Neutral Citation Number: [2019] EWHC 1008 (Ch)

Case No: C30CF095

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 18 April 2019

Before :

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

- -

Between :

(1) THE HONOURABLE IVOR EDWARD OTHER WINDSOR-CLIVE, EARL OF PLYMOUTH
(2) LADY EMMA WINDSOR-CLIVE
(3) THE HONOURABLE DAVID JUSTIN WINDSOR-CLIVE
(as Trustees of The St Fagans No. 1 and No. 2 Trusts) **Claimants**

- and -

(1) JENKIN THOMAS REES
(2) PHILLIP REES **Defendants**

- -
- -

Christopher McNall (instructed by **Burges Salmon LLP**) for the **Claimants**
Stephen Jourdan Q.C. (instructed by **Michelmores LLP**) for the **Defendants**

Hearing date: 3 April 2019

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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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HIS HONOUR JUDGE KEYSER Q.C.

JUDGE KEYSER QC:

Introduction

1. The claimants, as trustees of The St Fagans No. 1 and No. 2 Trusts, are the registered proprietors of land comprising Maesllech Farm, Radyr, Cardiff ("the Farm"). The first defendant is the tenant of the Farm, which he farms in partnership with his son, the second defendant. By this Part 8 claim, commenced on 22 September 2016, the claimants seek a permanent injunction restraining the defendants from interfering with their exercise of certain rights of access to the Farm.

2. On 29 September 2016 His Honour Judge Jarman QC, sitting as a Judge of the High Court, granted an interim injunction restraining the defendants from interfering with the exercise of the claimed rights of access until trial or further order. For reasons that need not be stated here, the proceedings went into abeyance thereafter; the interim injunction remained in place but no steps were taken to progress the matter to trial. Eventually, on 3 January 2019 the case came before me on an application by the defendants. I continued the interim injunction until trial and gave directions for this hearing.

3. The evidence adduced in support of the claim comprised an affidavit dated 26 September 2016 from Roderick Carew Perons, a director of Cooke & Arkwright and land agent for the claimants, and two statements from him dated respectively 21 September 2016 and 22 February 2019. The evidence in response consisted of one statement by each defendant, both dated 25 January 2019. There was no direction for oral evidence from the witnesses and none was received. I have regard to all of the written evidence, but I do not consider it necessary to recite in this judgment all the matters it covers.

4. For convenient ease of reference, and without meaning to indicate any disrespect, I shall from now on refer to the first defendant as Jenkin and to the second defendant as Phillip.

5. I am grateful to Mr McNall, counsel for the claimants, and Mr Jourdan QC, counsel for the defendants, for their helpful submissions.

The Farm and the Lettings

6. The Farm comprises a total of about 240 acres of mainly arable land. The buildings on the Farm include a farmhouse and two cottages. Jenkin lives in the farmhouse with his wife. Phillip's home has been in one of the cottages, although he is currently living in the farmhouse with his parents because, he says, the cottage is uninhabitable owing to the claimants' failure to repair it. The other cottage is currently vacant.

7. The Farm is on the western outskirts of Cardiff. It lies close to, and to the south of, the suburb of Radyr, adjacent to Llantrisant Road, which is the main local route into and out of Cardiff. Radyr was a developed settlement long before the 1960s, although of course it has undergone expansion in more recent years. A little way to the east of the Farm lies the settlement of Llandaff North, and to the south-east lies Llandaff;

these also pre-date the 1960s. Fairwater lies to the south/south-east; although much expanded latterly, it was an established settlement in the 1960s. The land to the west of the Farm has remained largely undeveloped green field land.

8. In the Cardiff local development plan 2006-2026, the Farm was identified as a strategic site for development. It is now intended to be part of the site of the new Plasdŵr "garden city". On 24 September 2014 two applications for outline planning permission were made to the local planning authority in respect of a larger area of land that included the Farm. One application ("the First Application") was for 630 dwellings, a primary school, a community centre, public open spaces, vehicular and pedestrian access, drainage and associated infrastructure and engineering works. The other application ("the Second Application") was for residential-led mixed-use phased development involving several thousand dwellings. The dispute between the parties arises out of the plans for development of the Farm pursuant to these planning applications.

9. Although the land at the Farm is farmed as a single agricultural unit, different parts of it were let separately by agreements made between Earl of Plymouth Estates, the claimants' predecessor, and Jenkin.

10. First, by a written agreement dated 8 January 1965 ("the 1965 Tenancy Agreement"), 187.568 acres or thereabouts ("the 1965 Land") were demised to Jenkin on a yearly tenancy commencing on 2 February 1964 at an initial rent of £1,496 p.a.

11. Second, according to Jenkin's evidence, shortly after the making of the 1965 Tenancy Agreement, sometime in 1966 or 1967, he made an oral agreement ("the Oral Tenancy Agreement") with the agent of Earl of Plymouth Estates, for a tenancy of an additional 3.5 acres of land ("the Additional Land") comprising two small areas adjacent to but slightly separated from each other; the larger area was to the north and was not contiguous to the 1965 Land; the smaller area was directly opposite the larger area and was contiguous to the 1965 Land. Jenkin says that it was never suggested that the letting of the Additional Land was to be treated as an addition to the 1965 Tenancy Agreement or the 1965 Land; it remained subject of a separate agreement that was never reduced to writing. On 7 February 2017, after the commencement of the present dispute, Jenkin executed an assignment of the Additional Land to JBG Rees Ltd, a non-trading company of which he, his wife and Phillip are the directors. He and Phillip continue to farm the Additional Land as part of the Farm. The claimants do not accept that the Additional Land constitutes a separate demise; they say that it has always been treated and invoiced as part of the demise under the 1965 Tenancy Agreement.

12. Third, by a written agreement dated 20 March 1968 ("the 1968 Tenancy Agreement"), a further 51.439 acres or thereabouts ("the 1968 Land") were demised to Jenkin on a yearly tenancy from 1 October 1967 at an initial rent of £350 p.a.

The 1965 Tenancy Agreement

13. The 1965 Tenancy Agreement contained the following five clauses under the heading "RESERVATIONS BY THE LANDLORD"; clause 7 is particularly relevant to this claim:

> "3. All mines minerals substances of every description stones flints chalk gravel sand peat earth and clay whatsoever in upon or under the premises with full and free liberty and power (including power and right to let down the surface without compensation) to enter upon the farm or authorise others to enter upon the farm in order to search for win dress make merchantable and carry away the same and to execute all work incidental thereto doing as little damage as the nature of the case may admit making the Tenant reasonable compensation for loss of crops (if any) for the current year and allowing the Tenant a proportionate reduction in rent for all land so permanently taken or damaged.
>
> 4. All timber and other trees pollards heirs saplings underwoods and woodlands with right of entry for himself and others authorised by him to plant mark fell cut and carry away the same over any part of the holding or lands hereby demised making the Tenant reasonable compensation for any loss or damage sustained thereby any claim for loss or damage to be rendered within two calendar months of the date of the occurrence of such damage.
>
> 5. Subject to the provisions of the Ground Game Acts of 1880 and 1906 all game ground or otherwise (including nests and eggs) fish wild fowl snipe landrail and plover together with a right for the Landlord and all persons authorised by him to preserve hunt shoot fish course and sport and the Tenant undertakes to assist in the preservation of game and the prosecution of poachers on the premises.
>
> 6. Power to take possession at any time of any portion of the holding (except house buildings or gardens) for building development or any purpose mentioned in Section 31 of the Agricultural Holdings Act 1948 on giving the Tenant three months' notice in writing paying the Tenant compensation for his interest therein and allowing a proportionate reduction in the rent of the Farm.
>
> 7. Right for the Landlord and his Consultant and all others authorised by him with or without horses carriages and other vehicles to enter on any part of the Farm lands and premises at all reasonable times for all reasonable purposes."

