

IN THE CENTRAL LONDON COUNTY COURT
TECHNOLOGY & CONSTRUCTION COURT

Claim No. TCC 06012

Before: HHJ Bailey

Between:

- (1) MR HARRIS RAPHAEL
- (2) MRS VICTORIA JANE RAPHAEL
- (3) MR MERVYN JAMES GILL-DOUGHERTY
- (4) MRS JUDITH PAULINE GILL-DOUGHERTY
- (5) SALLY JEAN NICHOLAS

Claimants

- and -

LONDON BOROUGH OF BRENT

Defendant

Final / JUDGMENT

1. This is a 'tree-roots' case. It concerns the residential property 153 Brondesbury Park, London NW2 5JL ('the Property'). The Property is presently owned by the Third, Fourth and Fifth Claimants, who acquired it on 22nd August 2002. Previously it had been owned by the First and Second Claimants. It is asserted that the Property has been damaged by the action of the roots of a plane tree ('the Tree') which is situated on the Defendant's footpath some 9 metres away from the Property. Such claim as the First and Second Claimants may have had in respect of the Tree has been assigned to the Third, Fourth and Fifth Claimants. The court need not therefore be concerned with this change in ownership. There is no issue as to the ownership of and responsibility for the Tree. It is the Defendant's tree.
2. The Claimants' claim is brought both in nuisance and negligence. Before I turn to the facts of the case I remind myself, briefly, of the relevant law. Traditionally tree-root claims are more naturally brought in nuisance than in negligence. However, since the decision of the House of Lords in *Delaware Mansions Ltd. v Westminster City Council* [2001] UKHL 55 [2002] 1 AC 321 there is little to distinguish these causes of action in this context. Both torts involve the application of the concepts of reasonableness between neighbours and reasonable foreseeability. To succeed in their claim the Claimants must establish that:
 - (1) the activity of the Tree by the encroachment of roots, whether directly through penetration or indirectly through the extraction of moisture from the soil

caused or materially contributed to damage to the Property, *Loftus-Brigham v London Borough of Ealing* [2003] EWCA Civ 1490 at [24]

- (2) it was reasonably foreseeable on the part of the Defendant that there was a real risk of damage to the Property through the encroachment of roots from the Tree, *Delaware Mansions Ltd. v Westminster City Council* [2002] 1 AC 321, at [33]
 - (3) the Claimants have suffered damage recoverable in law.
3. As much for the sake of completeness than to resolve any issue taken at trial I note also the following principles applicable in tree-root cases:
- (4) The fact that a Defendant has taken reasonable precautions to prevent or minimise the risk will not of itself exonerate him from liability. Where a Defendant can reasonably foresee that there is a real risk of damage to the Claimant's property from the encroachment of his tree roots, allowing the tree to remain without taking such steps as ensure that its roots will not cause damage to the Claimant is not a reasonable use by the Defendant of his land. The Defendant will accordingly be liable for damage sustained by the Claimant however reasonable the precautions he in fact takes may seem to the outside observer, *Cambridge Water Co Ltd. v Eastern Counties Leather plc*, [1994] 2 AC 264, 300
 - (5) A Defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise, *Solloway v Hampshire County Council* (1981) 79 LGR 449, CA; *Delaware Mansions Ltd. v Westminster City Council* [2002] 1 AC 321, at [34]
 - (6) As in any case in nuisance, or negligence, the Defendant must take his victim as he finds him. It is no defence that the Claimant's property was particularly vulnerable to the effects of the encroachment of the Defendant's tree roots through, for example, the property having shallow foundations, or the presence of other vegetation on the Claimant's property, or on adjoining properties. Where the court concludes that the damage to Claimant's property was caused by a combination of the Defendant's tree and other vegetation, the Defendant will be liable for Claimant's damage unless he can show that the other vegetation would have caused the same damage in the absence of his tree. See eg *Paterson v Humberside CC* The Times 19 April 1995, a decision of Mr. Roger Toulson QC, at p.39 of the transcript.

