Neutral Citation Number: [2024] EWHC 3296 (KB)

Case No: KA-2023-MAN-000004

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE MANCHESTER

ON APPEAL FROM HIS HONOUR JUDGE DODD
IN THE COUNTY COURT AT BARROW-IN-FURNESS
SITTING AT THE COUNTY COURT AT CARLISLE
CLAIM NO: F00BW097

Liverpool Civil and Family Court
35 Vernon Street, Liverpool
L2 2BX

Date: 18/12/2024

Before:

MR JUSTICE FREEDMAN

- -

Between:

NEIL MARTIN

Claimant/Respondent

- and –

IAN COOPER

Defendant/Appellant

- -
- -

Ms Cristin Toman (instructed by **Watkins & Gunn**) for the **Claimant/Respondent**
Ms. Eleanor d'Arcy (instructed by **Harrison Drury & Co**) for the **Defendant/Appellant**

Handed down in draft: 10 December 2024
Hearing date: 5 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 18 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal with a limited permission against an order made by HH Judge Dodd ("the Judge") on 29 June 2023. It is a dispute between two neighbouring landowners. The Appellant is the freehold owner of 1 Gleaston Lane, Stainton with Adgerley, Barrow-in-Furness ("the No. 1 Property). The Respondent is the freehold owner of 2 Gleaston Lane, Stainton with Adgerley, Barrow-in-Furness ("the No. 2 Property). They have been neighbours for over 20 years. There is a long history of how their relations have worsened over is the years culminating in the events leading to this litigation.

2. The Respondent's pleaded claim has two aspects, namely:

   (1) an alleged nuisance from sewerage allegedly leaking and/or emanating from the No.1 Property;

   (2) an alleged nuisance arising from damage to the Respondent's garden wall as a result of activities by the Appellant on land falling within the No.1 Property.

3. The Respondent sought mandatory injunctions against the Appellant:

   (1) to prevent sewage leaking from the Appellant's septic tank system into the garden of the No.2 Property and damages equal to the cost of remedying the contaminated land;
   (2) to effect remedial works in the nature of building a retaining wall at the boundary of the properties and/or damages for its cost.

4. It was the Respondent's case that:

   (1) the Appellant's septic tank system and drainage system were defective and caused wastewater to leak onto land falling within the title of the No.2 Property;

   (2) the Appellant damaged the Respondent's garden wall because of building up soil on land falling within the title of the Appellant's land and by building a garage against the garden wall.

5. It is not necessary to set out the full chronology and details of the dispute because of the limited scope of the appeal. It suffices to say that the Respondent's claim succeeded both as regards the sewage claim and the garden wall claim. The Judge ordered an injunction against the Appellant that he should not, until further order of the Court, permit the escape of sewage and/or foul effluent from the No. 1 Property onto the No.2 Property. Further, the Judge gave judgment for the Respondent in the sum of £16,560 made up of £13,800 plus VAT, being the cost of building a retaining wall between the properties.

II Limited grounds on which permission to appeal granted.

6. There were 24 grounds of appeal. The application for permission to appeal was dismissed on paper by Mr Justice Ritchie on 17 October 2023. The application was

reconsidered by Mr Justice Constable on 6 February 2024. He rejected most of the grounds and in particular grounds 1-11, 15, 16 and 20-24 subject to a qualification in respect of grounds 21-22.

7. The limited permission that has been granted is now contained in perfected grounds of appeal dated 19 February 2024. It is worth setting out those grounds in full.

> *"In relation to injunctive relief concerning the first aspect [the sewage claim]*
>
> 1. *The learned judge was wrong and/or he erred in law when he rejected the equitable defence of laches in respect of the final injunctive relief sought by the Claimant/Respondent. Injunctive relief should have been refused because the Claimant/Respondent had not acted quickly in bringing his Claim to Court.*
>
> 2. *In respect of the equitable defence of laches, the learned judge was wrong and/or he erred in law when he found that there was no prejudice to the Defendant/Appellant as a result of the Claimant/Respondent's delay in issuing his Claim.*
>
> *In relation to damages concerning the second aspect [the garden wall claim]*
>
> 3. *The learned judge did not consider, or make sufficient findings of fact, as to when the damage requiring rebuilding of the [garden wall] took place.*
>
> 4. *The learned judge was wrong and/or he erred in law when he failed to consider that any damage to the [garden wall] between 2011 and 2013 would not be actionable.*
>
> 5. *The learned judge did not consider, or failed to make sufficient findings of fact, as to whether, if by 2013, the damage the [garden wall] was such as to require re-building or repair to the same extent as is presently the case, no further loss was caused by any continuing nuisance."*

8. In short, the position of the Defendant/Appellant is that although he has not been granted permission in respect of many of his grounds, the limited permission should lead to the reversal of the judgment and the dismissal of the claims. That would be because the equitable defence of laches as regards the sewage claim should lead to the refusal of the injunction and therefore the reversal of the order made by the Judge. Further, the damages claim in respect of the garden wall should be reversed because the damage had occurred more than six years prior to the issue of the claim and was therefore statute barred.

III Injunctive relief in respect of sewage escape

9. The Judge analysed the defence of laches which is the remaining part of the appeal against the injunction ordered. He said the following in his judgment at paras. 83-88:

> *"83. Ms D'Arcy's submissions extend to another point, which is the defence of laches, and she quite properly refers me to the judgment of Lord Chancellor Selborne in Lindsay Petroleum Company v Hurd; the basic principle is that it is an equitable principle, it relates in this case just to this remedy:*
>
> > *"The principle of Laches requires that a claimant seeking an equitable remedy must come to court quickly once he knows that his rights are being infringed´" and 'quickly' in this case, says Ms D'Arcy, cannot encompass a delay from October 2012, when the Defendant's new system went in, until August 2019, when the claimant issued. The most famous passage in Lord Selborne's judgment is as follows:*
> >
> > *"[3]Now the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material.*
> >
> > *But in every case if an argument against relief which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.´*
>
> *84. In this case there is nothing equivalent to a waiver. What happened was that the claimant complained at the end of 2012. Thereafter, in 2013 and 2014, he tried to pursue the route of enforcement via the Local Authority's Environmental Health Department. Every now and again there would be a visit, a test, or an observation; these were negative in 2014 and 2015. There was some tentative support for the claimant's complaints in 2016, with that letter to the defendant which*

noted the escape of waste water onto a neighbour's property. After that the claimant might have expected some action to be taken by the defendant: it was being required of him; in fact, there was none.

