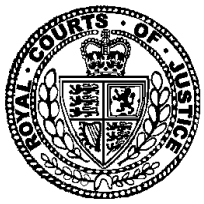


Neutral Citation Number: [2023] EWHC 683 (Ch)

Case No: PT-2021-000083

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 4 April 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

ZOE CLAIRE BUCKNELL	**Claimant**
- and -	
ALCHEMY ESTATES (HOLYWELL) LIMITED	**Defendant**

- -
- -

Richard Clegg (instructed by **Hewlett Swanson**) for the **Claimant**
Nicholas Isaac KC and Robyn Cunningham (instructed by **Veale Wasbrough Vizards LLP**) for the **Defendant**

Hearing dates: 29 November – 6 December 2022

- -

Approved Judgment

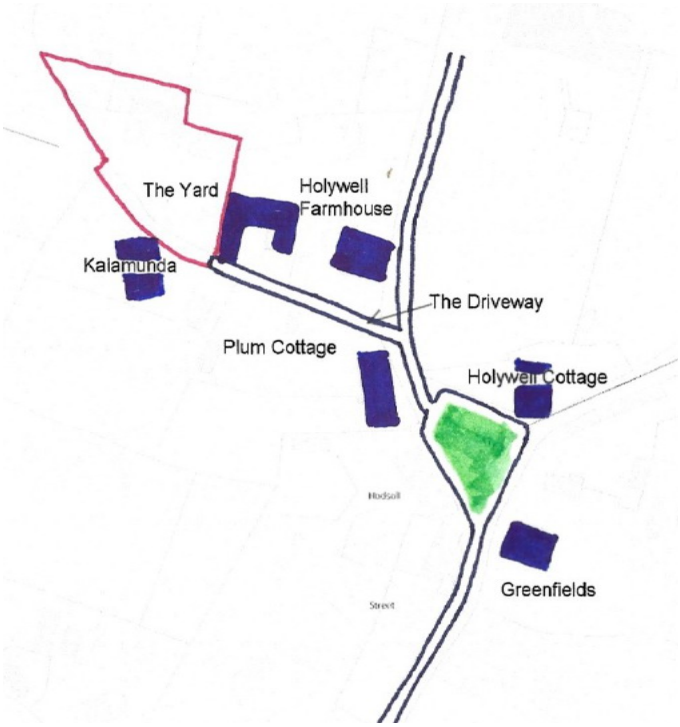
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of an action for declaratory and injunctive relief relating to the alleged increased use of a right of way over the claimant's land by reason of the construction and intended occupation of two houses on the defendant's adjacent land. The claimant is the owner and occupier of a property known as Holywell Farmhouse, Hodsoll Street, Sevenoaks, Kent ("the Farmhouse"). On its eastern side, this abuts the public highway in the village of Hodsoll Street. The defendant is a company incorporated for the purpose of developing its property, known for present purposes as "the Yard". This is to the west of the Farmhouse, and has no direct access to the public highway. It is landlocked. That is where the two new houses have now been built. One is already occupied. The plan below (the top facing north) illustrates the relationship between the properties.



2. Also shown on the plan, along the southern boundary (but forming part) of the Farmhouse, a metalled driveway runs from the public highway in a westerly direction to the Yard. It is either 53 or 55 metres long (both values were given, but it does not matter which is right). It is a single track road with no passing places. The west end of the driveway is some 710 mm higher than the east end, so there is a slight fall from west to east. There is a public footpath along the driveway to the Yard, and indeed beyond. In addition, it is common ground between the parties that in 1972 there was an express grant of a vehicular and animal right of way over the driveway for the benefit of the Yard. The present claim is framed in terms of both (i) excessive user of that right of way and (ii) nuisance.

3. The claimant herself uses part of the driveway to access not only the Farmhouse itself, but also an open courtyard to the west of the Farmhouse, and its adjacent buildings. These include a former stable block at the boundary with the Yard, which is now

converted to use as a workshop. In addition, the claimant uses the whole length of the driveway in order to exercise an express right of way granted over the Yard to access more easily other land which she owns behind the Yard. Other neighbours, apart from the defendant, including the occupiers of Plum Cottage (to the south of the Farmhouse) and Kalamunda (to the south-west of the Farmhouse) also use the driveway to access their adjacent properties. These two properties are both on the south side of the driveway, and are also shown on the plan.

Procedure

4. I understand that thereafter there was a mediation between the parties on 7 December 2020, but unfortunately this was not successful. The claim was commenced by claim form issued on 29 January 2021. On 1 February 2022 the claimant applied to the court for an interim injunction to prevent vehicles needed for the construction of the two houses on the Yard from passing over the driveway. That interim injunction was granted by Mann J on the same day, over until 11 February 2021. On that day, the injunction was continued by Zacaroli J, until after final order in the claim, with limited exceptions: see [2021] EWHC 1544 (Ch). It is to be noted that the interim injunction does not itself prevent use and habitation of the houses once constructed. As I say, one of the two is already complete, and is occupied. As at the date of reserving judgment, it was thought that the other would be completed shortly, and thereafter might be occupied.

5. Zacaroli J's order relevantly provided:

> "(1) Until after final judgment in this Claim, and except as set out in paragraph (2) below, the Defendant must not:
>
> > (a) use or permit the use of the Driveway to access the Yard with Vehicles, plant and/or machinery for the purpose of any works of clearance, removal, demolition and/or construction in relation to the dwelling houses that are the subject of the [Planning] Permission;
> >
> > (b) use or permit the use of the Driveway to access the Yard with any Vehicle travelling at a speed in excess of 5 miles per hour.
>
> (2) The order at paragraph (1)(a) above shall not prevent the following:
>
> > (a) The Defendant, its servants or agents, attending at the Yard by vehicle to inspect the Yard;
> >
> > (b) The Defendant, its servants or agents, filling in the foundations that have by the date hereof already been dug on the Yard with concrete only (not including building any basement) provided that any damage caused to the tarmac surface of the Driveway is made good by the Defendant."

6. Particulars of claim were served on 16 February 2021, and a defence on 13 March 2021. On 3 September 2021 Deputy Master Arkush gave directions to trial. The matter was tried before me between 29 November and 7 December 2022. On the second day of the trial, I carried out a site visit, in the presence of counsel from both sides, which was of considerable assistance.

7. The particulars of claim relevantly say:

> "10. There is a right of way for the benefit of the Yard over the tarmacked way on the Driveway as set out below ('the Yard Right of way').
>
> 11. There is a right of way for the benefit of Holywell Farmhouse over the Yard, the route of which connects the western end of the Driveway, across the Yard and between the two barns thereon, with the land forming part of Holywell Farmhouse to the north ('the Holywell Farmhouse Right of way'). …
>
> 12. The reservation and/or grant of the Holywell Farmhouse Right of way, and the terms thereof, is contained in the Yard Conveyance and/or Holywell Conveyance (both defined below). …
>
> 13. There is a public footpath along the Driveway.
>
> 14. A conveyance of Holywell Farmhouse dated 29 September 1972 made between (1) Nigel Fraser Neilson as Vendor and (2) William James Bryen as Purchaser ('the Holywell Conveyance') reserved the right of way in the following terms:
>
> 'A right of way at all times and for all purposes with or without animals and vehicles over the roadway coloured brown on the said plan for the purpose of access to and egress from the adjoining premises of the Vendor the person exercising such right paying to the Purchaser or his successors in title on demand Fifty per cent of the cost incurred in maintaining the same to such reasonable standard as shall be determined by the Purchaser or his successors in title'
>
> […]
>
> 16. The benefits and burdens of the Holywell Conveyance form part of the Property Register of the title to Holywell Farmhouse but are not registered on the title to the Yard.
>
> 17. A conveyance of the Yard and other land, also dated 29 September 1972, made between (1) Nigel Fraser Neilson as Transferor and (2) Colin Machlachlan Russell Stoneham and Ivor Robin Russell Stoneham as Transferees ('the Yard Conveyance') included a right of way in the following terms:
>
> 'a right of way at all times and for all purposes to pass and repass over the roadway coloured brown on the said plan with or without animals and vehicles the Transferees or their successors in title paying unto the Transferor or his successors in title 25% of the cost incurred in maintaining the same to such reasonable standard as shall be determined by the Transferor or his successors in title'
>
> […]
>
> 19. The benefits and burdens of the Yard Conveyance form part of the Property Register of the title to the Yard but are not registered on the title to Holywell Farmhouse.

> 20. In the premises the Claimant will contend, so far as relevant to these proceedings, that the Yard Right of Way, and the terms thereof, is that contained in the Holywell Conveyance as aforesaid; in the alternative, that it is that contained in the Yard Conveyance."

8. The defence relevantly says:

> "15. As to paragraph 10, it is admitted that there is a right of way for the benefit of the Yard over the tarmacked way on the Driveway. However, the said right of way, which for convenience is nonetheless hereinafter still referred to as 'the Yard Right of Way', extends over the full width of the Driveway, which at its narrowest points is approximately 4.10 metres wide.
>
> 16. Paragraphs 11 and 12 are admitted, but their relevance to these proceedings is doubted.
>
> 17. Paragraph 13 is admitted.
>
> 18. Paragraphs 14 to 19 are admitted.
>
> 19. For the avoidance of doubt it is the Defendant's case that the Yard Right of Way extends to the full width of the Driveway as shown on the plan attached to the Yard Conveyance, i.e. extending from the physical boundary feature on the north of the Driveway to the physical boundary feature to the south of the Driveway.
>
> 20. As to paragraph 20, and insofar as it makes a material difference, the Defendant's case is that the Yard Right of Way is that granted expressly in the Yard Conveyance …"

9. No Reply was filed or served by the Claimant. CPR rule 16.7(1) provides:

> "(1) If a claimant does not file a reply to the defence, the defendant must prove the matters raised in the defence."

CPR Practice Direction 16, para 12.2, provides:

> "A party may in a statement of case –
>
> (1) refer to any point of law;
>
> (2) give the name of any witness they propose to call,
>
> and may attach to it a copy of any document necessary to their case (including any expert's report under Part 35)."

Witnesses

10. The following witnesses gave evidence orally before me: the claimant, Mr Jean-Pierre Daeschler (her husband), Mrs Sally Bates (village resident), Mr Mark Stoneham (director of and shareholder in the defendant), Mr Nicholas Lavidge (defendant's building contractor), Mr Jeremy Skipper (former owner of Kalamunda), and Mr Colin

Stoneham (father of Mark Stoneham, and former co-owner of the Yard). In addition, there were two expert witnesses on each side who were tendered for cross-examination: Mr Suraj de Silva (engineering) and Mr Christopher Veasey (traffic management) for the claimant, and Mr Laurence Rae (engineering) and Mr Mark Baker (traffic management) for the defendant.

11. My appreciation of the live witnesses was that all of them were honestly trying to tell the truth as they believed it to be. Given the differences in their evidence, they cannot all be right. But in my judgment they were all trying to help the court, even if some of them were on occasions mistaken. I must however make two comments in particular. First of all, it was apparent from the way he answered questions that the memory of Mr Colin Stoneham (the father of Mark Stoneham) is not as good as it might have been. He himself said that he had "a short memory". He also tended to agree with whatever was being suggested to him. The consequence is that, without any disrespect to him, I will be cautious in accepting his evidence where not corroborated by other independent evidence.