14. Clauses 8 and 9 contained covenants by the landlord to repair the structure and exterior of the farmhouse and farm buildings. Clause 15 contained a covenant by the tenant against assignment or subletting of the premises or any part thereof without the landlord's written consent. Clause 17 contained a covenant by the tenant to maintain and repair fences, gates, roads, walls, hedges and so forth. I do not need to refer to the other extensive provisions.

The 1968 Tenancy Agreement

15. The 1968 Tenancy Agreement was a much shorter document. It contained a landlord's covenant for quiet enjoyment and tenant's covenants to keep the land in proper order and condition and all fences, hedges, roads, gates and so forth in good order and repair and not to assign, sublet or part with possession of any of the land without the landlord's written consent. The following provisions in particular are relevant; for ease of reference I shall designate them as clause X and clause Y:

> "PROVIDED ALWAYS AND IT IS HEREBY AGREED [X] that the Landlord shall have the right and power to resume possession of the land hereby let or any part thereof on the expiration of three calendar months' notice in writing … if the said land is required for any of the following purposes namely Building, the addition ot [sic] [?] the said land to any Building leasehold plot, Mining, Quarrying, Sewering, Draining, Road Making, Planting or other Estate Development, the laying of Gas, Water or Electric Mains or for any other easement approved by the Landlord or required by a Local Authority.
>
> AND FURTHER [Y] that the Landlord may at any time and at all times during the said tenancy enter upon the said premises with Agents Servants Workmen and others for the purpose of inspecting the same or for making roads sewers or drains or for any other purpose connected with his estate".

16. It is common ground that the demises under the 1965 Tenancy Agreement and the 1968 Tenancy Agreement both created agricultural tenancies governed at the time by the Agricultural Holdings Act 1948 and latterly by the Agricultural Holdings Act 1986.

The Facts

17. Discord first arose at the end of April 2014, when Jenkin encountered two ecologists who were carrying out a habitat survey at the Farm on the instructions of the claimants and asked them to leave. On 1 May 2014 Burges Salmon wrote to Jenkin on behalf of the claimants, stating that the ecologists were entitled to access pursuant to the terms of the 1965 and 1968 Tenancy Agreements and demanding written confirmation that further access would not be obstructed; the letter said that, if written confirmation were not received by 6 May 2014, the claimants would apply for an injunction. On 6 May Mr Barry Meade of Davis Meade Agricultural, the agricultural consultant retained by the defendants, gave the confirmation sought. During the following years a significant number of persons visited the Farm on the instructions or with the permission of the claimants, for purposes that included the digging of boreholes. Access was largely without incident. But by the summer of 2016 Jenkin was aggrieved with the claimants over, in particular, an issue concerning payment for fencing and the claimants' failure to pay compensation that he believed had been promised in respect of the boreholes. These matters form the backdrop of the events that led to these proceedings.

18. By notice dated 9 August 2016, the local planning authority granted outline planning permission ("the First Planning Permission") for development in accordance with the First Application.

19. On 16 August 2016 the claimants served on Jenkin a notice to quit in respect of 21 acres comprising part of the Farm pursuant to Case B in Schedule 3 to the Agricultural Holdings Act 1986, on the ground that the land which was the subject of the notice was required for a use other than agriculture, namely development in accordance with the First Planning Permission. On 5 September 2016, Barry Meade served a counter-notice disputing the notice to quit and requiring that the dispute be referred to arbitration under the Agricultural Holdings Act 1986.

20. On Tuesday 13 September 2016, Mr Chris Hyde of Cooke & Arkwright spoke to Phillip by telephone on two occasions, once at around 1 p.m. and once at around 6 p.m. The written evidence regarding the conversations is not entirely clear and not wholly consistent. Mr Hyde told Phillip that ecological surveyors would need to visit parts of the Farm on 14 and 15 September 2016; at some point in the conversations he mentioned that these were to be carried out by personnel of The Environmental Dimension Partnership (EDP). There were two different kinds of survey, a landscape survey and a habitat survey, though it is unclear to what extent they were distinguished in the conversations. The defendants' evidence is that in the first telephone conversation Mr Hyde assured Phillip in this conversation that the surveyors would stay on public footpaths and not otherwise enter the Farm; that Phillip reported the conversation to Jenkin, who told him to tell Mr Hyde that the surveyors were to stay on the footpaths as promised and not stray onto the Farm; and that in the second conversation Mr Hyde assured Phillip that the surveyors would not leave the public footpaths. That appears to be at odds with an email that Mr Hyde sent to Jenkin at 3.22 p.m. that day:

> "I spoke briefly with Phillip earlier today to let him know that surveyors will be conducting a walk over survey of parts of Maesllech tomorrow and on Thursday (14th and 15th September). The survey will be conducted on foot only, and will primarily use public rights of way. However, they also wish to skirt along the margins of some fields so as to gain a better view of the farm. I attach a plan showing the routes marked in yellow, not all of them affecting Maesllech."

This made it clear that the surveyors, though largely staying on public footpaths, would also enter the margins of some fields. It is possible that Jenkin did not see that email; it was sent to a different email address from that generally used by Jenkin at the time. But the fact that it was sent at all makes it likely that Mr Hyde told the defendants that the surveyors would want to leave the footpaths. The defendants correctly acknowledge that they made clear to Mr Hyde that the surveyors were to remain on the public footpaths and not enter onto any other part of the Farm. Mr Perons made a file note of the report he received from Mr Hyde:

> "Chris Hyde has reported to me that he has sought to arrange access for a walkover inspection by EDP tomorrow (14th September). In response to the latest request, Phillip Rees has

> told Chris Hyde today that he will deny access, unless conducted from the public footpath."

21. Mr Perons sent an email to Barry Meade, asking him to speak to the defendants and confirm that the surveys would not be opposed "so that we don't have to involve lawyers again." Mr Meade replied simply that he was abroad on holiday until 23 September. For some reason, Mr Perons nevertheless sent a further email later that day: "Please can you come back to me as soon as possible on access for the survey works? My clients have instructed Burges Salmon to apply for an injunction on Monday [19 September] otherwise." Mr Meade did not reply further. In the event, on 14 and 15 September the landscape survey was completed from the public footpaths without incident.

22. There remained the habitat survey, which could not be carried out from public footpaths. The habitat survey was arranged for Thursday 22 and Friday 23 September. On 16 September Mr Perons spoke to Phillip by telephone and told him when the habitat survey would take place. It was clear that the habitat survey would involve inspecting buildings, because it was concerned with the bat population at the Farm. Mr Perons states, "I … was left with the impression that they [the family] would not obstruct access for the ecological/habitat survey by EDP". At Phillip's request, Mr Perons wrote to Jenkin, formally notifying him of the habitat survey. The letter said, "I would be grateful if you could allow EDP access for this purpose or contact me if you wish to discuss the matter further."

23. In his statement, Jenkin states that he was concerned that the habitat survey was likely to prove very intrusive. He says that an earlier such survey in 2014 had been very intrusive and that the refusal of the ecologist to move when Phillip was working, in the dark, had been dangerous. He also refers to a previous incident where the claimants' representatives had been given access to the Farm and had left a mess, potentially dangerous for humans and animals; he does not, though, suggest that those representatives had anything to do with a habitat survey or that an ecologist was likely to create such a mess.

