



Neutral Citation Number: [2026] EWHC 1862 (Ch)

Claim No: CH-2026-000034

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD) and BUSINESS LIST (ChD)

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

Date: 31 July 2026

Before:

THE HONOURABLE MR JUSTICE THOMPSELL

- 1) PHILIP NEW
- 2) DENISE NEW

Appellants

- 1) STEPHEN GIBSON
- 2) KAREN GIBSON

Respondents

Mr Paul Wilmshurst instructed by direct access for the **Appellants**
Mr Rupert Myers instructed by Holmes & Hills LLP for the **Respondents**

Hearing date: 1 July 2026

APPROVED JUDGMENT

Mr Justice Thompsell :

1. INTRODUCTION

1. By way of an Appellant's Notice filed on 6 February 2026, the Appellants (whom I shall also refer to as the "**News**") sought the appeal of the order of HHJ Duddridge (whom I shall also refer to as the "**Judge**") dated 16 January 2026 (the "**Duddridge Order**") reflecting the judge's considered and detailed judgment handed down on 8 August 2025 (the "**Main Judgment**"). The Judge also on the same date provided a further judgment referred to as the "**Clarification Judgment**" in response to points that Mr Wilmshurst (counsel for the News) had objected to as being wrong in the draft of his Judgment, which had been circulated for corrections. These objections included many of the points that now found the basis of this appeal. In the Clarification Judgment the Judge explained why he had not altered the Main Judgment in response to these objections. I will refer to these two judgments together as the "**Duddridge Judgments**".
2. If successful, the Appellants put the court on notice within their Appellant's Notice that they will ask the court to revise the costs orders made and Part 36 consequences on damages.
3. It is slightly confusing that the Duddridge Order bears the date 23 January 2026 at its head, but 16 January 2026 at its foot. However, it is clear that this is the order referred to in the Appellant's Notice as this contains the provisions that the Appellants are seeking to reverse: in summary the requirements to pay £9,500 plus interest by way of damages and provisions for them to pay costs partly on the standard basis up to 17 October 2023 and thereafter on an indemnity basis (this being the consequence of a Part 36 offer made by the Gibsons and refused by the News).
4. The Duddridge Order has come at what I hope is the culmination of a long-running and bitter neighbour dispute between the News, who live at 24 Sunnymede Close, and the Respondents (the "**Gibsons**") who live next door at number 25.
5. In brief, this litigation originally stemmed from a complaint by the Gibsons, going back as far as 2014 that they believed the fencing erected by the News between number 24 and 25 did not reflect the true legal boundary between the properties and encroached on their property.
6. Originally it looked as if this matter could be settled amicably. The parties entered into mediation. This resulted in an agreement recorded in writing (but informally drafted) by the mediators on 22 July 2015 (the "**July Agreement**"). Under the July Agreement, they agreed to draw a line under previous events and move forwards as neighbours in good faith and act reasonably; that the Gibsons would replace the disputed fence with a 6 foot high fence and that they would meet to discuss the positioning of the new fence to be carried out using a string line method.
7. Unfortunately they were unable to agree the line of the new fence. A further round of mediation resulted in a further agreement dated 30 September 2015 (the "**September Agreement**"), again recorded in writing by the mediators. Again they agreed to draw a

line under previous events and to move forwards as neighbours in good faith and act reasonably. They agreed a process for the mediator to pick a surveyor to be paid for at their joint cost and to accept the result of the surveyor as bringing their dispute to an end.

8. A surveyor, Mr Malcolm Stephenson FRICS, was appointed under these arrangements. He produced a report (the “**Stephenson Report**”) that describes to the boundary line and included a hand drawn plan showing the boundary line.
9. This did not settle matters. After they had seen the report, the News disagreed with Mr Stephenson’s methodology and obtained a second opinion from a Mr Cowell. Lengthy litigation ensued, as is summarised in the Duddridge Judgment at [10] to [23]. This litigation finally settled the question of the boundary line (at least between the parties), but did not settle the damages claim being pursued by the Gibsons against the News. That question fell to HHJ Duddridge and was dealt with comprehensively by him within the Duddridge Judgments and his conclusions were reflected in the Duddridge Order.

2. **GROUND OF APPEAL**

10. The News have advanced four grounds of appeal, although their Ground 4 identified six different ways (lettered (a) to (f)) in which the Judge is said to have erred. By my order of 21 April 2026 I gave permission for each of these grounds to be heard except that permission was refused for Grounds 4(e) and (f).
11. In summary, the Grounds are as follows:
 - i) **Ground 1** is that the Judge erred in awarding damages for breach of an alleged agreement dated July 2015 what I have referred to above as the July Agreement”).
 - ii) **Ground 2** is that the Judge erred by awarding damages in respect to matters that were not pleaded: the destruction of a post topped by an ornamental squirrel (the “**squirrel post**”) and some unpleasant songs found to be rude towards the Gibsons that the First Appellant had posted on his Facebook page.
 - iii) **Ground 3** is that the Circuit Judge erred in awarding damages based on aggravated damages arising from the demolition of the squirrel post, even though aggravated damages in law can arise only in trespass, and the court had already declared that the post stood on the Appellant’s own land. Neither was there a relevant trespass at the time the songs were found by the Respondents.
 - iv) **Ground 4** (insofar as permission to appeal has been given on this ground) is that the Circuit Judge erred and was wrong to award £9,500 in damages because it:
 - a) ignored the legal principle that damages can only follow a request for the land;
 - b) applied in respect of a time period that was unjustified;
 - c) was contrary to authority with respect of trivial amounts of land; and

- d) ignored the fact that a substantial part of the Respondents' "garden" is in fact a public highway.

