Neutral Citation Number: [2022] EWHC 2161 (Ch)

**Appeal Reference: CH-2021-000198**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**CHANCERY APPEALS (ChD)**
**On appeal from the order of His Honour Judge Rochford dated 9th December 2021 in the County Court at Reading (sitting in the County Court at Oxford) Case No. F00RG838**

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

**15th August 2022**

**Before** :

**MR JUSTICE EDWIN JOHNSON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **YADEVINDER SINGH HOTHI** | **Respondent/ Claimant** |
| **and** | |
| **CLIVE STOKES** | **Appellant/ Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mark Spackman** (instructed by direct access) for the Appellant/Defendant
**Nigel Woodhouse** (instructed by DWF LLP) for the Respondent/Claimant

Hearing date: 24th June 2022

- - - - - - - - - - - - - - - - - - - - -

# APPROVED JUDGMENT

**This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down are deemed to be 10.00am on 15th August 2022**

**Mr Justice Edwin Johnson:**

Introduction

1. This case concerns a boundary dispute. The boundary in question lies between two residential properties in Old Windsor. The first property is 47 Straight Road, Old Windsor, Berkshire SL4 2RT (**"No. 47"**). Mr Yadevinder Singh Hothi, the Claimant in these proceedings, is the registered freehold proprietor of No. 47. The second property is 5 Glebe Road, Old Windsor, Berkshire SL4 2PN (**"No. 5"**). Mr Clive Stokes, the Defendant in these proceedings, is the registered freehold proprietor of No. 5.

2. In March 2019 the Claimant commenced proceedings against the Defendant in relation to the boundary dispute, seeking an injunction to restrain the Defendant from preventing the reinstatement by the Claimant of a fence along what was said by the Claimant to be the correct line of the boundary between the two properties (together **"the Properties"**). Damages were also sought for trespass, including exemplary damages. The Defendant defended the proceedings and counterclaimed for declaratory relief and damages.

3. The proceedings came on for trial before His Honour Judge Rochford in the Reading County Court (sitting at Oxford) on 26th, 27th, and 28th July 2021 (**"the Trial"**). The Judge reserved his judgment (**"the Judgment"**), which he delivered orally on 6th August 2021. After hearing further argument from counsel for the parties, the Judge made an order on 6th August 2021 (**"the Order"**) giving judgment for the Claimant in the sum of £420.00 and making a declaration as to the correct route of the boundary between No. 47 and No. 5. The counterclaim was dismissed, and the Defendant was ordered to pay the Claimant's costs of the proceedings. The Judge also refused the Defendant's application for permission to appeal.

4. By an appellant's notice filed on 31st August 2021 the Defendant seeks permission to appeal against the Order. On 17th November 2021 Adam Johnson J made an order, providing for the application for permission to appeal to be heard before a High Court Judge, with the hearing of the substantive appeal (subject to the grant of permission) to follow. The Claimant has, by a respondent's notice filed on 15th December 2021, sought permission to cross appeal against the refusal of the Judge to award exemplary damages to the Claimant. No equivalent order has been made providing for the application for permission to cross appeal and the substantive cross appeal (subject to the grant of permission) being heard together, but counsel for the parties were agreed that I should deal with the cross appeal at the same hearing as the appeal, and in the same way as the appeal; that is to say taking both the application for permission to cross appeal and the substantive cross appeal together.

5. The hearing directed by Adam Johnson J took place before me on 24th June 2022. With the agreement of counsel I heard the arguments on both sides in relation to the applications for permission to appeal and (subject to the question of permission) in relation to the appeal (**"the Appeal"**) and the cross appeal (**"the Cross Appeal"**).

6. This is therefore my reserved judgment on the respective applications for permission to appeal and, subject to my decision on those applications, on the Appeal and the Cross Appeal.

7. It is convenient to continue to refer to the Defendant, who is the appellant in this hearing, as the Defendant, and to continue refer to the Claimant, who is the respondent and cross-appellant in this hearing, as the Claimant.

8. At this hearing the Defendant was represented by Mark Spackman, counsel, and the Claimant was represented by Nigel Woodhouse, also counsel. Both counsel also appeared for their respective clients at the Trial. I am most grateful to both counsel for their succinct written and oral submissions.

Documents

9. In addition to a bundle of authorities, I was provided with three bundles of documents for the purposes of this hearing, comprising an appeal core bundle, the trial bundle used for the Trial, and a Defendant's supplementary bundle. The principal documents for the hearing, including the Judgment and the Order, were contained in the appeal core bundle. Where I refer to specific paragraphs in the Judgment, I will use the reference system **[J1]** and so on for the relevant paragraph number of the Judgment. Italics have been added to quotations in this judgment.

The relevant geography and topography

10. As with all boundary disputes, the essential starting point is an understanding of the relevant geography and topography of the Properties. There were numerous photographs and plans in the hearing bundles, including some measured site plans in the supplementary bundle. There is not however, so far as I am aware, any single plan by reference to which the relevant geography and topography of the Properties can be identified and explained. In these circumstances I must give a fairly lengthy description of the relevant geography and topography.

11. In this judgment all references to boundaries are, unless otherwise indicated, general references to boundaries between properties. They do not, unless otherwise indicated, necessarily refer to the correct line of the boundary between the relevant properties. I adopt this method of reference on the basis that the correct location of the relevant boundary line is either not in issue in these proceedings, or is not or may not be in issue at all, or is in issue in these proceedings.

12. Where I use compass points for orientation purposes it should be kept in mind that, as the Judge noted in the Judgment, the compass point showing north on at least one of the conveyancing documents is in the wrong place. For the purposes of this judgment, compass points are given for the purposes of general description and orientations, and are not intended to be precisely accurate.

13. No. 47 forms part of a line of properties all of which occupy relatively long and narrow sites, and all of which front on to Straight Road. The relevant properties, starting with the northern most property and working southwards, are No. 45, No. 47, No. 49, No. 51, and No. 53. I have already defined 47 Straight Road as No. 47. I will refer to the other properties on Straight Road, which I have just identified, by their numbers alone.

14. No. 47, 49, 51, and 53 all back on to No. 5, so that each property has a rear (eastern) boundary in common with part of the western boundary of No. 5. I will use the expression **"the Common Boundary"** to refer to the entire length of this boundary,

running along the rear boundaries of No. 47, 49, 51, and 53. As one proceeds down Straight Road, in a southern direction, there is a road on the left hand (eastern) side known as The Avenue, into which one can turn from Straight Road. No. 5 and 53 do not however have access to The Avenue. No. 5 and 53 each have a southern boundary with a large property, which I believe is known as No. 1 The Avenue and is situated on the corner of Straight Road and The Avenue. No. 1 The Avenue thus lies between and separates both No. 5 and 53 from The Avenue.

15. A brick wall (**"the Brick Wall"**) runs along part of the Common Boundary, between No. 5, on the one side, and 49 and 51, on the other side. The Brick Wall may also separate part of 53 from No. 5; the Judge left this point open in the Judgment; see **[J42]**. It is also not clear whether the Brick Wall does encroach into the area of the Common Boundary between No. 5 and No. 47. If it does, then the encroachment appears to be very limited. The Judge also left this point open, or at least unclear; see in particular the Judge's findings at **[J42]** and **[J45]**.

16. The Brick Wall has supporting piers which, with one exception, protrude eastwards from the face of the Brick Wall into No. 5. The exception is the pier at the northern end of the Brick Wall (**"the Northern Pier"**), which protrudes westwards, towards No. 47. The extent of the protrusion of these piers from the face of the main parts of the Brick Wall is limited. I was not referred to any measurements but, judging by the photographs which I have seen, the extent of the protrusions from the face of the main part of the Brick Wall looks to be a matter of inches rather than feet.

17. At the northern end of the Brick Wall there is an adjacent concrete post (**"the 2008 Post"**), which is all that remains of a fence erected by the Claimant in 2008 separating No. 47 from No. 5.

18. No. 47 is currently separated from No. 5 by a wood panel and concrete post fence. This fence (**"the 2017 Fence"**) was erected by the Defendant in December 2017. The 2017 Fence runs in a northwards direction until it comes level with the southern boundary of 45 (45 Straight Road). At that point it reaches (using a deliberately neutral expression) the southern end of the older wooden panel and concrete post fence which runs along the eastern boundary of 45. The southern end of this older fence, is marked by a concrete post, which I shall refer to as **"the 45 Corner Post"**. The 45 Corner Post is thus located on the corner of the eastern and southern boundaries of 45

19. Access to No. 5 is ultimately obtained from Church Road, which runs along a west-east axis some way to the north of No. 5. Coming from Church Road, one turns into and proceeds along Glebe Road, which runs on a north-south axis. Title to Glebe Road, which is not an adopted highway, is registered under title number BK108565. Coming from the north, Glebe Road comes to an end short of the entrance to No. 5. Connecting the end of Glebe Road to the entrance to No. 5 there is a much narrower drive (**"the Drive"**) title to the bulk of which is unregistered. As one proceeds along the Drive, to the entrance to No. 5, there is a single property on the left (to the east), which is 4 Glebe Road. On the right (to the west) one passes first a property which I believe is known as 5A Glebe Road, and then 45. As one enters No. 5, at the entrance thereto, there is the junction of the Common Boundary (the western boundary of No. 5), the eastern boundary of 45, and the boundary between No. 47 and 45. In this location are to be found the corner post of the 2017 Fence and the 45 Corner Post.

20. I refer to title to the bulk of the Drive as being unregistered because a narrow strip of land (**"the Strip"**) which is now comprised within the Drive, running along part of the western side of the Drive, was formerly part of 45 and is registered. Title to 45, as it is now constituted, is also registered. The registered proprietor of 45, is Celia Beer, who was registered as proprietor on 31st October 1990. The Strip was formerly included in the registered title to 45, but Ms Beer sold the Strip. My understanding is that Ms Beer sold the Strip to the late Mrs Vera Engels, who was then the owner of No. 5. I believe that this sale took place in 2014. Also in 2014, Vera Engels sold both No. 5 and (I assume) the Strip to an intermediate owner, who then sold on No. 5 and (I assume) the Strip to the Defendant in 2017.

21. Title to the Strip is now registered, in the name in the Defendant, under its own title number (BK463859). The acquisition of the Strip allowed Vera Engels to achieve a widening of the Drive, where the Drive runs alongside 45. I understand that Strip was identified, in the transfer to Vera Engels, as having a width of 45cm.

22. The Judge found that the fence which had marked the eastern boundary between 45 and what was then the relevant part of the Drive was, in 2014, replaced and relocated back into 45 (ie. to the west) by a distance of 45cm. Prior to its relocation this fence had been a concrete post and wire fence. The relocated fence was, and remains, a wood panel and concrete post fence. It is at the southern end of this relocated fence that the 45 Corner Post is to be found. I will refer to the original post and wire fence as **"the Original 45 Fence"**, and to the new wood panel and concrete post fence, which now marks the boundary between 45 and the relevant (now widened) part of the Drive, as **"the New 45 Fence"**.

23. On the other side of the Drive, along the boundary with No. 4 Glebe Road, there is a wood panel and concrete post fence. The eastern side of the Drive is enclosed by this fence. The western side of the Drive where it runs past 45, is now enclosed by the New 45 Fence.

24. The acquisition of the Strip and its incorporation into the Drive solved, or at least alleviated the problem with the narrowness of the Drive where it runs between 45 and No. 4 Glebe Road. What the acquisition of the Strip did not do was to solve, or at least alleviate the problem with the narrowness of the actual access into No. 5, at the point where the Drive reaches the entrance to No. 5. It is that problem which, as the Judge commented, had caused the issue in the present case. The solution to that problem is controlled by the location of the boundary between No. 47 and No. 5.

25. I will use the expression **"the Boundary"** to refer, in general terms, to the boundary between No. 47 and No. 5, which forms part of the Common Boundary. I will use the expression **"the True Boundary"** to refer to the correct location of the Boundary, whatever that correct location may be. It is also useful to employ the expressions **"Point A"** and **"Point B"**. Point A refers to the correct location of the point which constitutes the southern end of the True Boundary. Point B refers to the correct location of the point which constitutes the northern end of the True Boundary.

Relevant history

26. In order to understand the issues raised by the grounds of the Appeal and Cross Appeal, it is necessary to set out some of the history of this case. In setting out that history I base myself on the findings of fact made by the Judge in the Judgment.

27. The Claimant purchased No. 47, in 2002, from the previous owners, who were Mr and Mrs Jones. The Claimant called Mr Jones as one of his witnesses at the Trial. Mr and Mrs Jones acquired No. 47 in 1996, and lived there until they sold No. 47 to the Claimant in 2002.

28. When Mr and Mrs Jones purchased No. 47 it was separated from 45 by a field hedge, mainly of hawthorn. At the rear of No. 47, at the end of the garden, there was what was referred to as an ivy hedge, which comprised an old wooden fence which had become overgrown with ivy. I will refer to this old wooden fence as **"the Ivy Fence"**, and to the ivy hedge which had grown up around it as **"the Ivy Hedge"**. Mr Jones replaced the hawthorn hedge with a wooden post and panel fence, running along the length of his garden and the boundary with 45. Mr. Jones did this because his child, who was then a toddler, was getting through the hawthorn hedge.

