Neutral citation number: [2022] EWHC 1482 (TCC)

Case No: E50MA045

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY & CONSTRUCTION COURT (QBD)

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ

Date: Tuesday, 5 April 2022

BEFORE:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

BETWEEN:

THE HOUSE MAKER (PADGATE) LIMITED

Claimant

- and -

NETWORK RAIL INFRASTRUCTURE

Defendant

MR ANDREW SKELLY (instructed by **Blackstone Solicitors Limited**) appeared on behalf of the Claimant
MR RAHUL VARMA (instructed by **Addleshaw Goddard LLP**) appeared on behalf of the Defendant

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APPROVED JUDGMENT
(Approved on 20 June 2022)

Dates of hearing: 29 – 31 March 2022
Date of Judgment: 5 April 2022

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(Official Shorthand Writers to the Court)

HIS HONOUR JUDGE HODGE QC:

1. This is my substantive extemporary judgment following the trial of a claim in nuisance and/or negligence relating to a damaged drain under the defendant's land which caused nuisance and damage to the claimant's land. For structural reasons, this judgement is divided into seven parts as follows (although the contents of each part have informed the others):

   I: Introduction and background

   II: The trial

   III: Findings of fact

   IV: Scope of duty

   V: Breach

   VI: Loss;

   VII: Conclusion

I: Introduction and background

2. The claimant, The House Maker (Padgate) Limited, is a residential property development company. It is one of a number of companies owned and controlled by Mr Robert Walsh, who is the claimant's sole director. On 8 February 2017, the claimant purchased a development site at Green Lane, Padgate, Warrington to the south-west of Padgate Railway Station, which is owned and operated by the defendant, Network Rail Infrastructure Limited. The claimant was registered as the proprietor of the land on 5 June 2017.

3. Padgate Station lies to the east of Warrington and serves the more southern of the two main railway lines connecting Liverpool and Manchester. It is the claimant's case that due to flooding of the development land, caused by a collapsed drain on the defendant's adjoining land, the claimant was unable to develop its land as it had planned.

4. The defendant was first notified of the flooding on 1 March 2017 yet it was not until April 2020 that a new drainage system was in place which rectified the flooding issues. As a result, the claimant was unable to comply with certain planning pre-conditions, and it also found itself unable to commence any development works on the site.

5. The claimant's case is that, but for the issues with the drainage, it would have commenced development works on site in January 2018, that the development would have been completed after about 18 months, in or around July 2019, and that all the properties would have been sold off by the time of the first coronavirus pandemic lockdown in March 2020. Instead, with no signs of the drainage issue being rectified despite legal correspondence with the defendant, at the beginning of October 2019 the claimant resolved to sell the site to another house developer with the benefit of planning permission.

6. Mr Walsh's business model for House Maker Group projects is to acquire brownfield sites, obtain planning permission, develop the land, and sell the houses off plan, usually within 12 to 18 months. By October 2019, the claimant should have completed this development and moved on to the next one. As a result of the drainage issues, and with no date for their resolution in sight, the claimant had to part company with its project manager, Mr Peter George, because it had no work for him, and it placed the development land on the market. A purchaser was found after about six months but, in the event, this sale, at an agreed price of £978,000, failed to proceed and the claimant retains the development land.

7. At the time the claim form was issued, on 11 June 2018, the principal relief sought was an injunction to restrain the defendant from continuing the nuisance resulting from the defective drain. In the light of the defendant's indications that it would undertake remediation works, the claimant withdrew an application for injunctive relief; and by a series of agreed orders, the claim was repeatedly stayed until April 2020, by which time

the defendant's remedial scheme, which had commenced in September 2019, had been completed, at a cost in the order of £1 million. The claimant has therefore proceeded with its claim as one for damages only.

8. Rather than ordering the claimant to replead its case, at the costs and case-management hearing on 19 October 2020, His Honour Judge Stephen Davies directed the claimant to file and serve a schedule of loss, with the defendant responding by way of a counter-schedule. The claimant's schedule of loss was served on or about 11 December 2020, with the defendant's counter-schedule following on 23 December 2020.

9. On 10 August 2021, His Honour Judge Cawson QC gave each of the parties permission to call two expert witnesses to deal with the question of what, if any, losses the claimant had suffered. One was to be a quantity surveyor, to address the cost of the works in completing the development had the claimant proceeded to do so. In the event, only the claimant served such expert evidence, which took the form of a report dated 7 October 2021 from Mr Ken Latham, a director in the Manchester office of Edmond Shipway. Mr Latham also responded on 2 February 2022 to questions posed by the defendant. Mr Latham's estimate of the development costs is £3,338,900. This should be contrasted with an estimate of building costs produced by Baker Mallett (at page 451 of the main trial bundle) of £3,631,644 on which the claimant seeks to rely.

10. Both parties served expert valuation reports. The claimant's expert valuer was Mr James Staveley, of Evaluate Chartered Surveyors, Manchester. He valued the development land at £800,000. The defendant's expert valuer was Mr Nigel French who considered the agreed sale price of the undeveloped land with the benefit of planning permission for residential development, which he understood to be £1 million, to be reasonable and within the range of anticipated values. In Mr French's opinion, the site was unlikely to have been worth any significant amount more than £1 million. In view of the negotiated sale price of £978,000, the claimant no longer seeks to support its own expert valuer's £800,000 valuation.

11. At the pre-trial review, before his Honour Judge Pearce on 3 February 2022, the claimant was represented by Mr Andrew Skelly and the defendant by Mr Rahul Varma (both of counsel). They also represented the parties at the trial of this claim.

12. His Honour Judge Pearce's order records that the parties agreed that: (1) if the claimant had started the development in January 2018, then the development would have been completed, and the properties sold, by March 2020 and the claimant would have receive net sale proceeds of £5,035,044; (2) the opinion evidence as to gross development value contained in Mr Latham's report, dated September 2021, is inadmissible; (3) the claimant's case is that the value of the claimant's land with planning permission is £978,000, whilst the defendant's case is that the value is £1 million; (4) the sum of £435,540 (representing the cost of the land, marketing costs and VAT) falls to be deducted from any net sale proceeds; and (5) neither the cause nor the effect of any sewage on the claimant's land is an issue in these proceedings. In the light of that agreement, it was ordered that the expert evidence of all three experts should be given at trial by their written reports.

13. I do not intend in this extemporary judgement to go into detail on every point or nuance of argument raised by counsel for either party although I have borne them all in mind. In summary, the claimant's case is that, but for the issue with the damaged drain under the defendant's land, it would have started the development works in January 2018 and would have completed them and sold all the housing units before the effects of the coronavirus pandemic, with its consequent successive lockdowns, began to be felt in March 2020. Instead, by October 2019, with no end to the drainage problems in sight, the claimant was no longer in any position to proceed with the development, and it therefore resolved to sell the land with the benefit of planning permission. The claimant therefore now seeks to recover the difference between: (1) the profit it would have realised had it not been prevented from proceeding with the development as planned in 2018; and (2) the profit it will realise on the sale of the undeveloped land with the benefit of planning permission. The claimant asserts that the former figure is £1,403,400 on the basis of the agreed net sale proceeds of £5,035,044, less the Baker Mallett costs of £3,631,644. If Mr Latham's costs figure of £3,388,900 were adopted, the resulting figure would be £1,696,144. The claimant asserts that the latter figure is £542,550, on the basis of the agreed sale price of £978,000, less the agreed deduction of £435,540. The difference is £860,850 (or £1,153,594 if Mr Latham's estimate were to be adopted). In addition, the claimant seeks to recover drainage survey costs of £3,300.