85. The letter before action was sent on 19 June 2018. It therefore seems to me that after 2012 the claimant contends that there is a continuing problem but seeks to use the route of the Local Authority, as he did successfully in the years prior to 2012. That appears to produce no results, but then, perhaps surprisingly, it did produce a result in 2016. There then followed, I suppose, a period during which the claimant might reasonably expect the defendant to do something, and then did not.

86. There is, in my judgment, unexplained delay in 2017 and 2018.

87. So the gap between 2012 and 2019 appears to be explained in the following ways: down to 2016 in seeking to use the Local Authority to enforce a proper disposal of foul waste water; after 2016, a period of perhaps up to a year, expecting the defendant would do something about it, but then from 2017 to 2018, until a letter before action there is unexplained delay, and then some delay (but not unexplained) until the issue of proceedings in 2019.

88. I look at the length of actual delay; in my judgment, in that context it is not great. The defendant did not say, and it is not being said on his behalf, he thought the whole thing had lapsed and the claimant did not mind anymore. There was no particular prejudice contended for; the closest one got to, I think, was that delay would inevitably have some effect upon the defendant's ability to recollect."

(a) The submissions of the Appellant

10. The submissions of the Appellant can be summarised as follows:

(1) In respect of laches, there was a delay from 2010 to the commencement of proceedings in 2019, which was wrongly characterised by the Judge as "not great". The delay then became compounded by the delay before the case came to trial in 2023. If there had not been the original delay, the case would or might have been dealt with before the pandemic and the consequent procedural delays. This was characterised by Counsel for the Appellant as a 'massive' delay that by itself, even without prejudice, is sufficient to found a defence of laches.

(2) The Judge failed to give any or any sufficient weight to the prejudice resulting from the delay. This included evidential prejudice in having to adduce oral non-documented evidence of where a trench was laid more than 10 years after the event, which evidence was inevitably stale and unreliable due to the delay.

(3) Although this was not a case of waiver, there was acquiescence in the nuisance by the delay leading to a point in time well in advance of the commencement of the proceedings when there was no continuation of the effluence of sewage.

(4) There was no or no sufficient counter-balancing prejudice being suffered by the Respondent because there was no evidence of continuing effluence of sewage.

(5) It was therefore unjust in all the circumstances for the Judge not to find that laches was a bar against the award of an injunction.

(6) The Judge misstated the law, and had he stated it correctly, he would have made the above findings. In any event, even if he did not err in the statement of the law, he did not apply the law correctly on the facts.

11. As regards the law in respect of laches, it was submitted that it did not suffice to quote Lord Selborne LC in *Lindsay Petroleum Company v Hurd* [1873] 5 AC 221. The Judge should have identified the following:

(1) In certain cases, delay by itself could be so great that even without prejudice, sometimes referred to as detrimental reliance, it could found a defence of laches. In this regard, reference was made to the following:

(i) *Mills v Partridge* [2020] EWHC 2171 (Ch) at [117] where HH Judge Simon Barker QC said that the passage of time was relevant, but without more, even lengthy delay was not sufficient to defeat an equitable relief, and some form of detrimental reliance was usually an essential ingredient of laches, referring to Lord Neuberger in *Fisher v Brooker* [2009] UKHL 41 at [64];

(ii) *P & O Nedlloyd B.V. v Arab Metals and others* [2006] EWCA Civ 1717 in which Moore-Bick LJ stated at [61] that he would not wish to rule out the possibility of a very long period of delay making it inequitable for a claim to proceed even without evidence of a party or others altering their position in the meantime.

(2) It was possible to have a defence of laches based on unjustified delay coupled with an adverse effect of some kind on the defendant or a third party even when the claim was brought within the limitation period: see dictum to this effect by Moore-Bick LJ in *P & O Nedlloyd* at [61]. It was difficult to think that the laches could be based on delay without adverse consequences for a defendant or a third party during the currency of a limitation period: see *P & O Nedlloyd* at [56] and [61].

(b) The Respondent's submissions

12. The Respondent's case was as follows:

(1) The Judge had properly stated the law, in particular, identifying that there were a number of factors in the balance in the ultimate consideration of whether it

was unjust in the circumstances to seek an injunction, bearing in mind the delay and the prejudice (if any);

(2) This was a case where the Judge properly considered the length of the delay. Even if there was delay, the Judge was right to separate delay which could be explained from delay which was not explained. The period of delay of 2017 and 2018 was not long in context.

(3) The Judge identified prejudice: he said that there was no particular prejudice contended for, and the closest one got to it was that delay would inevitably have some effect upon the Appellant's ability to recollect: see the judgement at [88].

(4) Such prejudice was not particularly serious in that even without delay, there would have been serious difficulties of recollection where there was oral undocumented evidence about where trenches were laid.

(5) The Judge was entitled to have regard to the prejudice to the Respondent in the event that an injunction was not granted of the risk of further effluence of sewage and to balance that against any prejudice caused to the Appellant.

(c) Discussion

13. In my judgment, the Judge was correct in his statement of the law. He rightly took the law from the oft cited passage of Lord Selborne LC in *Lindsay Petroleum Company v Hurd.* It was not necessary to add the citations referred to above. They referred to highly unusual scenarios which were not directly relevant to the instant case, and which before it was not necessary for purpose of the judgment: their omission did not undermine the analysis of the Judge.

14. The Judge was entitled to conclude on the facts that the delay was not great by contrast with cases where the delays had been much longer. He considered carefully the explanations for delay. He was entitled to contrast delay for which there was an explanation with periods where there was no explanation. In the above cited case of *P&O Nedlloyd* at [61], Moore-Bick LJ used the expression of "unjustified delay", which itself supports a distinction between explained and unexplained delay. In any event, the Judge was entitled to conclude that delay of this order by itself did not justify the refusal of equitable relief.

15. Contrary to the revised grounds of appeal, the Judge did take into account prejudice in the nature of dimming of recollections, albeit that there was no particular prejudice such as the death of a witness or the loss of documents. The prejudice was not particularly serious in that the evidence of oral recollection of the laying of trenches was likely to be dim within a relatively short period after they had been laid.

16. There was a danger in the course of the oral submissions on behalf of the Appellant of using the prejudice submission to rely upon the challenge of the factual case about the sewage which had been rejected by the dismissal of the many permission grounds 1 – 10. Mr Justice Constable stated at [4-5] of his Reasons for his Order: *"Although couched in the alternative as errors in law, as Ms D'Arcy fairly accepted, grounds 1-6, 8 and 9 are all assertions in substance that the factual findings of the judge were wrong and that the judge failed to weigh the evidence properly to such an extent that his conclusion was a conclusion that no reasonable judge could have arrived at…. In light of the proper approach to be adopted by appellate courts with regard to the factual*

decision making of a trial judge, I conclude that there is no reasonable prospect of success in establishing that the critical factual finding relating to the sewage nuisance claim, namely that there was a continuing nuisance emanating from the Appellant's land, was not open to him on the evidence."