29. In 2008, following his acquisition of No. 47 in 2002, the Claimant replaced the Ivy Fence with a wood panel and concrete fence (**"the 2008 Fence"**). As I have already noted, the 2008 Post, which is adjacent to the northern end of the Brick Wall and the Northern Pier, is all that remains of the 2008 Fence.

30. In 2014, as I have described above, Vera Engels (now sadly deceased) purchased the Strip from Ms Beer. The purchase of the Strip was arranged by Mrs Pamela Engels, who is the daughter of Vera Engels and appeared as a witness for the Defendant at the Trial. As I understand the position, the purpose of this purchase was to secure a widening of the Drive, and thereby to resolve, or at least to alleviate the problems caused by the narrowness of the access to No. 5. The resolution or alleviation of these problems would render No. 5, which was to be sold, more marketable. The Judge found that the narrow access had proved a sticking point for many potential buyers of No. 5; see **[J62]**.

31. On behalf of her late mother Pamela Engels also approached the Claimant, in order to see whether he would be willing to re-position the corner post at the northern end of the 2008 Fence, by moving it back, in a westwards direction, thereby widening the access point where the Drive reached the actual entrance of No. 5. The Judge found that this was more than a request for a favour, and that what Pamela Engels was seeking was the actual transfer of a small amount of land for the purposes of widening the access point. Negotiations took place with the Claimant in relation to this proposal, but the Claimant's terms for agreeing to the proposal were agreement to the creation of an access from the rear of No. 47 to the Drive. This was not acceptable to Pamela Engels, and no agreement was reached. The 2008 Fence thus remained in place, with no relocation.

32. The Defendant arrived on the scene in 2017, when he purchased No. 5. The date of the purchase was 23rd August 2017. The Defendant approached the Claimant, seeking his agreement to the widening of the access into No. 5. As in 2014, the Claimant was only prepared to agree to this if he was granted access from No. 47 to the Drive. This was not acceptable to the Defendant, with the result that the 2008 Fence remained in place.

This in turn led to a dispute between the Claimant and the Defendant about the access, which the Judge found had arisen by November and December 2017.

33. The Judge found that, on 29th November 2017, the Defendant deliberately caused damage to the 2008 Fence, including damage to the two end posts. Following this the Defendant replaced the 2008 Fence on 8th December 2017. This replacement fence was then removed by the Claimant, who put up fencing of his own where the 2008 Fence had been. This fencing was however then removed again by the Defendant and replaced with a new fence. This all occurred in 2017. It is the fence which was finally installed by the Defendant, and which remains in place as matters stand, which I am referring to as the 2017 Fence.

34. I should also mention the findings made by the Judge in relation to the Brick Wall. The Judge accepted the evidence of Pamela Engels, that the Brick Wall was constructed in the late 1950s and in the early 1960s. The Judge also accepted the evidence of Pamela Engels that the Brick Wall had been built entirely on the land comprising No. 5 and inside (meaning on the No. 5 side) the then existing fences that marked the boundary between No. 5 and the rear of the relevant properties on Straight Road.

The proceedings

35. In the Particulars of Claim the Claimant's essential complaint was that the Defendant had removed the 2008 Fence and replaced it with a fence (the 2017 Fence) which was about 12 inches further into No. 47 than the 2008 Fence. The Defendant was accused of high handed and oppressive conduct calculated to make a profit exceeding the compensation payable to the Claimant.

36. The Claimant sought an injunction restraining the Defendant from preventing the Claimant reinstating the 2008 Fence in its position prior to 2017 or installing an alternative structure along the line of the 2008 Fence. In addition to this the Claimant sought damages for trespass, including exemplary damages for trespass. The damages for trespass were identified as being damages for trespass to No. 47 and to the 2008 Fence itself.

37. The Defendant served a first Defence and Counterclaim, on the court form provided for this purpose, denying all the claims against him. This first Defence and Counterclaim did not actually contain any formal counterclaim. This first document was then replaced with a more formal Defence and Counterclaim, which continued to deny the claims against the Defendant, essentially on the basis that the 2008 Fence had been located in the wrong place, within No. 5, and that the Defendant had thereby wrongly altered the location of the Boundary. By the Counterclaim, the Defendant sought a declaration that *"the land"* belonged to the Defendant. The expression *"the land"* was undefined in the Counterclaim, but seems to have been intended to be a reference to the land between the line of the 2008 Fence, and the line of the 2017 Fence, on the basis that the 2017 Fence occupied the line of the True Boundary. The Defendant also sought, by the Counterclaim, damages for trespass to the Defendant's land and property, and for distress. The claim to damages for trespass to property was, I assume, a claim in respect of alleged damage done when, in 2017, the Claimant removed the fence which the Defendant put up on 8th December 2017. It will be recalled that this first new fence was removed by the Claimant and replaced with the Claimant's fencing,

but that the Defendant then removed the Claimant's new fencing and installed a further new fence; namely the 2017 Fence.

38. A case management conference was held in the Slough County Court before District Judge Comiskey on 6th January 2020. Directions were given which included a direction for exchange of witness statements, together with a proviso that oral evidence would not be permitted at trial from a witness whose statement had not been served in compliance with the directions order or had been served late, except with the permission of the court.

39. In the case of Mrs Pamela Engels, who was one of the Defendant's witnesses at the Trial, a witness statement was not served. Instead the Defendant provided a letter, dated 30th October 2019 (**"the October Letter"**). The October Letter was addressed *"To whom it may concern"*, and was signed by Pamela Engels, Vera Engels (who died after the date of the October Letter), and June Jensen, sister of Pamela Engels. The October Letter was not a witness statement, and thus failed to comply with the requirements of the direction for exchange of witness statements given by District Judge Comiskey in the case management order of 6th January 2020.

40. A pre-trial review was held before the Judge on 15th July 2021, attended by counsel for the parties. At that pre-trial review (**"the PTR"**) Mr. Spackman, for the Defendant, sought permission to remedy the problem with the October Letter by serving a witness statement from one or other of Pamela Engels or June Jensen. I was told by counsel that permission was sought on the basis that the Defendant required relief from a sanction in this respect. This was plainly correct. It seems to me that the application for permission to serve this witness statement was an application for relief from a sanction.

41. The outcome of this application was the following direction by the Judge, in paragraph 2 of the order made on the PTR (**"the PTR Order"**):

> *"2. The Defendant has permission to serve a witness statement from either Pamela Engels or June Jensen (not both) and any hearsay notice in respect of Vera Engels by 12 noon on 19/07/2021 provided such evidence does not go beyond that contained in the document dated 30th October 2019. Time for service of such witness statement/ hearsay notice is, to that extent only, extended."*

42. Following the grant of this permission the Defendant served a witness statement of Pamela Engels dated 19th July 2021. The Defendant also served a hearsay notice, also dated 19th July 2021, which stated the intention of the Defendant to rely on the October Letter, as signed by Vera Engels and June Jensen, and to rely on what was said by these individuals to Pamela Engels and, in the case of Vera Engels, what was said to the Defendant. The grounds for service of the hearsay notice were stated to be that Vera Engels could not give evidence because she was deceased, and June Jensen could not give evidence because the PTR Order only permitted evidence from one of Pamela Engels and June Jensen.

43. The witness statement of Pamela Engels contained evidence which went beyond the content of the October Letter, and thus beyond what was permitted by the PTR Order.

In the Judgment, at **[J49-50]**, the Judge recorded how this problem was dealt with at the Trial:

*"49. A pre-trial review took place shortly before trial before me. As noted above, Vera Engels has died. I gave the defendant permission to rely on a proper witness statement from one or other of the two daughters, provided it did not go beyond what was in the 30 October 2019, "To whom it may concern" letter. I gave a short time for service of that witness statement.*

*50. What was then served was a statement from Pamela Engels, going quite significantly beyond the contents of the 30 October 2019 letter. For example, it exhibited a number of historic photographs, not previously referred to or disclosed. In the event, I allowed the defendant to call Pamela Engels to confirm the matters that were in the 30 October 2019 statement but not to go beyond that."*

44. Pamela Engels was therefore called as a witness at the Trial, but the Judge restricted her evidence to the content of the October Letter.

<u>The decision of the Judge</u>

45. As I have said, the Judge reserved his judgment, at the conclusion of the Trial on 28th July 2021. The Judge then delivered the Judgment on 6th August 2021. Prior to delivery of the Judgment, the Judge emailed counsel (Mr Woodhouse and Mr Spackman) on 2nd August 2021. The email stated as follows:

*"As agreed, I shall deliver judgment orally by cvp on Friday (subject to any developments in the Woodhouse family). Unless I have a collapsing list before then, I will not be in a position to hand down a written judgment. I have prepared a draft Order, which I attach. I can see this course might be regarded as putting the cart before the horse, but my hope is that you will be able to review the terms of my proposed Declaration and to suggest any improvements to the wording. This will save time on Friday, which would help as the available window in the list is quite short. The draft Order, of course, tells you my conclusions, but not my reasons.*

*YOU WILL RECALL THAT THE COMPASS POINT ON THE PLAN AT PAGE 352 IS ABOUT 45 DEGREES DIFFERENT FROM THAT ON THE LAND REGISTRY PLANS. We proceeded, I suspect rightly, on the basis that the LR plans had the correct compass, but could I ask that the parties check and agree this BEFORE FRIDAY if possible. Google maps seems to support the LR compass. The importance of this is, of course, that my intended Declaration is my reference to compass points.*

*In the circumstances, I do not regard it as necessary to place any embargo on the draft Order. It is no more than a draft."*

46. Turning to the draft order (**"the Draft Order"**), it provided as follows:

*"It is ordered that:*

*1. Permission to the Defendant to call and rely upon the evidence of Pamela Engels but limited to the matters contained in the document dated 30th October 2019 addressed "To whom it may concern" (permission granted 26th July 2021)*

> 2. *There be judgment for the Claimant on the claim in the sum of £420. This is an award of compensatory damages, the claim for exemplary damages being refused.*
> 3. *There be judgment for the Claimant on the Counterclaim.*
> 4. *There be a declaration in the following terms:*
>    *It is hereby declared that the boundary between 5 Glebe Road, Old Windsor, Windsor SL4 2PN, being registered title BK282344, and 47 Straight Road, Old Windsor, Windsor SL4 2RT, being registered title BK281620, is a straight line and lies on the line that runs between (a) the western-most face of the northern-most pier of the established wall that runs approximately between the said no 5 Glebe Road and numbers 47, 48 and 51 of Straight Road aforesaid and (b) a point 45cm back (ie approximately east from) the eastern-most face of the southern-most post of the established fence that separates number 45 Straight Road aforesaid from the drive that provides access to the said 5 Glebe Road.*
>
> *[Interest]*
> *[Costs]*
> *[Other]"*

47. In terms of the apparent outcome of the Trial the position, by reference to the Draft Order, appeared to be as follows:
    (1) Paragraph 1 of the Draft Order simply recorded the limit on the evidence of Pamela Engels which the Defendant was permitted to call and rely upon; see **[J49&J50]** as quoted above.
    (2) By paragraph 2 of the Draft Order the Claimant was granted judgment for compensatory damages in the sum of £420. The provenance of this sum was identified, at **[J117]**, in the following terms:
    > *"117. There is a valuation report from a single joint expert, at page E415. It deals with issues of valuation. The expert assesses the costs of replacing the fence at £350 plus VAT, i.e. £420. The report is nine months old. There may have been a very modest increase in costs since then. It is likely to have been small; there is no evidence and I make no allowance for that."*

    (3) The claim for exemplary damages was refused by paragraph 2 of the Draft Order.
    (4) By paragraph 3 of the Draft Order judgment was given for the Claimant on the Counterclaim, so that the Counterclaim was effectively dismissed.
    (5) Paragraph 4 of the Draft Order contained a draft declaration (**"the Draft Declaration"**). The Draft Declaration declared that the True Boundary was a straight line, and lay on the line which ran between the western face of the Northern Pier and a point 45cm back from the eastern face of the 45 Corner Post. Using my definitions, the Draft Declaration identified Point A as the western face of the Northern Pier and Point B as a point 45cm back from the eastern face of the 45 Corner Post.
    (6) The Draft Order left open, in square brackets, interest and costs and any other matters arising.

48. On 6th August 2021 the Judge delivered the Judgment orally. There then ensued a lengthy exchange between counsel and the Judge. I have seen a transcript of the exchange (**"the Exchange"**). As I have said, the Exchange is lengthy, and difficult to summarise. For present purposes the important point is that the Judge was persuaded

by Mr Woodhouse that the Draft Declaration did not reflect the findings of the Judge in the Judgment. The essential point made by Mr Woodhouse, in the course of the Exchange, was that the Judge had made a finding that the Claimant had installed the 2008 Fence along the same line as the Ivy Fence, and had not, as the Defendant argued, moved the 2008 Fence in an eastward direction, into No. 5. As such, so Mr Woodhouse contended, the Draft Declaration was incorrect in its identification of Point A. Point A was not located on the western face of the Northern Pier but, on the Judge's findings, must be located on the eastern face of the 2008 Post which is, it will be recalled, all that remains of the 2008 Fence.

