Neutral Citation Number [2023] EWHC 1035 (Ch)

IN THE HIGH COURT OF JUSTICE Appeal Ref: CH-2022-000148
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
Appeal from the Order of His Honour Judge Parfitt dated 13 July 2022
County Court at Central London
F10CL4279

7 Rolls Building
Fetter Lane, London,
EC4A 1NL
Date: 4 May 2023

Before: THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

(1) THOMAS FITZHARDINGE GUETERBOCK
(2) HELEN RUTH GUETERBOCK

Claimants below

and

(1) ALEXANDER DUGALD GREGORY MACPHAIL
(2) HELEN ELIZABETH MACPHAIL

Defendants below

and

HENDERSON COURT LIMITED

Third Party below

and

ALLIANZ INSURANCE PLC

Fourth Party below

Mr Sebastian Kokelaar (instructed by **Richard Slade and Company**) appeared on behalf of the **Appellant**, the First Defendant below

Mr Nigel Tozzi, KC (instructed by **DAC Beachcroft Claims Ltd**) appeared on behalf of the **Respondent**, the Fourth Party below

Hearing date: 27 March 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.00 am on 4 May 2023 by circulation to the parties or their representative by email and by release to the National Archives

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Mr Justice Marcus Smith:

A. THE JUDGMENT OF HIS HONOUR JUDGE PARFITT

1. In a reserved judgment dated 8 June 2022 (the "Judgment"), after a five-day trial in May 2022, His Honour Judge Parfitt (the "Judge") determined that the First Defendant's ("Mr MacPhail's) indirect[1] claim for an indemnity against the Fourth Party ("Allianz") under a contract of insurance (the "Policy") between Allianz and the Third Party ("Henderson Court") failed.

2. By the order consequential on his Judgment, the Judge made certain declarations in relation to the Policy, which Mr MacPhail (the party in reality interested in the Policy responding) sought to appeal.

3. The Judge refused permission to appeal. Permission to appeal was granted to Mr MacPhail by Meade J (on 6 September 2022) in respect of the declarations made by the Judge in relation to the Policy. Permission to appeal having been granted, Allianz filed a respondent's notice contending that the Judge's order should be upheld *(i)* for the reasons given by the Judge and *(ii)* for other reasons also.

4. The appeal was heard before me on 27 March 2023, and I reserved my judgment. This is that reserved judgment.

B. THE FACTS

(1) The proposed development

5. The Claimants below, Mr and Mrs Gueterbock, at all material times owned a property known as and situate at 28 Henderson Road, London SW18 3RR ("Number 28"). Number 28 is a late-Victorian/early Edwardian semi-detached house. It does not – for reasons which will become significant – have a basement or a cellar.

[1] Mr MacPhail was not the insured under the contract of insurance the subject of this appeal. The facts are complicated, and will be set out in the course of this judgment.

6. The next late-Victorian/early Edwardian house on Henderson Road is 42 Henderson Road ("Number 42"). Until bombed during the Second World War, similar houses existed between Number 28 and Number 42. In the 1950s, Henderson Court was built on the site formerly occupied by these houses. An application for planning permission to demolish Henderson Court dated September 2012 (the "Application") states that "Henderson Court is a 1950s block of six flats built on the site of three houses destroyed by a Nazi bomb during the War. Henderson Road is located close to Wandsworth Common, in a conservation area".[2] The Application proposed as follows:[3]

> The intention is to repair the damage caused by the bomb by re-creating three houses on the site which are in keeping with other houses in the road, incorporating the original facades and architectural details…

7. The three houses it was proposed to develop would, logically, be numbered 30, 32 and 34 Henderson Road ("Number 30", "Number "32" and "Number 34"), thus leaving a numeric gap (of no importance to the present case) between the putative Number 34 and Number 42. This case concerns the boundary between the putative (and subsequently built) Number 30 and Number 28 (owned, as I have said, by the Gueterbocks).

8. Number 30 was a semi-detached house (the other half of the semi being Number 32). The space between the houses as it was to be on construction was described as follows:[4]

> The proposal suits the character and scale of the surrounding houses and is appropriate for the size of the site, with fairly large gardens. The footprint of the proposed houses and the facades are similar to that of neighbouring houses. **Gaps of 90cm between each pair of semi-detached houses will be the same as that between other pairs of houses on the same side of the road, with a shared side path.**

9. The plans for Number 30 show an extensive basement (comprising various rooms) with a lightwell emerging onto the shared side path. It is worth noting that the sites are not completely regular, in that the site on which Number 30 was built (when viewed as a plan) is not a perfect rectangle, but tapers slightly

[2] Paragraph 2.0 of the Application.
[3] Paragraph 3.0 of the Application.
[4] Emphasis added.

along its boundary with No 28. I say this, simply because it is important to bear in mind that these irregularities make the regularly drawn plans (with specifications like gaps of 90cm) harder to implement.

