Case No: HC10C03969

Neutral Citation Number: [2012] EWHC 1492 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building, Royal Courts of Justice,
7 Rolls Buildings, London, EC4A 1NL

Date: 30/05/2012

Before :

MR JUSTICE NEWEY

- -

Between :

(1) JEFFREY HERRMANN	**Claimants**
(2) MINA GEROWIN HERRMANN	
- and -	
WITHERS LLP	**Defendant**

- -
- -

Mr Jonathan Seitler QC and Mr Benjamin Faulkner (instructed by **Jones Day**) for the **Claimants**
Mr Michael Pooles QC and Mr Paul Mitchell (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendants**

Hearing dates: 6-10 and 22 February 2012
Further written submissions: 24 and 28 February 2012

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Judgment

Mr Justice Newey :

Introduction

1. In 2008 the claimants, Mr Jeffrey Herrmann and his wife Mrs Mina Gerowin Herrmann, bought a house at 37 Ovington Square in the Knightsbridge area of London. They instructed the defendants, Withers LLP, to act for them on the transaction and were advised that the property had the benefit of a statutory right to use the garden in Ovington Square ("the Garden"). In the event, that advice proved to be erroneous: in 2010 Sir William Blackburne held that the relevant statute, the Kensington Improvement Act 1851 ("the 1851 Act"), does not apply to 37 Ovington Square. In these proceedings, the Herrmanns allege that Withers were negligent and so are liable to pay them damages.

Narrative

2. Mr and Mrs Herrmann, who are American, have both enjoyed successful careers. Mr Herrmann practised as a trial lawyer in New York City until he retired at the end of 2007. Mrs Herrmann also qualified as an attorney, but she practised as such only briefly before going to Harvard Business School and then into investment banking. She joined Paulson & Co in 2004 and was seconded to Paulson Europe LLP, of which she is a partner, with effect from January 2008. Paulson Europe LLP is an investment management firm.

3. The work visas issued to Mr and Mrs Herrmann were for five years. However, the Herrmanns told me, and I accept, that they envisaged that they might in the event remain in the United Kingdom for longer than five years. They will probably go back to their house in New York eventually, but there is no definite date by which they will do so.

4. Mrs Herrmann's secondment began on 4 January 2008, and her husband joined her in London later that month. They lived in rented accommodation initially, but they were soon looking for a house to buy. By the middle of March, they had decided that they wanted to purchase a property at 47 Cheyne Walk. With this in mind, they approached Withers (whom they had instructed the previous month to advise them on other matters) about the possibility of their acting for them on the purchase. On 13 March, the Herrmanns met Mrs Penelope Williams, a partner in Withers' private client department, and Miss Emma Copestake, who at the time was a senior lawyer in the firm's real estate team.

5. Following this meeting, the Herrmanns made an offer for 47 Cheyne Walk. This was accepted, subject to contract, but the Herrmanns were quickly "gazumped". The draft contract was withdrawn on 18 March 2008.

6. 37 Ovington Square first features in the documents on 7 March 2008, when Mrs Herrmann informed her husband in an email that a viewing had tentatively been arranged for the next day. She also said:

> "There is a garden, they're checking on dogs on leads".

On 18 March, the Herrmanns exchanged emails about the possibility of seeing 37 Ovington Square the following day, but on 19 March Mrs Herrmann told Miss Copestake that the "second favourite house" of herself and her husband was 21 Phillimore Gardens. By 26 March, Mrs Herrmann was nonetheless expressing enthusiasm for 37 Ovington Square. Mr Herrmann said that he was bothered by the "absence of a large green space nearby or even a little strip of grass like those along the Embankment" and "the unpleasant view from the front windows … and the unsightly apartment building in the square", but both he and his wife very much liked the interior, Mrs Herrmann calling it "wonderful and magical". Two days later, Mrs Herrmann wrote to Miss Copestake in an email:

> "We are looking at houses and there is one I've fallen in love with".

The house in question was 37 Ovington Square.

7. It was at this stage, as it seems to me, that Miss Copestake first learned of the Herrmanns' interest in 37 Ovington Square. A passage in Mrs Herrmann's witness statement could be read as suggesting that she had already spoken to Miss Copestake about 37 Ovington Square, but, if that is Mrs Herrmann's recollection (and I am not sure it is), I think she is mistaken.

8. 37 Ovington Square was described during the trial as being in the "neck" of Ovington Square. It lies on a short stretch of road (containing no more than five houses on each side) which connects a rectangular area containing a fenced garden to the north-west with Walton Street to the south-east. While it is possible to see the fenced garden from a bay window at 37 Ovington Square, the property does not front onto the Garden. Nor does it have a private garden of its own. It does, however, have the benefit of a small outside terrace at ground floor level. Its virtues also include, I gather, an excellent entertaining space, enhanced in particular by a room known as the "Grand Salon".

9. 37 Ovington Square was owned by the trustees of a family trust and occupied by a member of the family, a Mrs Norma Heyman. The property was marketed on the vendors' behalf by Knight Frank. The sales particulars Knight Frank prepared for the property included reference to "Access to communal garden".

10. On 2 April Mrs Herrmann gave Miss Copestake "advance notice" by email that she and her husband were about to start bidding on 37 Ovington Square. By an email of Friday 4 April, Mrs Herrmann informed Miss Copestake that a purchase price of £6.8 million had been agreed. After the weekend, Turner Debenhams, the solicitors acting for the vendors, wrote to Withers enclosing a draft contract and other documentation. They noted in their letter that "the intention is exchange Contracts within 5 working days, with completion to take place on or before 2nd June".

11. The time-frames for exchange and completion were discussed in the email correspondence. On 10 April Miss Copestake noted that the exclusivity period would technically expire on 15 April, but Mrs Herrmann suggested in her reply that Friday 18 April would be acceptable to the vendors. On 14 April Mrs Herrmann proposed planning for 18 April "if we get the paperwork committing from the Bank by Wednesday or Thursday" but said that Monday 21 April was also feasible.

12. On 9 April 2008 Turner Debenhams sent Withers, among other things, a "Property information form" completed by Mrs Heyman on behalf of the vendors. This included the question (number 8.1), "Are there any formal or informal arrangements which the seller has over any neighbouring property?" Mrs Heyman answered in the affirmative and went on to say:

> "Access to square gardens, this supplied as courtesy by garden committee".

No answer was given to question 10, "Has the seller ever incurred any expenses for the use of the property or any of its amenities?"

13. On 10 April 2008 Miss Copestake sent Turner Debenhams additional enquiries before contract. These included matters arising out of questions 8.1 and 10 in the "Property information form". With regard to question 8.1, the additional enquiries included this:

> "Question 8.1:
>
> 13.5.1. the reply states that access to the Square Gardens are at the 'courtesy of the garden committee'. Neither the Transfer nor the Lease provides for a right to use the gardens. Who or what is the garden committee; what authority does it have; how is it able to grant rights to use the gardens?;
>
> 13.5.2. please confirm that any pass or key will be handed over on completion; and
>
> 13.5.3. please provide contact details of the garden committee and explain how access is arranged".

The additional enquiries also asked for a reply to question 10.

14. Miss Copestake referred to the additional enquiries in an email she sent to Mr and Mrs Herrmann on 10 April. She said:

> "I have reviewed the pre-contract papers and received the results of most of my searches. I am pleased to report that there is nothing of major concern revealed. As is usual, I am today raising some additional due diligence enquiries following the review of the papers".

15. On 15 April 2008 Turner Debenhams sent Withers replies to their additional enquiries before contract. In response to enquiries 13.5.1 to 13.5.3, they said:

> "All houses that overlook the Square pay a fee to access the garden. The Seller is trying to find further information".

With regard to whether expenses had been incurred for the use of the property or any of its amenities (question 10 in the "Property information form"), Turner Debenhams replied:

> "No, subject to any payments that may have been made for the use of the Square Gardens".

The letter with which the replies to the additional enquiries were sent stated:

> "Our Client is looking for any further paperwork or correspondence that may be at the property and which would supplement the replies already given".

16. On 17 April 2008 Turner Debenhams forwarded to Withers copies of a variety of documents that Mrs Heyman had by then provided. These included a copy of a council tax bill for 37 Ovington Square.

17. On the same day, Withers sought further information from Turner Debenhams in relation to some of the additional enquiries. One of the requests related to enquiry 13.5.1. It said:

> "We note that a fee is paid to access the garden, but we are searching for a legal right to be able to use the garden. Please clarify the position".

Turner Debenhams responded promptly in these terms:

> "The enclosures to the letter sent to you today will I hope deal with many of the outstanding points you have mentioned, but I am making further enquiries about any Party Wall Act notices there may be, and also about the arrangements regarding the Square gardens which appear to be separate from ownership of the property".

18. During cross-examination, Miss Copestake was asked about a passage from one of her witness statements in which she said that Turner Debenhams' replies to the additional enquiries had led her to believe that it was more likely than not that payments had been made for use of the Garden. That that was Miss Copestake's belief is, I think, confirmed by the comment she made at the time (as quoted in the previous paragraph), "We note that a fee is paid to access the garden".

19. Taking the view that the information provided by Turner Debenhams was unsatisfactory, Miss Copestake decided to research for herself the position in relation to the Garden on 18 April 2008. Knowing that the 1851 Act dealt with garden squares in the vicinity, she confirmed from the website of the Royal Borough of Kensington & Chelsea ("the Borough") that the 1851 Act covered Ovington Square and then considered the Act's terms.

20. Where the 1851 Act applies to a "Square" in the Borough, by virtue of section 51:

> "the Owner for the Time being of the Garden, Shrubbery, or ornamental Enclosure in the Centre Area of each of the said Squares, his Heirs and Assigns, and the Occupiers of the several Houses in and encompassing such Square, and all Persons to whom such Owner shall have granted or may

> hereafter grant a Right of Access to the said Garden, Shrubbery, or ornamental Enclosure, shall be entitled to have the exclusive Use of such Garden, Shrubbery, or ornamental Enclosure".

The term "Square" is defined in section 5 to "include Crescents, Circuses, Half Squares, Terraces, and ornamental Enclosures" within the Parish of St Mary Abbots, Kensington. Section 42, dealing with "What shall be deemed a House in a Square", states:

> "That every House or Building the Front or Side of which shall face or form Part of the Line of any of the said Squares shall for the Purposes of this Act be deemed to be wholly situated in the Square which it shall face or form Part of the Line of, though the other Part of such House or Building may front or face on any other Street".