(1) *Causation*

4. At trial if not on the pleadings the Defendant accepted that there has been damage to the Claimant's property. The primary issue between the parties has been on causation: whether the Tree or other vegetation has been responsible for such damage as the Property has sustained. I have heard 'lay' evidence from the First Claimant and from Mr. Keith Ellis an arboricultural officer in the Defendant's

employ. Mr.Ellis is responsible for the Defendant's highway trees. He was able to give evidence as to the Defendant's system of tree maintenance, a system which has been carried out by independent tree surgeons, Gristwood & Toms. The record keeping by these surgeons is very limited, being restricted to 'verification notices' which inform the Defendant that work has been carried out to particular streets at particular times. Essentially this case turns on the expert evidence, both sides calling both expert engineers and arboriculturalists, notwithstanding the fact that the sum at stake in this case is in the region of £18,000 together with interest.

5. The First and Second Claimants purchased the Property in June 1999. They did not commission any detailed survey on the Property, but there was a Report for Mortgage Purposes [1:54A] which did not suggest that there was any evidence of subsidence or settlement, landslip or heave. Cracks first started appearing, to the Claimants' knowledge, in September 1999. The First and Second Claimants notified their insurers, Direct Line, who appointed structural engineers to undertake investigations. These engineers were Geo-Serve Ltd. whose director, Mr T.J.Freeman has been instructed by the Claimants in these proceedings. Between 13th October 1999 and 17th November 2000 Geo-Serve carried out precise level monitoring at the Property. A summary of the level monitoring results is at 3:744 and forms part of the joint statement of the engineering experts. It is agreed by the expert engineers, Mr.Freeman and Mr.Patrick Austin for the Defendants, that the monitoring recorded seasonal movement (upward in winter and downward in summer) both to the front and the rear of the property. The experts are agreed that 'the seasonal foundation movements to the entire property can be explained by root-induced shrinkage and swelling in a clay sub-soil'.
6. It is evident therefore that the Property has suffered damage both front and back. The Claimants' claim however is only for damage at the front and the front flank wall of the Property. The damage to the rear of the Property has been attributed to two black poplars belonging to a neighbouring property at the rear and forms no part of this claim.
7. Mr.Freeman, the Claimants' expert, is a chartered civil engineer who has specialised in the research and investigation of subsidence damage to domestic property over the past 20 years. He was an impressive witness. He was criticised for not having undertaken a wider range of investigations when he was instructed by Direct Line to consider the damage noticed by the Claimants in the Property in 1999. Mr.Freeman frankly accepted that there were other investigations he might have carried out, in particular the digging of trial pits, but told me that at the time he was instructed Direct Line were concerned only with their potential liability to their insured. Direct Line were not in 1999 thinking in terms of seeking to recover any payments they made under the policy from the Defendants or any other possible tortfeasor. Accordingly Mr.Freeman was not thinking in terms of acquiring evidence for possible court proceedings, merely ensuring that he was in a position to advise Direct Line as to their position under their policy with the Claimants. The investigations he carried out were sufficient for this purpose.
8. In his report dated 12th March 2007, which in the bundles begins at [3:567], Mr.Freeman notes the precise position of the Tree and other vegetation to the front

of the Property, helpfully summarised in a plan at [3:572], and considers the likelihood of damage being caused to the Property by the various plants both by reference to the Cutler & Richardson survey data and the NHBC standards for new buildings in the vicinity of existing trees. Mr. Freeman has taken the foundations of the Property to be 1.4m deep. This depth has been deduced from the depth of the foundations of a neighbouring property of similar design and construction, and has been accepted as the likely depth of foundation by the Defendants' experts. This is matter of some importance. It is common ground between the experts that climatic influences do not extend beyond 1 metre below ground level. Accordingly where a building has foundations of a greater depth, particularly where that depth is another 0.4m, the likely cause for foundation movement will be root induced.

