

MURIEL ANGELA WHISTON v (1) PETER JOSEPH LEONARD (2) KELLY MARIE LEONARD



No Substantial Judicial Treatment

Court

Chancery Division

Judgment Date

20 February 2026

Case No: CH-2024-BHM-000030

IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY
COURTS IN BIRMINGHAM CHANCERY APPEALS (ChD)

[2026] EWHC 355 (Ch), 2026 WL 00477084

Before: MR JUSTICE MICHAEL GREEN

20/02/2026

Hearing date: 30th January 2026

Birmingham Civil Justice Centre

The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Representation

Mr Joshua Dubin (instructed by Middleton Law Limited) for the Appellant

Mr David Taylor (instructed by MFG Solicitors LLP) for the Respondents

MR JUSTICE MICHAEL GREEN:

1. This is an appeal by the Appellant, Mrs Muriel Angela Whiston, who was the Defendant below, from a decision of Her Honour Judge Sarah Watson (the " Judge ") sitting in the County Court at Birmingham (Business and Property Work). The trial in this matter was heard by the Judge over four days from 14 to 17 May 2024, and the Judge's careful and detailed reserved judgment dated 10 September 2024 was handed down on 14 October 2024 (the " judgment ") at a consequential hearing when the final order under appeal was made. (References to paragraphs in square brackets are references to paragraphs of the Judge's judgment, save where the context otherwise requires.)

2. The case concerns a long running dispute between the owners of neighbouring farms and in particular over a right of way granted over the Appellant's land for the benefit of the Respondents (and Claimants below), Mr Peter and Mrs Kelly Leonard, who own the adjoining farm. The Appellant's property is called Lower Fenemere Farm, Baschurch, Shrewsbury SY4 2JF (the " Farm "); the Respondents' property is called Lower Fenemere Court, with the same address (the " Court "). The geography of the land comprising the Farm and the Court, which were originally one property in the common ownership or occupation of the Appellant's family, will be described below.

3. I say at the outset that it is most regrettable that this matter could not be resolved out of court and that there has been so much time and money spent in relation to this dispute, quite out of proportion to the issues at stake. Having said that, I do recognise that there is no easy solution to the problems that have arisen as to the fair and reasonable operation and use of the right of way. Furthermore I understand the parties have made a number of (ultimately unsuccessful) efforts to settle this dispute on terms satisfactory to both.

4. On 14 July 2025 I granted the Appellant permission to appeal on five Grounds: one of which concerns the Respondents' claim that the Appellant substantially interfered with the right of way; two concern the Appellant's counterclaim which was dismissed by the Judge; and the other two are in relation to costs.

5. The Respondents filed a Respondents' Notice by way of cross-appeal which challenges the Judge's findings on substantial interference and the relief that the Judge granted. I directed a rolled-up hearing in relation to the Respondents' Notice so that permission to cross appeal would be considered by me at the appeal hearing, along with the cross appeal if I was minded to grant permission. I will deal with that in due course.

6. There are no contentious points of law on this appeal. It is essentially about the Judge's findings of fact and whether her conclusions based on evaluations of those factual findings and the consequences that followed from them were correct. It is trite that an appeal court will be very reluctant to interfere with a trial judge's factual findings, particularly where there has been oral evidence, and, as there was in this case, a site visit by the Judge that would have brought vividly home to her the extent of the physical problems that have given rise to this bitter dispute.

7. The appeal was well argued by counsel for the parties who also appeared below: Mr Joshua Dubin for the Appellant; and Mr David Taylor for the Respondents; and I am grateful to them for their assistance. It would have been even more helpful if they had responded in writing to the other side's appeal, their respective skeleton arguments only covering their client's appeal. But I had the benefit of their clear oral submissions.

Background facts

8. In [7] to [48] of the judgment, the Judge set out the largely uncontroversial factual background. Perhaps most importantly, it is necessary to understand the lie of the land, that is the location of the Farm, the Court, the right of way, and the various gates that have been installed over the years. These are the salient points for the appeal.

9. As noted above, the Farm and the Court were originally one farm owned by the Appellant's family from before she was born. She is now 80 years old and she continues to work as a self-employed sheep farmer with a flock of Charolais sheep.

10. By a conveyance dated 14 November 1996, the Appellant and her former husband divided the land between the Farm and the Court. The latter comprised the original farmhouse, the outbuildings surrounding the large farmyard and 33 acres of land. The remainder of the farm, which had a bungalow into which she moved, was retained by the Appellant. By the conveyance the Court was acquired by Mr and Mrs Phipps.

11. Both the Farm and the Court are accessed from the public highway by a track running from west to east (the " Track "). The Farm is at the eastern end of the Track; the Court is to the south. At the time of the 1996 conveyance there was a farm gate at the eastern end of the Track at the entrance to the Farm (the " Original Gate "). It was common ground that the Original Gate was generally left open and it was only closed when the Appellant's sheep were in the area of the Farm's yard. As all parties recognise, it is necessary for the sheep to be secured within the Farm so that they cannot escape down the Track. The Original Gate had a sign on it that read: " *Please shut the gate. Movement & work with livestock in progress. Thank you.* " It is unclear who actually owned the Original Gate but as the Judge explained in [23] of the Judgment, that issue was not litigated before her. It was accepted, however, that the Respondents kept the Original Gate closed when asked to by the Appellant when she was corralling her sheep.

12. To the east of the Original Gate is an area of hardstanding (the " Hardstanding "). This is part of the Farm and owned by the Appellant. The entrance to the Court is at the southwest of the Hardstanding. There are gates across the entrance to the Court leading into a courtyard area that is surrounded by the farmhouse and outbuildings. It is possible to drive round the courtyard but the Respondents prefer not to do so as it is used for other things. It means that they tend to reverse out of the Court through their entrance gates and then manoeuvre on to the Track. Many of the issues in this case arise out of the difficulties they have in turning vehicles from the Court onto the Track.

