT Ltd v Patterson*, that the court should not look just at the effect of the access itself, but also at the effect of the works proposed to be done by the applicant. Although, as a decision in the County Court, it is not binding on me, this is a thoughtful and well-reasoned judgment, and is a useful guide to any judge looking at this matter in the future.

142. However, in the current case, it is clear that the expected result of the Claimant's works will have no deleterious effect on the Defendant. In fact the Defendant is likely to obtain significant benefit from these works being carried out since it will greatly enhance the appearance of the wall, and therefore be in keeping with the upmarket finish that the Defendant is seeking to bring to its own property. Indeed, I would not be surprised that if this work were not done by the Claimant, the Defendant, once it had finished its rebuilding project would be pressing for this to be done, so as to enhance the attractiveness and marketability of its own property.

143. I turn then to the individual potential heads of claim.

11.3 Additional costs in managing the rebuilding project

144. The Defendant has argued that the additional costs of managing its rebuilding project to work around the Claimant's works will be enormous. It bases this assessment on the report of its quantity surveying expert, Mr Justin Sullivan, who calculates these costs to be in excess of £3 million. His analysis is in turn based on work undertaken by Mr Timothy Murdoch, who works for the same firm of quantity surveyors. He judged that the Claimant's proposed works would result in a minimum period of 15 working weeks during which the Defendant's project would be shut down. This was predicated on the assumption that no work could or would be undertaken by the Claimant's contractor during the period in which the Defendant's contractor was occupying the Passageway Route, and was based on slightly extending the Contractor's programme, which Mr Murdoch considered to be unrealistic and allowing time for the Claimant's contractor to demobilise and mobilise its own work before and after this period of shutdown.

145. As will be apparent from my analysis above, I do not agree that Mr Murdoch's assumption or prediction that the Claimant's contractor would need to cease work, or would cease work, during the entire period of the Claimant's works is well-founded. As a result, any numbers based on it should not be accepted by the court.

146. However, I think it is foreseeable that the Defendant might have costs of dealing with this matter. Mr Adams-Cairns suggested that it would be reasonable for the Defendant to ask its contractor to engage an additional staff member, to liaise with and keep an eye on the Claimant's works and a management fee at a total cost shown in Mr Adams-Cairns report of £1,000 per week. This I think should be allowed to cover the expected 8 week period of the Claimant's project plus a further week, to cover planning. In addition it is foreseeable that there might be additional insurance costs for the Claimant and ad hoc costs of a nature that I have not thought of.

147. Under the terms of the order that I propose making, there would be an ability for the Claimant and the Defendant to work together to minimise the losses to the Defendant, and at present there is no certainty as to how these costs would pan out. Accordingly, I consider that the best way of dealing with these losses is for them to be dealt with retrospectively with a payment being made on account prospectively based on an estimate. I propose dealing with them in that way in my order.

11.4 Delay to the Defendant's building project

148. As noted above, I do not accept the Defendant's extravagant claims as to the delay that the Claimant's works would cause to the Defendant's development, but I accept that there is a possibility that the Claimant's works could lead to some delay. Insofar as this gives rise to extra costs which the Defendant's contractor would be entitled to impose, these should be considered as another category of cost and dealt with in the same way as other costs as I have described under the immediately previous heading. Again they should be judged with hindsight and should be reasonable having regard to the Defendant and the contractor's ability to mitigate such costs.

11.5 Delay in the Claimant's ability to monetise its investment

149. However, as well as increasing the costs of the build, if the Claimant's works demonstrably cause delay to the Defendant's development (after the Defendant and its

contractor had taken reasonable steps to mitigate the delay), so as to delay a sale or ability to lease the property this should be compensated by a liquidated sum of damages.

150. The court currently does not have sufficient information, or even a suggestion as to how any such damages would for be calculated. This was not something considered by Mr Justin Sullivan or Mr Adams-Cairns.

151. Depending on the circumstances, there may be a number of approaches to this question. One might be that any delay would be accounted for on the basis of the expected monthly rental that it is thought that the property would command, net of rental agent's fees, converted to a daily rate. Another might be to compensate the Defendant for its borrowing costs (and perhaps also its deemed cost of capital) during the period of delay. A third approach might be to base this on any schedule of liquidated damages that had been arranged between the Defendant and its contractor as representing an arm's-length valuation of delay.

152. The Claimant has expressed confidence that any such delay that its works would cause to the building project should be minimal, particularly if Method 2 is adopted and assuming that its the works are undertaken alongside the Defendant's own works. It argues that, and in my findings above I have agreed that, this should be limited to the Defendant's workers being denied access via the Passageway Route for a few days at the beginning and at the end of the project, and possibly a small reduction in the size of materials that the Defendant would be able to take via the Passageway Route. I agree with the Claimant that, with notice and planning, these are matters that the Defendant's contractor ought to be able to work around without causing any significant delay.

153. This being the case, I think that the most I should do in relation to this potential head of damage is to note that it may be one that the Defendant should be able to claim in hindsight if it is able to make its case that it did in fact suffer this type of loss and the calculation of any such loss should be considered in the light of the circumstances.

154. There might however be more of a risk of such a delay being engendered if the Claimant's works are delayed until after the Defendant's works are completed, as the Defendant suggests that they should be. The Defendant is in the best position to judge whether this might be the case. I consider that the Defendant should have the ability to delay the Claimant's works until after it has finished its own works if the Defendant assesses that this would reduce the compensatable losses suffered by the Defendant. However, I do not think it should be able to do so with the potential intent or expectation of increasing its claim for compensation and I will take account of this in the terms I propose for the order.

11.6 Damage to the Claimant's property

155. The Claimant should be required to indemnify the Defendant for any damage to the Defendant's property caused by the Claimant's works. In addition, the Claimant should be required to take out insurance to cover the risk of this. Arguably, the insurance should cover an amount equal to the level of insurance taken out by the Defendant's contractor for similar risks, although as no evidence was presented about this I will take as a starting point the level of insurance proposed by the Contractor. It may be subject to a deductible to be covered by the Contractor, which should be added to the amount of any security for claims, as I discuss below.

11.7 Substantial loss of privacy or other substantial inconvenience

156. The question that there might be some substantial loss of privacy does not, in my opinion, arise until Thurloe Lodge becomes occupied, although as these are rival buildings, it would be appropriate to require the Claimant and its contractors not to take any photographs of the interior of Thurloe Lodge and not to take any photographs of the exterior, except as is reasonably necessary for the purposes of documenting the progress of its own project, and even then subject to the caveat that these photographs should not be used for any other purpose.