12. Secondly, an attack was made on the evidence of Mr Mark Stoneham as to the position on the ground in 1972, because he was then only 7 years old. Obviously, a child's perception and interpretation of facts may differ from that of an adult, because of the child's inexperience of life. But our own experience shows us that we are able to remember matters and events from our youth, at least from the age of five or six years, and sometimes even earlier. For myself, for example, I have very clear memories of certain matters and events from when I was seven. I must and do bear in mind that the world does look different to a seven-year old child, and that fifty years is a long time ago. But I do not accept that I should ignore completely, or even heavily discount, Mr Mark Stoneham's evidence merely because of his age at the time of the events described. I have therefore given it the weight I think it merits.

13. In addition to these witnesses, witness statements with hearsay notices were served for the following witnesses for the claimant: Mrs Patricia Clark, Mrs Elizabeth Thomas, Mr George Thomas, and Mrs Tyna Airey (all village residents). Mr and Mrs Thomas live in Plum Cottage, opposite the Farmhouse, and Mrs Clark and Mrs Airey live nearby, in Holywell Cottage and Greenfields respectively, on the village green, opposite where the village public house, The Green Man, used to stand until it was destroyed by fire and demolished. This hearsay evidence is of course properly admissible under the Civil Evidence Act 1995, and I have accordingly taken it into account. However, as a general proposition, it is undesirable that important issues of fact should be determined on hearsay evidence. In the present case, these four witnesses were not on oath, I could not see their demeanour in giving evidence, and (most important) they could not be cross-examined on their statements. All this inevitably goes to reduce the weight of these witness statements, compared with live evidence from other witnesses.

Factfinding

14. For the benefit of the lay parties in this case I will say something about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. First of all, judges are not superhuman, and do not possess supernatural powers that enable them to divine when someone is mistaken, or not telling the truth. Instead, they take note of

the witnesses giving live evidence before them, look carefully at all the material presented (witness statements and all the other documents), listen to the arguments made to them, and then make up their minds. But there are a number of important procedural rules which govern their decision-making, some of which I shall briefly mention here, because non-lawyer readers of this judgment may not be aware of them.

15. The first is the question of the *burden* of proof. Where there is an issue in dispute between the parties in a civil case (like this one), one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. Here the claimant asserts excessive user of a right of way, and a nuisance. So, in general terms, she must prove those, and the facts and matters she relies on for that purpose. The importance of this is that, if the person who bears the burden of proof of a particular matter satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen. That may mean that, in some cases, the result depends on who bears the burden of proof.

16. There are however circumstances in which the question of the burden of proof becomes more complex to deal with. Where a rule provides for a certain result, it is generally for the person seeking to apply that rule to prove that the facts of the case fall within that rule. But, if the rule contains an *exception* (*ie* it does not apply in certain situations), then it is generally for the person relying on the exception to prove that the facts are such as to fall within the exception, rather than for the person relying on the rule to prove that they do not: for recent examples, see *Magmatic Ltd v PMS International Ltd* [2013] EWHC 1925 (Pat), [41]; and *Volcafe Ltd v Compagnia Sud Americana de Vapores SA* [2019] AC 358, [13], [25], [29].

17. Secondly, the *standard* of proof in a civil case is very different from that in a criminal case. In a civil case it is merely the balance of probabilities. This means that, if the judge considers that a thing is *more likely to have happened than not*, then for the purposes of the decision it *did* happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did *not* happen. The matter is binary. Either something happened or it did not, and there is no room for 'maybe'. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical experts might be used to. However, the more serious the allegation, the more cogent must be the evidence needed to persuade the court that a thing is more likely than not to have happened.

18. Thirdly, in our system, judges are not investigators. They do not go looking for evidence. Instead, they decide cases on the basis of the material and arguments put before them by the parties. So, it is the responsibility of each party to find and put before the court the evidence and other material which each wishes to adduce, and formulate their legal arguments, in order to convince the judge to find in that party's favour. There are a few limited exceptions to this, but I need not deal with those here.

19. Fourthly, more is understood today than previously about the fallibility of memory. In commercial cases, at least, where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more

objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. This is not a commercial dispute, but a neighbour dispute (in the sense of a dispute arising out of the rights of neighbours in relation to their respective properties). Nevertheless, it concerns money and property, in the way that many commercial disputes do, and there are a number of useful documents available.

20. In deciding the facts of this case, I have had regard to the more objective contents of the documents in the case. In addition to this, and as usual, in the present case I have heard witnesses (who made witness statements in advance) give oral evidence while they were subject to cross-examination and re-examination. This process enables the court to reach a decision on questions such as who is telling the truth, who is trying to tell the truth but is mistaken, and (in an appropriate case) who is not telling the truth. I will therefore give appropriate weight to both the documentary evidence and the witness evidence, both oral and written, bearing in mind both the fallibility of memory and the relative objectivity of the documentary evidence available.

21. Fifthly, a court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. They deal with the points which matter most. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation. Put shortly, judgments do not explain all aspects of a judge's reasoning, although they should express the main points, and enable the parties to see how and why the judge reached the decision given.

Facts found

Introductory

22. On the basis of the evidence before me, I find the following facts. Until September 1972, the claimant's and the defendant's properties, together with other agricultural land, and a further residential property known as Kalamunda, to the south of the driveway and to the southwest of the Farmhouse, were in the common ownership of Mr Nigel Neilson, who farmed the land, but more as a hobby, as he also worked in London. Kalamunda was occupied by the farm manager. But, on 29 September 1972, Mr Neilson completed three separate sales, one each to the respective purchasers of the three currently subsisting distinct properties. Title to the Farmhouse was at that time unregistered, though it was thereafter registered for the first time, on 5 October 1972. Title to the other two properties was however already registered.

23. The registered title to the Farmhouse, in the Property Register, contains the following entry:

> "3. The land in this title has the benefit of the rights granted by but is subject to the rights reserved by a Conveyance thereof dated 29 September 1972 made between (1) Nigel Fraser Neilson and (2) William James Bryen".

There is no corresponding entry in the Charges Register. The current registered title to the Yard, in the Property Register, contains the following entry:

> "3. The land in this title has the benefit of the rights granted by but is subject to the rights reserved by a Transfer thereof dated 29 September 1972 made between (1) Nigel Fraser Neilson and (2) Colin Maclachlan Russell Stoneham and Ivor Robin Russell Stoneham".

Again, there is no corresponding entry in the Charges Register.

The sales of Holywell Farm

24. The bundle does not contain a copy of the contract by which Colin Stoneham and his brother Ivor (now deceased) purchased the Yard and other agricultural property contiguous with it. But it is clear from a letter from their solicitors dated 2 August 1972 that it was a contract not only for the purchase of this land, but also of Kalamunda, and that the Stonehams were selling on Kalamunda to Mr Skipper by way of sub-sale. The relevant parts of the letter are:

> "I enclose the Contract for the purchase of Holywell Farm and the Contract for the sale of the bungalow to Jeremy Skipper … The sub sale to Jeremy Skipper is merely passing on the small piece of land at the bottom with the bungalow on it …"

However, it is clear from the office copy entries on the Land Register of Kalamunda that, on completion of the purchase, Mr Neilson transferred the property directly to Mr and Mrs Skipper.

25. The transfers of the land including the Yard and Kalamunda recorded the *grant* of rights of way over the driveway. The conveyance of the Farmhouse *reserved* rights of way to the vendor in relation to the vendor's land not conveyed to the purchaser of the Farmhouse, but also *granted* to the purchaser of the Farmhouse an entirely separate right of way over the Yard so as to be able to reach another part of the Farmhouse land. Conversely, the conveyance to the purchaser of the Yard (and other land) *reserved* a right of way over the Yard for the benefit of the vendor.

26. The conveyance of the Farmhouse conveyed the Farmhouse to the purchaser (Mr William Bryen),

> "TOGETHER ALSO with the rights set out in the First Schedule hereto and EXCEPT AND RESERVING as set out in the Second Schedule hereto TO HOLD the same unto the Purchaser in fee simple …
>
> […]
>
> THE FIRST SCHEDULE above referred to
>
> (Rights granted to the Purchaser and his successors in title)
>
> 1. A right of way at all times and for all purposes with or without animals and vehicles over the drive and yard between the points C B and D on the said plan shown coloured green thereon …
>
> […]

> THE SECOND SCHEDULE above referred to
>
> (Rights reserved to the Vendor and his successors in title)
>
> 1. A right of way at all times and for all purposes with or without animals and vehicles over the roadway coloured brown on the said plan for the purpose of access to and egress from the adjoining premises of the Vendor the person exercising such right paying to the Purchaser or his successors in title on demand Fifty per cent of the cost incurred in maintaining the same to such reasonable standard as shall be determined by the Purchaser or his successors in title …
>
> […]
>
> 3. All such rights and easements or quasi rights and quasi easements as are used and enjoyed in connection with the adjoining property of the Transferor over the property hereby transferred as if the properties had hitherto belonged to different owners and such rights or easements or quasi rights or quasi easements had been acquired by prescription".

I should record that, on the plan of the copy I have seen (which is the usual small-scale 1/2500 plan), the "roadway coloured brown" appears to cover the whole width between the black lines delineating the wall of the Farmhouse and the fence of Plum Cottage. As I have already said, title to the Farmhouse was subsequently registered in the Land Registry, with a deemed date of registration of 5 October 1972.

27. The transfer of the Yard transferred that property (and further agricultural land adjacent, amounting to about 25 acres) to the purchasers, Colin Stoneham and his brother Ivor Stoneham,

> "TOGETHER with (a) a right of way at all times and for all purposes to pass and repass over the roadway coloured brown on the said plan with or without animals and vehicles the Transferees or their successors in title paying unto the Transferor or his successors in title 25% of the cost incurred in maintaining the same to such reasonable standard as shall be determined by the Transferor or his successors in title …
>
> […]
>
> EXCEPT AND RESERVING to the Transferor and his successors in title:
>
> (a) a right of way at all times and for all purposes to pass and repass over the drive and yard between the points C B and D on the said plan and shown coloured blue on the said plan …
>
> […]
>
> (c) all such rights and easements or quasi rights and quasi easements as are used and enjoyed in connection with the adjoining property of the Transferor over the property hereby transferred as if the properties had hitherto belonged to different owners and such rights or easements or quasi rights or quasi easements had been acquired by prescription".

Again, I record that on the plan (also at 1/2500 scale) the "roadway coloured brown" appears to cover the whole width between the black lines delineating the wall of the Farmhouse and the fence of Plum Cottage.

28. Although no copy of the transfer of Kalamunda was before the court, the relevant part is set out verbatim in office copy entries for the registered title, which were before the court. Nigel Neilson as transferor transferred that property to Mr and Mrs Skipper as transferees,

> "TOGETHER with:
>
> (a) a right of way at all times and for all purposes to pass and repass over the roadway coloured brown on the said plan with or without animals and vehicles the Transferees or their successors in title paying unto the Transferor or his successors in title 25% of the cost incurred in maintaining the same to such reasonable standard as shall be determined by the Transferor or his successors in title …
>
> […]
>
> EXCEPT AND RESERVING to the Transferor and his successors in title all such rights and easements or quasi rights and quasi easements as are used and enjoyed in connection with the adjoining property of the Transferor over the property hereby transferred as if the properties had hitherto belonged to different owners and such rights or easements or quasi rights or quasi easements had been acquired by prescription."

