



Neutral Citation Number: [2023] EWHC 1882 (KB)

County Court Case No: J10CL138
Appeal Ref: KA-2023-000008

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE ORDER OF
HHJ RAESIDE KC DATED 9 NOVEMBER 2022
(AMENDED ON 24 NOVEMBER 2022)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 July 2023

Before :

THE HONOURABLE MR JUSTICE MURRAY

Between :

GOODMANS AUTOS LIMITED

**Claimant/
Appellant**

- and -

(1) MAVERSTONE PROPERTIES LIMITED
(2) BYOOT DEVELOP LIMITED

**Defendants/
Respondents**

Mr David Mayall (instructed by **Thirsk Winton LLP**) for the **Appellant**
Mr Nicholas Isaac KC (instructed by **BWL Legal Ltd**) for the **Respondents**

Hearing date: 19 May 2023

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 21 July 2023 at 10:30 a.m.

Mr Justice Murray:

1. This is an appeal by the claimant in the proceedings below, Goodmans Autos Limited (“GAL”), against an order made by HHJ Raeside KC (“the Judge”) dated 9 November 2022 (amended on 24 November 2022) (“the Order”). On 28 October 2022, which was the last day of a five-day trial, the Judge gave his reasons for making the Order in a detailed *ex tempore* judgment (“the Judgment”).
2. GAL appeals on the basis that the Judge was wrong to dismiss its claim for:
 - i) damages for trespass to its premises by excavating approximately 6 inches of the GAL Site and removing concrete fence posts on its land; and
 - ii) for an injunction requiring the defendants in the proceedings below, Maverstone Properties Limited (“MPL”), and Byoot Develop Limited (“BDL”), to remedy the trespass to its premises caused by concrete poured for the foundations of a building erected by the defendants flowing over into the excavated space and therefore into the GAL Site.
3. The Judge refers to this part of the claim as the “foundations claim” in the Judgment. There is no appeal of the Judge’s decisions on other issues that were decided by the Judge in relation to what he terms in the Judgment the “accessway claim”, the “amended scaffolding claim”, and the “fence claim”.

Background

4. GAL is the registered leasehold owner of a site known as Land on the South-East side of Shenley Road, Borehamwood, registered title number HD 437764 (“the GAL Site”). It operates its business, namely, the repair, servicing, and testing of motor vehicles and related activities, from premises at the GAL Site.
5. MPL is the registered freehold owner and developer of the site known as Majestic House, 16-18 Shenley Road, Borehamwood WD6 1DL, registered title number 226952 (“the Majestic House Site”). The Majestic House Site is contiguous to the GAL Site.
6. MPL had secured planning permission from the local authority for the demolition of a building which was then on the Majestic House Site and the construction there of a four-storey detached building (“Majestic House”), intended for A1 retail use on the ground floor with residential units on the upper three floors, comprising 11 one-bedroom and three two-bedroom flats, and provision of a basement for commercial use. The demolition had occurred prior to the claim being issued.
7. BDL is a contractor engaged by MPL to carry out the development of the Majestic House Site.
8. During the course of the development of Majestic House, a fence on the GAL Site that had run along the line of the boundary with the Majestic House Site was taken down by JJ Waste, a sub-contractor for BDL, by agreement with GAL. In due course, a replacement fence was erected by GAL, although on GAL’s case it was forced to construct the fence further into its own site than it should have had to do, due to the

manner and extent of the excavation on the Majestic House Site, which GAL alleged had involved removing up to six inches (about 150 mm) of earth from the GAL Site.

9. On 10 December 2021, GAL issued its claim for trespass, damage, nuisance, and breach of statutory duty and for injunctive relief. Its original Particulars of Claim are dated 30 March 2022. By consent, GAL was permitted by HHJ Monty QC to amend its Particulars of Claim. The Amended Particulars of Claim are dated 5 May 2022 (“the APoC”).
10. On 27 April 2022, MPL and BDL filed their Defence to the claim.
11. In the Judgment at paragraphs 5 and 16, the Judge refers to an application by GAL made during the trial to re-amend the APoC. The Judge subsequently refers in the Judgment on a number of occasions to the “Re Amended Particulars of Claim”, rather than simply to the APoC, as well as to the Amended Defence, which is dated 26 October 2022. My understanding is that the amendments to the APoC and to the Defence deal with the aspect of the claim that concerned alleged trespassing by scaffolding on the building under construction on the Majestic House site, which does not form part of this appeal.
12. For the appeal hearing, I was given the trial core bundle, which includes the APoC and the Defence (not the Re-Amended Particulars of Claim or the Amended Defence). I was taken by counsel for each party only to those documents in relation to the pleading of matters concerning GAL’s trespass claim as far as it concerns the foundations of Majestic House. Therefore, I have assumed for the purposes of this appeal that there is no relevant difference between the APoC and the Re-Amended Particulars of Claim or between the Defence and the Amended Defence in relation to the matters raised on this appeal.