157. Similarly, before Thurloe Lodge is occupied, the question of substantial inconvenience does not arise as a separate head of claim to those dealt with above. Any inconvenience that is already compensated under the headings above before does not need to be compensated again and it is difficult to conceive of any further type of inconvenience that could be said to be substantial.

158. However, once Thurloe Lodge has been occupied, its residents, who will have paid a premium price to live in a self-contained detached property at the end of private road, would have reasonable expectations of privacy that will be compromised by the Claimant's works. They will also be inconvenienced by the presence of the Claimant's workers on the site and the Scaffolding and there would be a period of weeks during which noisy building works will be held on the property.

159. Mr Adams-Cairns has found that there would be a number of items which would be relevant to inconvenience of any resident of Thurloe Lodge, including the access of workers and materials on the property; what he considered to be limited noise from the works; an unsightly structure in the form of scaffolding in the Passageway; a very small reduction in light to three windows; concerns about security; and concerns about damage to Thurloe Lodge by the works.

160. I think it is reasonable under these circumstances to regard both the loss of privacy and inconvenience that would necessarily be involved as being sufficiently substantial to warrant compensation. During the entire period of the Claimant's occupation of the site, the residents would need to suffer having workmen in their garden with the noise and loss of privacy that that involves.

161. Again the court does not have sufficient evidence to calculate in advance what would be reasonable compensation for this inconvenience, but given the high value and high rental value of Thurloe Lodge, once it is completed, it is possible that a high price could be put on this by an occupant who had paid a premium price to occupy a luxury property on a private road.

162. In view of this potentially high, and uncertain, value of inconvenience and loss of privacy, it would be in the interests of both parties to avoid the Claimant's works having to be done during any period when Thurloe Lodge is occupied. Only the Defendant has any idea whether delaying the Claimant's works until after the Defendant's works might risk putting those works into a period where Thurloe Lodge is occupied and this is another matter where I do not think that the Defendant should be able to require delay to the Claimant's works if this would have the potential effect of increasing the compensatable losses.

11.8 Provision for expenses of the application?

163. I have considered whether I should accede to the Defendant's request for the reimbursement of the Defendant's expenses reasonably incurred in connection with this application where these are not otherwise recoverable as costs, under section 2(9)(a) ANLA.

164. I do not consider that this is a case where it would be appropriate to order such a reimbursement.

11.9 Time of payment and security for payments

165. Where, as I consider should be the case here, the arrangements for compensation will involve at least some payment in arrears, it will generally be appropriate for the applicant to provide security to the respondent in order to provide assurance to the Claimant that the compensation will be paid. In this case, the Defendant has indicated that it would accept a personal guarantee from the ultimate owner of the Claimant company. Other forms of acceptable security might involve a bank guarantee or a charge over bank account.

166. The parties were considerably apart in agreeing what would be a suitable quantum for such security.

167. The Defendant suggested a very high figure based on the losses that it considered that it might suffer if there was a 15 week delay in its build, and also consideration of what might happen if the Claimant's contractor were to cause damage to its project.

168. The Claimant suggested that no security was required, given that the Claimant owned a very valuable property. If security was required it considered that in view of the relatively modest routine nature of the works it proposed, and having not accepted the Defendant's view about the likely quantum of delay, a figure of £20,000 would be appropriate.

169. As noted above, I do not agree that any very substantial period of delay in the Defendant's building project is likely and I consider that the risks of damage should be covered adequately by insurance, except in relation to any deductible. I consider that an appropriate figure for security would be as follows:

    (a) if the Claimant's works commence while the Defendant's rebuilding project is still proceeding (in the sense that works are still going on – this may be a period before the contract has been signed off as complete), this should be based as a percentage of the Defendant's contractor's estimate of the additional costs plus an amount equal to any deductible on the Claimant's insurance.

    (b) if the Claimant's works commence after the Defendant's rebuilding works are completed to such extent, an amount equal to any deductible on the Claimant's insurance.

12. Consideration

170. The question of consideration is a separate matter to compensating the respondent for any losses. It may be considered as a requirement to pay a fee for the privilege of

entering the servient land. To avoid confusion with the compensation provisions I will call this consideration a "**licence fee**", although that term is not used in the Act.

12.1 The requirement for consideration

171. The requirement to consider this arises under section 2(5) of the Act:

> "(5) An access order may include provision requiring the applicant to pay the respondent such sum by way of consideration for the privilege of entering the servient land in pursuance of the order as appears to the court to be fair and reasonable having regard to all the circumstances of the case including, in particular –
>
> (a) the likely financial advantage of the order to the applicant and any persons connected with him; and
>
> (b) the degree of inconvenience likely to be caused to the respondent or any other person by the entry;
>
> but no payment shall be ordered under this subsection if and to the extent that the works which the applicant desires to carry out by means of the entry are works to residential land."

172. Because of the words at the end of the subsection, the court needs to consider whether the works which the applicant (i.e. the Claimant) intends to carry out are works to residential land.

12.2 Is the Claimant's land residential land?

173. The term "*residential land*" is defined in section 2(7) as follows:

> "(7) For the purposes of subsection (5) above, "residential land" means so much of any land as consist of –
>
> (a) a dwelling or part of the dwelling;
>
> (b) a garden, yard, private garage or outbuilding which is used and enjoyed wholly or mainly with a dwelling; or
>
> (c) in the case of a building which includes one or more dwellings, any part of the building which is used and enjoyed wholly or mainly with those dwellings or any of them."

174. Mr de Waal on behalf of the Claimant argues that the Claimant's land is residential land on the basis that Amberwood House has been a dwelling for at least 90 years. It was a dwelling when occupied by the likes of Margot Fonteyn. It remains a dwelling now, even though it is temporarily unoccupied pending the completion of the works.

175. Mr Warwick argues on behalf of the Defendant that, whilst the property may have been a dwelling in the past, and may become a dwelling again in the future when it is occupied, the essential character of a dwelling is that somebody dwells there.