14. In summary, the defendant accepts that it owed a duty in tort to its neighbour, the claimant. However, the defendant says that this was merely the 'measured duty of care' to reduce or to remove hazards by taking reasonable steps within a reasonable time in the light of the defendant's obligations as a public infrastructure provider. The defendant denies that it has breached this measured duty of care. The defendant had spent at least £1 million to fix the drainage issues by April 2020. In the interim, the defendant conducted high-pressure jetting of the drains (at a cost of about £15,000) in an attempt to do what it could to alleviate the claimant's concerns. Although these works have benefited the claimant, no contribution from the claimant has been claimed. In fact the claimant required the defendant to pay a total (as I find) of £17,200 for the use of the development land in order to carry out the remedial works. The defendant also contends that if it is in breach of duty, section 122 of the Railways Act 1993 provides it with a statutory defence.

15. In any event the defendant contends that the claimant has suffered no recoverable loss. The claimant retains the development land, retains the benefit of the extant planning permission, and it is not committed to any sale. Accordingly, the claimant could build the development now if it chose to do so; and there is no evidence that if the claimant built the development, it would not be at least as profitable as it would have been in early 2020. The defendant relies upon the evidence of Ms Tina Horth, the claimant's former head of finance and marketing, who accepted that the claimant could take advantage of the planning permission now, although she also pointed out that the claimant no longer has any workforce in place to enable it to do so. The defendant submits that the claimant is seeking to recover a windfall. If the court were to award the claimant substantial damages, then there would be nothing to stop the claimant from then completing the development; and there is no evidence that the development would be any less lucrative than it would have been in early 2020.

16. At one stage, the defendant was contending that even if the claimant could not now develop its site if it chose to do so and/or if it would not obtain at least as much profit now as it would have done in March 2020, the claimant must still prove that any residual losses were reasonably foreseeable at the date of the breach of duty, that is in about March 2017. The defendant contends that lost profits caused by a decision forced upon the claimant by *"the uncertainties of the impact of COVID-19 on the UK economy"*, as

expressed in the claimant's schedule of loos, were losses of a nature that could not have been reasonably foreseen in 2017. However, it is clear from the evidence of Mr Walsh that the decision to sell the development land had been taken by 7 October 2019, long before COVID-19 had become a matter of any concern to people in this country (or even elsewhere in the world). After the short adjournment on day one of the trial, I allowed an amendment to delete references to the uncertainties caused by COVID-19 as a reason for the decision to sell the development site (for the reasons I gave in a short extemporary ruling) and so this particular aspect of the defence is no longer a live issue.

II: The trial

17. The trial started on Tuesday, 29 March 2022 and it lasted for three days. It took place as a hybrid trial, with one witness (Mr Hellings for the defendant) giving evidence remotely via the cloud video platform but with everyone else present in an overheated Court 42 of the Manchester Civil Justice Centre. I had the benefit of detailed written skeleton arguments from both counsel, and I was allowed one day for pre-reading. There was a core bundle of 154 pages and a further bundle of 657 pages. The bundle of joint authorities extended to some 300 pages. I give credit to the claimant's solicitors for having arranged an efficient series of hard-copy and electronic bundles for use by the court.

18. I heard from four witnesses for the claimant. The first was Mr Peter George, the claimant's former development director. His witness statement had been made for the purposes of a proposed interim injunction application in March 2018. Much of it had been overtaken by subsequent events, and there was little challenge to much of Mr George's evidence. In closing, Mr Varma rightly accepted that Mr George was an honest witness who had been trying his best to assist the court, and that he had been candid about the limitations of his own evidence, acknowledging that he was not qualified to express any opinion on how long it might take to rectify the drainage issue. I accept Mr George as a reliable and credible witness. Mr Varma also made no criticism of the claimant's third witness, Ms Tina Horth, the claimant's former head of finance and marketing, who was only in the witness box for about five minutes.

19. However, Mr Varma was highly critical of the claimant's other two witnesses, Mr Andrew Shaw is a property development consultant who had been retained by the claimant as a surveyor to assist in addressing the various planning conditions. He was the claimant's second witness and he gave evidence immediately before the luncheon adjournment on day one of the trial. Mr Walsh, the claimant's sole shareholder and director, was the claimant's fourth witness. He gave evidence in total for about two hours and 20 minutes on the afternoon of day one and on the morning of day two of the trial.

20. Mr Varma criticised both men for their propensity to litigate the claimant's case, rather than assisting the court. Both men were entirely invested, according to Mr Varma, in advancing the claimant's case, rather than addressing the objective realities. Neither witness was prepared simply to assist the court by answering the questions put to them. Both men were said to be evasive and argumentative, seeking to put questions back to Mr Varma. Mr Walsh in particular refused to accept that the first part of paragraph 6 of his first witness statement was wrong when he asserted that the defendant had failed to acknowledge the initial reports that had been made to it regarding the blocked culvert. Neither witness would acknowledge how much the claimant had paid to Mr Shaw to address the discharge of the planning conditions. Both witnesses were said to have provided the court with a lot of additional evidence relevant to the satisfaction of planning conditions which should not have appeared in their witness statements and which was not supported by any documentary evidence. The very late, and unheralded, amendment, deleting the reference in the claimant's schedule of loss to the uncertainties caused by the impact of the coronavirus pandemic on the UK economy as a reason for the decision to sell the development land, was said to have done considerable injury to the claimant's credibility.

21. I acknowledge the force of many of these criticisms, at least in relation to Mr Walsh, although I also accept Mr Skelly's point that it is not unusual for witnesses to expand upon matters in their witness statements in the course of cross-examination. An example on the defendant's side was Mr Hellings's omission to refer to the cut in the defendant's budget during Control Period 5. But I attribute the deficiencies in Mr Walsh's evidence and demeanour, and also in the evidence of Mr Shaw, to a sense of frustration and righteous indignation, particularly on Mr Walsh's part, at the defendant's delay in addressing the problems caused by the collapsed drain and the defendant's apparent lack

of concern about the impact that this was having upon the claimant's development project. Acknowledging these shortcomings, I nevertheless accept both men as honest, reliable and credible witnesses. I found Mr Shaw to be a competent, capable, and well-connected professional in the field of planning. I accept his evidence as to the claimant's ability to have satisfied the planning conditions in a timely fashion had it not been for the flooding of the claimant's land and the problems caused by the collapsed drain. I accept the evidence of Mr Shaw, which is corroborated by that of Mr Walsh, that but for this, development work could, and would, have started on the claimant's land in January 2018. I accept Mr Shaw's evidence that he had received the draft planning permission on or about 15 September 2017, and also that he had known what it was likely to contain, by way of conditions and informatives and otherwise, a couple of months earlier. This evidence is supported by the terms of the letter that the claimant's solicitors (Blackstone Solicitors) wrote to the defendant dated 2 August 2017 (at page 558 of the further bundle) inviting the defendant to note that the claimant intended to commence building works on the site in late August 2017 and therefore the new drainage needed to be laid as a matter of urgency. That letter also noted that it had been verbally accepted by the surveyor instructed by the defendant that the blocked drain was on the defendant's land and that a new drainage system needed to be laid; and the letter went on to inquire when this would be undertaken. The letter also made reference to counsel being in the process of preparing proceedings to ensure that the defendant remedied the drain blockage as a matter of urgency, and to require an exact date as to when the works would be started, and also an undertaking to assure the claimant that the new drainage system would be completed by late August 2017. There is no recorded response to this or to any later chasing letters.