24. On the evening of 20 September, Mr Perons attended at the Farm by prior arrangement and met there with Jenkin and Phillip. The conversation included, though was not limited to, discussion about access for the habitat survey. Mr Perons' file note records the meeting in the following terms:

> "I went to Maesllech today to seek confirmation that Jenkin Rees would allow EDP access for the walkover surveys.
>
> Philip Rees, speaking for his father, tried to claim that he understood that as his father had applied for arbitration, they didn't have to allow access for surveys.
>
> I told him that wasn't the case at all. Philip Rees said that they wanted to [seek] advice from Barry Meade. I said that Barry Meade was away until 23rd September. I said that they needed to take advice because, should they not permit access, I was required to refer the matter to Burges Salmon.

> Philip Rees said that they might speak to Barry Meade's son, Philip Meade. I said that I thought that would be a good idea."

There is some dispute as to who raised the possibility of speaking to Philip Meade, but in all other respects the note seems to be a reasonably accurate summary of the essential parts of the conversation.

25. However, there is something of a conflict as to where matters were left at the end of the meeting. Jenkin's evidence is as follows:

> "My recollection of the outcome of that meeting was that it was left that we would think about it. Phillip or I might speak to Philip Meade and then contact Mr Perons. Although Mr Perons had suggested that the survey should take place on 22 and 23 September, that was plainly not going to be the case because of the need for advice. More importantly in the context of what then happened, Mr Perons did not give any indication that there was any urgency about proceeding with this."

(That evidence largely reflects the contents of a letter that Phillip wrote to Mr Perons on 23 September.) Mr Perons' evidence was that his understanding remained that the defendants were denying access (see paragraphs 61 and 62 of his second statement) but that they would seek advice and revert to him. He states that he told the defendants the date for the habitat survey; he does not state that he told them the date was critical, but he does not describe any discussion concerning changing the date.

26. That there was a degree of urgency concerning the habitat survey is shown by the email that James Bird of EDP sent to Mr Perons on the evening of 20 September, after Mr Perons had met with the defendants:

> "Let's touch base in the morning and discuss further. We certainly need to resolve this as a matter of urgency.
>
> It is of paramount importance to the Plasdwr application that we update the ecology surveys. To put it bluntly (and I hope not to appear rude, but just so we are aware of the ramifications of not doing the survey), the Plasdwr application will be refused on ecology grounds if we do not update the ecological surveys. …
>
> We have 8 working days left to revise the Environmental Statement of which 2 of those days will be spent in the field doing the survey work. We simply must try to avoid changing the survey date, particularly as our ecology team is now fully booked for September.
>
> If access cannot be granted I will need to update Redrow on this and explain the repercussions, but will of course liaise with you further before doing so."

Jenkin states that Mr Perons did not tell him the contents or tenor of Mr Bird's email and that at no point did he tell him that the matter was urgent or that legal action would be commenced if access were not given for the bat survey.

27. At around midday on 21 September 2016 Jenkin sent an email to Mr Perons: "As you are aware our agent Barry Meade is out of the country on holiday from 14th to 28th September. We are concerned not to prejudice ourselves, so we request that the survey be postponed to enable us to seek advice from Barry to clarify the situation." Having tried and failed to speak by telephone to Philip Meade and to Jenkin and Phillip, Mr Perons left telephone messages for the defendants and sent an email to Jenkin on the evening of 21 September: "In the light of our meeting and your email, it is my understanding that you will obstruct access for the walkover surveys programmed by EDP for Thursday 22nd and Friday 23rd September. My clients have instructed their solicitors, Burges Salmon, to apply for an injunction without delay." The defendants did not reply to that email.

28. On 22 September, the claimants issued the Part 8 claim and an application for an interim injunction. The claim form as originally issued sought an injunction "prohibiting the Defendants from obstructing the landlords' or his authorised agents' access to Maesllech Farm". The application came before Judge Jarman QC on 23 September.

29. Shortly before the hearing on 23 September, Phillip sent to Mr Perons a long letter by email (as mentioned above). He questioned why he had been included as a defendant in the proceedings, as he was not a tenant of the Farm. He complained that Mr Perons had not expressed any urgency regarding the habitat survey or said that the preferred dates of 22 and 23 September were critical or warned that court proceedings would be commenced if access were not granted immediately. He raised concerns about the disruption, mess and danger that would be occasioned by a habitat survey. He wrote: "We will obviously now think about the position. As we have not chosen to have a row and certainly not chosen to have Court proceedings we want to give the overall position careful thought. We want to speak to Barry Meade about that. Obviously it is not going to be possible for us to meet with you and Barry Meade for several days."

30. Also on the morning of 23 September, Philip Meade sent a letter by email to Mr Perons. He referred to two authorities, to which I also have been referred by Mr Jourdan, which he suggested raised a question whether the claimants' rights under the tenancy agreements were as broad as they claimed. However, he said that he would not become involved in the matter.

31. At the hearing on 23 September, Judge Jarman Q.C. adjourned the application for an injunction until 29 September and directed the claimants to file and serve a further affidavit in support.

32. On 26 September Mr Perons sent an email to Barry Meade, who had returned from holiday. He wrote: "If your clients will now consent to access, please let me know but this will have to be endorsed by the Court." Mr Meade replied that he would take instructions.

33. That same evening, Phillip sent a letter by email to Mr Perons, setting out a proposal on behalf of himself and Jenkin: that they would permit access for an ecological

survey only, while reserving their position regarding the claimants' entitlement to access; that the proceedings would be stayed, with liberty to either side to restore them on notice; and that costs be reserved. Burges Salmon replied to the proposal on the following day, requiring general agreement not to obstruct access in accordance with the tenancy agreements and payment of half of the claimants' costs. I was referred to all of this correspondence in the course of the hearing.

34. On 28 September 2016 Phillip sent a letter to the court for the attention of the judge, explaining that he and his father would not be present at the hearing on the following day. He attached copies of recent correspondence, including the letters of 26 September, and wrote:

> "We hope it is clear that we accept that the Landlords must have access for the ecological survey. If there are to be arguments about the rights and wrongs of that it should be in the future. …
>
> I do not think that I should be involved in this at all because I am not a tenant of the farm. However, we agree that we will accept whatever the Judge thinks is the proper way to deal with this. …"

Phillip also sent a further letter by email to Mr Perons, to broadly similar effect. He wrote: "The sad thing is that these Court proceedings started without proper communication from you and without my Father even opposing access."

35. On 29 September 2016 Judge Jarman Q.C. granted an interim injunction restraining the defendants from "(a) interfering with or otherwise restricting the Right of Access and the use thereof by the Claimants their employees, agents and licensees; (b) interfering with or otherwise restricting the access to and egress from Maesllech Farm by the Claimants their employees, agents and licensees". The second limb of the injunction must be construed by reference to the Right of Access mentioned in the first limb; and that in turn refers back to the third recital to the order, which recited that the trusts of which the claimants are trustees enjoyed "a right of entry (the 'Right of Entry') into Maesllech Farm under the 1965 Tenancy and the 1968 Tenancy". Accordingly, the interim injunction was simply an injunction restraining interference with the exercise of the rights in clause 7 of the 1965 Tenancy Agreement and clause Y of the 1968 Tenancy Agreement. That, indeed, is precisely the relief now claimed in the amended claim form.

36. Since the injunction was granted, access to the Farm has been exercised on numerous occasions by persons acting on the instructions or with the permission of the claimants. The defendants have not obstructed access.

37. Events since September 2016 are of limited if any relevance to the issues before me. I refer to only a few of them.

38. By notice dated 27 March 2017, the local planning authority granted outline planning permission ("the Second Planning Permission") for development in accordance with the Second Application.

