England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2005] EWCA Civ 762
Case No: B2/2004/1510

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MEDWAY COUNTY COURT
Recorder Jane Plumptre
ME302010

Royal Courts of Justice
Strand, London, WC2A 2LL
23 June 2005

B e f o r e :

LORD JUSTICE CHADWICK
LORD JUSTICE LONGMORE
and
LORD JUSTICE CARNWATH

Between:

DOUGLAS BRYANT and BRENDA JEAN BRYANT **Appellants**

- and -

FRANK HARVEY MACKLIN and MANDY MACKLIN **Respondents**

**(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)**

Mr Wasim Taskeen (instructed by Pannone & Partners of 123 Deansgate, Manchester, M3 2BU) for the Appellants
Dr Timothy Sampson (instructed by Whitehead Monkton of Monkton House, 72 King Street, Maidstone, Kent, ME14 1BL) for the Respondents

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HTML VERSION OF JUDGMENT

Lord Justice Chadwick:

1. This is an appeal from an order made by Recorder Jane Plumptre sitting as a deputy circuit judge at Maidstone County Court in proceedings brought by Mr Douglas Bryant and his wife, Mrs Brenda Bryant, against their neighbours, Mr Frank Macklin and Mrs Mandy Macklin. The order as drawn and entered is dated 22 March 2004, but it is common ground that it was, in fact, made on 12 April 2004.

The underlying facts

2. Mr and Mrs Bryant are the owners of a dwelling house and land known as The Poplars, Perry Hill, Cliffe, near Rochester. On the northern and western boundaries of the Bryants' land there is, or was, a row of mature poplar trees and some leylandii. Mr and Mrs Macklin are the owners of

adjoining property known as Sandy Banks. Sandy Banks lies to the north and to the west of The Poplars. The Macklins keep livestock on their land. In the latter half of 2002 their animals – in particular, their horses and cattle – broke through a fence on the boundaries of the Bryants' land and damaged the trees.

These proceedings

3. These proceedings were commenced by Mr and Mrs Bryant by the issue on 12 June 2003 of a claim form in the Medway County Court. The relief sought included a declaration as to the position of the boundary on the north and west of the claimants' property, an injunction requiring the defendants to prevent their livestock from straying onto the claimants' land, an injunction requiring the defendants to remove fencing attached to the claimants' trees and damages (including aggravated damages) for the trespass.

4. Interim injunctions were granted against the defendants on 27 June, 1 July and 7 August 2003. On 19 September 2003 detailed case management directions were given by the district judge. On 28 November 2003 the solicitors then on the record for the defendants came off the record. Thereafter the defendants acted in person. On 4 December 2003 further directions were given by the district judge and it was ordered that, in default of compliance by the defendants with a direction to serve a list of documents, the defence be struck out. The defendants failed to comply with that direction; but they were relieved from the sanction imposed by the order of 4 December 2003 by a further order made by His Honour Judge Murdoch QC on 2 March 2004. Further directions were given on that day. On 22 March 2004 the matter came before His Honour Arnold Vick QC, sitting as a deputy circuit judge. He ordered that the defence be struck out - for failure, I think, to comply with the further directions of 2 March 2004 – and directed that there be a hearing to assess damages. He also directed that the defendants take no further part in the proceedings until they had discharged their liability under a costs order made against them on 25 February 2004; and he made an interim costs order against them in the amount of £25,000.

5. So it was that the proceedings came before the Recorder in April 2004 on the limited issue as to damages. The defendants were not represented and did not appear. The judge observed that that had the effect that the "hearing was inevitably one-sided"; in particular, that she was denied the benefit of a report prepared by the tree expert whom the defendants had instructed. At paragraph 5 of her judgment she identified the task on which she was engaged:

> "The real issue before me was whether I should award damages based on the diminution of the value of the claimants' property, in this case £25,000 as assessed by the claimants' own surveyor Mr Frank Jackson or the cost of restoration and replacement of damaged trees, the figures ranging from approximately £47,000, £193,000 to over £400,000 as estimated by Mr John Gilbert, tree surgeon."

