Neutral Citation Number: [2020] EWHC 821 (QB)

Appeal No: 9BS0041C
Case No: B01BH444

QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
ON APPEAL FROM THE BOURNEMOUTH COUNTY COURT
ORDER OF RECORDER SHEPHERD QC DATED 21 DECEMBER 2018

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Date: 08/04/2020

Before :

MRS JUSTICE EADY DBE

- -

Between :

MRS MARY MAJELLA INGRAM	**Appellant (Defendant)**
- and –	
GREEN CAPE LIMITED	**Respondent (Claimant)**

- -
- -

MR M NORMAN (instructed by the Appellant by direct access) for the **Appellant**
MR D MARSHALL (instructed by **Frettens LLP**) for the **Respondent**

Hearing dates: 1 April 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE EADY

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am on Wednesday 8th April 2020.

MRS JUSTICE EADY DBE:

Introduction

1. This is the full hearing of the Appellant's appeal from the Judgment of Recorder Shepherd QC, handed down on 21 December 2018, by which the Appellant's counterclaim was dismissed. Permission to appeal was given after an oral hearing before Soole J on 2 October 2019.

2. The proceedings relate to Flat 3, Meyrick Hall, 16 Meyrick Park Crescent, Bournemouth BH3 7AQ (variously referred to as "the flat" or "the property"); a two-bedroom flat in a block developed by the Respondent, which is the freehold owner. On 17 October 2014, the Appellant purchased from the Respondent a 125-year lease in respect of the flat, at a price of £345,000, subject to a written contract dated 10 October 2014 ("the contract"); she moved in shortly afterwards. Although construction was carried out by an associated company, the Respondent accepted full responsibility for performance of the contract.

3. In September 2015, the Respondent issued a Part 7 claim against the Appellant, alleging various breaches of covenant; in particular, of causing nuisance and annoyance to the owners, lessees and occupiers of other flats. In her defence and counterclaim, the Appellant raised allegations against the Respondent, which – albeit in re-pleaded form – ultimately formed the basis of the claims determined by the Recorder (the initial claim by the Respondent was stayed in January 2017) and are at the heart of this appeal.

4. By her counterclaim, the Appellant sought rescission of the contract and/or damages and consequential relief, including specific performance and injunctions. It was the Appellant's case that the Respondent had acted in breach of contract and/or was liable for misrepresentation, for breaches of section 4 of the Defective Premises Act 1972 and for personal injury (she had also pursued a claim under the Protection from Harassment Act 1997, which was dismissed at trial and in respect of which there is no appeal). The Appellant made a number of allegations regarding defects and shortcomings in the construction of the property. In particular, she complained of noise coming from other flats in the building, which she alleged was in breach of the applicable building regulations and approvals and that the design and construction had not provided "*reasonable resistance to sound*", contrary to the building regulations and guidance in Approved Document E ("ADE"). The Appellant's other claims essentially related to issues of damp, landscaping and drains and to vehicle access.

5. The trial before Recorder Shepherd QC took place over some five days and included a site visit. The Appellant represented herself but had previously received advice and assistance from Mr Norman of counsel, acting by direct access, who has appeared for her on this appeal. The Respondent was represented by Mr Marshall of counsel, who continues to represent its interests on appeal. The Court heard evidence from the Appellant and from her witnesses, Mr Saunders, Mrs Rudd and Dr Dunn (living in neighbouring properties), and from Mr Terry Williams, Director, on behalf of the Respondent. It also received expert evidence, in the form of expert reports, and answers to questions, from two jointly-instructed experts, and took into account a Psychiatric Report relating to the Appellant, and had regard to documents within a hearing bundle of some seven files.

6. By Order of 21 December 2018, Recorder Shepherd QC dismissed the Appellant's counterclaim (albeit recording that the Respondent had carried out/undertaken to carry out certain maintenance works) and ordered that she was to pay the associated costs.

7. In permitting this appeal to proceed, Soole J considered arguable points of appeal had been demonstrated on all grounds save those in respect of costs. By the Appellant's primary grounds of appeal, she objects: (1) that the Recorder's analysis of the expert evidence was incomplete and wrong (ground 1); and (2) in consequence, his findings of fact and law were wrong (ground 2). She then analyses the Recorder's findings on the different aspects of her counterclaim through the prism of these complaints. The remaining grounds permitted to proceed (grounds 3-7) largely reiterate the points made in grounds 1 and 2 but complain of how the Recorder treated the Appellant's testimony (ground 3), of his view as to the credibility of the Respondent (ground 4), about the failure to address the claims for specific performance and injunctive relief (grounds 5 and 7), and as to his findings on issues of fact (ground 6). For the purposes of the appeal hearing, the Appellant's case has been argued under the different headings of complaint (noise; landscaping/external soakaways; visibility splay; internal damp; bicycle store; redundant drain) and I have adopted the same course in this Judgment.

8. In accordance with current guidance applicable in the light of the COVID-19 pandemic, the hearing of this appeal has taken place remotely, by telephone. The parties, their legal teams and the court staff are thanked for their assistance in making this possible.

Background

General

9. The Appellant's flat is a ground-floor flat, in a block of nine; flats 6 and 9 sit above. It is a modern, purpose-built block and the Recorder accepted it would be described by estate agents as a "*luxury gated development*". Construction was authorised by a conditional planning approval of 1 August 2008 and subsequent amendment of 22 March 2012; it received a Building Regulation Certificate of Completion of Work (full plans application) on 13 March 2014.