17. There were times in the oral submissions when these matters were sought to be revived through the lens of prejudice within the laches defence. That was not available to the Appellant. The highest that the case could be put was that the Judge did not give adequate weight to evidential prejudice due to delay, but for the reasons given, this point was recognised and rightly not given much weight. In the case of the evidence of the Appellant, the Judge's criticisms of his evidence went beyond matters which could be explained by the difficulties of time. They extended to inconsistencies in the nature of recalling matters for the first time in 2023 which he did not recall in 2020: see the Judgment at [27-30]. The Judge could not accept such evidence, referring to his inconsistencies as being so striking that he had to treat his evidence with considerable caution: see the Judgment at [35]. He preferred the evidence of the Respondent where it conflicted with the Appellant's evidence, save where he indicated otherwise. All of this reduces the impact of the weight of any evidential prejudice.

18. In my judgment, the Judge made a proper balancing of factors in line with the passage of Lord Selborne LC. The balancing of factors included balancing any non-particular evidential prejudice with the prejudice to the Respondent of being without a remedy to abate the nuisance. As the Judge said at [89], *"taking all these factors together, it does not strike me, I am afraid, as at all unjust to forbid the defendant to allow a nuisance in the way that has been described to issue from his land onto the claimants."*

19. For the reasons which he gave, cited at length above, the Judge came to a correct conclusion or to a conclusion which was open to him on the evidence that it was not unjust to award an injunction to the Respondent, and that the defence of laches should fail. The deference of the appellate courts to the findings of fact of a court at first instance properly using its advantage of hearing the evidence apply also to evaluations from those facts if ones which were properly available to the Judge and not wrong. As Lewison LJ stated, citing a whole line of authority, in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]: *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."*

20. For these reasons, and for the reasons advanced in the Respondent's submissions, the first and second grounds of the modified grounds of appeal must be dismissed.

IV Damages in respect of the remedial expenditure in respect of the erection of a retaining wall

21. An issue before the Court on the appeal is whether the Judge was able to make an award of a sum of £13,800 plus VAT in respect of the remedial expenditure relating in respect of the erection of a retaining wall or whether he should have found that there was no basis for damages. This was because there were procedural bars to a claim for damages including limitation of actions.

22. The starting point is to set out the Judge's reasoning in respect of the garden wall.

> *"69. The wall I find was erected on the claimant's side of the boundary. I find that on the basis of the claimant's evidence, which is corroborated in this case by the report of the single joint expert. There is also some support for that from the surrounding circumstances, which are that this wall went round the claimant's property, not round the defendant's. I find that ownership of the wall was never discussed between the parties because it was obvious; in the circumstances it was obviously the claimant's wall.*
>
> *70. As to the claimant's ground levels around his house (one can still see that on site) but not right up to the wall: that assertion is corroborated to some extent by the contemporaneous photograph which of course shows work in progress.*
>
> *....*
>
> *72. I find that the defendant did, however, raise the level of the ground on his side. Happily, as we can now see, this is somewhat reduced along the length of the defendant's side of the wall. There is what appears to be a dip, or a trench, on the defendant's side of this wall. This I take from the report of the single joint expert corroborating the claimant's evidence. I find the wall is subject to movement caused by the defendant raising the level of his land and by erecting his garage with footings above the level of the wall footings, and will be unstable, because of this, in the medium to long term; this I take from the report of the single joint expert. The single joint expert's assertion that the garage footings are above the level of the wall footings was denied by the defendant, but once again I accept the report of the single joint expert that the position was at least apparently visible on site in the trial holes which had been left by the expert.*
>
> *73. I find that this is a continuing state of affairs. This is not additional loading imposed as a one-off, the loading has been in place since the level of the ground was raised and the garage footings and the garage built, and that continues, it is clear, and the result is medium- and long-term instability.*
>
> ....
>
> *75. I come now to remedies. Dealing first with the claim in respect of the wall; it is the claimant's wall, as I have found, it has been damaged by acts of the defendant, and that is a continuing state of affairs. At the start of this trial counsel for the claimant indicated that for reasons which seemed, and still seem to me to be sensible, that it was a claim for damages only rather than any sort of injunction to compel the defendant to do works to the rule, and the quantum of those damages I have concluded is £13,800 plus VAT".*

23. As is clear from the above, the Judge referred to the 'state of affairs' created by the Appellant as 'continuing'. The loading continued to be in place since the level of the ground was raised and the garage footings and the garage build resulted in instability in the medium-term to long-term. It is important to differentiate between two types of wall. That was the original garden wall built and re-built now many years ago. That was described in the single expert's report as *"present for aesthetic purposes only"*: in November 2021, the single joint expert found it to be leaning slightly *"up to 17mm over a height of 800mm"*. That was not a retaining wall, and it was never constructed with that purpose in mind: see answers 2 - 4 of para. 4.2 of the report. Insofar as that wall was damaged, the claim is not for the restoration of that garden wall. It is a claim that there has been a continuing nuisance requiring the erection of a retaining wall. The report of the single joint expert was quoted at para. 60 of the Judgment. It stated that there has been rotational movement of the garden wall which is leaning slightly. It was stated that the garden wall was not built to support the other structures such as the build-up of soil and the garage footings.

24. This is clear from the particulars of claim. The case is pleaded as follows:

> *"19. In 2003, with the consent of the defendant, the claimant replaced the existing wall between the two properties and erected a new wall within the title to the claimant's property ("the Garden Wall").*
>
> *20. Following construction of the garden wall, the defendant began to build up the soil level on his side of the wall. In 2011, the defendant further raised his garden level by 900 millimetres against the claimant's garden wall and constructed a garage wall abutting the wall. The garden wall was not constructed as a retaining wall. There is no system to allow water to discharge from the retained soil and the wall was not designed for lateral loadings.*
>
> *21. As a result of the infill of soil and the construction of a garage wall, the garden wall:*
>
> > *(1) has displaced severely in a horizontal direction;*
> >
> > *(2) is structurally compromised and fails to serve its original purpose and is at risk of collapse; and*
> >
> > *(3) comprises a hazard to the claimant, his invitees and licensees.*
>
> *22. The actions of the defendant constitute a nuisance.*
>
> *23. Alternatively, the Defendant owes the Claimed to duty not to do anything on their land that cause (sic) damage to the Garden Wall. The actions of the Defendant in compromising the stability of the wall constitute a breach of said duty.*
>
> *24. By reason of the matters aforesaid, the claimant has suffered loss.*

PARTICULARS OF SPECIAL DAMAGE

(a) The garden wall has displaced in a horizontal direction;

(b) large areas of stone have become loose along its full length;

(c) a large crack has appeared between the dense block skin of masonry and the stone facing on top of the wall;

(d) the wall is failing due to constant lateral loading from the soil banked up against the wall;

(e) remedial work is required to rebuild the garden wall as a retaining structure;

(f) the estimated cost of repair is £9000 plus VAT.

