Neutral Citation Number: 2007 EWHC 2256 (Ch)

Case No: 5LS59981

IN THE LEEDS COUNTY COURT
CHANCERY BUSINESS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2007

Before :

MR JUSTICE PATTEN

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Between :

(1)CHRISTOPHER GILL SINCLAIR	**Claimants**
(2) ALAN EDWARD PEARSON	
- and -	
(1)BRIAN GAVAGHAN	**Defendants**
(2) FRANCES RUTH GAVAGHAN	
(3) FR & B GAVAGHAN	

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Miss Caroline Hutton (instructed by **Schofield Sweeney**) for the **Claimants**
Mr Mark Halliwell (instructed by **Jordans**) for the **Defendants**

Hearing dates: 2 July, 2 October 2007

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Approved Judgment

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

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MR JUSTICE PATTEN

Mr Justice Patten :

1. In this action the Claimants sought an injunction and damages in respect of alleged acts of trespass by the Defendants over the tip of a triangular shaped piece of land which is registered in the name of the second Claimant. The land was acquired by the second Claimant (together with two other individuals who are now deceased) on 6 December 1996. The purchase price was £40,000 of which the first Claimant said that he provided some £6,000. Although not named as one of the beneficial owners in the transfer his title to sue was accepted by the judge (Mr Andrew Edis Q.C) at the trial of this action in April 2006 when the injunction sought was granted and an order made for damages to be assessed at an inquiry. Further to that order and to some subsequent directions given by District Judge Saffman, I have conducted that inquiry as a judge of the Leeds County Court.

2. The factual background is set out in some detail in the judgment of the trial judge and I need only summarise the issues of title which have lead to this dispute. The case concerns the development of part of the site of an old railway line which runs to the east of Upper Batley Low Lane in Batley, West Yorkshire. In 1969 Mr Gavaghan bought the old station house and part of the track. He renovated the station house and moved into it. He then proceeded to sell off part of the land in parcels, two of which became numbers 23 and 21 Upper Batley Low Lane. Subsequently, three

more houses were built on the strip of land between the undeveloped part of the track and the road. These are numbers 19, 17 and 15 Upper Batley Low Lane. The Claimants live at No. 17.

3. The result of these sales and the development of these houses was to leave the remaining length of track between numbers 19, 17 and 15 and some fields to the east of the track owned by a local farmer as undeveloped land. This has been referred to in the proceedings as the Yellow Land. It has no direct access on to the public highway and its only means of access is via No. 21 which forms its northern boundary.

4. The position is complicated by the triangular piece of land (referred to as the Red Triangle) which lies to the north of No 19 at its base and runs to its apex at a point which the judge subsequently found protruded several feet into part of the entrance drive leading to No. 21. This is (or at least then was) a semi-circular in and out drive in front of No. 21 with an area of lawn in the middle adjacent to the road bounded by a row or hedge of conifers.

5. Until 1996 the Red Triangle was owned by Mr and Mrs Chadwick, the owners of No. 38, which is on the other side of Upper Batley Low Lane. They originally intended to sell it to Mr Gavaghan to enable him to obtain access over it to the Yellow Land from the public highway. But the Claimants and their neighbours persuaded the Chadwicks to sell it to them in order to prevent the Defendants from developing the Yellow Land and so as to preserve the views which the Claimants and their neighbours enjoyed from their houses across the Yellow Land to the fields beyond.

6. As a result of being unable to acquire the Red Triangle Mr Gavaghan decided instead to purchase No. 21 in order to provide access to the Yellow Land from the public highway. The purchase was completed on 14 July 2004. This was something of a set-back for the Claimants who had hoped that the owners of No. 21 (Mr and Mrs Philmore) would assist them in preventing the development.