The pleadings

13. One of the issues in dispute is whether GAL properly pleaded the basis on which it now pursues this appeal. As the relevant pleadings in the APoC and the Defence are short and set out much of the relevant factual background, I set out the relevant passages. I have included the whole of each of the relevant paragraphs, even though some of the issues dealt with do not arise on this appeal, so that the key passages, discussed later in this judgment, can be seen in context.
14. The foundations claim is pleaded by GAL in the APoC at paragraphs 15-19 as follows:
 - “15. The Defendants excavated the Development Site [the Majestic House site] up to and beyond the boundary between the Claimant's premises and the Development Site. The Defendants removed approximately 6 inches of the Claimant's land including many of the concrete fence posts. There was then nothing to support the Replacement Fence on the side facing the Development Site. The Replacement Fence was, accordingly, in a very dangerous state and there was a real risk of it falling onto cars or people within the Claimants Premises. In order to avoid this risk, the Claimant had to devise a wooden structure with struts to support the

Replacement Fence from within its premises. It was not possible to do this without losing the use of four parking spaces within the Claimant's premises. As a result, the Claimant was unable to service/repair the volume of vehicles as it had before the loss of the four parking spaces.

16. The Defendants have now finished the piling for the foundations of the building. The Defendants have piled and placed a capping beam over the piled foundations upon which it is proposed that the building will be constructed. The piled foundations and the capping beam have not been constructed in accordance with the drawings and plans drawn up for the development on behalf of the Defendants. The piled foundations extend underneath the Claimant's Premises and, if the rear wall of the building is built on the capping beam as constructed, the rear wall itself is likely to extend onto the Claimants Premises.
 17. The piled foundations are 'special foundations' within the meaning of the 1996 Act. Accordingly, even if the First Defendant had validly served notice under Section 6 of the 1996 Act the First Defendant could not have placed the foundations as now constructed on the Claimants land without the Claimant's previous consent in writing, which consent has not been provided.
 18. The presence of the foundations on the Claimant's premises amounts to a trespass. It is the Defendant's intention to build the rear wall of the Development on the capping beam and this will also amount to a trespass. The Claimants rely upon the expert report of Dr Philip Antino dated 29.3.2022 annexed at Annexure 1.
 19. The Claimant is entitled to and claims an Order requiring the Defendants to remove the trespassing foundations and an Order prohibiting the Defendants from further trespassing on to the Claimant's premises by constructing the rear wall of the Development as threatened."
15. In response, MPL and BDL pleaded as follows in the Defence at paragraphs 15-19:
- "15. As for paragraph 15 of the POC:
- 15.1 It is not admitted that the Defendants have excavated the Development Site beyond the boundary between the Development Site and the Claimant's Premises or that approximately six inches of the Claimant's land has been removed.

Further, any excavation of the Claimant's premises, which is not admitted, was carried out by JJ Waste and without the authority of the Defendants.

15.2 It is not admitted that the Defendants removed the concrete fence posts. Any posts which were removed, which is not admitted, were removed by JJ Waste and without the authority of the Defendants.

15.3 The Replacement Fence was erected by the Claimant at a time when the Development Site was secured around its whole perimeter by Heras Fencing.

15.4 Paragraph 6 of this Defence is hereby repeated.

15.5 In the circumstances, no admissions are made as to the reasons why the Claimant felt obliged to erect the Replacement Fence in the manner that it did, or indeed at all.

15.6 Further, upon the Replacement Fence becoming unstable, the Claimant refused the Defendants access to brace the fence.

15.7 It is further not admitted that any loss of the Claimant's parking caused by its voluntary erection of the Replacement Fence meant a reduction in the volume of vehicles it was able to repair, or indeed that there was in fact any loss in trade as a result of the lost parking spaces.

16. As for paragraph 16 of the POC,

16.1 It is admitted that the Defendants' piled foundations for the Development Site are now completed, and that the piling is contiguous with a capping beam placed atop in the usual manner. It is further admitted that the proposed external walls of the new development will be placed, concentrically, atop the capping beam, and again in the usual manner for such construction.

16.2 Insofar as the piled foundations have not been built in accordance with the proposed development's plans and drawings, which is not admitted, any such deviation from the plans and drawings is both minor, and of no consequence to the Claimant.

- 16.3 It is denied that the piled foundations extend under the Claimant's Premises and/ or that any wall placed atop the capping beam is also, 'likely to extend onto the Claimant's Premises'. The piled foundations, the capping beam (and consequently any walls built off of the capping beam) are on the Development Site.
17. It is denied that the piled foundations are 'special foundations' within the meaning of the Act; they do not satisfy the definition of such in section 20 of the Act.
18. As for paragraph 18 of the POC, it is again denied that the piled foundations encroach upon the Claimant's premises as alleged or indeed at all, or that the rear wall to be built off of the capping beam will also so encroach. Accordingly, the allegation of trespass is denied. Further, and pursuant to paragraph 9 of the order of HHJ Monty QC of 18.03.22, the Claimant has no permission to rely on the expert evidence of Dr. Philip Antino, which is accordingly inadmissible. Should the position so change, the Defendants will seek to rely on the evidence of their own expert witness.
19. Consequently, the relief that the Claimant is said to be entitled to at paragraph 19 of the POC is not so available and is denied."
16. GAL did not file a Reply to the Defence.
17. The Judge summarised paragraphs 15-19 of the APoC in the Judgment at paragraphs 19-25 and paragraphs 15-19 of the Defence in the Judgment at paragraphs 43-47. In relation to paragraph 18 of each of the APoC and the Defence, by the time of the trial, each of the parties had permission to adduce expert evidence. See [23] below.