Once more I make clear that on the plan (this time at 1/1250 scale) the "roadway coloured brown" (though I would have said that, on my copy, it was more yellow than brown) appears to cover the whole width between the black lines delineating the wall of the Farmhouse and the fence of Plum Cottage.

Kalamunda and Plum Cottage

29. The current owner of Kalamunda (Mr Gary Barnacle, who purchased in 2003) is not a party to these proceedings. Neither are Mr and Mrs Banks, the owners of part of the agricultural land adjacent to the Yard ("the Banks' land"), which was sold to the Stonehams together with the Yard in 1972. Nor are Mr and Mrs Thomas, the current owners and occupiers of Plum Cottage, which also uses the driveway to access the public highway. Mr and Mrs Thomas have made witness statements but were not called to give oral evidence. They bought that property in 1985 from Mr Bryen, who was then also the owner of the Farmhouse. So far as the parties know, Plum Cottage is not the subject of any express grant of any right of way over the driveway. But use by the owners and occupiers of that property of the driveway has apparently taken place for many years without objection from the owners and occupiers of the Farmhouse. It may perhaps therefore be (though of course I am in no position to, and do not, decide) that a right of way over the driveway has been acquired by prescription. The position of Kalamunda, the Banks' land and Plum Cottage may be relevant to the question of remedy, as whatever remedy might be granted in these proceedings to the claimant could not bind the non-party owners of Kalamunda, the Banks' land and Plum Cottage.

Use of the Yard in 1972

30. At the time of the 1972 conveyance and transfers, Colin and Ivor Stoneham were farming Pettings Court Farm, which extended further to the west of the Yard. This farm had been bought by their father in the early 1940s, and handed over to them in 1966. From about the same time, they rented the Yard (then known as Holywell Barns) and also the courtyard nearest the Farmhouse from Mr Neilson, and used them for the purposes of their farming activities. When Holywell Farm was split up in 1972, the Stonehams bought the Yard and some 25 acres of the surrounding agricultural land, but not the traditional courtyard, which was sold with the Farmhouse itself. They used the barns on the Yard to store hay and straw, and farm machinery. They allowed Mr Skipper to keep his cars under cover there. They also used them occasionally to wean calves. There were also egg-laying chickens. Although some of the use of the Yard came over the agricultural land to the west, some of it involved the use of the driveway to the east, for example the transport of the calves, and the movement of the farm machinery. Trucks also bought in feed and took away bales. Seasonal fertiliser was brought in for the fields closest to the Yard.

31. From 1969 onwards, Colin Stoneham was also in partnership with Jeremy Skipper in running a new pig unit at Pettings Court Farm. As I have said, in 1972 Mr and Mrs Skipper bought Kalamunda, so that Mr Skipper would be closer to his work. Until about 1990, there was no mains drainage, and council vehicles had to visit regularly to collect waste and sewage from septic tanks. Heating oil was also delivered in tankers. Refuse was also collected in lorries. All those vehicles used the driveway for this purpose. The Skippers' own domestic vehicles, and those of their guests, also used the driveway.

32. Other uses of the driveway in 1972 would have been, as now, by the occupants of Plum Cottage and the Farmhouse. And, as I said earlier, there was also (and still is) a public footpath over the driveway and through the Yard to the fields beyond.

The degree of use of the driveway in 1972

33. There was conflicting evidence about the *degree* of use of the driveway at this time. The witness statement of Mrs Clark (who lived on the village green from 1967 to 1982) said she recalled no agricultural traffic at all, and only the "cesspool lorry" came that way, once every three or four months. The statements of Mr and Mrs Thomas (of Plum Cottage) referred to "hardly … any vehicles" and "very little traffic using the driveway". The statement of Mrs Airey (who has lived on the green since 1976) said she had "never seen any agricultural use of the driveway". The statement of Mrs Bates (who has lived in the village, but not within sight of the driveway, since 1962) does not refer to the degree of use of the driveway, although she said she herself used it to visit the houses there.

34. On the other hand, Mr Mark Stoneham's evidence was that in 1972 the Yard was in constant use as a satellite yard for the farm which his father and uncle ran. He called the agricultural use of the driveway "regular and daily". This was for the delivery of hay, the transport of calves, the delivery of animal feed, fertiliser, and to collect and deliver farm equipment from storage to where it was needed elsewhere. In addition, farm workers would access the village from the farm and vice versa more easily, and the vet would use the driveway to visit animals when kept there. At the same time, he

accepted that there were also farming activities in the Yard that could be carried on without using the driveway. The evidence of Mr Skipper (who lived at Kalamunda from 1972) was that at that time the Yard was in constant use for agricultural purposes, and the driveway "was used by all manner of vehicles including private cars, feed trucks, bale carrying trucks, tractors and other farm machinery", as well as council vehicles to collect waste and sewage, and fertiliser spreaders or slurry tankers. Mr Colin Stoneham referred to similar activities in his evidence. He also referred to a dispute with Mr Bryen about the height of the hay load and overhanging branches, which was documented in the correspondence before me.

35. The evidence of the claimant's witnesses on this point is problematic. On the one hand, Mrs Clark, Mrs Airey and Mrs Bates, who were living in the village in 1972, were none of them living on the driveway. The first two lived on the green, but I do not suppose for one moment that they spent all day every day looking out of the front windows at who was passing. It would take a few seconds only for a vehicle to pass into view on the green, and then out of view down the driveway. Accordingly, their evidence is at best that they did not *see* much, or any, agricultural use. Yet there undoubtedly was some. Given that, as I have said, I consider that they were all trying to tell the truth, that does suggest to me that they were not in the best position to notice whether there was any such use or not, for example because they mainly used the rooms at the back of their house or the garden behind. The evidence of the third witness (Mrs Bates) does not refer to the degree of use at all.

36. The evidence of Mr and Mrs Thomas would be more significant, because they lived and live in Plum Cottage, adjacent to the driveway. But unfortunately they only moved there in 1985. They cannot therefore give any useful evidence about the position in 1972. Moreover, and as I have already said, it takes only a few seconds to pass into and out of view in the small village. It would be very easy for someone living in Plum Cottage not to notice the passing of a vehicle unless it was particularly noisy or in some other way prominent. And, indeed, even Mrs Thomas noticed the presence of large vehicles on the driveway, because her witness statement refers to 2 incidents of damage to their fence. All in all, I am not very impressed with the claimant's evidence of limited, let alone no, agricultural use of the driveway at this time.

37. On the other side, the evidence of Mr Mark Stoneham (albeit aged seven years at the time) and Mr Skipper, who not only lived at the end of the driveway, next to the Yard itself, but also worked on the farm, seems to be to be not only plausible but highly cogent and convincing. It was certainly not shaken in cross examination. There is also the evidence of Mr Colin Stoneham, which, for reasons already given might not be sufficient on its own, but certainly adds weight to that of his son and Mr Skipper. In addition, Mr Colin Stoneham does refer to the disagreement with Mr Bryen about overhanging branches and the height of the hay load passing along the driveway.

38. Overall, I am entirely satisfied that in 1972, at the time of the conveyance and transfers, the driveway was used on a daily basis for agricultural vehicles and purposes, even though the number of daily movements might have been relatively low, say 10 or so. In addition, there would have been domestic traffic to Plum Cottage and Kalamunda, as well as to the Farmhouse itself. I do accept that, by 1990, when agricultural use of the Yard had in effect ceased, the number of movements to the

Yard would have been reduced accordingly, down perhaps to once or twice a week. But that was much later.

The condition of the driveway in 1972

39. There was also conflicting evidence about the *condition* of the driveway in 1972. First of all, there is the question whether the driveway was metalled or not. The experts' evidence was that there were now three layers of tarmac, each about 30 mm thick, over a base of two layers ((i) a "type 1" – for the heaviest applications – sub-base on top of (ii) capping material) varying in thickness between 300 and 350 mm. I accept this evidence, which means that the claimant's pleading that the tarmac surface was laid straight over the soil is wrong. But the experts were unable to determine from their tests when the driveway was first surfaced with asphalt. Mrs Clark's and Mrs Bates' statements do not assist on this point (although Mrs Clark says that the surface "was not loose"). Mr Thomas's evidence in his statement was that it was originally not a good road, but that Mr Bryen tarmacked the driveway *after* doing works on the Farmhouse and *before* moving into it. He also said that the tarmac had not altered in width since the 1970s. Mrs Thomas in her statement recalls the driveway being "tarmac I think" at Christmas 1974. I bear in mind that Mr and Mrs Thomas did not move into Plum Cottage until 1985, and so are relying on memories of visits from the nearby village where they lived. Mrs Airey moved to the village in 1976 and said in her statement she could not remember the driveway being anything other than tarmac.

40. Mr Skipper's oral evidence was that the driveway had been tarmacked in the time of Mr Neilson, so before the 1972 conveyance and transfers. Mr Mark Stoneham's oral evidence was that he remembered that in 1972 the driveway was smooth. His written evidence was that it was constructed of heavy duty materials, shuttered in large panels with expansion strips. There are photographs of the driveway in the bundle, but (apart from two Google Earth images, which are not helpful in this respect) none going back to 1972. The earliest helpful photograph is dated summer 1976, and clearly shows a tarmacked surface at the Yard end of the driveway. There is also a letter from Mr Bryen to Mr Colin Stoneham dated 8 October 1976 in which Mr Bryen sought payment from Mr Colin Stoneham "for 50% of the cost of making up the access road". There is a further letter from Mr Ivor Stoneham to their solicitors (Buss, Stone & Co) dated 30 May 1980, saying in part that prior to a sale of some land

> "in 1977, Mr Bryen re tarmacadamed the Roadway immediately in front of his house without prior consultation. He then sent C & IR Stoneham an Account for this work."

41. I accept that it would be a good time for Mr Bryen to improve the driveway at or shortly after the time of making improvements to the Farmhouse, and before moving in. That would suggest that the condition of the driveway at the time warranted such improvement, so that, if it was already tarmac, it would have been in poor condition. But Mr Mark Stoneham's evidence (as a seven year old child) is that it was smooth, but not then tarmacked. If it was in a smooth condition at that time, it would not need further work. It is then clear that tarmac was laid in 1976, because Mr Bryen asked Mr Colin Stoneham for a contribution to the cost of doing it. Yet, if it was resurfaced in 1972, given the level of usage, I find it hard to understand why it would need resurfacing again only four years later in 1976. I also cannot see why, if Mr Bryen

tarmacked the driveway in 1972, he did not ask the Stonehams for a contribution, as he did in 1976.

42. Mr Bryen's letter of October 1976 refers to "making up the access road", which suggests the first time of tarmacking. On the other hand, Mr Ivor Stoneham's letter of May 1980 uses the phrase "re tarmacadamed the Roadway … without prior consultation". That suggests it had been tarmacked before. Yet, in that letter, he set out the history of the relationship between Mr Bryen on the one hand and the Stonehams on the other. That history referred to only one tarmacking of the driveway, *ie* that which evidently took place in 1976. If there had been an earlier one in 1972, it would have been relevant to the relationship, because he would have referred to any consultation which took place on that occasion, and any contribution that had been demanded towards the cost. But nothing is said of any of that. No other relevant correspondence has survived.