Section 42 also provides for residents to belong to a "Garden Committee" which is to have the "Care, Management, and Regulation of such Garden, Shrubbery, or ornamental Inclosure". The Act also makes provision for an annual levy to meet maintenance costs.

21. Miss Copestake concluded that the 1851 Act applied to 37 Ovington Square. She summarised her reasoning in this way in a witness statement:

> "As the definition of *'Square'* included *'terrace'*, the fact that the Property was on a terrace leading to the Square did not preclude it from being part of the *'Square'* under the Act. Indeed, it seemed to me that the definition of *'Square'* was clearly intended to extend the right to use square gardens situated on terraces forming the *'neck'* to a square. I also noted that the address of the terrace on which the Property was located was Ovington Square, and that in contrast the street leading off the Square at the other side was called Ovington Gardens. This further persuaded me that the Property was part of the 'Square' for the purposes of the Act".

22. Miss Copestake sought a second opinion from Mr Henry Stuart, her supervising partner. In the early afternoon of 18 April, Miss Copestake asked Mr Stuart whether he agreed with her that 37 Ovington Square was one of the properties that enjoyed access to the Garden pursuant to the 1851 Act. He said that he did. His discussions with Miss Copestake lasted 10 minutes or so. Mr Stuart described the exercise as a "sanity check".

23. Miss Copestake also gave thought to how the Herrmanns would be able to obtain a key if Mrs Heyman did not provide one. With this in mind, Miss Copestake telephoned the Borough, who suggested that she speak to either Mrs Elizabeth de Stanford, the chairman of the garden committee for Ovington Square ("the Garden Committee"), or Mr Tony Doggart, whom Miss Copestake understood to be a member of that committee. Miss Copestake called the latter, who told Miss Copestake that her clients would need to apply to Mrs de Stanford for a key.

24. At 3.48pm on 18 April, Miss Copestake emailed a number of documents to the Herrmanns. These included a pre-contract report which Miss Copestake had prepared and which she later sent by courier in hard copy and with enclosures. The report said this about the Garden:

> "**Ovington Square**
>
> By virtue of a number of Acts of Parliament passed during the 1800s, you have the right to enter into and use the garden at Ovington Square. The management of the garden square is via a garden committee. The garden committee has the power to make bye-laws for the proper management of the garden for the benefit of the use and enjoyment of the users. The cost of running the garden square is charged by The Royal Borough of Kensington & Chelsea by way of an additional levy on the Council Tax, which is a fairly nominal amount. A copy of The Royal Borough of Kensington & Chelsea's note in relation to garden squares is included with this report".

25. At 4.53pm, Mr Herrmann emailed back to Withers a signed letter of authority to exchange contracts. At 5.18pm, Miss Copestake emailed the Herrmanns to say that she had just exchanged contracts. There was no reference in the contract to the Garden.

26. There is an issue between the parties as to how far the Herrmanns discussed the Garden with Miss Copestake before contracts were exchanged. Miss Copestake does not remember the Herrmanns mentioning the Garden. In contrast, it is the Herrmanns' recollection that the Garden was referred to repeatedly. Mrs Herrmann, who was Miss Copestake's primary point of contact during the purchase, said for example in her witness statement:

> "Once we had settled on the Property, I spoke to Ms Copestake almost every day. My two major concerns were access to the Garden Square and the arrangements for mortgage finance, topics which were regularly discussed with Ms Copestake. I recall that I asked Ms Copestake on a number of occasions, *'what about my garden?'* and she would always rely, *'leave it to me'*".

27. The truth probably lies somewhere between the two extremes. It seems to me that, if the Garden had been emphasised to the extent that the Herrmanns believe, it would have featured much more prominently in the contemporary documents. On the other hand, the likelihood is that Miss Copestake had more telephone conversations with the Herrmanns (in particular, Mrs Herrmann) than she now remembers and that the Garden was specifically mentioned to her. Miss Copestake recognised when giving oral evidence that, although she did not remember this, it was possible that the Herrmanns had told her that the Garden was important to them. It is apparent, moreover, that Miss Copestake does not make a record of all telephone conversations she has nor necessarily has any recollection of them.

28. The significance of the point is reduced to some degree by the fact that Miss Copestake considered the Garden to be important. When giving evidence, she said that she took it as read that the Garden was important. She explained that, wherever agents' particulars refer to a property having a right, she would take that to be important to a client. She said too that she imagined that the garden would be important to anyone buying a property in a garden square.

29. On 14 May 2008, Miss Copestake was told by Mrs Herrmann in an email that Mrs Heyman had said that she had lost her key to the Garden. When Miss Copestake sent requisitions on title to Turner Debenhams on 19 May, she included a request for confirmation that "the Sellers'/occupiers' key to the communal gardens will be delivered to the agents on completion". Turner Debenhams' reply was in these terms:

> "We are asking for information about this, but our understanding is that the use of the communal gardens is not an absolute entitlement so that, even if our client has one, it may not be available for handing over".

A couple of days later, Turner Debenhams sent Withers a letter in which they said that Mrs Heyman "does not have [a key] nor is she entitled to one"; she had one, they said, "as a courtesy" at one time, but "no longer has it". Passing a copy of the letter on to Mr Ian Peel of Knight Frank on 27 May, Miss Copestake said:

> "I must say that I am rather surprised by the response, given what we were told prior to exchange of contracts and given that the property was marketed with the benefit of access to the gardens. This is something that is rather important to my clients and I should be grateful for your assistance in trying to resolve this issue".

In emails of 28 and 29 May to Miss Copestake and Mr Peel, Mrs Herrmann stressed the importance that she attached to the key. For instance, she told Mr Peel that she could not be "more emphatic that this is a serious condition of closing [i.e. completion]". She observed to Miss Copestake that she had "no sense of humor about this key and access" and that she would not give in on this. She also said:

> "Re: key to garden. This is featured in the brochure. It is a condition of closing. We will only close without it if GBP 100,000 is withheld. No assurances, just hold hard cash hostage. There is no leeway and I suggest you discuss with Heyman's attorneys. We heard another tale of owners getting no key for years last night at dinner here…."

In the same vein, she said that she would "not close without the key or GBP 100,000 withheld to assure they deal with it and some garden committee decides never to give a key to some Americans or whatever".

30. During 29 May 2008, Miss Copestake spoke once more to Mr Doggart. He indicated that he thought that the owners of 37 Ovington Square were entitled to a key and confirmed again that, to obtain one, the Herrmanns would have to apply to Mrs de Stanford. Miss Copestake relayed Mr Doggart's comments to the Herrmanns by

telephone. Mrs Herrmann expressed relief, but continued to take the view that funds should be withheld on completion if no key was yet available. Miss Copestake, however, advised that the Herrmanns had no legal right to make a retention. It was agreed that Miss Copestake would write to Mrs de Stanford on the Herrmanns' behalf to request a key to the Garden.

31. Completion took place on 4 June 2008.

32. As had been agreed, Miss Copestake wrote to Mrs de Stanford, but without success. Mrs de Stanford replied that the Herrmanns "are in the gardens and so ineligible for a key". Miss Copestake pursued the matter first with Mr Robert Barham, a partner in Pemberton Greenish, the firm of solicitors retained by the Borough to advise garden committees, and then with a letter to Mr Michael Wainwright, the treasurer of the Garden Committee and a partner in Eversheds, solicitors. In response to a request from the Herrmanns to provide a statement of the case for their entitlement to access to the Garden, Miss Copestake explained that the 1851 Act gave rights to use a square to the owner of "every house or Building the Front or Side of which shall face or form part of the line of any of the said Square". She went on:

> "There is an argument for saying that as you are on the side street, your house does not face or form part of the Square. However, the definition of a Square includes 'Terraces'. Your address is also in Ovington Square. It is odd however that no fee is charged via the Council Tax".

33. It is apparent from this last comment that Miss Copestake appreciated by this stage that the levy charged pursuant to the 1851 Act would be shown separately on council tax bills. She explained in evidence, and I accept, that she had not been aware of this fact when contracts were exchanged.

34. Miss Copestake telephoned Mrs de Stanford, but she continued to maintain that the Herrmanns were not entitled to a key. However, Mr Doggart's wife suggested to Miss Copestake that a handwritten note to Mrs de Stanford "should do the trick", so Miss Copestake proposed to Mr Herrmann in an email of 2 October 2008 that "a handwritten letter on Smythson paper and an invitation to drinks might be the next step".

35. At this stage, the Herrmanns instructed fresh solicitors, Thring Townsend Lee & Pembertons ("Thring Townsend"). By 27 October 2008 Mr and Mrs Herrmann had, through Thring Townsend, sought the advice of Mr Charles Harpum, a member of Falcon Chambers and a former Law Commissioner, on whether they were entitled to use the Garden under the terms of the 1851 Act. Mr Harpum advised in conference on 27 October, following which Thring Townsend told Withers in a letter of 28 October that "Counsel's preliminary view is that the property probably does enjoy a legal right to use the garden by virtue of the Kensington Improvement Act 1851". In an opinion dated 30 October, Mr Harpum confirmed that he considered that the Herrmanns had a statutory right to use the Garden. He gave several reasons for thinking that the Herrmanns fell within the words, "Occupiers of the several Houses in and encompassing such Square". In the first place, having regard to the wide meaning given to "Square" in section 5, 37 Ovington Square was in a "terrace" forming an integral part of the Square. Secondly, section 42 differentiates between a "property the

front or side of which faces the square" and a "property the front or side of which forms a part of the line of the square but where some other part fronts or faces on to any other street", and 37 Ovington Square:

> "would seem to fall within one or other of those situations, because it can be said to face the square, in that the part of Ovington Square on which it stands is part of the Square, or it can be said to form part of the line of Ovington Square to the extent that the various roadways that comprise Ovington Square form the lines of the Square".

Thirdly, section 51 refers to houses both "in" and "encompassing" a square, and 37 Ovington Square could be said to "encompass" Ovington Square.

36. On 12 November 2008 Thring Townsend sent a copy of Mr Harpum's opinion to the Borough, copying their letter to Mr Wainwright and Mrs de Stanford, and requested that the Herrmanns now be given a key to the Garden. On 16 December Thring Townsend told the Borough, Mr Wainwright and Mrs de Stanford that they had instructed counsel to settle proceedings. Pemberton Greenish replied in a letter of 23 December. They took issue with the views advanced in Mr Harpum's opinion and invited Thring Townsend to withdraw the threat of proceedings against the Garden Committee. However, they added this:

> "Having said that we have advised the Garden Committee that they do have power, by virtue of the Open Spaces Act 1906, to enter into annual licences to use the garden and if you would like to be considered for such a licence please let us know".