The expert evidence

6. Mr Gilbert, the claimants' tree expert, had made two visits to the property: the first in December 2002 and a second in December 2003. In the report which he made following the later visit, Mr Gilbert advised that "there are 33 trees which require felling, four of them immediately because of their dangerous condition and 23 require felling within the next six months. 13 of these 23 are the tall poplars on the [northern] boundary". He advised replanting, but (as the judge explained) "It is unlikely that the newly planted poplars would survive the shade and competition from the neighbouring conifers. Therefore if poplars are going to be planted to conform the original design of the hedge he suggests that every tree between 1 and 43 should be removed and replaced." Mr Gilbert put forward three options: (A) to replace the damaged poplars with young whips (1 metre high trees); (B) to replace with heavy standard trees (approximately 10-15 centimetres girth and 3-5 metres high); (C) to replace with trees of a similar size, or "like for like". But, as the judge observed (at paragraph 15 of her judgment): "It rapidly became apparent during the hearing from Mr Gilbert's oral evidence that option C by replacing trees with "like for like" size was not a viable option. I understood the damaged poplars to be some 150 feet high. Mr Gilbert told me that suppliers laughed when he asked if they could provide poplars of a mature size". The cost of the "like for like" option (if it could have been achieved) was estimated in excess of £400,000.

7. The judge accepted that the trees were of importance to the claimants in the enjoyment of their home. The trees provided a visual screen against an electricity pylon some 60 metres from the boundary (with its associated power cables) and they provided an acoustic screen against the noise of freight trains on a nearby railway line. Further, the house and garden were on high ground, exposed to wind from the north and west off the Cliffe marshes. The trees provided a screen against the wind. The judge concluded, at paragraph 20 of her judgment, that:

> "The claimants' desire to reinstate the trees to the condition they were in before damage by trespass from the defendants' straying livestock is understandable but sadly both impracticable and financially unrealistic. There is no prospect of like for like replacement."

   That finding is not challenged. Indeed, it is said that the claimants have always recognised that "like for like" replacement is not realistic in the present case.

8. It is important, therefore, to appreciate that this is a case in which it is accepted that it is not possible, by an appropriate award of damages, to restore to the claimants – in the short term, at least – the screening effect of the trees which protected their property and which they have lost as a result of the trespass for which the defendants (in the absence of a defence) are to be treated as liable. But it is also important to appreciate that – unless the claimants sell their property and move away (which they have no wish to do) – they will, in fact, seek to restore the amenity which they have lost by replacing the trees on the northern and western boundaries. It was Mr Gilbert's opinion – as appears from his letter dated 2 February 2004 to the claimants' solicitors – that it would take between twenty and thirty years for young whips to grow to the height of the damaged, mature trees. Heavy standard trees (10-15 centimetres girth, 3-5 metres high) would

take a relatively long time to establish (and could not all be expected to do so); but would grow to maturity within fifteen to twenty years.

9. At paragraphs 11 to 14 of her judgment the judge summarised Mr Gilbert's evidence as to the costs of replacement:

> "11. Because the northern boundary differed from the western boundary by having a row of [leylandii] trees in addition to poplars when Mr Gilbert dealt with costs of these three options in a letter dated 2 February 2004 . . . , he had rather confusingly introduced an option D for the northern boundary which meant replacing trees with like for like which equated to Option C for the western boundary.
>
> 12. He summarised his preferred options in his letter of 2 February 2004 . . . "However, in my opinion I would [prefer] option [B] western boundary £47,960 and option C north boundary £102,450 and suggest this would offer adequate wind protection in accordance with what Mr and Mrs Bryant and their plants have become accustomed to".
>
> 13. Essentially Mr Gilbert was proposing replacement with medium-sized trees as achieving the best balance between the replacement trees 'taking' i.e. survival and providing sufficient screening – both in terms of protecting Mr and Mrs Bryant's screening from a view of large electricity pylons and protection from wind across the Thames estuary and providing protection from wind burn to plants and shrubs in their garden.
>
> 14. In broad summary the total costs of these options for both boundaries added together are:-
>
> Option A £37,910 (ie £8,260+£29,650) (young whips)
>
> Option B £187,611.08 (ie £67,232.33+£120,378.75) (medium size)
>
> Option C over £400,000 (like for like)
>
> To these figures must be added VAT."