7. Planning permission for the development of the Yellow Land was first granted on 12 July 1997 and then renewed in 1999 with the access to the public highway over the front garden and drive of No. 21. This lead to a dispute between the Claimants and the Philmores as to whether the apex of the Red Triangle protruded into the southern entrance to the front drive of No. 21. The Claimants' case before the trial judge was that they had instructed a survey from Ellams, a firm of chartered surveyors, who had drawn up a plan confirming that the southern part of the drive did cross the tip of the Red Triangle. The dispute was then referred to HM Land Registry in 2001. As an alternative to the denial by the Philmores that the drive crossed the Red Triangle, they sought registration of title over the disputed area on the basis of adverse possession.

8. This alternative claim was complicated by the fact that part of it related (or appeared to relate) to land which was part of the adopted highway. The Land Registry declined to deal with this land and the trial judge subsequently held that it was not material to the outcome of this dispute. In respect of the other land, the Land Registry decided that no part of the Claimants' land had been acquired by adverse possession because the use made of it by the drive to No. 21 was consistent with the exercise of a right of way acquired by prescription. At the trial in 2006 the Defendants (as an alternative to their case on where the true boundaries of the Red Triangle lay) also pursued a claim to title by adverse possession or to a right of way over the Red Triangle to the Yellow Land and these were the issues for decision by the trial judge.

9. The trial judge preferred the expert evidence of Mr Nigel Atkinson, the surveyor called by the Claimants, and on this basis held that the apex of the Red Triangle did protrude into part of the driveway of No. 21. There is a plan annexed to his judgment which sets out the location of the Red Triangle and the extent of the encroachment over it by the drive. He granted a permanent injunction to prevent further acts of trespass and awarded damages to be assessed for the acts of trespass complained about in the particulars of claim. The trial judge dismissed the Defendants' alternative claim to title by adverse possession on the same grounds as the Land Registry had rejected the Philmores' application for registration and he also rejected the Defendants' claim to a declaration that they were entitled to an easement over the Red Triangle in favour of the Yellow Land. He held that any right of way was limited to the enjoyment of No. 21 and did not extend to the Yellow Land. There has been no appeal against any part of his decision.

10. My task therefore is to determine what sum should be awarded for the acts of trespass which were alleged in the particulars of claim and have been proved. These originally included allegations of trespass based on the construction of a brick wall and the erection of steel sheeting on the Claimants' land, but by the end of the trial the only pleaded allegation remaining was an un-particularised one that the Defendants' had trespassed by entering the Claimants' land. The trial judge made no express findings at all in relation to this beyond his determination of where the boundaries lay. With one or two minor exceptions it is, however, accepted that any use of the Red Triangle by the Defendants in connection with the development of the Yellow Land and not merely in order to obtain access to their property at No. 21 constituted an act of trespass to which the Claimants gave no consent.

11. The damages in question are common law damages for trespass. I am not concerned with the assessment of damages in lieu of an injunction. If damages are to be assessed simply on the basis of compensating the Defendants

for the physical or other damage done to the Red Triangle from the trespasses alleged then they will be minimal. The relevant area of land was unused by the Claimants, has always been part of the drive to No. 21 during the period of their ownership of the Red Triangle and has not according to the evidence suffered any detectable physical harm or loss in value from any vehicles being driven over it en route to the Yellow Land. But it is, I think, accepted that damages can (if appropriate) be awarded in a sum which properly compensates the Claimants for the use which the Defendants have made of their land for their own profit and which has to that extent been made from the commission of a tort.

12. In the context of the tort of trespass the Court of Appeal in *Ministry of Defence v Ashmore (1993) 66 P & C R 195* held that where a trespasser has made use of the Claimants' land, the measure of damages is the value to the trespasser of the use of that land. That particular case concerned the unlawful occupation of a house owned by the Ministry of Defence which sought as damages the open market letting value of the property. Kennedy LJ said (at p.199) that assistance as to the proper value to Mrs Ashmore of the use of the property might be gained by looking at what she would have had to pay for suitable local authority accommodation elsewhere. The court was seeking to establish the value of the benefit which the Defendant had received.