10. Having conducted a site visit on the last day of the trial, the Recorder observed that Meyrick Hall was in an attractive area of Bournemouth, albeit that it abutted a busy railway line. The site visit took place mid-afternoon on a weekday, when the Recorder was unable to hear noise from any of the adjoining flats, although there was sound from passing trains. Although apparently designed and fitted to a high standard, it was agreed that there had been some issues, such as damp in the hall cupboard in the ground floor entrance, a leak in the roof of the residents' communal bicycle shed, and problems with drainage beneath the communal gardens.

The Parties

11. The Appellant is a woman in her earlier fifties, who lives alone. She is a highly skilled cake decorator and had previously traded through a company called Candy and Cakes Ltd from her detached house in Bournemouth. The Appellant had decided to

down-size by selling her house and moving into smaller premises so she could invest more money into her business.

12. The Respondent is a development company. Its Director, Mr Terry Williams, is a qualified architect with extensive experience in residential and commercial development. The evidence before the Court was that the Respondent had previously completed nine developments in the Bournemouth and Poole area, most of which were premium blocks of flats completed to high specifications. Mr Williams told the Court that the Respondent had faced no prior claims of the type brought by the Appellant. The Appellant did not dispute that evidence but says that the Recorder needed to see that in context, both in terms of the expert evidence in her claim and in view of the testimony of her witnesses, who lived in neighbouring properties and had also made complaints against the Respondent.

The Contract

13. The Appellant purchased the flat for £345,000 on 17 October 2014 and moved in a few days later. The contract, which incorporated the National Conditions of Sale, was subject (relevantly) to the following terms:

13.1 Special Condition 6, relating to representations, which provided:

> "Neither party can rely on any representation made by the other, unless made in writing by the other or his conveyancer, but this does not exclude liability for fraud or recklessness."

13.2 And Special Condition 19, which stated that:

> "The Seller will construct the Property in accordance with the planning permission and Building Regulations approval for the Property."

13.3 Standard Condition 7, dealing with remedies, providing (relevantly):

> "7.1 Errors and omissions
>
> 7.1.1 If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission by the seller, the remedies available to the buyer are as follows.
>
> (a) When there is a material difference between the description or value of the property, or any of the contents included in the contract, as represented and as it is, the buyer is entitled to damages.
>
> (b) An error or omission only entitles the buyer to rescind the contract: (i) where it results from fraud or recklessness, or (ii) where he would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect."

14. As the Recorder accepted (see paragraph 7 of the Judgment), none of these contractual terms amounted to a bar to rescission following section 1 Misrepresentation Act 1967. Equally, however, it was agreed by the Appellant that rescission would only be available as a remedy if the misrepresentation had been made fraudulently or recklessly or where Standard Condition 7.1.1(b0(ii) applied (paragraph 36 Judgment below which however failed to recite the criterion in Standard Condition 7.1.1(b)(ii)).

15. The Appellant relied on four pre-contractual representations (made in response to standard conveyancing questions and an email from Mr Williams, dated 12 October 2014), as follows:

> Representation 1: that, apart from the usual notices, there were no matters to the seller's knowledge affecting the use and enjoyment of the property.
>
> Representation 2: that, apart from anything in the draft lease or as disclosed, there were no rights over the property for pipes and wires.
>
> Representation 3: that the Respondent had actioned outstanding works as requested
>
> Representation 4: that planning consent and building regulation approval had generally been complied with.

16. The Respondent did not deny those representations, contending they had the objective meaning that "*the plans and specifications had been or would be complied with (or not materially departed from) and the construction was or would be in accordance with the building regulation and planning requirements*." It was the Respondent's case that the representations were not false and that the contractual warranties to the same effect had not been breached. Specifically, it contended:

> Representation 1: The appropriate certificates of building regulation control approval were granted by the Bournemouth Borough Council, including and in particular the certificate of completion of work of 21 March 2014. No enforcement action was taken in respect of any alleged breaches of building requirements; the property was compliant with building regulation requirements and had been 'signed off'.
>
> Representation 2: The Appellant was complaining of a redundant drain discovered during the course of the works and joined up in accordance with good building practice. It was not something the Respondent was under any duty to disclose and was not causative of any damage or legitimate ground for complaint by the Appellant.
>
> Representation 3: This was denied. To the extent there were defects (condensation in the lobby area and dampness in the bicycle store), these had not manifested themselves at the time

> of the statements and were maintenance issues that would be resolved.
>
> Representation 4: The property was generally built in accordance with the terms of the approved plans and specifications and in so far as the construction deviated from these plans (in relation to drainage and landscaping arrangements) these were non-material deviations which had not led to any enforcement action by the regulatory authority and were not causative of any alleged loss or damage.

The Evidence Below, The Recorder's Findings and Reasoning and The Appellant's Objections on Appeal

The Noise Issue

17. This was (and remains) the main focus of the Appellant's complaints, in particular in relation to noise transference from a soil pipe coming down into the Appellant's en suite bathroom, although also relating to noise outside the front entrance to her flat. On this issue, the Recorder heard evidence from the Appellant and witnesses called on her behalf (including residents from neighbouring flats) and from Mr Williams for the Respondent. He also had a report from a Consultant Psychiatrist instructed by the Appellant, Dr Parsonage, and the report and written answers from the jointly-instructed acoustic expert, Mr Jarman, and a report and written answers from a jointly-instructed Building Surveyor, Mr Frias-Robles.

18. The Recorder found that soon after moving into the flat, the Appellant had started to complain of noise. It was her case that she could hear the comings and goings of those in the flats above her and that the soil wastepipe going into her flat – servicing six toilets, six wash basins and three baths/showers - transmitted noise every time those in the flats above used their facilities. It was the Appellant's case that the level of noise was such that she was able to differentiate between the different facilities being used and whether solid waste was being flushed down the toilet. She also complained of noise disturbance from the communal lobby outside the front door to her flat, shared with two other flats.