10. It is not easy to reconcile the judge's figures in respect of Option B with those set out in Mr Gilbert's letter of 2 February 2004. The figures in Mr Gilbert's letter in respect of Option B are £47,960 (western boundary) and £51,300 (northern boundary) – in aggregate £99,260. Mr Gilbert's preferred solution – as he explains in his letter of 2 February 2004 – is to replace with heavy standard trees (Option B) on the western boundary, but to adopt a compromise between 3 to 5 metre trees (Option B) and "like for like" on the northern boundary by replacing with 7 to 8

metre trees. It is that option – which he (confusingly) calls Option C in his letter of 2 February 2004 – which he costs at £102,450. So, on a true analysis, as it seems to me, the choice (if there is to be replacement) is between Option A (young whips) at a cost of £37,910, Option B (heavy standard trees) at a cost of £99,260, and Mr Gilbert's preferred solution (heavy standard trees on the western boundary and more mature trees on the northern boundary) at a cost of £150,410 (£47,960 + £102,450). I suspect that the judge's figure of £187,611.08 (or £193,000 – as it appears elsewhere) is likely to be the cost of Mr Gilbert's preferred solution with the addition of value added tax and the cost of removing a garden shed; but it is difficult to trace that in her judgment.

11. The judge was, I think, mistaken when she referred to the diminution of the value of the claimants' property (£25,000) as having been "assessed by the claimants' own surveyor Mr Frank Jackson". Mr Jackson FRICS was a surveyor instructed as an expert by the claimants; but his report is limited to determining the position of the boundaries – which, as the judge recognised, was not an issue before her. The valuation report, dated February 2004, was prepared by Mr Graham Mitchell FRICS on the instructions of the claimants' solicitors. His opinion was that the value of the property, as at that date and with vacant possession (i) "on the basis that the mature poplars were still in place and undamaged" was in the order of £525,000 and (ii) "upon the assumption that all of the mature poplars . . . had been removed" was of the order of £500,000. It is, I think, from that report that the judge obtained a difference in value of £25,000. But it is, perhaps, pertinent to have in mind that the actual state of the property is not (and, in February 2004, was not) that all of the mature poplars had been removed. The actual state of the property was that there were damaged poplars, some of which (at least) needed to be removed on the grounds that they were dangerous. A more complete comparison would have taken account of the cost of removal.

12. It is, I think, helpful to note Mr Mitchell's comments at paragraphs 6.2 to 6.5 of his report. After explaining that the mature poplars and leylandii provided screening in the three respects that I have already mentioned, he went on to say this:

> "6.2 Whilst all of the mature poplars need to be removed according to the expert arboriculturist's report, I assume that the hedge of leylandii will remain, albeit that in the short term sections may need to be removed to facilitate access for the planting of replacement mature trees.
>
> 6.3 Although I accept that by themselves the leylandii may not provide as efficient a wind break or noise barrier as the previous combination of the leylandii and mature poplars, and consequently Mr & Mrs Bryant's amenity would clearly be adversely affected, I do not feel that the absence of the poplars would have a detrimental effect upon the Market Value purely due to excessive wind or noise. A prospective purchaser would generally assume that the leylandii provided a sufficient barrier even if in practice it does not.

> 6.4 However the loss of the mature poplars as a visual barrier would in my view have a far greater impact upon the value and saleability of the property. As can be seen from the photographs . . . the electricity pylon, which would previously have been largely obscured by the poplars, is now clearly visible above the leylandii and is rather overpowering. I do feel this would adversely affect the sale price of the property and this is reflected in my valuations . . .
>
> 6.5 What should be appreciated but cannot be quantified is the fact that many potential purchasers would be deterred altogether from purchasing as a result of the close proximity of the electricity pylon and therefore a sale would be more difficult and could well take substantially longer than would be the case if the mature poplars were still in place."