Procedural history

18. The procedural history of the claim prior to the trial is set out in the Judgment at paragraphs 10-14.
19. On 17 January 2023, GAL filed its Appellant's Notice, together with a request for an extension of time, supported by a witness statement dated 1 February 2023 from Mr Ashley Bean, solicitor at Thirsk Winton LLP, the appellant's solicitors, explaining that, due to a clerical error, the appeal had originally been filed with the Court of Appeal.
20. On 24 February 2023, Sir Stephen Stewart, sitting as a High Court Judge, granted the necessary extension of time, granted permission to appeal, and gave relevant directions.

The trial and the Judgment

21. The trial was listed for five days from 24-28 October 2022, with the first day reserved for judicial reading. The trial was heard remotely by MS Teams. No issue arises from the mode of hearing. GAL was represented at the trial by Mr David Mayall, as it is for this appeal. MPL and BDL were represented at the trial by Mr Stuart Frame.
22. For the trial, GAL relied on a witness statement of Mr Ian Neary, sole director of GAL, as well as witness statements from five further witnesses that concern only the accessway claim. MPL and BDL relied on a witness statement from Mr Vivek Mahan, sole director of MPL, and Mr Marwan Field, a director of BDL. Each of Mr Neary, Mr Mahan, and Mr Field provided oral evidence at the trial.
23. Each of the parties appointed a chartered building surveyor to provide relevant expert evidence, including evidence in relation to the precise position of the boundary line between the GAL Site and the Majestic House Site.
 - i) GAL appointed Dr Philip Antino, Managing Director of APA Property Services Ltd, APA Survey Ltd, and Antino & Associates Ltd. His principal report is dated 19 August 2022.
 - ii) MPL and BDL appointed Mr Robert French, a Senior Partner of Delva Patman Redler LLP. His principal report is dated 22 July 2022.
 - iii) Dr Antino and Mr French met, prepared, and provided an experts' joint statement dated 19 August 2022.
 - iv) On 2 September 2022, Dr Antino provided a further report.
 - v) On 7 September 2022, Mr French confirmed by letter that, in his view, the experts' joint statement set out the matters that remained unagreed between the experts and clarified those areas. He offered to provide further clarification, if necessary.
 - vi) Each of Dr Antino and Mr French provided oral evidence at the trial and was cross-examined.
 - vii) On 26 October 2022, Mr French provided a second report dealing with the amended scaffolding claim.
24. In the Judgment at paragraph 66, the Judge characterised the relief sought by GAL in relation to the foundations claim as:

“... an injunction requiring the removal of trespassing special foundations underneath GAL’s land (and possibly damages in lieu) together with an injunction preventing further trespass by MPL or BDL ... and damages for trespass already committed”
25. In relation to the law relied on by GAL in support of the relief sought, the Judge summarised the position of GAL, as set out in its skeleton argument, as follows in the Judgment at paragraph 68:

“68. By reference to both the foundation and scaffolding cases reliance was placed on *Coventry v Lawrence* [2014] AC822, in particular Lord Neuberger paragraphs 102 to 104 and 116 to 123 (all of which are fully quoted in the skeleton argument) it is submitted the court has a relatively unfettered discretion to award damages in lieu of an injunction and this was a deliberate wrongdoing and it cannot be said an injunction is oppressive but the court may refuse an injunction in which case damages should be assessed by reference to *Morris- Garner v One Step* [2019] AC 649 (paragraph 62) and an amount that might be fairly charged to voluntarily relinquish the right and the court will have conventionally have regard to the profit that has been made by the development at Majestic House for which there has been no discovery provided and is likely to be £3M.”

26. At paragraphs 70 and 72 of the Judgment, the Judge noted that Mr Frame characterised the issue in relation to the foundations claim somewhat differently, namely, whether the newly built piled foundations and wall for Majestic House would encroach on the GAL Site, noting that this was a question of fact and a matter for expert evidence.