39. As already mentioned, on 7 February 2017 Jenkin purported to assign the Additional Land to JBG Rees Ltd.

40. On 1 June 2017 an arbitration award upheld the validity and effectiveness of the notice to quit dated 16 August 2016. As a result of that award, on 29 June 2017 Jenkin delivered up vacant possession of the 21 acres to which the notice to quit related.

41. The claimants served on Jenkin five Case B notices to quit in January 2018 and a further three Case B notices to quit in August 2018. All of these have been referred to arbitration. The arbitration in respect of the January notices has been heard and an award is awaited. There has not yet been a hearing of the arbitration in respect of the August notices.

Summary of the parties' cases

42. I shall summarise very briefly how the respective cases were put by counsel. For the claimants, Mr McNall submitted that there was no proper reason to cut down the breadth of the wording of the rights of entry in clause 7 and clause Y. In the 1965 Tenancy Agreement, the only limitation in clause 7 was that the entry must be for the "reasonable" purposes of the landlord. The clause was to be read in the context of the very wide reservations in clauses 3, 4 and 5 and the power of resumption, reflecting section 31 of the 1948 Act, in clause 6; it was, however, an independent right, not to be read as merely ancillary to those in the preceding clauses. In the 1968 Tenancy Agreement, similarly, clause Y was to be read in the context of the reservation of a right of resumption in clause X. The words "his estate" at the end of clause Y were to be taken as a reference to the landlord's reversionary estate, not to the landlord's nearby land, and the words "or for making roads sewers or drains or for any other purpose connected with his estate" picked up the reference to easements in clause X. If the meaning of clause 7 or clause Y was ambiguous, it was to be construed against the tenant and in favour of the landlord because, for the purpose of the rule of construction *contra proferentem*, a reservation to the landlord was considered to be a re-grant by the tenant and, accordingly, the tenant was the *proferens* in respect of such a right. An injunction was required because the defendants had shown that they would obstruct the access to which the claimants were entitled.

43. For the defendants, Mr Jourdan submitted that a right of access limited only by a requirement of reasonableness would be inconsistent with a grant of exclusive possession, the very essence of a tenancy, and with the implied covenant for quiet enjoyment and the implied obligation not to derogate from the grant; thus it would be repugnant to the relationship of landlord and tenant. A clause giving a landlord a right of entry was to be construed narrowly. In clause 7, the permitted activity was simply "to enter on" the Farm; it did not extend to digging holes or trenches, constructing anything, or leaving things on the land. The purpose for which entry could be effected must be limited to purposes pertaining to the relationship of landlord and tenant; an unrelated purpose would not be included within the clause simply because it was reasonable for the landlord's extraneous interests. In clause Y, similarly, the right was to "enter upon" the Farm. The words "for the purpose of inspecting … with his estate" stated the permitted purposes of entry but did not give a

right to do more than enter. The words "or for making roads sewers or drains" were to be understood from the concluding reference to "his estate"; that must refer to land retained by the landlord adjacent to the Farm, because the power to make roads, sewers or drains on the demised land was contained in the power of resumption in clause X and there was no reservation of any relevant easement over the demised land. In any event, no injunction ought to be granted, because there was no good reason to suppose that the defendants would deny access for proper purposes, especially once those were determined by the court, or that any infringement of the claimants' rights would cause them any loss that could not be averted or remedied by the prompt grant of an interim injunction and, if necessary, an award of damages.

Discussion

The approach to construction

44. The principal issue concerns the proper construction of clause 7 of the 1965 Tenancy Agreement and clause Y of the 1968 Tenancy Agreement. The general principles of construction of written agreements are not in doubt. They were summarised pithily by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

The ramifications of that approach have been discussed in detail in many cases. I refer in particular to *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, esp. *per* Lord Neuberger PSC at [15]-[22]; and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173, esp. *per* Lord Hodge at [10]-[13].

45. There was one point of disagreement between the parties as to the application of these general principles to the present case. Mr McNall submitted that, as the written tenancy agreements created tenancies from year to year, the relevant background knowledge would change on a yearly basis. He cited no authority in support of that submission and I reject it. The relevant date is clearly when the respective agreements were made. Accordingly, neither the First Planning Permission nor the Second Planning Permission is relevant to the construction of the written tenancy agreements. The background knowledge of the parties in 1965 and 1968 would have included the fact that there had been some westward expansion of Cardiff, particularly in the Fairwater area, and that there was a possibility that the Farm would become earmarked for development in the future. It would also, I think, have included the fact that Earl of Plymouth Estates were significant landowners in and around the west of Cardiff. There is no evidence before me as to precisely what other land they owned in the vicinity of the Farm, save that Jenkin must be supposed to have known in 1965 that they owned the further land subsequently demised to him and to have known in 1965 and in 1968 that they owned the two areas of woodland that are now surrounded by the land demised by the 1965 Tenancy Agreement and the 1968 Tenancy Agreement. (The terms of Mr Hyde's email to Jenkin at 3.22 p.m. on 13 September 2016, which refer to the surveyors' intended walking routes, "not all of them affecting

Maesllech", seems quite likely to indicate that the claimants had other landholdings near the Farm; however, the inference is uncertain.) Finally, the legislative scheme under the Agricultural Holdings Act 1948 forms part of the potentially relevant background material.

46. There was a dispute between the parties as to the particular approach to the construction of a reservation in favour of a landlord: Mr Jourdan submitted that such a reservation ought to be construed restrictively, while Mr McNall submitted that the only particular rule was that, in the case of genuine ambiguity, the reservation ought to be construed in favour of the landlord in accordance with the maxim *contra praesumuntur contra proferentem.* I shall consider this dispute by reference to some of the authorities cited to me.

47. In *Street v Mountford* [1985] AC 809, the House of Lords reaffirmed the traditional doctrine that, in the case of a grant for a fixed or periodic term at a rent, "If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself" (*per* Lord Davey, sitting in the Judicial Committee of the Privy Council, in *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405 at 408). As Lord Templeman observed at 816, it might not always be clear whether exclusive possession was in fact granted. However, in the present case it is not in issue that the tenancy agreements granted Jenkin exclusive possession of the Farm, subject only to the reservations in the tenancy agreements, and that he is tenant to the claimants. It follows, further, that Jenkin is entitled to quiet enjoyment of the Farm, subject only to reservations made by the tenancy agreements.

48. Not every reservation of rights is consistent with exclusive possession or quiet enjoyment of the demised premises. A reservation of rights to the landlord will, if possible, be construed so as to be consistent with the irreducible minimum consistent with the grant itself; but, if it cannot be so construed, it will be rejected as being repugnant to the demise. Some relevant principles were set out by Neuberger J in *Platt v London Underground Ltd* [2001] 2 EGLR 121:

> "1. It is well established that a landlord, like any grantor, cannot derogate from his grant. To put it in more normal language, as has been said in a number of cases, a landlord cannot take away with one hand that which he has given with the other …
>
> 2. In order to determine whether a specific act or omission on the part of the landlord constitutes derogation from grant, it is self-evidently necessary to establish the nature and extent of the grant …
>
> 3. 'The exercise of determining the extent of the implied obligation not to derogate from grant involves identifying what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit, having regard to the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time the transaction was entered

> into': per Sir Donald Nicholls VC in *Johnson & Son Ltd v. Holland* [1988] 1 EGLR 264 at 268A.
>
> 4. There is a close connection, indeed a very substantial degree of overlap, between the obligation not to derogate from grant, the covenant for quiet enjoyment, and a normal implied term in a contract. Thus, in words which apply equally to an implied term in a contract, Bowen LJ said in *Myers v. Catteson* (1889) 42 ChD 470 at 481, in relation to the derogation from grant principle, that one should give effect to what he called 'the obvious intention of the parties, so as to give the transaction between them a minimum of efficacy and value which upon any view of the case it must have been their common intention that it should have.' In *Southwark Borough Council v. Mills* (1999) 4 AER 449 at 467F Lord Millett explained that, to a large extent, the covenant for quiet enjoyment, and the obligation of a landlord not to derogate from his grant amounted to much the same thing.
>
> 5. The terms of the lease will inevitably impinge on the extent of the obligation not to derogate. Express terms will obviously play a part, possibly a decisive part, in determining whether a particular act or omission constitutes a derogation. An express term should, if possible, be construed so as to be consistent with what Hart J called 'the irreducible minimum' implicit in the grant itself. However, as he went on to say, a covenant relied on by the landlord 'if construed as ousting the doctrine in its entirety is repugnant … and should itself be rejected in its entirety' — see *Petra Investments Ltd. v. Jeffrey Rogers plc* (2000) Landlord and Tenant Reports 451 at 471."