The judge's award of damages

13. The judge directed herself that she should apply the principles set out in the judgment of Lord Justice Clarke in *Scutt v Lomax* (unreported, 25 January 2000):

> ". . . Where trespass by the defendant has caused damage to the claimant's land, the claimant may be entitled to the diminution in the value of the land or the reasonable cost of reasonable reinstatement, or in some cases a figure in between. All will depend on the circumstances of the particular case, but the authorities seem to me to establish the following general propositions.
>
> 1. The claimant will ordinarily be entitled to the diminution in value of the property unless the reasonable claimant would have reinstated the land at less cost.
>
> 2. The claimant who has in fact reinstated the property will ordinarily be entitled to recover the reasonable cost of doing so, even if the cost is greater that the diminution in value, unless he has acted unreasonably in reinstating the property.
>
> 3. Where the claimant has not yet reinstated the property, (subject to 4 and 5 below) he will ordinarily be entitled to recover the reasonable cost of reasonable reinstatement, even if it is greater than the diminution in value.
>
> 4. In assessing what is the reasonable cost of reasonable reinstatement, the court will consider whether the amount awarded is objectively fair; that is fair to both parties. In particular the court will not award a sum which is out of proportion to the benefit conferred on the claimant.
>
> 5. In assessing what steps it is reasonable to take by way of reasonable reinstatement, the court will take account of the cost of the reinstatement. Thus it

> may not be reasonable fully to reinstate the property because the cost of doing so may not be justified. All will depend on the circumstances of the particular case."

14. The judge reminded herself, also, of the observations of Lord Justice Russell in *Farmer Giles Ltd v Wessex Water Authority and another* [1990] 1 EGLR 177, 179C:

> "The award, particularly when contrasted with the cost of full reinstatement, in my judgment, also passes the test of reasonableness. I add that test of reasonableness because the authorities to which we have been referred indicate that reasonableness always has to be taken into account. The judge must stand back, when he has done his arithmetic, and ask himself whether the figure achieved by his findings is fair both to the plaintiff and to the defendants."

15. With that guidance in mind, the judge said this, at paragraph 25 of her judgment:

> "Applying the test of reasonableness and standing back from the arithmetic and in order to ensure fairness between the claimants and the defendants, I consider the replacement of the damaged trees at approximately £193,000 is neither reasonable nor fair to the parties, given as stated above that this constitutes nearly half the total value of the claimants' property. I also conclude that Option [A][1] is neither fair nor reasonable on grounds of cost and also taking into account that it is not the option the claimants seek and would not reinstate the property in terms of screening and wind protection for several years."

And, after referring to the valuation report – which, as she said, reflected a diminution in value of the property of some 5 per cent – the judge went on, in paragraph 26:

> "In my judgment on the facts of this case it is appropriate to award the claimants the diminution in the value of their property ie £25,000 by way of damages for trespass, rather than the costs of reinstatement and repair."

16. The judge awarded damages in the total amount of £33,512.50 - a figure which she reached by the following computation:

> "**Total Award**
>
> General damages based on diminution in value £25,000
>
> Aggravated damages £ 3,000
>
> Incidental costs £ 4,512.50"

The incidental costs comprised reinstatement of the lawn (£2,962.50), replacement of damaged fences on the northern and western boundaries (£1,350) and replacement of damaged shrubs (£200).

17. There are a number of difficulties with that computation. First, the figures, as they appear in the computation, do not total £33,512.50 – the sum of those figures is £32,512.50. Second, the figure for aggravated damages (£3,000) is impossible to reconcile with the award which (at paragraph 28 of her judgment) the judge had said she would make under that head:

> "I consider it right in principle, given the defendants' conduct in this litigation to award aggravated damages. The circuit judge in Scutt v Lomax awarded £500 which the Court of Appeal increased to £1000. I make a similar award of £1,000."