9. In his supplementary report dated 6th November 2007 Mr. Freeman returns to the NHBC guidance from which he extrapolates zones of influence of the Tree and the Cherry tree closer to the Property given the size of the Tree and the Cherry in question. In both reports Mr. Freeman demonstrates that it is perfectly feasible for the Tree to be responsible for the damage sustained to the Property at points 1 to 10 inclusive of the monitoring points, and in the later report the extent to which the Tree may be influencing the foundations of the Property is increased to cover points 11 and 19 in addition to points 1 to 10.
10. In addition to the detailed work set out in his report, which I do not propose to rehearse in this judgment, Mr. Freeman also expressed his opinion based on his experience over 20 years of studying a great many cases of subsidence to domestic property. He told me, with some force, that taking into account the species and the size of the various trees and shrubs to the front of the Property (including neighbouring properties), it was perfectly clear to him that the Tree was a cause of the subsidence to the Property, and was the prime cause of that subsidence. Asked whether roots from the poplars to the rear of the property might be responsible for damage to the front Mr. Freeman said that he could not rule it out. However that the poplar roots were responsible for the front subsidence represented a 1% possibility as opposed to a 99.99% probability that the Tree was responsible.
11. Mr. Austin was a less impressive witness. In his report, which he restricted to points not agreed within the joint statement, he laid some stress on the fact that the monitoring showed that the least degree of movement along the front of the Property was at the corner nearest to the Tree, in comparison with the movement at the centre and left hand side of the Property. He notes that the regular supply of water at the left hand side of the front of the Property from the broken drain is likely to have caused roots to proliferate there, but adds that the Tree 'is distant from this point, and outside its theoretical root influence distance'. The reference to theoretical influence distance is I assume a reference to the Cutler & Richardson data. He also concludes that the bay at the front right of the property did not suffer from subsidence, either in 1999 or subsequently, a conclusion drawn from the absence of external cracking.
12. In cross-examination however Mr. Austin accepted that there was movement clearly affecting the whole of the front of the property, which must include the bay. He also accepted that the Tree could well cause damage beyond the Cutler & Richardson

theoretical influence distance (of 10m.) and accepted that roots from the Tree could be up against the whole of the front of the property. Indeed Mr.Austin went further than that in the course of his evidence. Commenting, quite correctly, that the NHBC guidelines were only guidelines (and indeed guidelines for new building) Mr.Austin stated that in his experience roots can be more extensive (by which I understood him to mean could extend further from the mother tree) than is indicated by the NHBC guidelines. Were it the case that the Tree's roots extended to the left hand front of the Property, and I conclude that it was, the broken drain would have had its effects on the Tree's roots, causing them to proliferate, with the potential for greater differential movement over the seasons notwithstanding the presence of water from the broken drain. There is, of course, no scientific way in which such matters may be assessed, even were trial pits to be dug.

13. Mr.Austin lends his voice to the complaints made by the Defendant that there was no site investigation. It is understandable that the Defendant might feel aggrieved that the fullest range of investigation was not carried out where the evidence which is available does not provide the Defendant with any specific assistance, and there is always the possibility (but never the certainty) that further investigation might tend to weaken the case against the Tree. But while aggrieved feelings as to the lack of further investigation may be understandable, making the point that further investigations might usefully have been carried out does little to advance the Defendant's case or assist the court. If the Claimants are able to shift the burden on them to show the causative effect of the Tree's roots there is nothing to be gained by demonstrating that with different information available to the court a different result might be achieved.
14. Except where detailed analysis can itself be persuasive of one view as opposed to another the court is inevitably reliant on the opinions of the experts. That is after all their function. In the course of his evidence Mr.Austin did make a number of detailed points which might tend to assist the Defendant's case. But on the overall opinion he was prepared to agree with Mr.Freeman. My note is of him saying 'I agree with Mr.Freeman entirely. If you turn up and look at that plane tree (ie the Tree) it is obviously relevant to the subsidence. True, Mr.Austin could find no correlation between the damage to the Property and that which other plane trees in the same road had or had not caused to adjoining property, neither could he account for the absence of external cracking to the Property if the Tree was responsible for the movement to the front of the property. But there was, and can be, no suggestion that all tree root subsidence happens in the same way to all buildings (even similarly designed and constructed buildings) and with the same effect to any particular part of any building which is affected by the subsidence.
15. The Claimant's expert arboriculturalist, Dr. Martin Dobson, prepared a careful and detailed report starting at [3:602]. He comments with some care on the possible extent of the zones of influence of trees and shrubs with reference to both the Kew Root Survey (Cutler & Richardson) and the NHBC guidelines. As he explains in his report it is impossible to predict with any accuracy the extent or pattern of root spread of any particular tree, nor the areas of the soil that it may influence within its root spread. Average figures can be misleading because they will encompass values that are much greater and much smaller than the mean. Dr.Dobson's conclusion is

