CA on appeal from the Hight Court, Lincoln County Court (His Honour Judge Inglis) before Laws LJ, Lady Justice Arden. 9th October 2002.

1. **LORD JUSTICE LAWS**: Lady Justice Arden will give the first judgment.

2. **LADY JUSTICE ARDEN**: This is a renewed application for permission to appeal against the order of His Honour Judge Inglis, dated 8 May 2002. His Honour was sitting in the Lincoln County Court. The action concerned boundaries and rights of access to constituent plots on the site previously occupied by a farmhouse and outbuildings in a village in Lincolnshire. The appellant has already been granted permission to appeal save on the grounds on which he now seeks leave. Permission to appeal on those points was refused on paper by Tuckey LJ on 31 August 2002. Those grounds were grounds 6 and 7 (which I will take together) dealing with the construction of the transfers in 1991, ground 8 relating to damages and ground 9 relating to costs. Ground 6 relates to the judge's construction of plans attached to (i) a transfer of Lot 3 called Jacob's Place (title number LL78144) from Turners to Mr and Mrs Rann from which the appellant derived his title (the relevant plan was Plan 4 annexed to the judge's judgment), and (ii) a transfer executed contemporaneously of Lot 2 (Home Farm) (title number LL78142) to Mr and Mrs Hunton. The issue is whether the latter included the corner of land on which the owners of Lot 3 (title number LL78153 now LL82154), subsequently built a garage.

3. The claimant's case was that part of that garage was in fact built on land dedicated as a right of access to three further plots and his own land, so that the owners of those three plots in bringing vehicles up the right of way, were in fact trespassing on his land. The claimant derives his title from the first of the transfers to which I have referred.

4. The garage was owned at the date of the trial by a Mr and Mrs Bridgestock, whose primary case was that they had acquired title to the corner of land through a transfer of land by Mr and Mrs Hunton subsequent to the transfers to which I have referred, and also subsequent to the dedication of the right of way. In the alternative they claimed a rectification of the transfers. In their skeleton argument for use at trial they also claimed that they were entitled to the property on the true interpretation and construction of the transfers, and most particularly the transfer plans.

5. The judge resolved the question of the ownership of the corner of the garage by interpreting the plans in 1991. He noted that a heavy felt plan had been used on the plans. The plans showed that a garage was going to be built on Lot 1, and the judge in his judgment found that the evidence showed that the garage that was built was, if anything, smaller than the garage site depicted on the plan: see paragraph 46 of the judgment. The judge held it was unlikely that the boundary line was intended to chop off a corner of the garage. That is a brief summary of the judge's judgment.

6. The judge also referred to the fact of the further transfer by Mr and Mrs Hunton to the Murphys, the predecessors in title of Mr and Mrs Bridgestock of a plot of land including the corner. As respects that transfer the judge said that the plan of the title: *"would give rise in the mind of the Murphys' solicitors to a risk that the boundary ran through the garage. That seems to me a far more likely explanation of events than that the Huntons always regarded themselves as owners of part of the garage site. I do not dissent from the submission particularly based on* ***Schuler AG v Wickman Machine Tool Sales Ltd*** *[1974] AC 533, that where a conveyance is ambiguous acts of the parties to it subsequently may aid construction. First, though, by far the most likely explanation of what happened in 1992 is the production of a Land Registry plan, itself not really faithful to the transfer plans, which caused doubt; secondly the Huntons were not common vendors such as were referred to by Megarry J in* ***Neilson v Poole*** *[1969] 20 P & CR 909, also cited by Mr Marshall: what has to be construed is the initial transfer to them; thirdly, though the intended site of the garage is known and is helpful and in my view admissible, I do not find construction of the transfers in this respect a matter of great difficulty, now that the originals are seen, against the background of what was going on in the summer of 1991."* (paragraph 47 of the judgment).

7. Accordingly, the judge held that the Bridgestocks' garage did not trespass on to the land forming part of Lot 2, which was previously held by the Huntons. He went on to decide that the right of access to the other plots extended over an area 4.2 metres from the garage and he made declarations accordingly.

8. Mr Paul Marshall appears for the appellant today. His primary point is that the case on interpretation was contrary to the Bridgestocks' pleaded case since they claim that they derived title through the subsequent transfers in 1992. The judge expressly recognised this in his judgment. However, as I have explained, that was the Bridgestocks' primary case. The position is that the interpretation issue had been raised in the skeleton argument and indeed at the end of closing submissions the judge had made it clear that provisionally he saw force in that argument.

9. The appellants' submission is, in effect, that, if the point had actually been articulated in the pleadings, evidence would have been led below to show that the parties thought that the Huntons had to convey a separate parcel of land for the corner of the garage, alternatively that further argument would have been addressed to that issue; and in the skeleton argument reference is made to additional correspondence to which it would be desired to refer the court to on any appeal. However in my judgment no case is made out for saying that the appellant was not duly warned that this point was to be taken. It was clear from the skeleton argument that the judge had indicated that he did not wish further amendments to the pleading and that the points were to be taken in the skeleton arguments. Moreover the judge had raised the point himself at the close of the appellant's speech, as I have already mentioned. Moreover it does not seem to me that further correspondence is evidence of a type which could be admitted on an appeal and no argument has been addressed before us orally to show that that was so.