12. Before turning individually to each of these Grounds, I will make some general comments about the approach that a judge needs to take on dealing with an appeal.

3. THE APPROACH TO BE TAKEN BY A JUDGE ON APPEAL

13. Under CPR 52.21(3) an appeal can succeed only if the decision was wrong, or was unjust because of a serious procedural or other irregularity.

14. An appeal court rarely disturbs a trial judge's findings of fact, or the conclusions he draws from the evidence. The principles to be followed by the appellate court were summarised by Lewison LJ in *Volpi v Volpi* [2022] EWCA Civ 464 at [2]) as follows:

"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

15. Mr Myers (counsel for the Gibsons) also refers me to *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at [63]:

“in the absence of a misdirection of himself by the trial judge, an appellate court which was disposed to come to a different conclusion on the evidence should not do so “unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge’s conclusion”.”

and at [67]:

“ ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

16. Mr Myers also refers me to *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114] for the reminder that:

“In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.”

17. This reminder is particularly apt in this case, where HHJ Duddridge heard this case over five days and, as he records, read the witness statements and his notes of the oral evidence “several times” before giving judgment. I cannot hope to have anything like his understanding of the underlying facts or of the arguments that were presented to him.

18. Mr Myers also refers me to *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 616–617, where Lord Wright, adopting the “good general guide” provided by Greer LJ in *Flint v Lovell* [1935] 1 KB 354 at 360) considered that (in the context of the award of general damages for distress, inconvenience and loss of amenity that:

“In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

4. GROUND 1

19. Setting it out in full, Ground 1 is as follows:

“It is submitted that the Circuit Judge erred by taking the procedurally unjust and wrong approach of awarding damages for breach of an alleged agreement dated July 2015 rather [*sic*] restricting himself to the September 2015 agreement, which formed the basis of court directions for the preliminary issue. Reliance on the alleged July 2015 agreement had never been pleaded at any time or argued at the liability trial before HHJ Pugh or in any other way.

Only the September 2015 agreement formed the basis of a full High Court appeal before Murray J, which addressed the specific terms and legal effect of only the September 2015 agreement.

Reliance on the July 2015 agreement, on which the Circuit Judge based liability and damages in this case was not argued before him at all, and he gave no notice that he intended to rely upon it. Further, it made a difference to the outcome, since the Judge should have awarded substantially less or nothing if he had not mistakenly thought that July 2015 agreement was the yardstick against which he had to assess damages.”

20. Mr Wilmshurst, for the News, expanded the points made in Ground 1 in his Revised Skeleton Argument. He notes that in the Main Judgment at [117] the Judge found that the September Agreement did not replace or supplant the July Agreement – it supplemented it by providing for a surveyor to determine the boundary; and that the two agreements needed to be read together.
21. Mr Wilmshurst goes on to say that the Judge appears to have done this because he thought the July 2015 agreement was important because it referred to the Respondents erecting a fence.
22. Mr Wilmshurst makes the point that there was no pleading by the Gibsons in relation to the July Agreement (and therefore there should be no damages for its breach).
23. There was something of a dispute as to what precisely were the Gibsons’ pleadings. The Judge had ruled (by his order of 27 April 2023) that the Claimants’ Amended Schedule of Damages would “stand as their Amended Particulars of Claim for the purposes of their damages claim”. It is not entirely clear that this order had the effect of *replacing* the original Particulars of Claim – during the hearing of the appeal I inclined to the view that the Amended Schedule of Damages supplemented the original Particulars of Claim rather than replaced them, but looking again at the language of the 27 April 2023 order I am not sure whether that is the case.
24. However, I do not think that the determination of that issue has much bearing on this appeal. Neither the original Particulars of Claim nor the Amended Schedule of Damages make any mention of the July Agreement. Both mention the September Agreement. Gibsons’ claim form within its “brief details of claim” sought damages for trespass, but not for breach of contract. Neither was breach of contract alleged in the original Particulars of Claim. A breach of what was referred to as “a settlement agreement dated 30 September 2015” was alleged within the Amended Schedule of Damages and there was there a clear allegation of breach of contract.