25 The claimant seeks:

(i) an injunction requiring the defendant to effect remedial work to the garden wall;

(ii) alternatively, damages in lieu representing the cost of reinstating the wall as a retaining wall (estimated at £9000 plus VAT).

And the claimant claims:

(1) an injunction or damages in lieu;

(2) an injunction;

(3) damages;

(4) costs."

25. The Respondent has drawn attention to the following dates:

(1) The Respondent's evidence at para. 24 of his witness statement was that he first noticed cracks in September 2014.

(2) It may have been before that in time because he commissioned an engineer to report, namely M & P Gadsden, who inspected the property on 1 August 2014. The engineer's report is dated 28 August 2014. It stated that the wall was not designed as a retaining wall and was not built to support the fill material. The wall had rotated and caused damage including loose stone facings, cracking between the block and stone as well as leaning and bellying. The garage appeared to have potentially undermined or damaged the foundation to the garden wall. The boundary wall was *"progressively failing"* and *"could become hazardous if it continues."*

(3) The recommendation of the engineer's report was that *"the wall should be re-built either as a designed retaining structure if the levels are to be maintained on the side of No.1 Gleaston Lane. Alternatively, it should be replaced in a similar fashion and removing the fill. An agreement should be reached to incorporate the garage foundation with the wall foundation."*

(4) There were photographs taken by Bleasdale Ward, engineers in January 2015.

26. On 6 March 2020, Rydal Engineering reported that the condition of the garden wall had deteriorated since 2015 (page 1 of the report under the heading *"further deterioration of the wall"*).

(a) The Appellant's submissions

27. In summary, the Appellant's submissions are as follows:

(1) The Respondent is not entitled to damages in lieu of an injunction because he abandoned the claim for an injunction. That is recited in the third sentence of paragraph 75 of the judgment quoted above, namely that the Respondent indicated that it was a claim for damages only rather than any injunction.

(2) The Respondent has not made a claim for damages at common law, and therefore does not have any claim for damages which remains.

(3) If and insofar as there is a claim for damages at common law, the Particulars of Claim show that the damage to the garden wall was in 2011. Even although there is a claim for continuing nuisance, the damage to the garden wall must have occurred more than six years prior to the commencement of the action in 2019. It is therefore statute barred as a result of the operation of section 2 of the Limitation Act 1980 which provides that "*an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

(4) The fact that there was a continuing nuisance does not allow a claimant to claim for past damage caused by the continuing nuisance which occurred more than six years prior to the commencement of the action. The case of *Jalla v Shell International Trading and Shipping Co Limited* [2023] UKSC 16 (*"Jalla"*) is authority for the following proposition at [32] per Lord Burrows namely: *"The second point is that it follows logically from the concept of a continuing cause of action that, if the limitation period is one of six years from the accrual of the cause of action, damages at common law for a continuing nuisance cannot be recovered for causes of action (ie for past occurrences of the continuing nuisance) that accrued more than six years before the claim was commenced: see generally, eg, Cartledge v E Jopling & Sons Ltd [1962] 1 QB 189, 207 (per Pearson LJ) (decision affirmed [1963] AC 758); Law Commission Consultation Paper No 151, Limitation of Actions (1998) paras 3.24 - 3.28."*

(5) Once a limitation defence has been raised, it is for the claimant to prove that they are not statute barred. The Respondent failed to prove that his damage was suffered at a later time then 2011 or, at any rate, within six years of the

commencement of the proceedings. The matters identified above do not prove that this was the case.

(6) Notwithstanding the finding of the judge that there was a continuing nuisance, in the absence of specific dates or times when loss was suffered and having regard to the plea in the particulars of claim that the nuisance was created in 2011, the Judge could not safely find that damage occurred within the six years prior to the issue of the claim. Accordingly, he erred in not dismissing the claim in respect of the garden wall.

(b) The Respondent's submissions

28. In summary the Respondent's submissions were as follows:

(1) There was no abandonment of the claim for damages in lieu of an injunction. In any event, this was not an argument for which permission to appeal was granted. It did not follow from the abandonment of the injunction that the claim for damages in lieu of an injunction was abandoned. The wording of the third sentence of para. 75 of the Judgment does not indicate to the contrary.

(2) The third head of the prayer for relief comprised a claim for damages which in context was damages at common law.

(3) The judge made a finding about a continuing nuisance. In order to abate the nuisance, it was necessary to build a retaining wall. That was expressly stated in the Particulars of Claim at [24(e)].

29. This was not a claim for past damage in the sense referred to in Jalla at [32]. The damages were required to prevent future instability in the medium to long term and this could be provided by equitable damages. This was referred to by Lord Burrows in Jalla at [29] who said the following:

> *"The concept of a continuing nuisance also has the consequence that, at common law, damages are given for the causes of action that have so far accrued and cannot be given for future causes of action which have not yet accrued: see, eg, Midland Bank plc v Bardgrove Property Services Ltd (1992) 65 P & CR 153. Where the nuisance continues, the claimant must therefore periodically come back to court to seek damages at common law. In contrast, damages for future causes of action can be given as equitable damages in substitution for (in lieu of) an injunction under section 50 of the Senior Courts Act 1981 (the successor to Lord Cairns' Act): see, generally, Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851; Hooper v Rogers [1975] Ch 43; Jaggard v Sawyer [1995] 1 WLR 269."*

30. At the heart of the response are the following submissions in the skeleton argument of the Respondent for trial at [30-31].