that it is highly likely that the Tree (possibly in conjunction with other plane trees for which the Defendant is responsible) caused damage to the front elevation of the Property. Independent evidence would be required for any certainty, but while it would have been beneficial had the engineer obtained more site specific data 'I consider that the level monitoring together with the data from site investigations from neighbouring properties (as to which Dr.Dobson comments in some detail in his report) is adequate to remove any doubt that the Plane(s) were the material cause .. of the recorded damage to the front of the Property'. The 'Plane(s)' is a reference to the Tree and another tree which was the responsibility of the Defendant.

16. Dr.Dobson was cross-examined with some care and at some length. He dealt with his questioning well and with due regard to his duty as an expert. He was critical of the Defendant in allowing the Tree, and other planes in Brondesbury Park to grow as high as 15 metres while allowing that at that height damage to neighbouring properties is not inevitable. He was unimpressed with the suggestion that one or more of the shrubs at or near to the Property were responsible for the damage found at the Property, and stated that it was most unlikely that the roots from any of these shrubs might have grown underneath the 1.4m foundations and caused the difference in levels in the centre of the Property. I found him to be a helpful and reliable expert.
17. The Defendant's arboriculturalist, Mr. Jeremy Barrell, submitted a report which suggested a 'compelling case' that the Tree has not made a significant contribution to the damage to the Property. He stresses the following points:
 1. Proximity: the pattern of movement, most extreme at the front left, rules out a significant contribution to the damage by the Tree. This is a matter to which Mr.Barrell suggests that very significant weight should be given.
 2. Climatic factors: he is not able to accept that the foundations at the Property are as deep as 1.4m. He is not impressed with the fact that a neighbouring property of same design and apparently similar construction has such a foundation. Rather he notes that it was common for properties of the age of the Property to have less foundations and 'it could be equally as likely that the foundations are less than 1m in depth, which means that climate could be an influencing factor'.
 3. Closer shrubs. There is closer vegetation than the Tree as appears from Mr.Freeman's plans. The smaller trees and shrubs had the potential, in Mr.Barrell's view of making a significant contribution to localised drying of the soil near the Property. Thus the relative distances of the various trees and shrubs is an important consideration in assessing the potential to contribute to damage and should be given significant weight in any overall analysis.
 4. Size and LAI (Leaf Area Index). Mr.Barrell notes that height is not everything. Crown size and LAI are important, and he takes issue with the suggestion by Dr.Dobson that the Tree had a capacity 10 times greater for soil drying than the smaller trees. Tree size is therefore an important factor, but it

would be misleading to use a 'LAI approach' in isolation from the equally important consideration of distance (proximity).