That would suggest that the total award was overstated. But that conclusion would be wrong in the circumstances that, in her computation of the total amount, the judge left out of account the further sum of £3,000 which – as she had said at paragraph 29 of her judgment, she would award "for loss of amenity by way of general damages for trespass". The figure of £33,512.50 does, I think, correctly reflect the total award which the judge intended to make; but that amount is made up of four elements, (i) diminution in the value of the property (£25,000), (ii) general damages (£3,000), (iii) aggravated damages (£1,000) and (iv) special damages (incidental costs) (£4,512.50).

18. The basis on which the judge made an award of aggravated damages (as she said at paragraph 28 of her judgment) was the defendants' conduct as alleged in paragraphs 18(e) and 19 of the particulars of claim.

(1) Paragraph 18(e) contains particulars of an allegation that the claimants have suffered inconvenience, anxiety and distress. It is in these terms:

> "on 14th August 2002 the Second Claimant received a significant electric shock from the Claimant's electrified mesh fence knocking her to the ground, on which she struck her head, and causing her pain and discomfort; she is therefore frightened to go near the perimeters of the garden."
>
> That paragraph must be read with the particulars under paragraphs 17(a) and (b). The claimants' case was that the Defendants had secured an electric fence tape to a tree within the claimants' land in such a way as to come into contact with – and make electrically live – a wire mesh fence belonging to the claimants. The electric shock suffered by Mrs Bryant is, on the pleadings, a direct result of that trespass.

(2) Paragraph 19 of the particulars of claim pleads that the trespass has been aggravated by the manner of the defendants' conduct. Particulars given are:

> "(a) In August 2001 the second defendant informed the Second Claimant in profane terms that anyone who interfered with her activities would '*wake up to find pigs at the end of their garden*';
>
> (b) The Claimants have a dog, but are unable to allow it to roam freely in the garden, since the garden is no longer secure owing to the breaking down of the boundary fences and trees. On 22nd January 2002 the Second Defendant threatened to shoot the dog if it strayed onto the Defendants' Land;
>
> (c) On 22nd January 2002 the Second Defendant shouted abuse at the Second Claimant;
>
> (d) In mid-July 2002 the Defendants deposited a large pile of animal droppings against the Western boundary fence creating a noxious odour."
>
> Again, it is necessary to have in mind that the boundary fences referred to in paragraphs (b) and (d) of those particulars are, on the claimants' pleaded case, within their own land. The breaking down of the fences and the deposit of manure are relied upon as acts of trespass.

(3) Those paragraphs are substantiated by the evidence. The position is summarised in the final sentence of paragraph 63 of Mr Bryant's second witness statement:

> "The Defendants' actions have destroyed the peace and tranquillity of our home and by doing so they have denied us the rightful enjoyment of our property for the last two years"

This appeal

19. Permission to appeal was granted by this Court on the basis that it was arguable that the judge gave insufficient weight to the damaging effect of the loss of the trees on the claimants' home. When granting permission Lord Justice Carnwath indicated that it would be appropriate for the respondents to be heard on the appeal (if they so wished) notwithstanding the order made by His Honour Arnold Russell Vick QC on 22 March 2004. The respondents have taken advantage of that indication and have been represented on this appeal.

20. By their appellant's notice Mr and Mrs Bryant challenge the judge's award under what I have described as heads (i), (ii) and (iii) – damages measured by reference to diminution of value, general damages for loss of amenity and aggravated damages. Put shortly, it is said that the judge

ought to have awarded £187,611.11 as damages in respect of reinstatement, £12,000 as general damages for loss of amenity and £4,000 in respect of aggravated damages. The figure of £187,611.11 represents Mr Gilbert's preferred solution (heavy standard trees on the western boundary and more mature trees on the northern boundary) with the addition of value added tax (£26,321) and the cost of removing a garden shed.