22. Mr Shaw accepted that there had been further work to be done in connection with planning matters. He acknowledged that in practice there had been about a two months' delay in the local planning authority confirming the discharge of planning conditions. However, I also accept Mr Shaw's further evidence that the blocked drain meant that there was no need for the claimant or its consultants *"to go hell for leather"*, as Mr Shaw expressed it, in addressing the planning conditions because the feedback from the defendant at that time had given the claimant no confidence that the necessary remedial works would be carried out in the immediate future. I accept Mr Shaw's evidence that the claimant's perception at that time was that the defendant was just (in Mr Shaw's

words) *"meandering along"*. I accept Mr Shaw's evidence that he had a good relationship with the local planning authority, and that, had there been any need to do so, he could have got confirmation of the discharge of any relevant planning conditions in a short space of time, such as only a week or thereabouts. I accept Mr Shaw's evidence that the fact that the drain was defective was delaying the whole scheme and that, but for this, the matter would have proceeded in sufficient time for work to have begun on site in January 2018.

23. I find that there was no point in the claimant satisfying the pre-commencement conditions of the planning consent because the claimant did not know when the drainage problem would be resolved. This was because it could get no confirmation of the start date or the progress of any remedial works from the defendant. I also accept Mr Shaw's evidence, corroborated by that of Mr George, that there would be no increase in the amount of water discharged into the drainage as a result of the development because the system was only receiving groundwater run-off. As Mr George put it, *"the rain falling up on the developed site and then discharging into the drainage system would be the same as before any development of the site"*. Further, as the claimant knew, and as evidenced by the defendant's Mr Max West's minor works remit submitted on 17 May 2017 (at page 515 of the further bundle), the site had formerly been used as a coach depot and therefore presumably had areas of hardstanding. I reject the vague suggestion to the contrary at paragraph 29 of Mr Hellings's first witness statement. I accept Mr Shaw's evidence that revisions to the approved planning application, such as those sought by the claimant's retained planning consultants on 26 March 2019, were the usual sort of changes which are commonly encountered during the course of the implementation of any residential development scheme, and that they would not have delayed either the commencement or the course and progression of the development.

24. The defendant called two witnesses, both civil engineers: Mr Richard (or Rick) Hellings, a senior asset manager with the defendant (who, for medical reasons, gave his evidence remotely, rather than in court); and Mr Matthew Clarke, who is employed by the defendant as a project manager, and who was involved in delivering the eventual remediation project.

25. In cross-examination, Mr Hellings emphasised that this had been Mr West's case and not his (Mr Hellings's) case. The defendant did not call Mr Max West, who had had the day-to-day conduct of the drainage remediation works. I was not invited to, and I do not, draw any inferences from this omission; but it does mean that the evidence I have heard from the defendant's side is not really first hand. In closing, Mr Varma rightly submitted that both of the defendant's witnesses had been professional, calm and courteous, although Mr Clarke might at times have seemed a touch nervous. I accept that both men sought to help the court with what they knew, and with what they did not know; but, as Mr Skelly pointed out, neither witness had been involved in any direct communications or correspondence with the claimant or their solicitors.

26. Mr Skelly emphasised that both witnesses called by the defendant may have been candid with the court but, unlike the claimant's witnesses, they could speak only to very narrow issues. However, paragraphs 5 and following of Mr Hellings's second witness statement are important because they reveal that a need for the renewal of the drainage system had been identified as long ago as July 2015, and that this had originally been timetabled to take place in the five-year Control Period ending on 31 March 2019. Mr Clarke explained in cross-examination that nothing had happened between 2015 and 2017 and that this was due to budgetary constraints. When asked about Addleshaw Goddard's letter to the court, dated 5 March 2019 (at page 588 of the further bundle), stating that the proposed remedial scheme was then expected to be completed in either October or November 2019, Mr Clarke responded that seven months would be a reasonable assessment for completion of the works, even though the design of the remedial works still remained to be discussed.

III: Findings of fact

27. The defendant's statutory predecessor, the British Railways Board, had sold the development land to the claimant's predecessors in title, Eric and Leslie Millman, on 6 April 1984. On the balance of probabilities, I find that the British Railways Board had installed the drainage system at some time before that sale since it is improbable that any third party could or would have installed a drainage system which extended below the railway tracks. Mr Hellings said that he was not aware that the Millmans had purchased the land from BRB or that BRB's former ownership of the land was the reason why its

surface water was permitted to drain from the development land into the defendant's drainage system.

28. The Millmans had used the land as a coach depot. Although Mr Varma pointed out in his brief reply that there was little, if any, evidence of the Millmans' former business activities on the land, its permitted use for planning purposes, or of any complaints about flooding, I find that the use of the land as a former coach depot, which was acknowledged by Mr West in his May 2017 remit, would inevitably have involved the existence of areas of hard standing on the development land.

29. The claimant purchased the land on 8 February 2017 and was registered as the proprietor thereof on 5 June 2017. Planning permission was granted on 27 November 2017, although this fact was not communicated to the defendant until a letter from Blackstone Solicitors dated 21 February 2018. However, I find that the draft planning permission had been supplied to the claimant on or about 15 September 2017, and that the claimant had known of its likely terms some two months before this date. The defendant was put on notice of the claimant's intention to commence building works on site, and for the need to lay the new drainage as a matter of urgency, by Blackstone Solicitors' letter of 2 August 2017. This urgency was reiterated in a further chasing letter from Blackstone Solicitors on 1 September 2017. Despite all this, it was not until 30 September 2019 that the remedial works were actually commenced; and they were not completed until 6 April 2020. The actual cost of the works was some £977,000, more than twice the original projected cost of £435,000; and the total project costs were in excess of £1 million. Mr Hellings accepted in cross-examination that if the works had been completed sooner, they would have cost less.

30. Drainage problems at Padgate Station had first been identified in 2015, and the need for the renewal of the drainage system, at an indicative cost of around £143,000, had first been identified by the defendant some time around July 2015. However, according to Mr Hellings, at that stage the defendant did not know that third-party land drained into the defendant's drainage system, although had the defendant appreciated that BRB had been the original owner of the claimant's land, I find that the possibility of this should have been apparent to the defendant. Because neither the operation nor the safety of the

railway were being compromised by the drainage problems, the matter was not treated as a priority.

31. Mr Hellings's first witness statement contains some details of the nature, and the causes, of the problem at paragraphs 7 to 9 and 12 to 17. I accept Mr Hellings's evidence that the most likely causes of the damage to the drainage pipes were: (1) wear and tear; and (2) the impact of traffic on the railway line. But, as Mr Clarke explained (at paragraphs 12 to 14 of his witness statement), the collapse of the drainage pipes was also due to their vitrified clay construction, which was, in Mr Clarke's words, *"very much of its time"*, and meant that they were liable to fully collapse under railway loadings and would not last as long as modern drainage, which is designed to last for 60 years.

32. Although originally scheduled to be undertaken in Control Period 5, and thus before 31 March 2019, the necessary work was allowed to slip into the next control period because other, more urgent projects were given priority, and there was also a cut in the budget part of the way through the control period, although the fact of this budget cut only emerged during Mr Hellings's cross-examination. As a result, this project was deferred to the next control period, starting in April 2019, in favour of other more urgent schemes. According to Mr Hellings, the money for any emergency works had to come from somewhere else, although he emphasised that he was a civil engineer and was not involved in financial matters. Mr Hellings also explained that it was possible to reschedule or postpone works in order to prioritise other works, although he emphasised that if the defendant undertook unplanned works, it would have to pay compensation to the train and freight operating companies who were thereby affected.

33. The early exchanges between the parties over the flooding of the claimant's land starts on 1 March 2017 when Mr George entered a complaint on the defendant's online support centre. The history appears from paragraphs 10 to 14 of Mr George's witness statement and is documented in the entries from the defendant's online call log at pages 92 to 94 (read in reverse order) and page 546 of the main bundle. I will refer to the relevant excerpts.