43. On this evidence, I think that Mr Skipper was mistaken in thinking that the driveway was already covered with tarmac in September 1972. At the time of the conveyance and transfers, I find it was a relatively smooth un-metalled road capable of taking heavy farm vehicles. Because tarmac was clearly laid in 1976 and it is inherently improbable that the driveway would need resurfacing twice in four years, I find that Mr Thomas was wrong to think it was tarmacked after the farmhouse works but before Mr Bryen moved in. The Thomases were not living at Plum Cottage then, and Mr Thomas did not give oral evidence. Moreover, I find that Mr Ivor Stoneham (who in any event got the year wrong) was strictly inaccurate in using the phrase "re tarmacadamed". I find that the first time that the road was "made up" with tarmac was 1976.

44. Mr Thomas's evidence was that Mr Bryen retarmacked the driveway some time after the first surfacing. He could not recall the year, but said that it was at the same time that the carpark of The Green Man public house was being retarmacked. I accept this evidence. One of the experts (Mr Rae) said he assumed that this was in the period 1980-84, by reference to the witness evidence. But I am not sure what that reference is to, and so am unable on this material to find when this was. It is common ground that the driveway was resurfaced again in about 1989 when drains and a sewer were laid under the driveway by Thames Water, and connected to Plum Cottage and Kalamunda (though not at that stage to the Farmhouse). There is no evidence of retarmacking since then.

The width of the driveway in 1972

45. There is then the question of the *width* of the driveway and the tarmac surface of the driveway. As I have said, there are three layers of tarmac, each about 30mm thick. On the evidence, I find that the bottom layer is the widest, and each successive layer is slightly narrower than the preceding one. But there is not much difference between the widths of the top and bottom layers, perhaps a few centimetres at most. It was also clear to me from the site visit that the vegetation on each side of the driveway had overgrown the edges of the tarmac, sometimes by a considerable margin. Counsel checked some of the width measurements in my presence, and had to scrape back vegetation in order to find the tarmac edge.

46. One of the experts, Mr Rae, used the topographical digital survey carried out by Brunel Surveys Ltd in January 2022 as the basis for measuring (i) the width of the driveway as a physical space between physical boundaries such as fences and walls, and also (ii) the width of the tarmac within that physical space. At the east end the respective measurements were (i) 3.88m and (ii) 2.98m. Opposite the garage of Plum Cottage, they were (i) 3.84m and (ii) 3.80m. Just at the western side of the gateway into the garden of the Farmhouse, they were (i) 4.66m and (ii) 4.51m. Just at the stone pillars, where the courtyard of the Farmhouse opens up, the single measurement is 3.83m. Moving to the west, the widths are larger thereafter, until the gateway into the Yard, when the single width between the gateposts is 3.77m. On these figures, therefore, the tarmac is generally about 3m wide or more, and the maximum physical space available is 3.83m at the stone pillars. (It is 3.77m at the Yard entrance, but of course the Yard owners could take down their gate and posts if they wished, and so the physical space there could be wider.)

47. The claimant's evidence was that, at its narrowest point, the maximum width was 2.76m across the tarmac, but not including any vegetation. I think this was a mistake. On the basis of all the evidence, I find that in fact the minimum width *across the tarmac* that currently exists, scraping back the vegetation that has overgrown it, is somewhat wider, at around 3m. The minimum width across *the physical space* is 3.83m, between the two pillars adjacent to the courtyard. I had no formal evidence to this effect, but on my site visit I considered that the two pillars had the appearance of having been in place since before 1972, and, in the absence of any other evidence bearing on the matter, so far as it matters I so find. As I have already said, there are no passing places on the driveway. It is not possible for two modern cars of average width to pass each other, at any rate with any degree of comfort.

The existence of verges in 1972

48. The next question is whether and to what extent, in September 1972, there were verges along the driveway, or merely vegetation growing beside (say) the fence outside Plum Cottage and the flint wall outside the Farmhouse, where the wheels of vehicles did not regularly run. Unlike some of the witnesses, I use the word "verge" in the sense of a deliberately created bank of vegetation, distinct from the driveway, and not intended to be driven on or walked over. On the other hand, where vegetation grows at the margins of a track over which people, animals or vehicles pass, not because it was deliberately intended that it should grow there, but merely because it is too close to the physical limits of the driveway to be trampled down or driven over, then I do not think that is properly to be described as a verge.

49. Once more, the evidence is conflicting. Mrs Thomas says in her statement that between the driveway and the flint wall of the Farmhouse there was a "small grass verge that was kept mowed by the gardener with flowerbeds nearest the wall", and that at some point the Bryens or their gardener planted box hedging in front of the wall. Mr Thomas says that there were grass verges on both sides, but that the Farmhouse side also had flowerbeds. Mrs Airey also says that "There was a verge and flowerbed on the outside of the Holywell Farmhouse driveway wall". These statements were not of course subject to cross-examination. I also bear in mind that Mr and Mrs Thomas moved to Plum Cottage only in 1985, though they visited the Farmhouse before that. Mrs Bates, who did give oral evidence, said that there were

grass verges (plural) of the same width now as then. This was not challenged in cross-examination.

50. In his statement Mr Mark Stoneham said "there was a very narrow verge of about 40 cm" along the driveway. On the other hand, in the defence (the statement of truth for which Mr Stoneham signed) it is stated that

> "At the time of the Conveyances, the Driveway did not have distinct or segregated grass verges, nor were shrubs or flowers planted along its edges".

In his oral evidence, Mr Stoneham explained this by saying that what he meant by verge in his witness statement was green vegetation growing at the sides of the driveway which were not regularly ridden over. The verges referred to in the defence would be deliberately built up banks at the side. Before me, he accepted that there was greenery at the side of the driveway, but said that this was not deliberately created. The extent of the greenery now was much greater than in his youth. Mr Skipper's oral evidence was that in 1972 the driveway went virtually up to the wall on the Farmhouse side, with some greenery. Mr Colin Stoneham in his oral evidence accepted that there was a verge in front of the flint wall, but commented that it was just weeds.

51. So far as the available photographs are concerned, the earliest photographs with any relevant information are those taken in the summer of 1976 at the boundary between the driveway and the Yard. These show the tarmac driveway extending over the whole width between the former stable block (now the workshop) and the gate post. Aerial photographs of the driveway from 1979 onwards appear to show the verges on the Farmhouse side referred to by the claimants' witnesses, but to nothing like the extent shown in photographs taken in 2019 or apparent to me at the time of the site visit. The only part of the correspondence before the court which is of assistance is the postscript to Mr Bryen's letter of 8 October 1976 to Mr Colin Stoneham. This says that he has "repeatedly had to repair the fencing to Plum Cottage caused by [Mr Stoneham's workmen's] vehicles…"

52. On this evidence, I find that there were no deliberately created verges in 1972, but that Mr and Mrs Bryen created some on the Farmhouse side of the driveway, *after* their acquisition of the Farmhouse, which were then maintained by them or their gardeners. This is consistent with the statements of Mrs Clark and Mrs Thomas, and partly with that of Mr Thomas. I further find that (despite Mrs Bates' evidence) those verges have been considerably expanded and enhanced by the claimant since her acquisition in 2014. This has had the consequence that the available road space has been significantly diminished. On the other hand, the evidence does not satisfy me that any such verges were ever created deliberately on the Plum Cottage side of the driveway (despite what Mr Thomas said). It is simply that vegetation has grown up naturally at the edge where vehicles do not pass and repass. Indeed, the postscript to Mr Bryen's letter of 8 October 1976 makes clear that in his opinion Mr Stoneham's men were getting *too* close to the fence, which would have been difficult, if not impossible, if there really was a deliberately created verge there. The same thing appears from Mrs Thomas's statement, which refers to vehicle damage to the fence of Plum Cottage on two occasions when she was living there (*ie* after 1985).

Events after 1972

53. First of all, I make clear that the general topography of the area concerned in this litigation has remained the same since 1972. The driveway is in the same place, and so are the buildings which border it. The fences and gates may have been renewed, the driveway resurfaced, and the use of the Yard altered. But the main elements of what I saw on my site visit have not essentially changed in 50 years.

54. In 1977, the Stonehams dissolved their farming partnership. It is not entirely clear what happened to Pettings Court Farm as such, but they sold off at least some of their agricultural land to a Mr Mulder, who renamed it Frieslawn Farm. They also (but later) sold off the land elsewhere, including the field immediately next to the Yard, which was acquired in 1984 by Mr and Mrs Banks. (There is a question as to whether Mr and Mrs Banks also have the benefit of the right of way claimed by the defendant over the driveway. But I am not required to decide that now.) But the Stonehams certainly retained the Yard. In about 1985, Mr and Mrs Thomas bought and occupied Plum Cottage. Also in 1985, the partnership between Colin Stoneham and Jeremy Skipper was dissolved after the sale of the pig unit at Pettings Court Farm. Mr and Mrs Skipper continued to live at Kalamunda until April 1987, when they moved away. All farming activities carried on by the Stonehams ceased in 1990. Their use of the drive for the purposes of accessing the Yard after that was limited.

55. On 11 August 2014 Mr Bryen sold and transferred the Farmhouse to the claimant. In her witness statement, prepared for use at trial, to stand as evidence in chief, she did not refer either to her knowledge or to her absence of knowledge of the existence of the Yard right of way as at that date. In cross-examination, however, Mr Isaac KC for the defendant asked whether the right of way had been drawn to her attention at the time of her purchase. She said that it had not. He asked whether she was aware of it at that time, and she replied that she did not think that she was. She said that she was first aware of this in 2019-20. I find these responses rather troublesome. This is because the Property Register for the title to the Farmhouse gives notice at entry number 3 of the existence of the conveyance of September 1972, and clearly states in the notice that the land is *subject to the rights reserved by* the conveyance.

56. The claimant's solicitors' conveyancing file was not in evidence at trial, but in my judgment they could not have failed to see that notice, and neither could they, consistently with their professional duties towards the claimant, have failed to call for a copy of the conveyance and see what rights were indeed reserved. Having seen what those rights were, they could not, again consistently with their professional duties, have failed to inform the claimant of what they had found. The claimant is a (non-practising) solicitor, even though not a property lawyer, and she would readily understand the point. In the circumstances, I find that the claimant is mistaken in her recollection, and that she was indeed made aware of it at the time. She has certainly not satisfied me that she was not.

57. At the time of the sale and transfer of the Farmhouse to the claimant, the Driveway was in regular use for the purposes of passage to and from the Farmhouse, Plum Cottage and Kalamunda, and also for deliveries to and collections from the Farmhouse and Kalamunda. The Yard lay at the end of the Driveway next to the entrance to Kalamunda. However, at that time there was no regular passage to and from, nor any regular deliveries to or collections from, the Yard. There is no evidence before the court that the Yard right of way was used during the year before the claimant's acquisition of the Farmhouse. Nevertheless, in my judgment, the existence

of a tarmacked roadway running over the south side of the Farmhouse, and indeed separated from it in part by a wall, and leading to the gated entrance to the Yard, so that it was obvious that access from the Yard could be had to the Driveway, and coupled with the regular use made of the Driveway to Plum Cottage and Kalamunda, makes it obvious on any reasonably careful inspection of this land that there was such a right of way.