25. Mr Myers argues that the generality of the wording referring to breach of contract in the Amended Schedule of Damages was sufficiently wide to refer to the July Agreement, but I do not think that argument is sustainable.
26. However, I am persuaded by the argument that the Judge was correct in finding that the September Agreement had to be read together with the July Agreement - or at the very least that the September Agreement had to be interpreted by reference to the terms of and mutual intentions expressed in the July Agreement.
27. The September Agreement makes no commercial sense whatsoever when read by itself without considering the relevant background. Apart from the agreement that the parties will move forwards as neighbours in good faith and act reasonably (repeating what was said in the July Agreement), all the September Agreement does is to agree a process for appointing a surveyor, accepting the result of the surveyor and ending the dispute (which is described as “their current dispute relating to “Mr [sic] Mrs Gibson’s garden fence”. The September Agreement does not describe the “current dispute” in any more detail or state what it is that the surveyor is to be instructed to do.
28. For that, one needs to go back to the July Agreement. There it is explained that the parties had agreed that the Gibsons would replace the existing fence with a 6 foot high fence and that the parties should agree the positioning of the new fence. Read in the context of the July Agreement, it becomes clear that the purpose of the September Agreement was to appoint a surveyor who would act to determine where the replacement 6 foot fence that the Gibsons wanted to erect should be placed and that the parties would abide by the decision of that surveyor.
29. Mr Wilmshurst argues that it is not necessary to look at the July Agreement to be able to understand the September Agreement – it is just necessary to look at the circumstances more broadly to acknowledge that there was a dispute as to the boundary and that the purpose of the September Agreement was to resolve that dispute. I do not think that this argument is correct if it is meant to say that one ignores the July Agreement as part of those circumstances.
30. Even if that argument was correct, I do not see how it advances the case that the Judge was wrong in determining that the actions of the Appellants in failing to abide by their agreement to accept the ruling of the surveyor led to the categories of loss and suffering that he considered. Whether or not you get to this by reference to the July Agreement, it was relevant that one of the reasons why the Gibsons wanted the boundary determined was that they wanted to have a six-foot fence erected along that boundary, and therefore their injury from the refusal of the News to observe the September Agreement included the matters that the Judge considered flowed from the fact that they were unable to erect such a fence until the uncertainty engendered by this refusal ended.
31. It is averred as part of Ground 1 that the Judge’s reference to the July Agreement made a difference to the outcome since the Judge should have awarded substantially less or nothing if he had not mistakenly thought that the July Agreement was the yardstick against which he had to assess damages, but this is not correct. Even without taking account of the July Agreement, the Judge would need to have considered the breach of the September Agreement in the context that this was to settle a boundary dispute so that the Gibsons could erect the fence they wanted on the correct boundary line. The reference to the July Agreement therefore made no difference to how he should assess

damages. Certainly (to go back to the “good general guide” advocated by Lord Wright that I refer to at [18] above, I am in no way satisfied that HHJ Duddridge misapprehended the facts or for these reasons or any other any other reason made a wholly erroneous estimate of the damage suffered.

32. In fact, as Mr Myers points out in his skeleton argument, the question of the fence was squarely before the Judge. The Amended Particulars of Claim pleaded breach of contractual obligations that had been “expressly secured for the purpose of (i) certainty and peace of mind ...; (iii) allowing the construction of a boundary fence in the correct location; and (iv) allowing the parties to enjoy their respective gardens undisturbed,” wording. Both agreements were in evidence, and were discussed in the oral evidence; the Appellants’ own Counter-Schedule argued about them at length; and the News cross-examined on the fence and the boundary. As the Judge put it, whether the Gibsons could fence the boundary:

“was plainly before me on the pleadings and in argument and therefore needed to be resolved”

33. In his Amended Skeleton Argument Mr Wilmshurst goes on to criticise the Judge’s findings that the Gibsons were unable to erect a fence throughout the period in question, and points out that they still have not erected a fence. However these points are challenges that are outside the terms in which Ground 1 is couched, and indeed entirely outside the grounds of appeal that the Appellants have been permitted to bring. I therefore ignore these points as having any bearing on Ground 1 although I return to these points in my consideration of Ground 4(b).
34. For these reasons, I dismiss Ground 1 of the appeal.

5. GROUND 2

35. Setting it out in full, Ground 2 is as follows:

“The learned Circuit Judge erred in that he proceeded in a procedurally unjust way by awarding awarded damages in respect of in respect of two matters that were simply not pleaded, relating the destruction of a squirrel post and some songs that the 1st Appellant had posted on his Facebook page. There was a protest made these elements in clear terms.

There was no ruling about whether it was sufficiently pleaded or not. The injustice was doubly bad as the Judge then invented a claim in aggravated trespass that had never been pleaded or even argued and based his judgment on his own legal research, of which he deprived the Appellants any opportunity to comment on. The entire award of £2,500 for aggravated trespass should be removed.”

36. There are here essentially two complaints:

- i) First that the Judge should not have brought into his consideration of damages the News’ conduct in relation to the squirrel post and the posting on Facebook

of insulting songs making various scurrilous accusations that must be interpreted as being about the Gibsons as these matters had not been specifically pleaded.