34. In paragraph 11 of his witness statement, Mr George summarises his communications with Network Rail as follows:

(a) On 1 March 2017 I reported flooding of the development land to Network Rail and the complaint log was started. I took photographs of the flooding on or around 1 March 2017.
(b) On or around 7 March 2017 United Utilities visited the adjacent land the development land and confirmed that the blockage was on the adjacent land and that the culvert was backing up and the water rising. I was present when United Utilities attended.
(c) On or around 7 March 2017 I chased an update from Network Rail regarding when remedial works would be done.
(d) On or around 7 March 2017, Network Rail's own signaller reported flooding on the railway track on the adjacent land. I have obtained this information from the complaint log with Network Rail.
(e) On or around 22 March 2017 I chased an update from Network Rail, further noting the serious consequences that flooding on the track could have for Network Rail.
(f) By 22 March 2017 Network rail had inspected the drain on Network Rail's land and had passed the issue to Network Rail's drainage team for work to be carried out.
(g) On or around 3 April 2017 I chased Network Rail for an update and to ascertain when the work would be carried out as the flooding was backing up on to the development land.
(h) On or around 11 April 2017 Network Rail informed me that its drainage engineers visited the adjacent land on or around 28 March and confirmed that there was a blockage within Network Rail's track drainage system on the adjacent land causing the flow to back up and partially flood the adjacent railway land (being the development land). Further that the flood water was contaminated with domestic effluent and that a full drainage renewal scheme was due to be implemented at this location in the future.

35. Pausing there, on 9 May 2017 Blackstone Solicitors wrote a pre-action protocol letter to the defendant, which appears at pages 539 to 541 of the main bundle. I quote:

We act for The House Maker who have an option agreement to purchase the land adjacent to Padgate Station called Millman Coaches Station Yard …
We write in relation to an ongoing complaint that you have failed to resolve. Our client's claim against Network Rail is in private nuisance relating to blocked drains on your land which is backing up and causing issues on the land.
We have been provided with a copy of the complaints log and upon review we consider that this matter should be dealt with in accordance with the Practice Direction on Pre-Action Conduct and Protocols contained in the Civil Procedure Rules … Ignoring this letter may lead to our client commencing proceedings against you and may increase your liability for costs.
<u>Background</u>
Our client's intention is to develop the land for residential properties. Our client has carried out all its due diligence and

necessary reports and has prepared architects' drawings ready for submission for planning. However, they cannot submit a planning application of this nature without also providing a 'drain design', such a report cannot be concluded until you have resolved your drainage issues.

Our client reported this matter to you on or around 1 March 2017, and on 7 March 2017 your signaller also reported flooding on the tracks caused by the blocked drain.

Our client continuously chased you for confirmation as to when you would rectify the problem and after much chasing is very concerned to be told that you consider it a major job as track will need to be removed and that this has been added to a list for planned works but with absolutely no timescale. Rather alarmingly our client was then told on 11 April 2017 that the flood water is contaminated with domestic effluent. We remind you that this is not just on your tracks but is backing up on to our client's land. You cannot ignore this serious issue or delay it any further. We note with some relief that you are investigating whether there are any short-term solutions, but our client has received no further update in this regard since 11 April 2017.

Breach of duty of care

The flooding of domestic effluent on to our client's adjoining site is actionable in tort as a private nuisance and also requires reporting to the Health and Safety Executive.

Your client owes a common law duty of care to our client as a neighbouring landowner. In this regard, liability falls on your failure to take action to remedy the flooding of human waste, resulting in the flooding of this on the land.

Our client is unable to proceed with submitting a planning application and therefore unable to progress developing the land, which is obviously causing a significant financial loss to our client, who is a property developer.

Quantum

The financial losses (including the increasing costs of construction) to our client are significant and arise solely from the fact that no remedial action has been carried out promptly or at all. It is over two months since this was reported to you and no works have been carried out to stop the flooding.

We will provide full details of our client's financial claim in due course.

Continuing nuisance and injunctive relief

In the event you fail to remedy the flooding and confirm the satisfactory timescale to us within the next 14 days we are likely to be instructed to apply to the court by way of injunctive relief to seek a mandatory court order requiring you to remedy the fault.

If such action is necessary, then the costs of and incidental to preparing an application for injunctive relief will also be sought from you.

The next steps

> *We require a response within 14 days of the date of this letter. If you fail to provide a full letter of response within the time allowed, we are instructed to issue and serve proceedings without further notice and without further compliance with the Protocol.*
> *Our client is of course open to a discussion as to the action plan for remedial works, but your failure to provide one with a reasonable timescale will result in our client taking court action.*
> *We look forward to hearing from you.*
> *Yours faithfully,* etc

36. Mr West of the defendant instigated a minor works remit on 17 May 2017 (at page 515 of the further bundle), with a response time of 28 days (rather than the usual 12 weeks). Mr Hellings stated in cross-examination that this indicated a level of urgency and priority. As Mr Hellings accepted in cross-examination, Mr West's minor works remit contains no reference to the fact that the drainage issues had been a problem since 2015. It contains no reference to the fact that wholesale renewal of the drainage system had already been planned since 2015. Mr Hellings was unable to explain the reasons for this omission. Mr Hellings accepted that the minor works remit indicated either that no work had been done since July 2015 to confirm that the drain had collapsed or, if such work had been done, that its results had not been communicated to Mr West. Mr Hellings was unable to indicate which was the true state of affairs.

37. Returning to Mr George's witness statement, at paragraph 11(i) he states that:

> *On or around 23 May 2017 Network Rail informed [him] that one of its drainage engineers had recently inspected the adjacent land on 17 May 2017 and that a further visual site inspection was due to be carried out but this had been cancelled due to a lack of access to the railway line being granted. Further, that a Minor Works remit had also been raised to undertake intrusive investigation work; ideally within the next 28 days although this would be dependent on works-resource and track-access availability.*

Mr George confirms that following 23 May 2017 neither he nor anyone else from the claimant had any further communication with Network Rail and that all further correspondence was effected through the claimant's solicitors, Blackstone Solicitors.

38. At paragraph 13, Mr George refers to receiving a telephone call from Mr Eric Millman who advised that an engineer/surveyor from Murphy Civil Engineers was inspecting the blocked drain on behalf of Network Rail. Mr George went to the development land and

met with the engineer/surveyor from Murphy Civil Engineering on 25 July 2017. This inspection was the result of the complaint logged with Network Rail. Mr George does not recall the name of the engineer or the time of the meeting; but the engineer verbally admitted that the blocked drain was on the adjacent land and that the defendant was taking steps to deal with the blockage following correspondence from the claimant's solicitors. It was admitted that a new drainage system needed to be laid but a timetable for those works was not provided. Mr George confirms that since that meeting he has had no further correspondence or any meeting with the claimant or its representatives. None of this was challenged in the course of Mr George's cross-examination.

39. It is necessary for me to refer to two further letters from Blackstone Solicitors. The first is dated 2 August 2017. It attached land registry documentation showing that the claimant was the registered owner of the development land. The letter continues:

> *We have been advised by our client that Network Rail have attended the site to investigate the sewer blockage on Network Rail's land. It is noted that has been verbally accepted by the surveyor that the blocked drain is on Network Rail's land and that a new drainage system needs to be laid. In this regard, we would be grateful if you could confirm when this will be undertaken.*
> *You should note that our client intends to commence building works on the site late August 2017 and therefore the new drainage needs to be laid as a matter of urgency.*
> *Please note that Counsel is in the process of preparing proceedings to ensure that Network Rail remedy the drain blockage as a matter of urgency. We require an exact date as to when the works will be started and an undertaking to assure that the new drainage system will be completed by late August 2017.*
> *We look forward to hearing from you by no later than Friday 4 August 2017 in this regard.*

40. The second letter from Blackstone Solicitors is dated 1 September 2017. It begins:

> *We write in relation to the above matter further to our correspondence dated 2 August 2017 and 11 August 2017.*
> *We note that we are yet to receive a response to the above-mentioned correspondence. We have telephoned on a number of occasions however Simon Pugh and Leila Evans have been unavailable. Members of Network Rail staff have advised on two occasions that Simon Pugh would return our call however no communication has been forthcoming.*