37. The implications of the Open Spaces Act 1906 ("the 1906 Act"), to which reference is made there, are summarised in these terms in a letter from the Borough:

> "The Open Spaces Act 1906 provides that a garden committee can admit other persons to have access to the garden and gives them power to regulate their admission on such terms as the committee thinks proper. The garden committee can therefore grant annual licences or enter into longer term arrangements …".

38. By now, Mr and Mrs Herrmann had had a somewhat unfortunate meeting with Mrs de Stanford. She visited 37 Ovington Square unexpectedly on 28 November 2008. The Herrmanns understood her to be put out that she had been contacted by solicitors on their behalf and that they had not themselves written to or visited her. She said, I gather, that the Garden Committee had a discretion as to who had a key, and the Herrmanns were left with the impression that they would not receive one. Mr Herrmann raised the state of decoration of Mrs de Stanford's house.

39. On 14 January 2009 Thring Townsend sent Pemberton Greenish draft Particulars of Claim and said that their letter should be treated as a letter before action. On the same day, however, they wrote to Mr Wainwright to apply, without prejudice to their claim to be entitled to access under the 1851 Act, for a licence to use the Garden pursuant to section 2(1)(d) of the 1906 Act.

40. On 23 January 2009 Mr Robert Sear of Thring Townsend had a without prejudice conversation with Mr Barham. Mr Sear's attendance note of the conversation includes this:

> "RB [i.e. Mr Barham] indicated that the Committee might be prepared to issue some form of licence but RPS [i.e. Mr Sear] said that his clients would be concerned that this was not permanent and could be revoked at any time.
>
> RB then went on to say that he had dealt with a similar issue at Pembroke Square where the Garden Committee were trying to raise funds for work to the garden. They had issued bonds to various householders who did not have access to the garden which gave a licence for an 80 year period and each householder paid £25,000 for the bond. RPS said that his clients would not be prepared to pay any such sum as they considered they had a right to the use of Square Garden. However, he would discuss the matter with the clients and come back to RB".

41. As Mr Barham remembers his conversation with Mr Sear, the latter's initial response was that what was proposed was reasonable. Mr Barham thought that Mr Sear had said something like, "It seems like a good offer". When giving oral evidence, Mr Barham unsurprisingly accepted that he could not recall Mr Sear's precise words, but I do not think that is of any importance. I accept that Mr Barham reasonably gained the impression that Mr Sear thought the offer a reasonable one.

42. Having taken instructions, Thring Townsend wrote to Pemberton Greenish on 29 January 2009. They said that their clients were not prepared to deal with the matter in the manner Mr Barham had proposed but were prepared to "settle … provided that the Ovington Square Garden Committee formally recognise our clients' rights under the 1851 Act and minute those rights in the Garden Committee's records".

43. On receiving Thring Townsend's letter, Mr Barham telephoned Mr Sear and expressed surprise that his clients wished to reject the offer of access. Mr Sear, however, confirmed that those were his instructions and that his clients preferred to spend the money on establishing what they asserted were their proper legal rights.

44. Pemberton Greenish responded to Thring Townsend by letter on 2 February 2009. They observed that the Garden Committee "do not have any discretion in this matter (other than to grant access in accordance with the Open Spaces Act 1906) and are not in the position to do what your clients want, which is to get their property added to the list of properties paying the Council tax precept". They suggested that any proceedings should be directed against the Council rather than the Garden Committee.

45. In March 2009, a notice was attached to the Garden's gates which began by asserting:

> "Mr & Mrs Herrmann recently acquired the Lease to 37 Ovington Square (previously Vincent Street) which does not have legal entitlement to the use of the Ovington Square Gardens".

The notice went on to say that, in the event of legal proceedings, the Garden Committee would be grateful for donations towards costs.

46. In letters to Pemberton Greenish of 24 April and 1 May 2009, Thring Townsend returned to the question of a licence being granted under the 1906 Act. In a further letter of 5 May, Thring Townsend said that they had issued proceedings (with the Borough as one Defendant and the Garden Committee – through Mr Wainwright – as the other), but their clients were prepared to refrain from serving them for 14 days in the hope that it might be possible to achieve a settlement. In a without prejudice reply, Pemberton Greenish said that, since it was not within their clients' power to grant rights under the 1851 Act, "the only settlement that could be proposed is a licence under the 1906 Open Spaces Act" which the Herrmanns had rejected when discussed earlier in the year. Thring Townsend were asked to clarify whether the Herrmanns had anything to offer the Garden Committee in this regard.

47. Pemberton Greenish sent a further letter to Thring Townsend on 13 May 2009. Given its importance, I think I should set out the substantive parts of the letter in full. It read:

> "We note that your clients are prepared to refrain from serving the proceedings in order to explore whether a satisfactory settlement can be reached. The question of whether 37 Ovington Square should correctly be included as one of the properties benefiting from use of Ovington Square garden under the provisions of the Kensington Improvement Act 1851 is not a question which our clients can settle. It is not in their power to determine whether or not the property has correctly been excluded but they will of course be bound by the decision of the court in this matter.
>
> What our clients can do is offer your clients access to the garden under alternative provisions, namely section 2 of the Open Spaces Act 1906. That Act confers on our clients a right to grant access to the garden on such terms and conditions as the Committee think proper. We have discussed this matter with officers of the Garden Committee and they have confirmed that they would be prepared to put the following offer to the full Garden Committee with a recommendation for acceptance. The terms proposed are:-
>
> 1. Licence to be granted by deed to Mr and Mrs Herrmann and their successors in title to the freehold of 37 Ovington Square.
>
> 2. The licence to be for a term of 50 years.
>
> 3. The premium payable for the licence to be £25,000.
>
> 4. Use of the garden by Mr and Mrs Herrmann to be subject to the rules and regulations in force from time to time regulating the use of the garden.

5. Your clients to be responsible for the Committee's legal costs of £750 plus VAT and disbursements in respect of the licence.

Before calling an extraordinary general meeting of the full Garden Committee our clients would need to know that if these terms were approved by the Committee they would be acceptable to your clients. Please therefore confirm whether or not such an offer would be acceptable.

If the offer is acceptable in principle to your clients the Garden sub-Committee will need to arrange for a full meeting of the Garden Committee to be convened in accordance with section 44 of the 1851 Act. We estimate that it will take them probably a week to arrange for notices to be served and the notices should give two weeks' notice of the meeting. Therefore we estimate it will take approximately 21 days for the proposal to be considered by the full meeting. You have previously indicated that you will serve the proceedings on 19 May but in view of the above please confirm that if the offer is acceptable in principle to your clients you will delay service of the proceedings by at least a further 21 days from the date on which we hear from you".

48. Mr Wainwright confirmed in evidence that the offer contained in the letter of 13 May 2009 was a genuine one. He explained that he and Mrs de Stanford had agreed that it would be better to resolve the matter on the basis set out in the letter than to spend money on litigation and that they thought that they had come up with something that worked from both their point of view and that of the Herrmanns. He said that he fully intended to honour the proposal if it was accepted. He also said that he had no doubt that the proposal would have been endorsed by the Garden Committee as a whole.

49. With regard to the £25,000 figure, Mr Barham said that this was derived from similar licences that he had been involved in granting in respect of another garden square.

50. Thring Townsend replied to Pemberton Greenish on 19 May 2009. They noted that the proceedings had now been served, but said that their clients remained willing to settle the litigation. They went on:

"As regards the offer of a licence pursuant to the Open Spaces Act 1906, while our clients welcome the fact that an offer has been made, we are instructed that they cannot accept the offer in the form in which it presently stands because the duration of the licence proposed is too short and the sum of £25,000 is excessive. We are, however, instructed to make a counter offer.

Our clients wish to have a licence to use the Garden for as long as possible for the benefit of themselves and their successors in title at 37 Ovington Square. The obvious basis upon which the consideration for that licence should be assessed is by reference to the additional Council Tax payable by those who have a

right to use the Garden under the Kensington Improvement Act 1851. Our clients would be prepared to pay by way of a licence fee the capitalised equivalent of what they would have to pay by way of additional Council Tax for the use of the Garden over the period of the licence".

51. In a letter of 22 June 2009, Pemberton Greenish confirmed that the counter-offer was rejected. They also said that, if Thring Townsend had a "specific and quantified counter-proposal which [the Herrmanns] are prepared to accept", this would be considered.

52. By now, the Herrmanns had told Withers that they would be making a negligence claim against them. Thring Townsend gave preliminary notice of such a claim in a letter of 1 May 2009. On 22 June, 3 July and 14 July, Thring Townsend invited Withers to comment on the Herrmanns' claim and the Defences served on behalf of the Borough and the Garden Committee. Withers, however, said that they had no comments to make.

53. In late June 2009, Thring Townsend instructed two firms of chartered surveyors, Bishop Beamish and Cluttons, to provide valuation reports in the context of the claim against Withers. The firms were asked to value 37 Ovington Square on three bases as at June 2008:

    i) That the property had the benefit of a right of access to the Garden under the 1851 Act;

    ii) That the property had an 80-year licence which could be assigned to future owners and occupiers under the 1906 Act;

    iii) That the property had no right under either the 1851 Act or the 1906 Act.

54. Bishop Beamish explained in their report, which was dated 8 July 2009, that they had assumed that the purchase price of £6.8 million represented the market value of 37 Ovington Square with the benefit of unrestricted rights of access to the Garden. They went on to express these views as to valuation:

    i) "[S]hould it become established that No. 37 Ovington Square has no right of access to the gardens of the square, either under the 1851 Act or the 1906 Act, then we consider the value will be reduced to reflect this by 7.5%: £510,000 …";

    ii) "[S]hould an 80-year Assignable Lease for use of the gardens be available to a qualifying owner or occupier, then in order to reflect the uncertainty associated with the assignment, the reduced term below the Freehold and the uncertainty of assignment, we consider the value should be reduced by 2.5%: £170,000 …";

    iii) "[S]hould a 20-Year Assignable Lease for a qualifying owner or occupier of No. 37 Ovington Square become available for use of the garden, then a 5% discount is appropriate to reflect the relatively short term and the uncertainties with regard to its re-assignment: £340,000 …".

55. In their report, dated 18 September 2009, Cluttons concluded that access to the Garden probably affected the value of 37 Ovington Square by about 5%. They considered that 37 Ovington Square had been worth the price paid for it, viz. £6.8 million, if it had the benefit of rights under the 1851 Act. Without any right of access to the Garden, under either the 1851 Act or the 1906 Act, Cluttons valued the property at £6,450,000 (i.e. £350,000 less than the £6.8 million paid). The value of the property was put at £6,750,000 (i.e. £50,000 less than the price paid) on the assumption that it had "an 80 year Licence, assignable to all future owners and occupiers under the 1906 Act".