49. In what was effectively a short further judgment in the course of the Exchange, the Judge accepted this argument. I will refer to this extract from the Exchange as **"the Further Judgment"**. What the Judge said was this:

*"JUDGE ROCHFORD: I have made my decision. I have made my finding to the effect that the post put up when the ivy fence was replaced, was placed in the same position as the ivy fence. That is indeed my finding and I do not resile from that. It therefore follows that at that particular point the ivy fence ran broadly in line with the wall rather than behind it, therefore the end post of the ivy fence and by in post, I mean the southernmost post of the ivy fence, marks the boundary, that is the boundary, historic boundary at that particular point and that the wall deviated somewhat into the garden properly of 49, rather 47, perhaps on the boundary, it does not alter that position therefore the boundary must be defined by a reference not to a pier at the wall but to the southernmost post of the fence put in by Mr Hothi in 2008 which is agreed and on the evidence there is not – has remained in place since then.*

*So, the declaration will be drafted on those terms. Yes, that is my decision on that. In so far as the evidence is, my finding is that the ivy fence was on the number 47 land though I think it must follow that the – that point that was at A in my draft proposal, it is going to be the easternmost base –*

*MR WOODHOUSE: Yes.*

*JUDGE ROCHFORD: – of the concrete post by the – we need to be a bit careful, because there are several concrete posts, sort of stumps of posts are there not –*

*MR WOODHOUSE: Yes.*

*JUDGE ROCHFORD: – concrete post –*

*MR WOODHOUSE: By – erected by Mr Hothi in 2008?*

*JUDGE ROCHFORD: I would rather do it –*

*MR WOODHOUSE: Because that, that's the one that's a bit – that's affixed to the wall so that, that can't move.*

***Pause.***

*JUDGE ROCHFORD: So, you, I am – suggest the following: A, the easternmost base of the concrete post erected by Mr Hothi in 2008 which abuts the end of the established wall that runs approximately –*

*MR WOODHOUSE: Sorry Your Honour, I'm sort of –*

*[Crosstalk]*

*MR WOODHOUSE: Sorry Your Honour, could you repeat that? My computer was just running out of battery, so I need to plug myself in.*

*JUDGE ROCHFORD: A will read as follows: the easternmost base of the concrete post erected by Mr Hothi in 2008 which abuts the end of the established wall and then the rest we get as existing A, i.e., that runs approximately between*

*said number five Glebe Road and numbers 47, 49 and 51 Straight Road, aforesaid.*
*MR WOODHOUSE: Yes, Your Honour.*
*JUDGE ROCHFORD: So, we need to be careful because there are a number of posts there and somebody looking at this many years down the line may not know which post Mr Hothi erected.*
*MR WOODHOUSE: Yes, Your Honour."*

50. So far as the Order was concerned, paragraphs 1, 2 and 3 reflected the terms of the Draft Order. As a consequence of the Further Judgment however, the declaration in paragraph 4 of the Order (**"the Declaration"**) was not in the same terms as the Draft Declaration. The location of Point A was changed from the western face of the Northern Pier to the eastern face of the 2008 Post.

51. The Declaration was made in the following terms (I have added the underlining and the struck out text, in order to show the extent of the revision from the Draft Declaration):

*"It is hereby declared that the boundary between 5 Glebe Road, Old Windsor, Windsor SLA 2PN, being registered title BK282344, and 47 Straight Road, Old Windsor, Windsor SLA 2RT, being registered title BK281620, is a straight line and lies on the line that runs between (a) ~~the western-most face of the northern-most pier~~ the eastern most face of the concrete post erected by Mr Hothi in 2008 which abuts the end of the established wall that runs approximately between the said no 5 Glebe Road and numbers 47, 49 and 51 of Straight Road aforesaid and (b) a point 45cm back (ie approximately east from) the eastern-most face of the southern-most post of the established fence that separates number 45 Straight Road aforesaid from the drive that provides access to the said 5 Glebe Road."*

52. Turning to the remainder of the Order, paragraph 5 contained a provision regarding liberty to apply if the parties could not agree on the installation of the new fence by the Claimant, the cost of which comprised the damages awarded to the Claimant. Paragraph 6 awarded the Claimant his costs of the proceedings, including the Counterclaim, with an order for an interim payment on account of costs in the sum of £45,000. Paragraph 7 refused permission to appeal to the Defendant.

### The grounds of the Appeal and the Cross Appeal

53. Starting with the Appeal, there are four grounds of appeal, for which permission is sought. In summary, they are as follows.

54. Ground one (**"Ground One"**) is that the Judge's finding that Point A was located on the eastern face of the 2008 Post was inconsistent with his findings in the Judgment. The essential point in Ground One is that the Judge's ultimate decision as to the location of Point A resulted in a kink in the Common Boundary. On the Judge's findings, so it is contended, the Common Boundary runs along the western face of the Brick Wall but then, where the Common Boundary reaches Point A, turns in an eastward direction to the eastern face of the 2008 Post. This is said to be inconsistent with the relevant conveyancing documents, which are said to show the Common Boundary as a straight line, with no such kink.

55. Ground two (**"Ground Two"**) is that the Judge wrongly altered the effect of the Judgment, after the Judgment had been delivered. It is said that the Judge's findings in

the Judgment ought to have resulted in a declaration that Point A is located on the western face of the Northern Pier, consistent with the terms of the Draft Declaration.

56. Ground three (**"Ground Three"**) is that the Judge was wrong, in the Exchange, to find (to the extent that the Judge did make this finding) that the Claimant or any predecessor in title had acquired title to any part of No. 5 by adverse possession; there having been no pleaded claim to title by adverse possession.

57. Ground four (**"Ground Four"**) is that the Judge was wrong to refuse to admit the entirety of the evidence of Pamela Engels in her witness statement, either on the basis that the evidence in the witness statement did not go beyond the evidence contained in the October Letter, or on the basis that the Judge was wrong to refuse to admit the evidence of Pamela Engels in her witness statement, if and in so far as that evidence did go beyond what was contained in the October Letter.

58. It is important to note that, if the Appeal succeeds, I am not asked to make my own decision or decisions on the claims in the proceedings (including the Counterclaim). Instead I am asked to set aside the Order and remit the case back the Reading County Court for a new trial before a different Judge.

59. Turning to the Cross Appeal, there is a single ground of appeal, which is that the Judge was wrong, on the findings which he made, to refuse an award of exemplary damages.

60. If the Cross Appeal succeeds I am asked to set aside that part of the Order by which the Judge refused to award exemplary damages, and to exercise my own discretion to make an award of exemplary damages.

Extending time for the filing of the appellant's notice

61. In his skeleton argument Mr Spackman dealt with the fact that the Defendant's appellant's notice is recorded as having been filed on 31st August 2021, which was out of time. The Order was made on 6th August 2021. Mr Spackman explained that the appellant's notice was filed on 27th August 2021, having been rejected on the previous day because the grounds of appeal were not in a separate document. The appellant's notice was however also rejected on 27th August 2021, despite the grounds of appeal being attached in a separate document, on the basis that the Order had been made on 28th July 2021. This had the consequence that the appellant's notice had to include an application to extend time for filing the appellant's notice. The Order was made on 6th August 2021, so that this second rejection of the appellant's notice was erroneous. The confusion arose because the Order was dated 28th July 2021 when it was originally drawn up by the Court. The date was subsequently corrected, by amendment of the Order, to 6th August 2021.

62. 27th August 2021 was a Friday. The following Monday was a bank holiday, but Mr Spackman's skeleton argument states that a telephone call was made to the Court Office on 31st August 2021, when the error in the date was pointed out. The skeleton argument further states that the Court accepted that it had made an error as to the date, but stated that it could, by then, only accept an appellant's notice which sought an extension of time. In the result, the appellant's notice was eventually accepted for filing on Tuesday 31st August 2021, with the inclusion of an application to extend time.

63. Mr Spackman's skeleton argument asserted that the appellant's notice was not filed out of time, but that even if it was filed out of time, the required extension of time should be granted. This issue was not raised in the oral submissions, and there was no challenge to what was said by Mr Spackman, in this context, in his skeleton argument. It seems to me that the appellant's notice was filed out of time, but only by a few days, and in circumstances where it would be unfair to regard the Defendant as culpable. I do not think that any detailed discussion of the question of extending time is required. It seems to me, in all the circumstances, that the case is one where the required extension of time should be granted, independent of the merits of the Appeal for which permission is sought.

The relevant conveyancing documents

64. In order to understand Grounds One and Two it is necessary to set out the conveyancing documents which are relied upon by the Defendant in support of his argument that the Common Boundary is a straight line. The relevant conveyancing documents comprise five conveyances of property relevant to this dispute.

65. The first of these conveyances is dated 3rd January 1934. By this conveyance (**"the First 1934 Conveyance"**) property was conveyed which comprised the northern section of what is now the block of property comprising No. 47, 49, 51, 53, No. 1 The Avenue, and No. 5; that is to say the block of property bounded by Straight Road and The Avenue. The plan attached to the First 1934 Conveyance shows the land conveyed by pink shading. The plan attached to the First 1934 Conveyance does not show the Common Boundary (the boundary running between what are now No. 47, 49, 51, and 53, on the one side, and No. 5, on the other side). This is because the land conveyed, shown on the plan by pink shading, included part of what is now No. 5, so that the Common Boundary was not then in existence.

66. My understanding is that the bulk of the pink shaded land on the plan attached to the First 1934 Conveyance is what subsequently became No. 47 and 49, while the remainder of the pink shaded land became part of No. 5. There is a memorandum which is indorsed on the First 1934 Conveyance and makes reference to a conveyance of 23rd July 1934, whereby part of the northern section of the land conveyed by the First 1934 Conveyance (presumably what is now No. 47) was conveyed away.

67. The second conveyance is dated 3rd April 1934, and was a conveyance of the central section of property within the block of property which I have described in relation to the First 1934 Conveyance. The plan attached to this conveyance (**"the Second 1934 Conveyance"**) again shows the land conveyed by pink shading. The plan attached to the Second 1934 Conveyance again does not show the Common Boundary. This is because the land conveyed, shown on the plan by pink shading, also included what I assume was the other part of what is now No. 5, so that the Common Boundary was not then in existence. In the case of the plan attached to the Second 1934 Conveyance someone has drawn on this plan a rough (and wavy) line which may be intended to mark the position of what is now the Common Boundary. There is however nothing to be deduced from this manuscript line, which is not even drawn as a straight line, as to the precise current location of the Common Boundary.

68. My understanding is that the bulk of the pink shaded land on the plan attached to the Second 1934 Conveyance is what subsequently became 51 and 53, while the remainder

of the pink shaded land became the remaining part of No. 5. There is a memorandum which is indorsed on the Second 1934 Conveyance and makes reference to a conveyance of 15th August 1934, whereby part of the land conveyed by the Second 1934 Conveyance (it is not clear which part) was conveyed away.

69. The third conveyance is dated 28th February 1935, and was a conveyance of the Drive, which I assume would then have included the Strip. I put the matter this way because the colouring on the plan attached to this conveyance (**"the First 1935 Conveyance"**) is not easy to make out. What was conveyed was the land coloured pink on the plan. There was also a grant of rights over the roadway coloured brown on the plan. As I read the plan, the pink land is what is now the Drive (but then including the Strip), and the brown land is what is now Glebe Road. I proceed on this basis. The point may be said not to be critical because the relevance of the plan to the First 1935 Conveyance, on the Defendant's case, is that it shows what is now the Common Boundary as an apparently straight line.

70. In referring to what is now the Common Boundary, there is a qualification to what I have just said in relation to the Common Boundary, as shown on the plan attached to the First 1935 Conveyance. By reason of the last of the conveyances which I deal with in this section of this judgment, the line of the Common Boundary now turns through an oblique angle where it divides No. 5 and 53. This was not however the position at the time of the First 1935 Conveyance, when what was then the equivalent of the Common Boundary was shown as an apparently straight line along the whole of its length. I will refer to this difference between the situation at the time of the First 1935 Conveyance and the situation now as **"the 53 Exception"**.

71. If one gets a ruler out and lays it along what I have described as an apparently straight line, the line is not completely straight. There is a very small, but discernible curve, to the west, in the course of the line. I was told that the compass points shown on this plan (the plan attached to the First 1935 Conveyance) are not accurate, but this does not matter for the purposes of this judgment, where I am only relying upon compass points for the purposes of general orientation. A further point I should mention, in the context of this particular plan, is that in the course of dealing with corrections to the draft of this judgment, I was informed that the Defendant had carried out the same exercise as I have carried out with a ruler, but on the original version of the First 1935 Conveyance and thus on the original version of the plan. I am using the copy of the First 1935 Conveyance and the plan attached thereto which are in the supplementary bundle provided for this hearing. I was provided with a photograph which was said to show this exercise and to demonstrate that the line of the Common Boundary was indeed shown on the original plan as a completely straight line. I will come back to this point. I will refer to this exercise carried out by the Defendant, in relation to the plan attached to the First 1935 Conveyance and in relation to the plans attached to the two remaining conveyances I need to deal with, as **"the Defendant's Exercise"**.