- ii) Secondly that it was not open to the Judge to award aggravated damages where aggravated damages had not been pleaded.

37. As to the first complaint, this is a pure pleadings point. Against this point the Respondents make the following arguments:

- i) That the News' behaviour was specifically pleaded. In particular, paragraph 10(d) of the Amended Schedule of Loss ("**paragraph 10(d)**") asked the court to assess damages taking into account "the aggressive, confrontational and rude approach of the Defendants in interactions with the Claimants". It was not necessary to specifically plead each and every incident covered by that phrase. Importantly they were fully aired at trial in witness statements, in video evidence and in cross examination; and the News gave their own evidence about them and cannot point to anything they would have done differently.
- ii) Aggravated damages are not a separate claim, they are simply additional compensation within general damages for the extra injury to feelings caused by a Defendant's high handed, insulting or oppressive behaviour.

38. As to the first complaint, I agree that, insofar as the two incidents regarding the squirrel post and the posting of songs on Facebook are to be regarded as part of the general claim for damages outlined in paragraph 10(d), they were specifically pleaded and could be taken into account by the Judge. There can be no argument that the News had no opportunity to respond to these points.

39. Turning to the second complaint, the term "aggravated damages" is defined in the White Book Glossary as

"Additional damages which the court may award as compensation for the defendant's objectionable behaviour".

40. The Judge had acknowledged at [146] of the Main Judgment that a claim for aggravated damages had not been expressly pleaded as required by CPR 16.4.1(c) but considered that nevertheless, he could take into account the matters that he had dealt with that at [145] of the Main Judgment: At [146] he said:

"The Claimants have not expressly pleaded the claim to aggravated damages as required by CPR 16.4(1)(c), but they have invited the Court to take into account the matters set out in Paragraph 10 (a) to (f) of their Amended Schedule of Loss, including the Defendants' behaviour and the prolongation of the dispute. In my judgment, they have sufficiently set out the factual basis for an award of aggravated damages even if they have not used the label. Bearing in mind that aggravated damages should also be modest and proportionate, I award a further £1,250 to each Claimant (£2,500 in total) as aggravated damages. Another way of looking at it is that the awards referred to paragraph 145 above do not reflect the further injury to

feelings caused by the specific behaviour I have referred to in this paragraph and should be increased by an equivalent sum to reflect that further injury to feelings. However, it is appropriate to identify and quantify the damages attributable to that specific conduct.

41. In other words, the Judge:

- i) considered that notwithstanding the failure to use the term “aggravated damages” in the Amended Schedule of Loss that as their Particulars of Claim did particularise the behaviour which formed a factual basis for an award of aggravated damages; and
- ii) in any case considered that the specific behaviours referred to could be regarded as adding to the injury to feelings which the Judge considered formed part of the distress, inconvenience, loss of amenity and so on that the Gibsons had suffered (and one might add had pleaded) as a head of loss for which ordinary (not aggravated) damages could be awarded.

42. As to the Judge’s first reason, I disagree. CPR 16.4(1)(c) clearly requires a statement that the claimant is seeking aggravated damages – it is, in my view, not sufficient for a claimant to particularise facts which may support a claim for aggravated damages. The defendant is entitled to know that the claim is being framed as a claim for aggravated damages so that he can defend the claim in that light, having regard to the case law on aggravated damages. It was not therefore open to the Judge to make an award of aggravated damages as such.

43. As to the Judge’s second reason, however, here I think his reasoning was sound. The Gibsons had pleaded a failure to move forward as neighbours in good faith as required by the settlement agreement and a head of loss including injury to feelings and/or emotional distress. They pleaded that the News had behaved in an aggressive and confrontational manner. The Judge was entitled to take account of these matters as part of these general heads of damage – i.e. by reference to the breach of the terms of the September Agreement requiring the News to move forward in good faith and the distress thereby caused rather than specifically because of the objectionable nature of the behaviour.

44. These heads of loss in my view were properly claimable, despite the general principle in *Addis v Gramophone Co Ltd* [1909] AC 488 that there can be no recovery of general damages for injury to feelings, annoyance and frustration arising from the manner in which a contract is broken as this was a contract that clearly was intended to secure the parties’ peace of mind and as such fell into exceptions discussed within *Ruxley Electronics v Construction Ltd the Forsyth* [1996] AC 344 and *Farley v Skinner* [2002] 2 AC 732.

45. It is an unwelcome feature that in what was otherwise an extremely thoughtful and rigorous judgment, the Judge put forward a justification based on a finding of aggravated damages which was not open to him, and ordered this payment on the basis of an aggravated damages claim. It leaves the suspicion that the Judge’s second reason, though in itself sound as a reason to add £2,500 compensation for these events, to the £7,000 he had already ordered for by way of compensation, was an ex-post-facto

rationalisation of a decision that he had originally made viewed through the lens of an aggravated damages claim.