I need not refer to the other principles mentioned in that case; the facts did not concern derogation from grant by way of derogation from exclusive possession.

49. What happens if more than one construction of the reservation is consistent with the irreducible minimum implicit in the grant? There are dicta that suggest that the reservation is to be construed restrictively against the landlord. However, if there were a principle of construction to that effect, the law would be incoherent, because the principle would conflict with the *contra proferentem* rule that, in cases of ambiguity, a reservation is to be construed in favour of the landlord. I think that, although there is some tension in the cases, they permit of a consistent explanation.

50. In *Timothy Taylor Ltd v Mayfair House Corpn* [2016] 4 WLR 100, in a passage on which Mr Jourdan especially relies, the deputy judge, Mr Alan Steinfeld QC, said at [114]:

> "Rights reserved to a landlord under the terms of a lease are to be construed narrowly against the landlord - see *William Hill (Southern) Limited v Cabras* (1986) 54 P & CR 42."

The claimant was tenant of the ground floor and basement of a building owned by the defendant landlord. The lease reserved a number of rights to the landlord. One such right was to carry out construction works to the building itself and to erect new buildings on adjoining property of the landlord. Another such right was a right of entry, as follows: "The right to enter … the Premises at any time during the term at reasonable times and on reasonable notice … to inspect them, to take schedules or inventories of fixtures and other items to be yielded up at the end of the term, and to exercise any of the rights granted to the Landlord elsewhere in this Lease …" The deputy judge rejected the submission that the right of entry included the right to build. After the remark quoted above, he continued:

> "In my judgment, what is described by clause 1-1 as the 'Right of entry to Inspect' does not extend to coming on to the Premises and, indeed, occupying them for a significant period of time, for the purpose of carrying out building works on adjoining property belonging to the Landlord. That, it seems to me, would be to give to the clause an extravagant rather than a narrow meaning. The rights that it seems to me clause 1-1 is referring to are rights that entitle the Landlord to come on to the Premises for the sort of matters which are already referred to in that clause."

51. This narrow construction of general and seemingly broad words in a reservation by reference to the context in which they are found is similar to the approach of Lord Templeman in *Street v Mountford.* Clause 3 of the agreement in that case provided: "The owner (or his agent) has the right at all times to enter the room to inspect its condition, read and collect money from meters, carry out maintenance works, install or replace furniture or for any other reasonable purpose." As in the present case with clause 7 and clause Y, so in *Street v Mountford* the landlord did not seek to argue that clause 3 was inconsistent with exclusive possession; indeed, the landlord in that case did not point to clause 3 as a particular indication that the rights granted to the occupier were purely personal: see 816F. Lord Templeman observed that the landlord had "only reserved the limited rights of inspection and maintenance and the like set forth in clause 3 of the agreement": see 818D. Thus, despite their apparent breadth, the final words of clause 3 ("or for any other reasonable purpose") did not indicate that the rights were more than merely "limited". Lord Templeman's use of the words "and the like" indicates that he read the concluding words of the clause in the context of the preceding words. That is the same approach as was taken by the deputy judge in the *Timothy Taylor* case.

52. Mr Steinfeld QC in the *Timothy Taylor* case relied on the decision of the Court of Appeal in *William Hill (Southern) Limited v Cabras* (1986) 54 P & CR 42 as establishing that a reservation was to be construed restrictively against a landlord. In the *William Hill* case, the tenant had during the term of the lease maintained illuminated advertising signs that had been in place since before the lease had been granted. The lease made no mention of a right to maintain the signs, and the landlord, the assignee of the original lessor, contended that the tenant had no more than a revocable licence to maintain them. The landlord relied on clause 3 of the lease, which provided that the demise should not be deemed to include or confer "any right of light or air liberties privileges easements or advantages (except such as are

specifically granted by this Lease) in through over and upon any land or premises adjoining or near to the demised premises." Having referred to the two general rules mentioned by Thesiger LJ in *Wheeldon v Burrows* (1879) 12 ChD 31, 49, Nourse LJ, with whose reasoning on this point Stocker LJ agreed, accepted at 48 the submission "that the court will not construe a general provision in a lease, particularly an exception and most of all an exception couched in very general terms such as those in clause 3, so as to take away with the other hand that which has already been granted by the one hand in the dispositive provisions of the lease."

53. Mr McNall submitted that Nourse LJ overlooked contrary binding authority in *Johnstone v Holdway* [1963] 1 QB 601, as mentioned and explained by the Court of Appeal in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No. 2)* [1975] 1 WLR 468, that "an exception and reservation of a right of way in fact operates by way of regrant by the purchaser to his vendor …" (*per* Upjohn LJ in *Johnstone v Holdway* at 612) and that accordingly section 65(1) of the Law of Property Act 1925 had not altered the existing law, which treated the language of reservation as having the same effect as would the language of regrant, and in those circumstances regarded the purchaser as the *proferens* for the purpose of the maxim *contra praesumuntur contra proferentem.*

54. I accept that the *contra proferentem* rule, which operates only where the normal canons of construction cannot resolve an ambiguity in the document, operates in the manner contended for by Mr McNall. A reservation in a lease operates as a re-grant by the tenant: *Johnstone v Holdway* at 612-613; this is part of the ratio of the case. Therefore the reservation falls to be construed against the tenant, who is considered to be the *proferens*: the *St Edmundsbury* case at 477-480; the remarks are *obiter* but are a straightforward application of the ratio of *Johnstone v Holdway* and represent the current state of the law.

55. I also accept that, if there were a principle of construction that a reservation was to be construed restrictively against a landlord, the law would be incoherent. Even though such a principle would operate at a stage of interpretation before the court had recourse to the *contra proferentem* rule, it cannot be right to say that the court must construe a reservation restrictively against the landlord unless it cannot decide between alternative constructions, in which case it must choose on the basis of an expansive interpretation in favour of the landlord.

56. However, I think that conflict and incoherence can be avoided, though some tension does remain. In my judgment, the correct position is not that there is a rule of interpretation, as such, that a reservation is construed restrictively against the landlord. Rather, as part of the normal method of construing written instruments, the court will have regard to the entirety of the text and to the main subject matter of the agreement and, in the normal course of things, is likely to suppose that the intention of the parties is to advance the main purpose of the agreement as shown by its subject matter. Thus in the case of a lease, which necessarily grants exclusive possession and the right to quiet enjoyment, the court will naturally be inclined to suppose that qualifications on these rights will emerge clearly from the lease. This is not a matter of applying a special rule that a certain kind of provision must be construed against a particular party. It is simply a matter of applying the normal approach to construction. Accordingly, if, having regard to all relevant matters, the court finds

that the normal approach to construction results in ambiguity, there is nothing irrational in resorting to the *contra proferentem* rule.

