Case No: B20CL118

IN THE COUNTY COURT
AT THE MAYOR'S AND CITY OF LONDON COURT

Guildhall Buildings
London, EC2V 5AR

Date: 03/07/2024

Before :

HHJ PARFITT

- -

Between :

IAN MILNE & OTHERS	**Claimants**
- and -	
HAMBRIDGE HOMES LIMITED	**Defendant**

- -
- -

Max Thorowgood (instructed by **South Bank Legal Solicitors**) for the **Claimants**
Michael Paget (instructed by **Judge & Priestly LLP**) for the **Defendant**

Hearing dates: 17 to 19 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 3 July 2024 by circulation to the parties or their representatives. A copy of the judgment is available from the court office.

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HHJ PARFITT

HHJ Parfitt :

Introduction

1. In a corrected judgment dated 3 April 2020 I determined the issues in this case other than what I there described as "the Disturbance Claim". This is my judgment on the Disturbance Claim following a trial starting on 17 June 2024. The background to the claim is set out in the earlier judgment. The Claimants seek damages for nuisance caused by the Defendant's works between November 2013 and the Summer 2015 (there is a certificate of completion dated 23 November 2015 which refers to a completion date of 27 March 2015). The development took place within a rough rectangle formed by four roads and the Claimants' properties had gardens which backed on to the site.

2. *The Claimants*

NAME	PROPERTY	WITNESS STATEMENT
Ms Adelle Martins	27 Wyatt Park Road	Yes
Mr Robert Roach		No
Dr Fiona Clarey	33 Daysbrook Road	Yes
Mr Ian Milne	39 Wyatt Park Road	Yes
Ms Vicky Price		No
Mr Errol Brown	19 Wyatt Park Road	Yes
Ms Maureen Brown		No
Mr Allan Hogg	25 Wyatt Park Road	Yes
Ms Vanessa Hogg		No

3. I have assumed that all of those Claimants had an interest in the relevant property at the relevant time periods so as to be the proper claimant for a case in private nuisance (I understand that Mr Milne and Ms Price were renting and that the others were freehold owners).

4. For convenience I refer to the particular claims by reference to the individual who gave evidence in support of them, so that Ms Martins' claims will be a reference to the claims of Ms Martins and Mr Roach which relate to nuisance caused to 27 Wyatt Park Road.

5. *The Defendant* The Defendant is a developer. Its witnesses were Mr James Overton, who said in his witness statement that he had primary responsibility for the management and supervision of the development site, and Mr Zak Harden who was the site manager from at least the beginning of June 2014.

6. *The Works* In broad terms the works involved an initial period of demolition which began in mid-November 2013 for about three weeks, site clearance and levelling (from about December 2013 / January 2014), foundation digging (on-going as of 9 April 2014), followed by construction, perhaps not completed until the end of 2015 or even later. On 6 June 2014 the rear garden walls of a number of properties on Daysbrook Road collapsed (but not Dr Clarey's at No. 33). This led to additional works of repair and shoring up. There are no claims relevant to the wall collapse brought by these Claimants (Dr Clarey said in evidence that her concerns regarding the same thing

happening to No. 33 kept her out of her garden but this subjective concern is not alleged to be actionable in private nuisance).

7. In this judgment: I set out the parties' respective submissions; address the law (which was substantially agreed); comment on the evidence; make necessary narrative findings; discuss and make my findings on the disputed issues; and, conclude.

8. The parties at trial have been well served by their respective counsel: Mr Thorowgood for the Claimants and Mr Paget for the Defendants. I understand it to have been common ground that if and to the extent that any of the Claimants succeed in their nuisance claims then the court should give express a view as to the quantum of any damage which would then, if necessary, be addressed by further submissions in whatever manner was most convenient.

The Parties' Cases

The Claimants

9. Mr Thorowgood's starting point was that the development works were necessarily likely to give rise to a substantial impact on the enjoyment of the parties' properties: no-one likes to live next door to a building site. Consequently, if the impact of the works was not to be actionable then it was to be expected that the Defendant would satisfy the court that all reasonable steps had been taken to keep those impacts to a minimum. Such steps included keeping to relevant statutory and/or regulatory controls governing the site: this the Defendant failed to do in a number of respects (e.g. by not keeping residents informed of what was going on, in not using water dampening to reduce dust, not keeping to required working hours and not registering the site with the Considerate Constructor's Scheme when they should). All of these pointed to an evidential context where it was more likely than not that the Defendant would have failed to have regard to the due and proper interests of the local residents, such as the Claimants.

10. It was recognised that there was a degree of exaggeration in the evidence of Ms Martins, but this was more an illustration of style rather than lack of substance, particularly when the evidence was supported by photos and videos, including one I was asked to look at, taken by Dr Clarey, who was a careful and particular witness. Mr Hogg was also a good witness, who made a considerable effort to provide evidence of how things appeared to him even through his health difficulties. The cross-examination of Mr Hogg premised on his not having done more while he was incapacitated was both unfair and unrealistic. Mr Brown was an impressive witness who had a clear recollection of works starting before they should have done and the court could also rely on what Mr Brown's wife said to him when he got home from work. Mr Milne, whose property was on the corner of the site, would still have had a good view and be exposed to the relevant nuisances, after a tree was removed in June 2014 even if prior to that the tree might have had an impact.

11. Mr Overton was a poor witness. It was apparent that he failed to do what he said he would do (either as part of the planning process or once complaints started to come in) and appeared to have little or no recollection of significant areas of evidence (such as not being able to say where a required stand pipe might have been located). Mr Harden was a better witness but did not come to the site until June 2014 when the worst of the problems occurred between November 2013 and June 2014.

12. The documents, including the photographs and video, illustrated the nature of the nuisance caused by the works and the careless nature of the Defendant's approach could be seen by their various failures (e.g the late registration; the comments by H & K Safety Services Limited ("HKS"); the issues identified by Frankham Consultancy Group Ltd at a meeting on 25 February 2014; problems identified in the regular clerk of works reports; and, a failure to follow the Mayor of London's best practice guidance for the control of dust and emissions from construction and demolition (in particular the use of water as a dust suppressant).

13. The specifics of the nuisance, suffered by all the Claimants, were: out of hours work and associated vibration and noise nuisance; excessive dust throughout; the shouting and abusive behaviour of site workers; for all those reasons not being able to use the properties' gardens and having to keep windows closed; and, excessively bright lighting directed into the properties, which, among other problems, required children to move bedrooms to allow them to sleep.

The Defendant

14. Mr Paget borrowed a phrase from an email written by a resident from Wavertree Court in praise of the Defendant and submitted to the court that the Claimants were "professional complainers" who were implacably opposed to the development and whose basic approach was to cause trouble by any means necessary.

15. The court was reminded that the Claimants' case must succeed as a matter of private law, but it was telling that the bulk of the Claimants' submissions were directed at possible issues of planning and regulatory breaches in a context where all those regulators and similar bodies had given the development a clean sign-off and no regulatory actions had been taken against the Defendant. The overarching question for a private law claim was whether as a matter of fact and degree over the whole of the development the amenity value of the Claimants' properties had been adversely affected over and above that which would be acceptable applying the reciprocity principle. In essence this was a 500-day development which produced quality homes without significant problems for these Claimants. The Claimants' case was a mirage.

16. The Claimants' witness evidence was flawed and should be attributed little weight: apart from Dr Clarey, the statements appeared to have been written by Ms Martins, who was hopelessly prone to exaggeration. An example was the phrase "human zoo" appearing in all the statements other than Dr Clarey's. The court should look at such complaints as the Claimants made at the time which fail to support substantial nuisance having taken place.

17. There is limited evidence to support the assertions in the statements: given the nature and scale of the works carried out, only a few photographs raise any suggestion of nuisance and none illustrate nuisance from the most invasive period of the works (demolishing and rubble loading). The video shows nothing. The Claimants give excuses for the lack of substantial supporting evidence but these are just that: excuses and do not make good the telling forensic failure. The paucity of the material at trial contrasts with what the Claimants said at the time about recording the wrongs being done to them.

18. The independent checks that were carried out and the actions of the local authority and safety inspectors do not support the theory of a poorly run site causing substantial and actionable interference to neighbours.

19. The allegation about bright lights is a telling example: it is supported by a photograph which properly analysed shows no such thing and there is no other support for it outside of the exaggerated statements. This feeds into the other claims which should also be rejected: there may be some evidence of dust from brick cutting but there is no evidence (statements aside) of this having a significant impact on the properties at issue; the allegations about noise do not go further than occasional assertions of work starting early which is explained by deliveries and the beeping of reversing lorries.