56. Thring Townsend responded to Pemberton Greenish's letter of 22 June on 14 July 2009. They said that the Herrmanns were prepared to put forward an offer of £2,477.83 for a licence under the 1906 Act on the following terms:

> "1. It should be for a minimum period of 80 years.
>
> 2. It should be freely assignable to future occupiers and owners of 37 Ovington Square.
>
> 3. Each party to bear their own costs in connection with the preparation of the licence."

It was explained that the figure of £2,477.83 had been calculated by reference to the additional council tax payable by those with right to use the Garden under the 1851 Act. Thring Townsend elaborated:

> "The basis for that number is that it is the discounted present value of a stream of 80 annual payments of £110.53 (the current annual garden levy), discounted by the risk free rate of return (4.308% on 30 year gilts as of 13 July 2009)".

57. In a reply dated 23 July 2009, Pemberton Greenish said:

> "as your offer is substantially below the figure which our client has indicated the Committee might accept, he does not feel able to recommend it for approval"."

58. Mr Barham explained in evidence that both he and the Garden Committee's officers felt that Thring Townsend's letter of 14 July did not represent a serious attempt to reach a compromise agreement. He said that it would not have made any particular difference to the Garden Committee whether a licence was for 50 years or 80 years, but the divergence between what had been offered on behalf of the Garden Committee and what the Herrmanns were suggesting "seemed to leave little room for further serious discussions". Mr Barham characterised the Herrmanns' proposals as, in substance, demands for withdrawal.

59. On 13 November 2009, Thring Townsend wrote to Pemberton Greenish to ask that the Garden Committee explain its offer and provide details of licences it had granted in the past; the Herrmanns were said to be "willing to try to negotiate a proper and reasonable settlement". Pemberton Greenish replied on 17 November in these terms:

> "As you will be aware our client is not obliged to grant a licence to use the garden under the Open Spaces Act 1906. Notwithstanding this, our client has indicated the basis on which he would be prepared to recommend to the Committee that … a licence be granted. Unless or until your clients abandon the proceedings against our client and make a realistic proposal for the grant of a licence there is little further that my client can do".

Pemberton Greenish also said that their client was not aware of any licence being granted voluntarily.

60. The Herrmanns' proceedings against the Borough and Mr Wainwright (on behalf of the Garden Committee) were heard by Sir William Blackburne, sitting as a Judge of the High Court, in June 2010, and judgment was given on 9 July. Sir William Blackburne concluded that the 1851 Act does not apply to 37 Ovington Square and, accordingly, that the Herrmanns are not entitled to access to the Garden under that Act. His main reasoning appears from the following passage from his judgment:

> "37. The issue is a short one: what is meant by 'the several Houses in and encompassing such square'? It is a crucial question since it is the occupiers of houses which fulfil that test who enjoy garden right.
>
> 38. The difficulty is, as Mr Harpum stated, that the Act does not provide a definition of the key concept of a 'square'. It includes houses but which? It may take a variety of forms in that it is not confined to the four-sided shape popularly associated with the notion of an urban square. It has a garden in or belonging to (or associated with) it. (I accept Mr Harpum's suggestion that 'belonging to' must mean 'associated with'.) But that is as far as the draftsman goes. Instead, as it seems to me, the draftsman appears to have assumed that, subject to including 'Crescents, Circuses, Half Squares, Terraces and ornamental Enclosures' within its meaning, the concept of 'square' requires no explanation. As appears from section 42, his focus has been to clarify what the position is at those points where the square intersects with a street which is not within it. What is of interest about section 42 is that it assumes that a house which is in a square must have either its front or one of its sides facing some part of the square or forming part of 'the Line' of some part of the square.
>
> 39. In one sense this begs the question as to what the square is. But the fact that its concern is to include (as a house wholly within the square) a house any part of which may 'front or face on any other Street' rather suggests that a house, a part of which fronts an access street (such as Ovington Gardens [i.e. the road running from the north-western corner of the rectangular area containing the Garden to Brompton Road] or the Terrace [i.e. the stretch of road in which 37 Ovington

Square is located] in the instant case) will only be within the square if some part of the front or side of the house (but not its rear) faces the square or forms part of the line of the square.

40. The concept of the 'Line' of the square, which the Act does not explain, suggests to me a notional line which follows the outline of the square (be it a square in the popular sense or a square in the extended sense indicated non-exclusively in section 5) and traces a course along the edge of each property (along either the property's front or one of its sides) which is within the square. It is a line which one would expect to mirror the general shape of the square, half square, circus, crescent or terrace in question.

41. Beyond those considerations there is another factor which has weighed with me in coming to a view on what the Act means by a square. That is that the Act must be readily workable. By section 41 the initiative to bring a square within the operation of the Act comes from the owner of the garden and the owners and lessees of the 'Messuages constituting any such Square'. The garden committee is drawn from among those persons.

42. I think it highly unlikely that the determination of what those properties are would turn on the kind of matters prayed in aid in the instant case concerning the circumstances in which the square and its access roads were constructed, for example whether they were designed or built by the same person or as a single development or are to be regarded as architecturally indistinguishable, much less on matters such as the street names which they bore when completed. The Act, which was intended to apply to garden squares already in existence as well as those yet to be constructed, was and remains, a facultative measure of indefinite duration. In the instant case the Square was only brought within the Act a century or so after it had been constructed and the Act had been passed. (I was told that it was one of 31 or so garden squares brought within the operation of the Act after 1901 and that most of those 31 were brought within the Act between 1953 and 1980.) The very fact that Mr Herrmann has devoted so much time and energy to researching the history of the Square, and has produced an exceptionally detailed account cross-referenced to treatises on the history of the Square, estate plans, memorials of deeds listed in the now defunct deeds registry, census and poor rate returns, street directories and the like, suggests to me (even ignoring those parts of his account that go to the parish boundary question) that the draftsman can never have intended the operation of the Act to depend on such matters.

43. In the circumstances, I have reached the clear conclusion that 'Houses in and encompassing such square' appearing in

> section 51 refer to those houses which have a front or side which wholly or in part faces the open square, half square, circus crescent or terrace, as those expressions are popularly understood, within which or associated with which is the garden in question. In short, the square (whether foursided, or having some other shape) must be of a kind which, with its attendant garden, the average man in the street would have no difficulty in recognising. Once identified, it is the houses within that square which qualify. Section 42 operates to resolve any argument at the fringes of the square.
>
> 44. I do not therefore consider that 'square' has the extended meaning for which Mr Harpum argued. Nor do I consider that his alternative argument, based on the expression 'encompass', has any validity. In any event, it was an alternative argument which Mr Harpum urged only faintly.
>
> 45. Since the front or side of No.37 does not face the Square in the sense intended, it follows that the Herrmanns, as occupiers of that property, do not enjoy the garden right that they claim. It is, in my judgment, irrelevant that it is possible to see the garden from the front windows of number 37. Equally irrelevant (although this was not a point urged in argument) is the fact that the front elevation of number 37 juts forward from the front elevation of 35 Ovington Square by a few inches with the result that the face of those few inches might be said to be 'facing' the Square. The reference in section 42 to the side of a building facing or forming part of the line of any part of the square is, in my view, to the whole or substantially the whole of that front or side."

Sir William Blackburne said that he was the readier to reach his conclusion as the rival approach to the 1851 Act "would not only have resulted in great uncertainty over what precisely a square is in any case but have potentially opened the door to numerous claims by occupiers of many other properties which have not hitherto been regarded as fronting an open square". Sir William Blackburne went on (in paragraph 57 of his judgment):

> "Not the least of the difficulties would have been to establish where along an access road such as the Terrace the 'square' would end. Indeed, it was by no means clear where, on Mr Harpum's argument, the Square ended along Ovington Gardens …".

61. With regard specifically to the Garden Committee's position, Sir William Blackburne summarised submissions made on its behalf in these terms (in paragraph 60):

> "[Counsel for the Committee], while conceding the fact of interference and accepting the general position in law where an easement, or a statutory right in the nature of an easement, is interfered with, submitted nevertheless that his client should

> not be liable. He submitted that under the Act it is the Commissioners (now represented by the Royal Borough) who take control and management of the garden. It is only those who are liable to pay the extra charge to cover the garden's care and maintenance that are entitled to exercise garden right. The garden committee has no involvement in determining who has that entitlement and who therefore is to be subject to the extra charge. On the contrary, a proper understanding of the statutory scheme which applies once a garden has been taken under the Royal Borough's control and management involves that the garden committee is obliged to allow persons who pay the extra charge to have access to the Garden and are no less obliged to prevent persons from having access who do not pay the charge. It is not for the garden committee to second-guess these matters. In those circumstances, he submitted, even though it was the Committee, through Mrs de Stanford, who denied the Herrmanns access to the Garden, in so acting it was doing no more than carrying out the obligations placed on it under the Act and is to be absolved from liability on that account. The liability, if there was any, was that of the Royal Borough."

Sir William Blackburne said (in paragraph 61) that he considered that counsel for the Garden Committee was right in his submissions.

62. The present proceedings were issued on 23 November 2010.

Witnesses

63. Factual evidence was given by Mr and Mrs Herrmann, Miss Copestake, Mr Stuart, Mr Wainwright and Mr Barham. All these witnesses seemed to me to be giving evidence truthfully, in accordance with their recollections. That is not, of course, to say that their evidence was always accurate. Given the passage of time, their recollection of events will inevitably have dimmed to an extent. I have, moreover, particular reservations about the reliability of the evidence given by Mrs Herrmann, whose strong feelings about the case had caused her to lose objectivity. In contrast, I was particularly impressed by the straightforward way in which Mr Wainwright and Mr Barham gave their evidence.

64. I also had the benefit of expert evidence from Mr Ruaraidh Adams-Cairns and Mr Timothy Lee, each of whom is a chartered surveyor. I have found the evidence of both of them helpful.

Issues

65. The issues which arise can be addressed under the following headings:

i) Were Withers negligent?

ii) What would the Herrmanns have done?

iii) Are the Herrmanns open to criticism for failing to mitigate?

iv) Quantum issues.

Were Withers negligent?