5. Water demand. Different species have different levels of water demand. Mr.Barrell notes that as a London Plane the Tree has the same water demand classification (moderate) as the cherry, the largest of the smaller trees and shrubs.
 6. Root identification. There has been none. This 'significantly reduces the reliability of implicating adjacent trees with certainty'.
 7. Pruning. The Tree has been pruned by the Defendant, the smaller trees and shrubs have not been pruned at all.
 8. Adjoining properties. Mr.Barrell notes recorded damage to 157 Brondesbury Park and the absence of reliable evidence of other damage, although other complaints have been made. Taken as a whole Mr.Barrell is of the view that there is no significant history of trees causing subsidence damage in the immediate vicinity of the Property.
18. Both in his report and in the manner of his giving evidence I detected a sensitivity to the cases he was making and meeting that did not inspire confidence. The various points I have noted above which Mr.Barrell stresses are plainly matters which require to be considered. But they are all matters well covered and explained by the other experts. Proximity cannot be disregarded but once it is accepted that the Tree had the potential to reach all parts of the front of the property, a proposition which Mr.Barrell accepted, this is surely a factor which ceases to be 'very significant'. Mr.Barrell said in evidence that if the greater movement had been at the middle rather than the left hand side of the Property that would be more consistent with the Tree being responsible, but he had to accept that this observation has less if any force once the leaking drain is taken into consideration. No expert attempted an analysis of the moisturising effect of the leaking drain as compared with the drying effect of the increased quantities of roots which the leaks encouraged. Quite plainly no such analysis is possible. The leaking drain remains a feature however that could readily result in a different pattern of movement to that which might otherwise be expected.
19. As to Mr.Barrell's concern with climatic factors I cannot readily entertain it. True, there is no direct evidence of the depth of the foundation. Further, I accept that it cannot be said that a builder who builds four houses to the same design must necessarily give each of them the same depth of foundation. But the likelihood that he has done so is strong.
20. The closer shrubs and (to a lesser extent given proximity) the smaller trees amount, at the end of the day, to the Defendant's main case in explaining the fact of the damage without involving the Tree. Mr.Barrell, pressed to explain how the shrubs might influence the ground at any point, and particularly beneath the centre of the Property, was disposed to accept that it was unlikely that they could cause damage

to buildings with a 1.4m foundation, but also, later in his evidence, asserted that the roots of shrubs were able to go down as deep as would be necessary to cause the damage. It would, I suspect, be foolhardy to suggest that the roots of elder, euonymus, passion flower (or wisteria) never grow as deep as 1.4 m. But on scales of likelihood the plane is far more likely to produce roots which go this deep.

21. It has not been suggested by any expert that size and LAI should be considered in the absence of proximity, the point with which Mr.Barrell expresses concern. I see no particular merit in this point (size and proximity are both plainly factors to take into account). Neither is there any especial merit in the remaining points raised by Mr.Barrell. The London Plane is known to be a moderate drinker, but its drinking habits will depend to an extent on its size. The experts have taken the size of the trees and shrubs as they have seen them, in the case of Mr.Freeman over most of the period 1999 to date. There has been damage to at least one adjoining property, and very possibly more than one of the adjoining properties have suffered from tree root subsidence. However, great care has to be taken before any conclusion may be safely reached with regard to the Property by reference to damage or absence of damage to other properties. Plane trees are known to cause subsidence damage, and may do so whether they affect all or only one property in any particular street.
22. I see no useful purpose in considering the detailed analysis of the Kew Root Survey or the NHBC guidelines. Neither can offer more than the most general of guidance. Having considered all the evidence adduced by the parties I am quite confident in reaching the conclusion that the roots of the Tree did cause or materially contribute to the damage sustained to the front of the Property, and I so find.

Foreseeability

23. I do not understand the Defendant to argue that it was not foreseeable that the Tree might cause damage to the Property. As is clear from Mr. Ellis' evidence, the Defendant has instituted a programme of maintenance designed to reduce the risk of damage to adjoining properties from trees on the highway. Mr.Ellis graphically described the outrage that some householders express when trees are significantly reduced in size or pollarded. Such complaints have to be endured, with the fortitude necessary for the purpose, in the knowledge that the householder who maintains that he bought his property because it was on an attractive tree lined avenue (or his insurers) will not for the same reason decide to meet the cost of repairing damage from subsidence himself without calling on the Defendant.

Negligence

24. No particular time was taken up at trial focusing specifically on the claim in negligence. As the Claimants succeed in nuisance a finding in negligence is not necessary. To the extent however that I should consider this cause of action I would observe that the Defendant did institute a maintenance programme which they contracted out to independent tree surgeons, Gristwood & Toms. I have no reason to suppose that Gristwood & Toms did not do as they were requested, or that they neglected to prune the Tree when attending to the other trees in Brondesbury Park. I do however accept Dr.Dobson's criticism that the Defendant allowed the plane trees, including the Tree, to grow to an excessive size. On that basis I find for the Claimants in negligence as well as in nuisance.