27. At paragraph 75 of the Judgment, the Judge characterised the issue before the court in relation to the foundations claim as follows:

“... The central and very serious issue in this case now is the foundations for which GAL maintain a cause of action in trespass on Goodmans Yard relying on the expert report of Dr Antino dated 29 March 2022 for which a final mandatory injunction is sought to remove the piled foundations and capping beam and the wall since constructed on Goodmans Yard alternatively damages in lieu of an injunction likely to be £3M and MPL and BDL do not admit the excavations deny both the trespass of these foundations and wall are on Goodmans Yard and so deny the relief”

28. At paragraph 76, the Judge noted that he needed to determine as a question of fact whether the piling foundations, capping beam, and wall now placed on them by BDL trespassed on the GAL Site, having regard to the evidence of the witnesses of fact, expert evidence, photographs, and trial pits that had been dug. If he found that there was a trespass, he needed to consider whether he should grant GAL a mandatory injunction or order damages in lieu.

29. In relation to the threshold factual question of where the boundary line lay between the GAL Site and the Majestic House Site, which the Judge discussed at paragraphs 101-104 of the Judgment, the Judge accepted the expert evidence of Mr French as to the position of the boundary. By the time of the trial, this was accepted by GAL. Having accepted this, GAL was also required to accept that, apart from the question of concrete overspill onto the GAL Site (which remained in dispute), the foundations, capping beam, and wall for Majestic House were all constructed within the boundary of the Majestic House Site.

30. At paragraph 107 of the Judgment, the Judge noted that GAL relied on several photographs to illustrate that excavations for the foundations of Majestic House went under the GAL Site to a distance of approximately six inches. He noted that “any objective viewer of those photographs is attempting to see whether this tiny alleged trespass can be seen”. He noted that photographs were taken before and after the excavation for the foundations, but not of the pouring of the piled foundation and capping beam. He commented further as follows:

“Equally the clarity of the distant excavation photographs before foundations were poured and what in fact is shown when the works are completed has to be taken into account and whether they depict foundation and capping beam concrete or simply overspill of concrete and/or concrete used to support the fence which are naturally very different. Trial pits are a much better basis to ascertain what in fact took place in the ground and in this case two trial pits were dug.”

31. It is not in dispute that when the concrete for the foundation was poured, there was wooden shuttering on the inner side of the excavation into which the concrete was poured but none on the outer side, meaning the earth was being used as shutter on the outer side. GAL relies on this fact and relies on what it says is unchallenged evidence that some earth was excavated from the GAL Site on that side up to about 150 mm (or about 6 inches) to support its contention that some of the concrete poured to create the capping beam trespassed (by overspill) onto its land.
32. Having reviewed the factual and expert evidence, the Judge found (at paragraph 117) that Mr Neary “did his best to tell the court what his understanding of the facts was”. As will be seen, however, the Judge considered that Mr Neary continued to assert that there was a trespass of the foundations of Majestic House in reliance on the expert evidence of Dr Antino, which involved a failure to appreciate the implications of Mr French’s correct delineation of the true boundary between the sites.
33. In relation to the factual evidence of Mr Mahan, the Judge found (at paragraph 121 of the Judgment) that he was not able to provide evidence in relation to the foundations. Mr Mahan was cross-examined as to the financial aspects of the development, which was relevant to the question of remedy by way of damages. The Judge found him to be a “straightforward witness of fact who had little or no knowledge of day-to-day events”, which was not surprising given that he was the developer, not the contractor.
34. As to the factual evidence from Mr Field, the Judge found (at paragraph 123 of the Judgment) that he was “a helpful and serious witness of fact”. The Judge accepted his evidence that the piled foundation and capping beam for Majestic House were on the Majestic House Site.
35. At paragraph 122(a) of the Judgment, the Judge quoted the following passages from paragraphs 24, 26, 27 and 29 of Mr Field’s amended second witness statement (which, in the transcript of the Judgment, is mistakenly referred to as his amended “first” witness statement):

“24. ... As far as I was concerned Byoot had, up to the point proceedings were issued, developed the site in

accordance with the drawings. The drawings show that the building was to be built within the boundaries of the development site. The wall which runs alongside the boundary with Goodmans Autos is within the boundary and does not require service of a Party Wall Act Notice.

...

26. The piled foundations have been built in accordance with the drawings. The main foundations including the pile caps are within the boundaries of the site according to the drawings and the expert report of Mr French. We were made aware, following a site visit by Mr French and Dr Antino on 16 August 2022 that there is a very limited amount of concrete overspill from pouring the foundations which does extend into Goodmans Autos' land by a maximum of 150mm according to Mr French. On my instructions, Byoot's employees have attempted to remove the overspill from Goodmans Autos land.

27. We have been unable to remove all of the concrete overspill due to the relative positions of Goodmans Autos fence and the southern wall of the building being built on our site. In places there is insufficient space to fit a person and the tools required to break off the concrete. In any event, the overspill covers a negligible amount of Goodmans Autos site. I cannot understand how the overspill has any effect on their business whatsoever or that this alleged trespass has any practical effect on Goodmans Autos; the concrete overspill is on the Byoot/Maverstone side of the fence erected by Mr Neary.

...

29. It may be possible to completely remove the concrete overspill from Goodmans Autos land if the existing fence could be removed. This would allow Byoot's staff sufficient room in which to remove any overspill, then the fence relocated to the true boundary. I consider that it may be a practical way to facilitate the removal of the overspill."