Amberwood House is not currently occupied and has not been occupied for a period of years. At one stage during the current redevelopment the building on the land consisted merely of some exterior walls and a very large hole in the ground. It would be ridiculous to have described the property as a dwelling at that point and since then no one has dwelt in it. Furthermore, Mr Warwick argues that the provision exempting owners of "*residential land*" from paying the licence fee was designed to benefit homeowners, not property developers.

176. Both arguments are tenable, and in my view it is not possible to choose between them just by appealing to the question of the natural meaning of the terms "*dwelling*" or "*residential land*". Mr de Waal can quite properly argue that anyone looking at Amberwood House as it exists at present would have no difficulty in recognising it as a house and would regard anything that was recognisably a house as being a dwelling. Mr Warwick can quite properly argue that something that is not being dwelt in cannot be regarded as a dwelling.

177. To determine this point in the context of ANLA it is useful to see the term "*dwelling*" and like terms such as "*dwellinghouse*" have been interpreted in other contexts. It is also necessary to consider the intentions of Parliament, in accordance with *Pepper v Hart*.

12.3 Dwelling and dwellinghouse in other contexts

178. To support his argument that whether a property is a dwelling depends on whether anyone is dwelling in it, Mr Warwick has drawn my attention to the speech of Lord Millett in *Uratemp Ventures Limited v Collins* [2002] 1 AC 301 in the following passage at [30]:

> "**The ordinary meaning of "dwelling"**
>
> 30. The words "dwell" and "dwelling" are not terms of art with a specialised legal meaning. They are ordinary English words, even if they are perhaps no longer in common use. They mean the same as "inhabit" and "habitation" or more precisely "abide" and "abode", and refer to the place where one lives and makes one's home."

179. This was a case before the House of Lords to determine whether a defendant occupying a single room in a residential hotel without any provision of cooking facilities could be said to be occupying the room "*let as a separate dwelling*" for the purposes of providing the occupant with the protections afforded under the Housing Act 1988 for lettings on an assured tenancy.

180. In my view, the case needs to be considered in that context. It provides authority for the proposition that a room that is lived in as someone's home constitutes a dwelling (at least for the purposes of the Housing Act 1988). It does not provide authority for the reverse proposition that something that is not currently being lived in as a house is not a dwelling - especially where the building in question has been built as a house, has been lived in as a house, is intended to be lived in as a house and has everything that one expects of house (roof, doors, windows, bedrooms, bathrooms, and kitchen living accommodation).

181. In some other legislation the Parliamentary draftsman has provided more clarity. For example:

(a) Under the Housing Act 1988, "dwellinghouse" has been defined to mean:

> "a building or part of a building occupied **or intended to be occupied** as a separate dwelling, including a building "used or constructed or adapted."
>
> (Emphasis added)

(b) The London Building Act 1930, which deals with the rights and obligations of owners of adjoining lands in relation to the erection of walls at or near the boundary of the property (and therefore may be considered close to ANLA in the nature of what it is dealing with) defines dwellinghouse as follows

> "'Dwellinghouse' means a building used o**r constructed or adapted to be used** wholly or principally for human habitation."
>
> (Emphasis added)

(c) For the purposes of Stamp Duty Land Tax, a dwelling can include residential property defined to include land or buildings used or **suitable for use** as a dwelling **or in the process of being constructed or adapted for such use** (see Finance Act 2003, Schedule 6ZA Part 3, paragraph 9.

(Emphasis added)

182. Of course, definitions adopted in another statute cannot be carried over to ANLA. However, it demonstrates a degree of flexibility in how the words *dwelling* and *dwellinghouse* can be used that other statutes have clarified whether a building is to be regarded as a dwelling or a dwellinghouse on the basis of (i) its occupancy; or (ii) its design and intended use, or (iii) both.

183. I have considered whether there is an argument that the fact that this clarification has been provided in other statutes and has not been provided in the case of ANLA of itself creates a presumption that Parliament expected the term "*dwelling*" to be interpreted in a particular way (and in particular as requiring current occupation as a dwelling). However, I have dismissed this argument for two reasons.

184. First, I think this argument depends on an unrealistic expectancy that there will be consistency in the approach taken to statutory drafting between different acts, dealing with different topics and drafted in different decades.

185. Secondly, even if one assumes the failure to define "*dwelling*" in any greater detail was deliberate, I see no way of concluding from that which of the three approaches to the definition I outline above at [182] should be assumed to be the fall-back interpretation where no further clarification is given.

186. Where the legislation is not so obliging as to apply a detailed definition, the courts have applied different solutions to the question whether a property's status as a dwelling

depends on its being dwelt in. The *Uratemp Ventures* case is by no means the only case to have considered this.

187. In the context of an indictment for setting fire to a dwellinghouse Maule J found in ' *R v Allison* (1843) 1 Cox CC24, 2 LTOS 288 (at [289])

> "…when you state it to be the dwelling-house of A and B, that is a place in which they are in some sense dwelling. A house, as soon as built and fitted for residence, does not become a dwellinghouse until some person dwells in it."

188. On the other hand, Mummery J in *Re 1-4 White Row Cottages Bewerley* [1991] 4 All ER 50, found that cottages that had been dwelt in in the past but were in an extremely derelict state and had been uninhabited for years, nevertheless were dwellinghouses for the purposes of provisions in the Common Land (Rectification of Registers) Act 1989 (which provided for a person to object to the inclusion of a dwellinghouse within a register of common land and of town and village greens). He said that:

> "In some statutory contexts and often in ordinary everyday language the word 'dwellinghouse' is indeed used to describe a *house* in which people are actually living as a private residence. Actual residential occupancy is not, however, a necessary characteristic of a dwelling house.
>
> As a matter of ordinary language 'dwellinghouse' is capable of including not only a house which is dwelt in but also a house which is constructed or adapted for dwelling in although it may at the relevant time be vacant or even not fit and ready for occupation. For example, a family may be forced out of their dwelling house by fire, flood or other natural disaster. The house may remain empty for a long period while building works are carried out on it. I do not think it would be a misuse of the English language to say of such a house that it was at all times, even when empty, a dwelling house."

189. Mr Warwick has suggested that I should not look at cases dealing with the definition of "*dwellinghouse*" as having any bearing on what is the question of a "*dwelling*". He points out that the word "*dwellinghouse*" more naturally puts some emphasis on the building whereas the choice of "*dwelling*" puts a sole emphasis on the question of use of the building.