The Law

20. The only area where it appeared there might be some disagreement was about the impact of planning and/or regulatory breaches (or possible breaches) to proving private law nuisance. Otherwise the law was common ground. I can summarise briefly and since it is the most recent discussion of the tort in the Supreme Court, I do so by reference to *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, where a viewing gallery looking into the Claimants' flats was held to be a nuisance. Paragraph numbers that follow are to that judgment unless otherwise stated.

21. The law of private nuisance protects the utility and amenity value of land not the personal comfort of those who happen to be on the land [11].

22. The relevant touchstone for what might be actionable is the principle of reciprocity or give and take [34] applying in circumstances where generally the owner of land is free to build on it as they wish, and so just as one landowner is entitled to build on their land, so is their neighbour. However, such reciprocity carries with it a mutual requirement (i.e. it applies to any person exercising the freedom to build) to carry out their building operations taking reasonable and proper steps not to cause undue inconvenience [37].

23. In general, it is irrelevant to issues of private nuisance that planning permission might have been granted [109]. Thus it would be no answer to the Claimants' case about nuisance in the building of the development to say that the development was built with planning permission because such permission has nothing to do with private nuisance: having permission to build does not equate to having permission to build so as to infringe private law rights.

24. However, the alleged interaction of planning / regulatory law and private law in this case is not of this kind. It is reflected, to an extent, in passages in *Winfield & Jolowicz* 20th ed:

> "Failure by the defendant to take reasonable care will usually lead to the conclusion that the interference is actionable, since there is no reason why the claimant should have to put up with discomfort or inconvenience that the adoption of proper measures would eliminate. Similarly, although compliance with relevant regulatory norms or planning controls is not a defence to a nuisance action, it may be relevant in determining whether an interference is unreasonable" (15-027, citing *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] EWCA Civ 987);

> "an activity which is conducted in contravention of planning or environmental controls is unlikely to be reasonable…" (at 15-067, quoting Carnwath LJ in *Barr v Biffa* [2012] EWCA Civ 312 [76] (but noting that in a later case Lord Carnwath described his comments as "unduly simplistic")

25. The *Hirose* case contains some illustrative guidance. Judgment was given by Mummery LJ. It was a noxious smell case. The claimant alleged a nuisance caused by the manufacture of food additives. These were next door commercial premises with a porous party wall on an industrial estate. The action failed. With regard to regulatory issues at [40] the court said:

> "The activities in Unit 20 were carried on without objection or intervention on environmental or health and safety grounds by the relevant statutory authorities. While those matters are obviously not conclusive against the existence of private nuisance, they are relevant indicators of the levels of discomfort and inconvenience caused by the smell".

26. Pulling those threads together as relevant to counsel's arguments before me, the impact of planning and environmental matters is evidential only. Whether or not there has been a private nuisance in a building case is always an assessment of "fact and degree" (*Andreae v Selfridge & Co* [1938] Ch 1 at 10). As part of that assessment it may be relevant to consider issues related to the various interactions between the works in issue and the regulatory authorities.

27. It seems to me that this, in general terms, is what Mr Thorowgood was submitting in the present case: any proven breaches would be part of the evidential context. Mr Paget's answer was twofold: no enforcement action had been taken against the Defendant, let alone proven; and, the Claimants' case raises isolated assertions of potential breaches which do not of themselves add up to a substantial degree of interference with the Claimants' properties (or any of them) for the purpose of the private law nuisance.

The Evidence

28. In this section I address some general features of the Claimant's evidence and then summarise the relevant evidence of each witness. I address documentary evidence, including photographs and video, in the narrative section which follows.

Collaborative Statements and Exaggeration

29. Mr Paget has two general criticisms of the Claimants' witness evidence: tainting and exaggeration. By "tainting" I mean the witness statements of Mr Brown, Mr Hogg and Mr Milne being more likely than not, in substance, to have been written by Ms Martins and by "exaggeration", that rather than being limited to an account of relevant facts which the witness has experienced and can speak to, the evidence includes conclusions and extrapolations which may or may not be justified given whatever was experienced. I will deal with each problem in turn.

30. In both instances the starting point for witness evidence is the requirement in CPR 32.4 and 32.8 that the statement should be in the witness' "own words". This is made express by the practice direction applied by CPR 32.8 and is implicit in the requirement at CPR

32.4 that the statement contains the evidence that the witness would be allowed to give orally. These are not mere technical requirements. It is obvious that a witness will speak to that which they have witnessed. It is also obvious that such a person's voice should be authentic, if it is to be credible. Indeed, it is undermining of the agency of a witness not to allow them to have their own voice (something which some solicitors might do well to remember).

31. There are various ways in which tainting can occur: witnesses to one incident can discuss their evidence with each other before committing it to paper or being interviewed (at worse this can lead to an agreed upon "official" version); witnesses can read or hear other witnesses and then allow that to influence their own recollection (either deliberately, as can happen during the course of a trial when a later witness tries too hard to support an earlier one or inadvertently because those discussions end up framing their recollection). There has been considerable concern by the tainting that occurs when witnesses are asked to repeat their evidence to solicitors during the course of litigation and the inherent risk that the witness' own narrative becomes constructed from those various meetings and re-memories. These are all examples of circumstances where the evidence becomes less valuable than it might have been otherwise.

32. I agree with Mr Paget that the statements of Mr Milne, Mr Brown and Mr Hogg bear similarities in structure, content and, less often, word choice to the statements of Ms Martins. Mr Brown accepted in evidence that his statement had been provided to him by Ms Martins. Mr Hogg and Mr Milne accepted that there had been general discussions between the residents who were unhappy with the development about the nature and types of things they might want to complain about and that those discussions were reflected in the statements. All three witnesses were clear that they were happy with the contents of the statements and it represented their truth: they believed in the contents of the statements and were happy to adopt those words as their own.

33. It has not been suggested that the evidence of these witnesses should be excluded as inadmissible. However, it is necessary for me to decide what weight I can place on their evidence. Given the circumstances in which the statements were prepared, I do place less weight on them than I might otherwise have done if I had the benefit of the true voices of these witnesses.

34. I also consider that there is a related problem with all the witnesses. The Claimants, as a group, have been cooperating together for more than 10 years to advance what they perceive to be their collective fight against the Defendant. I am not concerned to take sides in that fight or be at all critical of the Claimants for taking a collective approach: it is a truism that beneficial change is generally proceeded by group action. Even aside from the particular criticisms I have about the manner in which the witness statements were prepared, it is inevitable that this collective approach impacts the parties' recollections and perceptions about those recollections. This is the nature of human memory (see for example the report which was prepared before the BPL courts instigated CPR PD57A).

35. There is also a human aspect to exaggeration. It is a common for those who want to prove a particular point to take one or two examples and use that to justify a generality. In this way an argument about whether or not it happened on one occasion can become a proxy for the argument about whether the general conclusion is borne out. This is all fine for rhetorical purposes (and is perhaps a common feature of much political

discourse) but it is of little evidential value. All that is likely to have been proven evidentially is the particular example. The generality is often nothing more than the conclusion that the witness would like the judge to draw, but this is to usurp the judge's function.

36. The exaggeration contained in Ms Martins' statement is not just of the kind discussed above. It also includes exaggeration of the 2 plus 2 equals 5 kind or seeing something that might be a cat and describing it as a tiger. Much of Ms Martins' statement, when it touches on matters relevant to this judgment, is so over-dramatized as to deserve little evidential weight. It is both unpersuasive and undermining of whatever kernels of evidential truth that there might otherwise have been.

37. When these points were put to Ms Martins during her evidence, her response was to assert with some forcefulness that all she was doing was reporting accurate facts and that everything she had said was accurate fact. Ms Martins said that she did not embellish but was very honest, decent and truthful. Ms Martins said she did not make extrapolations but just told the truth. "I speak the truth", she said. I listened carefully to Ms Martins giving her evidence and taking account of the terms of her second witness statement (which she relied on for the trial) and also the terms of the emails which appear to have been written by her, I do not accept this as an accurate or helpful characterisation. In my assessment Ms Martins believes that her "speaking the truth" categorisation is accurate and has no doubt that she is right and anyone who disagrees with her is wrong (at least in relation to matters relevant to this dispute) but this very certainty fatally undermines the weight that can be given to her evidence as a whole. In brief summary she lacks any objectivity in relation to these matters.

38. Dr Clarey's evidence suffered from a related problem which was that she was so familiar with the documents in this case and the arguments that the parties might want to make at the front of her mind that her evidence was more of an explanation for why the Defendant could not hope to succeed in proving that they were competent developers rather than the simple recollection of relevant information which she had witnessed. A good example was when Dr Clarey was cross-examined about noise and she referred to the research that she had done with regard to the Defendant's vehicles (or those of the Defendant's contractor) having been assessed at having a 90 decibel noise rating. This proved for Dr Clarey's purposes that the noise was too much. In a similar way Dr Clarey said she had been told that if dust was visible then that was too much and so since there were photographs in which dust was visible, the dust was actionable. Again, like Ms Martins, Dr Clarey's own belief that she is right and the years of fighting against the Defendant, make the simple recollection of experienced fact on these issues both difficult and suspect.