36. The Judge considered and analysed the expert evidence in detail at paragraphs 124 to 145 of the Judgment. He made a number of criticisms of Dr Antino's evidence. At paragraph 139 of the Judgment, he said that he was satisfied that he should exercise the greatest care before accepting the evidence of Dr Antino. The Judge noted that the experts' joint statement reflected the fact that a number of areas of disagreement between the experts remained after the exchange of reports and their meeting. Overall, it is clear that the Judge preferred and accepted Mr French's evidence: see, for example, paragraph 143 of the Judgment.

37. At paragraph 117 of the Judgement, the Judge found that Mr French's evidence:

“... correctly defines the true boundary and [establishes] the fact that foundation and capping beam concrete are all on the land of Majestic House not Goodmans Yard. This is confirmed by the trial pits in particular the one on Goodmans Yard which shows no foundation concrete or capping beam and the simply fact that the wall is built on Majestic House [land].”

38. At paragraph 128 of the Judgment, the Judge indicated that he found paragraphs 9.2 and 10.1.4 of Mr French's report dated 22 July 2022 to provide a convenient analysis and summary of his findings:

“9.2 **Pile Cap Claimed Trespass:** I compared the outer pile cap line with my constructed boundary line and this led me to the conclusion that at no location does the pile cap construction step outside of what I believe to be the boundary of the Majestic House Site. To the southern boundary of the Majestic House Site, which marks the boundary with Goodmans' Yard, I estimate that the pile cap is consistently inside the Majestic House Site boundary by at least 80mm to the southwestern corner and then nearly 500mm to the southeastern corner of this boundary. To the eastern boundary of the Majestic House Site I found the pile cap to meet the former façade line i.e. 220mm inside the boundary line boundary line to the northern end of the site and to be circa 450mm inside the boundary line to the southern end of the eastern boundary with the adjacent access road.

...

10.1.4 **Pile Cap Claimed Trespass:** I conclude that in no location to the eastern or southern boundaries of the Majestic House Site has the installed structure of the Majestic House development been built up to or beyond the boundaries.”

39. At paragraph 141 of the Judgment, the Judge noted that Mr French's answers to questions put to him during his oral evidence “clarified his view on the existence of the small amounts of concrete around the fence posts that were used for support and thus [were] probably not overspill”. At paragraph 143, the Judge made the following findings based on Mr French's evidence:

“143. I have come to the clear view that I ought to accept Mr French's expert evidence in this case which has meticulously attempted to depict the true boundary line between Goodmans Yard and Majestic House. In doing so he has done his best on the photographic evidence and having regard to those two trial pits which were

made after the photographs and therefore is probably the best evidence before the court considered by both expert of what in fact is in the ground and the total lack of any piling and beam concrete found. The first trial pit is on Goodmans Yard land itself and he is satisfied it showed no trespass. I am quite prepared to accept that as a fact in respect of the piling foundations and the cap. The second photograph is shown on Majestic House and does show a thin layer of concrete some possible doubt as to its function and its nature. I am quite satisfied as indeed Mr French was satisfied that this was not laid as part of the piling foundation and piling cap but is a quite different and thinner layer which has a different function and as such could be used and was used to support a new fence. I also accept his clarification in oral evidence that this concrete seen is for the fence and not overspill **however the case of GAL is not about minor concrete overspill but a very serious trespass of a wall on Goodmans Yard.**” (emphasis added)

40. At paragraphs 162-167 of the Judgment, the Judge set out his conclusions on the foundations claim. The Judge noted that GAL’s pleaded case was that the foundations of Majestic House trespassed on the GAL Site. In the Judge’s view, that case was mistakenly put forward by Mr Neary and Dr Antino in their evidence at trial even after Dr Antino purported to accept Mr French’s determination of the true boundary line, based on an apparent misunderstanding of Mr French’s evidence. The Judge found as a fact that the correct boundary between the GAL Site and the Majestic House Site was the boundary determined by Mr French. At paragraph 163 of the Judgment, he continued:

“... On the basis of the true boundary line and where in fact the foundations pile cap and wall has been built it is clear that it is all on Majestic House only and I find that as a fact. It is perfectly clear and almost unarguable that the wall was [sic] duly built is not on Goodman’s Yard as predicted in the pleading in the Re Amended Particulars of Claim any more than the foundations or pile cap was on Goodman Yard once the boundary of Mr French is accepted as confirmed by the trial pits referred to below.”

41. At paragraph 164 of the Judgment, the Judge rejected the pleaded case that there were “six inches (or similar mm) of concrete foundations and pile cap on Goodmans Yard”. He rejected Mr Neary’s assertion that there had been a trespass on the GAL Site. He accepted the evidence of Mr French rejecting the proposition put to him by Mr Mayall that photographic evidence showed a trespass by six inches or, indeed, at all. Accordingly, the Judge rejected GAL’s pleaded case that the piled foundations extended underneath the GAL Site by up to six inches and that any wall built on those foundations would extend onto the GAL Site.
42. At paragraph 165, the Judge explained why he considered that the first trial pit, on the GAL Site, provided the most relevant evidence for determination of the foundations claim. He noted that Mr French, in his reported dated 22 July 2022 and in the experts’

joint statement, rejected the proposition that there was any concrete overspill onto the GAL Site evidenced by the first trial pit. The Judge found that the photographs in the trial bundle provided little or no support for GAL's pleaded case.