> *We have provided you with the necessary evidence to prove that our client is the registered owner of the land on the north-east side of Green Lane, Padgate, Warrington and on the south-west side of Station Yard, Green Lane, Padgate, Warrington.*
> *We note that Network Rail through their surveyor have verbally accepted that the blocked drain is on Network Rail's land and that a new drainage system needs to be laid. We are still waiting for confirmation as to when this work would be done.*
> *As you have been advised, our client hoped to commence building works on the site late August 2017 however, this has not occurred as the drainage has not been fixed. You will appreciate that the delay in build is causing our client significant concern and will result in a substantial financial loss for our client. Therefore the new drainage system needs to be laid as a matter of urgency.*
> *Please note that we have instructed Counsel to prepare proceedings to ensure that Network Rail remedy the drain blockage as a matter of urgency. We require an exact date as to when the works will be started and an undertaking to assure that the new drainage system will be completed as a matter of urgency.*
> *We look forward to hearing from you by no later than* ***Friday 8 September 2017*** *in this regard. Should a response not be received we will have no other option than to commence proceedings.*

41. Further correspondence ensued. In the absence of any satisfactory response from the defendant, the claim form was issued on 11 June 2018. This provoked a letter from the defendant's solicitors, Addleshaw Goddard, of 15 June 2018 to Blackstone Solicitors. It acknowledged receipt of notice of the hearing of an injunction application to be heard on 21 June together with draft particulars of claim and two supporting witness statements. Addleshaw Goddard stated that they would shortly be filing an acknowledgment of service confirming that the claim was disputed. Addleshaw Goddard enquired whether in the proposed claim generally, and in particular the application for an interim injunction, account had been taken of section 122 of the Railways Act 1993, to which reference was then made. Addleshaw Goddard submitted that the proceedings were caught by the defendant's statutory immunity from claims in nuisance and in respect of the escape of things from land. Without prejudice to the generality of that observation, Addleshaw Goddard submitted that the prospect of an injunction being granted was remote. The remainder of the letter was expressed to be entirely without prejudice to those observations. The letter continued:

> *Our client is aware that improvements are needed to the drainage which sits in part beneath the station platforms and/or railway lines.*

> *For some time our client has been planning and designing a solution to remedy problems with the drainage but has been severely hampered by the location of the drain and the complexity of the proposed solution. A solution has been found and the necessary works have been fully designed, but to put the problem and the proposed solution into context, the remedial scheme will certainly cost a minimum of £400,000. It is not therefore something which can be implemented quickly.*
> *As this is a major investment in infrastructure it must form part of our client's programme for capital expenditure and the maintenance generally of the railway network. The works are planned to take place during the year commencing in April 2019.*

Reference was then made to a temporary solution in the form of the construction of a pumping station, but the costs were substantial and pumping stations were said to be something to be avoided wherever possible because they were noisy when in operation and might itself lead to nuisance complaints from neighbouring properties. Reference was also made to the potential inadequacy of the claimant's proposed undertaking in damages and therefore Addleshaw Goddard indicated that if the claimant was intent on proceeding, they would expect a personal guarantee from a director or directors supported by evidence of means. The letter concluded by inviting the claimant to withdraw the injunction application.

42. In cross-examination Mr Hellings accepted that by the time of this letter, the works probably had been fully designed. He said that the timescale seemed to work. That however is at odds with paragraph 17 of Mr Hellings' first witness statement of 29 August 2018 which stated:

> *The Remedial Scheme is scheduled to take place in the period between April 2019 and April 2020 and will be dealt with as a priority item. No finalised construction plan has been issued yet as the proposed works are still in development, however it is anticipated that the works will take approximately three months. However, this timeframe is subject to railway access and possessions opportunities and undertake the works.*

43. Addleshaw Goddard wrote a further letter on 5 March 2019. This was addressed to the court in Manchester. It indicated that whilst the defendant was willing for there to be a further stay, some further explanation to the court as to the current position should be offered, not least because (ideally) a further stay would be required after May 2019 and

Addleshaw Goddard did not want the court to gain the impression that all issues would be resolved within that timeframe. The letter drew the court's attention to two points. The first was that the defendant was intending to replace the drainage system but that this was a complicated issue, not least because the railway line would have to be closed in order for the works to be carried out. The second point was that the proposed remedial scheme was now expected to be completed in either October or November 2019. At the time of Mr Hellings's previous witness statement, the best the defendant could say was that the works would take place between April 2019 and April 2020. Addleshaw Goddard acknowledged that the claimant had expressed dissatisfaction with the timing of the proposed remedial scheme. However, it was the defendant's position that the timing was very much linked with funding as well as completion of the design of the remedial scheme and there was therefore little prospect that the works would be completed any sooner. The letter concluded:

> *It follows that during the stay presently sought by the parties all that can be discussed is the design of the remedial scheme. It is of course hoped that the parties can reach an agreement about this. However, it is the defendant's position that the works will not be done before October or November 2019 and, as we say, we do not want either the claimant or the court to be misled by the defendant agreeing to a further stay of two months.*

That letter made it clear that by then the remedial scheme had not been fully designed. In cross-examination, Mr Hellings accepted that the statements in these two letters were at odds with each other.

44. On the basis of the evidence of Mr Shaw and Mr Walsh, which I accept despite the criticisms directed at them and their evidence by Mr Varma, I am satisfied that, but for the drainage problems, the claimant could, and would, have proceeded to address the pre-conditions in the planning permission in sufficient time to have enabled work to have commenced on the development site in January 2018. I am satisfied that the works would have been completed satisfactorily in about 18 months, by about July 2019, and that all the residential units would have been sold before March 2020.

45. The only condition relating to surface-water drainage was condition 16. The claimant obtained a drainage strategy statement which concluded that the connection to and

discharge through the drain running under the defendant's land was the best drainage option, and that it conformed with the hierarchy of drainage options. I am satisfied that the claimant would have been able to satisfy condition 16 but for the damage to the drain under the defendant's land. I find that there would have been no increase in the surface water run-off into the drain as a result of the development proposed by the defendant.

46. I find that the claimant was unable to submit any drainage scheme in compliance with condition 16 purely because of the problems with the drain under the defendant's land and the consequent flooding of the claimant's land as a result of that drainage problem. I am satisfied that without compliance with condition 16, the claimant could not proceed with its proposed development. I am satisfied that the other conditions in the planning permission were standard local-authority planning conditions which were neither particularly onerous nor unusual. These conditions were either complied with, or capable of being complied with, within a short period of time.

47. In short, I am satisfied that but for the problems with the drain under the defendant's land, the development works could, and would, have started in January 2018.

48. I am also satisfied that had the defendant proceeded to address the drainage problems promptly when the flooding was first reported on 1 March 2017, a satisfactory alternative drainage scheme could have been implemented in time for the claimant's development works to have commenced in January 2018.

49. In the absence of any evidence from Mr West, it is not clear whether he had been made aware that the defendant had already been planning for a wholesale renewal of the drainage system since July 2015; but I find that he should have been made aware of this fact, and that this should have informed the defendant's actions in addressing the flooding issue more promptly.

50. I find that the failure to address the flooding and drainage issues were entirely due to budgetary constraints and the spending priorities adopted by the defendant.

51. I reject Mr Walsh's evidence (at the beginning of paragraph 6 of his first witness statement) that the defendant had failed to acknowledge the initial reports sent to them

by Mr George regarding the blocked culvert on their land. However, I accept the remainder of his evidence at paragraphs 6 to 8 and paragraph 10 of that witness statement.