19. When the Appellant raised her complaints about noise disturbance with the Respondent, she was told that the property had passed the relevant sound tests. As the Recorder noted, however, although a first set of acoustic tests had been carried out by consultants, MSAFE, on 28 November 2013, only four of the six tests required by the Building Regulations were carried out. That said, on 21 March 2014, Bournemouth Building Control issued a Completion Certificate, incorporating the MSAFE test pass.

20. The Recorder accepted there was agreement between the witnesses called by the Appellant that sound transmission between flats at Meyrick Hall was "*not good*" but he did not consider that answered the question whether Building Regulations were met at the date of the contract or whether the design provided "*reasonable resistance to sound*" (as required under guidance to the Building Regulations), observing that this could not be purely subjective.

21. In any event, as the Recorder found, a second test was carried out in January 2015, which also confirmed that the requirements of the Building Regulations were met as regards sound transmission and insulation. The Recorder noted the Appellant's objection to this test, on the basis that carpets and furniture were in place at the time (which would not have been the case at the date of the contract), and further recorded the surprise expressed by Mr Jarman that Bournemouth Building Control had accepted the original MSAFE test. That said, he also observed that Mr Jarman had nonetheless reached the same conclusion, namely that the applicable Building Regulations had been complied with.

22. The Recorder noted that the Appellant's main claim relating to noise was of misrepresentation by the Respondent that the flat was built in accordance with the Building Regulations and complied with all plans and related requirements. It was her case that the level and nature of noise transferred into her bedroom had caused her such sleep disturbance that she had suffered personal physical and psychological harm; that, in turn, had rendered her so disabled she had been unable to continue developing her cake decorating business and she claimed damages for loss of profits as a result. In support of these claims, the Appellant relied on the (unchallenged) report of Dr Parsonage, dated 6 March 2017. Dr Parsonage had concluded that the noise disturbance had caused "*a profound and significant mental impact on [the Appellant's] psychological well-being*", she had developed a depressive disorder affecting every aspect of her life and had become hyper-sensitised.

23. The Recorder accepted the Appellant was hyper-sensitive - observing that since moving into the flat she had devoted much of her life to pursuing her complaints against the Respondent – but considered her conduct was consistent with hyper-sensitivity from the outset, noting that "*None of the other residents of Meyrick Hall have felt moved to bring proceedings against [the Respondent]*" and concluding her reaction had been "*extreme*", in particular given that when the Recorder had attended the flat he had heard "*no noise whatsoever*" from the other flats. The Appellant complains these conclusions are unjustified: the Recorder ought to have accepted the conclusions of Dr Parsonage; no inference could properly be drawn from the fact that others had not yet brought proceedings or from a site visit that had taken place during the day, when other residents were unlikely to be present.

24. Ultimately, although stating that he had taken account of the evidence of the Appellant and her witnesses, the Recorder reasoned that the issue whether or not the Building Regulations had been complied with was largely a question of expert evidence. He did not, however, accept that the flush of the lavatory in the flat above created a noise as disturbing and intrusive as the Appellant claimed and rejected her evidence that a single flush late at night would have the effect of keeping her awake all night.

25. In addressing the expert evidence relating to the noise transference via the soil waste pipe, the Recorder noted that Mr Jarman had conducted tests flushing the toilet in the upstairs flat both with water alone and with solid material (sausages), which gave readings of 30-35 dB in the Appellant's bedroom. The Recorder found, however, that the peak of 35 dB was only achieved flushing sausages down the pipe – observing that this was "*not something which would ever happen*" – and in any event was "*well below the WHO 40 dB threshold for adverse health effects*".

26. The Appellant objects that the Recorder was wrong to reject a test that the joint expert had considered valid. As for World Health Organisation ("WHO") thresholds, she contends that the Recorder failed to properly engage with the evidence, which stated that threshold levels for observed adverse effect for noise levels at night were at 32dB and 35dB for the incidence of night noise *inside* a building. The Appellant further points to the unchallenged evidence of Dr Parsonage, who considered the psychological impact of noise disturbance by reference to WHO standards, as follows:

> "25. The World Health Organisation Night Noise Guidelines for Europe indicate that there are biological effects when night noise is above 32 dBA. These include increased body movements, increased awakenings, and sleep disturbance. Sleep is recognised as an essential part of human functioning … The WHO guidelines recommend that for the primary prevention of adverse health effects related to night-time noise, that night-time noise levels should not be greater than 30dBA during the night. …"

27. Mr Jarman had also referred to Hilton Hotel design standards, which limit this type of noise to around 25dB in guest bedrooms, stating that it could not, therefore, be said that the noise levels created in the Appellant's bedroom were low. The Recorder, however, observed that "*Whatever may be the standard adopted by a hotel chain here the case that [the Appellant] advances is that noise levels did not comply with the Building Regulations*". Again, the Appellant objects that it was wrong for the Recorder to dismiss a standard considered relevant by the joint expert.