(2) The development

10. I shall refer to the development of Number 30, Number 32 (Number 30's semi-detached pair) and Number 34 as the "Development".[5] The corporate vehicle carrying out the Development was Henderson Court.[6] Henderson Court developed Number 30 for Mr MacPhail and Mrs MacPhail.[7] It will be necessary to say more about the Judge's findings in regard to Henderson Court's construction of the Development, and in particular, Number 30.

11. For the present, it is simply enough to quote from paragraph 2 of the Judgment:[8]

> The dispute arises because of works which included building a new house on Mr McPhail's property at 30 Henderson Road…The house is semi-detached, with a basement. The Gueterbocks owned and occupied [Number 28], which is next door to [Number 30], with the two houses being separated at ground floor level by a passageway of about 90cm across. **The basement of the new house extended below the 90cm pathway to the line of the flank wall of [Number 28].** The Gueterbocks brought these proceedings alleging trespass and nuisance.

12. The short point is that the basement of Number 30 went beyond the middle line of the shared side path between Number 28 and Number 30, and extended up to Number 28's "flank wall".[9]

(3) The Policy

13. Henderson Court carried insurance in respect of the Development in the form of the Policy. The cover provided was as follows:[10]

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[5] Which is the term the Judge used: see paragraph 4 of the Judgment.
[6] Paragraph 4 of the Judgment.
[7] For reasons that do not matter, Mrs MacPhail drops out of the picture, and I shall, hereon, refer only to Mr MacPhail. See, further, paragraph 1 of the Judgment.
[8] Emphasis added.
[9] I.e., the sidewall of Number 28.
[10] Emphasis added.

> A. The Insurer [i.e., Allianz] will indemnify the Insured [i.e., Henderson Court] against legal liability to pay compensation and claimants' costs and expenses in respect of **accidental**
>
> a. injury to any person
>
> b. loss of or damage to material property
>
> c. **nuisance, trespass, obstruction or interference with any right of way, light, air or water occurring within the Territorial Limits during the Period of Insurance in connection with the Business.**

14. The Policy contained provisions entitling Mr MacPhail to claim under the Policy, despite not being an insured. For present purposes, it is simply necessary to note that the Policy contained an extension (in Part B) providing that the indemnity in Part A "will also apply" in respect of "any principal for whom the Insured have agreed to execute work under contract or agreement against liability arising out of the performance of such work by the Insured and in respect of which the Insured are legally liable and would have been entitled to indemnity under this Section if the claim had been made against the Insured".

15. The critical, and critically first, question on this appeal is whether the trespass alleged by Mr and Mrs Gueterbock in respect of the extent of Number 30's basement was an "accidental…nuisance [or] trespass" within the terms of the policy. If that trespass was <u>not</u> accidental, then the Policy would not respond, whether it was Henderson Court or Mr MacPhail who sought the indemnity.

(4) The dispute

16. As I have described, Mr and Mrs Gueterbock brought proceedings against Mr MacPhail alleging that the basement in Number 30 encroached on their property at Number 28 and constituted a nuisance and trespass. Although that claim was initially disputed by Mr MacPhail, by an agreement dated 29 April 2021, that dispute was settled. The implications of this are described in the Judgment at paragraph 3:

> In relevant summary, the 29 April 2021 settlement involved Mr MacPhail carrying out limited works and making payment to the Gueterbocks of £100,000 and costs, subsequently agreed at £137,286.73. Mr MacPhail seeks

> to recover those losses and his own costs of that earlier litigation from [Henderson Court] and [Allianz].

17. The essence of Mr MacPhail's claim against Henderson Court was that "[Henderson Court] built 30 Henderson Road and so should be responsible for the consequences of failings in that building".[11] In this regard, the Judge had to consider and determine the following questions:

    (1) First, whether the disputed boundary ran down the centre of the shared side path between Number 28 and Number 30.[12] The Judge concluded that "the boundary between [Number 28] and [Number 30] ran down the centre of the original passageway".[13] That finding is not appealed. Inevitably, this means that Mr MacPhail was wise to settle with the Gueterbocks as he did, for their claim in trespass and nuisance would have succeeded at trial.