58. Since her acquisition, the claimant has built wooden stables on a concrete base on that part of the field that backs on to the Yard. The necessary digger, concrete and materials were brought down the driveway on appropriately sized vehicles. She has also demolished a conservatory to the rear and extended the living/kitchen area of the Farmhouse. Once again, the necessary equipment and materials were brought down the driveway, having first been decanted into appropriately sized vehicles. The unchallenged evidence (which I accept) was that the sitting rooms and bedrooms are at the front of the Farmhouse, overlooking the driveway. Also in 2014, the Farmhouse was connected to the public sewer under the driveway. The claimant lives at the Farmhouse with her daughter, now aged 11 years, her husband, and (for much of the time) his son, now aged 12 years, but with autism spectrum disorder and development language disorder, so that his mental age is rather less. The old stables in the traditional courtyard have been converted to a workshop, in which the claimant's husband works. It has no proper foundations, and the driveway runs past the end of it.

59. In 2018, Mr Ivor Stoneham died, leaving his share of the Yard to his nephew Mr Mark Stoneham. Subsequently, Mr Colin Stoneham and Mr Mark Stoneham transferred their shares in the Yard to a company called Alchemy Estates Ltd and then later to the defendant. In April 2019 the claimant was informed of an application for planning permission by the defendant to develop the Yard. Despite her objections, Alchemy Estates Ltd in April 2020 obtained planning permission to develop two new houses on the Yard. In June 2020 the defendant, Alchemy Estates (Holywell) Ltd, was incorporated in order to progress the development.

60. In September 2020 the claimant sent an email to Mr Mark Stoneham, stating that in her opinion there was no right of way along the driveway for development traffic or for accessing any buildings constructed on the Yard. There was thereafter a dialogue between the parties, which (as these things do) became a dialogue between the parties' lawyers. This continued until the end of the year without any agreement between the two sides. In January 2021, the defendant's solicitors informed the claimant's solicitors that the defendant intended to start work on the development during the week beginning 1 February 2021. As already stated, an application for an interim injunction to prevent the construction work being carried out was sought and obtained from Mann J on 1 February 2021, and continued by Zacaroli J on 11 February 2021. That interim injunction is still in force, though the construction work is now in fact complete.

61. A certain amount of work had been done at the Yard by the defendant, using the driveway, before the injunction was served on it and instructions were given to cease using the driveway. This included stripping the site and excavating the foundations, and removing contaminated soil, filling six 32 ton lorries, each escorted by a banksman. Once the injunction had been imposed, the defendant found an alternative route to bring construction materials, equipment and workmen to the Yard over other adjacent land, belonging to Mr and Mrs Banks, though at some extra cost. This

involved offloading materials at a property called Flintstones, and transporting it across fields for about 900m, using smaller, 4x4 vehicles. Conversely, staff toilets and other facilities have had to be brought across the fields in the opposite direction for emptying, servicing and cleaning at Flintstones.

62. On the other hand, the terms of the injunction themselves permitted the defendant to bring three 32 ton lorry loads of concrete along the driveway for the purpose of filling the foundations, and that was done. The defendant's evidence was that construction and labour costs for both houses had increased, by reason of the injunction. I make no findings about this. There will have to be a further hearing (where no doubt this evidence will be challenged) to deal with any claim under the cross undertaking as to damages.

63. The defendants traffic management expert considered the invoices and the logs from the development works, and estimated that in 314 working days between December 2020 and March 2022 there would have been 126 separate vehicle movements over the driveway, had the injunction not been enforced. The claimant's traffic management expert did not disagree with the defendant's expert's essential conclusions. I accept the defendant's evidence on this matter.

64. Since 18 May 2021 there has been closed circuit television installed at the entrance to the Yard and looking along the driveway. Movement sensitive technology has enabled a log to be kept of movements along the driveway. The defendant's unchallenged evidence (which I accept) was that the average movements in a month amounted to (a) a daily post office van visit (except on Sundays), (b) two daily return journeys by the claimant in a private vehicle, (c) eight weekly return journeys by the occupants of Kalamunda in private vehicles, (d) 20 weekly return journeys by residents of Plum Cottage, (e) one weekly visit by the council's refuse collection vehicle, (f) four monthly visits by parcel delivery vans, (g) a three weekly delivery of animal feed to the claimant, and (h) three or four monthly visits by supermarket delivery vans.

65. The parties' traffic experts jointly commissioned a traffic speed and flow survey by automatic traffic counter (ATC) and a concurrent video survey of traffic movements and activity along the driveway. The surveys were carried out for a 7 day period in May 2022. The traffic speed results were as follows. The 85 percentile average speeds (ie the speed exceeded by only 15% of total vehicles) over the survey period were 9.5 mph eastbound and 11.2 mph westbound. The mean (*ie* 50 percentile) average speeds over the period were 7.8 mph eastbound and 8.1 mph westbound. No vehicle was recorded as exceeding 16 mph in either direction during the survey period. I was told that, at 8 mph, it would take 15 seconds to travel the whole driveway.

66. The total two-way 24 hour motor vehicle traffic flow per day on the Driveway ranged from 12 vehicles (on the Saturday) to 24 vehicles (on the Friday), nearly all between 7am and 7pm. Nearly all vehicles were cars or equivalent light vans or larger (transit-sized) vans or equivalent. On four out of the seven days there were no movements in or out of the Yard, and on three there were none out of Kalamunda. The Farmhouse and Plum Cottage had at least one movement per day. Traffic into and out of the Farmhouse ranged from 7 vehicles (on the Saturday) to 16 vehicles (on the Friday) and constituted more than half the total traffic on the driveway on each day except on the Thursday, when it was little less than a quarter. There were a total of 113 traffic

movements during the seven day period. This compares with a total of 337 movements by all modes.

67. The traffic management experts agreed that:

> "There is clearly no possibility of the total motor traffic getting anywhere near the two-way traffic capacity of even such a narrow singletrack short section of road, on any reasonable scenario assessment basis".

I accept this assessment.

68. The two houses are now in substance complete. One is now let and inhabited. The occupants are now using the driveway for their domestic purposes. I was told that the defendant is considering the possibility of letting the second property in the near future, but (as at the date of reserving judgment) had not yet done so. As I have said, the interim injunction does not currently extend to use of the driveway for the residential purposes of the two houses, although the claimant has reserved her position in that regard.

69. According to the unchallenged evidence before me, which I accept, the use of the narrow lanes in Hodsoll Street is currently restricted by law to vehicles no more than 6 feet 6 inches wide and 7.5 tons in weight, though subject to important exceptions. I had no evidence, and make no finding, as to the legal position in 1972.

Issues before the court

70. A number of issues are raised in this claim for the court to decide:

(1) whether the claimant is bound at all by the right of way granted or reserved in 1972 ("the 1972 right of way") in the Yard transfer to the defendant's predecessors in title over the driveway, either (i) from the outset, or (ii) since her acquisition of the Farmhouse in 2014; the claimant accepts that she was bound by the right of way reserved in the Farmhouse conveyance;

(2) how far the 1972 right of way extends *across* the driveway, that is, between the physical barriers on the north and south sides;

(3) whether the 1972 right of way allows the use of the driveway for the purposes of (i) demolition of the originally existing barns and construction of (a) one or (b) two residential houses on the Yard, and/or (ii) domestic habitation of such house or houses;

(4) whether the user which, in the absence of the interim injunction granted on 1 February 2021, would have been made of the driveway for the purposes of the demolition of the originally existing barns and the construction of two residential houses on the Yard would have amounted to (i) an excessive user of the 1972 right of way and/or (ii) an actionable nuisance;

(5) whether the user which is now being made of the driveway for the purposes of habitation of the two residential houses on the Yard amounts to (i) an excessive user of the 1972 right of way and/or (ii) an actionable nuisance;

(6) whether the 1972 right of way is limited to vehicles of a certain weight or width, or travelling at a certain speed, and, if so, what are those limits?

The law

71. Four areas of law are relevant: (i) the law of priorities in registered land; (ii) the principles of construction of express rights of way, (iii) the law of excessive user of rights of way; and (iv) the law of nuisance. I shall shortly summarise here the principles of each, so far as relevant to this case.

Priorities in registered land

72. The Land Registration Act 1925 was the statute law governing registered land at the time of the 1972 conveyances. It relevantly provided:

> "70(1). All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say):-
>
> > (a) Rights of common, drainage rights, customary rights (until extinguished), public rights, profits a prendre, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register;
>
> […]"

73. The Land Registration Act 2002 is the current legislation governing registered land, having replaced the 1925 Act from October 2003. It relevantly provides:

> **"28 Basic rule**
>
> (1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.
>
> (2) It makes no difference for the purposes of this section whether the interest or disposition is registered.
>
> **29 Effect of registered dispositions: estates**
>
> (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
>
> (2) For the purposes of subsection (1), the priority of an interest is protected —
>
> > (a) in any case, if the interest—
> >
> > > (i) is a registered charge or the subject of a notice in the register,
> >
> > > (ii) falls within any of the paragraphs of Schedule 3, or

(iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.

(4) Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if—

(a) the grant involved such a disposition, and

(b) the disposition were registered at the time of the grant.

[…]

32. Nature and effect

(1) A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge

(2) The entry of a notice is to be made in relation to the registered estate or charge affected by the interest concerned.

[…]

134 Transition

[…]

(2) Schedule 12 (which makes transitional provisions and savings) has effect.

[…]

SCHEDULE 3

UNREGISTERED INTERESTS WHICH OVERRIDE REGISTERED DISPOSITIONS

Easements and profits a prendre

3 (1) A legal easement or profit a prendre, except for an easement, or a profit a prendre which is not registered under [Part 1 of the Commons Act 2006], which at the time of the disposition—

(a) is not within the actual knowledge of the person to whom the disposition is made, and

(b) would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable.

(2) The exception in sub-paragraph (1) does not apply if the person entitled to the easement or profit proves that it has been exercised in the period of one year ending with the day of the disposition.

SCHEDULE 12 TRANSITION

[…]

9(1) This paragraph applies to an easement or profit a prendre which was an overriding interest in relation to a registered estate immediately before the

> coming into force of Schedule 3, but which would not fall within paragraph 3 of that Schedule if created after the coming into force of that Schedule.
>
> (2) In relation to an interest to which this paragraph applies, Schedule 3 has effect as if the interest were not excluded from paragraph 3."

74. The Land Registration Rules 2003, made under the 2002 Act, relevantly provide as follows:

> "5. – The property register of a registered estate must contain -
>
> (a) a description of the registered estate …
> (b) where appropriate, details of -
>
> […]
>
> (iv) any other matter required to be entered in any other part of the register which the registrar considers may more conveniently be entered in the property register … "
>
> […]
>
> 35. – (1) On first registration the registrar must enter a notice in the register of the burden of any interest which appears from his examination of the title to affect the registered estate.
>
> […]
>
> 84. – (1) A notice under section 32 of the Act must be entered in the charges register of the registered title affected.
>
> […]"

75. It will be noted that, although rule 84(1) requires a section 32 notice to be entered in the charges register of the title concerned, rule 5(b)(iv) provides that a matter required to be entered in any other part of the register than the property register may be entered in that property register, if the registrar considers it more convenient.