190. I agree that any carrying across a definition from a case dealing with a different statute and different circumstances needs to be looked at with caution and the more so where a slightly different word is used. Nevertheless, it seems to me to be appropriate that I consider a variety of cases where the courts have had to consider whether a statutory reference to "*dwelling*" should be judged by reference to the intended use of the property in question or its state of habitation. It is difficult to conceive of a dwellinghouse that is not a dwelling. The relevance of occupancy has been a matter considered within the "*dwellinghouse*" cases and it is right that I take them, appropriately, into account.

191. Having done this, I see that different courts have reached different decisions as to whether the term "*dwelling*" or "*dwellinghouse*" should be applied to a property that is of the nature of a dwelling but is not currently occupied as a dwelling. It is also fair to conclude that when judges have approached this point they have done so having regard to the intent of the legislation in question.

12.4 The intent of the legislation

192. Turning to the intent of this legislation needs to be considered in the light of the history of this provision.

193. ANLA was introduced in response to the findings of the Law Commission Report No. 151 – *Rights of Access to Neighbouring Land*. This report examined the existing law of property and of trespass. It found that this gave almost absolute rights to a landowner to deny his neighbour access to his land. (The high point of this was demonstrated in the slightly later case of *Anchor Brewhouse Developments Ltd v Berkeley House (Docklands Developments Ltd etc.* [1987] 2 EGLR 173, where a landowner was found to be entitled to prevent cranes over-sailing his land even where there was no prospect of any inconvenience to the landowner.) The Law Commission noted that this led to an unsatisfactory position where property owners were unable to maintain their properties and recommended that the law should allow an ability, supervised by the court, and subject to various safeguards, for access to be allowed for this limited purpose.

194. Under the arrangements proposed by the Law Commission no provision was suggested for any licence fee.

195. When the bill which became ANLA was originally introduced it did not include any provision for a licence fee (see the speech of Lord Murton of Lindisfarne, *Hansard,* HL Vol. 531, col 167 (June 16, 1991)). Indeed the original wording of the bill included a provision that the court's power to impose terms and conditions could not be used to compensate a respondent merely because an access order has been made or merely because entry in pursuance of the order is inconvenient to him.

196. However by 11 December 1991, the bill had been amended. Lord Murton explained (*Hansard*, HL Vol. 533, col. 823 (December 11, 1991)) that there was an amendment to include a provision requiring the applicant to pay the respondent a licence fee for the privilege of entering the respondent's land. However, no licence fee was to be payable in the case of works to residential land.

197. Lord Wilberforce noted (at col. 825) that the new provision, applying only in the case of works being proposed to benefit non-residential land, appeared to reflect pressure from the country landowners' interests. It may be seen therefore that, as a matter of the history of this legislation, the original rule was that no licence fee should be paid. Allowing a licence fee in the case of non-residential land was introduced as an exception to that rule.

198. A discussion ensued about whether or not the licence fee provision (which at that point was the only proposed provision within the bill allowing compensation to the owner of the servient land for any inconvenience) should be limited to cases where the applicant's

land was not residential land. As part of this discussion (at HL Vol 533 Col 825), Lord Coleraine observed that:

> "I should perhaps note that under the definition the dwelling does not need to be occupied as a dwelling"

199. This discussion continued into the committee stage. Lord Mishcon (*Hansard*, HL Vol. 535, col.884 (February 13, 1992)) proposed an amendment to delete the words that now appear at the end of s 2(5) which exempt the payment of a licence fee in the case of works to residential land. He proposed this because he thought that a judge should be able to take account of compensation for loss of privacy or other substantial inconvenience even in residential cases. He referred to the problem that a judge would have in considering payment for these matters under what is now 2(5) of the Act, since on the then wording of the bill the judge would have to conclude that:

> "it was decided that a payment could not be awarded for inconvenience or loss of privacy in the case of residential homes. A payment can only be made in the case of industrial or business premises."

200. In support of Lord Mishcon's point, Lord Monson, raised the example of a property developer developing a large Victorian house into self-contained flats stating that:

> "there is nothing necessarily wrong property developers making money, but if they are to do so I see no reason whatever why they should not pay compensation to the occupants of the servient land who are inconvenienced by that process".

201. In the end the result of this debate was that the words at the end of what is now section 2(5) were retained but separate provision was made to deal with Lord Mishcon's point about compensation for loss of privacy or inconvenience in the form of what is now section 2(4)(a)(ii).

202. Insofar as there was any discussion of the meaning of "*residential land*" or of "*dwelling*", their Lordships appeared to accept that the wording of the bill (which in this respect was not changed in the Act) related to the nature and intended use of the building, rather than whether or not it was being occupied. In particular:

(a) Lord Coleraine observed that under the definition the dwelling does not need to be occupied as a dwelling.

(b) The distinction derived from the history of the bill, and certainly that which was in Lord Mishcon's mind at this point, was between "*residential homes*" and "*industrial or business premises*", rather than between unoccupied and occupied properties.

(c) The idea floated by Lord Monson of considering the nature of the *owner* of residential land (whether property developer or owner occupier), was not pursued by their Lordships. Instead, their Lordships abandoned the idea of making changes to the residential land test in what has become section 2(5) in favour of extending the rights of compensation for all owners of servient land under what is now section 2(4).

12.5 Conclusion in relation to the meaning of residential land

203. Pulling these strands together, first it seems to me that it is clear, and is often made clear by the parliamentary draftsman, that the terms "*residential land*", "*dwelling*" and "*dwellinghouse*" may need to be interpreted in different ways having regard to the matter under consideration. I think it is significant that it is made abundantly clear that a building can be regarded as a dwelling if it is occupied, **or** constructed **or** adapted to become a dwelling in the London Building Act 1930. Of the selection of statutes I have considered, this is the closest in subject matter to ANLA.

204. Secondly, where the courts have considered the interpretation of these terms the principle determined by the court in these cases has been a narrow one. In particular:

(a) *Uratemp* is authority for the proposition that a room that is lived in as someone's home is a dwelling, but casts no light on the question whether a house not lived in is not a dwelling;

(b) *R v Allison* is authority that a house that has been built but not yet lived in is not a dwellinghouse for the purposes of an indictment for arson until someone dwells in it, but casts no light on the position of a house that was used as a dwellinghouse and is unoccupied while it is being refurbished*;*

(c) *White Road Cottages Bewerley* is authority that a house constructed or adapted for dwelling, may retain its character as a dwellinghouse even if empty for a long period and not currently fit for occupation.