39. These criticisms do not mean that I reject all parts of the evidence of the Claimants but I treat the potentially relevant evidence with considerable caution. Such witness evidence always needs to be assessed against the background of the documentary evidence, the parties' actions during the relevant period and inherent probabilities (see *Gestmin* and related cases).

Claimants' Witnesses

40. Dr Clarey's statement mentions the development starting in mid-November 2013 and there being dust, noise and shaking. Debris fell into her garden and there is a photograph

taken as late as January 2020 said to illustrate this. There was dust on cars in Daysbrook Road. The dust and noise came through double-glazed windows and Dr Clarey developed a persistent non-productive cough from March 2014 which she attributed to the dust. Photographs of the concrete crusher show the problems with dust (p1866/7 of the main bundle). There was increased shaking noticed on 17 June 2014 (after the garden walls had collapsed on 6 June 2014). Dr Clarey said in oral evidence that she kept out of her garden because she was concerned that hers might be next. On 18 March 2015 Dr Clarey took a video of a concrete mixer working before 8.00 am.

41. Ms Martins was woken well before 7 am on 11 November 2013 by the start of demolition. On 14 March 2013 a complaint was submitted to Lambeth. The general complaints included daily billowing dust and out of hours work. Ms Martins refers to diary entries, including those dated between 3 and 6 December which document workers being on site before 7.00 am and on two occasions shaking and on 5 December 2013 floating dust. Ms Martins makes general reference to all properties surrounding the site suffering daily shaking and the routine starting of work before 7.00 am and not finishing until late at night and a plume of dust floating into the properties. Strong lights were shined into the back bedrooms of Wyatt Park Road for the best part of a year.

42. Mr Brown accepted that his witness statement was a combined effort. His oral evidence was that he got up early to go to work but on occasion he and his wife were woken by vibration from works in the morning. He remembered being woken and generally he leaves about 7.30 but could not say exactly what time. Often Mr Brown was not back for about 12 hours. When he returned his wife told him that disturbance had been going on all day. The shaking was from demolition not construction. Clothes had to be washed again because of dust. It was too noisy for some people but it was a building site and as a builder it was less disturbing for him. The site was bright but there were not lights shining into number 19.

43. Mr Hogg also said the witness statement was prepared for him in circumstances he was not sure about but he was happy with the contents of the statement. There was generally dust and vibration. Mr Hogg was recovering from serious back surgery and was incapacitated for about 7 months. He recalled sometimes work before 7.00 am. A hazy photo was meant to show the dust. There was dust and vibration. There were floodlights shining into the bedrooms, which were maybe taken down during the daytime which was why they are not on daytime photos or they are there but not visible. The new flats were really close to Mr Hogg's garden.

44. Mr Milne said he gave Ms Martins his information and then the statement came back and he was happy to sign it. He referred to the collective process evidence was prepared. Mr Milne's property was at the corner of the site, number 39. Mr Milne said that all the residents were impacted by the whole site. It was very bright. Mr Milne's life was disrupted on a daily basis by the work and others would have suffered worse than him. It started early and went on late.

Defendant's Witnesses

45. Mr James Overton had overall responsibility for the site. In general he came across as evasive and defensive while being cross-examined. I did not get the impression that he had much recollection of what happened on the site but this is understandable given the amount of time that had gone by and that this site was only one of many for which he

would have had responsibility and/or worked on. A good example was in respect of whether there was a standpipe on site (discussed in some detail below because it is relevant to the allegation of dust nuisance). Mr Overton said that he would have to guess where the pipe might have been because he had no recollection. Likewise, Mr Overton could not remember when he was asked about the late registration for the Considerate Constructors Scheme ("CCS") or the issuing of the Section 60 notice and could only answer questions about the demolition companies methods by assumption about what they would have done. Nevertheless, Mr Overton said that dust suppression was done. Mr Overton generally contested the conclusions that were put to him by Mr Thorowgood in relation to the various photographs produced from the Claimants' side. Mr Overton said that works were not carried out before 8.00 although on occasion there might have been deliveries before then and people would have been on the site getting ready for works to begin. The Defendant's own records of site attendance had not been kept. The Defendant could have called the site foreman during the demolition / foundation digging period but did not. Mr Overton had no recollection of lights but generally the only place there would have been site lights would have been the access routes to the portacabin.

46. I agree with Mr Thorowgood that Mr Harden was a better witness than Mr Overton. But he also did not remember quite a lot. Again, this is understandable but at the same time often witnesses are able to refresh their memory by looking through such contemporaneous documents as assist. Mr Harden was involved from June 2014 until Autumn 2015 or perhaps March 2016 (there was some doubts around the exact dates but I am not sure it matters). Mr Harden recalled a standpipe near to the site entrance. Generally, people would arrive from about 7.30 for an 8.00 start. Mr Harden did not think a concrete mixer would have been used prior to 8.00. Mr Harden disagreed with the conclusions the Claimants drew from the photographs and videos. There were task lights and security lights which operated on a sensor if someone approached them but no lights as described by the Claimants.

Narrative

Non-Photographic Documents

47. It is common ground that the works started in November 2013. Although it is largely tainted by both the exaggeration and collaboration problem with the Claimants' evidence, there was a general consistency across the witnesses (apart from Dr Clarey who was in Daysbrook Road and, she said, a heavy sleeper) about being rudely awoken by demolition works. I cannot make specific findings about this in isolation from the documents, but I have noted the various questionnaires from local residents which, while I am not sure when they were written (in particular relative to the community action having been discussed), have a large number of references to people being woken up.

48. Ms Martins' copy diary entries exhibited to her witness statement and contained in the supplemental bundle start from 3 December 2013 (but there are also entries said to be from her diaries in a compiled table format for November 2013). I address the detail below but by way of example on 5 December 2013 is an entry referring to dust from an uncovered pile of rubble "floating" from the site. There are also references to dust between 13 and 17 and 20 and 24 January 2014. There are references to work being done before 7.00 which caused the house to shake and loud works on a number of

mornings in November and December 2013 and January and June 2014, and what I guess are 31 July and 1 August 2014 (there is no narrative reference to help but the extract is at page 548 of the supplemental bundle) and March 2015 to early April 2015 (also without witness statement narrative). The only diary entries to which reference was made during the trial process were those in the early 2013/2014 and June 2014 date range and I understood Ms Martin's oral evidence when she was asked about the January to June 2014 period that this was probably because nothing happened. The June entries are around the time of the wall collapse and the necessary remedial works following on from that.

49. The first record I have been referred to about complaints is an email of 12 January 2014 written by a local councillor to Lambeth following a meeting with the residents (I think including Ms Martin). This raises the lack of consultation regarding the planning, the lack of notice of the start of works, generally the failure to comply with the method of construction statement regarding information exchange and shaking with the worry of structural damage. Nothing is raised about dust, noise or working hours.

50. On 21 January 2014 Lambeth wrote a letter to a redacted recipient raising planning breaches referencing bin issues and the information exchange issues.

51. It is likely that these exchanges prompted the Defendant to register with the CCS. This seems to have started from 22 January 2014.

52. On 10 March 2014 there was an email complaining to Lambeth. This referred to diggers starting at 7.15 in the morning and the lack of information exchange. There is a further email dated 14 March 2014. This referred to being woken every morning by the scary shaking and the lack of information exchange. Again there is no reference to dust or noise specifically but I treat the shaking as part of vibration and so noise related. Lambeth asked the Defendant for a response and was told that it was likely that deliveries were being made prior to 8 am but that the site would be told to enforce proper working hours.

53. These complaints led to Lambeth issuing a section 60 notice requiring compliance with specific working conditions on site. This was explained to the local residents in an email from Lambeth also dated 14 March 2014. Noise enforcement officers had been alerted. The residents emailed in response and noted that penalties would be issued for further breaches and asked about how the monitoring would take place.

54. On 19 March 2014 a different resident wrote an email to the Defendant generally praising the development and criticising those who might complain about the development as being "professional complainers". This is the source of Mr Paget's use of the phrase in his closing submissions. I comment on this below but for present purposes note it but do not give this email much weight. This is not so much because the writer was not called to give evidence (I see that as unsurprising) but more because a range of opinions is entirely usual and, as ever, the fact of someone having an opinion or having drawn a particular conclusion about anything does not of itself prove anything about the substance of the facts which could inform such an opinion or conclusion. Not least because for some people (and the writer of this email may be one) taking a contrary view is an end in itself. I also agree with a point only made to me following circulation of this judgment in draft which is that on closer reading this email, in so far as it

identifies any specific complainer individual or group appears to be concerned with those at Wavertree Court.