10. It appears that what happened at the trial was the judge took the view that he should not take into account subsequent actions. The appellant's counsel, Mr Paul Marshall, very properly took the view that he should research that issue, he did so, he found that there was authority in favour of the submission which the judge had appeared to reject at the trial, and wrote to the judge with the authorities accordingly with copies to the other parties. But as the passage which I have read from the judgment makes clear, the judge accepts that the subsequent conduct of the Huntons was relevant. However, he gave that evidence less weight in relation to the interpretation of the document than the appellant would have wished him to do. In my judgment no case is made for saying that he was not so entitled.

11. It has been submitted that the judge was not entitled to say, and was indeed speculating by saying, that the plan of the title (plan 12A, to which he refers in paragraph 47 of his judgment) would give rise in the mind of the Murphys' solicitors to a risk that the boundary ran through the garage. However, that is not, it seems to me, a matter of mere speculation. It was an inference which he was entitled to draw from the pieces of evidence that were before him. Among the many points he makes is that what he had to construe was the initial transfer document to the Huntons in 1991, and what happened thereafter does not necessarily therefore indicate what the intention was of the Huntons and Turners at that point.

12. Further arguments are addressed by Mr Marshall. He submits that he was entitled to have the issue formulated in pleadings, and moreover that the judge's measurement of 4.2 metres was a point not taken previously. But again in my judgment the appellant was given fair warning of the direction in which the judge was thinking, and indeed the case had been argued on the basis of interpretation by the Bridgestocks.

13. I bear in mind that the judge's construction has a knock-on effect on the transfer of Jacob's Place and means that the plan attached to the transfer in 1991 of that lot was inaccurate and affected; but that seems to me to be inevitable from the judge's interpretation of the plans. In my judgment he was entitled to come to the view that he did. The scale of the plans is very small and the line used for the boundary was very thick and the area of land in question must obviously have been very small. Accordingly, in my judgment, there is no real prospect of success on the interpretation issue.

14. I next go to ground 8. This relates to paragraph 8 of the order which provides*: "In the alternative to paragraph 5 above, in default of payment by the First Second and Third Defendants of £6630 in accordance with the said paragraph, the First Defendant shall pay the claimant £3500 damages in lieu of an injunction for future trespass by way of access with or without vehicles over the part of title LL78144 referred to in paragraph 5 above for all purposes connected with the use and occupation of the land in titles LL67119 and LL67121; similarly in*

default of such payment of £6630 the Second and Third Defendants jointly shall pay the claimant £3500 damages in lieu of an injunction for future trespass by way of access with or without vehicles over the part of title LL78144 referred to in paragraph 5 above for all purposes connected with the use and occupation of the land in title LL166539."

15. The ground of appeal is that the judge's finding, the determination of the sum of £3,500 was unexplained and unjustifiably low. The matter was dealt with in the judge's judgment at paragraphs 83 and 84. The judge first deals with the law and directs himself in accordance with the Court of Appeal decision in **Jaggard v Sawyer** [1995] 1 WLR 269, which establishes that an award of damages in these circumstances, that is in lieu of an injunction, should be compensatory and not by way of restitution to the tortfeasor for a benefit that he has obtained. He goes on*: "The damages may reflect the value of the rights that the Claimant has lost, measured by the amount he could reasonably have expected to receive for their release."*

16. The judge then considers the evidence in paragraph 84. He points out that on his view the properties are not in fact landlocked. He says there is no valuation evidence. He takes into account that there was an abortive agreement to grant easements in 1993 which placed a value of £8,000 on the value of the easement for both the plots in question (that is the equipment of £4,000 each). He considers that matter and he says he will not distinguish between access to the three plots concerned and determines the figure at £3,500.

17. No objection is taken to the way in which the judge directed himself as a matter of law. As to the first ground of appeal that the order is unexplained in my judgment it cannot be said that the judge did not give reasons for the way in which he reached the figure of £3,500.

18. The second point is that the judge's valuation is unduly low; and the principal point here is that the judge did not reflect the prices for Plots 2 and 3. What happened was that in 1993 a Dr and Mrs Watts had made an offer to purchase Plot 3 for some £133,000-odd. That transaction did not proceed because of the problem with access. But later in 1998 the first defendant purchased both Plots 2 and 3 for £100,000 only. But the judge was performing the valuation on the grounds that the land was not landlocked and the transaction in 1998 was a very different transaction, namely a purchase from mortgagees. Accordingly the position, so far as that is concerned, is that while the judge does not refer to that transaction, it can be seen that it was not a matter of great relevance to the inquiry which he had to conduct on the basis of **Jaggard v Sawyer.**

19. The appellant in his skeleton argument makes a large number of points on valuation. I have dealt with the point in paragraph 61 of the skeleton argument. I should also point out that the position in 1998 was that the site had a half completed house on it which may also have affected valuation. Objection is taken in paragraph 62 of the skeleton argument to an observation which the judge made about Mr Adie's conduct. But Mr Adie was the conveyancing solicitor who had in one way or another been responsible for the difficulties that arose in this litigation and in all the circumstances the judge's observation that Mr Alan believed when he purchased the property there was no real problem because he relied on Mr Adie "who obscured the true position by failing to assess true facts" was an observation which in my judgment the judge was entitled to make.