    (2) Second and third, whether Henderson Court owed a contractual duty to build Number 30 with reasonable skill and care;[14] and, if so, whether that duty was breached by the way in which the basement was built.[15] The Judge concluded that there was such a duty,[16] and that that duty was breached in the manner in which the basement was built, in building a basement which extended to the flank wall of Number 28.[17]

18. Mr MacPhail's claim against Henderson Court thus succeeded.

19. Leaving aside questions of quantification, and also the question of whether the position would be different depending on whether Henderson Court or Mr McPhail sought to claim under the Policy, the next question was whether the Policy would respond at all. This question turned on whether the trespass and nuisance were "accidental" within the meaning of the Policy terms set out in

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[11] To quote from paragraph 7 of the Judgment.
[12] See the Judgment at paragraph 11(A).
[13] Paragraph 67 of the Judgment.
[14] See the Judgment at paragraph 1(B).
[15] See the Judgment at paragraph 1(C).
[16] Paragraph 97 of the Judgment. This was actually a point of some factual controversy before the Judge, but his finding is not appealed, and I need only state his conclusion.
[17] Paragraphs 105 and 106 of the Judgment.

paragraph 13 above. The Judge considered the point in paragraphs 155*ff* of the Judgment and – for reasons it will be necessary to consider further – concluded that "the occurrence of the insured peril was not "accidental" within the meaning of the Policy".[18]

20. The Judge's order consequential on the Judgment materially provides:

> 9. By reason of the fact that [Henderson Court's] trespass on [Mr and Mrs Gueterbock's] property was not accidental within the meaning of Clause A of the [Policy]:
>
> a. [Allianz] is not liable under the terms of the Policy to indemnify [Henderson Court] against any liability of [Henderson Court] arising out of [Henderson Court's] Claim;
>
> b. [Allianz] is not liable under the terms of the Policy to indemnify [Mr MacPhail] against any liability of [Mr MacPhail] arising out of [Mr and Mrs Gueterbock's] claims.

The Judge's finding on the question of "accidental" was thus critical. It was this finding that Mr MacPhail sought to challenge on appeal.

C. THE APPEAL

21. Mr MacPhail's grounds of appeal are admirably succinct:

> The Judge was wrong in law to conclude that the trespass by [Henderson Court] onto [Mr and Mrs Gueterbock's] property at No 28 Henderson Road was not "accidental" within the meaning of Clause A of the [Policy] , so that [Allianz] was not liable to indemnify [Henderson Court] and/or [Mr MacPhail] pursuant to the Policy.

22. As I have described, there was a respondent's notice, seeking to uphold the Judgment on other grounds, as well as some consequential points if the appeal on this ground was successful. I will consider this ground of appeal first; and only proceed to consider the other aspects if it is necessary to do so.

23. The grounds of appeal, in reality, contained two limbs:

[18] Paragraph 200 of the Judgment.

(1) First, that the Judge, in the Judgment, had simply misstated the established legal test as to what constituted an "accidental" loss under the Policy.

(2) Secondly, and more subtly, that the Judge had misapplied the law (even if he had stated it correctly) to the facts, such that the conclusion he reached was not one properly open to him on the facts as he had found them. Counsel for Mr MacPhail (Mr Kokelaar, to whom I am indebted for his clear and cogent submissions) rightly recognised that this was a difficult point to make good, for two related reasons:

(i) The Judge found the facts, and I am in no position to look behind those found facts. In the first place, I have not (as the Judge did) had the benefit of hearing the witness evidence. Secondly, to the extent the evidence was documentary, the Judge is nonetheless the primary finder of fact, and it would be a usurpation of his function, and an abuse of mine, to revisit questions of fact as if I were the trial judge.

(ii) The Judge is entitled to a degree of latitude when applying the law to the facts. It is only if I conclude that the facts as found by the Judge cannot bear the legal conclusion that he reached that I can properly set aside his decision on this point.

24. I consider these two, distinct, points in the next two Sections. Section D considers whether the Judge failed properly to state the applicable legal test. Section E considers whether the Judge misapplied the law to the facts he found.