52. It is common ground that the defendant only rectified the flooding issue after the claimant had issued these proceedings on 11 June 2018 and that the remedial works were only completed by the defendant in early to mid-April 2020, almost two-and-a-half years after the full planning permission for the development had been issued on 27 November 2017.

53. I find that the claimant was totally unable to commence any development works, or to comply with the planning conditions detailed in the witness of Mr Shaw, until after those rectification works had been completed. I find that had the defendant set about rectifying the issues when they were first reported to the defendant, rather than waiting for proceedings to be issued and for the commencement of Control Period 6 in April 2019, the claimant would have completed the development, would have made a full development profit, and would have moved on to another, hopefully profitable, residential housing development scheme.

54. I also find that it was due to the serious delay of some three years, caused entirely by the defendant's inaction, and also due to the costs incurred, both in respect of overheads for the development land, and the necessary involvement of legal representatives to pursue the claim against the defendant, that the claimant made the difficult decision to sell the development land with the benefit of the extant planning permission. I find that this was an entirely reasonable decision for the claimant to make in view of the lack of any assured and communicated end date for the effective resolution of the drainage issues affecting the development land.

IV: Scope of duty

55. I was referred to a number of authorities on the scope of the duty arising from a nuisance which is not brought about by human agency, such as the encroachment of tree roots (as in *Delaware Mansions Limited v Westminster City Council* [2001] UKHL 55, reported at [2002] 1 AC 321). The most recent of these authorities is *Vernon Knight Associates*

v Cornwall Council [2013] EWCA Civ 950, reported at [2014] Env LR 6. During the course of Mr Varma's closing, I drew his attention to the fact that in his leading judgment in that case, Jackson LJ had prefaced this review of the authorities and discussion of the law (in Part 5 of his judgment, at paragraphs 36 to 51) with the observation that:

> *A discrete body of law has developed concerning the extent of the landowner's liability for natural nuisances. 'Natural nuisances' is a term used by some commentators to describe nuisances which are caused by the operation of nature rather than any act of the landowner.*

56. I have already indicated that I accept Mr Hellings's evidence that the most likely causes of the damage to the drainage pipes were: (1) wear and tear and (2) the impact of traffic on the railway line. I also accept Mr Clarke's evidence that the collapse of the drainage pipes was due to their vitrified clay construction which was *"very much of its time"*, and was liable to fully collapse under railway loadings and would not last as long as modern drainage, which is designed to last for 60 years.

57. In those circumstances, I questioned with Mr Varma the relevance of the authorities on the measured duty of care to the present case. Having re-read the whole of that section of Jackson LJ's judgment I note that he uses the phrase *"natural nuisance"* on some half a dozen occasions.

58. In response, Mr Varma took me to the headnote to the Court of Appeal's decision in the leading case of *Leakey v National Trust* [1980] QB 485. This reads:

> *An occupier of land owed a general duty of care to a neighbouring occupier in relation to a hazard occurring on his land, whether such a hazard was natural or man-made; that the duty was to take such steps as were reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour or his property of which the occupier knew or ought to have known; that the circumstances included his knowledge of the hazard, the extent of the risk, the practicability of preventing or minimising the foreseeable injury or damage, the time available for doing so, the probable cost of the work involved and the relative financial and other resources, taken on a broad basis, of the parties.*

59. Mr Skelly submitted that the authorities on the measured duty of care all related either to natural nuisances or to situations where a hazard, whether naturally occurring or man-made, had been thrust upon a landowner, with no involvement on his part or that of his predecessors in title. That was not the case with an artificial culvert or drain. The person through whose land the culvert or drain is laid must keep it in repair so as to ensure that it does not become a nuisance to adjoining occupiers. Thus, if the culvert or drain becomes blocked or collapses and, but for the blockage or collapse, the water would have flowed away naturally, causing no damage, the person responsible for the culvert or drain would be liable for failing to maintain it, either in nuisance or in negligence. Thus, in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 the House of Lords held that a landowner was liable for the escape of water which they could have prevented by taking a simple and obvious step. The landowner had initially been unaware of a culvert under their land; but once they had become aware of its existence, and had failed to take the simple and obvious step of unblocking it, they were liable. Effectively, the landowner had adopted the flooding nuisance.

60. I have some hesitation in accepting Mr Varma's submission that the *'measured'* duty of care, as developed in cases of natural nuisance and of hazards thrust upon an owner or occupier of land, applies to a case such as the present, where an artificial culvert or drain has become blocked, or has suffered a collapse, so as to cause a nuisance by flooding the claimant's land. However, I recognise that, as Lord Cooke of Thorndon observed (in his last opinion delivered in the House of Lords) in *Delaware Mansions* at paragraph 29, that the great cases in nuisance decided in our time have, at their heart, the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability which underlie much modern tort law and, more particularly, the law of nuisance. At paragraph 31, Lord Cooke also emphasised that:

> *The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it.*

In the circumstances of the present case, therefore, I am content to adopt, and apply, the measured duty of care, particularly since I am satisfied that it makes no practical difference to its outcome.

61. The most recent authoritative statement on the measured duty of care is to be found in the leading judgment of Jackson LJ in *Vernon Knight* at paragraph 49.

> *Where then does the law now stand in relation to the liability of landowners for nonfeasance in respect of natural nuisance? I would not presume to paraphrase the vast body of learning which has accumulated on this topic. Nevertheless I extract from the authorities discussed above the following principles which are relevant to the determination of this appeal.*
> *(i) A landowner owes a measured duty in both negligence and nuisance to take reasonable steps to prevent natural occurrences on his land from causing damage to neighbouring properties.*
> *(ii) In determining the content of the measured duty, the court must consider what is fair, just and reasonable as between the two neighbouring landowners. It must have regard to all the circumstances, including the extent of the foreseeable risk, the available preventive measures, the costs of such measures and the resources of both parties.*
> *(iii) Where the defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held. It may not be fair, just or reasonable to require a public authority to expend those resources on infrastructure works in order to protect a few individuals against a modest risk of property damage.*

At paragraph 50, Jackson LJ explained that: *"... the judge is required to carry out a somewhat daunting multifactorial assessment"*.

62. Mr Varma submits that three aspects of the measured duty of care merit the court's attention. First, the standard of the measured duty of care is merely to do what is fair, just and reasonable in all the circumstances. Those circumstances necessarily include the capability of the defendant. Secondly, the assessment of a particular defendant's capability and circumstances is a broad one. Thirdly, where the defendant is a public body, the courts must take into account the other calls on its resources and that these resources are not usually made available for the benefit of commercial entities.

63. Mr Skelly emphasises that the duty of care is not limited, as pleaded by the defendant, in the sense of being ‘reduced’ or ‘curtailed’. Rather it is a considered duty of care, involving considerations of what is fair, just and reasonable in all the circumstances. It is therefore necessary to consider what steps can reasonably be expected to be taken by a landowner in order to prevent damage to other land likely to be affected by a nuisance. Moreover, the duty to act arises as soon as the landowner becomes, or should have become, aware that the nuisance has come into existence.

64. I accept that these are all matters that fall to be considered as part of the *"daunting multifactorial assessment"*.

V: Breach

65. Mr Skelly submits that in this case the defendant was aware of problems with the drain since at least 2015. It could have taken measures to protect what is now the claimant's adjoining land at that time, but it chose not to do so. It is plain, from the defendant's own evidence, that neither the potential for damage to adjoining land, nor the need to prevent such damage, informed either the defendant's conduct or its planning. The defendant was only concerned with the question of damage to its own land, and the safety of its railway track and users of the railway.

