NEUTRAL CITATION NUMBER [2017] EWHC 2231 (Ch)

IN THE HIGH COURT OF JUSTICE Claim No. C30BM157
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY
Priory Courts
33 Bull Street
Birmingham
B4 6DS

6th September, 2017

Before: **DEPUTY HIGH COURT JUDGE LANCE ASHWORTH QC**

Between:
CHARLES WILLIAM MICHAEL LEA
Claimant

- and -

DAVID ANTHONY WARD
Defendant

MS. CAROLINE HUTTON (instructed by FBC Manby Bowdler) appeared on behalf of the Claimant.

MR. DAVID TAYLOR (instructed by mfg Solicitors) appeared on behalf of the Defendant.

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..
LANCE ASHWORTH QC

Introduction
This is a claim brought by Charles William Michael Lea (known as and hereafter referred to as "Michael Lea") against David Anthony Ward ("Mr Ward") as to the existence, location and

in particular width of a right of way said to have been granted under a Deed of Gift dated 2nd April 1979 ("the 1979 Deed") in favour of land now owned by Michael Lea.

The claimant's family had been farming land at Dodecote Grange in Childs Ercall near Market Drayton in Shropshire since 1865. A dispute arose in respect of a right of way over a strip of land which ran in a south to north direction with, on its western side certain farm buildings and on its eastern side an embankment. The claimant argued that a right of way had been granted across the whole of the strip under a Deed of Gift dated 2 April 1979. The defendant's case was that the grant of the right of way was only across that part of the strip that was a discernible track as at the date of the 1979 Deed.

Events since the 1979 Deed

Even after 1979, the style of farming did not change, it remained primarily an arable farm, albeit it was being undertaken by Robert Lea on his own account. In about 1982 Robert Lea reintroduced cattle. He used what has been described in evidence as "the second cattle shed" for this purpose.

In about 1980, John Geoffrey let his 2 sons, Michael Lea and Robert Lea farm the Meadow together. This was an informal arrangement. They tried to grow sugar beet, but the ground was too wet. In about 1981 Michael Lea stuck a fence down the middle and split the Meadow into 2 fields of approximately 40 acres, so that each brother had half. He kept sheep on his half.

By a tenancy agreement dated 9th October 1985, John Geoffrey formally let to his son, Michael Lea, the Meadow on a yearly tenancy. Michael Lea continued to keep his sheep there and on other land that he owned at Leafields. When John Geoffrey died in 1991, he left the land which had been subject to the tenancy agreement to Michael Lea.

In the meantime, Robert Lea sold the 2 Dodecote Gates Cottages, number 1 to the Coopers in 1986 and number 2 to Mr and Mrs Mackay the following year. In between the 2 sales, Robert Lea had swapped houses with his father, John Geoffrey, with Robert Lea moving into Dodecote Grange itself. This was described by Robert Lea as a mistake as Dodecote Grange was in a bad state of repair and was very costly to keep up. In 1989, he and Michael Lea fell out badly. Robert Lea blames Michael Lea for this, as the latter made a claim (which was not pursued) to rights over part of Robert Lea's land which he was trying to sell along with Dodecote Grange. The effect of this, according to Robert Lea, was that he was put under great financial pressure such that he could not service the loans taken out against Dodecote Grange. He therefore had to enter into forced sales of various parcels of land. Robert Lea retired from farming and moved out of Dodecote Grange.

Robert Lea had obtained planning permission for a golf course on the farm. He did not pursue this but sold the farm off in parcels in 1994. The property and outbuildings at Dodecote Grange and 29 acres were sold to Mr Ward and his wife, 30 acres were sold to Mr and Mrs Mansell and 32 acres, including part of field 4362 (incorporating the stackyard but not including the Strip) were sold to Adrian Marsh. In the correspondence leading up to the sale to Mr Ward and his wife, solicitors acting for Mr Ward wrote on 15th April, 1994 to make it clear that it was essential that he own the roadways, albeit that he appreciated that the purchasers of the other lots would have rights of way over them.

There have been subsequent transfers of land at Dodecote Grange. The position as of today is that:

Mr Ward is the registered proprietor of SL79513, which comprises the cowsheds and farm buildings which abut the Strip and the Meadow ("Dodecote Barns") and the land to the west of the cowsheds which was described in evidence as the foldyard. It also includes the whole of the Strip to the embankment on the eastern side of the Strip. The register refers to the 1979 Deed but not to any right of way granted over the Strip in favour of anyone else;

Mr Ward is also the registered proprietor of SL85660, which comprises the stackyard, formerly part of field 4362, having acquired this from Mr Marsh in 1995. It does not include the Strip. The property register refers to the 1979 Deed including the reservation of the rights of way in favour of the Grantor under that Deed between points D and F;

A Mr Blakeman is the registered proprietor of the remainder of field 4362, including the track that leads from the northern part of the stackyard down to a point where it meets the track between D and F opposite the entrance to the Meadow, which part of that track i.e. to the north of Dodecote Barns he also owns;

Michael Lea is the registered proprietor of SL151085, being the Meadow, the entrance to which is immediately beyond the end of the northernmost cowshed in title SL79513 and is accessed from the track which at this point is part of Mr Blakeman's land;

Mr Ward's wife, Helen Crossland-Ward, is the registered proprietor of SL79512, being Dodecote Grange itself and its outbuildings (but not Dodecote Barns comprised in SL79513) together with the roads/tracks which are those between points C and D (Bolas Lane) and between D and E (Dodecote Drive) in the 1979 Deed which is referred to extensively in the title register.