Damages

25. The Defendant does not dispute that damage was caused, but points are taken on the individual items claimed. The parties' respective cases on damages are summarised in the Scott Schedule. In the event the Third, Fourth and Fifth Claimants carried out an extensive programme of refurbishment works, which incorporated, though necessarily in individual items, the works which form the subject of the Scott Schedule. Both parties are agreed that any damages should be assessed by reference to this schedule.

Scott Schedule

26. 3.1 Rear elevation : Agreed nil

- 3.2 Front and side elevations. £600 claimed.

This item is disputed by the Defendant on the basis that there was no damage to the front elevation, and the 'minor fabric repairs' listed in the Atristor tender amount to ordinary wear and tear. There seems to be merit in these points. The more difficult aspect of this claim is cost of the overhaul of the paving. Mr.Austin accepted that the paving could have required relaying because of subsidence. There is no basis on which I can assess any particular figure for paving. I have to fall back on the civil judge's default position 'Doing the best I can', and on this basis I award half the total sum claimed, **£300.**

- 3.3 Hall : Claim £3,300 ; accepted £3,020.

The item in dispute in 3.3(iii) where the Claimant seeks the cost of easing and re-fitting 6 doors but the Defendant allows for only 2 doors. Mr.Austin said in evidence that he had excluded the doors on the first floor because of the absence of cracking to the walls on that floor. He accepted however that the doors might have stuck without there being cracking apparent and that if they had in fact stuck this would have been attributable to subsidence. Mr.Harris Raphael told me that the first floor doors stuck and I see no reason not to accept his evidence. Accordingly I allow the sum claimed, **£3,300.**

- 3.4 Dining room : Agreed nil

- 3.5 Shower room : Agreed nil

- 3.6 Kitchen : Agreed nil

- 3.7 Study : Claim £1,515 : accepted £1,085

The item in dispute is the cost of easing and adjusting the windows to accommodate the slight distortion in the window openings. Mr.Austin stated that if there was a need to ease and adjust the windows it was the result of flank wall movement which cannot be attributed to subsidence caused by the Tree. The Claimant takes issue with both matters here; the need to ease the windows can be properly attributed to front elevation subsidence and in any

event the flank wall movement may also be attributed to Tree caused subsidence. I prefer the evidence in this respect of Mr.Freeman, and award **£1,515**.

3.8 Front right hand room : Claim £1,395 : accepted £1,085

The item in dispute is the structural crack repairs to the bay. Mr.Freeman notes that this structural damage is recorded in the repair schedule, and is in any event typical of the type of subsidence suffered at the Property. Mr.Austin does not accept that there was any damage. Mr.Austin laid stress on the absence of external cracking. However with properties of this age I am not persuaded that it must necessarily be right to dismiss the evidence of the Repair Schedule, and assert that the only cracking must have been decorative. However the cracking is properly described I am satisfied on the civil standard that the claim for raking out and repairing these cracks with resin is properly made. Accordingly I allow **£1,395**

3.9 Front right hand bedroom : Claim £1,245 : accepted nil

Mr.Austin rejects this claim for the same reason as he rejects the claim under 3.8. For the same reasons as above I allow **£1,245**

3.10 Front left hand bedroom : Claim £1,410 : accepted nil

The dispute over this item arises on the issue of the flank wall. There is a significant crack in the cupboard corner, but the remainder of the room is essentially undamaged. Mr.Austin attributes the damage to there being a lack of restraint in the flank wall. Mr.Freeman, more cogently in my view, suggests that while the lack of flank wall restraint (noted in the bulge in the flank wall) may well have exacerbated any damage, there would have been no damage or tendency to cracking had there not been the subsidence in the first place. It is perfectly understandable that with so little at stake in this litigation there has not been any engineering examination of the flank wall bulge or assessment of any damage that was or might have been caused by the bulge. The result however is that I am dealing with conjecture from the experts. On balance I prefer the evidence of Mr.Freeman and allow **£1,410**