72. The plan attached to the First 1935 Conveyance also shows No. 47, 49, 51, and 53 in what I understand to be their current configurations (subject to a later and non-material conveyance of a small triangle of land out of 53). The same applies to the plans annexed to the fourth and fifth conveyances which I have to consider. This would seem to confirm what can be inferred from the memoranda indorsed upon the First and Second 1934 Conveyances; namely that No. 47, 49, 51, and 53 were created in their

current configurations by the two conveyances in 1934 which are referred to in the memoranda. Those two conveyances are not however available.

73. The fourth conveyance is dated 13th September 1935. I was told that this conveyance (**"the Second 1935 Conveyance"**) was a conveyance of No. 5. The land conveyed is identified as coloured pink on the plan attached to the Second 1935 Conveyance. I am bound to say that I was unable to discern any land coloured pink, or for that matter any land coloured any particular colour on the plan. The colouring, or marking (to use a better word) looked more as though someone had upset a cup of tea on the original of the plan. I was however told by Mr Spackman that the land coloured pink was No. 5. This was not contested by Mr Woodhouse, and so I proceed on the same basis. Again, the point may be said not to be critical because the relevance of the plan to the Second 1935 Conveyance, on the Defendant's case, is that it also shows what is now the Common Boundary, subject to the 53 Exception, as an apparently straight line.

74. Once again, if one gets a ruler out and lays it along what I have described as an apparently straight line, the line is not completely straight. There is a very small, but discernible curve, this time to the west, in the course of the line. By reference to the Defendant's Exercise, carried out on the original version of the plan attached to the Second 1935 Conveyance, it is said that the line is completely straight.

75. I was told that the compass points shown on this plan (the plan attached to the Second 1935 Conveyance) are also not accurate. Again, this does not matter for the purposes of this judgment where, as I have said, I am only relying upon compass points for the purposes of general orientation.

76. The fifth conveyance is dated 28th September 1954, and explains my reference to the 53 Exception. This was a conveyance of a small triangle of land, at the eastern end of what I assume was then 53, pursuant to which this triangle of land was incorporated into No. 5. The triangle of land is shown coloured pink on the plan attached to this conveyance (**"the 1954 Conveyance"**). The consequence of this was to form the Common Boundary as it is now constituted. Moving in a southwards direction, and at the point where the Common Boundary commences to run between No. 5 and 53, the consequence of the 1954 Conveyance is that Common Boundary turns at an oblique angle before running on between No. 5 and 53. Once again, the relevance of this plan, on the Defendant's case, is that it shows what is now the Common Boundary as a straight line, before it turns the oblique angle at the junction of No. 5, 51, and 53. In the case of the 1954 Conveyance if one gets the ruler out and lays it along this line it is a straight line, subject to the 53 Exception. By reference to the Defendant's Exercise, carried out on the original version of the plan attached to the 1954 Conveyance, which is said to be a scale plan, it is said that the line is completely straight. In this case therefore, my own exercise and the Defendant's Exercise produce the same result.

77. I will use the collective expression **"the Conveyances"** to refer to these five conveyances.

-

The Appeal - a preliminary point

78. Mr Woodhouse took the preliminary point that it was not open to the Defendant to challenge the Judge's finding that the correct location of Point A was the eastern face

of the 2008 Post. Mr Woodhouse pointed to paragraph 21 of Mr Spackman's skeleton argument for the Trial, which stated as follows:

> *"21. If Pamela Engels is right it would follow that the southernmost part of the fence is also encroaching on D's land because it now abuts the wall but D does not take any point on the southernmost post."*

79. I understand the reference to Pamela Engels being right to be a reference to her evidence that the fence at the rear of No. 47, which would originally have been the Ivy Fence, ran from the rear (western face) of the Brick Wall. This is confirmed by paragraph 23 of Mr Spackman's Trial skeleton argument, which is in the following terms:

> *"23. The evidence of Pamela Engels is to the effect that this new fence* [the 2008 Fence] *erected by C had been moved so as it abutted against the brick wall rather than running from the Western face of the wall. The evidence of Stacey* ***[TB 91]*** *who lived opposite the area in 4 Glebe Road plainly supports this contention."*

80. Mr Woodhouse contended that the Defendant did not resile from the position alleged to have been adopted in Mr Spackman's Trial skeleton argument, in relation to Point A, throughout the Trial. Mr Woodhouse contended that the cross examination and argument at the Trial was all concerned with the correct location of Point B. If the Defendant had argued that the 2008 Post was not the correct location of Point A, so Mr Woodhouse contended, the Trial would have taken a different course.

81. Mr Spackman disputed this. He said that paragraph 21 of the Trial skeleton argument was not conceding that the 2008 Post was the correct location of Point A. Rather, so he submitted, paragraph 21 was simply stating that the Defendant was not specifically concerned with securing the removal of the 2008 Post, notwithstanding that the 2008 Post was, on the Defendant's case, located on the wrong side of the Boundary, within No. 5.

82. This is not an easy point to deal with. I was not present at the Trial, and I have not seen a transcript of the Trial. It seems to me however that if this preliminary point is to succeed, Mr Woodhouse must be able to point to a specific concession by the Defendant that the correct location of Point A was the 2008 Post or some part of the 2008 Post.

83. I cannot find evidence of any such specific concession being made. It is true that the Defendant's case, as pleaded in the revised Defence and Counterclaim was somewhat vague. In particular, the counterclaim for a declaration that the land belonged to the Defendant did not identify *"the land"* in question. While however the pleaded case may have been vague, I cannot see that it contained a concession that the correct location of Point A was the 2008 Post.

84. Reading Mr Spackman's skeleton argument for the Trial as a whole, it is quite clear that it was not conceding that Point A was the 2008 Post or any part of the 2008 Post. In particular, paragraph 31 of the Trial skeleton argument reads as follows:

> *"31. In the light of the above, the Court is invited to find that the line of the boundary between Numbers 53-47 runs on a line northwards at the rear of*

*the brick wall and continuing on a straight line to the intersection of the boundary between number 47 and 45 where it dog legs in by 45 cm."*

85. This is consistent with paragraph 23 of the Trial skeleton argument, which summarised the effect of the relevant part of the evidence of Pamela Engels in the terms which I have quoted above. So far as paragraph 21 of the Trial skeleton argument is concerned therefore, I do not think that it can be read as making a concession in respect of the correct location of Point A. It may be said, with due respect to Mr Spackman, that paragraph 21 was not phrased as clearly as it might have been, but I do not think that the paragraph can fairly be read, in the context of the Trial skeleton argument as a whole, as making a concession as to the correct location of Point A.

86. Turning to the Judgment, I cannot find any record in the Judgment of the Defendant having conceded that the 2008 Post or any part of the 2008 Post was the correct location of Point A. This is borne out by the fact that the Judge devoted a substantial section of the Judgment (**[J42-77]**) to dealing with the evidence of Pamela Engels, in particular in relation to the Brick Wall and in relation to the events of 2008, when the Claimant installed the 2008 Fence in place of the Ivy Fence. In particular, and as I have already noted, the Judge made a finding that the Brick Wall had been constructed within No. 5. Specifically, the Judge made the following finding, at **[J45]**:

*"I find therefore, that the pier at the northern end of the wall is built on Number 5's land but the face of that pier marks, at that point, the line of the boundary with Number 47."*

87. If the Defendant had already conceded that the 2008 Post or some part of it was the correct location of Point A, one would have expected the Judge to mention the concession, either at this point in the Judgment or at least in the discussion which led up to this finding. Such a concession would, on the face of it, appear to have been inconsistent with the Judge's finding. Indeed, that alleged inconsistency is the essential basis of the first three Grounds of the Appeal. There is however no reference to any such concession, either in this part of the Judgment or elsewhere.

88. Turning to the Exchange there are extracts from the Exchange which suggest that the Judge was under the impression that there was no argument about the correct location of Point A. In particular, the Exchange included the following exchange between the Judge and Mr Woodhouse:

*"Your Honour has my learned friend's skeleton argument, it's at paragraph 21.*
*JUDGE ROCHFORD: Hold on, let me just –*
*MR WOODHOUSE: This is why I didn't –*
*JUDGE ROCHFORD: – lay my hands on it. Yes, sorry. Paragraph?*
*MR WOODHOUSE: Paragraph 21.*
*JUDGE ROCHFORD: Yes.*
*MR WOODHOUSE: The build-up is at paragraph 20 talking about the juxtaposition[?] of the fence and the wall.*
*JUDGE ROCHFORD: Yes.*
*MR WOODHOUSE: And what was said from the skeleton argument which is why I didn't think this was an issue, was that if Ms Engles was right and I'll take you to what the pleadings say because they don't, they don't give any indication as to what the defendant's case is as to the boundary. So, if Ms Engles is right, it*

*would follow that the southernmost part of the fence, that's the one with – butting up to the wall, is also –*
*JUDGE ROCHFORD: Yes.*
*MR WOODHOUSE: – encroaching on D's land because it abuts[?] the wall, but D does not take any point on the southernmost post. It never was an issue. In those circumstances –*
*JUDGE ROCHFORD: I think it was made fairly clear at the site view that it was not –*
*MR WOODHOUSE: Yeah. Yeah."*

89. Later in the Exchange the Judge took this point up with Mr Spackman, in the following terms:

*"JUDGE ROCHFORD: Come back to your submission Mr Spackman because I did not understand that any part of this case or argument was about the, the brick wall end of the boundary and that seems to be emphasised by paragraph 21 of your skeleton –*
*MR SPACKMAN: Yeah. The further end, the further end –*
*JUDGE ROCHFORD: – the [sample list is by?] my judgment –*
*MR SPACKMAN: – [inaudible] the one paragraph 23 of my skeleton. There the point was made. Obviously as far as Mr Stokes was concerned as, as Your Honour's found, the main problem lay at the northern end as far as, as far as the fence was concerned but it was always his case that in 2008 what Mr Hothi had done was effectively move the entire fence forward and I did spend some time cross-examining Mr Hothi about that.*
*JUDGE ROCHFORD: Yes, you did and, and about the position of the –*
*MR SPACKMAN: Probably at too great a length."*

90. It will of course be noted that, in this latter exchange between the Judge and Mr Spackman, Mr Spackman made reference to paragraph 23 of his Trial skeleton argument, which I have quoted above, and to the Defendant's case that the Claimant had moved the entire fence forward into No. 5 when the Claimant replaced the Ivy Fence with the 2008 Fence. The Judge appeared to accept that the Defendant's case had been conducted in this way. What the Judge did not do, either at this point in the Exchange or elsewhere, was to put it to Mr Spackman that there had been a concession, binding upon the Defendant, that the 2008 Post marked the correct location of Point A.

91. This is further borne out by a subsequent exchange between Mr Woodhouse and the Judge, shortly before the point in the Exchange where the Judge delivered the Further Judgment. This further exchange was in the following terms:

*"JUDGE ROCHFORD: My finding that that fence replaced the ivy fence, I think it must follow then that the boundary is not at the back face of the wall, it is at that post.*
*MR WOODHOUSE: Your Honour, yes."*

92. This exchange seems to me to bear out my own analysis of the Exchange. In essence what happened, over the course of the Exchange, was that the Judge was persuaded that the correct finding, in relation to the location of Point A, was that Point A was located on the eastern face of the 2008 Post. This finding is set out in the Further Judgment. It seems clear to me that the Judge did not make this finding because the Judge thought that this was a matter which had been conceded by the Defendant. Rather, the Judge

was persuaded to this finding as a result of what was submitted by Mr Woodhouse in the Exchange,

93. Drawing together all of the above discussion, I conclude that the preliminary point taken by Mr Woodhouse fails. I cannot find any evidence that the Defendant made a concession, either at the Trial or at any point in the proceedings below, that the correct location of Point A was the 2008 Post or some part of the 2008 Post. I cannot find any evidence that the Defendant conducted the Trial or the proceedings below in a manner which does or should now preclude the Defendant from challenging the Judge's finding, in the Further Judgment, that Point A is located on the eastern face of the 2008 Post. I conclude that it is open to the Defendant to seek to challenge the Judge's finding, in the Further Judgment, that Point A is located on the eastern face of the 2008 Post.

Ground One – discussion

94. The essential argument of the Defendant is one of inconsistency, and runs as follows. The Judge ultimately found that the correct location of Point A was on the eastern face of the 2008 Post; see the Further Judgment. This was inconsistent with his finding in the Judgment that the Brick Wall, including the Northern Pier, was constructed within the boundary of No. 5; see **[J42-45]**. The only way to resolve this inconsistency was to assume that there is a kink in the Common Boundary, so that the Common Boundary runs along the western face of the Northern Pier, but then turns through a right angle to the east, until it reaches the eastern face of the 2008 Post, where it turns through another right angle to turn north. This however cannot stand with the evidence of the Conveyances that the Common Boundary has always, subject only to the 53 Exception (which is immaterial in this context), been a straight line.