> *"30. There is a distinction between damage for past injury, and remedial expenditure to prevent future injury. Where there is a continuing nuisance of which the defendant knew or ought to have known, reasonable remedial expenditure may be recovered by the owner who has had to incur it: Delaware Mansions Ltd v Westminster City Council [2002] AC 321 at [38]*
>
> *31. The claim in relation to the wall is not statute barred because:*
>
> > *a. The nuisance here is ground built up against the wall. The defendant knows of its existence has had ample time to take steps to bring it to an end. A fresh cause of action accrues every day whilst the defendant fails to take steps to bring the action to an end.*
> >
> > *b. The Claimant claims remedial expenditure to rebuild the wall as a retaining wall so as to prevent future damage."*

(c) Discussion

(i) No abandonment of claim for damages in lieu of an injunction

31. There is an issue between the parties as to whether there was an abandonment of the claim for damages in lieu of an injunction. Even if permission had been granted to appeal on this ground, I have not been persuaded that there was any such abandonment. The Court was not shown a part of a transcript or a note of what words were said to amount to an abandonment. The abandonment was denied by Counsel for the Respondent. As the matter was being explained to the Court, it sounded as if the abandonment of the injunction was interpreted on behalf of the Appellant as an abandonment of the claim for damages in lieu of an injunction. There is no reason why that follows.

32. It is in the very nature of damages in lieu of an injunction that it arises where there was jurisdiction to grant a claimant an injunction: see section 50 of the Senior Courts Act 1981, derived from section 2 of the Chancery Amendment Act 1858, commonly known as Lord Cairns' Act. As Counsel reminded the Court, the application of section 50 of the Senior Courts Act 1981 in County Court proceedings occurs by reason of section 38 of the County Court Act 1984 which enables such an order in the County Court. This power to have damages instead of an injunction especially arises where the damages are for future or repeated or continuing wrongs and therefore extend beyond damages to which a claimant may be entitled at law.

33. In the instant case, the claim included a claim for an injunction, alternatively for damages in lieu or an injunction. The decision to proceed with a claim for an injunction without more did not mean an abandonment of the claim for damages in lieu of an injunction. Alongside a possible claim for damages at common law, it remained as a head of relief. Abandonment usually depends upon a clear and unequivocal representation by words or by conduct. In this case, no express words are relied upon, nor was there any clear or unequivocal conduct amounting to the abandonment of the claim for damages in lieu of an injunction.

34. Even if it had been the case that damages in lieu of an injunction had been abandoned, then there was still a damages claim. In context, although not spelt out, that appears to be a reference to damages at common law. I reject the submission that it would have been necessary to have spelt that out. The claim is sufficiently broad to refer to a damages claim at common law.

35. The suggestion that a claim for damages fell away is based on an artificial construction of the pleading in circumstances where enough was done to alert the reader of the two bases of the claim for damages for nuisance. The way or the primary way in which the damages claim was articulated on behalf of the Respondent was by reference to damages in lieu of an injunction.

~~36.~~ Staying with the pleadings, it was submitted on behalf of the Appellant that the Respondent only referred to past damage because of the time honoured expression in the opening of para. 24 of the Particulars of Claim, namely: *"By reason of the matters aforesaid, the Claimant* *has suffered loss* (emphasis added).". It is said that this is referring to damage which has occurred. This is too literal a reading. The particulars refer to *"(d) the wall is failing due to constant lateral loading from the soil banked up against the wall".* That is a reference to the continuing nature of the nuisance and how the loss is continuing. The particulars also refer to *"(e) remedial work is required to rebuild the garden wall as a retaining structure".* That is a reference to the need not for a garden wall to replace a damaged garden wall, but for the creation of a retaining wall. That is enough to refer to continuing damage or the need to prevent future damage.

(ii) Continuing state of affairs caused by lateral loading of soil and the garage

37. It is important to distinguish between a case of a one-off loss and a continuing state of affairs thereafter within the six year period prior to the issue of proceedings with the danger of medium to long-term instability to a property unless addressed by remedial action.

38. The Judge rightly characterised the lateral loading from the soil and the garage in the No.1 Property as a continuing nuisance. Following the limited permission, there is no challenge against the finding of the continuing nuisance. The submission is that the Respondent did not prove that the loss claimed for was not past loss suffered in 2011 or in 2011-2013 such that it was too late to claim damages in 2019 by the instant claim.

39. If the garden wall was damaged in 2011 or in 2011-2013, that is not the end of the time when the loss arose. This is due to the law of continuing nuisance. Within the six-year period prior to the commencement of proceedings, there was on the finding of the Judge, which is not challenged, a continuing nuisance in the nature of the continuing lateral loading in the No.1 Property. The effect of the continuing nuisance was that a retaining wall was required to support the No.1 Property from the medium to long-term consequences of the continuing lateral loading. The question which then arises is whether the Judge should have found that the loss had arisen more than six years prior to the commencement of proceedings.

(iii) The law of a continuing nuisance and the cause of action on a continuing basis

40. It is necessary to consider more carefully the case of *Jalla.* At [26], Lord Burrows said the following:

> *"In principle, and in general terms, a continuing nuisance is one where, outside the claimant's land and usually on the defendant's land, there is repeated activity by the defendant or an ongoing state of affairs for which the defendant is responsible which causes continuing undue interference with the use and enjoyment of the claimant's land. For a continuing nuisance, the interference may be similar on each occasion but the important point is that it is continuing day after day or on another regular basis. So, for example, smoke, noise, smells, vibrations and, as in Fearn, overlooking are continuing nuisances where those interferences are continuing on a regular basis. The cause of action therefore accrues afresh on a continuing basis."*

41. At [27], Lord Burrows quoted from *Hole v Chard Union* [1894] 1 Ch 293 at 296 where Lindley LJ said of a continuing cause of action *that "If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on de die in diem."*

42. The expression used in *Jalla* of *"an ongoing state of affairs"* is instructive. The example of a continuing nuisance given at [30] is that of tree roots: see *Delaware Mansions Limited v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321. In a tree roots case, there is an ongoing state of affairs outside the claimant's land constituted by a tree and its roots which causes continuing undue interference with the claimant's land by extraction of water through its encroaching roots. The cause of action for the tort of private nuisance therefore accrues afresh from day to day. The effect of a continuing cause of action was that the person who had purchased the land in 1990 after cracking had appeared in 1989-1990 was able to sue in nuisance for all damage both before and after the purchase up to the time when the nuisance was brought to an end in 1992 on the basis of a continuing cause of action.

43. It follows from the concept of a continuing cause of action that if the limitation period is one of six years from the accrual of the cause of action, damages at common law cannot be recovered for past occurrences of the continuing nuisance. That had application in *Jalla* where there was an oil spill on 20 December 2011 where the leaking was stopped after about six hours. It was pointed out in that case that the six years would run from the date of the isolated escape of water and that a fresh cause of action would not continue to accrue for so long as the land remained flooded and indefinitely until the land was restored. That would be to convert a private nuisance into a failure by a defendant to restore the claimant's land.