46. Nevertheless as aggravated damages are compensatory (see *Richardson v Howie* [2004] EWCA Civ 1127 at [22]–[23], and [16]), as are damages for breach of the contract, there is no reason why the Judge would not have assessed these damages in the same way if he had only looked at them on the basis of contractual or tortious damages and had not misled himself by allowing himself to consider an aggravated damages claim.
47. I consider, therefore, that the Judge was entitled to assess compensation by reference to the squirrel post incidents and the scurrilous songs and that there is no reason to go behind his calculation of the appropriate award of damages in relation to these matters. Ground 2 is therefore dismissed.

6. GROUND 3

48. Setting it out in full, Ground 3 is as follows:

“The Circuit Judge erred in [sic] he awarded damages based on aggravated damages arising from the demolition of the squirrel post, even though aggravated damages in law can arise only in trespass, and the court had already declared that the post stood on the own land. Neither was there a relevant trespass at the time the songs were found by the Respondents. The £2,500 aggravated damages ought to be removed and/or reduced.”

49. The answer to Ground 3 follows from the analysis I have made in relation to Ground 2. I have found in relation to Ground 2 that the Judge was not entitled to make an award of aggravated damages. However he gave an alternative reason for awarding £2,500 based on particular incidents adding further injury to feelings. He was entitled to do so based on injury to feelings, and this was an entitlement that did arise out of the pleaded breach of the September Agreement. Justified on this basis, there is no need to show an aggravated trespass and therefore no need to show a trespass. It follows that this Ground must fail.
50. At the hearing of this appeal I heard also detailed arguments about whether the entirety of the squirrel post was in fact on the News’ land. I am not satisfied that it was. Also I am not satisfied that all trespass over the Gibsons’ land had ceased at the time that the offensive songs were discovered by the Gibsons, and certainly not by the time when they were posted to Facebook, which in my view is the most appropriate time to consider this point. However, in view of my finding in the previous paragraph, these points are not material. Ground 3 fails anyway.

7. GROUND 4

51. Ground 4, insofar, as there is permission to appeal this ground, is as follows:

“The Circuit Judge erred and was wrong to award £9,500 in damages because it

- a) ignored the legal principle that damages can only follow a request for the land;
- b) applied in respect of a time period that was unjustified;
- c) is contrary to authority with respect of trivial amounts of land; and
- d) ignored the fact that a substantial part of the Respondents' "garden" is a public highway".

Ground 4(a)

- 52. I was unable to deduce on what authority the News considered that there was a legal principle that damages can only follow a request for the land. Mr Wilmshurst did not refer me to any such authority. Mr Myers by contrast referred me to various authorities to establish his point that trespass to land is actionable in itself and there is no need to prove any financial loss or to make any prior request.
- 53. Mr Wilmshurst did refer me to *Neilson v Poole* (1969) 20 P. & C.R. 909 as authority that a boundary agreement is not an agreement to convey land and to *Emmet on Title* at [5.020] for the proposition that an obligation to convey (which would include to provide vacant possession) only arises when a request is made, but I agree with Mr Myers that this is a different question to the question whether there was a trespass. It is certainly a different question as to whether there was a breach of contract.
- 54. In argument, Mr Wilmshurst's point appeared to be not so much that there was no trespass until there was a demand, but rather that there could be no compensation for a period before there was a demand and/or that it would be unreasonable to expect the News to cease their trespass the moment that Mr Stephenson made his report. He also argued that there was no complaint or communication at all between December 2015 and August 2018 by the Respondents to the Appellants. Mr Myers denies that this is correct.
- 55. Unfortunately the information available within the appeal bundle does not let me see who is correct factually on this point. I do not, however, see this as being important to resolve. First, it seems to me to be obvious that the Gibsons at the beginning of the dispute had alleged trespass and that they wanted it to stop - they gave notice of this when they first asked for mediation and never withdrew that notice. Secondly the Judge's awarded compensation was based on breach of contract as well as trespass.
- 56. In summary, I do not consider that the News have been able to establish Ground 4(a) as pleaded. I have not been persuaded that the principle of law that Ground 4(a) depends on exists; I am not satisfied that there was no continuing demand to cease trespass; and the point raised here anyway does not address the claim in contract that the Judge was also dealing with when he awarded damages. Accordingly, I dismiss the appeal on Ground 4(a).