28. At paragraph 88 of the Judgment, the Recorder summarised Mr Jarman's findings regarding the boxing and insulation around the soil pipe as follows:

> "(vii) The boxing of the soil pipe in the drawings would satisfy Part E. Photographs … illustrate the area of concern. Mr Jarman observed that there was no rigid contact between the pipe and the wall structure and that the insulation was building regulation compliant …. There is a small offset in the pipe which approved document E says should be avoided although it is not specifically a breach and the construction meets part E standards for internal walls.
>
> (viii) The offset is in the direction of the en-suite. The pipe then offsets 45 degrees back again so as to then rise vertically through the floor slab above through a fire seal. The soil pipe has an offset which exacerbates noise. Overall the offset in the pipe is around 150mm.
>
> (ix) In answer to further questions … Mr Jarman explains that the regulations do not apply to non-habitable rooms (because part E2 of the approved document does not apply to internal walls separating an en suite WC from an associated bedroom) and that notwithstanding the reference to 25mm mineral wool, behind the pipe there is actually further quilt which satisfies the requirements of the regulations."

29. It is common ground that references to ADE (relating to resistance to sound) at paragraph 88 (vii) should in fact have been to ADH, relating to drains and waste disposal. That, the Appellant submits, is evidence that the Recorder misunderstood Mr Jarman's testimony on noise transference. More than that, however, the Appellant contends that this summary fundamentally misunderstands and misrepresents Mr Jarman's evidence.

30. On the issue of insulation (sub-paragraph (ix)), it is correct that Mr Jarman stated that the fact that the quilt was at least 25 mm deep meant that it satisfied ADE guidance. The Appellant points out, however, that, in responding to the Respondent's question whether quilt could be aggregated with the plasterboard for the purposes of assessing compliance with ADE, Mr Jarman had opined:

> "2.17 The mineral wool quilt and the plasterboard serve different functions, with the quilt being installed to provide sound absorption in the void with the plasterboard providing the sound insulation. Therefore, the weights of the two materials cannot be aggregated in this way.
>
> 2.18 I would additionally point out the mass of mineral wool of 9kg/m³ is in terms of mass per cubic metre, whereas the plasterboard is in terms of mass per square metre of board. With the mineral wool therefore if 100mm thick the mass per square meter is only 0.9kg/m². It is of course incomplete in that it does not fully lag the pipe. With respect to sound absorption this is acceptable."

It is the Appellant's case that the Recorder was wrong to understand that Mr Jarman had thus concluded there was compliance with guidance relating to sound *insulation*, as opposed to sound *absorption*.

31. At paragraph 89, the Recorder went on to refer to Mr Jarman's Supplementary Acoustic Assessment, observing that he "*suggests what may be responsible for the transmission of sound*". This was a reference to Mr Jarman's report following further investigation of the possible reasons for noise transmission via the soil pipe. Initially, Mr Jarman had speculated that the soil pipe might be offset (that is, incorporate a bend) to accommodate a misalignment between the soil pipe enclosures in the ground floor and first floor flats, albeit the Respondent had denied this. Mr Jarman had also advised that another possibility was that the soil pipe was rigidly touching the boards. Having opened up the wall to investigate further, it was apparent that there was in fact a 45 degree offset (a bend) in the soil pipe, just above ceiling level, which was then offset again to rise vertically; this offset was around 150mm. Mr Jarman was also able to observe that:

> "4.1.8 … the plywood sheeting on the opposite side of the void did not extend to the underside of the slab. Instead the board was cut short and the soil pipe offset was in rigid contact with the top of the plywood. This rigid contact will transit noise into the wall structure. …
>
> …

> 4.1.13 It was also observed that the studwork walls between the cloakroom and bedroom … were not full height, the partition only rising to the plasterboard suspended ceiling level."

It was in this context that Mr Jarman expressed his opinion as to the possible causes of noise transmission, as referenced by the Recorder, as follows:

> "4.1.15 Drawing 7643/210 … indicate that … it was the architect's intention that the wall between cloakroom and bedroom extend up to underside of the slab, not just to suspended ceiling level. Having the walls not full height means that noise from the soil pipe can pass over the top of the partitions to neighbouring rooms, in this case Mrs Ingram's bedroom …"

32. The Appellant points out that the Recorder was wrong (at paragraph 88 (vii)) to say Mr Jarman had found no rigid contact; he had. More than that, however, the Appellant objects that the Recorder's conclusions misrepresented Mr Jarman's opinion on the question of compliance.

33. Noting that it was not an ADE requirement that internal walls extend up to slab level through plasterboard suspended ceilings – that was only a requirement for the relevant soil pipe enclosures – Mr Jarman further opined:

> "4.1.17 With the soil pipe partially set into the 70mm stud wall, this means the noise from the pipe can pass along the void of the stud wall and radiate from the wall into [the Appellant's] bedroom where the wall is a single layer of 15mm plasterboard, 10 kg/m². Treating this as a soil pipe enclosure the lining would need to be at least 15 kg/m² to meet Approved Document E standards."

34. Having referenced this part of the supplementary report, the Recorder stated his understanding, from Mr Jarman's answers to further questions on the point, that this standard had in fact been met. In order to understand this part of the Recorder's reasoning it is necessary to refer to Mr Jarman's answer to a question raised by the Respondent, as follows:

> "Is it correct that there is no requirement under the Building Regulations and no guidance under Approved Document E as to soil vent pipes which creates an obligation to enclose soil vent pipes which penetrate floors between non-habitable rooms for their full height from floor to slab (or at all)? …"

Mr Jarman had responded to this question as follows:

> "2.6 Regulation E1 requires:
>
> '*Dwelling-houses, flats and rooms for residential purposes shall be designed and constructed in such a way that they*

provide reasonable resistance to sound from other parts of the same building and from adjoining buildings'

…

2.9 The guidance on enclosure of pipes and ducts is found in section 3 of Approved Document E. Whilst the guidance on party floor constructions relates to all floors to habitable and non habitable rooms, the guidance on soil pipes relates to habitable rooms only. Therefore, it can be surmised that enclosure of the pipes is recommended to protect residents in habitable rooms from noise generated from common services passing through as a way of ensuring there is '*reasonable resistance to sound from other parts of the same building'*.

2.10 There is in this case therefore no expectation in Approved Document E that the enclosure of the soil pipe has a sound insulation function to protect the directly adjacent cloakroom or en-suite bathroom.

2.11 With the bedroom however, it is necessary to consider this. The intention is surely that habitable rooms should have a commensurate level of protection. In Approved Document E it states:

'Pipes and ducts that penetrate a floor separating habitable rooms in different flats should be enclosed for their full height in each flat'

…

2.13 In this case if the pipe had been enclosed as indicated on the architects drawing with full height partitions to the bedroom not touching the pipe then Part E recommendations would have been met. The difficulties are:

a) The offset in the pipe

b) The pipe in rigid contact with the plywood lining in the wall

c) The pipe being partially inside the partition wall which is then single boarded

d) The open void over the top of the bedroom wall to the service enclosure with the ceiling then being single boarded

The soil pipe having the offset then touching the wall lining is doubtless the primary cause of the noise heard in [the Appellant's] bedroom. The opening over the top of the wall and the sound path along the cavity wall add to that."

35. Given Mr Jarman's stated opinion in this regard, the Appellant contends that the Recorder was simply wrong to find that the expert evidence supported a conclusion that there had been compliance with ADE guidance.

36. Mr Frias-Robles also provided expert opinion evidence relevant to these issues, answering questions from the Respondent's Solicitors as follows:

> "1. The approved document to the building regulations does differentiate between habitable and non-habitable rooms.
>
> 2. Bathrooms and WCs are non-habitable rooms for the purposes of the building regulations.
>
> 3. The soil pipe is built part into the wall construction between the en-suite bathroom and the WC (both non-habitable rooms). At the point it penetrates the floor to the flat above, it 'swan necks' across as the hole in the floor above is not in line with the vertical pipe below. It appears that this is because the hole in the floor below does not line up with the hole in the floor above. Consequently the pipe is situated within the void of the plasterboard stud wall that separates the en-suite bathroom from the WC. The void within the separating wall at this point extends into the bedroom. It is for this reason that I consider that the pipe should be considered to be situated within the wall construction separating the en-suite, bathroom and the habitable bedroom as opposed to being situated entirely within any one room."

37. Again, given this expert testimony, the Appellant contends that it was simply wrong for the Recorder to conclude that the evidence supported a conclusion that there had been compliance with ADE guidance.

38. More generally, the Recorder acknowledged that, although meeting ADE standards, Mr Jarman had found that there was some audibility of speech sound between the flats.

39. The Recorder then turned to the complaints the Appellant had also made about noise levels in the lobby area outside her flat and arising from the perimeter sealing of her front door.

40. In relation to the lobby area, the Recorder noted that Mr Jarman had found that the carpet used did not satisfy ADE standards (albeit the manufacturers had claimed that it did). Although this amounted to a defect, the Recorder concluded there was no evidence that it was causative of loss; it was, furthermore, an issue that was easily capable of remedy and Mr Williams had confirmed that it would be addressed. In the circumstances, it gave rise to no loss that could properly be claimed by the Appellant.

41. As for the door seal, the Recorder noted Mr Jarman's acknowledgement that proper fire sealing had been achieved although he had questioned whether there was sufficient sound insulation. The Recorder concluded, however, that there was no proven breach of any regulations and, again, that this was not causative of any loss.

42. The Recorder's conclusions on the noise issue are summarised at paragraphs 96-102 of his Judgment. On the evidence, he found that the flat had complied with the Building Regulations in respect of noise transmission at the date when the contract was made and that there had been no misrepresentation in this respect. On that basis, the Appellant's claim failed. Even if she had established such a breach, however, the Recorder considered that the Appellant would have faced great difficulty on duty and causation:

> "100. … the test of reasonable foreseeability would raise considerable problems … as would the issue of whether it would be fair just and reasonable on the basis that the vendor can be expected to know about the potential effects on the wellbeing of a purchaser of some defect in the property or the particular state of mind of that person"

43. As for causation of loss, the Recorder found that issue was "*fraught with difficulty*" given the Appellant had a long history of serious back problems requiring her to be prescribed drugs for pain and sleep. As for the claim for loss of profits from the Appellant's business, in correspondence she had made frequent references to having to take time off work and, in any event, there was no evidence that the business had ever made a profit.

Landscaping/External Soakaways

44. The Recorder dealt with this complaint under the heading "*External Drainage dampness and landscaping*" and referred to the evidence of the jointly-instructed Mr Frias-Robles as well as to that of the Appellant's witness (and neighbour), Dr Dunn.

45. As the Recorder noted, Mr Frias-Robles had advised that the soakaways in the external grounds were "*not working correctly*", albeit the Recorder considered that "*this seems to me to be a maintenance issue*". The evidence also demonstrated "*a problem with areas below the surface*", with Dr Dunn testifying how this was causing significant water-logging issues on the outside area to his flat.

46. The evidence provided by Mr Frias-Robles' report on this issue was expressed in the following terms:

> "2.5.6 … The positions of the soakaways differ from those shown on the approved plans and further the majority of the rainwater drainage system is full of standing water and is not functioning. The most likely reason is that the two soakaways described above are not functioning correctly. This will require clearing, cleaning and exposing of the soakaways to determine whether they have been constructed correctly and are indeed functioning.
>
> 2.5.7 Further investigation and remedial works are therefore required to the surface water drainage system. The consequence of this not functioning is that the ground to the south east of the site is permanently wet and further that rainwater downpipes, gullies etc. will overflow and cause

> wetting to the ground and surfaces immediately surrounding the building. Long term this will have the potential to cause damp problems to the internal parts of the ground floor flats."

47. From this, the Recorder concluded that this "*seems to be a natural phenomenon about which little can be done without disproportionate trouble and expense*" and observed: *"[a]ll that the expert suggests is that the drainage should be monitored. On the basis of that report it appears to me that these are as [the Respondent] contends largely maintenance issues or defects that have developed over time all of which are being addressed in the course of such maintenance where possible*".

48. The Appellant contends that, on the basis of the expert evidence and without further investigation having been permitted by the Respondent, this was not a permissible conclusion.

Visibility Splay

49. As the Recorder noted, Mr Frias-Robles had identified a variance in the visibility splay for vehicle access from that shown on the plans. In his report, Mr Frias-Robles had opined:

> "2.4.3 Generally there are a number of variances … the 45º splay to the entrance of the highway is less than that indicated …
>
> 2.4.11 … any such variances should be discussed and agreed with the local authority planning officer and ultimately an 'as-built' drawing produced at the end of the development to reflect the actual work carried out.
>
> 2.4.12 This is particularly relevant to the entrance to the site and the splay to the site entrance. The design and angle of this may have been set by local authority highways to provide adequate visibility at the junction to the road for vehicles entering into and exiting the site. Consequently I would envisage that clarification of this would be required from Highways as to whether this variation as constructed on site has been approved. The fact also that the metal vehicle access gate opens outwards towards the road and there is no longer enough space for a vehicle to remain and wait for the gate to open without obstructing the public footpath would also be a matter for Highways to provide comment or approval on."

50. Having apparently accepted Mr Frias-Robles' evidence, the Recorder went on to find, however, that there had been no regulatory objection and no objection when one of the other flats had been sold.

51. The Appellant objects that the Recorder thereby simply failed to engage with her case that this demonstrated a failure to comply with the approved plans.

Internal Damp

52. The Appellant complained of internal damp in the lift lobby area and within the internal service riser cupboard. It is unclear whether the Recorder made any findings in respect of the former complaint but as regards the latter - accepting that there was dampness in the dry riser cupboard and that this had not been attended to as quickly as it should have been - he had noted that the solution to this (as advised by Mr Frias-Robles) appeared to be tanking and that the Respondent had accepted that this needed to be remedied. In any event, given that this seemed to have manifested itself well after the date of the contract, the Recorder was unable to see that it could give rise to any claim for misrepresentation or breach of contract.

53. The Appellant complains that the manifestation of damage at a later date would not necessarily mean that this had not been an issue at the date of contract.

Bicycle Store

54. The Recorder accepted that this external shed had been damaged by trees/weather activity and remained in a poor state at the time of his site visit. The Respondent had said it had been difficult to carry out repairs because bicycles had not been removed from the store. Noting that he hoped to be given a time-line for this work to be completed when he handed down Judgment, the Recorder was unable to see that this gave rise to any cause of action on the part of the Appellant.

55. The Appellant complains that the Recorder failed to address her claim for specific performance on this issue.

Redundant Drain

56. The Recorder found that the foul water drainage from Meyrick Hall had been linked up to a redundant drain from an adjoining property. The Appellant complained that this was a clear variance from the approved plans and she expressed her concern that this could be a breeding ground for rats. The Recorder dismissed the claim: there was no noticeable defect with the drain, no sign of rats after four years, and no loss occasioned to the Appellant.

The Appeal: My Approach and Discussion and Conclusions on the Merits

My Approach

57. I have set out the evidence before the Recorder, and his findings on the basis of that evidence, fairly fully because at the heart of this appeal is the Appellant's contention that the Recorder's analysis of the expert evidence was incomplete and wrong. It is that, she says, that undermines his findings of fact and his application of the law in this case. In order to determine the merit of that contention, it is necessary to have a clear understanding of the expert evidence before the Court below.

58. That said, I bear in mind that an appeal is not a re-run of the case below but is merely "*a review of the decision of the lower Court"* (CPR 52.21(1)) and an appeal will only succeed where the decision of the lower Court is "wrong" (CPR 52.21.3); that is, where it is either wrong in law or wrong on the facts to the extent that the decision is

one that no reasonable tribunal, properly applying its mind to the evidence, could have reached.

59. As the Respondent reminds me, guidance on the correct approach an appeal Court should take in considering an alleged error of fact by the lower Court was provided in *Assicurazioni Generali v Arab Insurance Group* [2002] EWCA 1642, in which it was emphasised that particular care should be taken before holding that the trial judge's conclusions of fact were wrong, particularly where those would depend on the view she had formed of the witnesses and where credibility was in issue.

60. That said, it is common ground that the key challenges made by the Appellant in this case concern expert evidence, given by report and answers to questions, which the appeal Court can read as well as the trial judge. There was no dispute on this evidence; save for the Psychiatrist, the experts were jointly-instructed and neither party sought to call them to give oral testimony at trial, relying instead on their reports and written answers to questions. Even in these circumstances, however, I bear in mind that the interpretation of the evidence is a matter for the trial judge and I agree with the Respondent that even expert evidence has to be viewed in the light of the trial judge's assessment of key witnesses of fact (in this case, the Appellant and Mr Williams); while the appeal Court might have taken a different view and come to a different interpretation, of itself, that does not make the Recorder's Judgment "wrong". In this respect it is helpful to bear in mind the observations of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, at paragraph 114 (cited with approval in *London Borough of Haringey v Ahmed* [2017] EWCA Civ 1861), as follows:

> "i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

The Merits of the Appeal: Discussion and Conclusions

General

61. For the Appellant it is argued that the appellate Court is well placed to determine whether the Recorder's findings and conclusions can be upheld in this case: as the Recorder observed (see paragraph 79 of the Judgment below) *"whether or not a misrepresentation was made [about] compliance with the Building Regulations and planning documents depends largely on expert evidence".* She further contends that the Recorder simply failed to address parts of the case before him or to engage with

aspects of the expert evidence and had failed to make proper reference to the ADE and to the role of the approved documents in relation to the substantive requirements of the Building Regulations. In the circumstances, the Appellant submits that his Judgment cannot stand, albeit she now accepts that the appellate Court would not be able to substitute its finding for that of the Recorder but would need to remit the matter to be tried afresh.

62. The Respondent argues that the Appellant is asking the appellate Court to step into the shoes of the trial judge; the grounds of appeal fail to explain how it can be said that the Recorder reached a conclusion that no reasonable tribunal could have come to; the Appellant's arguments were essentially mere recitation of the arguments that had failed below. The Recorder had had appropriate regard to various codes of guidance, including ADE, which did not have the force of statute and did not require a particular solution to be adopted if the relevant requirement could be achieved in some other way. More generally, the Respondent asks me to keep in mind the overriding objective, contending that a proportionate view needed to be taken of this matter, which had already taken up a considerable amount of Court time.

63. The overriding objective requires the Court to deal with a case justly and at proportionate cost. That objective will be met by affording due respect to the conclusions reached by the first instance judge at trial – adopting the approach I have already set out above. That said, if the trial judge's conclusions are rendered unsafe by the approach adopted or cannot stand, given the evidence below, it is the duty of the appellate Court to so find: justice will not have been served and the very purpose of the appeal process is to put that right.

64. In the present case, I agree with the Respondent that it would be wrong for me to seek to second-guess the view the Recorder formed of the witnesses of fact and I keep in mind the findings he made adverse to the credibility of the Appellant (see, for example, paragraphs 60, 62-64, 66, 68-71 and 79). I also agree with the Appellant, however, that the key issue on this appeal relates to the Recorder's approach to the expert evidence, which he made clear was key to his conclusions on questions of compliance and may have impacted upon this conclusions on credit.

Noise

65. Turning then to the core trial issue – the question of noise transference. As the Respondent observes, Building Regulations require only that the construction must provide "*reasonable resistance to the passage of sound*" from other parts of the building and within the dwelling, and reasonable resistance to the passage of sound through internal walls (although not internal walls separating an en suite toilet from associated bedrooms or an internal wall which contains a door). Although conceding that Mr Jarman had theorised as to what might permit the transference of sound in this case, the Respondent says this was not sufficient to establish the Appellant's case: the expert evidence had only found rigid contact between the pipe and the top of the plywood and, whilst Mr Jarman had opined that this would transmit noise into the wall structure, this was not a breach of ADE and the Recorder had been entitled to so find. Moreover, the Respondent points out that the Building Regulations only apply to habitable rooms, which an en suite bathroom is not.

66. The first difficulty with the Recorder's approach is, however, that it fails to demonstrate any engagement with the Appellant's case on misrepresentation in relation to compliance with approved plans. As the Respondent had accepted, the representations made "*had the objective meaning that the plans and specifications had been or would be complied with (or not materially departed from) ...*" (Judgment below, paragraph 6 (iii)). Mr Jarman's evidence was that this was not correct: the pipe had had to incorporate an offset because the alignment between the Appellant's flat and the flat above was not as had been planned (see also the report of Mr Frias-Robles in this regard), the plan had not envisaged any rigid contact and had shown the wall extending to the underside of the slab, not merely to the level of the suspended ceiling. The Respondent suggests that Mr Jarman had merely presented a theory as to why these factors might transmit noise, but the question for the Recorder was whether this demonstrated a material difference – whether (to use the language of standard condition 7.1.1) the Appellant was thereby obliged (to her prejudice) to accept "*property differing substantially (in ... quality ...) from what the error or omission had led [her] to expect*". Given Mr Jarman's conclusions (see as set out at paragraph 34 above), read together with the psychiatric evidence from Dr Parsonage, this was an issue with which the Recorder needed to engage.

67. Secondly, although it may be possible to read Mr Jarman's conclusions as somewhat ambivalent on the question of compliance with ADE, I find it difficult to understand the basis for the Recorder's conclusion that he had found that ADE requirements had been satisfied. In the written answers cited at paragraph 34 above, Mr Jarman referred to ADE guidance specifying that "*Pipes and ducts that penetrate a floor separating habitable rooms in different flats should be enclosed for their full height in each flat*". That guidance would, Mr Jarman considered, have been complied with "*if the pipe had been enclosed as indicated on the architects drawing with full height partitions to the bedroom not touching the pipe*" but he considered there were difficulties in the present case, going on to list the various divergences from the plans relating to the soil pipe. In the light of this stated caveat – expressly raised in the context of the limitation of the guidance to habitable rooms - it is unclear why the Recorder felt able to conclude that Mr Jarman had found that ADE requirements were satisfied.

68. Third, and returning to the question of materiality, the Recorder apparently misunderstood the evidence relating to WHO threshold levels for adverse health effects from night noise. The evidence before him was that adverse health effects were observed for internal night noise between 32dB and 35dB, which renders unsafe the Recorder's conclusion that the Appellant had not experienced levels of noise beyond the WHO threshold.

69. Although perhaps less material, I also consider the Appellant is entitled to complain of the Recorder's apparent dismissal of Mr Jarman's noise tests: the fact that sausages would not normally be flushed down the pipe was not in issue; the jointly-instructed expert had, however, taken the view that this was a useful way of testing noise transference and there was no basis for considering that this was an invalid test. Similarly, it was Mr Jarman who had considered standards laid down by Hilton Hotels to be potentially relevant and, given his expertise and the type of building in issue (acknowledged to be at the higher end of the market), it is unclear why the Recorder apparently rejected this as irrelevant.

70. For these various reasons, I am reluctantly forced to conclude that the Recorder's conclusions on the Appellant's claim relating to noise transference relating to the soil pipe are rendered unsafe and cannot stand. As the Appellant acknowledged during the hearing, this must mean that the claim in this regard is remitted to be re-heard.

71. The other complaints relating to noise – between the flats generally; relating to the carpet used in the lobby outside the Appellant's flat; arising from the perimeter sealing to the Appellant's door – do not give rise to such significant issues but, as the Recorder acknowledged, the evidence raised some questions of compliance and, given the view I have formed on the issue of noise transference relating to the soil pipe, I consider that the appropriate course is to remit the entirety of the claim on noise to be re-tried.

Landscaping/External Soakaways

72. On appeal, the focus of the Appellant's complaint under this heading has been on the issue of the external soakaways and issues of damp caused by what appear to be problems of external drainage. As the Respondent observes, the Recorder had the advantage of seeing the grounds on his site visit and it may be right that the area outside the Appellant's flat is largely unaffected. That said, the report of Mr Frias-Robles identified more general issues arising from the poor external drainage and I note that the Recorder did not dismiss this element of the claim on the basis that the Appellant could have suffered no damage herself.

73. The Recorder concluded that the problem identified "*seems to be a natural phenomenon about which little can be done*" and stated that the expert evidence suggested that "*the drainage should be monitored*". I am unable to see, however, how the Recorder could have drawn those conclusions from the expert evidence before him. Certainly it is hard to see how the Recorder derived support for his finding that this was a "*natural phenomenon*" from Mr Frias-Robles' report (see the extracts set out at paragraph 46 above), which suggested that the problem was the consequence of the non-functioning of the drainage system. Moreover, Mr Frias-Robles had not simply suggested that the issue should be monitored but had advised that further investigation was required. And whilst the Recorder found that the system had originally been approved by the Building Control officer, he did not engage with Mr Frias-Robles' testimony that the position of the soakaways "*differ from those shown on the approved plans*". Again, given that this went to the Appellant's case on misrepresentation, this was a point that the Recorder was required to address. In the circumstances, I cannot see that the Recorder's findings on this aspect of the case can safely stand. Although I accept the Respondent's concerns about proportionality, I consider that this is also a matter that is thus required to be remitted for re-trial.

Visibility Splay

74. Similar points can be made regarding the visibility splay issue. Again, the evidence before the Recorder (see the extracts from Mr Frias-Robles' report at paragraph 49 above) was that there was a variance with the approved plans in this regard – evidence that clearly went to the Appellant's case on misrepresentation, which is not addressed by the Recorder. The Respondent says that I can view this as a makeweight allegation and that it was rightly rejected by the Recorder as a non-material matter. Given the expert evidence on this issue, however, I am not persuaded that I can adopt the

approach thus urged. With some reluctance, I consider that I this is again a matter that must be remitted for re-trial.

Internal Damp

75. On the internal damp issues, the Respondent says that it had always acknowledged that there were some problems in this regard in the ground floor lobby but points out that these had not arisen at the time of the alleged misrepresentations and there was no evidence to show that anything the Respondent had done or said anything wrong at the time. The issues needed to be put right but, the Respondent contends, the Recorder was not only entitled to deal with this in the rather short form way he did (see paragraph 106 of the Judgment below) but it was the correct and proportionate response.

76. I have some sympathy for the Respondent's position: on any case these appear to have been relatively minor issues, which may now have been resolved. That said, I am unable to see the basis for the Recorder's conclusion that the underlying problem had "*not arisen at the time of sale*". As the Appellant observes, the fact that the damp had not manifested itself at that time does not mean that the underlying problem did not exist, and Mr Frias-Robles' report would not appear to exclude that possibility. Although the Recorder was entitled to take a proportionate approach to these aspects of the Appellant's claim, the conclusion reached needed to be explained. On this point, the reasoning provided is inadequate to the task and – subject to my earlier observation that the issue may now have been addressed – this matter will also be remitted for re-trial.

Bicycle Store and Redundant Drain

77. On these issues, I consider the Respondent is correct: the Recorder was entitled to deal with the points raised in the way he did; no actionable loss had been identified and it would have been disproportionate to further address these aspects of the claim.

Conclusions and Disposal

78. For the reasons I have explained, I therefore allow the appeal on all but the issues relating to the bicycle store and redundant drain. This matter will need to be remitted for re-trial, although it might be hoped that the issues have now crystallised sufficiently to enable this to be heard over a shorter time-frame than before. More than that, however, it would plainly be sensible for the parties to try to resolve their differences through mediation rather than further litigation.

79. As for the Order on the appeal, as indicated at the end of the oral hearing, any representations on disposal or costs that the parties wish to make should be made in writing within seven days of the handing-down of this Judgment. In the meantime, counsel are asked to provide the Court with a draft minute of Order; if it is possible for agreement to be reached on all outstanding issues (including costs), that should be made clear within the draft.