205. In my view these decisions were determined having regard to the purposes of the legislation or legal issue under consideration so that it is dangerous to read across from a decision made in relation to the interpretation of one statutory provision to a different statutory provision.

206. In the case of ANLA, there is nothing in the legislative history that suggests that Parliament intended anything other than to make a distinction between (i) land that would be recognised from its character as being residential land and (ii) other land used for commercial or agricultural purposes. Whilst the parliamentary draftsman chose to define the phrase "*residential land*" by reference to the concept of a "*dwelling*" I think it is likely that this was mainly for the purpose of being able to add clarification that, as well as including the residential building itself, the term included the garden and outbuildings used and enjoyed with the main residential building. I do not consider that it demonstrates any intention to refocus the question onto whether or not the land is currently occupied as a habitation.

207. Neither am I attracted on policy grounds to a reading that land can lose its status as residential property for the purposes of ANLA merely because there is a temporary (if lengthy) period of absence.

208. Of course if a building was built as a house and was then repurposed as an office or for some other commercial purpose, then it would cease to be residential property under ANLA at that stage. Also if property starts life as a commercial property (perhaps a warehouse) and is being developed into residential property (what is often termed a "loft conversion") it may be a difficult question to determine at what point the property

changed its character – would this be only at the point when the property is sold and occupied or is it when it is fitted out as a residence? This is a difficult question, but one unlikely to arise often under ANLA as generally ANLA will not apply to works being undertaken for the purposes of development or property conversion, as opposed to "*basic preservation works*".

209. Amberwood House has been used for 80 or 90 years as a residence and has been dwelt in for most of this period. It is currently being worked on with a view to its remaining a private residence. It now is ready or almost ready to be lived in again. Given all these circumstances, I do not think I should move away from what seems to be the natural characterisation of Amberwood House as being in the nature of residential land. Neither do I accept Mr Warwick's argument that the current ownership of the property by a property development company rather than by an owner-occupier has any bearing on the question.

210. To hold otherwise and suggest that a significant period of non-occupation could cause a property to lose its status as residential land could operate unfairly in many cases. One can imagine a position where an owner dies and it takes a number of years for the probate to be obtained and the estate dealt with. One can also think of situations where the owners have to move out because of some problem rendering the property unfit for habitation. In my view the purposes of the Act are best served by the interpretation that once a property has obtained the character of being residential land, it retains that character until the property is being used for something else.

211. Whilst I am cautious about relying on an interpretation arrived at in relation to the definition of "*dwellinghouse*" used in one statute to apply to a different statute using the term "*dwelling*", I nevertheless take some comfort in the fact that in deciding this matter this way I am in good company with Mummery J in *White Row Cottages.*

212. I will decide this matter, therefore, on the basis that Amberwood House should be regarded as residential land for the purposes of ANLA and therefore will not make an order for payment of a licence fee.

12.6 How should a licence fee be determined?

213. Despite this finding, I think I should consider how I would have approached the quantification of a licence fee if I had determined that Amberwood House is not residential land. As this is the first case where the High Court has considered ANLA it may be useful to judges and parties applying ANLA in the future to understand how the issue of determining a licence fee might be approached. Also this may be useful if it transpires that I am wrong in finding that Amberwood House should be regarded as residential land.

214. Section 2(5) sets out an overarching test that the court should order what

> "appears to the court to be fair and reasonable having regard to all the circumstances of the case"

and then goes on to highlight two factors that the court should consider in particular:

> "(a) the likely financial advantage of the order to the applicant and any persons connected with him; and
>
> (b) the degree of inconvenience likely to be caused to the respondent or any other person by the entry".

215. These words are given a further gloss by section 2(6). In summary, this requires the likely financial advantage of the access order to the applicant to be assessed as the greater of:

(a) any likely increase in the value of the dominant land (or other land in the same ownership) attributable to the works to be carried out with the benefit of the access order, insofar as these exceed the likely cost of carrying out the works; and

(b) if it would be possible to carry out specified works without the relevant access (which is not the case here) the difference between the cost of carrying out the works with the access and the cost of carrying them out without the access.

216. The court has had only limited assistance from the expert witnesses that were appointed in relation to valuation issues in applying these provisions.

The report of Mr Justin Sullivan

217. Mr Sullivan's expertise is as a quantity surveyor, rather than a property valuer. In keeping with his expertise, he considered what losses might accrue to the Defendant if the Claimant's works were undertaken while the Defendant was still completing its own rebuilding project. This analysis is relevant to the question of compensation, and I have considered it in reaching my conclusions about compensation above. However, it has no real bearing on the question of a licence fee, and there is nothing in Mr Sullivan's report that assists the Court in considering the matters raised by section 2(5) and 2(6) ANLA. He did not refer in his report to the sophisticated and multi-layered test to be applied under these sections and as far as I can see made no attempt to consider how they should be applied under the current circumstances.

The report of Mr Adams-Cairns

218. Mr Adams-Cairns clearly did have relevant expertise in relation to property valuation issues, but he was considering the question of a licence fee under ANLA for the first time, and was doing so without the benefit of any established methodology for approaching the question built up through case law under ANLA.

219. It appears that as a result of the instructions he received, Mr Adams- Cairns did not apply himself to the full drafting of section 2(5) and 2(6) ANLA. He considered the two particular aspects to be considered in particular under section 2(5): (a) the likely financial advantage of the order to the applicant and any persons connected with him; and (b) the degree of inconvenience likely to be caused to the respondent or any other person by the entry. He also considered the methodology required under section 2(6). However, he did not within his report consider the introductory wording to section 2(5) requiring an assessment of what is fair and reasonable having regard to all the circumstances of the case.

220. As regards this omission, he confirmed in his oral evidence that he did not consider that there was anything other than the matters dealt with in section 2(5) (a) and (b) that might affect his views on valuation.

221. His views on the matter raised by section 2(5)(a) (the likely financial advantage the likely financial advantage to the Claimant of completing the work) were that the unsightly nature of the wall at present, and the risk of damp arising to the property were matters that might be of some concern to a potential purchaser of the property. He thought that a prudent purchaser of the property would assess this by reference to the cost of doing the works, which he understood to be £20,000 if Method 1 is followed or £30,000 if Method 2 is followed. Essentially, he considered that a potential purchaser of the property would require a price reduction equal to or slightly above this cost. Mr Warwick put to him that to these costs should be added costs of taking this matter to court, but Mr Adams-Cairns did not agree.