D. THE FIRST LIMB – THE LAW: WHAT IS AN "ACCIDENT"?

(1) The terms of the Judgment

25. The Judgment materially states as follows:

155. Both parties referred me to the discussion about "accident" in *Colinvaux and Merkin's Insurance Contact Law* (2022):[19]

> It is settled law than an accident, for the purposes of an insurance policy, is from the assured's point of view an act, intentional or otherwise, which has unintended consequences. However, if the consequences were intended by the assured, or if the consequences while unintended were inevitable so that the assured can be regarded as having acted with reckless disregard for them, then it is clear from the authorities that there is no accident and the assured is precluded from recovery by the terms of the policy itself as well as on the grounds of public policy. The principle is that, by embarking upon a course of conduct that is obviously hazardous the assured intends to run the risk involved…

156. Mr Kokelaar [Counsel for Mr MacPhail, here and below] emphasised that the degree of recklessness required has been described in the authorities as "courting" the risk, which suggests a deliberate choice. A similar emphasis can be seen in the extract quoted above, which refers to consequences which "while unintended were inevitable" and "a course of conduct which is obviously hazardous".

157. I agree with Mr Kokelaar that the correct starting point is not the act of extending the basement to the flank wall of [Number 28], which must have been intentional. The relevant subject matter of the accident is the trespass because that is the relevant risk under the policy. Was the trespass accidental?

158. I was not taken to authorities on attribution but it is clear that the relevant intention regarding risk will be that of Mr Harris. It was he who was in control of the works and he was a director of [Henderson Court] throughout the material time. There is no difficulty in attributing his approach to the risk of trespass to [Henderson Court] for the purpose of determining whether [Henderson Court's] loss was within cover or not.

159. None of the parties has been able to provide direct evidence about how the basement came to be extended but Mr Andrews' evidence about what Mr Harris said to him regarding Mr McPhail being told about the plan to enlarge the basement at least is some evidence of Mr Harris recognising that it was a decision which he made. This placing of the responsibility with Mr Harris is also consistent with the general evidence of Mr MacPhail and Mr Andrews, the gist of which was that Mr Harris was the man in charge or the controlling mind or effective managing director so far as the Development was concerned.

160. So the question is whether Mr Harris decided to extend the basement out to [Number 28] knowing it would be a trespass or willingly taking that risk (in my formulation). I say "willingly" because it seems to me that a more up to date version of "courting the risk" is a

[19] The quotation derives from paragraph B-0496. Footnotes have been omitted, as they were by the Judge.

person aware of the risk but whose attitude might be summed up by "yes, there's a risk, but let's do it".

(2) Analysis

26. It is very difficult to criticise the Judge's articulation of the law and how he framed his approach to this particular legal issue. More specifically:

(1) The Judge's approach to attribution of knowledge to Henderson Court through Mr Harris (at paragraph 158 of the Judgment) was not criticised on appeal, and I do not see how it sensibly could be.

(2) Equally, the Judge properly framed the true question before him, in paragraph 157 of the Judgment. Obviously, the construction of the basement in Number 30 to the flank wall of Number 28 was intentional. It is difficult to see how that could possibly be an accident. The key question – as the Judge rightly identified – was the level of risk in the mind of Henderson Court that this intentional act ran the risk of trespass (or nuisance).

(3) The key question is what level of risk, accepted by Henderson Court, rendered the claim that Mr and Mrs Gueterbock successfully brought non-accidental. That is exactly the question that the Judge asked, and I find his approach to have been impeccable.

(4) One criticism that was made by Mr Kokelaar was that the Judge's substitution of the word "willingly" for "courting the risk" (paragraph 160 of the Judgment) represented a heterodox approach, whereby the Judge varied and lowered the test as to what was or was not an "accident", and so made an error of law. I do not accept this criticism:

(i) It seems to me that the Judge's formulation is actually quite a good one, provided one does not lose sight of the fact that it is the borderline between reckless and non-reckless conduct that one is focussing on. That borderline really concerns a person's "appetite for risk" (if I can introduce my own attempt at re-

phrasing), with intentional conduct unequivocally on the non-accidental side of the line, and a state of mind consciously and reasonably not even anticipating the risk on the accidental side of the line.