57. This understanding gains support from the authorities. The decision in the *William Hill* case rested not on some principle of restrictive construction in the abstract but on the conclusion that the landlord's proposed construction would "take away with the other hand that which has already been granted by the one hand in the dispositive provisions of the lease"; that is, it would be inconsistent with the grant. I think that the understanding set out above also gains support from the two authorities relied on by Mr Jourdan (and mentioned by Philip Meade in his email of 23 September 2016; see paragraph 30 above), namely *Heronslea (Mill Hill) Ltd v Kwik-Fit Properties Ltd* [2009] EWHC 295 (QB), [2009] Env LR 28, and the Scottish case of *Possfund Custodial Trustee Ltd v Kwik-Fit Properties Ltd* [2008] CSOH 65.

58. In the *Heronslea* case, the landlord wanted to enter the demised land and undertake an environmental investigation survey, including the drilling of a number of boreholes, in order to assess possible land and groundwater contamination from the current and historic uses of the site. It was said that the survey would take two days to complete and that the boreholes could be located in an area convenient to the tenant. The tenant objected to entry for the intended purpose and refused access. The landlord relied in particular on paragraph 13 of the lease, which was in the following terms:

> "Upon reasonable prior written notice … the tenant shall permit the Landlord and those authorized by it at all times to enter (and remain unobstructed on) the Premises for the purpose of:
>
> 13.1.1 inspecting the Premises for any purpose, or
>
> 13.1.2 making surveys or drawings of the Premises, or
>
> 13.1.3 complying with the Landlord's obligations under this Lease or with any other Legal Obligations of the Landlord
>
> Provided that the Landlord shall cause as little interference and disturbance as is practicable and shall make good any damage caused forthwith and to the reasonable satisfaction of the Tenant."

Sharp J held that paragraph 13 of the lease did not permit the activity intended by the landlord. She considered that the usual meaning of the word "survey" was not such as to include the drilling of boreholes. She also, at paragraph 39, considered the immediate context in which the word "survey" occurred in the lease:

> "As to immediate context, the use of the preposition 'on' together with the words which follow the word *survey* itself (*and drawings*) suggest that the word *survey*, in the context, means a survey of (rather than under) the land and of the buildings on the land (in contrast with the clause dealing with Hazardous Waste, where the parties provide specifically for what is or is not to be placed 'under' the Premises).

> Interpreting the words in paragraph 13.1.2 in the way in which a reasonable commercial person would construe them, I do not think one can detach the word *survey* from its immediate context which in my view, the argument advanced by [counsel for the landlord] seeks to do."

Sharp J also considered the question whether the degree of interference with the tenant's quiet enjoyment that would be permitted on the landlord's construction of paragraph 13 was consistent with the language used:

> "41. When endeavouring to ascertain the presumed intention of the parties and whether the parties would have intended the word *survey* to encompass every activity which could possibly be so described, it is also material in my view to consider the interaction between paragraph 13.1.2 and the Tenant's right to quiet enjoyment. The covenant to quiet enjoyment would be significantly undermined in my view if the Landlord has the right (as it is contended it does) to enter the Premises, and conduct whatever could be described as a survey, including a geological survey for example, no matter how intrusive, no matter what disruption was caused to the Tenant's business and however long such activities might take; even allowing it – on [the landlord's] interpretation so it seems to me – to demolish part of any building with the only proviso that it should cause as little damage and disturbance as is practicable and make good any damage forthwith to the reasonable satisfaction of the Tenant.
>
> 42. Such significant inroads into the Tenant's right to enjoy the Premises free from interference is not a result it seems to me that the parties would have contemplated when executing the Lease. If such had been the intention of the parties to a commercial lease, one would expect to find much clearer words or indication to that effect within it."

59. A very similar approach was taken by an Extra Division of the Inner House of the Court of Session in the *Possfund* case. The dispute was substantially the same as in the *Heronslea* case. The landlord relied in particular on clause 3.11 of the lease, which required the tenant:

> "To permit the Landlord and its agents at all reasonable times with or without workmen on giving forty eight hours written notice (except in emergency) to the Tenant to enter upon the Premises generally to inspect and examine the same to view the state of repair and condition thereof and to take a schedule of the Landlord's fixtures and of any wants of compliance by the Tenant with its obligations hereunder."

The parties did not put forward any background matter as bearing on construction; they relied simply on the provisions of the lease. Delivering the opinion of the Court, Lord Reed said:

> "12. A lease, like any other contract, must be construed as a whole, and so as to give proper effect if possible to all of its provisions. In the present case, it is necessary in particular to achieve a fit, if possible, between the landlord's right to inspect and examine, by virtue of clause 3.11, and the tenant's right to be maintained in possession, reflected in clause 4.1.
>
> 13. Since a lease is essentially a grant of possession of the subjects of the lease for the period of the lease, it is implicit, if not expressed, that the landlord is precluded from any action which encroaches materially upon the tenant's possession of those subjects during that period. The landlord's obligation to maintain the tenant in exclusive possession may however be qualified by the terms of the lease. [Lord Reed then referred to provisions in the lease that did qualify the tenant's possession, which however imposed requirements for minimising disturbance and making good any damage caused; and he continued:]
>
> 14. There is a striking difference between the wording of the provisions which we have just discussed and that of clause 3.11. Although clause 3.11 entitles the landlord to enter the premises 'to inspect and examine the same to view the state of repair and condition thereof...', there is no express obligation to do so in such a way as to cause the least practicable disturbance to the tenant; nor is there any obligation to make good any damage caused. In a professionally drafted lease, the omission of such obligations, when they are specified in several other provisions, is unlikely to have been unintended. While not necessarily conclusive in itself, it strongly suggests that it was not envisaged or intended that the exercise of the landlord's right of inspection under clause 3.11 would cause any material disturbance to the tenant, or would result in any material damage to the premises.
>
> …
>
> 16. More generally, it appears to us that if it had been the intention of the parties to the lease that the landlord should be entitled under clause 3.11 to interfere with the tenant's possession of the premises to the extent contended for by the pursuers (which, as we have explained, would involve intrusive investigations lasting several days and the cordoning off of parts of the forecourt of the premises), one would expect to find a much clearer indication to that effect in the lease."

60. In summary, therefore, the position is as follows.

1) An exception or reservation will, if possible, be construed in such a manner as to preserve its validity.

2) Therefore the court will, where it is possible to do so, construe an exception or reservation as restrictively as is required to avoid a derogation from grant or a conflict with the covenant for quiet enjoyment. In the words of Neuberger J in *Platt v London Underground Ltd (supra)*: "An express term should, if possible, be construed so as to be consistent with what Hart J called 'the irreducible minimum' implicit in the grant itself."

3) There is no further rule that a reservation is to be construed restrictively against a landlord.

4) However, the application of the standard principles of construction, including the requirement to have regard to all of the provisions of the instrument and to the principal purpose and subject matter of the instrument, will tend to lead the court to expect that substantial qualifications of the rights to exclusive possession and quiet enjoyment of the demised premises will appear clearly from the lease. Further, apparently broad and unqualified words in reservations may, on closer examination, be found to have a more restricted meaning when read in their immediate or wider textual context.

5) If it is not possible to construe an exception or reservation in a manner consistent with the 'the irreducible minimum' implicit in the grant itself, it will be struck down as being repugnant to the lease.

6) The *contra proferentem* rule operates only if the exception or reservation is ambiguous, in the sense that the court is unable to decide on its meaning by the use of the materials usually available for interpretation.