222. Section 2(6) requires the value to the Claimant under section 2(5)(a) to be assessed by reference to the greater of two figures.

223. The first of these (under paragraph 2(6)(a)) is the amount by which the increase in the value of the land arising from the proposed works is likely to exceed likely cost of carrying out these works with the benefit of the access order. I could not quite follow the logic of Mr Adams-Cairns' report. He suggested that the value of getting the work done was essentially all that a purchaser would pay for the benefit of the work being done, and he considered that this would be no more, or little more, than the cost of getting the work done. The conclusion in his report was that this benefit should be valued at £20,000 or £30,000, but he seemed to base this on what he understood the works to cost. On the logic of his argument, if a purchaser would only "chip" the price to the extent of the cost of the works, then the logic is that no payment should be calculated under paragraph 2(6)(a).

224. The second figure to be considered (under paragraph 2(6)(b)), requires a calculation of the difference between the cost of carrying out the work without the benefit of the access order, and the cost of carrying out the work with the benefit of the access order. This is only applicable if the work can be carried out without the benefit of any access order, which is not the case here.

225. However given the breadth of the introductory words in section 2(5) requiring the court to have regard to all of the circumstances of the case, I think it can be applied by analogy in relation to the difference between the cost of access being given in accordance with Method 1 and access being given in accordance with Method 2. Mr Adams Cairn reported that he had been given to understand that the difference in cost between these two methods amounted to £10,000 and I think it is appropriate that if access is given under Method 1, then this should be regarded as a benefit to the Claimant for the purposes of this calculation.

226. Mr Warwick made various references to the value of Amberwood House and the profit that its owner was hoping to make out of its redevelopment of the property. Whilst these provided some interesting context, I do not see their relevance in relation to matters to be considered under section 2(5) and 2(6) - insofar as benefit to the Claimant is relevant, the court needs to look at the benefit to the Claimant arising from the

proposed access and from the proposed works, not that arising from any larger building project that the Claimant may have completed.

227. Given the wide words at the beginning of section 2(5) the court is obliged not only to consider a purely mathematical approach to the matters considered under section 2(5)(a) and (b) but should consider the matter having regard to all the circumstances of the case and in considering what is reasonable.

228. As regards benefit to the Claimant, section 2(5)(a) taken with 2(6)(a) invites the court to consider whether there is a financial advantage that is greater than the cost of the works. Mr Adams-Cairns' evidence is essentially that there is not, on the basis that a rational purchaser would only take off the price of the property cost of doing the works.

229. There was no evidence to contradict Mr Adams-Cairns' approach to section 2(5)(a), but had I been obliged to determine a licence fee I would have been loath to accept his report at its face value considering that he had not considered section 2(5) as a whole and also having regard to the hesitancy with which he discussed these matters in his oral evidence.

230. With all due regard to Mr Adams-Cairns' expertise, I find this difficult to accept as I believe a rational purchaser of this type of property would also put a value on buying the property in an immaculate state, and being saved the bother of suffering the works being done during his or her period of occupation (or having to compensating a tenant by reducing the rent during this period of disruption). The purchaser or tenant of this property is likely to put a higher value on avoiding this disruption than the Claimant does itself during the period while work is anyway still under way at Amberwood House.

231. I do not know what the value of that benefit would be. Perhaps it could be approached by looking to period of disruption to the occupier of the dominant land, and the extent of the disruption and equate this to what reduction in rent would be given to a tenant leasing the property on commercial terms.

232. As regards section 2(5)(b), Mr Adams-Cairns did consider the degree of inconvenience likely to be caused to the respondent or another person. He considered that, if the work was undertaken while the Thurloe Lodge project remained under way, the degree of inconvenience would be minimal, if Method 2 was adopted and would be only slightly greater in the case of Method 1 as it would be limited to a short period during which the scaffolding materials were being taken through Thurloe Lodge.

233. He felt unable to give a considered opinion on valuing this inconvenience if the works to Thurloe Lodge had been completed and the house was occupied. He considered that he would have to have careful regard to the likely rental value of the property as a whole and consider those parts of the house in which there would be any negative impact. He listed a number of items which would be relevant to inconvenience which I have taken account of in paragraph [159] above.

234. To the extent that these issues were to be compensated to the Defendant under section 2(4) (whether or not a licence fee is payable), to compensate these issues any further under section 2(5) would, in my view amount to double recovery, and so, if a licence

fee were payable, I would not consider that it would be fair and reasonable for these matters to be taken into account a second time.

235. Having regard to all matters above, I consider that if (contrary to my finding) a licence fee should be considered, it should be considered principally by considering the matters I have considered at paragraphs [230] and [231], with a possible further payment of £10,000 if Method 1 is to be followed.

13. The terms of the order

13.1 Principles behind the framing of the order

236. In considering the terms of the order I am mindful of the following points:

(a) The order is an imposition made by law on the Defendant. The Defendant should be fully compensated for any loss, to the extent that such loss could not be avoided by the Defendant taking reasonable steps to minimise its loss.

(b) If there is a choice in the way in which the works are carried out (as with the choice between Method 1 and Method 2 in this case) the usual starting point is that a respondent (in this case the Defendant) should be entitled to insist that the method involving the least inconvenience to it is adopted.

(c) As discussed above, the amount of compensation, and the principles on which compensation should be calculated will depend on the stage at which the Claimant's works are undertaken.

(d) This action has already taken a great deal of court time and the terms of the order should be such to minimise the extent to which further court time and legal expense will be needed.

237. The Claimant has requested that works be undertaken at some point between the beginning of April and the commencement of winter. This would avoid the wall being unprotected during another winter. The Claimant's submission was that it could be done during this period without placing an unreasonable degree of disruption to the Defendant's building project, and I have accepted the Claimant's submission on this.

238. If the Claimant's works are delayed until after the Defendant has completed its works, then it is possible that its works could be completed with less cost and less inconvenience to the Defendant. However, assuming that it is the Defendant's intention to monetise its investment as soon as possible, it is just as likely that the Claimant's works might need to be done in a period while Thurloe Lodge is occupied and that this might involve more inconvenience for the occupant, and perhaps a greater requirement for compensation from the Claimant. Also, if the Claimant's works are delayed until after the Defendant has completed its building project, it is possible that the knowledge that these works are outstanding could have an effect of delaying the Defendant's ability to sell or lease its property also increasing compensatable losses. The Defendant is the best judge of which of these scenarios is more likely. However, given the current antipathy between the parties, there is a danger for the Claimant that the Defendant might deliberately choose an option that would increase its losses if it thought that these would be fully passed on to the Claimant.