66. The thrust of the Herrmanns' case against Withers is to the effect that they were negligent in failing to appreciate that there was a risk that the 1851 Act did not extend to 37 Ovington Square; in failing to warn the Herrmanns of that risk; and in failing to tell them of the unsatisfactory nature of the information from Turner Debenhams about entitlement to use the Garden.

67. It is common ground that, in considering whether Withers were negligent, I should have regard to the fact that they are a City of London firm and pride themselves on offering an excellent service to their clients. In *Hicks v Russell Jones & Walker* [2007] EWHC 940 (Ch), Henderson J said (at paragraph 138(3)) that it would be "absurd" to judge the firm with which he was concerned, which had "experience in the fields of commercial litigation and insolvency, including the conduct of complex appeals", by the same standard as a small country firm. Withers accepted that it would be similarly inappropriate to judge them by the same standard as a small country firm.

68. In the present case, I do not think Miss Copestake is open to criticism for taking the view that 37 Ovington Square was within the scope of the 1851 Act. Sir William Blackburne ultimately arrived at a different conclusion, but that does not mean that Miss Copestake's opinion was not a possible one. It is noteworthy in this context that, when he was later consulted, Mr Harpum arrived at essentially the same conclusion as Miss Copestake, and for similar reasons.

69. That does not mean, however, that Withers were entitled to regard the position as clear-cut. As Miss Copestake accepted in cross-examination, the 1851 Act is a difficult piece of legislation. A central problem is that the Act contains no full definition of "square". To say (as section 5 does) that "square" "includes Crescents, Circuses, Half Squares, Terraces, and ornamental Enclosures" is of limited assistance. It is apparent from this that a terrace (say) can form part of a "square", but there could be no question of *every* terrace within the Parish of St Mary Abbots, Kensington being part of every (or even any) "square" in the parish. It is thus necessary to find one or more criteria by which to determine whether a terrace is included in a "square". Further, the mere fact that a terrace is in a road leading to a garden was never likely to be sufficient to render it part of the "square" containing the garden for the purposes of the 1851 Act. Were it otherwise, a terrace quite some distance from a garden could form part of the relevant "square" – and could even, perhaps, qualify to be treated as part of more than one "square" (if a garden was to be found at each end of the road). Mr Harpum was plainly correct when he observed in his opinion that the 1851 Act "is not particularly well drafted".

70. It is significant, too, that Turner Debenhams had never claimed that 37 Ovington Square had the benefit of rights under the 1851 Act. While Knight Frank's sales particulars had confidently spoken of "Access to communal garden", Turner Debenhams had been much more circumspect. The response to the "Property information form" had used the word "courtesy", the replies to additional enquiries had said that further information was being sought, and, just the day before exchange of contracts, Turner Debenhams had referred to "making further enquiries … about the arrangements regarding the Square gardens which appear to be separate from

ownership of the property". Moreover, while Miss Copestake evidently read the exchanges as indicating that a fee was paid for access to the garden, Turner Debenhams had not in fact said that. Recognising that Turner Debenhams had not been able to answer her questions satisfactorily, Miss Copestake researched the position for herself. The fact remains that Withers could take no comfort from their exchanges with Turner Debenhams.

71. In all the circumstances, it seems to me that Withers ought reasonably to have concluded that there was at least serious doubt as to whether 37 Ovington Square fell within the 1851 Act. In September 2008, Miss Copestake observed that there was "an argument for saying that as [the Herrmanns] are on the side street, [their] house does not face or form part of the Square" (see paragraph 32 above). To my mind, Miss Copestake should have realised in advance of exchange of contracts that such arguments existed. My own feeling is that the more obvious view was that 37 Ovington Square did not enjoy rights under the 1851 Act; I do not find Sir William Blackburne's judgment to that effect at all surprising. As I have said, however, I do not think it was negligent for Withers to think the contrary view preferable. Where they seem to me to have been at fault is in failing to appreciate that there was a substantial risk that their construction might not be right. In my judgment, a reasonable solicitor would have realised that the point was open to question.

72. Miss Copestake made the point that clients prefer solicitors to give clear advice. However, I do not think Miss Copestake would have been justified in thinking that the Herrmanns should not be told about issues relating to the Garden. Miss Copestake herself recognised that access to the Garden was a matter of importance (see paragraph 28 above). It is also relevant that the Herrmanns were clients of considerable sophistication and that both had legal knowledge. It is noteworthy, too, that the position in relation to the Garden could have been clarified, at least somewhat, quite quickly. While Miss Copestake did not know at the time that the levy charged under the 1851 Act featured separately on council tax bills, she was aware that there was a levy. She should therefore have been alive to the possibility of checking whether the levy was collected in respect of 37 Ovington Square. Such an inquiry could have been expected to be answered within a short space of time and to cast light on the likelihood of 37 Ovington Square qualifying for garden rights.

73. All in all, I have concluded that it was negligent of Withers to advise in unequivocal terms that the Herrmanns would have "the right to enter into and use the garden at Ovington Square". I am sure that Miss Copestake will not make any comparable error in the future; few people are now likely to be better placed to advise on the impact of the 1851 Act. I consider, however, that Withers ought reasonably to have warned the Herrmanns at least that, as matters stood, there was scope for argument as to whether they would be entitled to use the Garden.

74. The decision of the Court of Appeal in *Queen Elizabeth's Grammar School Blackburn Ltd v Banks Wilson* [2001] EWCA Civ 1360, [2002] PNLR 14 provides an analogy. There, a Mr Erdozain of Banks Wilson, solicitors, had advised on the construction of a restrictive covenant. The Court of Appeal concluded that he had been negligent. In his judgment, Sedley LJ said (at 308):

> "But even accepting [counsel for the solicitors'] submission that Mr Erdozain's and the judge's confident interpretation [of

> the covenant] was entirely defensible, so that there was no way of saying that a competent solicitor could not arrive at it, it could on no defensible view have been so confident as to relieve Mr Erdozain of the need to enter the caveat that a court might construe it differently".

Similarly, it appears to me that Withers were not entitled to be so confident of their interpretation of the 1851 Act as to relieve them of the need to enter the caveat that a Court could take a different view.

What would the Herrmanns have done?

75. If, as I have held, Withers were negligent, what would the Herrmanns have done but for that negligence? More specifically, would the Herrmanns have proceeded with their purchase of 37 Ovington Square if, say, Withers had advised that they considered that the property carried a statutory right of access to the Garden but that there was room for argument to the contrary?

76. Mr and Mrs Herrmann were both clear on this point in their evidence. The evidence of each of them was to the effect that they would not have gone ahead with the acquisition. Thus, Mr Herrmann said this, for example, in his witness statement:

> "If we had been advised that there was any risk that we would not have an automatic and absolute right to use the Garden Square when we became owners of the Property, we would not have purchased it. Further, we would not have wanted to take the risk of purchasing the Property and then applying to the Garden Committee for permission to access it as a courtesy".

In similar vein, Mrs Herrmann said this in her witness statement:

> "I have no doubt that we would not have purchased this Property had we been aware that there was any risk that we might not have an absolute right of access to the Garden square, or that litigation might be necessary to enforce such a right".

77. Withers dispute what the Herrmanns say. They argue that the Herrmanns would not have given up the attractions of 37 Ovington Square merely because Withers had advised that there was room for doubt about their advice. The Herrmanns would, Withers contend, have pressed ahead with exchange of contracts.

78. In my view, however, there is no good reason to reject the Herrmanns' evidence. When challenged on the point in cross-examination, Mr Herrmann was firm: he and his wife, he said, would "absolutely not" have gone ahead. Further, the Herrmanns' evidence accords, to my mind, with the inherent probabilities. 37 Ovington Square had been marketed as having "Access to communal garden", and the Herrmanns had agreed to pay £6.8 million for the property on that basis. Cluttons, who valued the property for the prospective mortgagee, similarly "assume[d] that the property has rights of access to the communal garden square". Aside even from the importance that the Herrmanns attached on a personal level to having the use a garden, it seems to me that they are unlikely to have been prepared to proceed at a price fixed on the footing

that the property enjoyed access to the Garden if told that it might not, after all, have such access.

Are the Herrmanns open to criticism for failing to mitigate?

79. It is trite law that a claimant is not entitled to damages in respect of loss that he could have avoided by taking reasonable steps. The principle was applied in, for instance, *Jolliffe v Charles Coleman and Co* (1971) 219 EG 1608. In that case, solicitors had failed to make an application on the plaintiffs' behalf for a new tenancy under the Landlord and Tenant Act 1954, but the landlord offered to grant a new tenancy on terms which were not very much worse than those that could have been obtained under the 1954 Act. Browne J concluded that the plaintiffs had acted unreasonably.

80. On the other hand, the onus of proof lies on the defendant: it is for him to establish that the claimant ought reasonably to have taken mitigating steps and that, had he done so, there would have been no or less loss (see e.g. *Saunders v Williams* [2002] EWCA Civ 673, [2003] BLR 125, at paragraphs 21, 22 and 24). Further, the standard by which a defendant is judged is not a very demanding one. Thus, in *Banco de Portugal v Waterlow and Sons Ltd* [1932] AC 452, Lord Macmillan said (at 506):

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

81. Withers allege that Mr and Mrs Herrmann failed to mitigate their loss in the present case. The gist of their submission is to the effect that the Herrmanns should have accepted the offer of a licence to use the Garden for a fee of £25,000.

82. In my judgment, the Herrmanns ought reasonably to have pursued the offer of a licence under the 1906 Act. My reasons include these:

    i) The grant of a licence under the 1906 Act would have alleviated to a great extent the disadvantages of falling outside the ambit of the 1851 Act. Not only would the Herrmanns have been able to use the Garden themselves for however long they continued to own 37 Ovington Square, but they could have sold the property with the benefit of access to the Garden. The significance of the latter point should have been brought home to the Herrmanns by the valuation reports they commissioned from Bishop Beamish and Cluttons. On Bishop Beamish's figures, the property would have been worth £340,000 more

with an 80-year assignable licence than with no right of access, and even a 20-year licence could be expected to enhance the value by £170,000. For their part, Cluttons considered that, with an 80-year assignable licence, the property's value would be raised by £300,000 and would be only £50,000 less than the £6.8 million the Herrmanns paid. When giving evidence, Mr Herrmann said of the valuation reports:

> "when you look at the data or the absence of data and the reasoning or the absence of reasoning and you consider that they differ by a factor of 350 per cent in the impact of getting a licence in terms of how much value is not recovered, then you have to say to yourself: can I rely on this in making a decision to settle our lawsuit?"