55. At this time the Defendant was sent a warning email by Lambeth telling them that continued failure to comply with planning conditions would result in service of a breach notice.

56. On 26 March 2014 there was a further email raising early starts sent to Lambeth. The text of this email is included in an email sent by Lambeth to the Defendant. I note there is still no reference to dust. This referred to 7.00 am diggers and being woken up. The rest of the complaints were about information exchange. Lambeth repeat the need for compliance with planning requirements and the issued section 60 notice. It is apparent from internal Lambeth emails that this was seen more as an environmental issue than a planning one.

57. The Lambeth response to the Claimants addressed what was being done by Lambeth. This included serving an enforcement notice and telling the Defendant that future breach would lead to prosecution (it appears likely that the reference was to the section 60, certainly no other enforcement notice has been referred to in the papers I have been taken to). The noise nuisance service were asked to carry out on-site inspections. The residents were asked to report any continued early morning activity to the noise service directly because that might help with court action.

58. There are communications between the residents and Mr Overton but I do not need to detail these. The short point is that there has been no love lost between the two sides of this dispute. It has been polarised throughout. I can well understand this flowing from the lack of communication at the start of the development compounded by the drastic change to the residents' ways of life caused by the works and the development. It is no mitigation in this respect for those facing such change that objectively the development might look good, as Mr Paget submitted to me (and I see the basis for saying this, while myself preferring the look of the Claimants' properties).

59. In an email dated 27 May 2014, Dr Clarey referred to her having spoken to someone from McKenna and commenting on the dust to which Dr Clarey was told that normally water was used. Dr Clarey said in her email that she had not seen any water on site.

60. Ms Martins' diary entries for June 2014 detail a series of activities on site and in particular morning working and disturbance. I go through those I regard as most relevant below and do not repeat that material here.

61. I have referred above to Dr Clarey evidencing shaking through the bathroom pot plant on 17 June 2014. Dr Clarey demonstrated this in the witness box with her hand on the bench.

62. There is a 12 September 2014 email from the Claimants to the Defendant raising concern about an apparent threat to dismantle the garden walls, referring to all the residents having taken photographs of their walls and photographing / filming the site daily, the lack of information, the initial shaking, the inadequate newsletters and meetings, lack of party wall notices, and the generally dismissive and contemptuous nature of the Defendant. There is no reference to dust or light.

63. On 16 October 2014, Ms Martins and Dr Clarey met with their local MP. There are notes of the meeting prepared by Dr Clarey (I assume from the internal reference to health issues) which say: "noise. Dust vibrations like earthquake when piling". The letter from the MP, dated 18 March 2015, emphasised damage to properties and the lack of communication.

64. In a solicitor's letter dated 24 February 2015, the residents raised various issues which relevantly included working outside of the designated hours. There was no mention in this letter of dust or bright lights and it was said generally that the works outside of the designated hours were loud.

65. It is apparent that in February 2015 the residents wrote to Lambeth regarding noise issues. Lambeth said thank-you for providing details of the site and set out the work requirements under the section 60 notice (slightly more generous than the method of construction document) and said that Lambeth could arrange a meeting to collect relevant evidence and statements regarding any breaches of the notice for the purpose of court proceedings. The residents responded by raising an issue with a covenant which is not relevant.

66. Ms Martins was cross-examined about not taking up the Lambeth suggestion of meeting and providing evidence for potential enforcement action. Ms Martins' response was to question what evidence there could have been but it seems to me that the answer to that lies in the email giving the opportunity to assist Lambeth to enforce the section 60 notice. The diary entries and similar type of material and/or the photographs which had already been referred to in September 2014 would all be examples of the sort of evidence that would obviously be useful to Lambeth. In any event, this could have been discussed further with Lambeth.

67. On 18 March 2015, Dr Clarey said she was heard a cement mixer just after 7.00 and took a video of it at around 7.30 am.

68. On 23 August 2015, Dr Clarey sent an email referring to clinking of scaffold poles and men's voices being heard on a Sunday morning at 9.00 am.

69. On 23 November 2015 a completion certificate was issued which stated completion had taken place on 27 March 2015.

70. The bundle contains meeting notes for the development prepared by Frankham Consultancy Group Ltd. The meetings were attended by those involved in the development project and provide a reasonable picture of progress on site. I was not taken to them during the trial and the latest included in the bundle appears to be the meeting on 13 January 2015. At that time completion was estimated to be running some 4 weeks late against a contract date of 10 March 2015. This is broadly consistent with the completion certificate date referred to above. Presumably works on site after say May 2015 were concerned with snagging items. There are May 2015 photographs which seem to me inconsistent with a March 2015 completion (albeit "completion" can be a flexible concept). It does not matter for the issues of substance in this judgment exactly when completion occurred. It is not clear from the Defendant's witness evidence which is internally inconsistent and, in addition, Mr Harden's oral evidence was understandably uncertain.

The Photographs

71. These are my findings about and/or drawn from the photographs to which I was referred. I have looked through all the photographs in the bundle and they have informed the discussion below even if I have not referred to them in this section of the judgment. I address them in the order they appear in the bundle and refer to page numbers from the hard copy bundle.

72. At pages 6 to 8 are pre-development photographs showing the historic garaging. These photos provide some baseline of what the area looked like before the works. I understand the photos are looking towards the back of Wyatt Park Road.

73. At page 13 is a similar view to that at page 8. The photo has been dated to 13 November 2013. The Claimants say the lack of clear lines and discolouration in the photo show dust hovering over the site. The photo shows that the central row of garages have already been demolished and work was beginning on the garages lining the perimeter wall. Looking carefully at the photograph and taking account of the potential difficulties of extrapolating from photographs to the real world caught to an extent in that photograph, I am not persuaded that it is more likely than not that this photograph shows dust rather than the consequence of the photograph being taken into the sun.

74. This conclusion is borne out by a second photograph taken a minute later but looking further to the right. In general this photograph shows clearer definitions but with still a slight rainbow effect towards the area most impacted by the November sun. Again, I cannot find any evidence of hanging dust.

75. There are photographs, pages 19 to 22, taken on 18 November 2013 but later in the day at 14.48, which appear more likely to show dust.

76. In the photo at page 19, the excavator has likely just dropped a load, perhaps from the garages on the nearside, in the central area, and dust is present as a consequence between the hopper and the ground beneath. There is no sign of any water suppression of this dust. It is not apparent whether the dust is coming from the hopper down or from the dropped rubble up or a mixture of both.

77. The photo at page 20, assuming that the substantial cloud in the area of the trees is dust and not smoke, shows dust which is said by the Claimants to have come from the site and be drifting away from Daysbrook / Wyatt Park (I say this because although large it appears self-contained and to some extent off the site). It is also not apparent from the photograph at page 19. It seems to me unlikely that this particular dust cloud, if that is what it is, will have impacted on any of the Claimants.

78. The photo at page 21 may be the aftermath of the dust shown on page 19.

79. The photo at page 22 does not show any dust on the site but there are some signs of the larger cloud at page 20 at the edge of the photograph.

80. Assessing the information contained in these photographs as a whole and given that the demolition works were well underway at this time, it appears unlikely that there was constant significant dust nuisance arising out of this stage of the works. There are no signs of dust on the painted roof which is close to the photographer at the bottom of the

photograph (but of course the prevailing wind might have been in the other direction) or any other areas outside of the site. The specific dust identified on one or two photos appears to be just that: a particular action which has produced particular dust, rather than generally illustrative of dust being produced throughout.

81. This conclusion is also supported by later photographs taken on 18 and 21 November 2013. In the most general of terms these show a site where demolition works appear to have been carried out with reasonable care (see also photographs at pages 30 and 31). The piles are tidy and the access routes are kept clear. There is no obvious evidence of dust in the vicinity.

82. The photograph at page 35 is said by the Claimants to show dust on 28 November 2013. I cannot see this to any relevant extent.

83. There was a dispute about whether there was a stand pipe on the site, so allowing for the possibility of water suppression of the dust. In re-examination of Mr Harden, Mr Paget showed photographs of hosing in the area where Mr Harden said the standpipe was located and then other photographs said to indicate hosing around the site taking that water to where it might be required. Mr Thorowgood submitted that just because there was hosing does not mean there was a standpipe. It seems to me that this is contrary to the inherent probabilities and perhaps a better argument might have been that just because there is water does not mean that it would have been used. In any event, I see in the photo at page 40 what also appears to be hosing.