13. To the east of the Hardstanding, the Track continues into the Farm's yard. This area which is surrounded by the Farm's buildings and back of the Court's milking shed was called by the Judge, the " Triangular Area ". The Hardstanding, the Triangular Area and the portion of the Track connecting the two is the area over which there is the right of way in question in these proceedings (it is the area coloured yellow on the plan attached to the 1996 conveyance). The grant of the right of way in the 1996 conveyance for the benefit of the Court was in the following terms:

"the right for the Purchasers and their successors in title at all times hereafter and for all purposes connected with the use and enjoyment of the Property the right with or without vehicles of any description to pass and repass over and along that section of the yard on the plan coloured yellow in common with the Vendors and others so entitled for the purpose of gaining access to and egress from the Property."

14. In one of the Court's barns backing onto the Triangular Area there is a sliding barn door (the " Barn Door ") from an old milking shed that leads directly out onto the Triangular Area. This features in the appeal because the Appellant wants an order that the Barn Door be kept shut so as to prevent her sheep from going through it and also to stop the Respondents' animals from escaping out onto the Farm.

15. There is a further access to the Court, called the " Contractors' Gate ", which is closer to the road at the western end of the Track. Larger vehicles can use this, without going over the right of way, but it means driving over fields to the west side of the Court buildings and then into the courtyard. However most vehicles use the Track and the right of way to drive to the Court.

16. In 2007 Mr and Mrs Phipps sold the Court to Mr and Mrs Sheward. Then in 2017, the Respondents acquired the Court from Mr and Mrs Sheward.

17. The Respondents have four young children and they use the courtyard as a garden for their children to play in, as an enclosure for their dogs and other animals and for parking. The Second Respondent uses the old milking shed, with the Barn Door on the other side, to house rescue animals, such as rabbits. Once a week, they are visited by children with learning difficulties who enjoy contact with such animals.

18. When the Original Gate was in operation, most vehicles going to the Court would be able to travel down the Track, through the Original Gate, turn right over the Hardstanding and through the Court gates. They would only need to use a small part of the right of way. Alternatively, delivery vans, for both the Farm and the Court, could park on the Hardstanding and make their deliveries on foot. Longer vehicles, such as horseboxes, septic tank emptying lorries and tractor/trailer combinations, which could not make the right turn past the Original Gate, would continue down the Track into the Triangular Area, make a turn there, go back down the Track the other way and then turn left into the Court. When leaving the Court, those larger vehicles would have to do the same in reverse, turning on the Triangular Area. The smaller vehicles, which as I have said above would tend to reverse out of the courtyard, would be able to reverse on to the Hardstanding and then a short way down the Track towards the Triangular Area, and then go forwards down the Track to the road.

19. In [25] to [33] of the Judgment, the Judge set out a series of text messages between the Appellant and the Respondents in the summer of 2020, which was during the Covid pandemic lockdown. These were about the problems the Respondents had experienced with the Original Gate not being opened again after the Appellant's sheep were safely out of the area. The Appellant was trying to discuss with the Second Respondent an idea she had for a new gate to be put up in a different position that she thought would not be so inconvenient to the Respondents. However, as it turned out, she was unable to put this proposal to the Respondents.

20. Instead the Appellant just went ahead and put up a new gate. This was on 25 August 2020 and it was a gate and fence erected on the eastern side of the Hardstanding over the right of way (the " New Gate "). The New Gate was kept closed. Because of its angle and that there was fixed fencing as part of the structure, it made it considerably more difficult to reverse out of the Court and for larger vehicles both to enter and leave. There was evidence at the trial as to this and the Judge found that the New Gate actually made it impossible for some vehicles to enter or leave the Court – see [74] to [79]. The Appellant's expert surveyor agreed that the New Gate obstructed larger vehicles from entering and leaving the Court – see [80]. The Judge concluded at [83] that the New Gate substantially interfered with the Respondents' right of way.

21. Almost immediately after their installation, the Respondents complained about the New Gate and the problems it was causing. On 24 September 2020, the Respondents' solicitors sent a pre-action letter but the Appellant, through her solicitors, denied that it caused any substantial interference with the right of way. These proceedings were then commenced on 17 May 2021. A mediation failed to resolve matters. But on 17 December 2021, the Appellant removed the New Gate including the fencing. She replaced it with double gates that were a couple of feet further east down the Track towards the Triangular Area (the " Double Gates "). These have no fencing but are almost as wide as the right of way. It is the Double Gates that have been the focus of the trial and this appeal. (In the meantime, the Original Gate had also been removed from its hinges.)

22. The Double Gates are unlocked. They are secured by a swing-over arm and ground pin. But they are kept closed, save when they are opened for access. The Appellant put up a large sign on the Double Gates that says:

" *Lower Fenemere Farm. Messrs Whiston & Grovell. Farm Livestock. Please keep gate shut at all times* " (the " Sign ").

23. The Respondents considered the Double Gates to have been an improvement to the New Gate but they still claimed that the Double Gates substantially interfere with their right of way and constitute an actionable nuisance. They had some evidence that delivery drivers had been deterred from opening the Double Gates and using the Triangular Area to turn. Some of them had even resorted to reversing all the way down the Track to the road, which is obviously not ideal and potentially dangerous. The Respondents also claimed to have evidence that the Appellant had been verbally abusive and confrontational with visitors who had opened the Double Gates and used the Triangular Area to turn.

24. The Respondents therefore amended their Particulars of Claim to take into account the problems allegedly caused by the Double Gates.

The Judgment below

25. By their amended Particulars of Claim, the Respondents alleged that the Double Gates and/or the Double Gates in combination with other factors amounted to a nuisance by the Appellant in respect of their right of way. They maintained that the Double Gates in themselves substantially interfered with the right of way because drivers reversing out of the Court have to either open the Double Gates or perform a multi-point turning manoeuvre in order to get onto the Track.