21. I have set out the passage in *Scutt v Lomax* on which the judge relied. It is, I think important to have the facts of that case in mind. The trespass was to two small plots of land (comprising together about one fifth of an acre) in a rural setting which the claimant had purchased for £300 in 1974 and which he and his wife had tended as a memorial garden to their daughter, who had died prematurely. As Lord Justice Clarke explained:

> "Although the plots were some 70 miles from their home, they provided a favourite place for the claimant and his wife to visit and enjoy there the pleasure and delight most other people experience in owning and tending their gardens. They visited the plots regularly, perhaps five or six time a year, during the 25 years before the events which gave rise to this action took place."

The claimant had planted cricket bat willows and cypress trees on the plots and erected a small structure to serve as a shelter and observatory. In December 1995 the defendant's contractor, with the aid of a JCB excavator, had cleared the plots, demolishing both the structure and the trees. The district judge had awarded damages for trespass in the sum of £24,600 (including general damages of £3,000 and exemplary damages of £2,000). The circuit judge had reduced that award to £5,300 (reducing general damages to £2,000 and replacing the award of exemplary damages with an award of aggravated damages in the amount of £500). The principal difference between the two awards (other than in respect of general, exemplary and aggravated damages) lay in the cost of reinstatement of the trees. The district judge awarded £18,500 under that head; the circuit judge reduced that to £2,000. This Court awarded £8,000 in respect of the reinstatement of the trees; restored the award of £3,000 in respect of general damages, upheld the circuit judge's view that the case was not one for exemplary damages, but increased the amount of aggravated damages to £1,000.

22. It was accepted in *Scutt v Lomax* that diminution in the value of the land was not an appropriate measure of damages in respect of the trespass in that case: Lord Justice Clarke observed that the diminution in value of the land was likely to be minimal. The issue was whether reinstatement should be on the basis of "like for like" trees – or as nearly as could be achieved – or whether, as the circuit judge thought, it would be reasonable to plant smaller and younger trees. This Court came to the conclusion that it would not be reasonable to replace trees of the size that they were in 1995. As Lord Justice Clarke put it: "I do not think that a reasonable person in the claimant's position, who had, for example, ample funds of his own, would spend £13,500 replacing twelve cricket bat willows and four cypresses and a further £5,000 tending them, when he could spend very much less on somewhat younger trees". But that did not lead to the conclusion that the reasonable person with ample funds would spend as little as the £2,000 which the circuit judge

allowed. That figure was "substantially too low. The claimant would reasonably plant as large trees as possible, provided the overall cost was not too great". And it was important that "the claimant should be able to plant trees which he will be able to enjoy without waiting for too long". This Court took the view that weighing the proper concern of the claimant to replace the trees which had been destroyed with trees which would come to maturity within a time that he could enjoy them "without waiting for too long" against what would be fair to the defendant – in the sense that the defendant should not be expected to pay for reinstatement at a cost which the claimant (if he had ample funds) would not, as a reasonable person, think it sensible to lay out – the balance should be struck at £8,000. In short, the decision was that a reasonable person with ample funds at his disposal would not think it reasonable to lay out more than £8,000 of his own money in restoring his amenity.

23. It is pertinent, also, to have in mind what Lord Justice Clarke said in relation to general damages in a case of this nature:

> "The facts of this case are unusual because they are an example of a case where the claimant is entitled to a sum by way of general damages to compensate him for the fact that he has not been fully indemnified by an award based on partial reinstatement. In my judgment, he is entitled to recover by way of general damages a sum to reflect the following facts. First, for a significant period there have been neither trees nor other structures on his land since 1995. Secondly, if reinstatement is carried out on the basis which I have suggested, the trees planted will be smaller than the trees which were there at the time of the tort. Thirdly, none of the structures will be replaced. The amenity available to the claimant and his wife will thus be substantially less than they were before the trespass."

24. In the present case I have no doubt that the judge was right to take the view that replacement of the damaged trees at a cost of £193,000 (or £187, 611, if that were the true cost of Mr Gilbert's preferred option) would not satisfy the test of reasonableness. It is not what a reasonable man would do with his own money, even if he had ample funds. He would not think expenditure at that level reasonable to achieve the benefit that would be achieved – having the other options in mind. I think, too, that that would be the correct view in relation to the cost of the option B that Mr Gilbert had in mind (replacement with heavy standard trees on both the northern and western boundaries). As I have explained, the cost of that option, on Mr Gilbert's figures, would be £99,260 (exclusive of value added tax) – say £125,000 after adding the tax and the cost of removing the garden shed.