13. There is discussion in the judgments in *Ashmore* as to the correct jurisprudential basis for awarding damages by reference to the benefits accruing to the tortfeasor Hoffmann LJ described an award of this kind as restitutionary. Lloyd LJ took a different view and expressed doubts as to whether damages could be assessed other than on a purely compensatory basis. These issues were however resolved by the decision of the House of Lords in *Attorney General v Blake [2001]1 AC 268.* In his speech Lord Nicholls reviewed the earlier authorities both at common law and in equity which deal with the assessment of damages or compensation for interference with property rights. He dealt with the common law's approach to cases of trespass in the following passages at p.279:

> *"Recently there has been a move towards applying the label of restitution to awards of this character: see, for instance,* Ministry of Defence v Ashman *66 P & CR 195, [1993] 2 EGLR 102 , 105, and* Ministry of Defence v Thompson *[1993] 2 EGLR 107 , [1993] 40 EG 148. However that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule."*

14. His speech goes on to trace similar developments in cases of equitable compensation where the Courts of Equity require the wrongdoer to yield up all his gains in the form of an account of profits. At p. 280 he said this:

> *"….in these types of case equity considered that the appropriate response to the violation of the plaintiff's right was that the defendant should surrender all his gains, and that he should do so irrespective of whether the violation had caused the plaintiff any financially measurable loss. Gains were to be disgorged even though they could not be shown to correspond with any disadvantage suffered by the other party. This lack of correspondence was openly acknowledged. In* Lever v Goodwin *(1887) 36 Ch D 1, 7, Cotton LJ stated it was 'well known' that in trade mark and patent cases the plaintiff was entitled, if he succeeded in getting an injunction, to take either of two forms of relief: he might claim from the defendant either the damage he had sustained from the defendant's wrongful act or the profit made by the defendant from the defendant's wrongful act.*
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> *Considered as a matter of principle, it is difficult to see why equity required the wrongdoer to account for all his profits in these cases, whereas the common law's response was to require a wrongdoer merely to pay a reasonable fee for use of another's land or goods. In all these cases rights of property were infringed. This difference in remedial response appears to have arisen simply as an accident of history."*

15. It seems to me that care needs to be taken when applying this analysis to cases (e.g.) of breach of confidence or breach of fiduciary duty. In such cases the very essence of the claim in equity is that the fiduciary is under a duty to give to his principal unqualified loyalty and to account for all profits made from his position. In such cases an account of profits is the obvious and only appropriate remedy. But as Lord Nicholls went on to point out, the principle of seeking to compensate a Claimant for the profits made by the wrongdoer from his breach of duty or tortious conduct has been applied consistently in cases where an injunction has been refused to remedy a trespass or breach of a restrictive covenant and damages have been awarded in lieu based on the court's assessment of what it would have cost the Defendant to obtain a release or relaxation of the covenant. In such cases, the remedy is not an account or share of profits as such, but the court takes into account the profits earned by the Defendant from acting in breach of the covenant when calculating what he would have been prepared to pay for the release. So in *Wrotham Park Estate*

Co. Ltd v Parkside Homes Ltd [1974] 1 WLR 798 Brightman J refused an injunction requiring the demolition of houses built in breach of a restrictive covenant but instead awarded the Plaintiff damages in lieu assessed at 5 per cent of the developer's anticipated profit which the judge found was the amount of money which could reasonably have been demanded for the relaxation of the covenant. A similar approach was taken by Mr Anthony Mann Q.C (as he then was) in *Amec Developments Ltd v Jury's Hotel Management (UK)Ltd [2001] 1 EGLR 81.* The amount of the damages was, he said, to be the sum arrived at in a hypothetical negotiation between the parties had each been making use of their respective bargaining positions without holding out for unreasonable amounts. Negotiations are to be assumed to take place before any transgression occurs, but the court can take account of the actual profits as evidence of what the parties would have contemplated at the time of the hypothetical negotiations.