26. The other factors relied upon by the Respondents as deterring visitors from using the right of way, particularly the Triangular Area, were:

- (1) The Sign;
- (2) Loose livestock roaming freely on the Triangular Area which might escape if the Double Gates were opened; and/or
- (3) The conduct of the Appellant towards visitors who open the Double Gates, in particular in claiming that they had no right to use the Triangular Area or that they had to close the Double Gates immediately.

27. The Appellant denied the Respondents' allegations of nuisance and counterclaimed for excessive user of the right of way and for various declarations as to the extent of the right of way that could be enjoyed by the Respondents. The Appellant also counterclaimed in respect of the Barn Door, alleging that the Respondents' behaviour in respect thereto, namely leaving it open and allowing vehicles to park for extended periods of time on the Triangular Area by the Barn Door particularly in order to change and empty the portaloo that the Respondents had installed in the old milking shed.

28. As I have said above, the Judge heard the trial between 14 to 17 May 2024, after conducting a site visit on the first day. She clearly had a good understanding of the layout and the issues and difficulties caused by the Double Gates. She heard live evidence from the Respondents together with their witnesses: Ms Stokes; Ms Roberts; Mr Dwyer; Mr Cadman; and Ms Sheppard. The Respondents also adduced hearsay evidence from: Ms Wilding; Mr Arthur; Mr Mainwaring; and Natalie (surname unknown). From the Appellant's side the Judge heard live evidence from: the Appellant and her husband, Mr Grovell; together with Ms Garmston; Mr Lloyd; and Mr Haynes. There was one further witness statement from Mr Morgan that the Respondents admitted prior to the trial.

29. In very broad terms the Judge found as follows:

(1) That the extent of the right of way is limited to access and egress from the Court, but that includes access to the Barn Door –[50] and [54]; that includes the right to halt on the right of way for the purpose of making deliveries and loading and unloading; but there is no right to park save in respect of the aforesaid – [55] to [59];

(2) There were some occasions when there had been excessive user by the Respondents of the right of way, in particular the incidents concerning the delivery and maintenance of the portaloos through the Barn Door; but in general the stopping of delivery drivers and the like on the Hardstanding to make deliveries was not excessive user – [60] to [66];

(3) That the New Gate had amounted to a substantial interference with the Respondents' right of way and damages were awarded in respect thereof – [83] and [185];

(4) That the Double Gates themselves do not constitute a substantial interference with the right of way, even if they are required to be kept closed – [95]; but

(5) That the closed Double Gates, together with the Sign and the Appellant's conduct in telling those of the Respondents' visitors driving small vehicles that she considered were not entitled to use the Triangular Area that they should not come through the Double Gates did amount to a substantial interference with the Respondents' right of way – [160].

30. After a hearing on 14 October 2024 to consider the appropriate relief to be ordered following her judgment, the Judge made an order that has the following material terms:

"AND UPON the Court having determined that the double gates which were erected by the Defendant in place of the aforesaid gate and fence, and across the Claimants' right of way on or about 17th December 2021 (' the Double Gates '), not in themselves but when taken together with (a) the sign which the Defendant affixed to the Double Gates (' the Sign ') and (b) the Defendant's conduct in challenging various of the Claimants' visitors who attempted to drive onto the part of the yellow land

which lies to the east of the Double Gates, amounted to a substantial interference with the Claimants' aforesaid right of way;

...

AND UPON the Court having determined that the Claimants are under no obligation to keep the aforesaid sliding door closed;

...

AND IT IS ORDERED

3. The Defendant:

- a) shall forthwith remove the Sign from the Double Gates;
- b) shall by 12th November 2024 erect a sign or signs stating " *Lower Fenemere Farm and Turning for Lower Fenemere Court. Please shut gate after use to prevent the escape of farm livestock* ". The constituent parts of the sign(s)' wording shall be easily legible, and of equal prominence;
- c) shall not, whether herself or by her servants or agents, prevent or challenge any person using the yellow land (including that part lying to the east of the Double Gates) to turn or manoeuvre in order to access Lower Fenemere Court or to load or unload things going to or from Lower Fenemere Court.

4. Paragraph 3(c) of this Order shall remain in place until 2 years from the date of handing down of judgment.

...

5. The Defendant's Counterclaim is dismissed.

...

7. The Defendant shall pay:

- a) the Claimants' costs of the claim, and
- b) the Claimants' costs of the counterclaim.

The Grounds of Appeal

31. The Appellant has five Grounds of Appeal but they can be dealt with in three parts. They are as follows:

(1) Ground 1 is that the Judge was wrong to find that the closed Double Gates together with the Sign and the Appellant's conduct constituted a substantial interference with the right of way. The Appellant says that there was insufficient evidence to support such a finding.

(2) Grounds 2 and 3 concern the counterclaim in relation to the Barn Door. Ground 2 is that the Judge was wrong to have held that there was no obligation on the Respondents to keep the Barn Door closed. Ground 3 follows Ground 2 and it is that the Judge should not have dismissed the counterclaim completely if there was such an obligation on the Respondents to keep the Barn Door closed.

(3) Grounds 4 and 5 concern costs. Ground 4 is about the costs of the counterclaim; Ground 5 the costs of the claim, both of which the Appellant was ordered to pay in full. The Appellant says that the costs order should reflect the parties' respective success, and the counterclaim should not have been dismissed and the Respondents were not wholly successful on their claim.