7) By reason of the principles of construction set out above, the *contra proferentem* rule can only apply if the court cannot otherwise decide among two or more constructions, all of which are consistent with the irreducible minimum consistent with the grant itself. This is because: (a) if any possible construction of the reservation would be inconsistent with the irreducible minimum implicit in the grant itself, the reservation will have been struck down as repugnant to the grant; and (b) if, of two possible constructions of the reservation, one would be consistent with the irreducible minimum implicit in the grant itself and one would not, the court will have chosen the former in accordance with the principles set out above.

8) Once the court is forced to have recourse to the rule, the correct position is that the reservation operates as a re-grant by the tenant and therefore the reservation falls to be construed against the tenant, who is considered to be the *proferens*.

The 1965 Tenancy Agreement

61. The right in clause 7 relates to "any part of" the land and premises demised. This must include buildings on the land demised by the 1965 Tenancy Agreement, although in such cases entry could of course not reasonably be exercised with vehicles. The right is to be exercised "at all reasonable times", which shows an intention that the entry should not derogate from the irreducible minimum consistent with the grant itself and accordingly provides encouragement to find a construction in

accordance with that intention. The critical and related questions are, first, what "for all reasonable purposes" means and, second, what things are permitted in pursuance of those purposes.

62. The purposes in question are necessarily those of the persons exercising the right, namely the claimants. Obviously, however, "reasonable purposes" cannot extend to all purposes that are reasonable merely in the landlord's interests. The two possibilities are, therefore, (a) that any purposes are permissible if they are reasonable in the landlord's interests and do not derogate from the irreducible minimum consistent with the grant itself and (b) that the "reasonable purposes" are reasonable purposes concerned with the parties' rights and obligations under the 1965 Tenancy Agreement, including purposes concerned with the landlord's reversionary interest in the demised land. The latter interpretation is suggested by the wording of the clause. The reference is simply to "all reasonable purposes", not to all purposes that are reasonable in the interests of the landlord. In the context of a lease, the obvious canon of reasonableness is the relationship of landlord and tenant. Whereas in the abstract reasonableness may have no connection with the tenant at all, in a reservation of rights in a lease the obvious way to assess reasonableness is by reference to that relationship. In my view, this interpretation of the purposes is supported by consideration of the scope of the acts permitted by the right reserved in clause 7.

63. The right is expressly a right of entry. The fact that entry is to be for a (reasonable) purpose shows that entry is not an end in itself but is to be in order to achieve something beyond the simple fact of entry. However, clause 7 does not mention any particular acts that may be performed once entry has been gained and to which the right of entry is ancillary. In this respect it differs from other express or implied rights of entry, provided for by the tenancy agreement, that are ancillary to substantive rights to do things: clause 3 (entry to get minerals), clause 4 (entry to take wood) and clause 5 (entry to hunt). This suggests that under clause 7 the reasonable purposes are to be achieved by either the mere fact of entry and presence on the land (notably, inspection and observation) or the performance of specific obligations under the tenancy agreement (such as repair of buildings). As the right of entry in clause 7 is not tied to a specific right or obligation (such as, the obligation to repair and the right to enter for the purpose of effecting repairs), it is reasonably construed as being wide enough to cover both instances. Thus, for example, entry for the purpose of inspection or observation to assist in deciding whether to exercise, or for facilitating the future exercise of, the power of resumption in clause 6 would be within the scope of clause 7.

64. The present case is concerned with the exercise of the right of entry for purposes other than the discharge of duties or exercise of rights specifically mentioned in the 1965 Tenancy Agreement. It follows from what I have said already that such purposes ought to be construed as relating to inspection and observation. The extent of the activities thus permitted cannot be properly considered in the abstract and without regard to particular cases. However, in my judgment, the permissible activities do not extend to those which cause damage to the land or involve cordoning off parts of the land or significant interference with the operation of the working farm. First, the right is stated to be a right to enter; no other right is mentioned. Second, if the intention were to permit specific activities, not otherwise mentioned in the tenancy agreement, such as would tend to interfere with possession or quiet enjoyment, one would have

expected that to have been stated rather than left for inference. Third, if intrusive activities were envisaged, the tenancy agreement would probably have mentioned the need to minimise disruption (see for example clause 3). Fourth, if the permitted activities were liable to cause damage, the tenancy agreement would probably have provided for the possibility of compensation (see for example clauses 3 and 4) or for the exclusion of compensation (see clause 3). I consider, accordingly, that the digging of excavations, the sinking of boreholes and the erection of structures all fall outside the limited rights in clause 7. The installation of monitoring devices, being a form of extended inspection, would I think be capable of falling within the scope of the rights in clause 7; much would depend on the position, nature and effect of the devices. I should consider that, absent special circumstances that I cannot now envisage, the installation of remote bat detectors would be permitted. I do not know enough about other kinds of device to speculate. Similarly, I consider that it would be permissible under the terms of clause 7 for a surveyor to place discreet reference points on the land in order to assist in conducting a visual survey and inspection; on the other hand, anything that involved significant interference with use of areas of the land or intrusion below its surface, or activities such as trial pegging out of intended development sites, would not be within the scope of the reserved rights.

The 1968 Tenancy Agreement

65. Counsel's submissions were directed primarily to clause 7 in the 1965 Tenancy Agreement. Yet it is perhaps clause Y of the 1968 Tenancy Agreement that gives rise to the greater difficulty. Clause Y reserves a right that may be exercised at any time, although it would have to be exercised reasonably. The right is again one of entry. However, three specific purposes for which it may be exercised are set out: "inspecting" the demised premises; "making roads sewers or drains"; and "any other purpose connected with [the landlord's] estate." The clause gives rise to two particular questions. First, where are the "roads sewers or drains" to be made: on the demised land (as Mr McNall contends) or on the landlord's adjacent land (as Mr Jourdan contends)? Second, what is meant by the landlord's "estate": its reversionary interest in the demised land (so Mr McNall) or its other landholdings in the vicinity (so Mr Jourdan)? The connection between these two questions is obvious. The answer to them is less obvious.

66. In my judgment, the wording of clause Y, both by itself and when read in its textual and factual context, shows that the "roads sewers or drains" were not on land forming part of the demised premises at the time of entry and that the landlord's "estate" refers to all the landlord's land in the vicinity. I shall explain my reasons for this conclusion, what precisely it means and what its implications are.

67. First, the context in which the 1968 Tenancy Agreement was made is relevant. The parties knew that the landlord owned both the reversion of the 1965 Land and of the Additional Land and also the two pieces of woodland that were now to be landlocked by the Farm. They also knew the provisions of the 1965 Tenancy Agreement. Accordingly, the parties were aware of the possibility of future development not only

on the 1968 Land but also on the 1965 Land, the Additional Land and any other land held by the landlord in the vicinity.

68. Second, the wording of clause Y contains certain indications, albeit in themselves inconclusive, as to how the two questions mentioned above are to be answered. The first permitted purpose of entry is to inspect "the same"; those words refer to "the said [demised] premises", namely the 1968 Land. However, the second permitted purpose, "making roads sewers or drains", does not specify "on the same", as it could easily have done. The wording of the third permitted purpose ("any *other* purpose connected with his estate": my emphasis) tends to suggest that "making roads sewers or drains" is itself a purpose "connected with [the landlord's] estate". Further, the use of the words "his estate" rather than "the said premises" suggests that there is a distinction between the two. The distinction could conceivably be no more than the distinction between physical land and legal interest, but this seems improbable and it is far from clear what useful reason could have existed for introducing such a distinction into the clause. Accordingly, these considerations tend to indicate that the final words of the clause ("or for any other purpose connected with his estate") mean simply that the landlord may enter the demised land for the purpose of doing anything he may otherwise be entitled to do on the demised land or on any other land of the landlord adjacent to it. The same considerations would also tend to indicate that the "roads sewers or drains" were not necessarily on the demised premises, but it would not indicate whether they could be on it.

69. Third, one must consider the wider textual context of the clause. The "roads sewers or drains" mentioned in clause Y could not themselves be for the use of land tenanted by the tenant; they could only be for the use of a development on land that was not part of the Farm, whether because it was not demised by the tenancy agreements or because, although it had been demised by one or other of the tenancy agreements, the landlord had resumed possession (that is, under clause X of the 1968 Tenancy Agreement or under clause 6 of the 1965 Tenancy Agreement or, perhaps, in the case of the Additional Land under section 31 of the Agricultural Holdings Act 1948). Mr McNall submitted that the "roads sewers or drains" could nevertheless be built on the retained 1968 Land (that is, such parts of the 1968 Land as had not been subject of a resumption of possession under clause X), because the landlord need not rely on clause X but could instead rely on an easement. However, the 1968 Tenancy Agreement contains no easement that would permit use of such roads, sewers and drains. Neither clause X nor clause Y nor any other provision of the 1968 Tenancy Agreement provides for an easement of drainage or a right of way to be taken over land still forming part of the demise. The reference in clause X to mains supplies and other easements is to rights over land of which the landlord is resuming possession: possession is taken in order that the necessary rights can be granted. If the making of roads, sewers and drains mentioned in clause Y is on retained 1968 Land, this can only be in anticipation of the resumption of possession under clause X. Yet the right is exercisable "at any and at all times", not merely pursuant to a notice under clause X. Further, it is improbable that the "roads sewers or drains" mentioned in clause Y were to be on retained 1968 Land, because clause X made provision for resumption of possession for that purpose and because the making of roads, sewers and drains on the demised land would involve not merely entry but the taking of possession. Therefore it is probable that the entry envisaged was for the purpose of making roads, sewers and drains on *other* land of the landlord; that is, the right was a right to enter the

demised land for that purpose, not a right to make sewers and drains on the demised land.

70. For these reasons, I conclude that clause Y gave to the landlord a right to enter the 1968 Land for three purposes: first, to inspect the 1968 Land; second, to make "roads sewers or drains" on land other than the retained 1968 Land; third, to do anything that he is lawfully obliged or permitted to do on the 1968 Land or the 1965 Land or the Additional Land or any other adjacent land he may own. However, the third purpose is simply that, namely a purpose for which entry may be effected; it does not give further rights to do things on the land that are not otherwise permitted. The result is that clause Y permits to be done on the 1968 Land no more and no less than clause 7 permits to be done on the 1965 Land, save that the second purpose may permit some additional activity near the boundary, ancillary to the making of roads, sewers and drains on adjacent land.

Remedy

71. I propose to make declarations reflecting the foregoing conclusions, with a view to assisting the parties and avoiding future strife. If counsel can agree suitable terms of declaration, I shall consider it. If not, I shall hear them further on the matter.

72. However, I have come to the conclusion that no injunction ought to be granted as final relief, for reasons appearing below.

73. The injunction sought is for the purpose of restraining the defendants from future infringement of the claimants' rights. It is thus a *quia timet* injunction. In *Lloyd v Symonds* [1998] EWCA Civ 511, Chadwick LJ, with whom Millett and Waller LJJ agreed, said:

> "Such an injunction [that is, a *quia timet* injunction] should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm—that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. 'Preventing justice excelleth punishing justice'—see *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] Ch 235 at page 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see *Attorney-General v Nottingham Corporation* [1904] 1 Ch 673 at page 677)."

In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2, Marcus Smith J considered the authorities relating to the grant of *quia timet* injunctions and at [31] set out the principles that he derived from them; the following principles are relevant:

> "(3) When considering whether to grant a *quia timet* injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of *actual* infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?
>
> (4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage—the strong possibility that there will be an infringement of the claimant's rights—and without seeking to be comprehensive, the following factors are relevant: (a) If the anticipated infringement of the claimant's rights is entirely anticipatory—as here—it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. … (b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As Spry, *Equitable Remedies*, 9th ed (2013) notes at p. 393, '[o]ne of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions'. (c) Of course, where acts that may lead to an infringement have *already* been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act. (d) The time-frame between the application for relief and the threatened infringement may be relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature (*Hooper v Rogers* [1975] Ch 43, 50).
>
> (5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no *quia timet* injunction, but an infringement of the claimant's rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an *ex post* rather than an *ex ante* intervention, but the following other factors are material: (a) The gravity of the anticipated harm. It seems to me that if the some of the consequences of an infringement are potentially very serious and incapable of *ex post* remedy, albeit only one of many types

> of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind; (b) The distinction between mandatory and prohibitory injunctions."

74. It is clear enough that the defendants have not sought to make life easy for the claimants. I do not think it unfair to say that they were, at times, positively difficult in August and September 2016; see, for example, the rather obstructive suggestion that the reference to arbitration meant that access did not have to be given (paragraph 24 above). On the other hand, matters have to be viewed in context. In furtherance of their perfectly proper intentions to benefit from development of the Farm, the claimants have asserted a claim to the widest rights of entry onto the Farm. The defendants have, quite reasonably, sought to ensure that they are not taken advantage of. They were, indeed, slow to acknowledge in September 2016 that an ecological survey should take place. But the evidence does not demonstrate that the urgency of the ecological survey was made clear to them before proceedings were commenced. What is plain is that the defendants were unwilling to permit, without receiving, compensation what they did not have to permit at all, and that they were concerned not to prejudice their own rights by conceding what they did not need to concede. The nub of the dispute, indeed, concerned the extent of the claimants' rights. I am not persuaded that the defendants are likely to deny access to the claimants for purposes that are established as being lawful. If this judgment and the accompanying declaratory relief leave any measure of uncertainty as to precisely what activities are or are not within the scope of the claimants' rights of entry, that uncertainty will not constitute a reason to grant an injunction in more general terms (see further below).

75. Accordingly, I do not consider that the first condition of the grant of a final *quia timet* injunction (a strong probability that, unless restrained by injunction, the defendants will infringe the claimants' rights) is satisfied. I also see no evidence that the second condition (the risk of irremediable damage) is satisfied, though I need say nothing further in that regard.

76. For completeness, I add the following. First, if I had granted an injunction it would not have been in the terms of the interim injunction granted in September 2016 by Judge Jarman Q.C. and continued in January 2019 by me. The terms of the interim injunction amounted to an order not to infringe the claimants' rights. That left it uncertain what acts would infringe those rights. An injunction must make it clear to the respondent what he must or must not do. To identify the prohibited or mandated acts merely by reference to legal conclusions is insufficient. Second, if I had granted an injunction, I would have excluded from its scope the Additional Land but given to the claimants permission to apply later for a variation so as to include it. The oral tenancy in respect of the Additional Land was apparently subject of evidence and cross-examination in recent arbitration proceedings between the parties arising out of the most recent Case B notices. The arbitrator's decision is awaited. I am unclear precisely what the issue concerning the Additional Land was in the arbitration and would have thought it best to await the arbitrator's decision before extending the injunction to the Additional Land.

77. In the course of the hearing, submissions were made concerning the proper incidence of the costs of the application for the interim injunction. It seems to me preferable to defer consideration of that issue until the costs of the claim as a whole are dealt with.

The parties have been unable to agree very much in this litigation, but I am not entirely without hope that they might be able to reach some agreement as to costs.

78. This judgment is being handed down in the absence of the parties. I shall adjourn consideration of the appropriate terms of order and of any consequential matters, including costs and any application for permission to appeal, to a further hearing and shall extend the time for filing an appellant's notice until 14 days after that further hearing.