43. At paragraph 166, the Judge set out his view that the second trial pit, although plainly relevant, was less compelling because it was done on the Majestic House Site. What it showed was "between 100 and 150 millimetres section of concrete", which was plainly insufficient as a foundation and capping beam to support the wall of Majestic House and make it structurally stable. He preferred the evidence of Mr French that this was either overspill or a deliberately cast fence concrete base strip to support the fence on the GAL Site. The Judge then continued his conclusions as follows:

"166. ... The function of foundations and pile cap is to found a building of the several floors of Majestic House and is very different from concrete that could be used as Mr French indicated it was used for the fence or simply spillage which could support no weight. I am satisfied on the evidence that that is the correct approach to take to this case and whilst there may be some doubt if there was a bit of spillage or use for the fencing support and on balance I find as a fact If I had to it was support for the fence but to answer the pleaded case which is as far as I need to go I am satisfied that I cannot possibly make a finding that this is foundation and pile cap concrete that was there to support the wall of Majestic House.

167. Accordingly the pleaded case on foundations is not proven by GAL as they are required in this trial and if for any reason there might be some concrete overspillage though on balance I find it to be fence footings that has nothing to do with case in the Re Amended Particulars of Claim in this trial."

44. At paragraph 184 of the Judgment, the Judge found that there was no basis for the foundation claim. That part of the claim was, therefore, rejected.

Legal principles

45. As this is an appeal, having regard to CPR r 52.21, GAL needs to establish that the decision of the Judge was wrong. GAL does not submit that there was any serious procedural or other irregularity in the proceedings before the Judge. As the appeal does not concern any alleged error in the exercise of a discretion, the issue is whether, in reaching his decision to make the Order as it relates to the foundations claim, the Judge erred in law or erred in fact or both.
46. As to any alleged errors of fact by the Judge, the Supreme Court in *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477 at [1]-[6] and in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [58]-[68] has made it clear that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was "plainly wrong". Although these are Scottish cases, it is clear that the same approach applies in England and Wales.

See, for example, *Re B (A Child)* [2013] UKSC 33, [2013] 1 WLR 1911 (Lord Neuberger PSC) at [53]:

“... where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where the conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.”

See also *Re B (A Child)* at [108] (Lord Kerr) and [200] (Baroness Hale).

Submissions

47. Mr Mayall submitted that the Judge was wrong to make a factual finding that there was no trespass by the foundation of Majestic House across the boundary line as determined by Mr French, for the following reasons:
- i) the unchallenged evidence of Mr Neary was that some 6 inches of the GAL Site was removed;
 - ii) the Judge failed to identify any evidence that allowed him to reject Mr Neary’s evidence on this point;
 - iii) the photographic evidence showed, conclusively, that there was excavation under the fence posts, which were on the GAL Site, even if, as the Judge found, the photographs did not show that the land was excavated beyond that point;
 - iv) there was no wooden shuttering on the GAL side of the excavation into which the concrete was poured, and therefore the concrete must have flowed into the excavated area under the fence posts on the GAL Site;
 - v) the evidence established that the capping beam was formed from a single pour of concrete, as accepted, for example, by Mr French, when he was cross-examined by Mr Mayall (transcript of the hearing on 27 October 2022 at page 99);
 - vi) the concrete extending into the GAL Site under the fence posts necessarily constituted a trespass; and
 - vii) the trespassing concrete formed part of a single block of concrete as part of the capping beam and therefore was part of the foundation of Majestic House.
48. Mr Mayall noted that Mr Field had accepted in his evidence that there was a concrete overspill into the GAL Site: see, for example, his second amended witness statement at paragraphs 26-27 (set out in quotation at [35] above). As the trespassing concrete was part of a single pour, it necessarily formed part of the foundations of Majestic House, which are therefore trespassing to that extent onto the GAL Site. The Judge did not find that the amount of concrete overspill was *de minimis*. Accordingly, the Judge was wrong to conclude that there was no trespass by concrete forming part of the foundation of Majestic House, whether or not described as “overspill”. It was wrong and unfair of

the Judge to ignore the trespassing concrete, and he had no evidential basis for doing so.