32. The Respondents have two Grounds of Appeal in their Respondents' Notice, both concerned with the Double Gates and the order the Judge made:

(1) Ground 1 is that the Judge erred in concluding that the closed Double Gates in themselves did not substantially interfere with the right of way;

(2) Ground 2 is that the Judge erred in the relief she granted based on her findings that the closed Double Gates together with the Sign and the Appellant's conduct which the Respondents say was insufficient to address the substantial interference; the Respondents say that the Judge should have ordered the Appellant to keep the Double Gates open except when required to be closed for the purpose of corralling sheep.

Appellant's Ground 1: Was the Judge right to find substantial interference?

33. This is a challenge to the Judge's findings of fact and her evaluations of those facts. The Appellant says that the Judge failed adequately to identify the specific instances of interference and that led to a flawed evaluation as to whether the evidence was sufficient for her to find that there had been substantial interference with the right of way.

34. Mr Dubin submitted that the Respondents' pleaded case was that there were four factors that combined together to amount to substantial interference. The four factors were: the closed Double Gates; the Sign on the Double Gates; the free-roaming livestock; and the Appellant's behaviour. Mr Dubin submitted that the Judge found that two of those factors were not causative of substantial interference. The Judge found that the closed Double Gates in themselves did not amount to substantial interference; and the Judge considered the presence of sheep on some occasions did not amount to substantial interference.

35. However I do not consider that this is an accurate portrayal of the case put by the Respondents or the Judge's judgment. The Respondents pleaded that either the closed Double Gates in themselves constituted a substantial interference with the right of way (the Judge found against them on that) or that the closed Double Gates together with the other factors amounted to substantial interference. Thus for instance, the Sign can only interfere with the right of way because it is attached to the closed Double Gates and the combination of the

two would be essential to a finding of interference. Similarly, the allegations as to the Appellant's conduct are related to and in part dependent on the Double Gates being closed. In other words, the Judge's findings were not just in relation to the Sign and the Appellant's conduct; but it was those findings in combination with the closed Double Gates.

36. Before looking at the alleged evidential inadequacies and errors of the Judge, it is important to remember the role of an appellate court in relation to the findings of fact of a trial judge. There are many authorities that can be cited in this respect, but Counsel in this appeal referred to Lord Reed's statement of the principle in *Henderson v Foxworth Investments Limited* [2014] 1 WLR 2600 where he said:

"67 It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

37. The Court of Appeal decision in *Re Sprintroom Limited* [2019] BCC 1031 was also cited and the joint judgment of the Court (McCombe, Leggatt and Rose LJ) makes clear that it is not only the Judge's findings of primary fact that should not be interfered with unless plainly wrong but also the conclusions based on the Judge's evaluation of the facts – see [74]. The Court of Appeal also endorsed the memorable reasons of Lewison LJ for an appeal court's reluctance to interfere with the trial judge's findings in *Fage UK Limited v Chobani UK Ltd* [2014] EWCA Civ 5 [114] which are worth repeating:

114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc* [1977] R.P.C. 1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 W.L.R. 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii) The trial is not a dress rehearsal. It is the first and last night of the show.
- iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

- iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

38. It is also of assistance to bear in mind what Lewison LJ said about the approach of an appeal court to findings of fact in the later case of *Volpi v Volpi* [2022] 4 WLR 48 at [2], in particular concerning the assumption that all the evidence has been taken into account by a judge even if a specific piece of evidence is not referred to:

The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

- (i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
- (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
- (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
- (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
- (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
- (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

39. To a large extent, this is what the Appellant is doing in relation to this Ground of Appeal. She has picked on certain parts of the evidence and has said that because of the nature of that evidence, for example it is hearsay or the witness statement is unsigned, the Judge should have placed no or less weight on it than she did. She also refers to evidence that might not have been specifically mentioned in the judgment. But as Mr Taylor submitted, it is necessary to bear in mind that the Judge had regard to the whole of the "*sea of evidence*" before her, including her site visit, the oral and written evidence, including any admissions of the parties and many contemporaneous videos (the Judge saw 43 videos from the Respondents and 29 from the Appellant's CCTV). That was ample evidence on which the Judge could fairly base her factual findings. And she actually dealt in some detail with most of the evidence and it does not seem right to me to assume that because some small piece of evidence was not specifically referred to, it was not taken into account by the Judge in her overall assessment of the weight of the evidence. The Appellant is inviting me to "*island hop*" and that is not a strong basis for interfering in the trial Judge's factual and evaluative findings.

40. Mr Dubin submitted that the evidence of drivers being deterred by the Sign is thin to non-existent. He said that the Judge only referred to one incident where a driver was deterred from going onto the Triangular Area by the Sign on the closed Double Gates. At [159] of the judgment the Judge said as follows (underlining added):

"Drivers who have not visited Lower Fenemere Court before and who were not aware of the existence of the right of way beyond the Double Gates and onto the Triangular Area would be deterred from opening the Double Gates and using that [...] to turn by the existence of the closed gate and the signage . Mrs Leonard recorded a conversation with a driver who had backed his van into the ditch in the Track as he had not wanted to go through the Double Gates due to the signage . In addition, it is clear from video evidence that some drivers who had previously been told they were not welcome to turn on the Triangular Area chose not to do so. They prefer to avoid potential conflict and reverse down the drive.

41. Mr Dubin said that the driver had not been identified and had not provided a witness statement. But it is clear that this was based on a recorded conversation with the driver. What is also clear from the first sentence is that the Judge relied on her finding as to the effect of the Sign on the closed Double Gates to any driver unfamiliar with the site and the right of way. In [97] to [100] the Judge had made those findings based on the significant differences between the sign on the Original Gate and the Sign and concluded that the Sign on the closed Double Gates would "*act as a further deterrent to visitors unfamiliar with the right of way, who would be likely to assume that they would be trespassing if they open the Double Gates.*" In my view the Judge was entitled to take this into account in coming to her conclusion on this issue.