95. I do not think that it is right to say that there is an inconsistency between the two findings referred to in my previous paragraph. In theory there is no reason why the Common Boundary should not, at Point A, incorporate a relatively small kink in the line of the Common Boundary. The Judge made a clear finding that the western face of the Northern Pier marked, at that point, the line of the Boundary. The Judge also however made a clear finding in the Judgment that, when the Claimant replaced the Ivy Fence with the 2008 Post, the Claimant installed the 2008 Fence in the same position as the Ivy Fence, subject only a possible change caused by the use of a larger fence post; see **[J77]**. It followed from this that the correct location of Point A had to be the eastern face of the 2008 Post. The 2008 Post was the only remaining post from the 2008 Fence. As such, and on the Judge's findings, it lay at the southern end of the True Boundary, and marked the correct location of Point A. It is perfectly possible to reconcile these various findings on the basis that there is a kink, or return angle, as between the western face of the Northern Pier and the eastern face of the 2008 Post.

96. The alleged inconsistency only arises if one assumes that the Defendant is correct in the argument that the Conveyances clearly demonstrate that the Common Boundary, where it passes between No. 5, on the one side, and 51, 49, and No. 47 on the other side, has been and remains a straight line. I will refer to this argument as **"the Straight Line Argument"**.

97. In support of the Straight Line Argument Mr Spackman referred me to *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894. This was a rare example of a boundary

dispute reaching the House of Lords. The case reached the House of Lords because it concerned the presumptions which may be applied where a boundary is marked by a hedge and ditch. Mr Spackman relied upon this case as authority for the proposition that the first port of call in any boundary dispute is the deeds which created the parcels of land. In the present case the relevant deeds comprise the Conveyances, or at least the First 1934 Conveyance and the Second 1934 Conveyance as the conveyances of the land which became No. 47, 49, 51, and 53. The Conveyances, Mr Spackman submitted, all show the Common Boundary as a straight line, save for the immaterial 53 Exception in relation to the 1954 Conveyance.

98. Mr Spackman derived the proposition that the first port of call in any boundary dispute is the deeds from the speech of Lord Hoffmann in *Wibberley*. At 895H Lord Hoffmann said that the first resort in the event of a boundary dispute is to look at the deeds. It is however important to record all that Lord Hoffmann said in the relevant extract from his speech, at 895H-896B.

> *"The first resort in the event of a boundary dispute is to look at the deeds. Under the old system of unregistered conveyancing, this means the chain of conveyances and other instruments, going back beyond the period of limitation, which demonstrates that the owner's title is in practical terms secure against adverse claims. These conveyances will each identify the subject matter in a clause known as the parcels which contains the description of the land. Sometimes it is no more than a reference to the land conveyed by an earlier conveyance, which will then have to be consulted. Older conveyances of farm property often describe the property as being the house and land in the occupation of the vendor or his tenant. The parcels may refer to a plan attached to the conveyance, but this is usually said to be for the purposes of identification only. It cannot therefore be relied upon as delineating the precise boundaries and in any case the scale is often so small and the lines marking the boundaries so thick as to be useless for any purpose except general identification. It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which existed, or may be supposed to have existed, when the conveyances were executed."*

99. As Lord Hoffmann explained, there are difficulties with establishing exact boundaries from plans attached to conveyances. As I read this passage from Lord Hoffmann's speech, he was not saying that these problems only arose when the relevant plan was expressed to be for the purposes of identification only. He was identifying the problems which may arise with a conveyancing plan which is not subject to this proviso, but has a smallness of scale and a thickness of lines which render it impossible to identify exact boundaries.

100. In the present case it seems to me that there are two associated problems with the Straight Line Argument.

101. The first problem is that the Judge, on the basis of all the evidence which he read and heard, made three clear findings of fact. The first finding was that the Ivy Fence marked the line of the True Boundary, while the Ivy Fence was in existence; see **[J76]**. The second finding was that the Ivy Fence was constructed within No. 47; see **[J76]**. This means that the line of the True Boundary would have been situated on the outer,

eastern face of the Ivy Fence. The third finding was that the Claimant installed the 2008 Fence along the same line as the Ivy Fence, subject only to the possibility of a few inches discrepancy caused by the use of a thicker fence post; see **[J77]**.

102. In making these findings of fact the Judge would have had in mind the evidence of the Conveyances. The Judge made specific mention of the Conveyances, and of the plans attached to the Conveyances in the opening passages of the Judgment. While the Judge made a specific finding that the True Boundary constituted a straight line (**[J75]**), the Judge did not, as I read the Judgment, attach any significance to what the plans showed, in terms of the configuration of the Common Boundary. In particular, when the Judge came to deliver the Further Judgment, the Judge does not appear to have regarded the conveyancing plans as undermining his decision that the correct location of Point A was the eastern face of the 2008 Post. To the contrary, it is quite clear from the terms of the Further Judgment that the Judge placed paramount importance upon his finding that the 2008 Post was installed in the same location as the southern most post of the Ivy Fence.

103. It seems to me that I am in no position to interfere with the relevant findings of fact made by the Judge. In particular, it seems to me that the Judge was quite entitled to attach paramount importance, as he did, to his findings that the Ivy Fence lay on the line of the True Boundary, and that the 2008 Fence was installed in the same location. Given this state of affairs, and given the Judge's findings of fact, it seems to me that I am not in a position to say that the plans attached to the Conveyances should have been found by the Judge to trump the evidence of what had, historically, marked the Boundary. Mr Spackman did not suggest that there is any rule of law that the evidence of a conveyancing plan must always trump any other category of evidence in a boundary dispute. Mr. Spackman was plainly correct not to suggest this, as any such rule of law would be unworkable. The weight to be attached to the evidence of a conveyancing plan in any boundary dispute must necessarily depend upon the quality of that evidence, and the quality of such other evidence as may be available in that particular case. In the present case it seems to me that it was a matter for the Judge to decide what was the most important category of evidence. The Judge decided that his findings in relation to the Ivy Fence and the 2008 Fence constituted the best evidence as to the correct location of the True Boundary. In my view the Judge was quite entitled to assess the evidence in this way.

104. The second problem is that what I have just said, in my identification of the first problem, assumes that the evidence of the plans attached to the Conveyances was capable of trumping the evidence which the Judge regarded as paramount. This seems to me to be an unsafe assumption. In my view the evidence of these plans fell some way short of establishing that the Common Boundary was incapable of deviating from a straight line, at the junction of No. 5, No. 47, and 49. I will use the expression **"the Junction Point"** to refer, in general terms only, to this junction of No. 5, No. 47, and 49.

105. Running through the individual Conveyances, the position seems to me to be as follows.

106. The plans attached to the First 1934 Conveyance and the Second 1934 Conveyance do not show the position of the Common Boundary at all. It follows that they cannot

support the Straight Line Argument. The two conveyances in 1934 which are, respectively, indorsed upon the First 1934 Conveyance and the Second 1934 Conveyance are not available for scrutiny. It follows that they, also, cannot assist the Straight Line Argument.

107. Turning to the First 1935 Conveyance, it is important to note that this was a conveyance (as I read the plan to the First 1935 Conveyance) of the Strip, with what is now Glebe Road also identified by coloured shading. I accept that the plan shows what was then the Common Boundary as an apparently straight line, but the purpose of this plan was to identify the Strip and what is now Glebe Road. I would be wary of attaching too much significance to this plan, in terms of its identification of what was then the Common Boundary. The purpose of this plan was not to identify the relationship between what was to be become No. 5, on the one side, and what had then become No. 47, 49, 51, and 53, on the other side.

108. I am therefore doubtful that what is shown as an apparently straight line on the plan attached to the First 1935 Conveyance can be regarded as reliable evidence that the relevant boundary line was incapable of containing a relatively small kink. Still less does it seem to me that a plan dating from a 1935 conveyance can be regarded as reliable evidence, in 2021, that a kink could not have developed in the relevant boundary line, as a result of subsequent events on the ground.

109. The Second 1935 Conveyance was, so I am assuming, a conveyance of No. 5. As such, the plan attached thereto is directly relevant in its identification of the location of the western boundary of No. 5. In this case however the premises now known as No. 5 are identified in the following terms in clause 1 of the Second 1935 Conveyance:

> *"ALL THAT piece or parcel of land situate at Old Windsor in the County of Berks together with the messuage or dwellinghouse erected thereon or on some part thereof and known or intended to be known as The West Church Road Old Windsor aforesaid Which said premises are for the purpose of identification only more particularly delineated in the plan annexed hereto and thereon coloured pink"*

110. The plan attached to the Second 1935 Conveyance was therefore expressed to be for the purposes of identification only. As such, it seems to me that little or no weight can be given to this plan, in terms of identifying precise boundary lines. I say this independent of the points which I have already made in relation to the plans attached to the First and Second 1934 Conveyances and the First 1935 Conveyance. I am doubtful that what is shown as an apparently straight line on the plan attached to the Second 1935 Conveyance can be regarded as reliable evidence that the relevant boundary line was incapable of containing a relatively small kink. Still less does it seem to me that a plan dating from a 1935 conveyance can be regarded as reliable evidence, in 2021, that a kink could not have developed in the relevant boundary line, as a result of subsequent events on the ground.

111. This leaves the 1954 Conveyance. This was however a conveyance of the triangle of land at the southern end of the Common Boundary. As such, I would be wary of placing much weight on this plan, in terms of its identification of the Common Boundary. I do not consider that the position is affected by the fact that I have been told that this plan is a scale plan. Nor do I consider that the position is affected by the

fact that there is a T mark on this plan, which is said to mean that responsibility for maintenance (I assume meaning maintenance of the Common Boundary) rested on the owner of No. 5. The point which I have made seems to me to remain the same, whether or not the plan is a scale plan, and regardless of the significance of the T mark. Independent of this point, clause 1 of the 1954 Conveyance described the triangle of land in the following terms:

> *"ALL THAT piece or parcel of land situate at the bottom of and forming part of the garden of Number 53 Straight Road Old Windsor in the County of Berks Which said piece or parcel of land is for the purpose of identification only more particularly delineated in the plan annexed hereto and thereon coloured Pink"*

112. Again therefore, it seems to me that little or no weight can be given to this plan, in terms of identifying precise boundary lines. Given the nature of this boundary dispute, which turns on very precise locations, I do not think that it is appropriate to attach significant weight to the evidence of this plan either because it is a scale plan, or because it bears the T mark mentioned above. Once again, I say this independent of the points which I have already made in relation to the plans attached to the earlier Conveyances. I am doubtful that what is shown as a straight line on the plan attached to the 1954 Conveyance can be regarded as reliable evidence that the relevant boundary line was incapable of containing a relatively small kink. Still less does it seem to me that a plan dating from a 1954 conveyance can be regarded as reliable evidence, in 2021, that a kink could not have developed in the relevant boundary line, as a result of subsequent events on the ground.

113. In this context I also repeat the point that if one gets the ruler out, and lays it along the line of the Common Boundary, as shown on the plans attached to the relevant Conveyances (the last three of the five Conveyances), and if one disregards the angle which now exists by reason of the 53 Exception, two of the three relevant Conveyances do not even show the Common Boundary as a precisely straight line. It may be objected that it is not fair to subject the lines shown on these plans to the application of a ruler, because the thickness of the lines and the possibility of human error in drawing what was supposed to be a straight line may explain why the relevant lines are not completely straight. There is also the subsequent point made on behalf of the Defendant; namely that I have carried out my exercise by reference to copies of the original plans and that, if one carries out the same exercise on the original plans attached to the First and Second 1935 Conveyances, the result is a completely straight line; see the relevant photographs of the Defendant's Exercise. All this however seems to me only to bring out the unreliability of assuming that the Common Boundary could not have contained a kink and cannot now contain a kink at the Junction Point. Putting the matter another way, all this seems to me only to bring out the unreliability of trying to use the plans attached to the Conveyances for the purposes of establishing the exact position of the True Boundary.

114. In summary therefore, the second problem with the Straight Line Argument is that the Conveyances do not seem to me to offer evidence which was capable of trumping the evidence which the Judge regarded as paramount. As I have said, it is my view that the evidence of the relevant plans fell some way short of establishing that the Common Boundary was incapable of deviating from a straight line, at the Junction Point.

115. It seems to me that there is also a further, and more fundamental problem with Ground One. As I have already noted, the order which I am invited to make, if permission is granted for the Appeal and if the Appeal is allowed, is an order setting aside the Order and remitting the case to the Reading County Court, for re-trial before a different judge to the Judge. I am not asked to attempt my own determination of the line of the True Boundary.

116. This however highlights a particular problem with the way in which the Appeal is constructed. Ground One asserts that the Judge went wrong in his identification of the correct location of Point A. There is however no specific challenge to the decision of the Judge as to the correct location of Point B. There were no grounds which were identified, on the basis of which it could be said that the Judge went wrong in his determination of Point B. As I understood the Defendant's position, his objective was to achieve a re-trial of the case at which, I assume, the Defendant would seek to re-open all the issues in the case, including the correct location of Point B.