44. There was no such right. The damage occurred at the point of the escape. There was no repeated activity by the defendant or ongoing state of affairs for which the defendant was responsible that was continuing. The leak was a one off event or an isolated escape.

45. By contrast, in the instant case, the Judge found a continuing nuisance: see paras. 72 and 73 of the Judgment as quoted above. There is no challenge by the Appellant against that. It was in the nature of *"a continuing state of affairs"* for which the Appellant was responsible. It was not a one-off additional loading, but the loading in place had been in place since the level of the ground was raised and the garage footings and garage had been built. As the Judge said, *"that continues, it is clear, and the result is medium and long-term instability".*

46. This represents a continuing interference with the use and enjoyment of the Respondent's land. The remedy required is not to rectify any loss of the garden wall, for example by building an equivalent garden wall, but to shore up the land of the Respondent by the erection of a retaining wall not because of the loss of a garden wall, but to prevent the consequences of future instability caused by the build-up of soil and the garage. That kind of loss of remedial expenditure to prevent future injury is a recognised head of loss in a continuing nuisance case: see *Delaware Mansions* at [38].

47. The claim is for damages in lieu of an injunction in the nature of damages comprising the future expenditure to bring to an end the cause of the continuing instability of the Respondent's land consequent upon the continuing nuisance. This is what was pleaded at para. 24(d) and para. 24(e) of the Particulars of Claim that the remedial expenditure was in the erection of a retaining structure due to constant lateral loading from the soil banked up against the garden wall. The remedial expenditure of the retaining wall arose on a continuing basis without a limitation period.

48. The Judge said that the reasons for not seeking an injunction seemed sensible: see the Judgment at para. 75. It is to be inferred that this would include not requiring the work to be carried out by a neighbour in the context of a dispute between the parties, and still less in circumstances where the retaining wall was on the land of the Respondent. There would be problems of definition of the works and of problems in the event that there was a dispute as to whether the works had been carried out.

49. The Court was referred to the kind of case where the Court would provide damages in lieu of an injunction as set out in the case of *Shelfer v City of London Electrical Lighting Co. Ltd.* [1895] 1 Ch.287, especially per A L Smith LJ at 322-323 where it was stated that a good working rule for ordering damages in lieu where a small sum of money, capable of being estimated may be adequate, and where an injunction may be oppressive to the defendant. It may be that these four requirements are not to be strictly applied in all cases, and that in some cases the court's power to award damages in lieu of an injunction involves a classic fact-sensitive exercise of discretion which should not be fettered: see *Coventry v Lawrence* [2014] UKSC 13, especially at [120]. As Lord Burrows in *Jalla* said of passages in *Coventry v Lawrence* at [119-124] and [161], there may be a greater willingness than in the past to refuse an injunction for a continuing nuisance and to award damages instead.

50. The concern of the court in a case like *Shelfer* is among other things that a party should not be able to buy themselves out of a nuisance by an offer of damages. That is not to say that the difficulties of an injunction cannot be recognised by a claimant who might then in effect settle for damages instead of an injunction as a sensible and commercial way to abate the nuisance. That is what has occurred in the instant case.

51. This answers the third ground of appeal because the remedial works were required to bring the nuisance to an end. That involved the building of a retaining wall. The damages in lieu of an injunction were to prevent future damage, in the nature of medium to long-term instability and were not about past loss.

(iv) The failure to specify the date when there was damage to the garden wall

52. In the decision of Constable J providing limited permission to appeal, he stated at para. 6 that:

> *"... damages at common law can only be recovered for cause of action (i.e. for past occurrences of a continuing nuisance that accrued more than [6] years before the claim was commenced (as recently restated in Jalla v Shell International Trading [2023] UKSC 16). It is reasonably arguable that the Judge did not consider, or make sufficient findings of fact, relating to the date when the damage requiring rebuilding of the wall took place. The Appellant's building works said to have had the effect of damaging the wall took place in 2011. Any damage caused between 2011 and 2013 to the wall would not, it is reasonably arguable, be actionable. If by 2013 the damage was such so as to require rebuilding or repair to the same extent as is presently the case, it is arguable that no further loss was caused by any continuing nuisance."*

53. It is said that the Judge failed to consider or make sufficient findings of fact relating to the date when the damage requiring rebuilding of the wall took place. The law in respect of continuing nuisances is that damages at common law cannot be recovered for past occurrences of the continuing nuisance that accrued more than six years before the claim was commenced: see Jalla at [32] quoted above.

54. In addition to the judgment which had found a continuing state of affairs and the retaining wall being required to prevent medium to future instability, attention is required to the Judge's remarks when considering the oral application for permission to appeal. He said the following at [104] – [105]:

> "*[104]... the defendant says that I was wrong to find that the damage to the wall had happened over the last six years and therefore this part of the claim is within limitation. In my judgment the answer to the defendant's limitation point here was that the defendant's actions in building up his garden and then building a garage where he did and in the way he did was there after a continuing state of affairs, and that means that there is a continuing nuisance and that therefore the limitation defence is not made out.*
>
> *[105] The point about when damage occurred was not dealt with during the trial. The understanding that I have gained from the evidence is that it is a state of affairs, a continuing process. When exactly any one particular piece of damage occurs is not capable of precise analysis. Nonetheless, because of what has happened, including what has happened during the last six years, the wall had to be rebuilt and therefore the claimant succeeds on this point."*

55. In *Jalla*, the nuisance was a one-off event lasting a number of hours. It was not a continuing nuisance because there was continuing flooding which resulted from it. In the instant case, the Judge emphasised the continuing state of affairs, not in the sense of the loss continuing, but that the loadings of the soil and the garage were continuing to be a source of medium-term and long-term instability to the Respondent's property. Constable J recognised that but questioned whether the Judge had considered or made sufficient findings as to when the damage occurred, and in particular whether it, or a part of it, had occurred more than six years prior to the commencement of the action.

56. The submission of the Appellant is that the Respondent has been unable to show on the evidence the damage to the garden wall and/or the need for remedial action of the building of a retaining wall had already arisen more than 6 years prior to the commencement of the action. As a matter of law, it submits that once limitation is raised as a defence, the onus then shifts to a claimant to prove that the claim was commenced in time: see Clerk & Lindsell on Torts 24th Ed, para. 30-03; McGee on Limitation Periods 9th Ed. at paras. 21.015 -21.016. This is what has occurred in the instant case in that the Appellant has raised limitation.