42. Mr Taylor pointed to another piece of evidence from a hearsay statement of a delivery driver, a Mr Mainwaring, who delivered to the Court and the Farm relatively frequently. He always parked on the Hardstanding. In his statement he said that the Sign had put him off from opening the Double Gates. The Judge referred to Mr Mainwaring's evidence in relation to the Appellant's conduct – see [150]. Mr Taylor also said that the Judge's finding that drivers felt compelled dangerously and inconveniently to reverse down the Track could only be based on the Sign having some deterrent effect.

43. Mr Dubin however submitted that the evidence accepted by the Judge in relation to the Appellant's conduct depends on drivers actually going through the Double Gates to be confronted by the Appellant, thereby indicating that the Sign was not acting as a deterrent.

44. In my view, the Judge was perfectly entitled on the evidence before her to come to the conclusion that the Sign together with the closed Double Gates acted as a deterrent to some drivers from opening the Double Gates and using the Triangular Area to turn. It did not deter everyone, but it did deter some, and that is enough for her to have made the finding that she did.

45. I should add that I understand that the Appellant was content with the new wording for the Sign that she was ordered to make by the Judge, and there is no issue about that part of the Order.

46. Turning to the findings in relation to the Appellant's conduct, the Appellant again says that there were insufficient incidents for the Judge to have made the findings she did. However, the Judge dealt thoroughly with this issue between [102] to [160] of the judgment, going through the evidence of a number of incidents and coming to her conclusions as a result. The Judge actually found in the Appellant's favour as to whether she was abusive or aggressive but ended up concluding that the Appellant can "*on her own admission be forthright... She does not mince her words.*"

47. A further important finding of the Judge is that both the Appellant and her husband, Mr Grovell, mistakenly believed, even up to the trial and despite advice having no doubt been given as to the ambit of the right of way, that small vehicles that did not need to use the Triangular Area to turn should not be coming on to the Triangular Area – see [104] and [105]. And both accepted that if they saw such vehicles on the Triangular Area they would approach the drivers and "*politely*" make clear that they should not be using the Triangular Area – [106].

48. However, Mr Dubin preferred to concentrate on whether the Respondents had produced enough evidence in relation to the Appellant's conduct. He identified four instances since the installation of the Double Gates that were relied upon by the Judge.

49. The first was in relation to Mr Mainwaring, who I have just referred to. Mr Dubin said that this evidence was based on an unsigned hearsay statement from Mr Mainwaring and the Judge did not warn herself in [150] that that was the nature of his evidence. Mr Dubin also referred to video evidence from the Appellant's CCTV that indicated that Mr Mainwaring decided to turn on the Hardstanding despite the Double Gates being open.

50. The second was a driver called Natalie. This was also a combination of hearsay and video evidence and in this case the Judge did remind herself of the fact that her evidence was hearsay – [141]. The Judge made detailed findings in relation to Natalie's experience of delivering to the Court and her interactions with the Appellant. She accepted the Appellant's evidence that she was not abusive or aggressive towards Natalie. But the Judge did find that Natalie chose to reverse down the Track, in fact from the road going east, because she understood that she was not welcome to turn on the Triangular Area. The Judge found that the Appellant, because she was of the view that smaller vehicles do not need to use the Triangular Area to turn, did tell Natalie that she should not turn on the Triangular Area and she should use the Hardstanding instead. Mr Dubin said that this conclusion

was inconsistent with the Judge's other findings in relation to this encounter, but there is no proper basis for interfering with the Judge's careful analysis of the evidence relating to this.

51. The third driver was from Jewsons, the building suppliers, in July 2022. I agree with Mr Dubin that the Judge's findings in [153] are somewhat inconclusive. It is purely based on a video taken by the First Respondent who was expecting a delivery from Jewsons. The video shows the driver reversing out of the Triangular Area. There seems to be some confusion around why he did not use the Contractors' Gate and that may have been what the Appellant told him, given that she thought this was a condition of the planning permission the Respondents had obtained for this building work. In the circumstances, I do not think that the Judge placed much reliance on this incident.

52. The final incident is more a combination of the Judge's findings in [159] that "*it is clear from video evidence that some drivers who had previously been told they were not welcome to turn on the Triangular Area chose not to do so*". This appears to be a reference to the evidence of delivery drivers reversing down the Track – see [153]. It is legitimate and not unreasonable to question why they would take the inconvenient and potentially dangerous course of reversing down the Track when they could easily have turned round on the Triangular Area.

53. There was also evidence that pre-dated the installation of the Double Gates and showed the Appellant's attitude. The Judge referred to taxi drivers who had told the Respondents that the Appellant had told them not to turn on the Triangular Area. The Judge recognised that this was unsupported by any evidence from those taxi drivers (which is perhaps unsurprising) but reasonably concluded in [152] that even though the Appellant was not verbally abusive to them that "*it is likely that some may have been told that they should not turn beyond the Double Gates.*"

54. The Judge went through the evidence of various incidents in great detail, including the delivery of the portaloos by Mr Cadman, and the evidence of Ms Stokes, Ms Sheppard and Mr Dwyer. Some of the findings were in favour of the Appellant's version of events. But they all contributed to the Judge's conclusion that the Appellant had challenged drivers that used the Triangular Area when she believed that they were not entitled to because their vehicles were small enough to turn on the Hardstanding. Mr Dubin said that most of the incidents were from before the installation of the Double Gates, but that does not detract from their relevance to this issue. The Appellant's attitude to small vehicles persisted throughout the relevant period.

55. Mr Taylor had submitted to me that the Appellant and Mr Grovell had accepted that they had challenged drivers of smaller vehicles that had driven onto the Triangular Area. This submission led to a flurry of correspondence after the hearing, providing me with a number of notes of the hearing to substantiate what Mr Taylor had submitted and also notes of the cross examination at the trial of both the Appellant and Mr Grovell. The Appellant's solicitors were maintaining that Mr Taylor was wrong to have said that there were any such admissions by the Appellant or Mr Grovell.