(ii) That borderline is one that the Judge had well in mind. The Judge considered, and rejected, the suggestion that Henderson Court had acted intentionally, and that the trespass could not be accidental for that reason:[20]

> I agree with Mr Kokelaar that there is no basis on which I could find that the trespass was deliberate, i.e., that Mr Harris knew the boundary was approximately down the centre of the pathway but chose to build beyond that line by some 45cm up to the flank wall of [Number 28]. So this issue is all about recklessness and risk towards the chance that (a) the Gueterbocks would assert the boundary was not along their flank wall but some 45cm nearer to [Number 30] and (b) the Gueterbocks would be right. It seems to me both those aspects are necessary parts of the relevant risk that Mr Harris will have had to have been reckless toward, if cover is to be denied [Henderson Court].

If I may respectfully say so, this not only shows that the Judge clearly had in mind the correct legal test, but that he articulated the application of that test on the facts of this case with impressive clarity.[21]

(iii) Instead of an intention, the Judge found a "high level of recklessness" on the part of Henderson Court, which (of course) rendered the act of trespass (and nuisance) non-accidental within the terms of the policy.[22]

The question of whether the Judge was entitled, on the facts he found, to reach this conclusion is one I consider in Section E below. But there

[20] Paragraph 161 of the Judgment.
[21] See also paragraph 178 of the Judgment, where the Judge again shows a clear awareness of the correct legal test.
[22] See paragraph 199 of the Judgment, and (more generally) paragraphs 163 to 198.

can be no question that the Judge's direction to himself as to the law was unimpeachable.

(5) There was some debate before me as to whether the Judge had attempted to "cure" defects in his Judgment in his refusal of permission to appeal. The refusal of permission materially states:

> Permission was sought because the wrong test for "recklessness" was applied to the issue of whether the act of trespass by [Henderson Court] was accidental. This was based on paragraph 160 of the Judgment, where the agreed test of "courting the risk" was summarised as being "willing" to take the risk or "there's a risk, let's do it". This was not intended to lessen the test set out at paragraph 155 by quotation from *Colinvaux and Merkin*, and agreed between the parties.

Had the Judge erred in framing the legal test in his Judgment (which he did not), then he could not have cured that error by asserting, in a refusal to give permission to appeal, that he had not "intended" to lessen the true legal test. But this passage does no more than state, correctly, that the Judge had well in mind the proper test in the Judgment itself, and that he was simply putting a phrase that is a little archaic into more modern language.

27. For all these reasons, the first limb of the grounds of appeal is dismissed.

E. THE SECOND LIMB – A CONCLUSION ON THE FACTS NOT OPEN TO THE JUDGE

(1) Introduction

28. The question is whether the Judge could properly conclude, on the facts found by him, that there had been a "high level of recklessness" on the part of Henderson Court, which precluded the Policy from responding.

29. I remind myself that a good definition of recklessness is to be found in the Law Commission's *Report on Criminal Law: A Criminal Code for England and Wales and Draft Criminal Code Bill*, which provides:[23]

> A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to – (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.

30. I do not suggest that this can act as a substitute for the case law described by the Judge; but it is a helpful touchstone when seeking to apply the law to the facts.

31. In considering this ground of appeal, I am conscious that what I must not do is review the granular detail of the facts and matters which – in documentary form – were before the Judge. That is because, as I have already noted, the Judge saw more evidence than has been before me (he heard the witnesses) and, more importantly, the Judge is the primary evaluator of fact. Thus, although I was taken to much of the documentary evidence that was also before the Judge, my starting point will be the Judgment and not the evidence that informed the Judgment (although I will, of course, have regard to this also).

(2) Findings of the Judge

32. The Judge was careful to note the "gappy" evidence before him, and was astute to ensure that the incomplete nature of the evidence he was presented with did not lead him into over-generalisation or impermissible assumption. His consideration of the evidence was nuanced and careful.[24] The Judge's findings must be treated with corresponding respect.

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[23] Cited with approved by Lord Bingham in *R v. G*, [2003] UKHL 50 at [41].

[24] Thus, for example, the hearsay evidence of Mr Connor (paragraph 17 of the Judgment); the question of Mr Andrews' evidence of something said by Mr Harris (paragraph 59 of the Judgment); the absence of direct evidence about how the basement came to be extended (paragraph 159 of the Judgment); the absence of evidence from Mr Harris (paragraph 162 of the Judgment, and also (particularly) paragraph 188 to 189 of the Judgment); the issue of why Mr Harris was not called (paragraphs 180 and 182 of the Judgment).