The principles of construction of express rights of way

76. There are two aspects to the construction of express rights of way. The first relates to the understanding which the court gives to the meaning of the words used in commercial documents. The modern approach to this is set out in a series of cases about contracts in the Court of Appeal and the Supreme Court in the last 15 years or so. The statement of Lord Neuberger PSC (with whom Lords Sumption, Hodge and Hughes JJSC agreed) in *Arnold v Britton* [2015] AC 1619 (a case concerning the construction of certain leases) is a paradigm of this approach.

77. Lord Neuberger said:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would

> have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

78. In addition to subjective evidence of any party's intentions, pre-contract negotiations for purpose of drawing inferences as to meaning are also excluded from consideration. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, Lord Hoffmann (with whom Lords Hope, Rodger, and Walker, and Lady Hale agreed) said:

> "42. The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

79. The other aspect of the construction of express grants of rights of way relates to their status as property rights. Purely contractual rights (with limited exceptions) apply only as between the *parties* to a contract, and are usually of short to medium duration. So, subject only to public policy limits, they may have whatever content the parties please. However, property rights are different. They are intended to be stable and long-lasting, and to apply to (and potentially affect) third parties. They therefore should be clearly recognisable to third parties and their advisers.

80. In the civil law, this is partly achieved by the idea that there is in principle only *one* property right, namely absolute ownership (what the Romans called '*dominium'*), but with a limited list ('*numerus clausus*') of exceptional property rights which are less than full ownership, and which operate as rights against property belonging to others ("*iura in re aliena*"). The common law had (and has) no principle of *dominium*, and thus no *numerus clausus* of exceptions to it either. It simply allows the fragmentation of ownership of land into a range of smaller bundles of rights, called estates and interests in land. But land was the only long-term store of value in medieval times, and the English feudal system similarly recognised only a small number of such estates and interests in it. So, stability was "baked in" to the common law property system: see *eg Hill v Tupper* (1863) 1 H & N 121, 127-128. But (unlike the civilian *numerus clausus*) in the common law world further property rights have been recognised from time to time. It should, however, be added that, since section 1 of the Law of Property Act 1925 was enacted, new estates and interests in land can no longer be created at law. But the existence and protean nature of the trust, giving the owner power to tailor (equitable) property interests to the precise needs of the situation, means that pressure to expand the list is nowadays very small.

81. The need for stability for property rights, and the consequent small number of such rights, means that judicial decisions on such property rights acquire much greater

significance in the construction of grants of such rights than in relation to contracts. In order to be able to advise clients as to their position when they acquire property which comes with or is subject to rights concerning third parties, lawyers must be able to rely on a settled approach to grants of such rights. As the late Prof Peter Birks once wrote, "The mission of property law is stability". That settled approach is to be found in the caselaw.

82. Thus, for example, the Court of Appeal has many times said that a right of way under an express grant is not to be restricted to such uses as were reasonably required at the date of the grant: see *eg White v Grand Hotel, Eastbourne, Limited* [1913] 1 Ch 113, 116; *Robinson v Bailey* [1948] 2 All ER 791; *British Railways Board v Glass* [1965] Ch 538, 558F; *Jelbert v Davis* [1968] 1 WLR 589; *Holmes v Hughes*, unreported, 15 July 1988. On the other hand, such a right *is* limited to what the servient land can physically accommodate, because that is all that the parties can have reasonably contemplated at the time of grant: *Todrick v Western National Omnibus Company, Limited* [1934] Ch 561. To put it another way, an express right of way "should not be used for something for which it obviously could not be used": *Rosling v Pinnegar* (1987) 54 P & CR 124, 595G-H.

Excessive user of rights of way

83. But even if the use is *permitted*, it is not *unlimited*. In *Jelbert v Davis* [1968] 1 WLR 589, the plaintiff bought agricultural land which was landlocked,

> "together with the right of way at all times and for all purposes over the driveway retained by the vendor leading to the main road in common with all other persons having the like right subject to the purchaser or his successors in title paying a proper proportion of the cost of repairing and maintaining it in repair".

84. Although at first the plaintiff used the land for agricultural purposes, later he obtained planning permission to use part of the land for up to 200 holiday caravans, subject to certain conditions. But planning permission does not override private law rights. The servient land was owned by the defendants, who objected to the proposed caravan use, and placed warning notices on the driveway, denying caravaners entry. The plaintiff claimed that this was a slander of his title and a nuisance. The defendants counterclaimed for an injunction to restrain the use of the land for caravans. The judge at first instance decided in favour of the plaintiff. The defendants appealed to the Court of Appeal.

85. Lord Denning MR said (at 595C-E):

> "In my opinion a grant in these terms does not authorise an unlimited use of the way. Although the right is granted 'at all times and for all purposes,' nevertheless it is not a sole right. It is a right 'in common with all other persons having the like right.' It must not be used so as to interfere unreasonably with the use by those other persons, that is, with their use of it as they do now, or as they may do lawfully in the future. The only way in which the rights of all can be reconciled is by holding that none of them must use the way excessively."

86. Danckwerts LJ said (at 597D-E):

> "On the authorities, it is plain that the easement so granted is in such wide terms that the use by the plaintiff of it for caravans is permissible; but it is an easement which on its terms is a right which is to be used 'in common with all other persons having the like right.' That includes the defendants. A use of the right of way which is so excessive that it renders the rights of such other persons practically impossible, therefore, is not justified."

87. Edmund Davies LJ (at 598A) agreed with both judgments. However, whilst the court confirmed that allowing 200 caravans onto the site *would* be an excessive user, it declined to say what number would *not* be. Instead, it granted a declaration

> "that the plaintiff is entitled to use the right of way claimed for use with caravans but not in such a manner as to cause substantial interference with the use of the right of way by the defendants or either of them or to cause a nuisance to the defendants or either of them. Liberty to the defendants to apply for an injunction."

88. In *White v Richards* (1994) 68 P & CR 106, a father conveyed one acre out of 29 acres of agricultural land to his son, on which the son built a bungalow. There was no express, but only an implied, right of way to reach the bungalow along a track from the public highway. The father later sold six further acres, including a part of the track, and simultaneously sold the one-acre plot with bungalow, to a third party. The father's conveyance reserved a right of way along the track in the following terms:

> "EXCEPT AND RESERVING to the Vendor and his successors in title and owners and occupiers for the time being of the land retained by the Vendor (hereinafter called "the retained land") which said land is edged blue on the said plan:-
>
> > (a) the right for the Vendor or his servants or licensees at all times hereafter to pass and repass on foot and with or without motor vehicles over and along the track coloured brown on the plan so far as the said right may be necessary for the use and enjoyment of the retained land ....
>
> […]"

89. The third party subsequently sold the land on to the plaintiffs, subject to the same reservation. Later the father sold his remaining 22 acres of land to the defendant. The plaintiffs now sought an injunction against the defendant's user of the track. The defendant counterclaimed for a declaration of his right to use the track for agricultural purposes. There were two questions. The main question was what was the nature and extent of the right of way. The subsidiary question was whether there had been excessive user of that right.

90. At first instance the judge decided both questions in favour of the plaintiffs. He granted the injunction and dismissed the counterclaim. He also granted declarations

> "(1) that the right of way reserved by clause 3(a) of the 1987 conveyance is 2.7 metres or 8 feet 10 inches wide along its length, save for the point where it enters Lot 2, where it widens to 15 feet; (2) that the right of way is for use by pedestrians and by vehicles but not for use by livestock save and except for

> horses led by a person on foot or dogs walked by lead; (3) that the vehicular right of way may not be exercised by any vehicle with a greater wheelbase width from outer to outer wheel edge than eight feet nor any vehicle with an overall width in excess of nine feet nor by any vehicle exceeding 10 tons laden weight; and (4) that the use of the right of way may not be such as unreasonably to interfere with the rights of any other person to use it."

91. The defendant appealed to the Court of Appeal. As to the first question (nature and extent), Nourse LJ, with whom Stuart-Smith and Mann LJJ agreed, said (at 112):

> "Having correctly directed himself as to the test to be applied, the judge correctly applied it to the facts he had found and granted relief in a form with which I do not think that this court ought to interfere."

92. As to the second question (excessive user), Nourse LJ referred to the decision in *Jelbert v Davis*, and summarised the judge's findings in these words:

> "Here the judge found that in the four months between October 1989 and January 1990 there were on average 14 to 16 vehicles using the track in and out every day, mostly very heavy lorries of 38 ton laden weight carrying rubble and building materials, and excavators and other heavy machinery as well."

93. Having considered the judge's reasoning in detail, he concluded (at 146):

> "On the judge's findings, this is primarily a case of excessive use by unauthorised vehicles. But it may be assumed that the track was also used by authorised vehicles, that is to say by vehicles whose dimensions and weight did not exceed those laid down by the judge, which would necessarily have contributed to the excessive use as a whole. In any event, having once again correctly applied the correct test, the judge had good grounds for making the additional declaration contained in declaration (4). He did not think that an injunction in support of that declaration was called for at present and the plaintiffs have not argued to the contrary in this court. For these reasons I would affirm the judge's decision of the subsidiary question and the relief that he granted in respect of it."

94. In *Bee v Thompson* [2010] Ch 412, a testatrix by her will gave a house and garden to the first claimant, "subject nevertheless to a right of way as existing at the date of my death to" an acre of fallow land beyond the house known as "the garth". This latter parcel of land was given by the will to the defendant's predecessor in title "together with the right of way from [the street] across the rear of [the house] at all times and for all purposes connected with the said garth". There was a rough core track, about 10 feet wide at the entrance, leading from the public highway round the back of the house to the garage, but also to a gate which led into the garth. The executors assented the house to the first claimant subject to "all rights of way and easements affecting the same". A week later they assented the garth to the defendant's predecessor in title "together with all rights of way and easements affecting the same". The defendant obtained planning permission to build three houses on the garth. The claimants sought an injunction to restrain user of the right of way for the purposes of the three houses.

95. At first instance the judge, construing the will and the assents together, held that the defendant had an express right of way to the garth, but limited to user for agricultural

purposes. He granted an injunction restraining the defendant from using the right of way for any other purpose. He further held that, even if there had been a grant of a wider right of way, user for the purpose of access to the proposed houses would be excessive. The Court of Appeal allowed an appeal in part, holding that the words "at all times and for all purposes connected with the said garth" in the will meant that use of the right of way was unrestricted (though only in connection with the garth rather than any other area of land), since neither the text of the will nor the context justified cutting down "all purposes" to "agricultural purposes". However, the Court of Appeal refused to disturb the judge's finding on excessive user.

96. Mummery LJ (with whom Etherton and Sullivan LJJ agreed) said:

> "38. This court does not interfere with a trial judge's evaluation of matters of fact and degree, unless it was shown that he erred in principle or that his conclusion was plainly wrong, being one which no reasonable tribunal could have reached. …
>
> […]
>
> 42. In my judgment, the judge was entitled, on the evidence that he heard and on the points argued before him, to conclude that the proposed user would be excessive. It could not be justified simply by reference to 'all purposes' which does not authorise use to the point of an unreasonable level of interference with the rights of the servient owners to their property and to use the way in common with the occupiers of the dominant tenement: see *Jelbert v Davis* [1968] 1 WLR 589, 595C, in which Lord Denning MR explained that even a right granted in wide terms like 'at all times and for all purposes' is not a sole right, if it is used in common with others, and it does not authorise unlimited use. Mere change of the Garth by itself to residential use may not be unlawful, but the track must not be used excessively so as to interfere unreasonably or substantially with the rights of Mr and Mrs Bee to use the track or to enjoy the rest of their property."

97. From these decisions, I derive the following relevant propositions:

(1) a right of way must not be used excessively, that is, must not be used so as to interfere unreasonably with the use by other persons having a similar right;

(2) the question whether there is excessive user is fact-sensitive and evaluative;

(3) if the judge at trial applies the correct test in law, the appellate court will interfere with that decision only where it is one which no reasonable tribunal could have reached;

(4) accordingly, an evaluative decision by the court in one set of circumstances that there is or is not excessive user cannot govern any other set of circumstances.

In addition, I bear in mind that, as the world becomes more sophisticated, so too does expert evidence. That adduced in the present case is many times more complex than will have been adduced (if any at all) in the earlier cases.

Nuisance

98. The tort of nuisance is quite separate from excessive user of a right of way, and must be considered separately. In *Lawrence v Fen Tigers Ltd* [2014] AC 822, the defendants had occupied land and used it as a motor sports stadium for more than 20 years, pursuant to planning permission granted by the local planning authority. They had also used agricultural land behind the stadium to construct a racing track, for which eventually they obtained permanent planning permission. In 2006, the claimants bought a house which was situated close to the stadium and the track. Complaints from the claimants led to noise abatement notices from the local authority, and later to the present claim being made in nuisance in respect of the noise. At first instance the judge held that the noise was a nuisance, and that it was not possible to prescribe for a right to commit a noise nuisance over 20 years. The Court of Appeal reversed the judge's decision, holding that the implementation of planning permission could cause the character of the locality to change and therefore the question whether there was a nuisance was to be judged against that changed character.

99. The Supreme Court reversed the decision of the Court of Appeal. In summary it held that (i) a landowner could prescribe for an easement to carry on a noisy activity which would otherwise cause an actionable nuisance, where such noise nuisance had been caused for 20 years, (ii) it was no defence that the claimant had acquired the affected property after the nuisance had started, (iii) in determining whether a particular activity caused a noise nuisance, the court had to assess the level of noise which, objectively, a normal person would find it reasonable to have to put up with given the established pattern of uses, or character, of the locality in which the activity concerned was carried out, (iv) however, the defendant could not rely on a planning permission permitting the very noise which was alleged to constitute a nuisance as making that noise an established part of the character of the locality, and (v) that the fact of planning permission was not a major determinant of liability.

100. Lord Neuberger (with whom, on these matters, Lords Sumption, Mance, and Clarke agreed) said:

> "3. A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land.
>
> 4. … Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.
>
> 5. As Lord Goff said in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299, liability for nuisance is
>
> > 'kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action": see *Bamford v Turnley* (1862) 3 B & S 66, 83, per Bramwell B'."

101. The fifth member of the court, Lord Carnwath, said:

> "179. It is important at the outset to identify the test to be applied in determining what amounts to a nuisance. In his introduction (para 5), Lord Neuberger PSC quotes without comment a passage in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299 in which Lord Goff of Chieveley referred to the controlling principle of 'reasonable user – the principle of give and take . . .' As I explained in *Barr v Biffa Waste Services Ltd* [2013] QB 455, paras 60-72, Lord Goff was not seeking to lay down a general rule, and the concept is not without its problems. …
>
> 180. Another important question is the context in which the reasonableness test is to be applied. Traditionally the acceptability of the defendant's activity is to be judged by reference to the character of the locality', a concept which dates back at least to *Sturges v Bridgman* (1879) 11 Ch D 852. At that time the mix of uses in an area would have been the result largely of unrestrained market forces, and the degree of regulatory control was very limited. Although the same principle has survived into the modern law, it is unrealistic to leave out of account the many factors which influence the character of an area in the modern world, including the impact of planning control."

The application of the law to the facts found

Issue (1): whether the claimant is bound by the 1972 right of way

102. The 1972 transfer of the Yard to the Stonehams by Mr Neilson contains wording apt to grant a express right of way over the driveway. The conveyance of the Farmhouse to Mr Bryen by Mr Neilson on the same day contains wording apt to create an exception and reservation of a right of way over the driveway for the benefit of the vendor's "adjoining premises". The two are similar, although not identical. But it was not suggested at trial that anything turned on the differences. If this grant and reservation were sufficient to create a legal right of way in favour of the Yard, then in *unregistered* land terms that right would bind Mr Bryen's successors in title, whether they knew of it or not, because it would be a legal interest in the land, and legal interests bind the world. The claimant accepts that the reservation in the Farmhouse conveyance is binding upon her, but not that in the Yard transfer.

103. In terms of *registered* land, at that time a legal right of way would have constituted an overriding interest under s 70(1)(a) of the 1925 Act, and equally would bind Mr Bryen's successors in title, without being noted on the register, and whether they knew of it or not. Then, when the claimant acquired the Farmhouse in 2014 from Mr Bryen, by which time the 2002 Act had come into force (in October 2003), that right of way on the face of it would have remained binding on her, whether she knew of it or not, by virtue of section 28 of the Act (the "basic rule" of priority). Section 29(1) would not have reversed the basic rule because the legal right of way was "protected at the time of the [claimant's] registration". It was protected for two reasons: first because there was a notice on the register, but second because, although it would not have otherwise fallen within Sch 3, para 3 and s 29(2)(a)(ii), the transitional provision in Sch 12 para 9(2) treated it as though it were included in Sch 3 para 3.

104. The claimant however argues that this reasoning cannot apply in the present case to the Yard transfer. First, the claimant (correctly) points out that only the Farmhouse conveyance is registered against the Farmhouse title, whereas the Yard transfer is not. Second, the claimant says that the defendant needs to demonstrate both (i) that the vendor (Mr Neilson) was able to grant a right of way at the time he executed the Yard transfer, and (ii) that the interest thereby created was an overriding interest. The claimant says that neither of these points has been pleaded by the defendant. In any event, as to (i), she says there is no evidence as to the order of the assurances. And, as to (ii), she says that any right of way granted would not meet the tests in Sch 3 para 3 or Sch 12 para 9.

105. However, the claimant *has* pleaded *inter alia* that:

> "10. There is a right of way for the benefit of the Yard over the tarmacked way on the Driveway as set out below ("the Yard Right of way").
>
> […]
>
> 19. The benefits and burdens of the Yard Conveyance form part of the Property Register of the title to the Yard but are not registered on the title to Holywell Farmhouse.
>
> 20. In the premises the Claimant will contend, so far as relevant to these proceedings, that the Yard Right of way, and the terms thereof, is that contained in the Holywell Conveyance as aforesaid; in the alternative, that it is that contained in the Yard Conveyance."

106. The claimant is not *obliged* to plead matters of law (*Metall & Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, at 436 B-C), but may do so if she wishes (CPR PD 16, para 12.2(1)). Here she has pleaded that there *is* a right of way over the Driveway for the benefit of the Yard. So she must impliedly be averring the existence of necessary facts which would result in that legal conclusion. These facts include the ability of Mr Neilson to grant a right of way over the driveway in 1972. There is no issue between her and the defendant as to that fact. It is therefore not open to her at trial to object to the defendant's plea that there is a right of way by denying the ability of Mr Neilson to grant it. As to whether the right of was constituted an overriding interest, this is a matter of law, and the defendant did not need to plead that. So the "non-pleading" points go nowhere.

107. But in any event the claimant's point on the order of conveyances is a bad one. It does not matter in which order the Yard transfer and the Farmhouse conveyance were executed on 29 September 1972. If the Yard transfer came first, then *ex hypothesi* Mr Neilson still then owned the Farmhouse and could grant a right of way over the Driveway to the Stonehams. If, on the other hand, the Farmhouse conveyance came first, Mr Neilson would have reserved the right of way over the Driveway for the benefit of the Yard which at that stage he still owned, and then he would have transferred the Yard to the Stonehams, with the benefit of the right of way already reserved. Accordingly, no evidence is needed as to the order in which the conveyances were executed. The legal result is the same in either case.

108. The claimant's second point is that any right of way granted by the Yard transfer would not meet the tests in Sch 3 para 3 or Sch 12 para 9, and so bind the claimant. In relation to the Farmhouse conveyance, there is an intermediate point. This is that the priority of the interest represented by the right of way is also protected if it is the subject of a notice in the register. In the present case, the Farmhouse conveyance of 29 September 1972 *is* the subject of a notice in the Property Register of the title to the Farmhouse, in the following terms:

> "3. The land in this title has the benefit of the rights granted by *but is subject to the rights reserved by* a Conveyance thereof dated 29 September 1972 made between (1) Nigel Fraser Neilson and (2) William James Bryen" (emphasis supplied).

109. I have already noted that, although rule 84 of the Land Registration Rules 2003 requires a notice under section 32 of the 2002 Act to be in the Charges Register for the burdened property, rule 5(b)(iv) provides that the registrar may put it in another part of the title if that is more convenient. In the present case, that is what the registrar has done. The notice shows that the land in the title is subject to the rights reserved by that conveyance, which include the right of way. Accordingly, the priority of the right of way is protected under section 29(2)(a)(i). That in turn means that the right of way in the Farmhouse conveyance is binding on the claimant on her purchase in 2014. The claimant accepts this.

110. In relation to the Yard transfer, there was no notice on the register of the right of way. So, it is necessary to look at the transitional provision in Sch 12 para 9. This applies where (i) a right of way was an overriding interest in relation to a registered estate immediately before the coming into force of Sch 3 in October 2003 but (ii) it would not fall within Sch 3 para 3 if created after October 2003. Both limbs would be satisfied in relation to this right of way. The consequence is that Sch 3 would have effect as if the right of way were not excluded from Sch 3 para 3. By virtue of inclusion in that paragraph, coupled with section 29(20(a)(ii), the right of way would have its priority protected, and thus bind the claimant on her purchase in 2014.

111. The claimant however seeks to rely on the exception in para 3(1) for an easement which at the time of the sale and purchase in 2014 neither was actually known to the claimant nor would have been obvious on a reasonably careful inspection of the driveway. However, I have already held that the claimant knew about the right of way at the time of her purchase. I have also held that the right of way was obvious, from a reasonably careful inspection of the land. Accordingly, the exception does not apply, and the right of way is binding upon her. In any event, because this is an *exception*, the burden of proving that the exception applies falls on her, and she has not so satisfied me. Indeed, the claimant has not even pleaded that she was not aware of the Yard right of way at the time of her purchase, or that the right of way was not obvious from a reasonably careful inspection of the land. Yet these are facts crucial to the establishment of the exception.

Issue (2): how far the right extends across the driveway

112. The question how far the right extends across the driveway is a matter of construction of the grant, in the context of the circumstances then obtaining. Plainly the right does not extend to use for vehicles or loads which are wider than the space physically

available: see *Todrick v Western National Omnibus Co Ltd* [1934] Ch 561, CA. The same principle applies to loads which are heavier than the roadway can physically bear: *Robinson v Bailey* [1948] 1 All ER 791, 795B. But here the agreed expert evidence is that the driveway can easily bear the user by the defendant in constructing the houses and by the occupants in living there. I have already recorded my finding that, on the plans of both the Yard transfer and the Farmhouse conveyance, the "roadway coloured brown" appears to cover the whole width between the wall of the Farmhouse and the fence of Plum Cottage. In *Carpenter v Calico Quays Ltd* [2011] EWHC 96 (Ch), [45], Floyd J (as he then was) said that the use of the word 'roadway'

> "does not in my judgment either necessarily exclude the verges or necessarily include them. It is at least capable of including the grass verges."

113. In *West v Sharp* (2000) 79 P & CR 327, CA, there was an express grant of a right of way "over and along the piece of land marked 'reserved for road' on the said plan and thereon coloured brown". The plan attached to the conveyance showed a 40 feet wide strip of land coloured brown marked 'reserved for road'. A cart track existing at the time of the grant did not occupy the whole of this width. Mummery LJ (with whom Colman J agreed), said, at 333,

> "In my judgment the judge correctly construed the grant in the 1935 conveyance. In the ordinary, natural meaning of the language, the right of way is over the land coloured brown shown on the plan annexed to the conveyance. It is not limited either by language of the grant or by the plan itself to a track which happened to exist on the brown strip at the time of the grant or to a road subsquently [sic] constructed within the brown strip. Mr Wilson's submission involves substantially rewriting the grant so as to give no effect to the words in the grant that refer to the brown strip and to the plan. He would have it that the right was only along the track existing at the time or the road to be constructed at a later time. That is not what the grant says and it is not what it means."

114. This can be compared with *White v Richards* (1993) 68 P & CR 105, where there was the reservation of a right of way

> "on foot and with or without motor vehicles over and along the track coloured brown on the plan so far as the said right may be necessary for the use and enjoyment of the retained land … " (at 107).

There was no physical limit on either side of the track. The Court of Appeal held that the judge at first instance had been quite right to concentrate on the physical track itself. Nourse LJ (with whom Stuart-Smith and Mann LJ J agreed) said, at 112:

> "Here the words of the grant, to the extent that they are clear, identify nothing but the track, so that it is only from its physical characteristics with [sic] the width of the way can be ascertained."

115. In the present case I have found that there were no deliberately created verges in 1972, but that some were later created on the Farmhouse side of the driveway. I have also found that the minimum width *across the tarmac* that currently exists, scraping back the vegetation that has overgrown it, is around 3m. The minimum width across *the physical space* is however wider, at 3.83m. Construing the words of the grant in

the context of the circumstances obtaining in 1972, the ordinary and natural meaning of the words "over the roadway coloured brown on the said plan", where the brown colour extends across the whole width of the driveway, in my judgment the right of way similarly extends across that whole width, for the length of the driveway running eastwards from the gate to the Yard to the junction with the public highway.

Issue (3): the purposes for which the right can be exercised

116. The purposes for which the right can be exercised is once again a question of construction of the express grant, construed in the circumstances then obtaining. In my judgment, it must be possible in principle to draft a form of right of way over what is originally agricultural land, which continues to apply to the land if the purpose later changes to residential. The question is whether that is what has been done here. The words used in the grant are as wide as they could possibly be: "a right of way at all times and for all purposes … with or without animals and vehicles". Even without the express reference to "animals" it is obvious from the 1972 context and the use then made of the Yard and the agricultural hinterland that agricultural use of the driveway was contemplated. But the simultaneous grant of a right of way by the same grantor and in the same terms over the same driveway for the benefit of Kalamunda, a residential property, shows beyond doubt that use of the driveway by residents was contemplated too. There is nothing in the physical make-up of the driveway which on the one hand allows for agricultural use but on the other hand makes it unsuitable for residential use. In my judgment, it is not seriously arguable that changing the use of the Yard to residential use would by itself fall outside the scope of the express right of way granted. Of course, there can be a question as to excessive user. But that is different. If, without any effort of demolition and reconstruction, the barns could have become residences, I would hold that the right of way could be used to support such habitation.

117. The demolition of existing buildings and reconstruction of new ones raise further issues. Buildings fall into disrepair or decay, or they become outmoded or unsuitable for their original use after periods of time. Accordingly, it must be expected that they are demolished and reconstructed from time to time, and that the process of demolition and reconstruction will involve use of the access to the site, in this case, the driveway. It is also obvious that the purpose of the reconstructed buildings may not be the same as the original. As I have already said, a grant of a right of way is not to be restricted to access to the land merely for such purposes as were reasonably required at the date of the grant.

118. It is similarly obvious that the demolition and reconstruction of buildings involves special construction traffic having access to the site. Since such demolition and reconstruction is contemplated, so too must be the construction traffic. In order for both activities to be both safe and efficient, such traffic is likely to be larger and heavier than ordinary domestic traffic. But the evidence of the construction traffic movements over the driveway, referred to above, does not show that there were any physical impediments to such traffic's using the driveway. And the expert engineering evidence shows that the driveway was capable of accepting the loads involved. The drains under it, and the flint wall dividing it from the main house, for example, would not be harmed (as the claimant accepted in cross-examination). Moreover, most if not all large lorries should be able to make the turn from the public highway into the driveway, or vice versa. Three 32 ton lorries certainly did so, pursuant to the terms of

the interim injunction. Accordingly, I do not consider that the demolition of the old buildings and the construction of the new fell outside the scope of the purposes for which the right of way could be used.

Issue (4): the effect of user for the purposes of construction

119. The agreed evidence of the engineering experts (which I accept) included a finding that the use of heavy construction vehicles over the driveway for the purposes of the construction of the two houses on the Yard would not have caused any damage to its surface. The evidence of the construction traffic movements over the driveway, referred to above, does not demonstrate to me an unreasonable interference with the use of the driveway by others during the limited time that it continued. In these circumstances, I do not consider that there would have been any excessive user of the right of way if the construction vehicles had used the driveway rather than the alternative route over the fields on the western side. The claimant says that there will be some extra "wear and tear", but if this is so it is provided for in the terms of the grant, by making provision for users to contribute to the owner's costs of upkeep.

120. Nor do I consider that such user would have amounted to an actionable nuisance. Demolition and construction are facts of everyday life, and there must be "give and take" in relation to them: *cf Celsteel Ltd v Alton House Ltd* [1985] 1 WLR 204, 214B. They involve acts necessary, at reasonably lengthy intervals, for the common and ordinary use and occupation of constructible land. I accept that they involve greater loads and greater noise than ordinary domestic traffic (though refuse and delivery vehicles are part of that, too) but on the other hand they last for a limited time. If kept within reasonable bounds, they will not unduly interfere with the claimant's enjoyment of her land. They will not be so extensive as to fall outside the reasonable contemplation of the parties. They will not make the exercise of the rights of others "practically impossible". A few movements a day, each lasting perhaps fifteen or twenty seconds, for a limited period, is frankly very small. I have found that there would have been 126 movements over 314 working days. I accept that, compared to nothing at all, it is certainly something, but the claimant, having acquired a property subject to a right of way in the terms of the present, cannot reasonably expect nothing at all.

Issue (5): the effect of user for the purposes of habitation

121. The defendant's position in relation to user of the right of way for the purposes of habitation in the two houses now built is, I think, stronger. The traffic is not limited in time, but is much less significant, compared to demolition and construction. In his opening, the claimant's counsel asserted that constructing even one house on the Yard would lead to excessive use and also constitute a nuisance. The claimant relied heavily on the decision of the Court of Appeal in *Bee v Thompson* [2010] Ch 412. In that case, the court refused to disturb the trial judge's decision that building three residential houses on former agricultural land would lead to excessive user of the right of way over the claimant's land close to their own home. But, as I have already said, this is an evaluative decision based on the evidence in the particular case. It does not appear (for example) that in that case there was any expert evidence of the kind admitted in this.

122. In the present case, the claimant complains of loss of amenity. But the traffic management experts agreed that

> "The key conclusion is that the traffic generated by the residential development of two dwellings at The Yard on a day-to-day basis will not cause serious loss of amenity to the Claimant or other local residents or road users, whether or not that traffic is greater, equal to or less than the previous farm traffic".

I accept this evidence.

123. However, according to the claimant's own evidence, the use of the driveway by the defendant for a total of one hour and 15 minutes a week *would* be excessive, because the additional use "would increase risk". It was put to her that, during the survey carried out over the driveway, there was not a single instance of two vehicles actually meeting on the driveway. The claimant repeated that this possibility was an inconvenience that did not presently exist. She said that such inconvenience was an element of her loss of amenity. She accepted that she and her family used the driveway 35 times a week, but pointed out that it was her driveway. She also accepted that it would not be unreasonable if Kalamunda used it 35 times a week. She further accepted that if the driveway was used for two new houses that would not make it "impossible" for the other residents to use the driveway, *but* it would be a loss of amenity. She was pressed on the question of how many extra vehicle movements would be unreasonable. My note says that she asserted that use by the defendant more than once a week would result in a loss of amenity for the claimant and her family. This appears also to be the view of the defendant, as set out in its closing submissions at [4.7] iii. However, when I circulated this judgment in draft, the claimant's counsel challenged this point, and supplied a copy of the relevant part of his solicitor's note, and his own, neither of which say that. Ultimately, it does not matter for the purposes of this judgment, and accordingly I do not reach a conclusion as to exactly what was said about it.

124. This is because it is clear from the evidence of the traffic management experts that the additional use imposed on the driveway by the habitation of two houses built on the Yard would be very small in comparison with the existing use. There is no evidence that any damage would be caused to the surface by the increase in traffic movements as a result of two extra houses being inhabited. There would be slightly increased wear and tear, but this is dealt with by provision in the grant of contributions to the upkeep from other users. User by the occupants of two houses on the Yard would in my judgment not interfere unreasonably with user by others having the like right, nor with the enjoyment by the claimant of her land. In these circumstances, I do not consider that it would amount to excessive user or that it would cause an actionable nuisance, even in the locality as it was in 2014, or indeed 1972. The claimant is not automatically entitled to the maintenance of the same rural peace and quiet that she enjoyed when she bought in 2014: *Rosling v Pinnegar* (1987) 54 P & CR 124, 132.

Issue (6): weight, width, and speed limits?

125. There was no suggestion in the expert evidence that any particular limits needed to be imposed by reference to weight or width of vehicles, or the speed at which they travel. The heaviest vehicle used in the trials was a 26 ton three axle heavy goods vehicle. It appears that there are restrictions imposed by general traffic law for traffic entering

the village. Vehicles must not exceed 6'6" in width or 7.5 tons in weight, with exceptions. The survey showed that the mean average speeds on the driveway were about 8 mph. On private land such as the driveway is, sufficient limits are provided by the terms of any express grant, combined with the application of the ordinary law of negligence. In the circumstances, I see no need for the imposition of any limits by the court.

Conclusion

126. For all the reasons given above, the claimant's claim fails, and is dismissed. The question of remedies for the claimant does not therefore arise. I will need to discuss with counsel the question whether, and if so what, directions need to be given in respect of any claim by the defendant under the cross undertaking in damages.