84. At page 41 is a photograph dated 7 March 2014 showing excavations having taken place on site. There is also a photograph at page 44 which is said in the index to be taken on 27 March 2014. The similarities in the two photographs make it unlikely they were taken almost three weeks apart – this does not matter save that I am noting my impression that the index's dating may not always be accurate.

85. On 21 March 2014 at page 42 is a photograph of the same view as photographs 8 and 13. Again there are no obvious signs of dust in the vicinity of the site (this of course is not taken from the Daybrook Road or Wyatt Park Road sides).

86. The progress on site from excavation to construction is well demonstrated by the steel frame being present on site in a photograph at page 51 dated to May 2014 and similar photographs dated 9 May 2014 at pages 57 and 58. This is consistent with Mr Harden's evidence about his joining the site for the construction phase soon after this.

87. I make the same in passing observation regarding the bulk of the photographs showing the construction phase as I made regarding the demolition stage. There appear to show a tidy, well organised site, with reasonably clean vehicles and no obvious indication of on-site sloppiness. I do not repeat this point again.

88. In June 2014 the garden walls south of Dr Clarey's property collapsed because of the Defendant's works.

89. At pages 111 to 113 are photographs said to be taken between 17.26 and 17.31 showing work being carried out after 5pm contrary to the design statement to finish work at 5pm (but within the section 60 requirement of 6 pm). I am reasonably sure something has gone wrong with the ordering of the photographs here because that on page 113, which

shows a worker standing on a cherry picker next to a beam suspended on a chain from what is likely to be the crane shown on the photograph at page 111, is said to have been taken later than that on page 112 when the crane is folded down.

90. At page 116 is a photograph showing that the tree that might otherwise have obscured the view of Mr Milne had been removed by 25 July 2014. I do not get much from this because Mr Milne's evidence left me entirely uncertain about what he was able to recall about his view in any event. Rather he, quite reasonably, found it difficult in the context of a remote cross-examination about a house he no longer lives in and events about 10 years ago, to orient himself by reference to photographs not taken by him, from the opposite side of the site and which he likely had not seen before.

91. At page 126 and dated 8 September 2014 is a photograph that clearly shows dust being created from construction work. There are two relevant workers one or both of whom might be carrying out an operation which is producing dust. At least one of them can be seen wearing a protective mask. There is no sign of any water suppression being carried out (that may or may not be practicable for the relevant operation – the Defendant has not suggested or asserted not).

92. There are similar signs of non-suppressed dust being caused by works on site in the next photograph, at page 127 and dated 10 September 2014. Again, there is no sign of any water suppression being carried out.

93. At pages 141 and 142 and dated 22 February 2015 are two photos said by the Claimants to show one of the floodlights which had been put up and aimed towards the rear of the houses on Wyatt Park Road. The Defendant's case is that the bright light in the photograph is a reflection of the flash coming from the device taking the photographs. I have had no expert evidence analysing the photographs and so I treat my own impressions with a degree of caution. Ms Martins said in her oral evidence that these photographs were taken by a resident a couple of doors away from her. He was not called to give evidence. Ms Martins' witness statement makes no reference to the photographs, saying only "[the Defendant]…inexplicably chose to beam strong search lights directly into our back bedrooms all night for the best part of a year". So there is no evidential context within which to assess the information contained in the photographs.

94. If the photographs were taken to illustrate the search lights then the positioning of the photographer relative to the main subject matter is strange: the search light is not at the centre of the picture but almost behind a curtain towards the left of the sash window (from the photographer's viewpoint). At the centre of the photographs, and so, objectively, the most likely subject matter, are lit windows within the flat opposite. It would not surprise me at all if those lit windows were annoying for the residents of Wyatt Park Road – such lights can and do cause a significant impact but it is not suggested they are a nuisance (and I am not sure it could be).

95. Mr Paget made a number of light based points about the photographs which seem to me to carry some weight: the brightness is within the room not outside it; the opposite room lights would be much less bright than the asserted search light and yet it is those room lights which have the attributes associated with the brightest source on the other side of the window – if were otherwise than the interiors of the rooms opposite would not be as clearly visible; the room in which the photographer is standing appears extremely

bright, the left curtain, the paintwork on the window frames and even the metal window lock all appear to have reflected light back towards the camera; in contrast the external parts of the window, so far as they can be seen, appear less bright. These features do all support the idea that the bright circle of light on the photograph comes from a flash or other light source within the room being reflected back from the window.

96. I will not reach a conclusion at this stage about whether these are external lights or not. Given the paucity of actual evidence around these disputed photographs, such a conclusion belongs in the discussion section which follows.

97. At page 147, and dated 12 March 2015, is a photograph of a small rectangular piece of what seems to be insulation in a pond. Dr Clarey explains this came into her garden from the site.

98. On 18 March 2015, Dr Clarey took the video mentioned above. I have looked at the video a number of times on a large screen and with the volume turned up. It shows two workers active. It is not clear what they are doing but given their high-vis vests and interaction with each other and purposive movements it is clear that they are working. There is no relevant sound on the video (there are sounds but not coming from the site).

99. At page 153 and dated 26 April 2015 is a photograph showing a person on site on a Sunday.

100. At page 156 and dated around May 2015 is a photograph of the scaffold at the Wyatt Park Road facing elevation of the flats showing a lack of protective screening for the benefit of the Wyatt Park Road gardens. Mr Harden said that protection was given to the external areas of the adjacent flats where there was a proximate risk compared to the gardens, which were at a distance where the risk was less. The Claimants, and Dr Clarey in particular, say that site debris fell into their gardens.

101. At page 158 and dated 20 May 2015 is a photograph taken by Mr Hogg and said to show dust. I do not accept this. The photograph appears of poor quality and there is nothing within the photograph which would indicate a dust producing operation and given the timing and the works likely on site at this stage – presumably fitting out / second fix and snagging – dust is not inherently likely. It seems more likely that the subject of the photograph was the person working rather than an attempt to show dust.

Discussion and Findings

102. The Supreme Court recently stressed the function of the trial judge: "The duty of a trial judge is to consider the matters which are in issue on the pleadings, and which are supported by evidence, and only those matters" (*Davies v Bridgend County BC* [2024] UKSC 15, Lord Stephens at [72]).

103. The Claimants' pleaded case in nuisance is set out at paragraphs 10 to 12 of the Amended Particulars of Claim. As relevant and as argued for at trial, the allegations included the search lights; excessive dust (from November 2013 to early 2016); excessive and unreasonable noise at unreasonable hours over a period of more than two years; and a failure to control workers (this was pleaded and was referred to in the opening statement but was not the subject of cross-examination).

104. There was occasional reference in the evidence and the amended particulars of claim, but not mentioned in the skeleton argument or submissions, to nuisance because of items falling into the gardens, in particular that of Dr Clarey showing material that had fallen into her garden. I do not consider these sufficiently serious to be actionable and do not consider them further.

105. Ms Martins had pleaded a case in racially aggravated harassment / nuisance by site workers. This had been stayed by order 22 March 2019. Ms Martins had permission to apply to restore those claims. No such application had been made but in Ms Martins' witness statement dated 1 January 2024 she said that she wished them to be the subject of trial. Mr Thorowgood made an informal application in this respect at the outset of trial which I refused: the Defendant had been given no opportunity to address these claims (they are not even pleaded to). I said that it would have been sensible had the issue been raised with the court in the more than three years since the first trial so directions could have been given. I remain of the view, which I had when I imposed the stay, that the harassment claim is different in kind to the works claims. If it is to be pursued then my suggestion – but no more than that – is that it would be more suitable for a fast track process (small claims are not considered appropriate for harassment claims relating to residential property – which this probably is, although it could be argued that the residential aspect is incidental rather than an essential – it is not a neighbour issue).

106. Apart from Ms Martins' evidence discussed above there was nothing substantial directed at site workers behaving badly. It was not the subject of cross-examination or argument beyond the reference at paragraph 4.6.3 of the opening statement (which appeared to be a reference to Ms Martins' harassment case). For the avoidance of doubt I dismiss any case, other than Ms Martin's stayed case, based on a failure to control workers.

107. I will deal with the remaining nuisances in the following order: lights; dust; noise. Before doing so I need to address some overarching arguments made by Mr Paget.

Ad Hominem Attacks

108. Mr Paget, who has himself routinely been the subject of the Claimants' fire in this respect, put at the start of his submissions that the Claimants were, or included, "professional complainers". The gist of the submission was that because the Claimants' dominant mode is to attack those who disagree with them regardless of any objective reality then the court should give no weight to either their complaints or their evidence. Mr Paget included in his oral submissions about the Claimants enthusiasm to complain reference to "recuse".

109. I think this was unfortunate. The Claimants did make an application, which was dismissed, to have me recused from this case. It is essential that the Claimants are not left thinking that the Defendant is encouraging the judge determining their claims to feel common cause with the Defendant and the Defendant's representatives as collectively victims of the Claimants (or Ms Martins and/or Dr Clarey – the distinctions are not relevant for this purpose).

110. I stress that the court's personal feelings are irrelevant to its judgment. The judgment must be based on the evidence and the law. Nothing else. Moreover, the Claimants have

every right to make an application to have a judge recused and to have that application determined. I have no criticism of them in this respect. It is irrelevant background so far as this judgment is concerned.

111. There are other more significant reasons why the "professional complainers" approach is unhelpful. It is a truism of legal argument (and of life) that just because a person has been wrong once does not mean that they might not be right about something else. This is reflected in the caution with which the court approaches secondary fact evidence, by the familiar jury direction about lying witnesses and in the present case by the sensible question asked me by counsel before the start of evidence about irrelevant matters, such as the allegations made against the Defendant on other unrelated sites or the multifarious criticisms of the Defendant's legal representatives in Ms Martins' statement, not being the subject of cross-examination. I said none of these peripheral and irrelevant matters need be the subject of cross-examination – it would have been disproportionate and of limited or no evidential value.

112. It follows that just because the Claimants refuse to be silenced when others might not complain, or assert their rights when others might not do so, or raise serious matters when they consider it justified to do so, even if others might not think it so justified, does not mean their present claims are undermined. This will depend not on the alleged characteristics of the Claimants, either individually or as a group, but the relevant facts established by the evidence.

Other General Observations

113. What is of more background relevance is the lack of specificity about the claims or how they have been pleaded or evidenced. The causes of action in private nuisance touch on matters that impact the amenity of the particular properties separately. A nuisance is not proven, for example, on one property by proving a nuisance impacting the one next door. The wrong done to each property is specific to that property.

114. As a matter of evidence, and depending on the nature of the alleged nuisance, there may well be situations where it is obvious that all relevant properties will suffer in a similar way – this might be the case with a noxious smell (subject to prevailing winds perhaps) or a noisy speedway track. In general, so far as the nuisances addressed below are concerned, the Claimants have taken a generalised approach both in their pleadings and in the evidence: there was dust and noise throughout because the Defendants, in breach of relevant regulations / guidelines, failed to take all reasonable measures to stop it; there were bright lights shined into the Wyatt Park Road properties for about a year because the Defendants wanted to torture us.

115. This is ok as far as it goes but it rather discourages the type of detailed evidence about particular properties that would provide a more reliable factual foundation for findings in favour of private law nuisance. A good illustration is Mr Brown's oral evidence about his wife saying that she had to rewash the clothes. This could be very telling – it suggests an occasion when the dust was such as to have a significant impact on 19 Wyatt Park Road. It also suggests, depending on much more information than the court has, that this might have been occasional rather than throughout the relevant period. All in a context where dust is likely to be more or less of a problem depending on what works are being done on the site at any time and depending on particular weather conditions. But the court has not been given the benefit of that type of detailed evidence.

116. If I take a step back and consider the nature and quality of the Claimants' evidence in the round, I am left with the predominant impression that large conclusions are drawn on slender factual foundations. I have commented above about the tendency to exaggeration. There is much in the witness statements (most particularly those which I understand might have been through Ms Martins' hands to a greater or lesser extent) which puts forward a wider thesis about the nature of the Defendant or the nature of property developers against working families and so on. These may well all be valid and useful points in a different context but this approach is not at all persuasive in the context of proving facts which add up to a successful case in private nuisance for the relevant properties owned and/or occupied by the Claimants.

117. I add that I do not think this is an unfairness arising because the Claimants have represented themselves. On the contrary, there is nothing complicated or technical about a person setting out in their own words what they have experienced which has given rise to the need to make a claim. But the general approach of the Claimants is not to do this so much as try and win the arguments they have set themselves.

Environmental / Planning Breaches

118. It is part of the Claimant's case that in general the Defendant carried out its development without due regard for the rules and regulations and guidelines governing the work. The Defendant denies this and asserts that there has been no finding that the Defendant was in breach of any regulations and nor were any criminal / regulatory proceedings taken against the Defendant. In this respect the Defendants also rely on reports from various third parties (e.g. the Considerate Constructors Scheme, Lambeth, the clerk of the works reports, H & K Safety Services Limited) which for all relevant purposes gave the site a clean bill of health, albeit there are particular criticisms which are not relevant to these claims.

119. Mr Paget submitted that the Claimants' case was based on the assertion of regulatory failures rather than proving private law nuisance but that since those regulatory failures were not actionable, the case must fail.

120. I address these issues as a matter of principle before turning to making my detailed findings on the allegations of nuisance. I have already summarised the relevant law above. I have kept in mind the following relevant statements of principle tailored to the circumstances of this case.

121. There is no relevance to the Claimants' case before me to establish, for example, that the Defendant was late in signing up to the Consideration Constructor's Scheme. It is not sufficiently connected to the private nuisance allegations to have any evidential weight. Merely establishing a cavalier attitude to any particular regulatory requirement does not make it any more probable that a private nuisance might be caused.

122. The same is also true of failures in respect of communication. I well understand that communication about potentially disruptive works is important. Good communication is likely to ameliorate the impact of such works because it allows for subjective preparation and/or potential avoidance. Good communication is also likely to reduce the chance of litigation because potential claimants who have a human rapport with potential defendants are sometimes said to be less likely to sue (*Blink*, Gladwell (2005)). But none of these things touch on whether there has been actionable nuisance which is

assessed on an objective basis focused on the property rather than subjective characteristics of the occupiers of that property. Nuisance is actionable on the basis of what would not be acceptable for reasonable people in that area rather than the subjective feelings of the actual residents.

123. It is of some limited relevance to the Defendant's case that they were not prosecuted or found guilty of regulatory breaches and the like. If they had been it would have been potentially more relevant (depending on the subject matter of the finding) but that does not make it equally relevant that no such determination has been made. There is a substantial logical middle ground where in real life bad conduct might have taken place but no action taken by the relevant authority.

124. The potential relevance of other regulatory issues will flex with the particular allegation. So that, for example, a failure in respect of dust management will not itself create a cause of action in private nuisance but demonstrating that all reasonable precautions had been taken against dust (which would at least include complying with regulations / guidance) might mean that such dust as impacted any particular property was not actionable because it fell within the reciprocity principle – what reasonable neighbours have to put up with in the circumstances.

125. A final example will illustrate the same point and is relevant to the discussion below about noise. Merely working outside of permitted hours will not give rise to a claim in nuisance because working on the site, of itself, does not impact neighbouring properties. Of course, in many instances the nature of the work carried on may well amount to a potential nuisance and for those occasions being outside of the required hours to a relevant degree is of considerable significance because those regulated hours are reciprocal and good for neighbourhoods. I say "relevant degree" because as always in private nuisance whether or not something amounts to an actionable nuisance will be a question of "fact and degree": a few minutes before 8.00 or after 5.00 may not matter, but it will depend on the relevant facts and circumstances.

Bright Lights

126. This case is supported by the evidence of Ms Martins and Mr Hogg primarily. Mr Brown considered the site was lit bright but there were no lights shining into number 19. Ms Martins relies on the photo discussed in detail above. It is accepted that there are no other photographs which show these lights either on the site or operating. I was not taken to it until after this judgment was circulated in draft but the diary entries of Ms Martins for March 2015 and the first 5 days of April 2015 do refer to bright lights being beamed into their homes (there is also an entry saying that the photo was sent by email on 17 March 2015).

127. I start with inherent probability. Ms Martins graphically refers to these lights as having been set up to shine into the back of the Wyatt Park Road houses as a punishment and a torture. The Claimants do not suggest, or allow for, any good reason for the lights to be present. It follows that it is a relatively unlikely thing to have happened. This does not mean that it did not happen just that the court will need sufficient evidence to prove it bearing in mind the nature of the allegation.

128. The Claimants' case is vaguely pleaded: it is said that the lights were pervasive at various times of the day, evening and night. Ms Martins' statement says it was for the

best part of a year but gives no parameters to that, so I do not know where the 22 February 2015 photographs fit in the time-line. This is relevant because to assess whether the fact of these lights being present on the site for almost a year is proven it would have been helpful to know when it is said they were present. I have no such information other than 22 February 2015 and the diary entries referred to above.

129. If this had happened for the length of time alleged then I would have expected it to have been the subject of written complaint, both to the Defendant but also to the local authority, but I have been taken to no such document and other documents that might be expected to mention this issue do not (the various issue raising emails / letters summarised above).

130. If the Defendant had done what is alleged in the Amended Particulars of Claim, which included the lights shining at various times during the day, then they would have been present and since there are some photographs of this side of the site, it is of some relevance that no lights are seen. Perhaps more telling, there is no photograph of the lights as a whole at any time of the day or night even though one could have been taken (we know Mr Hogg had a phone with a camera and so did Dr Clarey).

131. The witness evidence in support of this allegation suffers from exaggeration. I can give it very little weight. I have already indicated the possibility that the internal lights from the new flats might have been irritating but those are not the lights the subject of this allegation. I have considered what weight to give the diary extracts in this context but they are not close to sufficient to outweigh the preponderance of the evidence which is against this allegation.

132. For what it is worth Mr Brown's impression was not that there were lights shining in to number 19. The case in the Amended Particulars of Claim is a general one and so if the reality is that it was not happening to number 19 then it is less likely that it was happening to other properties, at least as the case is pleaded.

133. Finally, the evidence relevant to the photographs that I have summarised above, provide no convincing proof sufficient to establish this claim as more likely than not. On the contrary, the information available from the photograph makes it unlikely that it shows an external light shining into Wyatt Park Road. It follows that there is no reliable evidence of a series of external flood lights shining in.

134. For all those reasons I dismiss the claim based on bright lights shining into the Wyatt Park Road properties.

Dust

135. Unlike the allegation about the bright lights considered above, dust nuisance from a substantial building site is well within the inherent probabilities. This is one of the reasons, combined with its potential impact on health and the environment, that mitigation measures are provided for in planning permissions (such as the method statement in the present case) and the Mayor of London's general guidance to building contractors which is referred to in the evidence (issued by Ken Livingstone).

136. The parties dispute whether the Defendants ever took any mitigation measures for dust at all. The Claimants rely on the photographs of dust which do not show such measures in place and the assertion that there was no standpipe at the site.

137. There was no pleading about there being no standpipe (the Defendant did plead that they used a water spray). This is no criticism of the statements of case but it illustrates that the parties had no particular reason to address evidence to this issue which rather emerged during the trial when Mr Overton said that he did not know where the standpipe was. It is of little surprise to me that Mr Overton did not have this knowledge to hand in the witness box, given his overseeing role and the time that has gone by. Mr Harden said there was one and it was in the corner near the entrance. Mr Paget showed pictures of blue hoses coiled in that area and other hoses around the site. Mr Thorowgood riposted that proving the hoses does not prove they were connected to a standpipe.

138. In my view it is more likely than not that there was a standpipe. I accept Mr Harden's evidence in this respect, supported as it by the photographs. I cannot put any significant weight on Dr Clarey writing an email that said she had not seen any water on site.

139. At the same time, I agree with the Claimant that on the two occasions demonstrated by the photographs of November 2013 and the two occasions of the September 2014 photographs, there was dust created by the works and that those particular works were being carried on without any water suppressing the likely dust.

140. The presence of dust on the site and the lack of water suppression of the dust on those occasions could support a more general finding that these occasions that happen to have been photographed are not exceptions but the rule and that the dust created by the works on the site was generally allowed to drift as the wind might take it and in that way caused a nuisance to the Claimants' properties for the more than two year period alleged in the amended particulars of claim.

141. However, in my judgment this is implausible. The photographs demonstrate the obvious fact that the creation of dust is occasional. It would be more likely a problem during the demolition and levelling / foundations stage of the works (broadly from November 2013 through to April / May 2014) than the construction stage (broadly from June 2014 through to Summer 2015). With the addition that it would also be likely that dust would be an issue during the June 2014 period when the garden walls collapsed on Daysbrook Road.

142. I have already explained why I cannot give substantial weight to the witness evidence of the Claimants, there is exaggeration and contamination. This is of particular concern in relation to the dust allegation. What needs to be proven is not that it occurred on a few occasions but substantially throughout the period. The exaggerated approach of the Claimants makes it far too likely that noticing dust on the site on a few occasions has supported an allegation that there was dust throughout without that conclusion being objectively justified by factual observation.

143. A similar point is that seeing dust on the site (demonstrated in some of the November 2013 photos and the September 2014 photos) might justify an assertion that there is dust making gardens unusable and requiring windows to be kept shut throughout the period regardless of any factual evidence that would objectively justify such a

conclusion. The exaggerated approach to evidence is pernicious in this way: it undermines any confidence the court can have.

144. I regard Ms Martins' diary entries, as to which she was not cross-examined regarding their creation, as some evidence of their being dust at least on site when there is a dust reference in the diary. But, like the photographs that only goes so far. If I accept that there was likely dust on site and that it is likely that such dust was not subject to reasonable water suppression, it does not follow from establishing those likelihoods for specific periods on site that there was substantial dust nuisance caused to all or any of the Claimants' properties as a consequence. At best, the photographs and the diary entries are some evidence that it might have done. I remain concerned about the risk of exaggeration.

145. It is at this point that the lack of substantive complaint about dust during the course of the works becomes relevant. In all the circumstances, if dust was a significant problem for all or any of the Claimants then it would have been raised by them in their letters to the Defendants or to Lambeth. It was not. In my view this is good evidence that the degree of any nuisance from dust on the Claimant' particular properties was not significant to an actionable extent. If it was significant they would have raised it during the works.

146. This goes along with the lack of any objective evidence to establish the presence of such dust within the gardens: most obviously photographs. I take on board what Ms Martins argues about this being 2013 to 2015 when smart phones were less prevalent (Ms Martins' reference to "miniscule" is another exaggeration) but at least some of the Claimants had smart phones and/or cameras and there is reference in the emails from the Claimants to photographs being taken as evidence. Also, there being a possible reason for why a particular type of evidence is not available only goes so far. The evidence is still not there but the reason why needs to be taken into account as part of the overall determination on the relevant issue. Even a good reason for the evidence not being available does not prove what the evidence would prove if it was available.

147. There are two other parts of the evidence that I do bear in mind. The first is Mr Brown's reference to his wife having to redo the washing. This might have been the basis from which I could draw inferences at least about particular occasions when there was dust nuisance impacting number 19 but the details are lacking and this would be to put too much weight on the scrap of evidence that I have.

148. The second is Dr Clarey saying that she suffered a persistent cough as a consequence of dust. Dr Clarey does not bring a personal injury claim but rather the point is that the cough is a canary in a coalmine which evidences the nuisance caused by the dust. I do give this point some weight at least so far as Dr Clarey's case is concerned and diminishing weight so far as the other Claimants are concerned (evidence of potential dust nuisance at 33 Daysbrook Road does not necessarily evidence dust at the Wyatt Park Road properties).

149. However, the cough does not do enough in this respect to make a dust nuisance case more likely than not for any of the Claimants. There are too many unknowns for it to be sufficient to tip the balance in Dr Clarey's favour, let alone any of the other Claimants. It cannot be known if because of Dr Clarey's various health issues she might have a particular sensitivity. If so, then the cough would not necessarily evidence

nuisance to a relevant objective standard (it certainly could but that is not the point I am making). Also it is obvious that Dr Clarey might have been exposed to dust, not when at the property but when she was elsewhere (there is reference in the papers to dust on cars parked in the street) but it is only a lack of amenity or enjoyment within the property that is protected by the tort. The cough is interesting but not sufficient evidence.

150. For all those reasons, the dust claim is dismissed: I am not satisfied on the evidence that the claims in respect of dust as a matter of fact and degree are more likely than not to reach the threshold for actionable nuisance either for the extensive period claimed in the amended particulars of claim or for any lesser but still actionable period.

Noise and Vibration

151. The claim is put generally across the time period of the works and, at a general level, it is unpersuasive for the reasons already discussed: the lack of relevant contemporary complaints, e.g. after March 2014 and March 2015 when Lambeth asked for them; the evidential problems arising from tainting and exaggeration; the inherent probability (amounting to an almost certainty in the present case) that the levels of noise and vibration would have varied depending on the works being carried out (Mr Thorowgood rightly identified that most of the problems for which damages were sought would have occurred in the demolition and levelling phases).

152. It is also not part of the Claimants' case before me that the works in general could have been carried out without the general level of noise and vibration that occurred (Mr Paget pointed out that the experts had agreed that the equipment and machinery used was appropriate and there has been no criticism of the methodology). Instead, and rightly, the focus of the case from Mr Thorowgood has been on the noise and vibration that has been caused outside of the permitted hours.

153. Against that the Defendant's case is that this did not happen with the exception of a few occasions when there were deliveries before 8.00 but those were stopped once complaint was made (Mr Overton's email of 11.3.14 and witness statement paragraph 16(c)).

154. The relevant particular evidence includes the witness evidence of all Claimant witnesses, except Dr Clarey, about the impact of the start of demolition. I strip this of all exaggeration but still consider it establishes that works on site started before they should have done during certain periods – Mr Brown's evidence about his normally having left the house by 8 and Mr Hogg's evidence about his being incapacitated following his back surgery but being disturbed in the early morning is both detailed and credible in this respect (in particular the oral evidence rather than the witness statement evidence). In short, I do not think that they are all lying about this core fact: that the works started on 11 November 2013 significantly before 8 am.

155. There is not reliable evidence that these things happened throughout the period, albeit that was what the Claimants tended to say, because of the problems with the lack of detail and the risk of exaggeration and natural extrapolation. This latter idea works as follows: if something undesirable happened a few times that, for many of us, perhaps depending on context, would justify saying it was always happening or "literally"

always happening, to borrow a word that crops up a lot in the Claimants' emails and witness statements. However understandable, this does not make for good evidence.

156. Further support for early working in the demolition / levelling period is provided by the "diary logs" attached to Ms Martins' statement (I pick up only those which are likely to refer to out of hours impactful working): 13 November 2013, "…digging before 06.30 again"; 28 November 2013, "…06.45 concrete crusher active"; 5 December 2013, "06.30, house shaking"; 6 December 2013, "06.45 …house to shake"; 13 January 2014, "06.50…shaking"; 15 January 2014, "06.35 …shaking"; 17 January 2014, "06.30…loud construction works"; 18 January 2014, "06.50…noisy construction"; 20 January 2014, "06.50…loud construction"; 25 January 2014, "07.00…woke everyone on Saturday".

157. There are also later relevant diary entries in June 2014, these works may have related to the collapse of the walls and the shoring works required as a consequence but it is not suggested that the emergency created by the collapse required out of hours work – just that out of hours work did not happen. The entries are for 6 June 2014, "06.50…woke us up"; 16 June 2014, "woke everyone up"; 19 June 2014, "06.50…vibrating"; 20 June 2014, "06.45…vibrating"; 21 June 2014, "06.55…vibrating"; 23 June 2014, "07.00 vibrating"; 24 June 2014, "07.00 vibration"; 25 June 2014, "06.50…vibrating"; 26 June 2014, "06.50…vibrations"; 28 June 2014, "07.50…waking up the neighbourhood".

158. While they were not referred to during the trial and do not form part of any detailed evidence in Ms Martins' witness statement, Mr Paget, very properly, pointed out, after seeing this judgment in draft, that there are further diary entries in the supplemental bundle which the court might consider relevant (pp 548, 549 and 561+). I have read all of these and the following are of some relevance on this issue: 31 July 2014 "07.00 noisy works on site"; 1 August 2014, "07.15…"waking everyone up" (I had to extrapolate the month of these entries because it is not stated); 2 March 2015, "07.00…noisy works"; 20 March 2015, "07.20…wake us up"; 21 March 2015, "07.35…noisy"; 24 March 2015, "07.15…clanking noises"; 28 March 2015, "07.30…awoken by noise"; 31 March 2015, "31 March 2015…waking us up"; 1 April 2015, "loud noises at 07.00".

159. When deciding what weight to give to this evidence, I take account of Ms Martins' general capacity for exaggeration. I also take account of the lack of any of this level of detail in the amended particulars of claim. Nevertheless, these notes were made and made contemporaneously (it has not been suggested otherwise).

160. Mr Harden was cross-examined about the lack of disclosure of the Defendant's site book, which might have provided some indication of comings and goings on site. Mr Harden explained that it would have been destroyed after the job completed and he suggested that typically this might happen about two years later. In this case the litigation was threatened in 2015 and had started in 2016, both well within that 2 year period. I also notice that the McKenna's documents in the bundle include a blank sample "site diary" which provides for the in / out time of labour entering the site and that the clerk of works reports also refer to site diaries (presumably a different document again to the McKenna document). In short, given how heavily documented construction works typically are there is a surprising dearth of detailed information about the comings and goings from site. This is not a criticism of the disclosure process but is a

comment that I take account of the lack of detailed material against which I can test such inferences as I might draw from Ms Martins' diary entries. After this judgment was circulated in draft my attention was drawn to a document dated 16 October 2013 entitled "Construction Phase Plan" which provided at page 135 of 154 (page 1624 of the bundle) that the hours of work would begin at 7.00 am. I note this but in the absence of cross-examination of the Defendant's witnesses about this I am not sure it takes matters any further. I have already made findings contrary to the Defendant's evidence that works did being and on occasion were a nuisance prior to 8 am.

161. I have also considered the photograph of 26 April 2015 and the video of 18 March 2015 but neither prove to my satisfaction that it was more likely than not then intrusive works were being carried on. Certainly, the video shows some works were being carried on at about 7.30 am (and before given Dr Clarey's evidence about the time taken to get the video camera and so on) and Dr Clarey says there was a cement mixer but it is hard to either see or hear anything disruptive to a relevant extent on the video. I realise it was disruptive for Dr Clarey because she was concerned about out of hours working and so noticed it and went out of her way to obtain a recording, but that is not a relevant test for actionable nuisance.

162. I take account of all the relevant evidence and I find that there was significant and actionable nuisance caused to the Claimants on the mornings for about 23 days of the development (this is 21 days from the diaries plus the 11 and 12 of November 2023). It concerns that me that there is not detailed evidence directly related to each property for these periods and so I will assume that the impact of the noise and vibration was to lose for each of the landowners just over an hour's relative quiet before the time when noisy works were meant to be restricted.

163. I will however, reduce the damages payable to Mr Milne and Ms Price by 25% because of the location of 39 Wyatt Park Road being less proximate to the works than the other properties and the impression I got from the evidence of Mr Milne who said he recognised that others would have suffered worse than him.

164. I have considered whether these numbers should be revisited after my attention was drawn by Mr Paget to the other diary entries referred to at paragraph 158 above. I do not. Those entries are not for periods of time when there would obviously have been noisy or vibration making works being carried on. When I take account of the risk of exaggeration and oversensitivity (a common feature of nuisance reports), the lack of other specific evidence to support any further findings of nuisance related to these days and the likelihood of seriously disruptive works being carried out, I am not satisfied on the evidence that any upwards revision of the damages awarded is justified on the balance of probabilities. So that even if there might have been a handful of other days when noisy works took place significantly before 8 am, it would not justify any further damages.

Quantum

165. The award of damages is designed to compensate the injured party for the loss which is caused by the relevant tortious conduct. The wrong I have found is not the noise and vibration of itself but the noise and vibration suffered at times when noise and vibration should not have been present. Presumably, those works would have been done but they should have been done broadly speaking during appropriate hours and so perhaps the

noisy / vibration inducing works would have continued for two or three working days longer than they did. This is a good indication of the necessarily modest level of damages that need to be awarded – the disruption would still have occurred just on different days and at different times.

166. It is always the case that in awarding general damages the court will do the best it can on such information as is available. Mr Thorowgood suggested I should provide an indication about quantum, if relevant, and if the parties wished they could address further submissions to the issue, but he hoped (as I understood it) that it would be capable of agreement. The paragraphs that follows are subject to any such arguments as might be made or the parties reaching separate agreement.

167. **Clerk and Lindsell**, 24th ed, at 19-28 says: "In cases involving interference with amenity and enjoyment of property the court must place a value on an intangible loss which "cannot be assessed mathematically". Sometimes rental values can provide a useful starting point but that does not apply here because of the time specific nature of the interference for which compensation is being given and it being unrealistic to spread the rental equally across 24 hours a day (even assuming £5000 pcm would only point to a £150 award, which would, in my view, be far too little). The same paragraph in **Clerk and Lindsell** points out that the Court of Appeal, at one time, referenced values from personal injury awards but this has been disapproved of by the House of Lords (for reference a minor injury with recovery in about 28 days falls in a bracket of £840 to £1,680 – so for a continual month of decreasing pain and inconvenience one might get £1,000).

168. As so often in the award of damages, and in particular for amounts that are necessarily modest given the nature and extent of the injury for which compensation is being given, it is question of doing the best that can be done in the circumstances. I will award each property £1,000 (to be split between two owners where relevant) and Mr Milne and Ms Price £750 in total. I have reached these figures on my sense of what the damage should be at today's values. This is relevant in that it is not my intention to make a separate award of interest on the amounts. If this is unacceptable then I would need to discount the proposed amounts to take account of inflation and then interest would be awarded to bring the figures back up again (which would seem a pointless exercise given the necessary lack of precision in the assessment).

Conclusion

169. Save for the limited extent addressed above, the Claimants' remaining claims are dismissed.