33. Turning then to the facts found by the Judge:

(1) The Judge found that there was a certain ambiguity about the extent to which any basement could extend beyond the curtilage of the building above; and still more uncertainty about whether a basement could go beyond the middle line of the shared side path between Number 28 and Number 30, and extend up to Number 28's flank wall.[25] The pre-construction title plan showed the boundary down the middle line.[26]

(2) In terms of explaining the position to Mr and Mrs Gueterbock, Henderson Court was less than frank. The Judge recorded:[27]

> I have been taken to a number of email exchanges between Mr Connor and/or Mr Harris and Gueterbocks which are said to throw some light on the intentions of [Henderson Court] regarding the risk of trespass. The last in time is dated 10 December 2015. In that email Mr Harris seeks the Gueterbocks' consent to the underpinning of their flank wall saying that "the new wall [i.e., the underpinning to Number 28] will be entirely on your side of the boundary…the new property next door [i.e., Number 30] will have its own new walls, entirely independent from your new wall (including the new underpinning wall)"…

(3) The Judgment records the following evidence from Mr Andrews:[28]

> Mr Andrews gave evidence that Mr Harris had told him, once the litigation had blown up, in about November 2019, that Mr Harris had a conversation with Mr MacPhail about the basement extension before the works had begun during which Mr Harris said we can extend the basement under the passageway which would increase its size but these changes would only be made at Mr MacPhail's risk as Mr MacPhail was the sole beneficiary of the changes. Mr MacPhail said he had no recollection of any such conversation. Mr Andrews in cross-examination said Mr Harris may well have been making further mischief and Mr Harris' account of his conversation with Mr MacPhail may well not be true.

(4) Paragraph 164 of the Judgment refers to an email dated 26 October 2021, which concerned the draft of an explanation to interested parties as to what the Development entailed. Although the Judge set out the

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[25] Paragraphs 45 and 46 of the Judgment, concerning the party wall notices served under the Party Wall, etc Act 1996.
[26] Paragraph 163 of the Judgment.
[27] Paragraph 47 of the Judgment.
[28] Paragraph 59 of the Judgment.

gist in paragraph 164, it is worth stating precisely the evidence that the Judge had in mind. The email states:[29]

> Tom and Helen [Gueterbock] have also raised concerns about the side path. **I have said to them it is not entirely clear where the boundary lies – some Land Registry documents show the side path solely belongs to [Henderson Court].** The planning application documents don't seem to me to be determinative of boundaries, so I'm not sure if we should get too hung up on the precise location of a red line on the plan. I am absolutely committed to ensuring [Number 28] retains the access they currently use down this path to get to their side door and have tried to reassure them about this.
>
> The most generous possible interpretation of where the boundary lies from [Number 28's] perspective is halfway across the original width of the side path – not halfway across the current width of the path. To restore the original footprint of the house, and ensure consistent proportions in this conservation area, **it is proposed that the new house next to [Number 28] is built in such a way to leave a 90cm gap between the houses – the same spacing as other existing houses on this side of Henderson Road.** There is absolutely no way that the construction of the house in this position could be interpreted as being on land owned by [Number 28].

(5) In the next paragraph, paragraph 165 of the Judgment, the Judge references another email, dated 9 August 2014. Again, I set out the text that the Judge summarised:[30]

> Both of us I guess. He's fine. His wife might be a little tricky. She got irate about the red boundary line not being dead straight on the plans with the planning application. It just mapped the existing kinks in the fence. Turned out it was them in the wrong as their rear extension encroaches slightly onto our land! All fine in the end. She did say what a nightmare it was with noise when the house on the other side of them was having their basement done. **I emphasised that house joins on to them – the new one won't – although that may not be the strongest argument if we do want to go up to near the boundary underground??** I think that while they won't like the noise/disruption they'll accept it for the sake of getting nice houses next door – just need to emphasise how disruption will be minimised and risk of their house subsiding will be met.
>
> **Remember we may possibly want to run the drain pipe down under the alley between 28 and the new 30. Need to give some thought to re-routing options.**

[29] Emphasis added.
[30] Emphasis added.

I have not set out all of the narrative contained in the Judgment, nor each and every finding of the Judge. The foregoing is sufficient to enable me to consider the conclusions drawn by the Judge.

(3) Conclusions of fact drawn by the Judge

34. The Judge concluded that Mr Harris "believed the flank wall was the true location of the boundary".[31] Given my reading of the evidence, as set out in the Judgment, I find that a slightly surprising conclusion, in that it is perhaps not the finding I would have made. But it was one that was open to the Judge to make. Mr Kokelaar, on behalf of Mr MacPhail, unsurprisingly placed great reliance on the finding. The point made was that this conclusion precluded any finding of recklessness, because Mr Harris "believed" the boundary to be at the flank wall, which was the point to which the basement extended. Ergo, the trespass was accidental.