Ground 4(b)

57. Ground 4(b) is the proposition that the Judge erred because he applied damages in respect of a time period that was unjustified.
58. Mr Wilmshurst argues this on the basis that the Judge awarded damages covering a period between 19 November 2015 and 22 August 2022. Apart from the argument (which I have dismissed) that there had been no call for the land to be handed over Mr Wilmshurst relies on the proposition that in any event all the land was handed over by 18 October 2021. Mr Wilmshurst suggests that the Judge fails to deal with the fact that any trespass had ceased from that date.
59. The Judge was clearly aware that the Defendant erected a second fence on “their side of the boundary” (see the Main Judgment at [17]) and noted that this was claimed to be either on the 18 or 21 August 2021. At [20] of the Main Judgment the Judge notes that the News claimed in an email at the end of October 2021 that they had erected their second fence on their side of the boundary, had relinquished possession of all the land they were required to give up as a result of the Stephenson Report and had granted the Claimant’s a revocable permission to use the area between their new fence and the Stephenson Line as part of their garden, but not to build new fences.
60. It is argued for the News that at this point they had ceased any trespass, and therefore damages should not be calculated by reference to any period after this date.
61. However, a clue as to why the Judge did not agree with this may be seen [21] of the Main Judgment where he criticises the News for a continued combative tone in their correspondence. He considered also that the suggestion that they had granted the Gibsons a revocable permission to use the land up to their new fence, but not permission to fence that land:

“was not a practicable or sensible way to bring the dispute to an end, given its history, but a recipe for further uncertainty and disputes. Conversely, the Claimants [the Gibsons] were reasonably entitled to expect that the Settlement Agreement would be implemented in a way that was certain, irrevocable and enabled them to fence the boundary without interference.”

62. Later at [94(c)] HHJ Duddridge recorded his finding that:

“...for reasons I have given above, those [the new fence and concessions I have described above] were not reasonable or practicable ways of resolving the dispute. In my view, they were attempts to present the Defendants as seeking to comply with the Settlement Agreement and the Claimants as resisting it which, under the circumstances, were also rather disingenuous.”

63. At [110]) the Judge recorded his finding that:

“The evidence shows that the Defendants’[new] fence is on their side of the boundary, save for the single met post which encroaches by 7 mm. However, it is positioned so close to the

boundary (and the met post in any event encroaches) that it interferes with the Claimants' ability to fence the boundary."

64. It appears that that the Judge was not satisfied that the trespass had entirely ceased, but more importantly, whether or not the News had ceased any trespass, the Judge considered that they were still in breach of their obligation to cooperate in bringing the dispute to an end.
65. As to the nature of that non-cooperation, this was discussed at length at the hearing. Mr Wilmshurst sought to impress on me that after their second appeal had failed against Judge Pugh's order all that the News were seeking to achieve was an order of the court making the Settlement Agreement binding on successors in title – they were no longer trying to invalidate the finding of the court that the boundary line found by Mr Stephenson was binding on them.
66. It does not appear that HHJ Duddridge was convinced by that argument. At [22] of the Main Judgment he describes the steps he ordered following a case management conference on 19 May 2022 to allow the parties to register a determined boundary at the Land Registry so as to bind future owners of the property. At [23] he explained that the News applied to the High Court for permission to appeal that order. This was refused on 6 July 2022.
67. At [25] the Judge noted that the Gibsons were complaining that the News had through what was alleged to be unreasonable behaviour prevented their contractor from installing the new fence that they sought to erect and that a post supporting the new fence installed by the News in 2021 encroached a small distance over the boundary.
68. From the above it is clear that the Judge was aware that the News were arguing that by withdrawing to behind the new fence that they had erected, they had ceased any trespass and that this was correct except in a very minor way (in relation to the footings of one of the fence posts). However the Judge still considered that there were ongoing criticisms to be made of the News and that they were failing to be properly cooperative.
69. It is true that the Judge did not expressly refer to these findings when setting the amount of compensation. At [144] in the Main Judgment the Judge stated that the Gibsons were entitled to damages for trespass for the entirety of the period from 19 November 2015 to 22 August 2022. He noted that compensation should include damages reflecting the inconvenience and distress to the Gibsons; he acknowledged that this overlapped with the damages for frustration, distress and lack of amenity, security and privacy caused by the News' breach of contract; and considered that the two sources of redress needed to be considered together by reference to a single award.
70. The Judge (at [145]) dismissed Mr Myers' submission that this should be calculated on the basis of an annual rate and considered that the damages should be assessed in the round and should be proportionate to the distress, inconvenience, loss of amenity and so on that the Gibsons have suffered, and thus should properly reflect the duration of the trespass and breach of contract.
71. In the Clarification Judgment the Judge explained the cut-off date of 22 August 2022 was based on the last date Gibsons had sought redress in their Amended Schedule of Loss.

72. Given:

- i) the Judge's approach, of calculating the sum calculated not by reference to time, but by reference to distress; and
- ii) that the Judge considered that throughout the period for which he was considering it was appropriate to grant there was either trespass or breach of contract (and for all but perhaps the last year of that period, running concurrently),

there is a strong argument that the Judge's failure to acknowledge that there had been a complete or virtually entirely complete cessation of the trespass from a date in August 2021 does not invalidate his calculation. He clearly considered that there was frustration, distress and lack of amenity, security and privacy throughout this period and that this was not cured by the erection of the second fence as the dispute was not at an end and he considered that the News were still continuing to act unreasonably in breach of the September Agreement.