However, the surveyors' views on the extent to which the value of 37 Ovington Square would be increased by a licence differed very little; the views they expressed should not have been regarded as startling; no expert had expressed a contrary view; and the Herrmanns did not seek a further opinion. In the circumstances, I do not think the conclusions reached by Bishop Beamish and Cluttons could be reasonably disregarded;

ii) Of course, the Garden Committee did not offer the Herrmanns an 80-year licence that could be assigned to occupiers. Pemberton Greenish's letter of 13 May 2009 proposed the grant of a 50-year licence for the Herrmanns and "their successors in title to the freehold of 37 Ovington Square". The likelihood is, however, that the Herrmanns could have secured an 80-year licence assignable to occupiers. Mr Barham confirmed that the difference between a 50-year term and one of 80 years would not have been important to the Garden Committee (see paragraph 58 above), and Mr Barham had referred to 80-year licences when speaking to Mr Sear on 23 January 2009 (see paragraph 40 above). Thring Townsend's letter of 14 July 2009 was understandably seen as "leav[ing] little room for further serious discussions" (see paragraph 58 above); as Pemberton Greenish said in their reply, the offer contained in Thring Townsend's letter was rejected because the amount the Herrmanns were prepared to pay was "substantially below the figure that our client has indicated the Committee might accept". Had the Herrmanns appeared more receptive to its overtures, the Garden Committee would probably, I think, have been willing to grant a licence that would be for 80 years and assignable to occupiers;

iii) As well as being much less than the likely uplift in the value of 37 Ovington Square, the £25,000 for which the Garden Committee was prepared to grant a licence was, when compared with the price at which the Herrmanns had bought the property, a relatively small sum. It was also far less than the costs the Herrmanns stood to incur in contested litigation. In fact, it was foreseeable that the Herrmanns could find themselves unable to recover costs of upwards of £25,000 even if ultimately successful in such litigation;

iv) One of the justifications advanced for not pursuing the offer of a licence was that the Herrmanns were optimistic that they would be successful in establishing that 37 Ovington Square had the benefit of rights under the 1851

Act. While, however, the Herrmanns may (like Miss Copestake) have thought that their property was probably within the scope of the 1851 Act, I do not think they were reasonably entitled to regard it as a foregone conclusion. The very matters that the Herrmanns rely on in support of their allegation that Withers were negligent indicate that the Herrmanns ought reasonably to have appreciated that there was real doubt about the construction of the 1851 Act. There is, moreover, no evidence that the Herrmanns' legal advisers advised that they were *bound* to succeed in their claim to have a right of access under the 1851 Act. The fact that Mr Sear of Thring Townsend gave the impression that he thought Pemberton Greenish's offer of January 2009 a reasonable one (see paragraph 41 above) tends to suggest that the Herrmanns' lawyers did not think that they would necessarily win;

v) The Herrmanns' counter-proposal none the less involved paying no more than they would have had to pay with a right of access under the 1851 Act. As Thring Townsend said in their letter of 19 May 2009, the Herrmanns were prepared to pay "the capitalised equivalent of what they would have to pay by way of additional Council Tax" (see paragraph 50 above; see also paragraph 56). In effect, the Herrmanns were offering nothing at all in respect of the chance that 37 Ovington Square did not enjoy a statutory right of access. That was not, in the circumstances, a reasonable approach. The Herrmanns evidently felt that it would be "fundamentally unfair" for them to be required to pay so much more than other users of the Garden, but (a) the Herrmanns' position differed significantly from that of users as to whom there was no doubt but that they had statutory rights of access and (b) the figure put forward by the Garden Committee was only £25,000;

vi) Mr Herrmann explained that he had thought it implicit in the Garden Committee's proposals that they would have to renounce any claim under the 1851 Act. However, he accepted that it was not clear that that was the case, and he and his wife never seem to have thought it worth investigating the point; they did not, for example, take any steps to establish the views of the Garden Committee or, perhaps more importantly, the Borough. For my part, I find it difficult to see that the Herrmanns would have been required to give up their claim under the 1851 Act;

vii) The Herrmanns appear to have felt that, if they used the Garden pursuant to a licence rather than the 1851 Act, they would have a second-class status. However, it is difficult to see that the differences between a licence and a statutory entitlement were likely to be of much practical importance. In any case, I cannot see that the differences were such as could have justified the Herrmanns in declining to pursue a licence capable of increasing the value of their property by so much. Moreover, as I have already indicated, I do not think the Herrmanns had a stark choice between fighting to establish a right under the 1851 Act and accepting a licence; they could potentially have done both.

viii) Another point made on the Herrmanns' behalf was that Withers had not provided any assistance or guidance in relation to their proceedings against the Borough and the Garden Committee. To my mind, however, there is nothing in this point. Apart from anything else, Withers were neither given access to all

the advice the Herrmanns were receiving nor even informed of the Garden Committee's proposals.

83. Mr Seitler queried whether the Herrmanns would have been granted a valid licence even if they had accepted the Garden Committee's proposals, which, in evidence, Mrs Herrmann described as a "contingent nothing". In my view, however, it is very likely that the full Garden Committee would have endorsed the grant of a licence; I found Mr Wainwright's evidence to this effect (see paragraph 48 above) convincing. Further, it seems to me that, had agreement been reached on the grant of a licence, the parties would have focused on, and ensured compliance with, the procedural requirements for such a grant.

84. In short, I consider that the Herrmanns ought reasonably to have pursued the Garden Committee's proposals and that, had they done so, they would probably have been granted a 50-year licence for £25,000.

85. I further consider that, had they so wished, the Herrmanns could probably have obtained, albeit perhaps at some additional cost, an 80-year licence capable of being assigned to occupiers as well as owners.

Quantum issues

Introduction

86. My conclusions on mitigation have considerable implications for the assessment of damages.

87. Mr Seitler said that, were I to conclude that the Herrmanns should have pursued the Garden Committee's proposals and that, had they done so, a licence would have been granted for £25,000, damages of the order of £300,000 should be awarded. The damages ought, Mr Seitler argued, to include the following:

    i) The £25,000 the Herrmanns would have paid for the licence;

    ii) £135,000 in respect of the difference between the value of 37 Ovington Square in May 2009 with a statutory right and its value with a licence;

    iii) £28,000 in respect of interest paid/forgone on the additional £135,000;

    iv) £5,400 in respect of the stamp duty attributable to the additional £135,000;

    v) £55,906.28 in respect of Thring Townsend's fees up to 31 May 2009;

    vi) The legal costs which would have been incurred in relation to negotiating and agreeing the licence;

    vii) Damages for loss of amenity and enjoyment, anxiety and disappointment.

88. In contrast, Mr Pooles suggested that the damages awarded should comprise the following:

i) £50,000 in respect of the difference between the value of 37 Ovington Square with a statutory right and its value with a licence. As I understand it, half of this sum can be attributed to the £25,000 that the Herrmanns would have had to pay for the licence[1];

ii) Compensation for interest paid/forgone on that £50,000;

iii) £2,000 in respect of the stamp duty attributable to the £50,000;

iv) Reasonable costs (which could not exceed £55,000) of the litigation with the Borough and the Garden Committee up to the date the licence would have been granted.

89. The main questions in this context are thus these:

i) Should the damages take account of legal costs that the Herrmanns would have incurred in connection with the grant of a licence but, no licence having been granted, have not in fact incurred?

ii) What was the difference between the value of 37 Ovington Square with a statutory right and its value with a licence?

iii) How far are the Herrmanns entitled to recover the £55,906.28 they had incurred in respect of Thring Townsend's fees by the end of May 2009?

iv) What (if any) damages should be awarded in respect of loss of amenity and enjoyment, anxiety and disappointment?

Legal costs that would have been incurred in connection with the grant of a licence

90. As I have mentioned, Mr Seitler maintained that the damages awarded should take account of the legal costs which the Herrmanns would have incurred in relation to negotiating and agreeing a licence with the Garden Committee. Mr Pooles' position was to the contrary. He summarised his argument pithily in these terms:

> "failure to mitigate precludes recovery of losses that would otherwise not have been incurred; it does not create a new head of loss for costs which ought to have been incurred but weren't".

91. On this aspect, I agree with Mr Seitler. It seems to me that, in determining the damages, I should have regard to all the costs (both the £25,000 for the licence itself and relevant legal costs) that the Herrmanns would have incurred had they mitigated by taking a licence.

92. Where a claimant has failed to mitigate, he is not entitled to recover more than the loss he would have sustained had he done so. The extent to which he is compensated for the loss he has suffered is reduced because, had he mitigated, there would have

[1] Schedule C to the experts' statement of agreement and disagreement shows that Mr Lee put the reduction in the value of 37 Ovington Square with a 50-year licence at £25,000. The balance of the £50,000 figure will represent the cost of the licence.

been less loss. He may or may not have incurred loss in quite the way he would have done had he mitigated; that is immaterial. It is not a matter of compensating for "costs which ought to have been incurred but weren't" but of limiting the damages he receives for the (larger) loss he has in fact sustained. He is compensated for loss he has suffered, but only up to the amount of loss he would have suffered had he mitigated.

93. An example may help. Suppose that the victim of a wrong stands to suffer loss of £100,000 but could readily avoid that loss by spending £75,000. If he unreasonably fails to do so, and so loses the £100,000, he can be held responsible for increasing his loss by £25,000 (£100,000 less £75,000), but he should receive damages of £75,000. It could not be right for him to be denied damages altogether.

94. In the circumstances, it appears to me that the damages awarded to the Herrmanns should take account of the legal costs which would have been incurred in relation to negotiating and agreeing the licence. It is reasonable to estimate those costs at £10,000.

Difference between the value of 37 Ovington Square with a statutory right and its value with a licence

95. The experts, Mr Adams-Cairns and Mr Lee, found common ground in relation to what 37 Ovington Square would have been worth had it qualified for rights under the 1851 Act. They agreed that, with the benefit of such rights, the property would have been worth £6.8 million when the Herrmanns bought it in 2008, £6 million in May 2009 and £7.8 million by late 2011.

96. Mr Adams-Cairns and Mr Lee were also at one in considering that it is not easy to determine the extent to which the value of 37 Ovington Square was reduced by the fact that it does not enjoy rights under the 1851 Act. They agreed, in particular, that a conventional comparables-based approach is not very helpful. They explained in the statement of agreement and disagreement that they prepared that the conventional approach alone "does not provide sufficiently reliable or compelling evidence to identify with any precision the difference between the values of houses with or without statutory or perpetual rights of access to Ovington Square".