239. Mr de Waal acknowledged that if accommodating the Claimant's works was too difficult during the Defendant's build project, then the Claimant's would need to accept that its access would take place after these works were complete. The Claimant put a value of £30,000 on the benefit to it of avoiding the risk of another winter - a relatively modest sum compared with the value of both properties.

240. Having regard to these issues, I consider that the best way forward would be to order that the works be done this year before the onset of winter unless the Defendant elects for the works to be delayed until the spring of next year. However if the Defendant does make such an election, it would be on the basis that it would not be able to make any claim that the Claimant's works had any effect of delaying the Defendant's ability to sell or lease its property or any claim for substantial inconvenience or loss of privacy properties occupied. This would be because the timing of the works would have been chosen by the Defendant rather than the Claimant and these losses should in those circumstances be regarded as flowing from that decision rather than from the Claimant's application. The effect of the order will be that the Defendant should nominate a date in 2022 if it wishes to ensure that it is compensated for any losses of this type.

241. Within the time window allowed before the onset of winter, it would be in the interests of both parties that the work should be undertaken at a time that will do least damage to the Defendant's project, and the Defendant's contractor should be given an opportunity to review its programme of works to determine which would be the best time for these works to be undertaken.

242. Accordingly, I consider that the order should be framed along the following lines, with such amendments (particularly as to timings) or embellishments as the parties may agree or may persuade me would be useful or fair.

13.2 Summary of the terms of the order

243. The court should order that the Defendant should provide access to its land at Thurloe Lodge for the Claimant to carry out its works in in the manner determined in accordance with the order and for such access to commence at a date to be determined in accordance with the order.

244. The works to be carried out shall comprise all works necessary to re-render, and having re-rendered it, to repaint, the flank wall of Amberwood House which abuts onto the Passageway, from the top of the wall down to the top of the sill which runs along that wall at the height of approximately 2.4 m from the current floor level, and including making good around the windows where these come down to the bottom of that sill. Such work shall include making good any loose or missing brickwork, any gaps around the windows contained on such wall and the doing of anything which is requisite for, incidental to, or consequential on carrying out of such works.

245. Such works shall be carried out in accordance with what has been referred to as Method 2 in this judgement, being the methodology headed "*Amberwood House Access"* described in Exhibit AM3 to the third witness statement of Andrew Jonathan Morton dated 17 December 2021 unless the Defendant agrees (whether as a result of any payment offered by the Claimant or otherwise) instead to undertake it in accordance with Method 1, being the methodology headed "*Thurloe Lodge Access*" as referred to

in the same Exhibit. In either case the methodology shall be applied with such variations as may be necessary so as to comply with the terms of the order.

246. The Claimant shall take no more than three working days at the beginning of this period to construct the Scaffolding, and no more than four working days at the end of the period to strike and remove the Scaffolding;

247. If its works are being undertaken during a period when the Defendant's works are still continuing, the Claimant must procure:

(a) that once the Scaffolding is constructed, and until it commences striking the Scaffolding, those working on the Defendant's rebuilding project would have access to the Passageway Route at ground floor level with a head height of at least 2.1 metres from the current floor level and with a width of at least 80 cm; and

(b) that the bottom level of the Scaffolding comprises a so-called "crash deck" spanning the entire width of the Passageway as described at paragraph [101] so as to provide adequate protection to persons passing underneath.

(c) that its contractors shall cooperate with the Defendant and the Defendant's contractors to meet any reasonable requirements relating to health and safety or any necessary conditions to be observed for the Defendant to retain the benefit of insurance for its works.

248. The Claimant must ensure that its contractors have in place adequate public liability insurance to conduct this work, this may be in the amounts referred to in Exhibit AM3 to the third witness statement of Andrew Jonathan Morton dated 17 December 2021. If practicable having regard to any requirements of the relevant insurer and/or any provisions agreed with any relevant provider of finance to the Claimant, the Claimant should procure that the Defendant is noted as having an interest in such insurance.

249. The Claimant shall not, and shall procure that its employees and its contractors shall not, take any photographs or videos of the interior of Thurloe Lodge nor any photographs or videos of the exterior, except as is reasonably necessary for the purposes of documenting the progress of its own works, and even then subject to the caveat that these photographs or videos should not be used for any other purpose.

250. The date on which access should commence shall be determined in accordance with the following procedure:

(a) Defendant shall instruct its main contractor ("**the Defendant's Contractor**"):

(i) to nominate a commencement date ("**the Nominated Date**") for the works;

(ii) that the Nominated Date should be a date either:

i. between (aa) 1 April 2022 (or if later five weeks after the Claimant shall have had notice of the Contractor's Proposal as defined below) and (bb) 15 September 2022 being the date which in its view access could most conveniently be given during such period whilst causing the least disruption, cost and delay to the Defendant's building project ("**a 2022 Nominated Date**") or

ii. if the Defendant so chooses, a date between 1 April 2023 and 15 September 2023 ("**a 2023 Nominated Date**") being a date after the Defendant's Contractor expects to have completed such of the Defendant's works as require it to have access to the Passageway Route;

(iii) that where the Nominated Date is a 2022 Nominated Date, the Defendant's Contractor should provide its reasoned assessment of the cost and/or delay to the Defendant's building project which it anticipates would occur by reason of the Claimant's works if the Claimant's works were to be commenced on the Nominated Date (on the assumption that it shall have chosen the Nominated Date, and will be taking all reasonable steps, with a view to minimising such cost and/or delay);

(iv) that such reasoned assessment (if required) and the Nominated Date (together "**the Contractor's Proposal**") should be provided within one week of the order being made;

(v) that the Contractor's Proposal must be made in accordance with the findings of this court that so that it is based upon on the following assumptions:

i. that the Claimant will complete its project within eight weeks of its commencement and in accordance with all requirements placed on the Claimant under the order;

ii. that the Claimant will take three working days at the beginning of this period to construct the Scaffolding, and four working days at the end of the period to strike and remove the Scaffolding and that during these periods the Contractor's workers will have no access to the Passageway or the stairs leading up to the Passageway in the light-well at the front of Thurloe Lodge and that during these periods these areas should not be considered as part of the site managed by the Defendant's Contractor; and

iii. that the Scaffolding will be constructed as directed in this order and that (except during the periods mentioned in the immediately preceding paragraph when the Scaffolding is being constructed and removed) the Defendant's Contractor's workers would during the period of the Claimant's works have access to the Passageway Route so that the area underneath the Scaffolding and within the bounds of the uprights of the Scaffolding may be considered as part of the site managed by the Defendant's Contractor, but above this, the Passageway shall be considered to be part of the site managed by the Claimant's contractor.