73. However, I consider that the Appellants do have a point in that at the point in early 2022 when the boundary line which had been finally determined was pegged out on the ground, there was no reason why the Gibsons could not erect a 6-foot fence to this boundary and thereby to have mitigated their loss as relating to privacy etc. This, I consider, is the earliest point at which the Gibsons could have mitigated such loss, since before then they would have reasonably apprehended a risk that the News would withdraw their temporary concession of allowing a fence to be put up on their land insofar as it was outside the new fence that they had put erected dispute the placement of the fence.
74. I do not accept points put forward by the Judge at [110] as answering this assessment. I do not think it is an answer to that argument that they would have needed to lay concrete footings on the News' side of the boundary if they wanted to go right up to the boundary. The News were never obliged to accommodate this. If the Gibsons wanted to fence right to the last few millimetres of the boundary, they would always have had to find a way of supporting the fence entirely on their own land. Neither is it realistic to think that the incursion of the MetPost (which I believe are typically 75 mm or 100mm wide) by 7mm onto the Gibson's side would practically prevent this. Even if the Gibsons were determined to go right to the boundary line it would be easy for their fence to oversail this intrusion. Given the standard shape of a MetPost, the 7mm incursion must have been caused only by the flange of the MetPost which itself is only a few millimetres in height.
75. I do consider therefore that the Judge failed to deal realistically with the possibility of mitigation at least from this point in early 2022 and accordingly it must be presumed that he failed to consider this in determining the damages.
76. It is difficult to see whether this point, if it had been fully considered, would have had much or any bearing on his calculation of compensation of £7,000. It is not proportionate to remit the matter to him to determine this question and so I must do my best to determine it.

77. If the Judge had reduced these general damages by the difference between the length of the period from December 2015 and August 2022 (say 80 months) and the period between December 2015 and the point in early 2022 when the boundary line which had been finally determined was pegged out on the ground which I understand to be January 2022 (so say 73 months), this would argue for an 8.25% reduction (which if applied to £7,000 would result in a reduction of the damages to £6,387.50).
78. I strongly doubt, however, this mathematical approach is the right one, given that the Judge rejected a time-based calculation of damages and approached the question of damage in a suitably robust manner.
79. My conclusion is, that was not realistic to think that the Gibsons could mitigate the loss by constructing the fence that they wanted to construct up to the boundary line in August 2021, as at that stage they would still fear that there would be further legal battles about precisely where the boundary line was to be placed on the ground. However, this did not remain a realistic fear from the point that the boundary line was staked on the ground. The Judge's reasons for dismissing the possibility of the Gibson being able to mitigate the loss by building their fence were mistaken from this point. However on any view this would result in a very small reduction in the award of damages, certainly no greater than that calculated on a time basis above. I will summarily assess the reduction to be made for this possibility of mitigation as a £500 reduction so that the general damages (before interest) should be reduced from £7,000 to £6,500. The additional damages of £2,500 remain unaffected.

Ground 4(c)

80. Ground 4(c) is that the Judge erred and acted contrary to authority with respect of trivial amounts of land.
81. The authority that the Appellants rely on here is found in two cases:
- i) *Aco Properties Ltd v Severn* [2011] EWHC 1362 (Ch) where compensation of £1,000 was awarded for deprivation of a very small strip of land;
 - ii) *Davis v Winner* [2021] 11 WLUK 575, another case concerning a boundary agreement which concerned two encroachments of 9 and 8 inches, respectively. Here, the Circuit Judge held that, had the claimants succeeded in establishing there had been an encroachment, the amount of their compensation would have been unlikely to exceed £1000.
82. As is apparent from the Main Judgment at [129] HHJ Duddridge was aware of these cases and considered them. He understood that compensation for any encroachment on the land would need to be minimal. However it was not the encroachment on the land that drove his assessment of loss: as noted at [130] – [139] he was assessing damages for distress, loss of privacy, inconvenience and loss of amenity caused by both a continuing trespass and a breach of an agreement and found justification for doing this in a number of decided cases.
83. I see no reason why the Judge was not entitled to take this approach and accordingly I dismiss Ground 4(c).

Ground 4(d)

84. Ground 4(d) is that the Judge erred in ignoring the fact that a substantial part of the Respondents' garden is a "public highway".
85. It is correct that at [30] the Judge poured doubt on whether the evidence definitively showed that part of the Gibson's garden was a public highway, and at [33] he considered that the arguments advanced by Mr Wilmshurst to this effect were unreal. However, whether or not the Judge was correct in these assessments, this issue has no effect on the correctness of his assessment of damages. As we have seen, he did not assess damages by reference to the seriousness of the encroachment onto the Gibson's land. He assessed it by reference to their frustration, distress and lack of amenity, security and privacy. None of this is affected by any defect that may exist in their title to part of their land.
86. Ground 4(d) therefore is unsustainable and I dismiss it.