16. One obvious and important difference between cases such as *Wrotham Park* and the present one is that the court was there assessing compensation to be awarded in lieu of an injunction and therefore to compensate the Claimant for a continuing and permanent invasion and loss of its rights. Without a notional relaxation of the covenant, the developer had no right to build at all. In this case, the award of damages is limited in time to the period from when use of the Red Triangle began until at latest, the grant of the interim injunction on 6 January 2006. In principle, however, I can see no reason why the model developed in cases such as *Wrotham Park* should not be adapted and applied to the present case provided that one bears in mind the more limited nature of the exercise and takes into account the considerations which would have been relevant to negotiations for the limited permission being sought. This approach is consistent with the decision in *Ashmore* (as approved in *Blake)* that the court is seeking to ascertain the value to the Defendants of their unauthorised use of the Claimants' land. What therefore needs to be determined is:

    i) What the acts of trespass were;

    ii) What were their purpose and effect in relation to the development of the Yellow Land: and

    iii) What alternatives did the Defendants have to using the Red Triangle in order to carry out those works.

17. On the basis of these findings the court must then assess what payment would have been agreed for the temporary use of the Claimants' land. It is not of course open to the Defendants as part of this exercise to say that they would (if confronted with a demand for payment) have avoided making any use of the Claimants' land. The purpose of the assessment is to calculate a sum which compensates the Claimants for the financial benefits which the Defendants actually made from using the Red Triangle. But the alternative possibilities open to the Defendants are of course highly relevant as factors which would have influenced the hypothetical negotiations. Clearly the Defendants would not have been prepared to pay and the Claimants would not have been able to demand a fee which was disproportionate to the actual financial advantages of using the Red Triangle as opposed to postponing the works or creating an alternative access point.

18. As mentioned earlier, the Defendants acquired No. 21 on 14 July 2004. The original planning permission for the development of the Yellow Land had provided for an access point across the Red Triangle further south along its access with Upper Batley Low Lane but when the Claimants succeeded in purchasing this land, the Defendants obtained a revised planning permission in August 1999 under which the access point to the public highway was across the frontage of No. 21. On 16 July 2004 the Defendants had received a letter from Kirklees Metropolitan Borough Council, the local planning authority, stating that the access proposals were satisfactory on the basis of an access road widened to 5.00m. Consistently with this, it remained a planning requirement (presumably imposed after consultation with the highway authority) that the access road should be this minimum width on completion of the development and occupation of the completed development was made conditional on this. The revised planning permission did not, however, require this width of access to be maintained during the period of construction and it is common ground that there was at all material times a gap of 3.1m in width between the front wall of No. 21 and the tip of the Red Triangle through which contractors' vehicles could drive without trespassing on the Claimants' land.

19. As of mid 2004 the Yellow Land was overgrown and inaccessible. It was covered with brambles and self-sown trees and to get to it the Defendants needed to remove a row of three established conifers (some 3m high) which blocked off any access from the drive to the garden of No. 21 through which the access road to the Yellow Land had to run following the sale to the Claimants of the Red Triangle. There was a significant difference level in ground levels between these two areas and the first task of the Defendants was to remove the conifers and bring in hardcore to create a ramp. There are photographs showing the vehicle used for this purpose. It is what might be described as a mini digger with caterpillar tracks and it was used to remove the trees and spread the hardcore down the slope and along what became the driveway to the Yellow Land. Once access to the Yellow Land had been obtained, the same digger went on and cleared the Yellow Land of the brambles and trees. This took place in about July or August 2004. Most of this material was shredded on site and the roots were then ground out. The work took about three weeks. It was carried out by contractors at a cost of £2,900 and Mr Gavaghan says that due to the limited size of the

equipment involved they were able to use the northern entrance to the driveway of No. 21 and that no acts of trespass were therefore involved. There is no evidence to the contrary and I accept that.

20. There was no further work of any significance in 2004 but on 16 February 2005 the Claimants were notified through their solicitors that the Defendants now intended to proceed with the proposed access to the development. On 31 March 2005 a site meeting took place at which there were discussions about jointly appointing a surveyor to resolve the issue about where the boundary with the Red Triangle lay. But nothing could be agreed and both sides continued to take their own advice.