66. Ultimately, the defendant seeks to justify its complete lack of activity by reference to its internal five-year budget cycle. The fact that the defendant has such a budget cycle is not a reasonable excuse, nor any explanation, for its failure to act. The defendant's internal accounting procedures are a matter for the defendant; but, on any analysis, there were clearly substantial funds which could, and should, have been made available for the remedial works. It was not reasonable to allow the claimant to suffer huge damage and loss simply because of the defendant's budgeting procedures and internal five-year cycle system.

67. Insofar as the defendant had a measured duty of care, Mr Skelly submits that it was a duty to take reasonable, and appropriate, steps to prevent damage to neighbouring land. The damage suffered by the claimant's land would not have occurred had the drain been maintained and timeously repaired. The defendant knew about a problem in 2015 but it

had failed to take reasonable steps to remedy it. Thereafter, the problem had come to a head in March 2017, but the defendant had still failed to take reasonable and appropriate steps until some two-and-a-half years later. As a result, the defendant was, Mr Skelly submitted, in breach of its duty of care, measured or otherwise.

68. As regards to the defence of statutory authority under section 122 of the Railways Act 1993, which confers a defence of statutory authority upon a defendant in relation to (amongst others) any civil proceedings in nuisance or in respect of the escape of things from land, Mr Skelly characterises the defendant's reliance on this provision as *"facile"*. Where a statute has authorised the doing of a particular act, or the use of land in a particular way, and such act or user will inevitably involve a nuisance, any resulting harm is not actionable, providing every reasonable precaution, consistent with the exercise of the statutory powers, has been taken to prevent the nuisance occurring. The burden of proving that a nuisance is inevitable lies on the person having statutory authority.

69. This is not, Mr Skelly emphasises, merely a burden of legal argument which rests on the statutory undertaking to show that the statute must be construed in their favour. Rather, it is a burden of proof on the facts to show that the nuisance was an inevitable result of carrying out the authorised work. It is discharged by showing that all reasonable care and skill, according to the state of scientific knowledge at the time, has been taken. If, however, due diligence or reasonable care is not taken, there will be liability, even when the defendant acted under statutory authority. A defendant who creates a nuisance through the exercise of statutory powers will therefore normally be liable if he exercises those powers negligently: see generally paragraph 19–87 of *Clerk & Lindsell on Torts* (23rd edn.).

70. Mr Skelly submits that the use of the defendant's land for the purposes of a railway will not inevitably involve the nuisance which occurred in this case; this nuisance was not inevitable. In any event, the defendant had not taken every reasonable precaution, consistent with the exercise of the statutory powers, to prevent the nuisance occurring.

71. Mr Varma disputes that the defendant has breached its measured duty of care to the claimant. He advanced six points: First, although the claimant repeatedly refers to the

cause of the flooding as a blocked drain, this hugely understates the problem. In reality, the renewal scheme required complex works to drainage infrastructure running under and in between one of the two main railway lines connecting Liverpool and Manchester. The ultimate project cost of at least £1 million, well in excess of the value of this claim, is said to be instructive. I find that this point is established on the evidence; but I must also bear in mind Mr Hellings's evidence (at paragraphs 14 and 15 of his witness statement) that the remedial work was not limited to preventing the flooding onto the claimant's land. The remedial scheme involved the renewal of the track drainage system at Padgate Station in its entirety with the largest diameter pipes (of 300 millimetres) that could possibly be placed in this location. It also involved extending the existing track drainage system so that the entire length of the platform was served by new drainage in the hope that this would provide some storage during larger rainfall periods to alleviate the potential flooding of the track drainage system.

72. Secondly, the drainage problem was caused by the ordinary use of the railway over decades and not by any deliberate action or other wrongdoing on the defendant's part. This is correct in part. However, the collapse of the drainage pipes was also due to their vitrified clay construction which was, according to Mr Clarke, *"very much of its time"*, liable to fully collapse under railway loadings, and would not last as long as modern drainage, which is designed to last for 60 years.

73. Thirdly, the claimant could not reasonably have been expected to have started the renewal scheme any earlier, or to have progressed the works with any more haste. The defendant was forced to conduct the works in accordance with the' Rules of the Route' governing train traffic, limitations to the defendant's funding, and the priority given to matters where, unlike here, there is a real threat to the safety or stability of the railway. Mr Varma emphasised what Jackson LJ had said at paragraph 49(iii) of *Vernon Knight*. I acknowledge the limitations under which the defendant was operating; but the question is whether these justified the delay in commencing the renewal works until September 2019 when they had been recognised as necessary in or about July 2015 and when it was known, from about May 2017 onwards, that the flooding resulting from the collapse of the drainage pipes would prevent the residential development of the claimant's land as it had planned. Further, this was a case of actual flooding, preventing the claimant commencing a residential housing development on land which it had recently acquired

for that very purpose from a successor in title of the defendant's statutory predecessor. Any necessary remediation works were not directed to protecting the claimant *"against a modest risk of property damage"* (to quote Jackson LJ).

74. Fourthly, the defendant had acknowledged the claimant's initial complaints, despite Mr Walsh's refusal to accept this. Doing the best it could, the defendant had carried out high-pressure jetting in September 2017 (at what Mr Varma described as considerable cost), which was in part an attempt to at least alleviate the problems. These were said to be reasonable steps for the defendant to have taken; and the claimant would have been critical of the defendant had it not taken any such interim measures pending the implementation of the renewal scheme. In cross-examination, Mr Hellings had sought to justify the jetting as serving an investigative function, so as to establish the extent of the failure of the drainage pipes. This was not part of his written evidence, nor was it supported by the contemporaneous documentation. It also raises the question why this had not been undertaken when the problems with the drainage system had first been identified in 2015. In fact, the cost of the jetting was a relatively modest £15,000; and in the light of the information known to the defendant from about July 2015, but not noted by Mr West in his minor works remit of 17 May 2017, the jetting was inevitably doomed to failure. It was no substitute for a comprehensive remediation scheme. The jetting also took some 12 weeks to undertake, which was well outside Mr West's 28-days response time.

75. Fifthly, Mr Varma emphasises that the claimant has posited no evidence to show that the flooding could have been permanently resolved any faster, or any more effectively, than the defendant's remedial scheme eventually resolved it. The crux of the claimant's case is said to be little more than the bare assertion that the defendant could have resolved the issue by some unspecified earlier date, by designing and implementing some unspecified course of action. In fact, however, the claimant's case is simply that the defendant should have progressed the works that it did undertake far more quickly, perhaps limiting the initial scope of the works to those immediately required to address the flooding upon the claimant's land rather than the wider issues affecting the operation of the defendant's railway line.

76. Sixthly, as regards foreseeable risks to the claimant as the defendant's neighbour, now that the claimant no longer relies upon the impact of the coronavirus pandemic as a reason for abandoning the development, the defendant simply asserts that it could not have reasonably foreseen any risk to the development before planning permission for the development was obtained (on 27 November 2017) and that fact had been communicated to the defendant (which the claimant did not do until 21 February 2018). However, the claimant had first alerted the defendant to the implications of the flooding for the claimant's proposed residential development as early as 9 May 2017, and this had been reiterated in further solicitors' letters on 2 August and 1 September 2017. None of these communications succeeded in moving the defendant to accelerate the pace of its remediation scheme. Mr Varma submitted that it was not reasonable to assume that the claimant would obtain planning permission for its proposed development. This was not posited by either of the defendant's witnesses as a reason for the defendant's inaction; and it was clearly the defendant's own funding position that was critical in this regard, rather than any deliberate decision to await any communication of the outcome of the planning application.

77. I prefer Mr Skelly's submissions to those of Mr Varma for the reasons I have given when addressing the latter's submissions. In my judgment, considerations of fairness, justice and reasonableness as between two neighbouring landowners, having regard to all the circumstances of this particular case, including the parties' respective knowledge of the extent of the foreseeable risk, the available preventive measures, the costs of such measures, and the resources of both parties, even bearing fully in mind the competing demands on the defendant's resources and the public purposes for which they are held, lead me to conclude that the defendant was in breach of the duty of care it owed to the claimant, even acknowledging that this was a 'measured' duty.