56. In my view this was an overreaction on the Appellant's side. I understood Mr Taylor's submission to be that, given the Appellant's belief that smaller vehicles should not be using the Triangular Area to turn, and Mr Grovell's evidence that, because of that belief, he or the Appellant would approach such drivers if they drove onto the Triangular Area, they had admitted that such challenges happened. But it is not Mr Taylor's submission that matters; it is that the Judge actually found that to be so in her judgment – see [104] to [106].

57. In short there was ample evidence before the Judge as to the Appellant's conduct towards drivers using the right of way. She carefully balanced that evidence against the available video footage and the Appellant's evidence and other witnesses, taking into account the form of that evidence and the appropriate weight to be applied to it in the circumstances. There is no basis for saying that her conclusions are "*rationally insupportable*" or "*plainly wrong*". I therefore reject Ground 1 of the Appellant's appeal.

Grounds 2 and 3 of the Appellant's appeal: the Barn Door counterclaim

58. The Appellant suggests that the Judge erred in law in holding that there is no obligation on the Respondents to keep the Barn Door closed. The Appellant says that it is important that the Barn Door is kept closed as there is a risk that her sheep might escape into the old milking shed and the Court, and that the Respondents' animals might stray onto the Farm.

59. Mr Dubin relied on the Supreme Court decision in *Fearn and ors v Board of Trustees of the Tate Gallery [2024] AC 1* for the proposition that the basis of a claim in private nuisance "*is not the physical invasion itself but the resulting interference with the utility or amenity value of the claimant's land*" [13]. He submitted that the underlying principle is that of good neighbourliness and reciprocity.

60. However *Fearn* was not cited by Mr Dubin below; nor was the point pressed before the Judge. It is, as Mr Taylor submitted, a new point being taken on appeal. This is not only unusual but also potentially unfair as there was no real evidence or cross examination as to the facts that would be required to prove such a claim.

61. In paragraph 50 of the Amended Defence and Counterclaim, the Appellant pleaded that "keeping the [Barn] Door open and unmanned constitutes a nuisance upon the [Appellant's] Property". The relevant particular is at paragraph 51h and stated as follows:

"The [Barn] Door is left open by the [Respondents], or those authorised by them, for extended durations of time in connection with the [Respondents] or their agents access to and from the [Respondents'] Property through the [Barn] Door or use of that part of the [Respondents'] property. When the [Barn] Door is left open and unmanned the [Appellant] has had to take steps to mitigate the impact of this on the operation of her farm as when the [Barn] Door is left open it defeats the objective of the [Appellant's] otherwise contained yard on the [Appellant's] Property, and treatment area for the [Appellant's] sheep."

62. By way of Defence to the Counterclaim, the Respondents pleaded that they were unaware of the Barn Door being left "*open and unmanned*". They went on to state that there were two occasions when the Barn Door was damaged by wind or storms but that the Appellant had placed a barrier over the entrance until the Barn Door was repaired. This was confirmed in the Respondents' witness statements. They were not cross examined on this at the trial.

63. The point was not mentioned in Mr Dubin's skeleton argument for the trial. Nor was it dealt with in oral closing submissions. It was in truth a non-issue before the Judge.

64. Nevertheless, the Judge did deal with the point as pleaded at [65]:

" Leaving the Barn Door open : There is evidence that, on occasion (particularly when the Portaloo was delivered) the Barn Door was left open. However, the Defendant has failed to satisfy me that there is any prohibition, whether in the grant or otherwise, on leaving the Barn Door open. The fact that it causes difficulty for her if the Claimants' animals stray into Lower Fenemere Farm or her sheep should stray into the milking shed does not mean that she is legally entitled to insist on the Barn Door being kept closed, though it is clearly unneighbourly of the Claimants to open the milking shed to Lower Fenemere Farm without warning and without placing a barrier in the entrance to prevent sheep entering the milking shed of animals escaping from it, leaving the Defendant to do so."

65. Mr Dubin latched onto the Judge's suggestion that it would be " *unneighbourly* " to open the Barn Door " *without warning and without placing a barrier in the entrance* ". But the Judge made no findings that that had happened, save perhaps in relation to the portaloo incident, and there was seemingly no evidence that on other occasions the Barn Door had been left open and unmanned for any time. The Judge was clear that there was no legal prohibition on the Respondents on leaving the Barn Door open. Mr Taylor referred to *Lister v Rickard* (1970) 21 P&CR 49 for the proposition that there is generally no obligation to keep gates shut where it would not be reasonably necessary for the enjoyment of the land.

66. If there was evidence that the Barn Door was regularly opened by the Respondents and left unmanned, then I can see that the Appellant might have a claim in nuisance. But there was no evidence to such effect and the point was not even argued at trial. Therefore there is no basis for saying that the Judge erred in law in the way she dealt with it at [65] and her conclusion at [175].

67. Accordingly, I reject Ground 2 of the Appellant's appeal. As Ground 3 is dependent on Ground 2, that also is necessarily rejected.

Ground 1 of Respondents' cross-appeal: the Judge's conclusion that the Double Gates do not in themselves amount to a substantial interference

68. Before turning to the Appellant's appeals on the costs orders, it is convenient to deal with the cross appeal raised by way of the Respondents' Notice. Ground 1 is a factual appeal and therefore subject to the same considerations that I have set out above in [36] to [38]. The Respondents still require permission to appeal in relation to both of their Grounds.

69. At the heart of the Respondents' concern is that the Double Gates are more inconvenient for them in their preferred way of entering and exiting the Court than existed before the Double Gates and New Gate were installed. The practical difficulties that they complained of, and which were found to exist by the Judge, were not appreciated to their full extent, they say, and the Judge should not therefore have found that the closed Double Gates in themselves did not cause a substantial interference with the Respondents' right of way.