57. The submission of the Appellant is that the Particulars of Claim pleads that the build-up on the Appellant's land occurred as a result of activities of the Appellant in 2011. It is therefore submitted that this must have been the time of the damage to the garden wall and that therefore the action was brought more than six years after the accrual of the cause of action. Alternatively, the submission is that the Respondent has failed to prove that the loss was not caused prior to six years before the commencement of the action, and that the Respondent, bearing the onus of proof, has failed to discharge the same.

58. The submission of the Respondent is that the nuisance in this case is the ground built up against the wall. The Appellant knew of its existence and had ample time to take steps to bring it to an end. A fresh cause of action accrued every day whilst the Appellant failed to take steps to bring the nuisance to an end. The claim is for remedial expenditure to build the wall as a retaining wall so as to prevent future damage: see the Respondent's skeleton argument for trial dated 16 June 2023 at para. 31.

59. Specifically for the appeal, the Respondent submits in its skeleton argument dated 30 October 2024 at para. 11 that *"the cost of abatement (remedial expenditure to prevent future injury) rather than damages for past injury. An owner who incurs remedial expenditure to prevent future injury can be [to] recover expenditure, irrespective of when the damage first occurred: see Delaware Mansions Ltd v Westminster City Council [2002] AC 321 at [38]; Abbahall v Smee [2002] EWCA Civ 1831; [2003] 1 WLR 1472."*

60. Assume for the purpose of this stage of the analysis only that the Respondent has been unable to show on the evidence the damage to the garden wall and/or the need for remedial action of the building of a retaining wall had already arisen more than 6 years prior to the commencement of the action. The Respondent submits that a failure or inability to show when there was a need for a retaining wall does not render the damages claim in respect of the wall statute barred because the claim is for a continuing nuisance based on "an ongoing state of affairs" for which the Appellant is responsible.

61. In my judgment, the continuing nuisance required a retaining wall to prevent medium to long-term instability of the Respondent's property. The cause of action continued afresh from day to day because of the ongoing state of affairs. On this basis, the cause of action in contrast to *Jalla* of the one-off water escape was not a one-off event in 2011 or more than six years prior to the commencement of proceedings. The critical finding

of the Judge to this effect was at [73] that the additional loading was not a one-off. The loading was in place since the level of the ground had been raised and the garage footings and the garage built. As noted above, the Judge found that "*that continues…and the result is medium and long-term instability".* He said that the point about when damage occurred was not dealt with during the trial because it was *"a state of affairs, a continuing process."* He said that the wall had to be rebuilt and the Respondent succeeded.

62. This amounts to what Lord Burrows described in *Jalla* at [26] as a continuing nuisance in the nature of an ongoing state of affairs for which the Appellant was responsible. In the instant case, the cause of action in nuisance therefore accrued afresh on a continuing basis, and this was not a claim for past damage or past occurrences of the continuing nuisance (the term used by Lord Burrows in *Jalla* at [32]). It is important to note that the relevant damage was the cost of building a retaining wall, which was required following the effect of the continuing pressure from the build-up of soil and the garage and was in order to avoid future loss by ending the medium-term or long-term instability of the property, that is to avoid future loss.

63. It is important to note that this is not a case about replacing the garden wall, built for aesthetic purposes, but for a retaining wall which had not previously been required. The purpose of a retaining wall was to bring to an end the medium-term or long-term instability of the property, that is to avoid future loss.

64. The evidence is not to the effect that this damage was past damage by the time of the commencement of the proceedings. Rather that the effect of the continuing nuisance was that there was the medium-term or long-term instability of the property. In those circumstances, applying similar reasoning like that of *Delaware Mansions* (which related not to the accrual of a cause of action but to whether the successor in title could sue for the continuing nuisance even if some of the damage had been suffered by the predecessor in title), the Respondent was entitled to sue in this case on the basis that it was not a claim for past damage, but to the cost of bringing to an end the continuing state of affairs and the prospect of future damage.

65. The build-up of the soil and the presence of the garage had given rise on a *"continuing state of affairs":* see the Judgment at [73]. It was not a one-off, but the loading in the level of the ground and the garage *"continues…and the result is medium- and long-term instability".* Not only was this a finding about a continuing state of affairs, it was a finding that it gave rise to future damage in the nature of instability in the future.

66. As regards remedy, the Judge said that for reasons which seemed sensible, it was a claim for damages only rather than any sort of injunction to compel the Appellant to do works: see the Judgment at [75]. The quantum of the damages was £13,800 plus VAT based on the most economical quote obtained by the Respondent: see the Judgment at [61]. The quotation dated 20 February 2020 was to take down and dispose of the existing wall and then to replace with a reinforced retaining wall.

67. In context, the reasoning was clear enough: hence the emphasis on the concept of a continuing state of affairs, a continuing nuisance of preventing medium-term to long-term instability. The reasoning could have been more expansive to explain why the Judge rejected the limitation case, but it can be sufficiently understood from the reasoning in the context of the arguments before the Court. It is to the following effect, namely:

(1) the claim was for damages in lieu of an injunction, which as noted above, is available for future damages, that is to say that damages which will or may arise

as a result of a defendant not taking steps which might occur in the event that an injunction had been ordered;

(2) in the instant case, the Appellant could have brought to an end the continuing state of affairs by the removal of the build-up of soil and the removal of the garage or the reinforcement of the foundations of the garage. Had this been done, the source of medium to long term instability would have been brought to an end, and there would have been no need for the retaining wall;

(3) when the Judge referred at [104] to *"a continuing state of affairs, and that there is a continuing nuisance and that therefore the limitation defence is not made out"*, this was a reference to the continuing need to build a retaining wall if the Appellant would persist in not removing the build-up of soil and the garage (or reinforcing the foundations of the garage);

(4) there has been an elision of the garden wall and the retaining wall in the Judgment and the submissions, but it is clear enough what is meant. The garden wall was there for aesthetic purposes only. It was not required at the time that it was built. It had stood for a number of years, but in 2014, it was discovered that it was subject to rotation and cracking due to the build-up of soil and the garage. The continuing failure on the part of the Appellant to remove the build-up of soil and the garage (or to reinforce the foundations of the garage) was the source of the continuing state of affairs. The creation of a retaining wall was to prevent future instability in lieu of the Appellant taking steps to abate the continuing nuisance.

68. It therefore follows, as the Judge said at [105] that the Judge found that there was not a limitation defence because *"..it is a state of affairs, a continuing process…because of what has happened, including what has happened during the last six years, the wall had to be rebuilt and therefore the claimant succeeds on this point."*

69. If, contrary to the foregoing, the Judge did not do enough to make findings about the date when the damage occurred, the question arises as to what should happen next in this County Court litigation. There are three possibilities to consider, namely:

(1) to order that the claim in respect of the wall aspect should be dismissed on the basis that the Respondent did not prove when his cause of action in nuisance accrued in the face of a limitation point;

(2) to order that the matter should be remitted to the County Court so as to clarify the judgment or to make findings to the extent that they were missing in the Judgment. A complication here is that neither party wanted this: the Appellant because it had lost faith in the Judge and the Respondent because the legal costs had spiralled out of proportion to the cost of the remedial works;

(3) for the appellate court to resolve any matters to the extent that they had not been resolved in the County Court. This would depend on whether there was sufficient evidence to make this determination.

70. If the conclusion cannot be gleaned from the judgment, there is sufficient material in the papers before the appellate court (which was also before the Judge) for the appellate court to resolve the matter. The result of this is that (a) there is no need to remit the

matter to the County Court; (b) there is sufficient evidence to determine the matter (if, contrary to the above, the matter was not already determined sufficiently, (c) the Respondent has been able to discharge the onus of proof. The next section of the judgment will be to examine the materials available to the County Court in connection with the accrual of the cause of action in nuisance bearing in mind the findings of a continuing nuisance and a continuing state of affairs.

71. It is evident from the matters set out above especially at para. 25 of this Judgment that as of August 2014, within 6 years of the commencement of the action, there were two possibilities mentioned expressly in the report of the consulting engineer at that time, M & P Gadsden. They were either (a) the removal of the build-up of soil and attending to the garage or (b) the building of a retaining wall. If the continuing nuisance had been abated by the Appellant, the cost of remedial expenditure in the nature of the cost of the retaining wall would not have been incurred. On the basis of the first option, the Appellant would have abated the continuing nuisance and the future damage in the nature of medium term to long term instability to the No. 2 Property would have been averted. This would have obviated the need for the remedial work of erecting a retaining wall, which was required in order to prevent future damage to the No.2 Property.

72. It followed that damages in lieu of an injunction was not about past damage, but was the way, on the Judge's findings, to avoid the medium to long-term consequences of the continuing nuisance without abatement by the Appellant. It therefore followed that the Respondent had proven that the damage in this case was not past damage incurred prior to the six year limitation period. The remedial expenditure of building a retaining wall is loss which was not past damage but has arisen in consequence of the continuing nuisance of the Appellant and to avert the future damage to the No. 2 Property.

73. There is an additional and very much secondary argument raised by the Respondent, namely that the damage to the garden wall did was not exist until within 6 years of the commencement of the action. The deemed service of the claim form was on 8 August 2019, but a copy of the claim form containing the date of issue is not in the bundle for the date of issue. The Respondent discovered cracks in the garden wall only in 2014 when he observed cracking to the garden wall for the first time and when he engaged M & P Gadsden who reported about damage to the wall and that it was likely to get worse. On 6 March 2020, Rydal Engineering reported that the condition of the wall had deteriorated since 2015. It is said that therefore the problem about the wall itself was only in 2014. Had it arisen earlier in the context of the existing concerns between the parties, the problem is likely to have been noticed earlier. Alternatively, the Respondent says that if there had already been a problem before the six year limitation period, it can be treated as small part of the damage because the damage was progressive over many years.

74. This argument may have to deal with the Judge's finding that the time when a particular piece of damage occurred was not capable of precise analysis (Judgment para. 105). In the event, it is not necessary for the Court to make a finding about whether on this basis the damage only came into being in 2014 or less than six years before the commencement of the action. The reason for this is that the claim is not to rectify the ornamental garden wall. In whatever condition it was, it had to be replaced by a retaining wall in order to prevent damage in medium to long term affecting the No.2 Property. This explains why the Judge did not need to ascertain when the garden wall first suffered damage or to ascertain what it was. His judgment rested on the nature of the continuing nuisance and the remedial work in the nature of the creation of a retaining wall which was, as set out above, to bring an end to the continuing nuisance and to prevent future damage.

(vi) Further objection of the Appellant to the damages claimed

75. It was submitted in argument on behalf of the Appellant that this was objectionable because (1) there was no analysis of whether this was the correct sum, but it was simply based on the limited evidence of an estimate for work (in particular, there was no evidence as to the conventional measure damages, namely diminution in value of the property due to the continuing nuisance: see *Coventry v Lawrence* [2014] UKSC 13 at [101]); and (2) there was no deduction for betterment.

76. This is not a ground for which permission to appeal has been obtained. There was no evidence of what the alleged betterment was in financial terms. In any event, it is not an answer because the Judge was satisfied on the evidence that he had heard that the measure of damages would be the cost of erecting the retaining wall. As already noted, where there is a continuing nuisance which a defendant knew or ought to have known, reasonable remedial expenditure may be recovered by the owner who has had to incur it: see *Delaware Mansions* at [38]. There was no reason to believe that the estimate was not reasonable, and no evidence to contrary effect was before the Court. The attempt in argument to draw assistance from the cost of building a swimming pool to specifications has no application (*Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344) because in the instant case, the remedial works were essential. There was also no reason to believe that the diminution in value of the property would not correspond to the amount required to do the essential works.

77. As regards betterment, it was not betterment to have a retaining wall in the sense that the retaining wall would not have been required but for the continuing nuisance. It was not a better garden wall: it was a new kind of wall which was required due to a continuing tort. Further, even if the garden wall had not yet suffered damage, the retaining wall instead of the garden wall would still have been required in order to deal with the instability resulting from the continuing nuisance. Where remedial works are made necessary because of a tortfeasor, and the party whose land is damaged has no alternative other than to incur the expenditure, the law will generally not reduce damages on account of a betterment (if there is one) which that party never sought: see McGregor on Damages 21st Ed. para. 2-009.8281.

78. It follows that the three grounds relating to the garden wall claim must fail. That was to the effect that the Judge did not deal with the fact that the damage arose in 2011 or in 2011-2013 or that there was no additional loss caused by any continuing nuisance. The answer is that the Judge made findings of fact that there was a continuing nuisance requiring a retaining wall to prevent future damage in the nature of medium to long-term instability of Property No.2. This was not therefore a claim for past damage suffered more than six years prior to the commencement of the action. It therefore follows that the second aspect of the appeal, namely the limitation point in relation to the remedial expenditure to bring to an end the continuing nuisance by building a retaining wall, is dismissed.

V Disposal

79. It follows that the grounds of appeal (for which permission to appeal was granted) are dismissed, and the judgment of the Judge is therefore upheld. The order will therefore be that the appeal is dismissed.

80. It remains to thank both Counsel for their respective skill and clarity in the presentation of the arguments and for the assistance which they have given to the Court.