25. But I do not think that the judge was right to reject option A, if that were what she did in the passage to which I have already referred: "I also find that Option [A] is neither fair nor reasonable on grounds of cost and also after taking into account that it is not the option that the claimants seek and would not reinstate the property in terms of screening and wind protection for several years". The fact that the claimants would prefer reinstatement with mature trees (rather than with young trees) is not a good reason for rejecting the option of reinstatement with young

trees if that is what a reasonable person would choose to do if he was laying out his own money. And the fact that reinstatement with young trees would not provide screening "for several years" overlooks the fact that, in the short term, no viable reinstatement option will restore the amenity to what it was. The choice is between options which will each take time to restore the amenity. The question is what, if anything, is it worth doing by way of reinstatement.

26. On the basis of Mr Gilbert's figures, Option A (replacement with young whips) would cost £37,910 exclusive of value added tax – say £44,544 with the tax. That represents less than ten percent of the value of the property in question. In my view it is impossible to say that a reasonable person with ample funds at his disposal would not think it reasonable to lay out that sum in restoring an amenity to his home; provided, of course, that the expenditure would lead to a benefit worth having. Mr Gilbert, thought that it would; and the judge made no finding that it would not. It is important to keep in mind that Mr and Mrs Bryant want to continue living in their property. They do not want to sell up and move on. I find it difficult to accept that they would not think that the prospect of restoring trees to their boundaries – even if that would take some time – was not a benefit worth having. The alternative - to do nothing – would, I think, be rightly rejected as unacceptable.

27. For my part, therefore, I would set aside the judge's award in respect of diminution of value on the ground that that was not the appropriate basis on which to measure damages for trespass in this case. I would substitute an award, under that head, of £44,500. And I would increase the award of general damages for loss of amenity. In adopting the figures of £3,000 awarded by the district judge (and this Court) in *Scutt v Lomax* the judge failed to appreciate the important distinction between that case and this. In this case the amenity affects, very directly, the enjoyment of the claimants' home. The loss of the screening which they had come to value must be a cause of daily annoyance. And that will continue for many years. I would increase the award of general damages to the figure which the claimants seek on this appeal - £12,000.

28. I would increase, also, the judge's award in respect of aggravated damages. As Lord Devlin observed in *Rookes v Barnard and others* [1984] AC 1129, 1221, it is well established that, where damages are at large, the court can take into account the motives and conduct of the defendant where they aggravate the injury done to the claimant. The judge recognised that this was such a case when she made an award of aggravated damages. I have no doubt that she was right to do so. But, in adopting without further examination the amount awarded by this Court in *Scutt v Lomax*, the judge failed to give sufficient weight to the extent to which the trespass in the present case was aggravated by the defendants' deliberate and high-handed conduct. There is no doubt, on the pleaded case and the evidence, that there was a serious incursion into the claimants' right to the enjoyment of their home; that the defendants were well aware of the effect that their conduct was having in that respect; and that they intended (or, at the least, were indifferent to the fact) that it should have that effect. I would increase the award to the amount which the claimants seek (£4,000) in respect of the aggravation.

Conclusion

29. I would allow this appeal. In place of the judge's total award of £33,512.50, I would substitute an award of £65,012.50 made up as to (i) £44,500 in respect of reasonable reinstatement costs, (ii) £12,000 in respect of general damages, (iii) £4,000 in respect of aggravated damages and (iv) £4,512.50 in respect of incidental special damages (as identified by the judge).

Lord Justice Longmore:

30. I agree.

Lord Justice Carnwath:

31. I also agree.

Note 1 The judgment, as signed by the judge, refers to Option C; but it is common ground before this Court – and, I think, is apparent from the context – that the judge must have intended to refer to Option A at this point in judgment. [Back]