70. In short the difficulties the Respondents say they face with the Double Gates being closed are as follows:

- (a) larger vehicles, such as the Second Respondent's Land Rover Defender 130, using their preferred method of reversing out of the Court, have to engage in a multi-point turning manoeuvre to point in the right direction to go down the Track; this might have to be endured many times a day;
- (b) even larger vehicles, such as the Second Respondent's horsebox, which have to use the Triangular Area to turn, have to open and shut the Double Gates, as well the Court gates, every time they arrive and leave the Court;
- (c) as referred to above, delivery drivers to both the Farm and the Court tend to park on the Hardstanding while making their deliveries, which blocks the right of way, albeit for a relatively short time; and such delivery drivers either have to make multi-point turns on the Hardstanding or dangerously reverse all the way down the Track, which they do very slowly, thus causing further obstruction.

71. The Judge made the following findings:

- (a) small cars and vans can turn easily in and out of the Court without interference from the Double Gates – [85] and [177];
- (b) larger vehicles such as the Second Respondent's Land Rover can also enter and leave without difficulty; if they wish to reverse out of the Court and the Double Gates are closed, they only need to perform a 4-point manoeuvre – [86] and [177];
- (c) larger delivery vans, if they do not open the Double Gates, would need to manoeuvre "*several times*" to turn round – [89] and [177]; the Respondents made use of home delivery services fairly regularly – [90];
- (d) the even larger vehicles, such as horseboxes and tractors with trailers, would probably not be able to leave without opening the Double Gates; the slightly smaller ones might be able to, but they would have to shunt "*forwards and backwards many times and with difficulty*" – [91];
- (e) As to the frequency of this occurring, the Judge found that the Second Respondent might leave the Court as often as 6 to 8 times a day; however the larger lorries and horseboxes etc would be not very frequent – [92]; at [179] the Judge found that it was "*relatively rare*" and "*the inconvenience of opening one or both of the Double Gates on the few occasions when it is necessary would not, in my judgment, amount to a substantial interference with the right of way.*"

72. Mr Taylor said that the Respondents were not challenging those findings of the Judge, only her conclusion that these difficulties did not amount to a substantial interference with the right of way. However that was her evaluation based on her factual findings, and an appeal court is subject to the same restraint in dealing with challenges to a trial judge's evaluations as to her factual findings. It is a multi-factorial balancing exercise which is much better made by the Judge who heard and considered the whole "*sea of evidence*".

73. The Judge came to her conclusion in part by comparing the relative inconveniences to drivers when the Original Gate was in operation to that experienced with the Double Gates. The Judge's conclusion on this is contained in [179] as follows:

"The inconvenience of opening one or both of the Double Gates on the few occasions when it is necessary would not, in my judgment, amount to a substantial interference with the right of way, particularly given that, before they were erected, there were times when all drivers had to open and close the Original Gate. Mrs Leonard's evidence was that she sometimes left Lower Fenemere Court six or eight times in a day. Opening and then closing the Original Gate on the way in and out up to 8 times a day would be 32 times per day, and that is just for Mrs Leonard's journeys, on days when the Original Gate needed to be closed. The serious inconvenience to her was clear from her message to the Defendant and Mr Grovell. In my judgment, the inconvenience to the Claimants and their visitors, who need open the Double Gates only for very large vehicles, is likely to be less than having to open the Original Gate for every vehicle at times when the Original Gate was closed."

74. In this paragraph the Judge was appropriately considering the relative inconvenience of the earlier situation with the Original Gate and the identified difficulties experienced by the Respondents with the Double Gates. As she rightly recorded, the exchanges in 2020 between the parties were because of the serious inconveniences that the Respondents were suffering with having to open and close the Original Gate, sometimes many times a day. The relocation of the gates was meant to alleviate that problem and the fact that it is only rarely that the Double Gates needed to be opened for the larger vehicles leads to the conclusion that they were less inconvenient to the Respondents overall. I cannot see any basis upon which that conclusion can really be challenged.

75. Mr Taylor puts this Ground in a number of ways. First he says that the Judge had incorrectly assumed that the Appellant had been entitled to insist that the Original Gate should be kept closed whilst she was handling the sheep. There is an unresolved dispute between the parties as to who owned the Original Gate, but this was agreed not to be before the Judge – see [23] where the Judge added: " *However, it is clear that the Claimants did keep the Original Gate closed when requested, and they do not appear to have suggested to Mrs Whiston that they were not obliged to do so.* " In the Respondents' Reply, they admitted that they " *frequently opened the Original Gate in order to pass through it* " and that it was an " *inconvenience which they tolerated in the interests of being neighbourly* ".

76. I therefore do not accept Mr Taylor's argument. It is nothing to do with who owned the Original Gate or whether the Appellant had the right to insist on them being closed during sheep handling times. The fact of the matter is, and this was common ground, that the Respondents were substantially inconvenienced when the Original Gate was closed. And the Judge was entitled to take that into account in her assessment of whether they were more inconvenienced by the closed Double Gates.

77. Mr Taylor then argued that the Judge placed insufficient weight on her findings as to the daily difficulties caused to the Respondents and their visitors in their preferred method of using the right of way. This is of course a matter primarily for the trial judge as to how to weigh the evidence.

78. The first example of this, according to Mr Taylor, is the finding that the Original Gate was generally left open, so it did not cause much inconvenience. But the Judge's finding in [179] was based on the times when it was shut and the inconvenience that that caused, which was what the Respondents complained about.

79. The second example was of the difficult multi-point turning that the large delivery vehicles and larger cars have to do on the Hardstanding. But the Judge clearly considered that a 4-point manoeuvre was "*quite manageable*" and does not present a "*material difficulty*" – see [87], [88] and [177]. Even though she did not expressly compare these difficulties with those existing with the Original Gate, she reasonably concluded that they did not amount to a substantial interference with the right of way.