49. In those circumstances, Mr Mayall submitted, the Judge should have concluded that GAL is entitled to a mandatory injunction that the trespassing foundation be removed. If the Judge had reached that conclusion, as he should have done, then if he considered that a mandatory injunction was too oppressive, he had a discretionary power to award damages. The Judge did not, however, have the option to do nothing in the face of this admitted trespass.
50. Mr Mayall submitted that the pleading point raised by the Judge is answered by the undisputed fact that the capping beam was formed by a single pour of concrete and the trespassing concrete, whether properly characterised as “overspill” or not, forms part of that single mass of concrete which constitutes part of the foundation of Majestic House. Accordingly, Mr Mayall submitted, the foundations claim, as pursued at the trial on the accepted basis of the boundary line determined by Mr French in relation to the overspilled concrete, is properly within the pleaded case.
51. In response, Mr Isaac first addressed GAL’s allegation that MPL and BDL had trespassed on the GAL Site by excavation. He submitted that, although the Judge did not deal expressly with this in the Judgment, it is clear that he was right to reject any such claim for the following reasons:
 - i) GAL’s pleaded allegation that MPL and BDL had “removed approximately six inches of the Claimant’s land including many of the concrete fence posts” (which, properly interpreted, must mean that MPL and BDL have allegedly removed six inches of earth from the GAL Site) was based on the mistaken boundary line determined by Dr Antino, which was rejected by the Judge, who found that the true boundary was that determined by Mr French;
 - ii) paragraph 15.1 of the Defence makes it clear that the respondents’ defence is that no such excavation took place or, alternatively, that the excavation was undertaken by a third party (namely, JJ Waste) without authority;
 - iii) the alleged boundary line on which the allegation of trespass by excavation is based is approximately 12 inches (or roughly 300 mm) to the north of the true boundary line, as found by the Judge and now accepted by GAL;
 - iv) Mr Neary’s evidence does not support the allegation that the respondents excavated approximately six inches of earth from the GAL Site or that they removed any concrete fence posts, but instead makes clear that the original fence was removed by agreement between Mr Neary and the sub-contractor, JJ Waste, under an agreement to which the respondents were not party; and
 - v) Mr Field’s evidence corroborates the foregoing.
52. In relation to the allegation of trespass by concrete, Mr Isaac submitted that the pleaded allegation is that the “piled foundations extend underneath the Claimant’s Premises”. There was an allegation that any wall built on the capping beam was likely to extend onto the GAL Site, but there was no allegation that the capping beam itself trespassed on the GAL Site, nor that the concrete poured at the same time as the capping beam

was formed had been poured onto the GAL Site, whether accidentally as overspill or deliberately to form the base for the fence. The Defence at paragraph 16.3 specifically denies that the piled foundations extend under the GAL Site and denies that any wall placed atop the capping beam would extend onto the GAL Site.

53. Mr Isaac noted that there were extensive exchanges between the Judge and Mr Mayall during the trial, quoted at length in Mr Mayall's skeleton argument, which demonstrate that the Judge, in his analysis of the evidence, was making an entirely valid distinction between concrete forming the foundation for Majestic House and concrete that was merely overspill or had been poured to form a base for GAL's fence.
54. Mr Isaac submitted that GAL pursued a different case on appeal than it had before the Judge. GAL's original case was that the respondents had deliberately laid or poured foundations so as to encroach on the GAL Site, intending to build a wall along that side of the building that also encroached to the same extent. To remedy this trespass, GAL was seeking negotiating damages. GAL's case at trial was quite different, namely, that the Judge should have held that there was a trespass by overspilled concrete poured by or on behalf of the respondents, such that GAL was entitled to a mandatory injunction for removal of the trespassing concrete or damages in lieu.
55. Mr Isaac submitted that Mr Field in his evidence acknowledged that BDL's employees had been instructed to remove the "very limited amount of concrete overspill" identified by Mr French and had done so, save where there was insufficient space for that to be done between GAL's fence and the wall of Majestic House.
56. Mr Isaac submitted that Mr Mayall had been wrong to submit that Mr French had "confirmed" a trespass that was "admitted" by Mr Field in his evidence. This was circular reasoning. The relevant evidence from Mr French is set out in the experts' joint statement at the row designated "Ref No. 8" in the fourth column (under the heading "Defendants' experts' comments"), as follows:

"...the concrete below the existing fence post blocks consisted of a circa 100-150mm thick section of concrete overspill, or a deliberately cast fence concrete base, which forms a strip of concrete on which the existing fence posts are founded. The fence posts sit within concrete blocks which rest on top of the overspill/deliberately poured fence concrete base. This fence concrete base could have been unintentional concrete overspill that was then conveniently used to form the fence concrete base or could have been deliberately installed at the time of pouring the pile cap with the knowledge that this could then be later used to support the fence posts.

My view is that there really is no significance to the fact that the fence concrete base has been poured at the same time as the pile cap. There was always intended to be a concrete poured fence base below the Claimant's fence posts and so, from a technical perspective, whether the concrete below the fence posts is or is not connected to the Defendants' pile cap is in my view a moot point from a technical perspective."