3.11 First floor bathroom : Claim £1,480 : accepted nil

This item is also related to the flank wall issue which I have determined in favour of the Claimants. I therefore allow **£1,480**

3.12 Shower room : Agreed nil

3.13 Rear right hand bedroom : Agreed nil

3.14 Rear left hand bedroom : Agreed nil

3.15 En suite : Agreed nil

3.16 Contingencies : Agreed nil

27. The total cost of the above works which I have allowed amounts to £10,645. To this figure has to be added the appropriate figure for preliminaries, value added tax and contract administration fees. Mr.Montagu-Smith has calculated these at 46.52%, and on the basis that this calculation is correct the total recoverable for the works is £15,597.05.
28. *Fees and investigations*
The Claimant claims and the Defendant accepts a monitoring fee of £822.50 and an initial report fee of £552.25. Two further items are in dispute.
29. The Claimant claims a site investigation fee in the sum of £100 plus vat. There was in fact no site investigation carried out. The claim arises because, on Mr.Freeman's evidence, in 1999 Direct Line insurers arranged for a site investigator to attend every initial investigation. If there was work to do he did it, and if there was not he made a standard charge of £100. This was clearly a convenient working practice and I can well understand why Direct Line should make this kind of arrangement. However I cannot see that it would be right to visit this fee on the Defendant, small as it is, on first principles.
30. The Claimant also claims the sum of £528.75 by way of engineer's fee. The Defendant's objection to this head of claim is that it represents in reality the cost of Mr.Freeman adopting a loss adjuster rôle. Mr.Freeman however gave evidence to the contrary. The duties he described, fairly summarised by counsel as 'updating the homeowner, liaising with the Defendant, management of the investigation and repairs, appear to me to be properly claimed as damages. I allow this sum.
31. The total sum I allow for fees and investigations is therefore £1,903.50.
32. *General Damages*
The Claimants seek general damages for discomfort, inconvenience, and interference with the use of the Property. In principle such claims should be entertained sympathetically. There has perhaps been a feeling in the past that English courts have expected too great a degree of fortitude on the part of citizens whose quality of life has been interfered with by the breach of contract or duty in tort of others. But as these claims go this is the very bottom of the scale. The First Claimant did indeed say that three rooms in the Property became 'inaccessible' because the doors were sticking. What he complained of was this. The doors could all be opened and shut, but with some, as I understood it, moderate difficulty. An adult could come and go as he pleased, but young children could not. Mr and Mrs Raphael were concerned that their young children, aged 3 to 4 years, might become 'trapped' in a room of which the door was sticking.
33. I can understand why parents might be concerned that their young children should not be, effectively, locked into a room. But it is far from clear to me why the room should thus become inaccessible. It is not essential that the door to any room be kept closed while the room is either occupied or unoccupied. I suppose Mr. Raphael may have been envisaging the possibility that his small children could open a door, or go through an open door, and then shut it behind them without themselves being able to open it. But if he was, he did not say so, at least not expressly. It is a

possible but not a likely scenario, and there was no suggestion on the part of Mr.Raphael that this had in fact happened. There is indeed nothing about this problem in Mr.Raphael's witness statement. The matter was introduced in additional examination in chief. Unsurprisingly Mr.Raphael was not pressed about the matter in cross examination. I consider that the appropriate award of general damages under this head should be £100, inclusive of interest.

32. The total recoverable by the Claimant therefore amounts to £17,600.55. Interest on the special damage items, which total £17,500.55, is claimed at 8% pa from the date on which the First and Second Claimants sold the Property to the Third, Fourth and Fifth Claimants, ie 22 August 2002. This appears to be an appropriate date from which to claim interest. The claim to 7 December 2007, ie 1,936 days totals £7,425.77, continuing until payment at the daily rate of £3.84.

HHJ Edward Bailey

14 10 December 2007