35. I do not consider this follows. Very few beliefs are absolute, and this paragraph of the Judgment says nothing about the quality of Mr Harris' belief, i.e., how confident was Mr Harris (or, rather, Henderson Court, to which Mr Harris' knowledge was to be attributed) in his belief. That question is answered by the Judge in the very next paragraph of the Judgment:

> But that only goes so far. The key question is what was [Henderson Court's] attitude to the risk that this was wrong and that the true boundary lay down the centre of the pathway?

36. The Judge concluded that a number of documents were misleading as to Henderson Court's intentions when communicating with third parties, including the Gueterbocks. I have referred to some of these documents above, but the Judge set out at paragraphs 190 to 194 of the Judgment precisely those documents which informed that conclusion. It was a conclusion that was open to him to reach. As a result, the Judge found as follows:[32]

[31] Paragraph 188 of the Judgment.
[32] Paragraph 195 of the Judgment.

> In my view, the reason for these misleading documents in November and December 2015 was that Mr Harris was aware and took account of the fact that, if the Gueterbocks knew that [Henderson Court] was intending to build to the [Number 28] flank wall, then they would have objected on the basis that such works would have crossed the boundary between the two properties. Mr Harris would have known that the proposed underpinning to [Number 28] required the consent of the Gueterbocks. In my view, Mr Harris took steps to hide from the Gueterbocks that the basement was going to extend to the [Number 28] flank wall to stop them from objecting. Any such objection would have included the Gueterbocks asserting their view of the boundary. At best, this would have caused further delay and expense to the works.

37. This is the answer to the point made by Mr Kokelaar both before the Judge and before me on appeal, namely that there could be no hope of Henderson Court keeping the extent of the basement works secret from the Gueterbocks in the long-run.[33] Obviously, the lightwells emerging onto the shared path would, in due course, have given the game away. But there was a definite short-term gain in deceiving the Gueterbocks, namely to procure their consent to the underpinning. When once the work had been done, the Gueterbocks would no doubt complain, but would be met with a *fait accompli* and – given Mr Harris' belief about the location of the boundary, that was a risk he clearly felt able to take.

38. But that answers the question of recklessness or courting the risk. Given the Judge's findings, even if Mr Harris believed that the boundary was at the flank wall, he must have known that the contrary was at least arguable and that (if alive to the problem) the Gueterbocks would almost certainly take the point. The evidence I have described – and there is more in the Judgment – shows that the Gueterbocks were appropriately protective of their rights. Accordingly, to revert to the Judge's two questions (*(i)* would the Gueterbocks assert the boundary was not along their flank wall but some 45cm nearer to Number 30; and *(ii)* would the Gueterbocks be right)[34] there was clearly a considerable risk of both of these questions being answered in the positive, given the findings of fact made by the Judge.

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[33] The point is made, and accepted, by the Judge at paragraph 177 of the Judgment.
[34] Paragraph 161 of the Judgment, quoted at paragraph 26(4)(ii) above.

39. The Judge put the point as follows:[35]

> On a balance of probabilities the motivation for hiding the truth about the works from the Gueterbocks included minimising the risk the Gueterbocks would raise the boundary issue. The point was to keep the Gueterbocks believing the position was as explained to the planners in 2012 – no need to worry about the boundary because the two buildings will be independent. If the Gueterbocks knew in late 2015 what was intended, there was a strong likelihood the boundary issue would have been raised. Mr Harris was misleading the Gueterbocks because he had decided to take the risk on the boundary and build to [Henderson Court's] version of the boundary underground. If Mr Harris thought this was without serious risk, he would not have needed to mislead the Gueterbocks to obtain their consent.

40. The Judge was entitled to conclude that there was a high degree of recklessness and that the claim under the Policy was not accidental. It follows that the second limb of the grounds of appeal must also be dismissed.

F. DISPOSITION

41. For the reasons I have given, the appeal is dismissed. The questions that would arise had I reached a different conclusion do not therefore arise, and it would be inappropriate and inefficient to consider them further. I invite the parties to agree a form of order consequential upon this judgment for me to review.

[35] Paragraph 196 of the Judgment.