80. The third example was of delivery drivers parking on the Hardstanding and thereby restricting access to the right of way. But this would happen for deliveries to the Respondents as well, because they would not drive into the Court. I do not think there was any evidence that in practice this caused any significant inconvenience to the Respondents. In any event, I do not understand where the Respondents are saying the delivery drivers should otherwise stop to make their deliveries. If delivering to the Farm, they could go through the Double Gates, and perhaps the Appellant should make that clear to her delivery drivers. But I do not see that the Judge's overall assessment in relation to inconvenience is affected by this point.

81. Accordingly, I reject Ground 1 of the Respondents' cross-appeal.

Ground 1 of Ground 2 of the Respondents' cross appeal: the Judge erred in declining to grant an injunction requiring the Double Gates to be kept open except when required to be shut for sheep handling

82. This Ground seeks to attack the exercise of the Judge's discretion in granting the remedies that she did, based on her findings in the judgment. As set out in [30] above, the order she made reflected the conclusions she reached that substantial interference was caused by the closed Double Gates combined with the Sign and the Appellant's conduct. She required the wording on the Sign to be changed to make it clear that the Triangular Area could be used for turning by visitors to the Court. And she enjoined the Appellant from preventing and challenging visitors as to their use of the Triangular Area. The Judge thought that it would not be appropriate to accede to the Respondents' request that she order the Double Gates to be kept open except when required to be shut for sheep handling operations.

83. The Judge explained in her judgment on consequential matters on 14 October 2024 why it would not be appropriate for her to order the Double Gates to be kept open. She said that the Appellant is "*quite entitled to keep the [Double Gates] closed*" as it was not only to keep her sheep in but also to stop other animals straying onto her land "*as had happened on a number of occasions*". As she had not found the Double Gates in themselves to cause a substantial interference with the right of way, it was sufficient to address the interference that she had found by requiring the Sign to be amended and granting the injunction as to the Appellant's conduct.

84. It was never going to be easy to find the right remedy in this situation. It would never be able to resolve all the problems, as the parties must have realised from their inability to find an acceptable compromise of their dispute. But I think the Judge did the best she could in the circumstances at reflecting her findings in the order she made. It certainly cannot be said that she acted outside the broad discretion that she had or that no reasonable judge would have made such an order.

85. Mr Taylor suggested that the new Sign wording would not have a material effect on the inconvenience that exists, and the only way to remove the substantial interference that the Judge found, would be to require the Double Gates to be open unless required to be closed. But that is really the same argument that he had in relation to the judgment and the alleged failure to recognise the difficulties that arise from the Double Gates being closed.

86. In my view, and given the findings of the Judge which I have upheld, the order that the Judge made was well within the ambit of her discretion and indeed was a reasonable one to make. I therefore reject Ground 2 of the Respondents' cross appeal.

87. I should add that, consistent with the grant of permission to appeal to the Appellant, I am prepared to grant the Respondents permission to appeal on both Grounds. But both Grounds are dismissed on their merits.

Ground 1 of Grounds 4 and 5 of the Appellants' appeal: costs

88. Turning back to the remaining Grounds of the Appellant's appeal in relation to costs, I have dismissed all the substantive Grounds of Appeal. Ground 4 concerned the costs order on the Appellant's counterclaim which the Judge dismissed. This is dependent on the Appellant succeeding on her Grounds 2 and 3 in relation to the Barn Door. She has not succeeded on them, so her appeal against the counterclaim costs order must also fail. The counterclaim remains dismissed.

89. Ground 5 challenges the exercise of the Judge's discretion to order the Appellant to pay the Respondents' costs of their claim. The Appellant says that the Judge should have made an issues-based order to reflect the fact that the Respondents did not succeed on all the issues that were fought at trial. In particular, Mr Dubin relied on the findings in the Appellant's favour that the Double Gates, in themselves, did not constitute a substantial interference with the right of way and that the Appellant was not found to have been abusive to the Respondents' visitors.

90. I did pause to consider whether the fact that the Respondents were seeking to cross appeal the finding in relation to the Double Gates meant that they themselves did not think that they had been wholly successful in getting what they needed to prevent that substantial interference. But the issue is not whether I, as a trial judge, would have made a different costs order. Rather the question is whether the Judge exceeded the very wide discretion that she had in relation to the costs of the case. In other words, did she come to a conclusion that no reasonable judge could have come to? I do not think she did.

91. It is clear from her costs judgment that the Judge considered the arguments being run on this appeal, namely the respects in which it could be said that the Appellant won. But she also took into account the fact that overall the Respondents were "*clearly the winners in this case*". As I have pointed out above, even in relation to the closed Double Gates causing a substantial interference, the Respondents did establish that there was a substantial interference by a combination of the closed Double Gates, the Sign and the Appellant's conduct. As to the Appellant's conduct, the Judge considered that even though she was not abusive, she did adopt a "*firm and direct approach*" and that it did not much matter ultimately whether the Appellant was abusive or conducted herself in such a way as to discourage visitors from using the Triangular Area for turning. They both have the same effect of amounting to a substantial interference and she was enjoined from any similar behaviour in the future.

92. The Judge also took account of pre-action conduct, attempts to settle/mediate, and certain without prejudice, as well as open, correspondence. With her deep knowledge of the case and the parties, and the way they had behaved, the Judge concluded that, as the Respondents won overall, they did not have to have won on every single point to be entitled to their costs. She was well within the bounds of her discretion to decide in that way, and I therefore reject the appeal on costs.

Conclusion

93. In the circumstances, and for the reasons set out above, I dismiss the appeal and cross appeal on all their Grounds, although I do grant the Respondents permission to cross appeal

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