57. Mr Isaac submitted that it was relevant that the fence was GAL's fence and was erected by GAL's contractors and that the Judge awarded GAL against the respondents the costs of erecting that fence. As such, whether the concrete was overspill or deliberately intended to form a base for the fence, it was adopted for the latter purpose by GAL's contractors on GAL's behalf. He submitted that it was not now open to GAL to assert that this concrete is a trespass requiring removal.
58. Finally, Mr Isaac submitted that the Judge's findings of fact at paragraph 166 in relation to the concrete and his decision at paragraph 167 of the Judgment that GAL had not proven "its pleaded case on the foundations" were obviously correct on the basis of the evidence before him at the trial.

Discussion

59. I do not accept Mr Mayall's submission that the Judge had no evidential basis for rejecting Mr Neary's evidence that six inches of earth from the GAL Site had been excavated. Although, as noted by Mr Isaac, the Judge did not set out an express conclusion on the pleaded trespass by excavation in the Judgment, it is clear from the Judgment read as a whole that he rejected that part of the claim, which was pleaded on a factual basis that was subsequently proven to be incorrect, namely, the boundary line as determined by Dr Antino.
60. As to Mr Neary's evidence, the Judge appears to have found Mr Neary to be an honest witness, doing "his best to tell the court what his understanding of the facts was" (paragraph 117 of the Judgment). The Judge did, however, criticise Mr Neary for his "tendency to argue the pleaded case" and his confusion on "the real facts particularly on the concrete and the fence and foundations and demolition which are quite separate" (paragraph 114 of the Judgment). It is clear that the Judge found that Mr Neary's evidence was too heavily reliant on Dr Antino's evidence on the boundary and the foundations, which the Judge largely rejected where it differed from that of Mr French, in particular, of course, with regard to the boundary line (paragraph 117 of the Judgment).
61. Mr Mayall had submitted that the photographic evidence showed "conclusively" that there was excavation under the fence posts, which were on the GAL Site, into which trespassing concrete must have flowed from the single pour for the capping beam. The Judge made clear, however, that he considered that the photographs were not particularly helpful in determining whether the alleged trespass by concrete, which was "tiny" (having regard to the true boundary line), had occurred and that the two trial pits that were dug were a much better basis for making that determination (paragraph 107 of the Judgment).
62. As noted at [41] above, it is clear from paragraph 164 of the Judgment that the Judge did not find the photographic evidence of particular assistance in relation to the question of trespassing concrete. Reviewing the Judge's assessment of the photographic evidence on an appellate basis, I am not able to say that there was any error in the Judge's approach or assessment.
63. The trial pit dug on the GAL Site showed that no concrete from the foundation crossed the boundary line. The trial pit dug on the Majestic House Site was less conclusive (paragraph 166 of the Judgment), but the Judge agreed with Mr French's conclusion

that, to the extent the concrete crossed the true boundary line at that point (by between 100 and 150 mm), it made no difference whether that occurred accidentally or deliberately to form part of the concrete base of the fence. To the extent that it is a factual conclusion or a matter of expert opinion, Mr French was entitled to express a view on that point, and the Judge was not wrong to accept it. To the extent that it is a legal conclusion (namely, whether it constituted a trespass), then, of course, it was a matter solely for the Judge.

64. In my view, the Judge was not wrong to conclude that the possible extension of the concrete over the true boundary line by between 100 and 150 mm was not a trespass, whether it was accidental overspill or done deliberately to form a base for the fence. He was not wrong to have reached this conclusion on the evidence as a whole, including Mr French's evidence that (i) there was always intended to be a concrete poured fence base below GAL's fence posts, (ii) from a technical perspective it makes no difference that the concrete in question is connected to the capping beam, and (iii) it makes no difference that it was done as part of a single pour of concrete. It is a reasonable (indeed, compelling) inference from the evidence, although the Judge did not put it in these terms in the Judgment, that GAL's contractors adopted the concrete on GAL's behalf to form the base for the fence, as Mr Isaac submitted.
65. Finally, although it is not necessary to the foregoing conclusions, my view is that the Judge was not wrong to conclude that the case eventually pursued at trial by GAL regarding concrete trespassing by overspill was not within the APoC. Once the boundary as found by Mr French was found to be the true boundary, which by the time of the trial GAL had accepted, and the Judge found that the piled foundations, capping beam, and wall above it were (apart from a "tiny" concrete overspill, the extent of which was difficult to determine) entirely on the Majestic House Site, then it could not be said that the "piled foundations extend underneath the Claimant's Premises" (paragraph 16 of the APoC) or that "the foundations" were on the GAL Site (paragraph 18 of APoC). The final sentence of paragraph 143 of the Judgment (which is set out at [39] above) makes clear the Judge's view that this was a quite different claim. GAL could and should have sought to re-amend the APoC if it wished to pursue the trespass by overspill claim, which it did not do.
66. During the trial, there were extensive exchanges between Mr Mayall and the Judge regarding the appropriate remedy if the Judge were to find that the concrete overspill constituted a trespass. As he did not do so, and I have concluded that he did not err in fact or in law in reaching the conclusion that there was no trespass (and/or that the alleged trespass by overspilled concrete was not within GAL's pleaded case), there is no need for me to deal here with those submissions.

Conclusion

67. The appeal is dismissed.