117. If the Order was to be set aside, and a re-trial directed, it is not clear to me why the Defendant should be allowed to re-open issues on which no grounds have been identified for challenging the Judge's findings. Unless the Defendant has good grounds for challenging the Judge's decision on the correct location of Point B, and in my view none have been identified, it seems to me that the Defendant should remain bound, at the least, by the Judge's decision on the location of Point B.

118. If however the Defendant is bound by the Judge's decision on the location of Point B, the following rather strange result ensues, if one assumes that the Judge should have stood by the Draft Declaration, and determined the correct location of Point A to be the western face of the Northern Pier, pursuant to the Straight Line Argument. On that hypothesis the True Boundary, which the Judge found to be a straight line (**[J75]**), would run from the western face of the Northern Pier to the point identified by the Judge as Point B; namely a point 45cm east of the eastern face of the 45 Corner Post. I was not referred to any measurements carried out in the present case which would confirm this, but I assume that the True Boundary, if it followed this line, would not constitute a straight line with the Common Boundary running from 49 and 51, but would veer from the straight, forming an oblique angle at the Junction Point. This is the result one would expect, if Point A alone was moved back from the eastern face of the 2008 Post to the western face of the Northern Pier, with Point B remaining where it was fixed by the Judge. Effectively the line of the True Boundary would swing back westwards, with Point B acting as the hinge. If my assumption is correct, this would be a result inconsistent with the Straight Line Argument.

119. If one changes the hypothesis, and assumes the Defendant should not be bound by the Judge's decision on the correct location of Point B in the event of a re-trial, this does not seem to me to improve the position, in terms of the merits of Ground One. One would still be left with the evidence which caused the Judge to find that the correct location of Point B was the point 45 cm east of the eastern face of the 45 Corner Post. As the Judge found, at **[J71]**, the New 45 Fence was the most compelling evidence of where the post at the northern end of the Ivy Fence had been located. It seems to me that the Judge was correct in this finding. The relocation of the eastern boundary of 45, following the sale of the Strip, and the replacement of the Old 45 Fence by the New 45 Fence, in a location further into what had previously been part of 45, provided good

evidence of where the northern end of the Ivy Fence had been located; namely adjacent to the southern end of the Old 45 Fence. This no doubt explains why the Defendant is unable to mount any specific challenge to the Judge's decision on the correct location of Point B. I assume, on the hypothesis which I am considering in this paragraph and on the basis of the Straight Line Argument, that the Defendant would have to argue, in any re-trial, that Point B was to be located by projecting a straight line across and from the western face of the Northern Pier. As I understand the position, this is not an exercise which has been carried out. I do not know where the point would be at which such a straight line would come level with the southern boundary of 45. Wherever such a point came out, it is difficult to see how the Straight Line Argument could prevail over the evidence which supported the Judge's decision on the correct location of Point B.

120. In summary, it seems to me that the additional, and fundamental problem with Ground One is that if it did succeed, and if the case was remitted for a re-trial, it is very hard, if not impossible to see how the Defendant would be able to overturn the Judge's decision on the correct location of Point B. Given this position, it is very hard to see how a re-trial would not itself produce a result inconsistent with the Straight Line Argument, even if the Defendant was able to persuade the judge, at such re-trial, that the correct location of Point A is the western face of the Northern Pier.

121. Drawing together all of the above discussion of Ground One, I arrive at the following conclusions:
   (1) It seems to me that the Defendant is right to contend that the Judge's decision on the correct location of Point A results in a kink in the Common Boundary, at the Junction Point.
   (2) It seems to me that the Defendant is wrong to contend that the Judge's decision on the correct location of Point A was inconsistent with his findings in relation to the Brick Wall, or indeed with any other of the Judge's findings.
   (3) It seems to me that a re-trial of the case would not produce a different result to that arrived at by the Judge even if, which strikes me as wrong in itself, the Defendant was permitted at such re-trial, to re-open the question of the correct location of Point B.

122. I therefore conclude that the Order cannot set be aside, either in part or in whole, on the basis of the arguments advanced in support of Ground One.

Ground Two - discussion

123. Ground Two is that the Judge wrongly altered the effect of the Judgment, after the Judgment had been delivered. It is said that the Judge's findings in the Judgment ought to have resulted in a declaration that Point A is located on the western face of the Northern Pier, consistent with the terms of the Draft Declaration.

124. I can take Ground Two more shortly, because it seems to me that the arguments underlying it have already effectively been dealt with in my discussion of Ground One.

125. Mr Spackman accepted that the Judge was entitled to change the terms of the Draft Declaration, as they appeared in the Draft Order, to the terms of the Declaration, as they appeared in the Order. That concession was plainly correct. The Draft Order was not an order made by the Judge and, while the Draft Order may have been expressed, in

the covering email from the Judge, to identify the Judge's conclusions, the Judge was not bound by the terms of the Draft Order. I also understood Mr Spackman to accept that it was open to the Judge, prior to the making of the Order, to change the terms of the Judgment. Again, it clearly was open to the Judge to change the terms of the Judgment, prior to the making and sealing of the Order. Mr Spackman's point, as I understood it, was that whilst this course may have been open to the Judge, it was not a legitimate course for the Judge to have taken.

126. The difficulty with Ground Two is that it proceeds on the basis that the Judge reversed findings which he had made in the Judgment. More specifically, Ground Two proceeds on the basis that the Judge's ultimate decision on the correct location of Point A was inconsistent with his finding that the Brick Wall, including the Northern Pier, lay within No. 5.

127. I do not think that these findings were inconsistent, or that the Judge, in the Further Judgment, reversed findings which he had made in the Judgment. As I have explained, in my discussion of Ground One, the consequence of the relevant findings made by the Judge in the Judgment is that a small kink exists in the line of the Common Boundary, at the Junction Point. The existence of this kink does not render the findings inconsistent, unless it is the case that the Common Boundary, subject to the 53 Exception, must be taken to be a dead straight line, with no kinks. For the reasons which I have set out in my discussion of Ground One, I do not think that the Common Boundary can or should be taken to follow any such dead straight line.

128. In this context I do note that Mr Spackman raised the argument of inconsistent findings with the Judge, in the course of the Exchange, and Mr Woodhouse responded. In order properly to convey what happened, it is necessary to set out the following fairly lengthy extract from the Exchange, which followed the Judge's comment that it followed, from his finding that the 2008 Fence replaced the Ivy Fence, that Point A was not on the western face of the Brick Wall, but was located at the 2008 Post:

> *"JUDGE ROCHFORD: And therefore, the terms of the declaration need to reflect, need to be – the terms at B need to be adjusted to reflect that.*
> *MR SPACKMAN: Well, well the, the difficulty with that in my submission is that that doesn't reflect Your Honour's finding that the, that, that the boundary – that the Engles built the wall entirely –*
> *JUDGE ROCHFORD: Built the wall –*
> *MR SPACKMAN: – on their own land.*
> *JUDGE ROCHFORD: So, you would say my judgment – there is inconsistency in my judgment in finding that the –*
> *MR SPACKMAN: Yeah.*
> *JUDGE ROCHFORD: – something of an inconsistency in finding that the wall was placed up to the – by the Engles up the boundary –*
> *MR SPACKMAN: Yes, because the – because otherwise the wall will at that point be built on land within the ownership of either 47 or 49.*
> *MR WOODHOUSE: Well, Your Honour, I'd, I'd say there is no inconsistency because wherever the wall was originally built that the structure that this replaced had been in existence for well in excess of the period prescribed by Section 15, titles extinguished by Section 17 and that gives us all of these problems. As I said in my main submissions –*
> *JUDGE ROCHFORD: Yes, Section 17 of the Limitation Act –*

*MR WOODHOUSE: – whatever had happened –*
*JUDGE ROCHFORD: – and Section 15 of the Administration Act.*
*[Crosstalk]*
*MR WOODHOUSE: Yes, they're both, they're both, they're both the Limitation Act, the 12 years.*
*MR SPACKMAN: Correct.*
*JUDGE ROCHFORD: Yes.*
*MR WOODHOUSE: Because this – we're talking about events going back until the 50s. This wasn't – this, the – isn't affected by the Land Registration Act 2002 which didn't come into force until the end of 2003. So, until that period of time, it was all governed by the Limitation Act 1980 and then previous to that the, the prior Limitation Act, which was exactly the same, '98[?] I think.*
*MR SPACKMAN: Well, as I've already – as I've pointed out in my skeleton, that there has never been any claim of time for this possession –*
*JUDGE ROCHFORD: Yes.*
*MR SPACKMAN: – advanced in this case. So, the only issue is where the boundary lies.*
*JUDGE ROCHFORD: I think that is right Mr Woodhouse is it not?*
*MR SPACKMAN: And the idea that, the idea that somebody doesn't have to plead adverse possession is a slightly startling proposition.*
*MR WOODHOUSE: Well, Your Honour I say that it's not right because it's just simply where was the, the ivy fence and that is the question. Mr Stokes' primary case was he put it back in exactly the same position as, as it was previously. Then he says, 'oh I had a right to remove it at this end' and he seeks to rely upon historic boundary. All I have to do is, is rely upon the boundary that existed when it was damaged and it, it is for Mr Stokes to prove his case, that he has title to that land and that's what he's not been able to do. It's not a question for me to plead that I've acquired something by adverse possession. He has to say he's entitled to remove something that had been there for what on the evidence is, is over 60 years. It's for him to prove it. Not, not for me –*
*JUDGE ROCHFORD: Okay.*
*MR WOODHOUSE: – to claim adverse possession."*

129. It was immediately following this exchange that the Judge delivered what I have referred to as the Further Judgment, which is set out earlier in this judgment. As can be seen, the Judge did note the submission of Mr. Spackman that there was an inconsistency in his findings. As can also be seen, Mr Woodhouse submitted that there was no inconsistency because any part of the Brick Wall which would be located within No. 47, on the assumption of a straight line boundary at the Junction Point and on the assumption that Point A was located on the eastern face of the 2008 Post, would have been acquired by adverse possession, notwithstanding that such part of the Brick Wall would originally have been located within No. 5.

130. As I read the Exchange however, the Judge made no decision on the argument based on adverse possession. In the Further Judgment, the Judge simply followed the logic of his finding, in the Judgment, that the 2008 Fence was installed along the same line as the Ivy Fence, and thereby continued to mark the line of the True Boundary.

131. In the absence of any decision on the adverse possession argument, it seems to me that the Judge must be taken to have left matters on the basis that there was a kink in the

Common Boundary at the Junction Point. For the reasons which I have set out in my discussion of Ground One, it seems to me that the Judge was quite entitled to reach a decision on the location of the True Boundary which left a kink in the Common Boundary.

132. It seems to me that the Judge did not, in the Further Judgment, change or reverse any of his findings in the Judgment. I therefore conclude that the Order cannot set be aside, either in part or in whole, on the basis of the arguments advanced in support of Ground Two.

Ground Three - discussion

133. Ground Three is that the Judge was wrong, in the Exchange, to find (to the extent that the Judge did make this finding) that the Claimant or any predecessor in title had acquired title to any part of No. 5 by adverse possession; there having been no pleaded claim to title by adverse possession.

134. It seems to me that Ground Three does not in fact arise. As I have already noted, in my discussion of Ground Two, the Judge did not, in my view, make any finding that the Claimant or any predecessor in title had acquired title to any part of No. 5 by adverse possession.

135. It is correct that adverse possession was raised in the course of the Exchange. I have set out in the previous section of this judgment the relevant part of the Exchange, where Mr Woodhouse submitted that any inconsistency could be dealt with on the basis of adverse possession. The Judge did not however make any finding that any part of No. 5 had been acquired by adverse possession. The Further Judgment does not contain any such finding.

136. If one looks at the closing part of the Exchange, where Mr Spackman sought permission to appeal, Mr. Spackman did assert *"that the claim which has been now advanced upon a basis of adverse possession was neither pleaded nor [inaudible] in my learned friend's skeleton argument"*. The Judge then refused permission, but did not give reasons, saying that he would prepare the required form N460. The reasons for refusing permission to appeal which were stated by the Judge in the N460 form were as follows:

> *"Permission was sought to appeal in part on the basis of a case management decision at the allow or refuse appeal outset of the trial whereby I refused to permit evidence of Pamela Engels that went beyond that contained in a letter addressed "To Whom it May Concern". This was a case management decision and there are no reasonable prospects of it being overturned. It is not clear that a different case management decision would have affected the outcome of the trial.*
>
> *Further permission is sought on the basis that the decision was wrong. Reliance was placed on a draft proposed order that I circulated before giving (orally) my reserved judgment. In the event, this draft was amended slightly as it did not fully reflect the terms of my judgment. This may be a criticism of the draft order, but cannot amount to a criticism of the judgment.*
>
> *No reasonable prospects of success."*

137. There was no reference to adverse possession in these reasons. Instead the Judge was plainly of the view that he had, in the Further Judgment and in the Declaration, made no change to his findings in the Judgment. Rather, the Judge was of the view that the Draft Declaration did not fully reflect the terms of the Judgment. In this analysis it seems to me that the Judge was plainly correct, for the reasons which I have set out in my discussion of Grounds One and Two. The relevant point for present purposes however is that it seems to me clear that the Judge, in giving his reasons for refusing permission to appeal, did not regard himself as having made any finding that any part of No. 5 had been acquired by adverse possession.