8. CONCLUSION

87. I have dismissed all the grounds of appeal advanced by the Appellants, except that I have partially accepted Ground 4(b). I have assessed the effect of this partial success on this ground as justifying a £500 reduction in the damages awarded, so that the figure of £9,500 is reduced to £9,000. The other provisions of the Duddridge Order stand, including provisions for interest to be payable on this amount (but as so revised), and the provisions relating to costs.
88. The Respondents have helpfully produced a calculation as to the overall effect of this reduction having regard to the interest on damages and the consequences of their Part 36 offer. The effect of this reduction in the damages before interest is to reduce the total money judgment excluding costs from £13,305.71 to £12,605.41.
89. In accordance with a suggestion that I made when circulating this judgment in draft, the parties have provided me with representations on paper as to what should be the costs consequences of this judgment.
90. Having considered those representations, I find that the Respondents must be regarded as the successful party in relation to this appeal. The Respondents have won as a matter of substance and reality. This is the test that the court should apply in determining who is the successful party in accordance with *Roache v News Group Newspapers Ltd* [1998] EMLR 161 – see *per* Lord Bingham at page 168.
91. When this test is applied, it is clear that the Respondents are the successful party. I have dismissed six out of the seven grounds of appeal advanced by the Appellants for which permission to appeal had been given. I have allowed only a small reduction in relation to the ground of appeal that I have allowed - £500 before interest or £700.30 when interest is included. The major motivation of this appeal for the Appellants was to overturn the very substantial award of costs in favour of the Respondents in the previous proceedings (for which a payment on account was ordered of £55,155.84). The small reduction in damages that the Appellants have achieved should and will have no effect in changing that award.

92. The Respondents have suggested in their costs submissions that I should re-open the previous costs award on other grounds. These include: first some recent alleged conduct by the Gibsons which, it is said, casts a light on previous abusive conduct by them which is said not to have adequately been reflected in the Duddridge Judgments; secondly the submission that “the vast number of allegations made against the News were not proven”; and thirdly an argument based on the history of settlement offers.
93. It is too late to ask the court to deal with these points now. If the Appellants considered that the costs award made in the court below was unfair on other grounds, it should have brought those grounds as part of its grounds of appeal.
94. The Appellants quote *KR v Royal & Sun Alliance plc* [2006] EWCA Civ 1454 at [78] where it was held that:

“As the appeal is to be allowed, the issue of costs will have to be considered afresh in the light of our conclusions.”

However, the circumstances in that case were entirely different to this case. Here I have found that the Respondents were the successful party. It is not credible to think that if HHJ Duddridge had found, as I have done, that the damages should have been set at £9,000 rather than £9,500 he would, or should, have made an entirely different order in relation to costs. The small reduction that I have allowed in damages provides no warrant to reopen HHJ Duddridge’s decision on costs.

95. As the Respondents must be regarded as the successful party, costs should be awarded to the Respondents. The Respondents have asked for costs on the standard basis, and I agree that the standard basis is appropriate.
96. I should however reflect the success that the Appellants have had in obtaining a small reduction in the damages.
97. The Appellants argue that this should be a large percentage, having regard to a point that they make that the period after which the News had physically erected a fence and the boundary had been marked out took up a significant amount of time at trial.
98. I do not think that this is an appropriate measure for calculating the appropriate reduction in the costs to be awarded to the Respondents in the appeal. This is not least because I have assessed my finding that the Respondents could have mitigated their loss during this period to be worth only £500 (before interest is taken into account). This suggests that the time that was spent on this issue at trial was wasted time.
99. In my view, the percentage reduction should be considered by reference to the size of the success that the Appellant have had in reducing their liability to the Respondents relative to what they were seeking to achieve in the appeal. They were looking to overturn the damages order against them of £9,500 plus interest and the award of costs against them, which I understand to be something like an amount of £100,000 (and where costs on account amounted to over £55,000). Their success in reducing the amount they will have to pay by £500 before interest or £700.30 when interest is included is not nothing but it is not substantial.

100. In my view, to take account of this small measure of success, the costs payable to the Respondents in respect of the appeal should be reduced by only a small percentage, which I set at 1%.
101. I have been asked to assess summarily the Respondents' costs, and it is appropriate that I do so.
102. The Respondents claim costs in a total amount of £24,570 inclusive of VAT, The Appellants argue that this should be reduced (before any further reduction to reflect the Appellants' partial success) to £10,000 including VAT.
103. The Appellants make various points that go towards establishing that the amount claimed by the Respondents is more than is reasonable and proportionate. They point to the fact that the rate for the Grade A solicitor is above the guideline rate; a failure of the Grade A solicitor to delegate for more routine work; and suggest that excessive amounts were claimed in respect of communications and on documents. It is reasonable to make a deduction to reflect these points. However, I do not agree that it was unreasonable or disproportionate for the solicitor to conduct of this matter to attend the hearing alongside counsel.
104. Having regard to the points made by the Appellants that I do agree with, I summarily assess the Appellants' costs at £19,000 inclusive of VAT. Applying the 1% reduction, I will order the Appellants to pay costs in the total amount of £18,810.