97. Mr Lee sought a way forward in evidence relating to transactions involving the purchase of garden rights. In his report, he expressed the view that "the actual cost of obtaining … rights of access to various communal gardens by properties in the vicinity which did not previously have any such rights, is far more compelling as evidence than … comparing sales evidence of actual property sales, with or without communal gardens access". He concluded that "a deduction of 1.5% off the April 2008 value of £6.8m is the maximum that could be justified". Having regard to, among other things, the fact that a "sum of £100,000 should be sufficient for obtaining access to the far lovelier communal gardens of Lennox Gardens" (which are a few minutes' walk to the south-east of 37 Ovington Square), Mr Lee put the cost that should be deducted at £50,000.

98. Mr Adams-Cairns took issue with Mr Lee's approach. He stressed that cost and value cannot be equated and said that he did not think that someone purchasing 37 Ovington Square would have considered the possibility of buying a licence to use the Garden.

Mr Adams-Cairns observed that he had never seen a set of sales details for a property saying:

> "This property does not enjoy the rights of access to the key gardens. However, they can be purchased by approaching the local garden committee".

99. To my mind, there is considerable force in Mr Adams-Cairns' points. In the circumstances, I do not think Mr Lee's approach of itself provides a reliable guide to the extent to which the value of 37 Ovington Square has been reduced because it lacks garden rights. It would be going too far, however, to say that the garden rights transactions are irrelevant. They provide some indication of the value that people put on garden rights.

100. For his part, Mr Adams-Cairns based himself largely on "opinions in the market place with regards to percentages and the reality of the market place in terms of the discount from market value which could probably have been negotiated by a willing buyer, from a willing seller … for the lack of a statutory access". He said of the Bishop Beamish and Cluttons reports (paragraphs 53-55 above):

> "Both valuers appear to have arrived at their conclusions by a forensic analysis of valuation data from comparable properties. … [M]y opinion remains that the data does not stand up to close professional scrutiny of this type and, whilst I believe that they do represent their professional opinion, I would accordingly suggest that the percentages arrived at are based, perhaps unconsciously, more on gut feeling and general intuition".

He concluded:

> "The consensus of opinion between valuers in the market place would appear to be between 5% and 10% and, in my view, a figure at this higher end is justified both with regard to the state of the market and the likelihood that a purchase at such a discount could have been negotiated".

He therefore put the value of 37 Ovington Square in April 2008 at £6.1 million, £700,000 lower than the £6.8 million that the Herrmanns paid.

101. Mr Lee criticised Mr Adams-Cairns' approach as "pure speculation and conjecture". He also said that he considered the 10% deduction espoused by Mr Adams-Cairns "grossly excessive".

102. Notwithstanding Mr Lee's points (which are by no means without substance), it seems to me that, for want of anything better, I should take Mr Adams-Cairns' approach as a starting-point. I have not, however, been persuaded that the reduction in value of 37 Ovington Square was (as Mr Adams-Cairns suggested) at the "higher end" of his 5-10% range. It is to be remembered that, even had it been within the ambit of the 1851 Act, 37 Ovington Square would have had neither a garden of its own nor a real view of the Garden. It appears from the evidence, moreover, that the

Garden is rather less appealing than, say, the garden in Lennox Gardens. It is noteworthy too that Cluttons took the view that access to the Garden probably affected the value of 37 Ovington Square by about 5% (and even the less-considered Bishop Beamish report only put the reduction at 7.5%). Further, the garden right transactions to which Mr Lee referred tend to cast doubt on whether a purchaser of 37 Ovington Square would have been willing to pay as much as £700,000 extra for a statutory right to use the Garden. In all the circumstances, I consider that the absence of any right to use the Garden reduced the value of 37 Ovington Square at the time the Herrmanns bought it by some 5% (or £340,000).

103. On the assumption that the lack of garden rights had diminished the value of 37 Ovington Square by £700,000, Mr Adams-Cairns calculated that, had a 50-year licence been obtained, the property would have been worth £135,000 less than if it had had the benefit of rights under the 1851 Act. Since I have concluded that the value of the property without any garden rights would have been cut by £340,000 rather than £700,000, Mr Adams-Cairns' logic suggests that, if the Herrmanns had been granted a 50-year licence, the property would have been worth about £65,000 (i.e. £340,000 multiplied by 135,000/700,000) less than with a statutory right.

104. In the circumstances, I consider that I should award damages of £65,000 in respect of the difference between the value of 37 Ovington Square with a statutory right and its value with a 50-year licence.

Thring Townend's fees up to the end of May 2009

105. The damages awarded for a wrong can potentially, of course, take account of expenses that the claimant has incurred in attempting to mitigate his loss. The principle is summarised in these terms in McGregor on Damages (18th. edition) (at paragraph 7-005):

> "where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss".

106. In the present case, it was plainly reasonable for the Herrmanns to instruct Thrings Townsend to advise them in relation to access to the Garden. In general terms, it seems fair to regard the costs of employing Thring Townsend (and Mr Harpum) up to the end of May 2009 as attributable to Withers' negligence.

107. However, there is an issue between the parties as to whether the Thring Townsend costs should be subject to assessment on the standard basis. Mr Pooles contended that they should. Mr Seitler, in contrast, submitted that costs should be paid on the indemnity basis.

108. Before the 1980s, it was well-established that, if the victim of a wrong had reasonably incurred legal costs in previous proceedings against third parties, he could recover the costs as damages to the extent that he was unable to recover them from another party

to those proceedings (see McGregor on Damages, 18th. edition, at paragraphs 17-002 and 17-003). In *Pearce v European Reinsurance Consultants and Run-Off Ltd* [2005] EWHC 1493, [2006] PNLR 8, Hart J explained (at paragraph 23):

> "At one time the rule clearly was that where costs incurred by a claimant incurred in other proceedings are recoverable in damages the amount recoverable would be his costs taxed as between solicitor and client less his costs taxed as between party and party recovered by him in the earlier proceedings".

109. In 1986, however, changes were made in the rules relating to the taxation of costs. One of the bases of taxation mentioned by Hart J (party and party) ceased to exist, and standard costs were introduced. As is explained in McGregor (at paragraph 17-004):

> "The then RSC Ord.62 on costs was entirely recast to enable the successful party in litigation to recover costs either on what was termed the standard basis, which allows costs reasonably incurred and reasonable in amount, or on what was termed the indemnity basis, which allows costs except where unreasonable in amount or unreasonably incurred, standard costs being the norm in civil litigation".

110. In *The Tiburon* [1992] 2 Lloyd's Rep. 26, the Court of Appeal observed that the standard basis of taxation provided for the recovery of all costs shown to have been reasonably incurred. Parker LJ said:

> "[P]arty and party costs only permitted the recovery of costs necessarily incurred and there was a wide margin between such costs and costs reasonably incurred. This difference has now been alleviated and enables the successful party who is awarded costs on a standard basis to recover a reasonable amount in respect of all costs reasonably incurred. The only difference between that and the indemnity basis being that on the standard basis the burden of proof is upon the receiving party, whereas on the indemnity basis the burden is upon the paying party."

Scott LJ said:

> "The standard basis formula … corresponds closely, in my opinion, to the yardstick that would have to be applied to a contractual or tortious damages claim".

111. The implications of the 1986 rule changes for the assessment of costs claimed as damages were considered in *British Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] PNLR 523. In that case, the plaintiffs had incurred legal fees in attempting to mitigate loss caused by negligence on the part of the defendant solicitors. Carnwath J decided that, to the extent that the sums related to litigation, the plaintiffs were entitled to no more than would be recoverable on the standard basis of taxation. Carnwath J summarised his conclusions as follows (at 552-553):

> "The expenditure on the professional fees of solicitors … was, as I have held, expenditure incurred by the plaintiffs in reasonably mitigating their loss. Prima facie therefore, it is claimable under the ordinary rules relating to mitigation. However, litigation costs have traditionally been subject to special rules for policy reasons. Prior to the change in the taxation rules there was an established distinction between such costs incurred in proceedings between the same parties, and those incurred in proceedings against third parties. This was anomalous, given that similar policy considerations applied in each case. The most recent cases show that the position must be re-considered in the light of the changes to the taxation rules. This enables the anomaly to be resolved. Under the new dispensation, taxation on the standard basis is to be regarded as equivalent to the solicitor and client basis referred to by McGregor [on Damages]. Accordingly, where costs on the standard basis have been recovered from the defendant in other proceedings, there is no basis for an additional claim by way of damages".

112. *British Racing Drivers' Club Ltd v Hextall Erskine & Co* has been followed on a number of occasions. Evans-Lombe J did so "willingly" in *Mahme Trust Reg v Lloyds TSB Bank plc* [2006] EWHC 1321 (Ch) (see paragraph 68). Certain other judges have considered that they should follow the *British Racing Drivers' Club* decision as a matter of comity, but have expressed doubts about it. In *Yudt v Leonard Ross & Craig* (1998) 1 ITELR 531, for example, Ferris J said that he was impressed by criticism of the case in McGregor on Damages (see 584). In *Dadourian Group International Inc v Simms* [2007] EWHC 454 (Ch), Warren J said this (at paragraph 38):

> "Like Ferris J, I see considerable force in some, at least, of the criticism of *British Racing Drivers Club Ltd* in *McGregor*. There are serious policy issues here which would benefit from consideration by a higher court. For my part, were this a case on the ordinary measure of damages where foreseeability was in issue, I would follow Carnwath J, and the other judges who have felt constrained to follow him. I would not do so, however, with the same enthusiasm as did Evans-Lombe J".

113. By the date of the *Dadourian* case, the Civil Procedure Rules had been introduced and, with them, significant changes in the rules relating to costs. In particular, standard costs must now be "proportionate" as well as reasonable. This is apparent from CPR 44.4(2), which is in these terms:

> "Where the amount of costs is to be assessed on the standard basis, the court will-
>
> (a) only allow costs which are proportionate to the matters in issue; and

> (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party".

In contrast, where costs are assessed on the indemnity basis, "the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party" (see CPR 44.4(3)).

114. In *National Westminster Bank plc v Rabobank Nederland (No 3)* [2007] EWHC 3163 (Comm), [2008] 1 All ER (Comm) 266, Sir Anthony Colman expressed the view that the changes to the costs rules had undermined *British Racing Drivers' Club Ltd v Hextall Erskine & Co* and the cases following it. The introduction of the component of proportionality into the definition of the standard basis had, he said, called into question the "conceptual basis" of the cases (paragraph 19). He observed that, since "the concept of costs proportionately incurred and proportionate in amount is distinct from the concept of costs reasonably incurred and reasonable in amount", "costs reasonably incurred and reasonable in amount may not be proportionately incurred or proportionate in amount" (paragraph 19). In the same vein, he said this (in paragraph 26):

> "The component of proportionality in the standard costs basis of assessment clearly introduces discretionary elements of assessment which are to be superimposed on the reasonableness tests and therefore may be extraneous to the failure to mitigate tests. They operate to reduce recoverable costs by reference to CPR policy considerations which are not necessarily relevant to the failure to mitigate tests. The introduction of this component, in my judgment, displaces the basis of the argument in *The Tiburon* [1992] 2 Lloyd's Rep 26, *Lonrho plc v Fayed* (*No 5*) [1994] 1 All ER 188, [1993] 1 WLR 1489 and the *British Racing Drivers' Club* case that there was substantial equivalence between the standard basis and the indemnity basis of assessment".

Sir Anthony Colman also expressed "serious doubt" as to whether the reasoning in *British Racing Drivers' Club Ltd v Hextall Erskine & Co* could be supported on public policy grounds (paragraph 25).

115. As Warren J said in *Dadourian*, there are issues here which would benefit from consideration by a higher Court. However, I have myself been persuaded that the approach that Carnwath J adopted in *British Racing Drivers' Club Ltd v Hextall Erskine & Co* is no longer appropriate. I agree with Sir Anthony Colman that the changes to standard basis costs are significant. They mean that such costs do not correspond as closely to "the yardstick that would have to be applied to a contractual or tortious damages claim" as they did when *The Tiburon* was decided. It can no longer be said (as Parker LJ did in *The Tiburon*) that the "only difference" between the standard basis and the indemnity basis is that "on the standard basis the burden of proof is upon the receiving party, whereas on the indemnity basis the burden is upon the paying party". Nowadays, costs will not necessarily be recoverable on the standard basis even if shown to have been reasonably incurred. That result is not fully consistent with the general principle that a claimant can recover for losses and

expenses reasonably incurred when trying to mitigate. Further, it is not apparent to me that there is a sufficient basis in public policy for continuing to restrict a claimant to standard costs. As McGregor observes, "[t]here is nothing anomalous in allowing the now claimant, provided he has acted reasonably, to be made whole in relation to the action into which he has been forced by the now defendant's breach of contract of tort" (paragraph 17-019); "Lord Blackburn's age-old principle" is to the effect that "the party suffering the wrong is to be put into the position he would have been in had he not suffered the wrong".

116. In the circumstances, I accept Mr Seitler's submission that the relevant costs should be paid on the indemnity basis.

Damages for loss of amenity and enjoyment, anxiety and disappointment

117. Among the matters for which the Herrmanns seek damages are loss of amenity and enjoyment, anxiety and disappointment. Mr Seitler suggested that a suitable sum to award in this respect would be £50,000.

118. A much-cited summary of the circumstances in which damages can be awarded for distress and inconvenience is to be found in the judgment of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421. The relevant passage of Bingham LJ's judgment (at 1445) reads as follows:

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.
>
> But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.
>
> In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained …".

119. The availability of damages for distress and inconvenience was considered by the House of Lords in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732. The plaintiff in that case had instructed the defendant, a surveyor, when he was considering the

purchase of a house some 15 miles from Gatwick Airport. The plaintiff had specifically asked the defendant to investigate whether the property would be affected by aircraft noise and had been advised that it would not. The plaintiff proceeded with the purchase on that basis. The reality, however, was that there was aircraft noise. The defendant had been negligent.

120. The trial judge found that the plaintiff had paid no more for the property than its open market value after taking account of aircraft noise. He therefore declined to award any damages for diminution in value. However, he made an award of £10,000 for what he described as the discomfort that had been sustained by the plaintiff.

121. The House of Lords upheld the judge's decision. Lord Steyn explained (at paragraph 24) that damages can be awarded "if a major or important object of the contract is to give pleasure, relaxation or peace of mind"; there is no requirement that that should be the sole or entire object of the contract. The case before the House of Lords was of that kind: it was to be "approached on the basis that the surveyor's obligation to investigate aircraft noise was a major or important part of the contract between him and the plaintiff" (paragraph 18).

122. Lord Steyn noted (again at paragraph 18) that the plaintiff's claim was "not for injured feelings caused by the breach of contract", but "for damages flowing from the surveyor's failure to investigate and report, thereby depriving the buyer of the chance of making an informed choice whether or not to buy resulting in mental distress and disappointment". In similar vein, Lord Clyde said (at paragraph 40):

> "[D]isappointment merely at the fact that the contract has been breached is not a proper ground for an award. The mere fact of the loss of a bargain should not be the subject of compensation. But that is not the kind of claim which the plaintiff is making here. What he is seeking is damages for the inconvenience of the noise, the invasion of the peace and quiet which he expected the property to possess and the diminution in his use and enjoyment of the property on account of the aircraft noise".

123. It was stressed in the House of Lords that awards of this type should be modest: see paragraphs 28 and 110. Lord Steyn said that the £10,000 awarded by the trial judge was "at the very top end of what could possibly be regarded as appropriate damages" (paragraph 28), and Lord Scott of Foscote expressed the view that "£10,000 may have been on the high side" (paragraph 110). Lord Hutton said that "on first impression the award of £10,000 damages appears to be a very high one", but noted that "this is a very unusual case where the inconvenience and discomfort caused to the plaintiff will continue" (paragraph 61).

124. In the present case, Mr Pooles argued that there could be no question of damages being awarded on *Farley v Skinner* principles because the Herrmanns' retainer of Withers was a financial transaction. On the other hand, Mr Seitler pointed out that Miss Copestake had accepted in cross-examination that the Herrmanns were buying a home for their personal comfort and enjoyment. Further, Miss Copestake recognised that the Garden was important and thought that a garden would be of importance to anyone buying a property in a garden square (see paragraph 28 above). More than that, the likelihood is that the Herrmanns told Miss Copestake that the Garden was

important to them (see paragraph 27 above). In the circumstances, it seems to me on balance that "a major or important object" of the Herrmanns' contract with Withers was "to give pleasure, relaxation or peace of mind".

125. Of course, Withers cannot be held responsible for the fact that 37 Ovington Square does not enjoy access to the Garden. That is not a consequence of their negligence. However, it is fair to assume that, had Withers not been negligent, the Herrmanns would have bought a different property which had access to a garden. Withers' negligence thus meant not only that the Herrmanns suffered the disappointment of finding that they could not use the Garden but that they lost the chance to enjoy a garden elsewhere.

126. Mr Pooles submitted that such matters would be sufficiently compensated by awarding damages for the diminution in the value of 37 Ovington Square. The fact that 37 Ovington Square does not enjoy access to the Garden is, Mr Pooles said, reflected in its value. An award by reference to the property's value would thus compensate the Herrmanns for loss of amenity.

127. Mr Pooles' submission is consistent with an observation made by Lord Scott in *Farley v Skinner*. He said (at paragraph 109):

> "I would add that if there had been an appreciable reduction in the market value of the property caused by the aircraft noise, Mr Farley could not have recovered both that difference in value and damages for discomfort. To allow both would allow double recovery for the same item".

This comment was, however, obiter, and it is described in McGregor on Damages as "dubious" (see paragraph 3-026). McGregor on Damages goes on to say this:

> "Allowing both [i.e. difference in value and damages for discomfort] would surely not be double recovery as [Lord Scott] suggests; pecuniary loss and non-pecuniary loss lead to two separate and distinct recoveries. Lord Scott might be right in a *Ruxley*[2] situation where the non-pecuniary award may be considered to be dependent upon the non-existence of a pecuniary one but in *Farley* the discomfort and distress caused by the excessive noise was completely independent of its effect upon the market value of the property".

128. For my part, I find the comments in McGregor on Damages persuasive. The Herrmanns' non-pecuniary loss is, as it seems to me, distinct from the reduction in the value of 37 Ovington Square. The loss of value would have affected the Herrmanns regardless of whether they had been buying it as a home. They would have been entitled to be compensated for it even if 37 Ovington Square had been acquired as an investment. Since, however, the Herrmanns purchased 37 Ovington Square to live there, they have also suffered non-pecuniary loss. This loss has to be additional to the diminution in value.

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[2] This is a reference to *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

129. In the circumstances, I have concluded that I should award damages for loss of amenity and disappointment. On the other hand, I do not think I should award anything like the £50,000 suggested. As already mentioned, it is apparent from *Farley v Skinner* that awards should be modest. Relatively small sums have, moreover, been awarded in respect of matters at least as serious as the loss of amenity and disappointment the Herrmanns have experienced: see e.g. Jackson & Powell on Professional Liability (7th. edition), at paragraph 10-203. Further, the Herrmanns would have gained access to the Garden in 2009 but for their failure to mitigate.

130. The appropriate award is, in my judgment, £2,000.

Other losses

131. In the light of what I have said above, it appears to me that the Herrmanns are also entitled to damages in respect of the following:

    i) The £25,000 the Herrmanns would have paid for the licence;

    ii) £2,600 in respect of the stamp duty attributable to the additional £65,000; and

    iii) Interest paid/forgone on the additional £65,000.

Miscellaneous points

132. During submissions, there was some discussion as to whether it would have been reasonable for the Herrmanns to continue with their litigation against the Garden Committee, or at least the Borough, even if they had been granted a licence to use the Garden. I do not think it would. Not only would the proposed 50-year licence have made up to a great extent for the absence of rights under the 1851 Act, but, as I have already said, the Herrmanns could without exposing themselves to the risks and expense of litigation have obtained an 80-year licence capable of being assigned to occupiers as well as owners.

133. A second point relates to the availability of access to a garden now. It is by no means clear that the Garden Committee would still be willing to grant the Herrmanns a licence to use the Garden. On the other hand, the evidence suggests that, if they wished, the Herrmanns could purchase access to the (more attractive) garden in Lennox Gardens for no more than about £100,000-£150,000.

Conclusion

134. In short, the Herrmanns are, in my judgment, entitled to the following:

    i) Damages of £104,600 in respect of the £25,000 the Herrmanns would have had to pay for a 50-year licence, legal costs which would have been incurred in relation to negotiating and agreeing the licence (£10,000), the residual reduction in the value of 37 Ovington Square (£65,000), stamp duty attributable to the £65,000 (£2,600) and loss of amenity and enjoyment, anxiety and disappointment (£2,000);

    ii) Damages for interest paid/forgone on the £65,000;

iii) Thring Townsend's costs up to 31 May 2009 on the indemnity basis; and

iv) Appropriate statutory interest.