138. In these circumstances it seems to me that it would be wrong to treat the Judge as having made any finding that any part of No. 5 had been acquired by adverse possession. The correct course, in my view and as is apparent from my discussion of Grounds One and Two, is to take the findings which were made by the Judge, and look at their consequences. It follows from the findings which were made by the Judge that the Common Boundary does indeed have a kink in its course, at the Junction Point, in order to accommodate the change in the line of the Common Boundary between the western face of the Northern Pier, and the eastern face of the 2008 Post.

139. I therefore conclude that Ground Three does not arise. The Judge did not make any finding that any part of No. 5 had been acquired by adverse possession.

140. This renders it unnecessary to consider whether, in the absence of a pleaded case of adverse possession, it was open to the Claimant to rely upon adverse possession. I have already noted that Mr Woodhouse sought to rely upon adverse possession in support of his submissions to the Judge in the course of the Exchange. Mr Spackman's skeleton argument also asserts that Mr Woodhouse sought to rely upon adverse possession during the Trial. I do not think that it is sensible to consider whether it was open to Mr Woodhouse to rely on adverse possession in this way. The question does not arise because the Judge did not make any findings that title had been acquired by adverse possession. If the Judge had made any such findings, it would have been possible to consider whether they were permissible findings, in the absence of a pleaded case of adverse possession. In the absence of such findings, it seems to me that this question cannot sensibly be answered.

141. Given my conclusion that Ground Three does not arise, I do not think that the Order can set be aside, either in part or in whole, on the basis of the arguments advanced in support of Ground Three.

Ground Four – discussion

142. Ground Four is that the Judge was wrong to refuse to admit the entirety of the evidence of Pamela Engels in her witness statement, either on the basis that the evidence in the witness statement did not go beyond the evidence contained in the October Letter, or on the basis that the Judge was wrong to refuse to admit the evidence of Pamela Engels in her witness statement, if and in so far as that evidence did go beyond what was contained in the October Letter.

143. It is clear that the witness statement of Pamela Engels did go beyond the October Letter. The Judge made a specific finding to this effect at **[J50]**. I have already set out **[J50]** earlier in this judgment, but I repeat what the Judge said, for ease of reference:

> *"50. What was then served was a statement from Pamela Engels, going quite significantly beyond the contents of the 30 October 2019 letter. For example, it exhibited a number of historic photographs, not previously referred to or disclosed. In the event, I allowed the defendant to call Pamela Engels to confirm the matters that were in the 30 October 2019 statement but not to go beyond that."*

144. In the course of his submissions in support of Ground Four I asked Mr Spackman to identify what material evidence he had been unable to put before the Judge, as a result of the Judge's ruling (as recorded in paragraph 1 of the Order). In answer to this question Mr Spackman identified four photographs from the 1950s, which were referenced in paragraph 4 of the witness statement of Pamela Engels, and were included in the exhibit ("PE1") to this witness statement. These photographs were not referenced in, or annexed to the October Letter. I assume that they were the photographs or some of the photographs to which the Judge made reference at **[J50]**. For present purposes, the relevant point is that, without conducting a line by line comparison between the October Letter and the witness statement of Pamela Engels, it is clear that the witness statement did seek to introduce evidence which went beyond the evidence in the October Letter. I can see no basis for saying that these photographs fell within the limitation on the grant of permission contained in paragraph 1 of the Order. Equally, I can see no basis for saying that these photographs did not go *"beyond"* the evidence contained in the October Letter, within the meaning of the limitation in paragraph 2 of the PTR Order.

145. This leaves the question of whether the Judge was wrong to refuse to admit the entirety of the evidence in the witness statement. In my view the Judge was right to refuse to admit the entirety of this evidence, so far as it went beyond the October Letter, for three separate reasons.

146. First, it seems to me important to keep in mind that the order which restricted the Defendant to the evidence in the October Letter was not the order made by the Judge at the Trial, which is set out in paragraph 1 of the Order. The order which imposed this restriction was that made in paragraph 2 of the PTR Order, which was also made by the Judge. Paragraph 2 of the PTR Order granted permission for a witness statement from either of Pamela Engels or June Jensen, provided that such evidence did not go beyond that contained in the October Letter. So far as I am aware, there was no appeal against paragraph 2 of the PTR order. While I can see that, in theory, it was open to the Judge, at the Trial, to expand the permission which had been granted by paragraph 2 of the PTR order, it seems to me that it would have needed a very good reason for the Judge effectively to change the case management decision which he had already made at the PTR. So far as I can see, there was no good reason for such a change.

147. Second, the limited permission which the Judge did grant at the Trial for the Defendant to rely upon the witness statement of Pamela Engels was a case management decision, made by the Judge in the exercise of his discretion. It is well-established that an appeal court should be slow to interfere with case management decisions, independent of the point that I should only interfere with the exercise by the Judge of his discretion if I conclude that the Judge went wrong, in the exercise of his discretion, in a way which would permit me to interfere with his decision. This would involve demonstrating that the Judge made some error of principle, or took into account something which should

have been left out of account, or left out of account something which should have been taken into account, or reached a decision which no reasonable judge could have reached.

148. I cannot see any grounds which would justify my interfering with the case management decision of the Judge to grant a limited permission to rely on the witness statement of Pamela Engels. As I understand the position the permission granted by paragraph 2 of the PTR Order was granted on the application of the Defendant. As I have already noted in this Judgment, I was told that the application was treated as an application for relief from sanctions. As I have also said, it seems to me that it was correct to treat the application as an application for relief from sanction. The price paid by the Defendant, as the price of permission to serve a witness statement of Pamela Engels or June Jensen, was the restriction of that witness statement to the evidence in the October Letter. I cannot see any grounds for saying that the Judge, in requiring the Defendant to pay that price as a condition of obtaining relief from the relevant sanction, made a flawed or unreasonable decision.

149. Moving on to the Trial itself the Judge was confronted with a situation where the Defendant had failed to comply with the condition imposed by paragraph 2 of the PTR Order; namely that the witness statement should not go beyond the evidence in the October Letter. It seems to me that the Judge would have been well within his rights to have ruled that the Defendant could not rely upon the witness statement at all, given the failure of compliance with the condition in paragraph 2 of the PTR Order, which itself followed the failure of the Defendant to serve a witness statement in compliance with the order made at the case management conference on 6th January 2020. The Judge however took a more generous view, and allowed the Defendant to rely upon the witness statement, subject to the same limitation as had been imposed by paragraph 2 of the PTR Order. Once again, I cannot see any grounds for saying that the Judge, in granting this limited permission, made a flawed or unreasonable decision.

150. Third, I cannot see what material disadvantage the Defendant suffered at the Trial, as a result of the limitation on the grant of permission to rely upon the witness statement of Pamela Engels. As I have already explained, Mr Spackman identified the photographs from the 1950s as material evidence which he was unable to put before the Judge. His argument was that those photographs supported the Straight Line Argument. I looked at the photographs myself, on the basis that although they were excluded from the evidence at the Trial, I did need to look at them as part of my consideration of Ground Four. I am bound to say that I cannot see how the introduction of these photographs into the evidence at the Trial would have had any effect on the outcome of the Trial. I can see that the photographs might have been of some assistance, in investigating the history of the Properties. I cannot see however how the photographs lent any particular support, let alone material support to the Straight Line Argument, or any other part of the Defendant's case at the Trial.

151. For the three reasons which I have identified above, taking those reasons both individually and collectively, I conclude that there are no grounds for challenging the Judge's decision to limit the evidence of Pamela Engels to the evidence contained in the October Letter.

152. I therefore conclude that there are no grounds for setting aside paragraph 1 of the Order, or any other part of the Order on the basis of the arguments advanced in support of Ground Four.

The Cross Appeal – discussion

153. The claim for exemplary damages was based on the conduct of the Defendant when the dispute arose in November and December 2017. The relevant conduct was pleaded in paragraphs 5-10 of the Particulars of Claim, in the following terms:

> *"5. In about September 2017 the Defendant approached the Claimant to seek his agreement to the westward relocation of the right northernmost fence post of the Claimant's Boundary Fence situated at the junction between No 47 and the access passageway to No 5 in order to increase access to No. 5.*
>
> *6. Following the Claimant not agreeing to such relocation, on about 29th November 2017 the right northernmost fence post and associated gravel boards and wooden fence panels of the Claimant's Boundary Fence were damaged in a manner consistent with impacts from a heavy instrument by, to the best of the Claimant's belief, the Defendant*
>
> *7. On 2nd December 2017 the Claimant secured the Claimant's Boundary Fence with wire mesh fencing but on 8th December the Defendant removed the wire mesh fencing and proceeded to remove the Claimant's Boundary Fence save for the southernmost fence post and relocate the fence on a westward line with the right northernmost fence post relocated about twelve inches onto No 47 ("the New Westward Line").*
>
> *8. Upon discovering that the Claimant's Boundary Fence had been removed and relocated, and after calling at the Defendant's residence to no avail, the Claimant removed the relocated fence. On 9th December 2017 when the Claimant attempted to re-demark the Boundary with wire mesh fencing along the line upon which the Claimant's Boundary Fence had been situated, he was confronted by the Defendant who announced an intention to establish a fence along the New Westward Line.*
>
> *9. After the Claimant completed de-marking the Boundary with wire mesh fencing along the line upon which the Claimant's Boundary Fence had been situated, the Defendant cut through such fencing and erected a fence along the New Westward Line.*
>
> *10. Between 28th March and 31st March 2018 the Defendant concreted over the area where the Claimant's Boundary fence had been situated and has since graveled over the same thereby rendering it impossible for the Claimant to reinstate the Claimant's Boundary Fence without significant work and cost."*

154. The claim for exemplary damages was then pleaded in the following terms, in paragraph 11 of the Particulars of Claim:

> *"11. In the premises the Defendant has engaged in high handed and oppressive conduct calculated to make a profit exceeding the compensation payable to the Claimant."*

155. I have set out the principal events, as found by the Judge, earlier in this judgment. Following his purchase of No. 5 the Defendant approached the Claimant, seeking his agreement to the widening of the access into No. 5. Agreement was not reached, and the 2008 Fence remained in place. This in turn led to the dispute between the Claimant

and the Defendant about the access, which the Judge found had arisen by November and December 2017.

156. The Judge found that, on 29th November 2017, the Defendant deliberately caused damage to the 2008 Fence, including damage to the two end posts. Following this the Defendant replaced the 2008 Fence on 8th December 2017. This replacement fence was then removed by the Claimant, who put up fencing of his own where the 2008 Fence had been. This fencing was however then removed again by the Defendant and replaced with a new fence. This all occurred in 2017. It is the fence which was finally installed by the Defendant, and which remains in place as matters stand, which I am referring to as the 2017 Fence.

157. The Judge dealt with the events of late 2017 in the last part of the Judgment, at **[J88-112]**. In the course of this part of the Judgment the Judge made a number of findings against the Defendant. In particular, at **[J97]**, the Judge rejected the evidence of the Defendant that the 2008 Fence must have been damaged by a delivery driver, and made the following findings concerning the damage caused to the 2008 Fence on 29th November 2017:

> *"97. I find it extremely unlikely that Mr Stokes, experiencing a narrow drive, would not have wanted to discuss matters with Mr Hothi to see if some sort of accommodation could be reached. I find that that is exactly what happened. He did not achieve agreement. I find that he then deliberately damaged the fence put in by Mr Hothi in 2008. I conclude that he was hoping, by some means or other, to persuade Mr Hothi to revisit his position."*

158. The Judge then proceeded to make further findings that the Defendant had concealed the *"historic conveyances"*, which I take to be a reference to the Conveyances or to documents including the Conveyances, until a very late stage in the proceedings. The relevant findings are at **[J98-103]**, and are in the following terms:

> *"98. In concluding that Mr Stokes' evidence on how the fence came to be damaged is untruthful, I am supported by his evidence about the historic conveyances that he had in his possession. Those were disclosed by him at a very late stage in proceedings. He said in his evidence that he had forgotten about them and that is why he did not disclose them earlier.*
>
> *99. He said that they were provided to him shortly after he bought the property. They were provided to him by the vendor's estate agents. That was in August or September 2017. He says that he gave the conveyances to his elderly mother for safekeeping and then forgot about them and was reminded of them only shortly before the trial. They came to light because his mother was clearing her spare room in preparation for her sister coming to stay.*
>
> *100. Mr Stokes said he had discussed with his mother on a fairly regular basis the dispute he was having about the drive but neither of them, apparently, remembered the deeds. Mr Stokes points out, and no doubt he is correct, that his mother is an elderly lady.*
>
> *101. I find it impossible to accept that Mr Stokes had forgotten about those deeds which he regarded as sufficiently important to give to his mother for safekeeping. He must have known at or very soon after he received the deeds that he was in dispute that Mr Hothi and, on his case, gave the deeds*

*to his mother when he either knew that access was an issue or gave them to her at a time very shortly before it became an issue.*

*102. By November and December 2017, he was embroiled in a dispute with Mr Hothi about the access. I can only conclude that Mr Stokes deliberately concealed those deeds because he feared they might not support his case or might damage it. Quite why he chose later to disclose them perhaps matters not. Maybe he took the view that they did not undermine his case. Perhaps he was made more clearly and forcibly aware of his disclosure obligations. Or perhaps he felt that the conveyancing file, which is or parts of which are within the trial bundle would indicate that those conveyances had been provided to him and, therefore, were in his possession, custody, or control.*

*103. It matters not why Mr Stokes had the change of heart and disclosed those historic conveyances close to the trial."*

159. The Judge then went on to consider the Defendant's evidence that he had put the 2017 Fence in the same position as the 2008 Fence. The Judge rejected this evidence, and found, at **[J112]**, that the Defendant's installation of the 2017 Fence constituted a trespass on to No. 47.