20. In paragraph 63 there is then the point, on which Mr Marshall also substantially relied this morning, that there was evidence of a valuation in October 1997, that if the properties were a landlocked that would reduce their value by in excess of 50 per cent. The judge did refer to that and he took the view that that was not a relevant matter in the valuation that he was performing since it was produced for a wholly different purpose. The fact is that that was a valuation of the entire property for the purpose of security. Since the valuation was made on that basis it seems to me the judge was right to say that it was not strictly relevant for the valuation that he had to perform.

21. In paragraph 64 the submission is made that the judge directed the same sum to be paid in respect of both properties; and that the judge provided no explanation for why he treated all the properties the same. But really that in itself so not going to assist on the question of permission to appeal on the figure of £3,500. In paragraph 64 a further point is made about the sum for which the claimant himself

was liable, but that is not within the ground of appeal. The ground of appeal is directed to paragraph 8 of the order which I have read.

22. At the end of the day the judge had to perform a valuation exercise. He made it clear that there was a paucity of evidence on valuation and he therefore had to weigh the evidence as best he could. In my judgment he directed himself correctly in law and took into account relevant considerations, and there is no real prospect of challenging his exercise of judgment on this issue on an appeal.

23. I now turn to the final matter of costs. The judge's orders on costs were as follows. So far as concerns the claimants he ordered the claimant to pay three-quarters of the costs of the action of the Part 20 defendants (that is Mr and Mrs Bridgestock) on an indemnity basis, to be the subject of a detailed assessment, if not agreed, and he ordered the claimant to pay two-thirds of the first defendant's costs of the action on a standard basis, again to be the subject of a detailed assessment if not agreed.

24. It is contended in the grounds of appeal from the skeleton argument that the judge failed to take into account that the first defendant succeeded on an estoppel issue which was not pleaded; and second, that the defendant also succeeded on the construction of the deed of grant being ineffective, which they had not contended for. Those are matters which are to be dealt with on the appeal pursuant to leave which Tuckey LJ has already given. Moreover, as regards the Bridgestocks, they did not plead anywhere that they were entitled to succeed on the interpretation of the plans. What the claimant seeks is an order that the defendants and the Bridgestocks should pay his costs. So far as the Bridgestocks are concerned, I have already dealt with the position in some detail so far as the pleading point is concerned. Mr Marshall's skeleton argument does not challenge the indemnity basis as such, for which the judge gave reasons. As I see it the judge was entitled to take the view that the Bridgestocks had succeeded in the dispute so far as concerned them. They had raised the point in the skeleton argument.

25. It was of course open to the claimant to point out to the judge that the argument on which the Bridgestocks succeeded was raised late and that their costs should be reduced accordingly. This point is not taken in the skeleton argument for this application, but Mr Marshall informs us that he made the submission to the judge that the Bridgestocks ought to have amended their pleading but not the submission that they should not have their costs for the period before they raised that new case in their skeleton argument. As I see it it is not possible to raise on an appeal the point that the judge should have restricted the amount of costs, so far as the Bridgestocks were concerned, as that submission was not made to the judge.

26. So far as the defendants are concerned, the same point in effect applies. The defendants succeeded on the case so far as concerned them. Of course, if they are unsuccessful on appeal, a different situation might arise.

27. Mr Marshall relies also on the fact that the defendant and the Bridgestocks rejected the claimant's offer of mediation. The difficulty about this point is that we do not know why they refused; and it is not clear that the claimant would in the course of mediation agreed to an arrangement which would have been the effect of the judge's order. As I see is, therefore, the failure to go to mediation, albeit not a matter to be encouraged, was of no causative effect.

28. The judge gave a written judgment again on the question of costs of some seven pages. It was highly critical of the uncompromising attitude of the claimant. He was fully aware that the claims had not been pleaded; he took into account relative success in relation to the defendants, for instance that they had failed on other issues; he also referred to the offer of mediation. In those circumstances in my judgment an appeal against the judge's judgment on costs stands no prospect of success.

29. Accordingly, I would dismiss the application.

30. LORD JUSTICE LAWS: I, too, would dismiss the application for the reasons given by my Lady.

(Application dismissed; no order for costs).

MR P MARSHALL (instructed by David Gregory John, Lincoln LN2 1ES) appeared on behalf of the Applicant

The Defendant did not appear and was not represented.