(b) The Claimant shall pay the reasonable costs of the Defendant's Contractor for compiling the Defendant's Contractor's proposal within seven days of being invoiced for it.

(c) Upon receipt of such notice by the Defendant, the order shall be effective to require the Defendant to allow the Claimant access to its land in accordance with the comments of the order for a period of eight weeks commencing on the Nominated Date (as the same may be amended by agreement between parties or in accordance with sub-paragraph (d) below.

(d) If it deems this reasonably necessary as a result of delays or changes to the Defendant's Contractor's programme of works, the Defendant may by notice in writing amend the Nominated Date upon notice in writing to the Claimant, provided that no such notice may be given less than four weeks before the Nominated Date applying before or after the service of such Notice and the revised Nominated Date must fall within one of the time windows provided for in sub- paragraph(a)(i) of this paragraph [250]

251. If the Nominated Date is a 2022 Nominated Date, no later than two weeks before the Nominated Date, the Claimant shall:

(a) make an interim payment to such bank account as the Defendant shall nominate, on account of its obligations to compensate the Defendant equal to:

(i) £9,000 (being an appropriate amount to cover the foreseeable expense of engaging an additional staff member, to liaise with and keep an eye on the Claimant's works and a management fee); plus

(ii) 50% of any amount reasonably assessed by the Defendant's Contractor as being the value of any cost not included in (i) including any additional costs reasonably imposed by the Contractor as a result of any delay to the Defendant's building project that will be caused by the Claimant going ahead with its works on the Nominated Date; and

(b) it shall at the same time put in place acceptable security for the costs that may finally be assessed as being the compensation due to the Defendant of the type dealt with in paragraphs [144] to [148] above in accordance with the principles set out in this judgement such security being in an amount that may be capped at:

(i) the amount of such compensation reasonably assessed by the Defendant's Contractor less the interim payment made on account in accordance with paragraph (a) above; plus

(ii) the amount of any excess applicable in relation to any public liability insurance obtained by the Claimant's contractor.

252. If the Nominated Date is a 2023 Nominated Date, no later than two weeks before the Nominated Date, the Claimant shall put in place acceptable security for the costs that may finally be assessed as being the compensation due to the Defendant of the type dealt with in paragraph [155] above in accordance with the principles set out in this judgement such security being in an amount that may be capped at the amount of any excess applicable in relation to any public liability insurance obtained by the Claimant's contractor.

253. For the purposes of the above provisions, security shall be regarded as acceptable security if it is provided in the form of (i) a guarantee by the owner of the Claimant; (ii) a charge over a bank account containing an amount equal to the secured sum; or (iii) a performance guarantee or letter of credit in each case provided by duly authorised bank in the United Kingdom or the European Union.

254. Where the Nominated Date is a 2022 Nominated Date, the Claimant must provide compensation to the Defendant for any loss, damage or injury of the nature of the types of compensatable losses discussed in paragraphs [138] to [155] of this judgment.

255. Where the Nominated Date is a 2023 Nominated Date, the Claimant must provide compensation to the Defendant for any loss, damage or injury of the nature of the type of compensatable losses discussed in discussed in paragraph [155] of this judgment.

256. In addition in either case, if Method 1 is selected:

(a) the Claimant will be responsible for the additional cost of providing any additional strengthening of the protection to the floors and walls of Thurloe Lodge forming part of the Direct Route over and above that which the Defendant's Contractor would anyway have put in place (for example the additional cost of covering flooring three-quarter inch plywood over and above the cost of covering it in hardwood, if that had been the Defendant's Contractor's original intention at this point in its works); and

(b) the Claimant shall procure that taking the materials for the Scaffolding though Thurloe Lodge into the garden of Thurloe Lodge ready for construction of the Scaffolding at the commencement of its works and from the Passageway back into the access road in front of Thurloe Lodge at the end of its works will take no longer than one day in each case.

257. Following completion of the Claimant's works, the Defendant shall set out its full claim for compensation in accordance with paragraph [254] or [255] as may be appropriate (as well as paragraph [256], if applicable), backed up with appropriate evidence demonstrating the loss, damage or injury claimed.

258. To the extent that these amounts exceed any amounts already paid by the Claimant, the Claimant shall pay such excess within seven days of the amount being agreed or finally determined.

259. To the extent that such amounts are agreed or finally determined and the Claimant does not pay them by this date, the Defendant may have recourse to any security obtained in accordance with the provisions above, up to the amount of that security as well as, for the avoidance of doubt, recourse in-person against the Claimant.

260. To the extent that any security is provided by the Claimant after the Defendant has received in full the amount it is entitled to by way of compensation, the Defendant shall cooperate with the Claimant to procure the immediate release of that security.

14. Conclusion

261. I will ask the Claimant to draft a form of order for the court to seal reflecting the principles set out above, and if possible to agree the form of this order with the Defendant.

262. I would ask the parties also to make arrangements with Chancery Listings for a short hearing at which the form of the order may be settled, and any consequential matters arising from this judgment may be dealt with. Pursuant to CPR rule 52.12 I direct that the time for either party to apply for leave to appeal any aspect of this judgment shall be extended until 21 days after the court has determined all matters consequential upon this judgment.

263. If this case has proven anything, it has proven that the Biblical precept to "*love thy neighbour*" is one that owners of neighbouring properties would do well to abide by. The current action has involved great effort and cost to both parties in order to produce an outcome that, with only a modicum of goodwill, they might have been able to agree between them.

264. To the extent that they were unable to agree because of differing views on how ANLA is to be applied, I hope that the detailed analysis of the Act that has been provided in this judgment will assist future potential litigants in resolving their differences without going to court and that it will be another 30 years or more before the Act needs to be considered again in the High Court.