160. The Judge then turned specifically to the claim for exemplary damages. He rejected the claim. His reasons for doing so can be found at **[J113-116]**, as follows:

*"113. I am invited by the claimant to award exemplary damages. I am reminded by McGregor on Damages, 21st edition, chapter 12, that exemplary damages are exceptional and a departure from the rule damages are ordinarily compensatory, not punitive.*

*114. The claim for exemplary damages is based on the second of two common law grounds for awarding such damages, namely that, "The defendant's conduct has been calculated by him to make a profit for himself which may exceed compensation payable to the plaintiff", that being taken from McGregor, I think, in reference to a case.*

*115. Although, in my judgment, the defendant's conduct was reprehensible and had no regard to the rights of the claimant, he simply wanted to widen his drive. I suspect he took the view that the land was of more practical use to him than it was to the claimant but I cannot equate that with the necessary degree of financial calculation that is required to make an award of exemplary damages.*

*116. There is no claim for aggravated damages and the evidence would not have supported such an award in any event."*

161. The Claimant's case, in support of the Cross Appeal, is that the Judge misdirected himself in law, at **[J115]**, in requiring evidence of a financial calculation as a condition precedent to the making of an award of exemplary damages. The Claimant's case is that the circumstances in which exemplary damages can be awarded are not restricted to cases of financial calculation, and can include a case where the relevant party is seeking to gain, at the expense of the other relevant party, an object which the first party either cannot obtain at all, or can only obtain at a price which the first party is not willing to pay. I am asked to set aside the relevant part of the Order, by which the Judge refused to award exemplary damages, and to exercise my own discretion to make an award of exemplary damages in such sum as I see fit.

162. The common law categories of case in which an award of exemplary damages can be made were explained by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, specifically at 1225-1227. Lord Devlin identified two categories of cases where, at common law, exemplary damages may be awarded. The first category comprises cases of oppressive, arbitrary or unconstitutional action by servants of the government. The second category, which is the relevant category in the present case, comprises cases in which the defendant's conduct has been calculated by him to make a profit for himself. Lord Devlin explained this category in the following terms, at 1227:

> *"Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay."*

163. It is clear from what Lord Devlin said in this extract from his speech in *Rookes v Barnard* that this second category is not confined to cases of pure financial calculation. It extends to cases where the relevant defendant acts in cynical disregard for the claimant's rights, and seeks to gain at the expense of the claimant an object which the defendant either cannot obtain at all, or cannot obtain at a price which the defendant is willing to pay.

164. The law in this area is comprehensively set out in the 21st Edition of McGregor on Damages, in Chapter 13. I assume that the Judge was referred to the explanation of the law in this Chapter. At **[J113]** the Judge made reference to Chapter 12, which deals with nominal damages. I assume that this was an error, and that the Judge intended to refer to Chapter 13. In any event McGregor contains a quotation from the speech of Lord Morris in *Broome v Cassell & Co.* [1972] AC 1027, at 1094B-D, which gives further useful guidance on what is required for an award of exemplary damages in the second category of cases identified by Lord Devlin, in the following terms:

> *"There may be exemplary damages if a defendant has formed and been guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him."*

165. This brings me to the question of whether the Judge misdirected himself, at **[J115]**, when he said that he was unable to equate the Defendant's conduct with *"the necessary degree of financial calculation that is required to make an award of exemplary damages"*. Arguably, this was a misdirection. As I have said, it is clear that Lord Devlin's second category of cases extends beyond cases of pure financial calculation. I am not however convinced that the Judge did misdirect himself. What is also clear, in

relation to the second category of cases, is that what is required is an element of calculation by the relevant defendant, pursuant to which the defendant decides that is more advantageous to act in cynical disregard of the claimant's rights, in order to achieve his objective, than to act in a lawful fashion. In such cases exemplary damages can be awarded, essentially to make the point that tort does not pay.

166. In my view, the Judge was not saying, in **[J115]**, that exemplary damages were confined to cases of pure financial calculation. I think that a fairer reading of this paragraph of the Judgment is that the Judge was saying that he was unable to find, on the evidence, the degree of calculation (in the *Broome v Cassell* sense) which would have been required to found an award of exemplary damages.

167. I therefore reach the conclusion that the Judge did not misdirect himself in the manner asserted by the Defendant.

168. If however I am wrong in that conclusion, and the Judge did confine the basis for an award of exemplary damages too narrowly, there is, in my view, a more fundamental problem with the Cross Appeal. If I was to set aside the decision of the Judge to refuse to award exemplary damages, on the basis that the Judge misdirected himself as to the law, there would, in theory, be two courses open to me. The first course would be to remit the case to the Judge, or a different judge, in order to allow a reconsideration of the claim for exemplary damages by reference to the correct legal test. The second course, which is the course I have been invited to take, would be for me to remake this part of the Judge's decision for myself. To this end, Mr Woodhouse cited a number of authorities to me on the correct approach to assessing the amount of an award of exemplary damages.

169. In a case of this kind, it would plainly be disproportionate to remit the case to the Reading County Court for a re-trial of the claim for exemplary damages, independent of the question of whether such a re-trial of the claim for exemplary damages would produce a result different to that arrived at by the Judge. It is also difficult to see how such a re-trial of the claim for exemplary damages would be practicable, given that it would be difficult to isolate the issues and evidence requiring to be heard again in such a re-trial. This leaves the second course, which I have been invited to take, and which is to make my own decision on the claim for exemplary damages. The problem with this course however is that it assumes that the Judge made findings of fact sufficient to justify an award of exemplary damages.

170. Reviewing the findings of the Judge in the Judgment, in particular at **[J88-116]**, I do not think that the Judge did make findings sufficient to support a finding that the Defendant made a calculation, in cynical disregard of the Claimant's rights, of the kind which is required to support an award of exemplary damages. The Judge did make a finding that the conduct of the Defendant was reprehensible, and had no regard for the rights of the Claimant (**[J115]**), but this seems to me to have fallen short of what would have been required to support an award of exemplary damages.

171. In the absence of what would, in my view, have been the findings required to support an award of exemplary damages, I cannot see that it is open to me to supply the missing findings. The Judge read and heard all the evidence. In particular, the Judge heard and assessed the evidence of the Defendant. Sitting in an appellate capacity, I am not in a

position to make findings of fact of my own in relation to the claim for exemplary damages.

172. There is also this point. I have already concluded that the Judge did not misdirect himself in law. The point I have just made about missing findings seems to me to support my conclusion that the Judge did not misdirect himself. It seems to me that what the Judge was really saying, in **[J115]**, was that the Defendant's conduct, while reprehensible, simply fell short of what would have been required to justify an award of exemplary damages. This conclusion was consistent with the findings which the Judge did make in relation to the Defendant's conduct. I agree with Mr Spackman that this conclusion was a matter for the evaluation of the Judge and is an evaluation with which I should not interfere.

173. Mr Woodhouse made the point that the Judge's findings as to the Defendant's conduct were not confined to his conduct in November and December 2017. Such conduct also extended to the failure of the Defendant to disclose what the Judge identified as the historic conveyances until a very late stage in the proceedings. On the Judge's findings this late disclosure was the consequence of the Defendant deciding to conceal the conveyances because he feared they might not support his case, or might damage his case; see **[J102]**.

174. I agree with Mr Woodhouse that this was further unacceptable conduct on the part of the Defendant. Such conduct might, by way of example, have supported an award of indemnity costs against the Defendant. If the decision to award exemplary damages had been made by the Judge, this conduct would also have been relevant to the exercise of the Judge's discretion as to the amount of exemplary damages to award. I cannot however see that this conduct, which occurred after the commencement of the proceedings, demonstrated that the Defendant had made a calculation of the kind required to support an award of exemplary damages.

175. Returning briefly to the question of whether a re-trial could and should be ordered in respect of the claim for exemplary damages, I have already explained why it would not have been proportionate or practical to remit the claim for exemplary damages for a re-trial, even if it is assumed (contrary to my view) that the Judge did misdirect himself in law. There is however also this point, if a misdirection in law is assumed. It follows, from the discussion above, that there would be no justification for taking this course in circumstances where the Judge's findings on the evidence were, in any event, insufficient to support an award of exemplary damages.

176. I therefore conclude, drawing together all of the above discussion, that the decision of the Judge to refuse an award of exemplary damages is one with which I should not interfere.

177. I should add that I reach this conclusion with some reluctance. The Defendant's conduct, in deliberately damaging the 2008 Fence and in then ignoring the Claimant's rights by installing the 2017 Fence, was reprehensible. The court should clearly mark its disapproval of such conduct, not least to discourage such conduct in other cases. This is particularly important in the case of boundary disputes, which are notorious for poisoning relations between neighbours and generating litigation in which the costs end up substantially in excess of the value of the land in issue. Many such disputes have

their origin in the high handed behaviour of one party or the other. The Defendant's conduct in the present case, as found by the Judge, is the sort of conduct which might be said to deserve an award of exemplary damages. Ultimately however, I am not persuaded that it is right for me to interfere with the evaluative conclusion of the Judge who, after reading and hearing all the evidence at the Trial, clearly did not think that the case was one which merited an award of exemplary damages. I have concluded that I am ultimately bound to respect the evaluation of the Judge on this issue.

178. My conclusion renders it unnecessary for me to consider the authorities cited to me by Mr. Woodhouse which relate to the principles to be applied in determining the quantum of an award of exemplary damages. It is also unnecessary for me to consider the report of the joint valuation expert in the proceedings, to which some reference was made in the oral submissions. The joint valuation expert was instructed for the purposes of addressing the issue of quantum of damages, if trespass was established. Mr Spackman argued that the joint valuation report was relevant to the Judge's decision to refuse to award exemplary damages because, so he submitted, the valuation expert had concluded that the conduct of the Defendant had not actually resulted in any increase in the value of No. 5. I am doubtful that this valuation opinion, if this valuation opinion was what the report actually contained, was particularly relevant to the question of whether the conduct of the Defendant justified an award of exemplary damages. It seems to me however that it is not necessary for me to go further into this particular question, given my own conclusion that the decision of the Judge to refuse an award of exemplary damages should be upheld.

179. In summary, I conclude that the decision of the Judge to refuse an award of exemplary damages should be upheld, and should not be set aside.

Conclusion – the applications for permission to appeal

180. I think that there was sufficient in Grounds One, Two, and Three to justify the grant of permission to appeal on these three Grounds. I think that each of these Grounds justified detailed consideration, and can fairly be described as having had a real prospect of success.

181. I do not think that there was sufficient in Ground Four to justify the grant of permission to appeal. Ground Four seems to me to have had no real prospect of success, and I can see no other compelling reason for granting permission to appeal on this Ground. To the contrary, it seems to me that there are good reasons to discourage this kind of appeal, against a perfectly reasonable case management decision of the lower court.

182. I think that there was sufficient in the Cross Appeal to justify the grant of permission to appeal. I have found the Cross Appeal more difficult to determine than the Appeal, and I have, as I have said, reached this part of my decision with some reluctance. In my view the Cross Appeal clearly had a real prospect of success.

Conclusion – the Appeal and the Cross Appeal

183. It follows from my discussion of Grounds One, Two, and Three that the Appeal (so far as I have granted permission to appeal) fails, and falls to be dismissed.

184. It follows from my discussion of the Cross Appeal that the Cross Appeal fails, and falls to be dismissed.

Outcome

185. The outcome of the applications for permission to appeal, the Appeal (so far as I have granted permission to appeal), and the Cross Appeal is as follows:
    (1) It seems to me that I should formally grant an extension of time for the filing of the Defendant's appellant's notice, to 31st August 2021.
    (2) In relation to the Appeal, permission to appeal is granted in respect of Grounds One, Two, and Three.
    (3) In relation to the Appeal, permission to appeal is refused in respect of Ground Four.
    (4) Permission to appeal is granted in respect of the Cross Appeal.
    (5) The Appeal (so far as I have granted permission to appeal) is dismissed.
    (6) The Cross Appeal is dismissed.

186. I will hear the parties, as necessary and so far as matters cannot (subject to my approval) be agreed, on the terms of the order to be made consequential upon this judgment.