78. Against the background of the defendant's knowledge that a radical overhaul of the drainage system was required since about July 2015, in my judgment even a measured duty of care required the defendant to reprioritise the remediation works when it was put on notice of the flooding of the claimant's land in March 2017, and the impact that this would have on the claimant's development plans in May 2017. If the defendant's budgetary systems do not permit it to respond to such emergencies, then the defendant must face up to the resulting financial consequences, in terms of an award of damages in

favour of the injured neighbour. The fact that drainage issues do not compromise the operation, or the safety, of the railway network is no sufficient reason for the defendant's failure to address them where this is preventing its neighbour from carrying out development work on lands served by the relevant drainage system. Particularly this is the case where the neighbour's land had originally been sold off by the defendant's own statutory predecessor. Even if the defendant only owed a 'measured' duty of care to the claimant, I am satisfied that it failed to discharge that duty when it failed to undertake satisfactory remediation measures upon receipt of the claimant's complaint of flooding on 1 March 2017, and in response to the claimant's successive solicitors' letters.

79. Mr Varma accepts that s. 122 of the Railways Act 1993 is only available if the defendant exercised 'reasonable diligence' to control the nuisance or emanation. However, he submits that in order for the statutory defence to add anything to the law of tort generally, the requirement of 'reasonable diligence' must be more easily satisfied than the 'reasonable occupier' standard in tort. Otherwise, Mr Varma says, there would be no tortious liability for the statutory defence to apply to. Mr Varma contends that the aim of s. 122 must have been to allow the defendant to go about its business unhindered by claims for nuisance where that nuisance has been caused by ordinary issues of railway maintenance, to be addressed in accordance with an established hierarchy of priorities. In this context, Mr Varma says that the defendant's remedial actions amounted to acting with reasonable diligence, even if there is a prima facie liability in tort.

80. I reject these submissions for the reasons I have given when finding the defendant to be in breach of its duty of care in tort. I do not accept that the 'reasonable diligence' test is less stringent than that imposed by the 'measured' duty of care in tort. But even if it is, I find that the defendant failed to exercise due diligence in all the circumstances in failing to address the flooding issue before January 2018.

VI: Loss

81. Mr Varma disputes that the claimant has caused the losses the claimant claims. He points out that it is not enough for the claimant to prove that the flooding prevented it from starting to build the development in January 2018. Rather, the claimant must show that

the defendant's **breach** prevented construction from starting in January 2018. The defendant's duty was not to **prevent** the flooding but to **abate** it within a reasonable time.

82. Even assuming, in the defendant's favour, that its knowledge of the risk of the failure of the drainage system, dating back to July 2015, imposed no duty upon it to prevent the flooding that took place in February 2017, I am nevertheless satisfied that the due discharge of the defendant's measured duty of care required it to undertake the necessary remedial works to prevent the cause of the flooding by January 2018. I reject Mr Varma's submissions to the contrary. I am also satisfied, on the evidence, that this was both practicable and reasonable. I am satisfied, for the reasons I have already given, that, but for the flooding, all the pre-commencement planning conditions, and the other outstanding planning issues, could, and would, all have been satisfactorily addressed by January 2018.

83. Mr Varma submits that the claimant retains the development land and is not committed to any sale. If it chose to, it could construct the development now. There is no evidence to suggest that the development would yield any less profit for the claimant than it would have done in 2020: if anything, the expert evidence is said to suggest a clear increase in property values since March 2020 (although there was evidence from Mr Shaw that building costs have also increased). The court cannot allow the claimant, Mr Varma submits, to recover substantial damages, and yet also to be free to construct and sell the development for at least as much profit as it would have made two years earlier. The defendant's breach of duty does not permanently deprive the claimant of its development profits. They can still be made now. There is no pending, or imminent, sale of the development land; and the court cannot be satisfied that the claimant will sell the land with the benefit of the extant planning permission rather than developing it itself. There is no evidence that the claimant has abandoned housebuilding altogether. Mr Varma points to the last sentence of paragraph 35 of Mr Walsh's second witness statement, where he states that *"... a sale of the land may be the sensible route forward but until I know what is happening in this litigation I do not want to make a final decision"*. In passing, I observe that one reason for this reticence on Mr Walsh's part was that the defendant's solicitors had threatened an application for security for costs if the claimant were to dispose of the development land pending the conclusion of this litigation.

84. Again, I reject Mr Varma's submissions. They ignore the fact that the claimant's claim is for loss of the development profit that it would have received by March 2020. Against that must be set the present net value of the land, after the costs of its acquisition. The fact that the claimant might be able to develop the land in the future, whether remote or immediate, seems to me to be as irrelevant to its claim for loss as the prospect of what it may do with the resulting damages or the proceeds of any sale of this development land. The claimant should be free to invest those damages and sale proceeds in another development site and seek to turn a profit on that.

85. The reality of the situation is that, as a result of the defendant's breach of duty, the claimant was compelled to hold a development site from January 2018 until April 2020, without any ability to develop it as it had planned. It had to get rid of its development workforce. The defendant's argument that it thereby achieved a saving in salaries and wages ignores the fact the claimant's workforce was idle as a result of the defendant's breach of duty. The claimant mitigated its loss (in terms of a potential claim for the wages of idle staff members) by dispensing with their services.

86. I also reject Mr Varma's oral submission that it was not reasonably foreseeable that the claimant might abandon the development if it could not develop by January 2018. In my judgment, it was reasonably foreseeable that the claimant might decide to dispose of the development site if it found itself in the position in which the claimant did by October 2019, with no date for the start of its development confidently in view.

87. In principle, therefore, I agree with the basis on which the claimant maintains its case in damages. The claimant is entitled to recover the difference between: (1) the profit it would have made had it not been prevented from proceeding with the development as planned in 2018, and (2) the profit it will make on any sale of the land with the benefit of planning permission.

88. In determining this latter element of the damages calculation, the claimant accepts that the agreed sale price of the land with the benefit of planning permission of £978,000 is probably a more accurate indication of the true value of the claimant's land with the benefit of planning permission than Mr Staveley's valuation of £800,000. Mr Varma contends for Mr French's valuation figure of £1 million, but I am satisfied that this was

clearly arrived at on the assumption that that was the amount of the agreed sale price, rather than the actual figure of £978,000. I therefore find that £978,000 should be taken as the present open-market value of the development land with the benefit of planning permission.

89. I am satisfied that the claimant should give credit for the two sums, totalling £17,200, which it was paid by the defendant for the use of its land: see page 519 of the further bundle. I am satisfied, for the reasons I have given, that the claimant is not obliged to give any credit for saved wages and salaries.

90. However, other issues of quantification remain. It is not clear to me whether I should adopt as the construction costs the Baker Mallett figure of £3,631,644 or Mr Latham's figure of £3,338,900. It is not clear to me whether I should make an allowance for finance or for the other costs identified in Mr Latham's calculation at page 108 of the core bundle. It is not clear to me what I should do about Mr Shaw's fees for addressing the planning conditions. I would welcome further submissions from counsel upon these, and other, matters relating to the precise quantification of the claimant's recovery.

91. The claimant also claims drainage survey costs of £3,300. The counter schedule of loss puts the claimant to proof of these sums. I will also need to hear submissions on whether these have been proved.

VII: Conclusion

92. In my judgment, the claimant has established its claim for damages for nuisance and breach of the measured duty of care it was owed by the defendant. The claimant has also established the factual basis of its claim for damages; but I would welcome further submissions from counsel on the precise quantum of that claim, subject to those matters which I have already resolved in my extemporary judgment.

93. That concludes this extemporary judgment.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk