Neutral Citation Number: [2024] EWHC 502 (Ch)

Case No: PT-2022-000711

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUST AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 8 March 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

STEPHEN PINCUS	**Claimant**
- and -	
(1) SANDEEP SINGH JOHAL	**Defendants**
(2) VENUS PROPERTY HOLDINGS LTD	

- -
- -

Christy Burzio (instructed by **Edwards Duthie Shamash Solicitors**) for the **Claimant**
Joseph Meethan (instructed by **Rainer Hughes**) for the **Defendants**

Hearing dates: 26 October 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

……

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 8 March 2024.

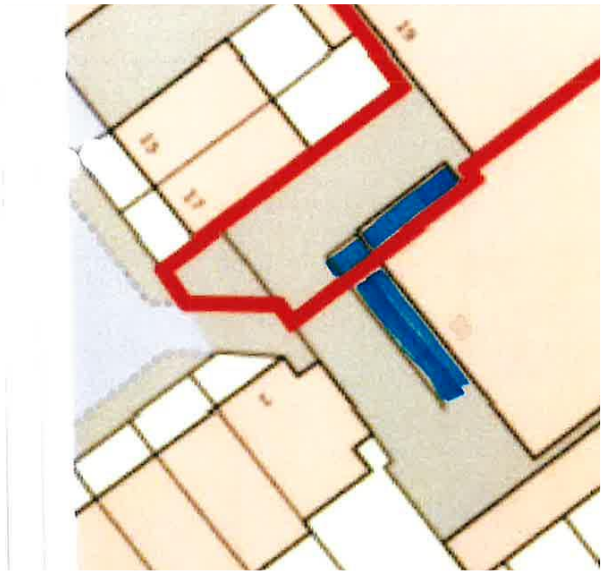
HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by the claimant by notice in this matter dated 14 July 2023. The claim in which it is made was begun by claim form issued on 19 August 2022. It alleges that the defendants have wrongfully interfered with a right of way vested in the claimant to entitle him to use a concrete platform situated on the second defendant's land at 19 Millicent Road, Leyton, London E10, so as to access an entrance to his own next-door commercial premises at 21 Millicent Road. The first defendant is concerned in the management of the second defendant, and therefore of the land. The application currently before me is for an order that the claimant be permitted to enter on the defendants' land to reinstate the concrete platform. I shall return to that in due course, but first I will deal with the background to the matter and the procedural aspects of the claim.

Background

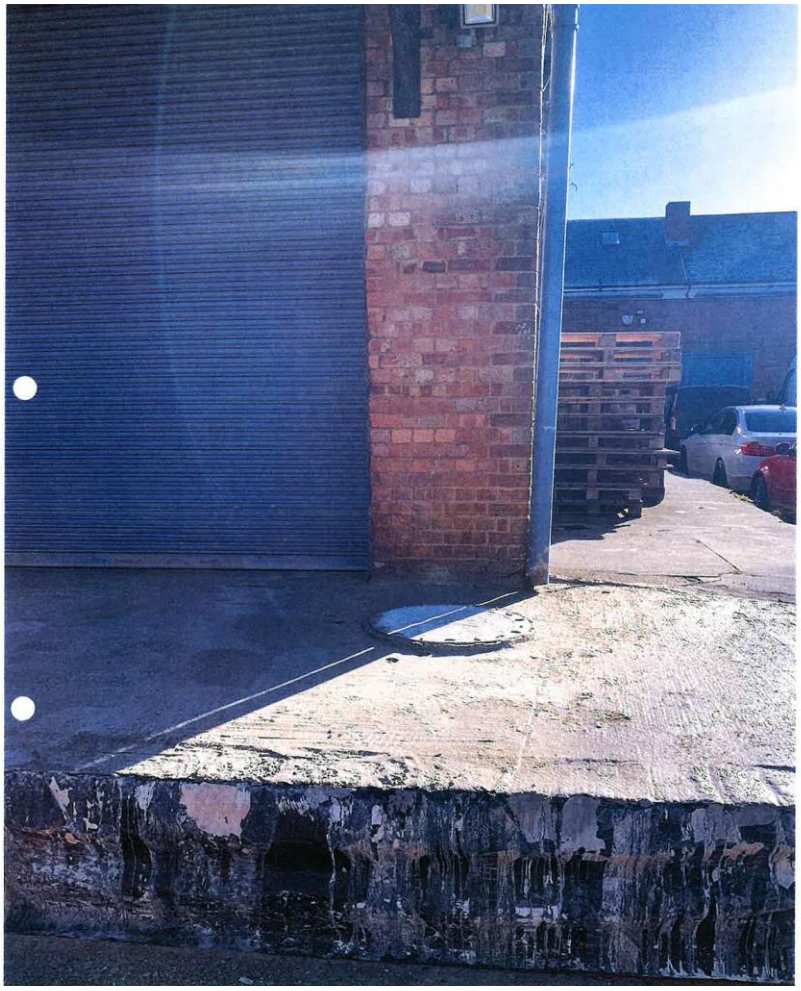
2. The claimant's land contains a commercial property which at the time of the hearing was let to a commercial tenant. I understand that the lease was due to come to an end by effluxion of time on 7 December 2023, but I do not know if it has been renewed or statutorily continued, if the tenant is holding over or indeed has left. At the time of the hearing the evidence was that the tenant would unload goods on the unbuilt part of the claimant's land and take them by fork-lift truck up a concrete ramp on that land. The ramp becomes a platform by the side of the building and then turns a corner and passes onto that part of the platform on the defendants' land, so as to have access to the entrance to the building on the claimant's land, which (i) is at the height of the platform but (ii) abuts the *defendants'* land. On the plan below, the defendant's land (no 19) is edged in red, and the claimant's land (no 21) is immediately adjacent to the south-east. The areas coloured blue indicate the concrete ramp, starting at ground level inside the claimant's land and finishing at door entry level in the defendant's land.



3. The interference alleged was that the defendants began to demolish the platform, making it impossible for the tenant to take goods into the building by fork-lift truck. The photograph below, taken on 19 August 2022, shows the concrete ramp as it turns the corner from the claimant's land (on the right) onto the defendant's land (on the left). The boundary between the two is the wall of the building on the right. It can be seen that, as at the date of the photograph, parts of the ramp appear to have been removed or damaged.

Procedure

4. On 4 September 2022 the claimant applied by notice for an interim injunction against the defendants, to restrain the alleged wrongful interference. On 20 September 2022, Miles J granted a mandatory and prohibitory injunction, requiring the defendants to reinstate the damaged platform and not to interfere further with the claimant's alleged right. The defendants carried out certain remedial works to the ramp, although not completing them by the date stipulated in the order of Miles J. I include below a photograph of part of the ramp after the defendants' works had been done, in particular showing the manhole cover which features later in the story, and which can also be seen in the previous photograph. (These may be regarded as "before" and "afterwards" views.)



5. On 15 February 2023, the court, at the request of the claimant made under CPR rule 12.4(1) in Form N227, entered judgments against the defendants in default of defence. I will set out the relevant rules in due course. As is made clear later, there were in fact several requests for judgment in default, and also additional correspondence which must be considered. But I will come to that.

6. On 22 May 2023, the defendants issued notice of application for an order to set aside the default judgments. On 14 July 2023, the claimant issued notice of application for "an Order permitting [him] to reinstate the Loading Platform to an acceptable standard", as well as for damages and costs. These two applications came before me on 26 October 2023. At the outset of the hearing, I heard and dismissed (for reasons given at the time) an informal application for an unsigned witness statement of the defendants' surveyor, Mr George Charalambous, dated the day before, to be admitted on the defendants' behalf.

7. I then went on to hear the defendants' application to set aside the default judgments. However, after hearing counsel on both sides, I dismissed it, for the reasons I then gave orally. These reasons have now been transcribed, and are to be found on the usual websites under neutral citation number [2023] EWHC 2997 (Ch). No application was made to me for permission to appeal, and, so far as I am aware, no appellants' notice has been lodged. The consequence is that the default judgments stand.

The present application

The letter of 14 February 2023

8. Having heard and disposed of the defendants' application, I then heard the claimant's application of 14 July 2023 for an order to permit him to reinstate the platform and for damages and costs. Having heard that application, I considered whether I should give an extempore judgment or reserve it. In the event I told the parties later the same day (26 October 2023) that I would reserve my judgment. However, the next day I found on the court file the final request by the claimant for default judgment, which was filed at court on 14 February 2023, together with an accompanying letter confirming that the claimant was "content not to pursue all non-monetary aspects of the Particulars of Claim". This was not in the bundle, and had not been referred to at the hearing the previous day. (In his sixth witness statement, dated 17 November 2023, the claimant solicitor explains that the failure to include this in the bundle was an oversight, for which he apologised.)

9. I therefore invited the parties to let me know if they wished to make further submissions in the light of this document. Both sides agreed to the following directions, which I formally made on 3 November 2023:

> "1. The Claimant do file and serve a witness statement addressing the letter of 14 February 2023 by 4pm on 16 November 2023.
>
> 2. The Defendants do file and serve their written submissions by 4pm on 30 November 2023.
>
> 3. The Claimant do file and serve their written submissions in reply by 4pm on 7 December 2023."

The written submissions

10. The claimant served his submissions, in the form of a witness statement by the claimant's solicitor (5 pages, plus a 10-page exhibit), on 17 November 2023. That is of course one day late. The claimant seeks a retrospective extension of time for this, which I will give, no point being taken by the defendants. Although the defendants were due to file their submissions by 30 November 2023, there was apparently a mix-up between counsel and his solicitors as to who should file, and it was only on 7 December that written submissions from counsel were received. These ran to just over 13 pages, plus 127 pages of authorities annexed.

11. By letter dated 13 December 2023, the claimant sought an extension of time for his reply submissions to 13 January 2024, on the ground that his counsel would be on leave from 19 December to 8 January. This letter did not on its face state that it had been copied to the defendants (*cf* CPR rule 39.8(4)). Once it was confirmed that the letter had also been sent to the defendants, on 14 December 2023 I extended time for lodging and service of any reply submissions of the claimant to 4 pm on Monday 8 January 2024. However, it is not clear that my decision was passed on to the parties. At all events, on 9 January 2024, following a further application, I extended time again to 4 pm on Friday 12

January 2024. On 11 January 2024, the claimant filed a further written submissions of about 11 pages, plus a supplemental bundle of 76 pages and an authorities bundle of 73 pages.

12. This veritable cornucopia of written submissions, received at a time when I was busy with other work, and not expecting still to be dealing with this case, has unfortunately slowed down the production of my judgment. I apologise for the delay.

The claimant's claim

13. For various purposes arising on this application, it is necessary to bear in mind some details of the claimant's claim as formally pleaded against the defendants. Unfortunately, there are two versions of the "Amended particulars of claim" in the papers before me. The one in the hearing bundle, produced by the claimant's solicitors for the hearing on 25 October 2023 before me, appears to be dated 4 September 2022. But I now have a second version, which is exhibited to the sixth witness statement of the claimant's solicitor, Shaun Murphy, dated 17 November 2023, which (as set out below) was filed on that day. This version says it is "Amended pursuant to the order of Mr Justice Miles of the 20 September 2022", and carries the date of 11 October 2022.

14. I do not know why the earlier version of 4 September 2022 was contained in the bundle for the hearing on 25 October 2023, when there plainly was a later version in existence. Moreover, and so far as I can see, the order of Mr Justice Miles dated 20 September 2022 is not in the bundle. I have checked the court file, and find that paragraph 4 of that order reads "Permission is granted to the Claimant to amend the Particulars of Claim in the form annexed hereto". Unfortunately, the version on the court file has nothing annexed to it. For present purposes, I shall proceed on the basis that the later version is the correct and duly authorised one, although that is not the version in the bundle. Accordingly, it is to that version that I shall refer for the purposes of this judgment.

15. Paragraphs 38-39, and 42-43 of the amended particulars of claim dated 11 October 2022 relevantly read as follows:

> "38. The First Defendant and Venus [*ie* the Second Defendant] are likely to continue to interfere with the claimant's right of way and access unless restrained …
>
> 39. The Claimant seeks a final order for relief which is both mandatory and prohibitive [sic]. It is sought in response to and to prevent further demolition, destruction and damage that amounts to an interference and nuisance so caused by the First Defendant and Venus …
>
> […]
>
> 42. The Defendants are continuing to demolish, destroy and damage the raised platform, thereby affecting the Claimant's right of way and access to the Property. As such, the full particularisation of loss at this stage is

> unknown. The Claimant therefore reserves the right to plead such losses as the situation evolves.
>
> Aggravated Damages £10,000
>
> 43. The conduct of the First Defendant and that of Venus warrants an award of aggravated damages … "

16. The prayer for relief in the amended particulars of claim reads:

> "AND the Claimant claims:
>
> a) A declaration of the Claimant's proprietary rights in the terms specified in [registered title number], or 1987 Transfer and plan,
>
> b) A mandatory order for the Defendants to restore the raised platform and the Claimant's right of way and access,
>
> c) A prohibitory order restraining the Defendants from, by any means whatsoever, obstructing or interfering with the Claimant's right of way and access,
>
> d) Damages,
>
> e) Aggravated Damages,
>
> f) Interest on damages pursuant to Section 35A of the Senior Courts Act 1981,
>
> g) Further or other relief,
>
> (h) Costs."

The issues on this application

17. The issues with which I propose to deal on this application, and the order iwhich I will do so, are as follows:

> (1) Does the claimant have standing to seek an injunction?
>
> (2) If so, is there evidence of interference with the right of way?
>
> (3) If yes, has the claimant abandoned the claim to an injunction?
>
> (4) If not, should the injunction sought be granted?

Standing

The nature of this claim

18. As to the first issue (standing), the defendants say that the claimant does not have standing, because his claim is in nuisance, and he is not in possession of the dominant tenement, having let it to a third party who has not been joined to

these proceedings. As to the legal nature of the claim, the amended particulars of claim are not as clear as they might be. Paragraph 22 states:

> "The Claimant avers that all three Defendants are closely involved and are therefore jointly responsible for the trespass and interference with the Claimant's rights. The Claimant avers that each are [sic] responsible for the interference and nuisance complained of by the Claimant."

And then under that paragraph there are given "PARTICULARS OF INTERFERENCE AND NUISANCE". So far as I can see, there is no allegation of any trespass to the claimant's land or goods. But there *are* allegations of interference with the claimant's right of way over the defendants' land, by rendering the use of the platform over which the right of way subsists both less safe and less convenient. My conclusion is that this is a claim in nuisance only.

Nuisance

19. Nuisance is a claim about damage to a proprietary interest in land. It is clear that a lessee, even a yearly or weekly tenant, in possession of land can sue in nuisance: *Inchbold v Robinson* (1869) LR 4 Ch 388; *Jones v Chappell* (1875) LR 20 Eq 539. But mere occupation of land on its own, without a proprietary interest, is not enough: *Hunter v Canary Wharf Ltd* [1997] AC 655, HL. On the other hand, it is also clear that the owner of an incorporeal hereditament, such as an easement, may sue for interference with that easement: *Celsteel Ltd v Alton House Holdings* [1985] 1 WLR 204, 216.

20. The proprietary interest concerned need not, however, be in possession. A reversioner, such as the claimant is, may sue in nuisance in respect of damage *to the reversion*: see for example *Kidgell v Moor* (1860) 9 CB 364 and *Bell v The Midland Railway Company* (1861) 10 CB (NS) 287. So, to be actionable, the damage must be of a *permanent* nature. As Parker J said in *Jones v Llanrwst Urban DC (No.2)* [1911] 1 Ch 393, 404 (a case of nuisance by a riparian owner against an authority which discharged sewage into the river flowing past his land), that means "such as will continue indefinitely unless something is done to remove it." Over a century later, Morgan J confirmed in *Metropolitan Housing Trust Ltd v RMC FH Co Ltd* [2018] Ch. 195, [54], that a "reversioner can sue in relation to a nuisance where the nuisance will, or even might, continue to a time when the reversion falls into possession". That was in the context of a right to light, but I do not consider that a different principle applies to a right of way.

21. Here the reversion was due to fall in very shortly after the hearing (and may now have done so). On any view, if physically damaging the platform so that, until it is repaired or reconstructed, or, when so reconstructed, it is less convenient and less safe to use a right of way over it amounts to a nuisance, it is a "permanent" nuisance for this purpose. It may continue until the reversion falls into possession, which therefore damages the reversion. Accordingly, I hold that the claimant has standing to sue for the nuisance alleged, without joining his tenant.

Interference with the right of way

22. It is also clear from the decision of the Court of Appeal in *Nicholls v Ely Beet Sugar Factory Ltd* [1936] 1 Ch 343 that, although the claimant must prove an infringement of the legal right, he or she need not prove actual damage. So, the next question is whether there is evidence of interference with the right of way. In my judgment there is. The right of way granted to the claimant was over the entire width of the platform, and not any particular part. As set out in the written evidence, and as can be seen from the first photograph reproduced earlier in this judgment, a substantial part of that width had been demolished, and in practice the right of way could not so conveniently and safely be exercised over the demolished part. It has now been restored but, as the claimant says, defectively. The question is whether the demolition and defective reconstruction was a sufficient infringement.

23. In *B & Q plc v Liverpool & Lancashire Properties Ltd* (2001) 81 P & CR 20, the claimant had a right of way to its commercial premises over the whole of a large area adjacent. It used that right for deliveries by large lorries. The defendant proposed to extend a building so as to encroach on the area over which the right of way subsisted, arguing that the encroachment would not be sufficient to interfere with the exercise of the right. Blackburne J referred to and quoted extensively from the decision of the Court of Appeal in *West v Sharp* (2000) 79 P & CR 327, and the decision of Scott J (as he then was) in *Celsteel Limited v Alton House Limited* [1985] 1 WLR 204.

24. In particular, the judge cited the following passage from the judgment of Mummery LJ in *West v Sharp*, at 332:

> "Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction."

He also cited this passage from the decision of Scott J in *Celsteel*, at 217:

> "The interference will be actionable if it is substantial. And it will not be substantial if it does not interfere with the reasonable use of the right of way."

25. On the basis of these authorities, Blackburne J concluded:

> "45. … (1) the test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence on being able to continue the use of the whole of what he contracted for is reasonable; (2) it is not open to the grantor to deprive the grantee of his preferred *modus operandi* and then argue that someone else would prefer to do things differently, unless the grantee's preference is unreasonable or perverse."

26. In my judgment the claimant's insistence on continuing to use "the whole of what he contracted for" is indeed reasonable. The claimant's preference for having the whole width of the ramp to take goods up to his building entrance was and is neither unreasonable nor perverse. The demolished part has now been

replaced, but the claimant says defectively. The brick retaining wall was inadequately rebuilt, and had to be demolished and done again. In addition to this, the remedial works carried out by the defendants have left a manhole cover protruding upwards from the concrete slab of the ramp rather than sitting flush with the ground. This can be seen in the second photograph reproduced earlier. It is both a trip hazard and an obstacle to the moving of heavy goods over the surface of the ramp.

27. In my judgment, it is no answer to say that, with care and using narrower pallets, the claimant and his tenants can avoid the manhole. Nor is it an answer to say that complaining of a trip hazard is analogous to (and should be judged by the test for) a *quia timet* mandatory injunction to prevent personal injury. The claimant seeks a restoration of the *status quo ante*, in which there was a right of way over a ramp of a certain width with no obstacle or trip hazard. That is what he bargained for, and that is what he was granted. In my judgment, considering the situation and purpose of the ramp, this is a sufficiently substantial interference with the claimant's right to amount to a nuisance.

Abandonment

28. The next question is whether the claimant has abandoned the claim to an injunction. As already stated, the claimant's solicitors made a number of requests for judgment in default of defence. The first three of these were on 6 December 2022, 13 December 2022, and 25 January 2023. Each of them was rejected, though for various reasons. The solicitors wrote to the court by letter dated 14 December 2022 to say that they were instructed "not to pursue the claim for declaratory relief", and also filed a letter of even date from the claimant himself to the same effect. Both these letters expressly referred to abandoning the claim *to a declaration*.

The letter of 14 February 2023

29. However, a fourth request for judgment in default of defence was made on 14 February 2023. According to the court's electronic file, it was uploaded by the solicitors at 1755 on 14 February, and accepted by staff at 1644 on 15 February 2023. It is event no 54 on the file. On the same day, and at the same time, the claimant's solicitors e-filed a letter saying:

> "We write further to the application we submitted on the e-filing system today for judgement to be entered against the Defendants on the basis that they have not filed a Defence. On behalf of the Claimant we confirm that the Claimant is content not to pursue *all non-monetary aspects* of the Particulars of Claim." (Emphasis supplied.)

This letter was also accepted at the same time as the request, at 1644 on 15 February, and is at event no 55 on the file.

Referral to the master

30. According to an email from court staff to the claimant's solicitors dated 20 February 2023, the request for judgment of 14 February was referred to Master Clark. She directed that judgment be entered in default of defence

> "for an amount to be decided by the court, for the following reasons: –
>
> (1) Form N227 is a Request for judgment by default with the amount to be decided by the court
>
> (2) The prayer to the Amended Particulars of Claim seeks 'damages', not a liquidated sum
>
> (3) Your letter dated 14 December 2022 states that the claimant is seeking damages for an amount to be assessed for an amount to be decided by the court".

31. Despite the lack of reference to it in this letter, the master would also have seen the letter of 14 February 2023, because that was filed at the same time as the request and accepted by staff at the same time. The two are next to each other on the file. As a former chancery master, I know that a master who has been sent an alert about the request would also be alerted to the accompanying correspondence, and in any event could not fail to see from the event log that there was correspondence immediately next to it on the file. It is clear (from the terms of the court's email) that she also saw the solicitors' letter of 14 December 2022. However, it is unclear whether her attention was drawn to the difference in language between the letter of 14 December and the letter of 14 February. At all events, judgment in default was sealed on 15 February 2023 (timed at 1915) and thereafter sent out to the claimant's solicitors.

The evidence of the claimant's solicitor

32. In his sixth witness statement, dated 17 November 2023, and made specifically in relation to this point, the claimant's solicitor Shaun Murphy said this:

> "9. My letter of 14 February 2023 referred to an application to enter Judgement in the sum of £10,000, this being the figure referred to in the Amended Particulars of Claim … My intention at that stage was as follows:
>
> (a) To secure a Judgment for £10,000;
>
> (b) To confirm that the Claimant, in this event, was content not to pursue non-monetary aspects of the Amended Particulars of Claim.
>
> 10. On behalf of the Claimant, the above was intended to be a reference to the application in the Amended Particulars of Claim, for declaratory relief … It was not intended to refer to the injunction that had been granted on 20 September 2022 by Mr Justice Miles. The order granted by Mr Justice Miles existed, in my view, independently of the application for Judgment and would continue to do so, even though Judgment had been entered. I did not consider the application for Judgment would have affected this order …
>
> […]

> 13. I had therefore proceeded on the basis that the only non-monetary claim that was no longer being pursued by the claimant was the application for declaratory relief … "

33. The reference in paragraph 9 of the witness statement to "Judgment for £10,000" is a reference to the claim under paragraph 43 of the Amended Particulars of Claim for aggravated damages in the sum of £10,000. But Master Clark pointed out that the claim to damages is not a claim to a liquidated sum, and that the letter of 14 December 2022 said the claimant was seeking damages "for an amount to be decided by the court".

34. There is a further point to mention. The claimant's solicitor says in his evidence that it was clear from the inter-solicitor correspondence that the claim to an injunction was still pursued and had not been abandoned. He refers to five letters from his firm to the defendants' solicitors. The first two and the fifth were sent in November 2022. The third was sent in January 2023. All of these were therefore sent *before* the letter of 14 February 2023. But the letter of 14 February was written to support the latest request for the default judgments, and, in apparently abandoning "non-monetary aspects" of the claim, would inevitably be read as superseding the earlier letters. The fourth letter was written to the defendants' solicitors in June 2023, opposing their application to set aside the default judgments, the benefit of which the claimant wished to retain. Moreover, this letter did *not* say that the application for an injunction was still pursued. It said only that a claim for damages and costs was still being made.

The procedural rules

35. The relevant rules of the CPR are the following:

> "12.3(2) Judgment in default of defence (or any document intended to be a defence) may be obtained only—
>
> > (a) where an acknowledgement of service has been filed but, at the date on which judgment is entered, a defence has not been filed;
> >
> > …
>
> and, in either case, the relevant time limit for doing so has expired.
>
> […]
>
> 12.4(1) Subject to paragraph (3), a claimant may obtain a default judgment by filing a request in the relevant practice form where the claim is for—
>
> > (a) a specified amount of money (Form N205A or N225);
> >
> > (b) an amount of money to be decided by the court (Form N205B or N227);
> >
> > (c) delivery of goods where the claim form gives the defendant the alternative of paying their value (N205A, N225); or

(d) any combination of these remedies.

[…]

(3) The claimant must make an application in accordance with Part 23 if they wish to obtain a default judgment—

(a) on a claim which consists of or includes a claim for any other remedy; or

[…]

(4) Where a claimant—

(a) claims any other remedy in the claim form in addition to those specified in paragraph (1); but

(b) abandons that claim in their request for judgment,

they may still obtain a default judgment by filing a request under paragraph (1).

[…]

13.2(1) The court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because

[…]

(b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied; or

(c) The whole of the claim was satisfied before judgment was entered.

13.3(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if --

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why --

(i) the judgment should be set side or varied; or

(ii) the defendant should be allowed to defend the claim.

(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

[…]

> 13.6 Where –
>
> (a) the claimant claimed a remedy in addition to one specified in rule 12.4(1) (claims in respect of which the claimant may obtain default judgment by filing a request);
>
> (b) the claimant abandoned his claim for that remedy in order to obtain default judgment on request in accordance with rule 12.4(3); and
>
> (c) that default judgment is set aside under this Part,
>
> the abandoned claim is restored when the default judgment is set aside."

36. It will be seen that the simple request route to default judgment is appropriate only where the claim made is for money (whether in a specified sum or to be assessed) or the delivery up of goods where a money alternative is available. If *any other remedy* is claimed, *and not abandoned*, an application must be made under CPR Part 23. That will involve notice being given to the defendant, and a hearing taking place. It will take time, and involve extra costs. The claim in the present case was for money, but (originally) also for a declaration and final injunctions. Despite the terms of rule 12.4(3), no application was made under Part 23. On the other hand, on the request for judgment being made, the matter was referred to the master, who, after considering the matter and taking account of the letters from the solicitors, directed that judgments in default be entered.

Robins v Kordowski

37. The only authority cited to me on the operation of these rules was *Robins v Kordowski* [2011] EWHC 1912 (QB). In that case, a problem arose with some similarities to the present. As set out by the judge, the proceedings began thus:

> "9. On 11 March 2011 the Claimants commenced proceedings [for libel] against Mr Kordowski and Mr Smee claiming damages and an injunction. On 14 March the proceedings were served, and on 17 March there was an acknowledgement of service. The Particulars of Claim are dated 11 March. The Claimant sought an interim injunction. On 30 March 2011 that application came before Henriques J. Following a hearing which I am told lasted a day, he granted an injunction restraining publication of the words complained of or any similar words defamatory of the Claimants until trial or further order."

38. Then in April 2011 judgment was entered against Mr Kordowski in default of defence, for damages to be assessed. Subsequently, two applications were issued:

> "5. … By an application notice dated 7 June 2011 Mr Kordowski applies to set aside a judgment for damages to be assessed. It was dated 12 April 2011 and entered against him in default of Defence in the libel proceedings brought against him by the Claimants.

> 6. By an application notice dated 27 June 2011 the Claimants ask for summary disposal of their libel claim against Mr Kordowski, in accordance with Section 8 of the Defamation Act 1996 ('the Act'). Although they have already obtained judgment in default of Defence, the draft order includes an application for judgment to be entered against Mr Kordowski under section 8 of the Act. The Claimants also ask for relief in the forms of: a declaration that the words published or caused to be published by the Defendants were false and defamatory of the Claimants; publication of a suitable correction and apology; damages and an injunction. These are the forms of relief provided for by section 9(1) of the Act."

39. The argument on abandonment is put in paragraphs 55 and following:

> "55. Mr Crystal [counsel for the defendants] submits that, by using the procedure in part 12.4(1) instead of 12.4(2) [this is the original number; it is now 12.4(3)] the Claimants have irrevocably abandoned their claims for any relief other than the relief by way of a money claim. He submits that there is accordingly no jurisdiction to grant relief by way of summary disposal under section 8.
>
> 56. I reject this contention. In *Loutchansky v Times Newspapers Limited* … [2002] QB 783, [the Court of Appeal] considered the application of section 8 of the Act in circumstances where the judge at first instance had given judgment for the Claimant with damages to be assessed. It was argued that, following that judgment, the court had no jurisdiction to make an order under section 8 of the Act. In paras 93 to 99 the Court of Appeal rejected that submission …
>
> 57. The same reasoning must apply where the judgment on liability is one that has been entered in default of defence.
>
> 58. Moreover, I would reject Mr Crystal's interpretation of CPR Part 12 on the ground that it leads to an unnecessary and unjust result. The overriding objective in part 1.1 provided 'these rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly'. It goes to say:
>
> > '1.2 The court must seek to give effect to the overriding objective when it
> > …
> > (b) interprets any rules.'
>
> 59. It would be plainly unjust to interpret Part 12.4 to the effect that by making the application by request, instead of by application under Part 23, the Claimant must be held to have irrevocably abandoned their claim for relief other than money damages. In my judgment the effect of the Claimants having made a request under Part 12.4(1) is that, if they wished to pursue their other claims for relief, they had to make an application to the Court. That is what they have done, pursuant to section 8 of the Act.
>
> 60. In any event, as Mr Singla submits, where there has been an error of

> procedure, Part 3.10 gives the court power to make an order to remedy the error. If I were wrong on the interpretation of Part 12, I would make an order setting aside the judgment in default, and substituting an order under section 8 of the Act (also on the ground that the defence has no realistic prospect of success). It is to be recalled that there has since 30 March been in force the injunction granted by Henriques J, and until Mr Crystal thought of this point last night (it is not in his Skeleton argument) it had not occurred to anyone that the Claimants had abandoned their claim for an injunction".

40. In that case, as in this, the claimant proceeded by way of a request for a default judgment rather than by way of an application under Part 23. Nevertheless, in that case it was held that the claimant was not to be taken to have abandoned the claim to injunctive relief in the claim form. But it is necessary to see that decision in the context of the particular facts of that case. The act of abandonment alleged was the making of the application for a default judgment by simple request under CPR rule 12.4(1) instead of by application notice under CPR part 23 under rule 12.4(3). As the judge said,

> "It would be plainly unjust to interpret Part 12.4 to the effect that by making the application by request, instead of by application under Part 23, the Claimant must be held to have irrevocably abandoned their claim for relief other than money damages."

This case

41. The present case is different. The act of abandonment considered here is not simply applying for default judgments by request under rule 12.4(1). It is also the letter of 14 February 2023 accompanying the request for default judgment of the same date. This letter expressly abandons "all non-monetary aspects" of the claim. In his evidence, set out above, the claimant's solicitor explains that he did not consider this expression to cover the claim to an injunction, because that had already been granted by Miles J on 20 September 2022. The claimant's problem is that what was granted by Miles J was an *interim* injunction, intended merely to hold the ring until the court could decide whether, the claimant's case being either admitted or proved, any of the *final* relief sought in the claim should be granted.

42. That relief (as set out in the prayer to the amended particulars of claim) included (i) a mandatory order for the defendants to restore the raised platform and (ii) a prohibitory order restraining them from obstructing or interfering with the claimant's right of way and access. Both are discretionary remedies. None of that relief had so far been granted. It was still for consideration. It was therefore capable of being abandoned in order to obtain a default judgment by request under CPR rule 12.4(1). On its face, the letter of 14 February effects that abandonment.

43. The letter must also be read in its context. The claimant had previously made three separate requests for a default judgment under rule 12.4(1). Each of them had failed for some reason. The claimant had now made a fourth such request. The rules made clear (as indeed they still do) that a default judgment may be

obtained by simple request under that rule *only* if the relief sought is restricted to money (whether a liquidated or an unliquidated sum) or delivery of goods with a money alternative. If any other relief was sought, it had to be by Part 23 application notice. No such notice was given in the present case. The claimant did not wish to proceed in that way. The matter was referred to the master, who considered the relevant documents, and decided that judgment in default could be entered on the basis of the request, and without the need for an application notice. That can only be on the basis that the master understood that, by reason of the letter, *all* non-monetary relief was being abandoned. *Robins v Kordowski* is thus distinguishable.

44. CPR rule 13.6 reverses the effect of any abandonment of claims if the default judgment obtained by request under rule 12.4(1) is set aside. This benefits the claimant who obtains a default judgment but later loses it on application by the defendant. In this case, the defendants' application to set aside the default judgments failed, and so rule 13.6 has no express application. But its existence and limits show that the rule maker has considered the circumstances in which a claimant having abandoned a claim should be allowed nonetheless to continue with it. It implies that there are no other circumstances in which a claimant having abandoned a claim may do so.

The correction of errors

45. The court having reached the conclusion that the claims to injunctions have been abandoned, the claimant now asks that the court "exercise its discretion to regularise the position". This expression is not altogether clear, but the principal jurisdiction for "regularising" the position is identified by the claimant's counsel as CPR rule 3.10. That rule empowers the court to make orders to remedy what are called "errors of procedure". Here the solicitor's error was to use the phrase "non-monetary aspects" in his letter when he says that he meant "non-declaratory aspects". However, had he used the latter phrase, he would not have been able to obtain the judgments in default which he had requested. Rule 12.4(3) would have applied, and he would have had to make a Part 23 application, which he deliberately did not do. In my judgment, that was not an error of *procedure* within this rule. The solicitor meant to employ the procedure that he did. At best, it was an error of language in using a phrase bearing a meaning which (unknown to others) was not intended.

46. It is of course possible for the court to set aside orders made and judgments entered, particularly when vitiated by fraud, mistake or other similar vitiating factor (see *eg* CPR rule 3.1(7); *Tibbles v SIG plc* [2012] 1 WLR 2591, CA). But I do not consider that the "internal" mistake of the claimant's solicitor as to what *he* meant by "non-monetary aspects", unexplained to the court (or anyone else) until his sixth witness statement was made in November 2023, can justify that here. Certainly, no authority has been cited to me in support of that view.

Conclusion

47. Accordingly, I hold that the claimant must be taken to have abandoned the claim to the mandatory and prohibitory injunctions, and is now restricted to his claim in damages, for which there will need to be an inquiry before the master. In

these circumstances, it is not necessary for me to consider whether it would have been appropriate to grant the injunction now sought, to require the defendants to permit the claimant to enter onto their land and restore the ramp to its pre-existing condition. The claimant's application is accordingly dismissed. I would be grateful to receive an agreed minute of order to give effect to this judgment, and any further directions that may be necessary.