21. In June 2005 further work was done to clear away the brambles and other undergrowth which had grown up on the Yellow Land since August 2004. A trial hole was also dug. This was minor work again involving a small digger. In July five bore holes were dug by contractors from Norwest Holst. This work took about a day to complete. These contractors brought in their own equipment using a Mercedes Sprinter van which Mr Gavaghan says used the north entrance to his drive and did not pass over the Red Triangle. In his written evidence Mr Sinclair alleges that both the mini digger used in June and the drilling equipment in July did trespass over the Claimants' land, but in cross-examination he said that he did not know how the digger got access and that the drilling equipment could have been brought in via the north entrance to the drive. I am not therefore persuaded that any acts of trespass were involved in these operations.

22. In August 2005 a portacabin was placed on part of the front drive adjacent to the road. The Claimants complained that part of it was on their land and after about two weeks it was removed. I am prepared to accept that there may have been some encroachment on to the apex of the Red Triangle although it was only slight. But the evidence shows that the portacabin did not require to be there and was moved following the complaints. It is not therefore a significant matter in relation to the calculation of damages because there was clearly no necessity to use the Red Triangle and no particular advantage was gained by placing it where it was. Looked at in isolation this act of trespass merits no more than an award of nominal damages.

23. On 3 August 2005 the Claimants' solicitors were informed that the Defendants intended to commence pile driving along the access road close to the eastern boundary of the Red Triangle. This work continued for several days and led to a complaint that steel sheeting had been installed on the Claimants' land and that their boundary fence had been removed. The plan attached to the trial judge's order (which is based on the Claimants' own surveyor's evidence) shows however that the steel piling is not on the Red Triangle and no question of trespass therefore arises.

24. The significant work for the purposes of what I have to decide began in about September 2005. At that stage work started on constructing the improved access to the public highway required under the planning permission. At about the same time work was also being carried out further along the access road installing pipes and other services for the development site. This seems to have been a two part operation. In order to reduce the roof height of the houses to be constructed on plots 4 and 5, the Defendants had to reduce the ground levels in this area. This involved the removal of many tons of earth and rubble and its distribution on to adjoining parts of the site. At the same time, Leafield Specialist Contractors were engaged and began work building retaining walls and the foundations for the drive. This work involved digging trenches for drainage pipes, removing the shrubbery and small retaining wall enclosing the semi-circle of garden between the north and south entrances to the drive to No. 21 and building a new curved wall immediately in front of No. 21. This took place at the end of October 2005. A wall was also built on the eastern side of the Yellow Land which necessitated lifting blocks by crane from the highway on to a dumper truck which then delivered the materials on site. The surface of the access drive from the public highway was also tarmacadamed.

25. The result of these operations was that from November 2005 the in and out drive ceased to exist and a single entrance and access point with a 5m splay was created in accordance with the revised planning permission. Mr Gavaghan says that on the basis of the advice he had received and in particular, the letter from the planning authority confirming that the apex of the Red Triangle was part of the public highway he believed that the construction of the new access point and drive in that position did not involve any trespass on the Claimants' land. In fact, however, as the trial judge has found, this was not the case and the use made of the new drive so far as it comprised the apex of the Red Triangle constituted a trespass.

26. The Claimants' case is that during this period and up to and including 6 January 2006 when the interim injunction was granted, there were regular movements by vehicles across the apex of the Red Triangle and pipes were laid under this part of their land. This is not really disputed by the Defendants. Mr Gavaghan says in his witness statement of 1 March 2006 that in 2005 he had left brick pavers in situ on the southern access to the original drive at the point where he believed the apex was situated, but this has turned out to be inaccurate. Even after the Atkinson plan was produced he continued to believe that the apex was part of the public highway and his contractors crossed it on the assumption that they had a right to do so. The use was not regular and even taking into account the correct position of the Claimants' land there still remained some 3.1m of drive which could be used for access purposes. There were,

however, occasions when builders did arrive with vehicles and machinery and I am satisfied deliveries were made by crossing the tip of the Red Triangle.

27. On 14 December 2005 a JCT Minor Works Contract was signed by the third Defendant and Leafield in respect of the construction work to plot 5. The contract price was £171,124 and the scheduled date for completion was 31 October 2006. However, on 16 December 2005 all work stopped on site for the Christmas holidays which were due to last for two weeks. Before any further work could be done the interim injunction was granted on 6 January 2006. HHJ Behrens allowed the Defendants to deliver six loads of concrete to fill in various trenches which had been dug for the footings of No.5 so as to prevent them from collapsing but Mr Gavaghan said that he was in the event able to get this material on site without using the Claimants' land. Apart from that, no further use of the Red Triangle was permitted until trial and on 12 April 2006 a permanent injunction was granted when judgment was given in favour of the Claimants.

28. There are some allegations made by the Claimants of occasional breaches of these injunctions but the allegations are un-particularised and vague and are not sufficient to extend what I consider to be the proper period for computing damages. It seems to me that on the evidence I have heard the unauthorised use of the Red Triangle took place between about late September and 16 December 2005. It did not include the carrying out of the works to plot 5 under the JCT contract of 14 December 2006 but did include the works involving the construction of the access drive from the Yellow Land to its point of entry on to the public highway.

29. Once the interim injunction was in place on 6 January 2006 the Defendants fenced off the Red Triangle and the services were routed around it. None of the pipes under the apex have been connected or used. The new retaining wall in front of No. 21 which had been constructed at the beginning of November was removed and a new wall was built so as to re-open the northern entrance drive to No. 21 as a means of access to the Yellow Land pending the trial of the action. This took about a week and cost approximately £14,000. After judgment was handed down in April the Defendants applied for an amendment to the planning permission to incorporate a revised access road with the entrance from Upper Batley Low Lane moved further north so as to avoid any contact with the Red Triangle. To accommodate the position of this new road and to maintain the 5m width required by the local planning authority it has been necessary to demolish part of the corner of No.21. The revised planning permission was granted on 10 May 2006 and appears to have been treated by the local planning authority as uncontroversial. The evidence is that an indication of consent was given by a planning officer as early as 24 April 2006.

30. Work to plot 5 was completed on 22 October 2006 and work commenced digging out the footings for the house on plot 4 in December 2006. The main structure is now complete. In April 2007 work began on the foundations of the house on plot 3. This is scheduled for completion this year. Plots 1 and 2 remain undeveloped.

31. The principal matters therefore to consider are what financial advantages (if any) the Defendants gained from using the drive across the tip of the Red Triangle between September and December 2005 and what they would have been prepared to pay for a licence to do that during that period. It is, I think, clear from Mr Gavaghan's evidence (which I accept on this point) and as a matter of commonsense that had the Defendants been properly advised of the true position of the Red Triangle sometime in 2005 they would have sought a revision in the planning permission to achieve what was obtained in 2006 as a result of losing the action and it is clear that they could have obtained that permission. Although they were in the event required to alter the front drive at least twice, the cost of doing so is a loss they have suffered and is not relevant to the calculation of damages. On the hypothesis that the negotiations for the licence would have occurred before the trespasses began in September 2005, the cost of altering the drive so as to by-pass the Red Triangle would have been unavoidable even with the licence. The drive had to be altered and a single access point created with all the attendant costs involved in constructing the retaining wall and demolishing part of the house so as to avoid using the Claimants' land. The Defendants did not seek and did not obtain in the litigation the right to use the Red Triangle free of any injunction but upon payment of damages in lieu. It is therefore part of the hypothesis upon which damages in the form of a licence fee for the temporary use of the Red Triangle fall to be calculated that the Claimants were never willing to give the Defendants rights which would avoid the alteration of the front drive and the demolition of the corner of No. 21. Therefore, the most that the licence would have saved the Defendants was any loss of progress in preparing the access road or commencing the work on plot 5 due to not being able to utilise the full width of the old drive while an amended planning permission was obtained and the new access point was being built.

32. The Claimants supported by their expert contend that in September 2005 it would not have been anything like certain that the amended planning permission could be obtained. I do not accept this. The evidence of what occurred in 2006 shows that had the Defendants asked the planning officers back in September 2005 whether they could move the new access road to the north in order to avoid the dispute over the Red Triangle they would have received at the very least a positive and encouraging response. Although not a certainty, it has to be assumed that they would have gone into any negotiations with the Claimants knowing that it was highly likely that they would get the revised planning permission and any enquiries made by the Claimants would have led to the same response.

33. As mentioned earlier, the calculation of the value of the trespasses over the Claimants' land between late September and 16 December 2006 can be achieved by determining what the Defendants acting reasonably would have been prepared to pay for the temporary licence necessary to use the Red Triangle in this period. The works of construction to plot 5 under the contract with Leafield fall outside this period and such use of the Red Triangle as occurred, was limited to the occasional lorry and other vehicle movements in connection with the construction of the access road down to the development site. Ms Hutton, on behalf of the Claimants, accepts that in the period between September and the end of December 2005 the use of her clients' land was limited to this purpose, but she contends that by using the tip of the Red Triangle in this way the Defendants were able to maintain the progress of the construction of the access road and the other preliminaries such as laying pipes and services and so avoid any unnecessary delay in the commencement of the work to plot 5 itself. There was therefore considerable value in it and she points to various paragraphs in Mr Gavaghan's witness statement of 1 March 2006 in which (in relation to the delays likely to be caused by the interim injunction) he estimates the cost of the development up to the end of February 2006 as £200,000 and the cost of the building works under the contract with Leafield as £3,850 per week.

34. The Claimants' case is that a proper figure for an award of damages is £125,000. This is said to be what the Defendants would have paid to obtain the value to them of the temporary use of the Red Triangle. This calculation is based on the report of their expert valuer, Mr Simon Nabarro FRICS. He was instructed by the Claimants' solicitors to calculate what a reasonable developer would have agreed with the reasonable land owner as a fee for crossing the Red Triangle but because no findings had yet been made about the extent or duration of the trespasses involved he was not in terms asked to make his valuation on the basis that only a temporary right of access was being offered.

35. In his report he has produced two calculations. The first is a conventional *Stokes v Cambridge* calculation of one third of the development value. The second is a calculation of what he estimates would have been a reasonable licence fee for the Defendants to pay. Based on certain evidence of comparables, he calculates the development value of the Yellow Land as £628,750 one-third of which is £207,485. He does, however, express reservations as to whether an unmodified *Stokes v Cambridge* formula is appropriate in this case and the Claimants have not in the event pursued this as the basis of their claim for substantial damages. I need therefore say no more about it.

36. The valuation which is relied upon is that based on the hypothetical negotiations for a licence. Mr Nabarro calculates the value obtained by the Defendants from their use of the Claimants' land as a minimum figure of £103,288. This is made up of 16 weeks at £4,318 per week which represents his estimate of the weekly cost of delay comprising the builders' costs of £3,850 per week plus interest at 6.5% on a loan of £375,000 which is what Mr Gavaghan in his evidence says were his borrowing costs. This comes to £69,088. To this Mr Nabarro has added Mr Gavaghan's assessment of the costs of demolishing the corner of No. 21 (£10,000), altering the front drive to provide a revised access road clear of the Red Triangle (£14,000) and the diminution in the value of No. 21 caused by the demolition works (£10,000). With additional printing costs this comes to £34,200. The figure of £125,000 appears to be the amount which the Defendants are likely, in his estimate, to have gone up to in any negotiations in order to secure these benefits.

37. When asked about these calculations Mr Nabarro asserted that his calculation of the licence fee remained the same whether or not the licence offered was temporary or permanent and was unwilling to concede that the Defendants would be unlikely to pay a licence fee based in part on the costs associated with moving the access point to the public highway if the licence offered by the Claimants was only temporary and would not have prevented the Defendants from incurring these costs in any event. I am afraid that I find this evidence to be illogical and unrealistic and I reject it.

38. On the evidence presented to me there is no reason to doubt the Defendants' assertion that most (if not all) of the vehicles which needed to gain access to the Yellow Land during the period from September to late December 2005 could do so though the 3.1m gap referred to earlier and it is clear from what happened when the concrete for the footings was delivered in January 2006 that even on the few occasions when a vehicle could not easily negotiate the limited access available the problem could be overcome although it would have been less convenient to do so.

39. The most therefore that the Defendants were buying was a more convenient way of delivering materials to the site during the period when the access road was being constructed in late 2005. They were not in the position of having to obtain the notional licence in order to carry out the works at all. Mr Nabarro accepted that on this basis he needed to re-calculate the licence fee but he did not suggest an alternative figure.

40. The second important point (already made) is that the temporary licence did not remove the need for a revision of the planning permission, the creation of a new access road at a position further to the north and the demolition of the corner of No. 21. Since it resulted in none of these savings the Defendants would not, in my judgment, have been willing to pay to the Claimants any sum in respect of them.

41. This therefore leaves Mr Nabarro's figure of £69,088 based on 16 weeks' delay. The difficulty about this is, I think, two fold. Although his figure of £4,318 per week is derived from Mr Gavaghan's evidence, the building costs of

£3,850 per week is simply an apportioned part of the 14 December 2006 contract price. We know that this contract did not begin during the relevant period and that even with the delays between January and May 2006 caused by the injunctions and the need to get a revised planning permission it was still possible to finish the work by 22 October 2006 within the contract period. The Claimants' argument therefore that without the licence there would have been in effect a cessor of the preliminary works to the site with a knock on effect on the construction of No.5 is difficult to accept. Even without the use of the Red Triangle, these works could have continued using the 3.1m access point and any delay could easily have been accommodated within the contract period. Put another way, the Claimants have not demonstrated that by trespassing on to the Red Triangle between September and December 2005 the Defendants were in fact able to complete the construction of the access road and the house on plot 5 any more quickly or cheaply than they would have been able to had no use of the Red Triangle been made at all. The grant of the injunction meant that the base on plot 5 was not completed until late October 2006. This is not a case therefore in which by acting illegally the Defendants have been able to put themselves in a position which could not otherwise have been achieved.

42. It seems to me that in any negotiations in late September 2005 both sides would have known that it was highly likely that the Defendants would get a revised planning permission enabling them to move the access to the north and that this permission could be obtained quite quickly and in all probability well before the end of 2005. The parties would also have known that the Defendants could (if necessary) avoid using the Red Triangle although it would be less convenient to do so and might on occasions make deliveries more complicated and perhaps more expensive. In addition (in the knowledge that a revised planning permission could be obtained fairly quickly and be implemented in a matter of a week or two at most) it seems to me unlikely that either party would have foreseen that without the use of the Red Triangle there was likely to be any significant (or indeed any real) delay in completing the access road and the house on plot 5 within the contract period. I see no basis for assuming the 16 week delay which is the period suggested by Mr Nabarro.

Conclusion

43. The Defendants by their limited use of the Claimants' land obtained a more convenient way of servicing their development in the pre-contract period but they did not achieve anything more and in my judgment they would not have paid or been asked by any reasonable land owner in the Claimants' position to pay more than a relatively modest sum for that privilege. No actual damage was occasioned to the Claimants' land and the payment involved would have been little more than a recognition of their rights as landowners. I am afraid that I regard the figures put forward by the Claimants' expert as quite unrealistic. Taking all the factors I have indicated into account the licence fee would not in my judgment have exceeded the sum of £5,000 and the damages will be assessed in that sum.