Mr Ward and his family moved into Dodecote Grange itself in 1995. In the same year, he sought planning permission for the conversion of Dodecote Barns into 16 holiday cottages. This was obtained in 1999, but was not acted upon.

In 2002 Mr Ward considered redeveloping Dodecote Barns into 6 residential units, but it was not until July 2007 that a formal planning application was made. The plans attached to the planning application showed that the whole of the Strip was to be incorporated into the development, it being used for gardens for the properties which abutted the Strip. There was no reference in the planning application to any right of way over the Strip, nor to a public footpath which it has subsequently been claimed exists along the Strip. Planning permission was granted in May 2007. Michael Lea and his wife, Judy, did not object to the planning application, but rather they say that they were unaware of the planning application or permission being granted.

Unfortunately for Mr Ward, the financial crisis in 2008 put on hold his development plans. While work was formally commenced in October, 2010, it appears that this was to preserve the planning permission. In 2014, Mr Ward was looking for finance to be able to complete the development. He was dealing with Helmsley Acceptances Ltd ("Helmsley") and it appears to have been they who raised a query over the ability to develop the Strip for gardens due to a potential right of way over some part of the Strip.

I will revert to what happened following this below, once I have made some observations about the issues, the site view and the witnesses.

<u>The Issues</u>

By the end of the evidence, Counsel for the Claimant submitted that the following issues need to be determined by the Court:

What is the width of the strip of land over which the Claimant is entitled to exercise a right of way under paragraph (a) of the First Schedule to the 1979 Deed?

Was the right of way substantially obstructed by Heras fencing erected by the Defendant in April 2015 and removed on 18 September 2015 such that it constituted a nuisance by way of substantial, albeit temporary, interference?

Is the Claimant entitled to general damages at common law for the nuisance caused by the Heras fencing, if any, and, if so, in what sum?

Is the width of the way available for use so restricted as to be substantially interfered with by:

the retaining walls and the Unit 1 parking space/garage entrance created by and between the two retaining walls and/or

the reverse wall joining the northernmost of the retaining walls to the gate post and/or

the width between the gate posts and/or

the unlocked gate and/or (v) the retaining wall constructed and erected in the period from early November 2015 to the end of January 2016 and maintained ever since given the layout of those structures and erections and their physical relationship with the profile of the ground over which vehicles are legally entitled under the right of way to approach them either from the south or from the north?

Is the Claimant entitled to a mandatory injunction to remove any or all of those physical structures/erections?

Is there a real risk of future substantial interference with the exercise of the right of way such that the Claimant is entitled to a restraining order?

Is the Claimant entitled to general damages at common law for the nuisance caused by any of those physical structures/erections referred to in paragraph (d)?

If injunctions are not granted requiring removal of any of those physical structures/erections is the Claimant nevertheless entitled to damages in lieu in equity and, if so, calculated on what basis?

While the Defendant's Counsel in his written submissions did not agree that these were all the correct questions, he did not submit orally that I should not make a determination of the extent of the right of way in the event that I did not accept the Claimant's position that it is over the whole of the Strip. Rather he says that I have to do the best that I can on the evidence which is available and I should define as clearly as possible where the right of way runs. In my judgment, there needs to be a question inserted between those identified in sub-paragraphs (a) and (b) above, namely "If the right of way does not extend the whole way over the Strip, what is the location of the right of way within the Strip?"

In the course of oral closing submissions, both Counsel were in agreement that I have to make a ruling about where point D is, including whether it is actually a point or whether it is a line or is even an area.

<u>Site View</u>

On the first day of the trial, I attended a site view at Dodecote Grange. I was accompanied on this by Counsel and Solicitors, but neither client took part. The site view was very informative as to how the land actually is now and also enabled a better understanding of the photographs that were produced and a visualisation of how the Strip is likely to have looked in 1979 at the time of the grant of the right of way.

The first thing to note is that the approach along Dodecote Drive from Childs Ercall Lane up to point E at Dodecote Gates and from point E until one gets close to point D is narrow. As one gets close to point D, it opens up considerably. There is a pinch point just beyond point E where the width of the track was measured on the site view to be 370 cm with a concrete post on the one side. That would necessarily restrict the width of any vehicles approaching point D to 370 cm.

Coming up the Bolas Lane from the Bolas Road, there is a 5-metre gate at point C, in respect of which it has not been asserted that this restricts the width of the right of way.

Further, as I left the site view I observed a pinch point south of point C which had been measured at 430 cm, which would limit the overall width of any vehicle approaching from that direction.

The gate from Michael Lea's Lawn Field onto Dodecote Drive is 11 feet 6 inches wide (approximately 350 cm). This would limit the width of any vehicle coming from Michael Lea's house through Lawn Field in order to then carry on to the Strip for the purpose of going to the Meadow.

The gate into the Meadow is 15 feet or approximately 450 cm wide, but it lies almost perpendicular to the track running along from point D to F (which at this point is on Mr Blakeman's land).

There is a route through the stackyard which, at the time of the site visit, was clear of any obstruction and very well maintained. It was very wide even with vehicles parked at the back of the cornhole, as to which see below.

The embankment on the eastern side of the Strip has been cut back and a retaining wall has been erected in line with what would have been the top of the embankment. It appears therefore to have widened the Strip to the extent that the slope of the embankment is no longer present. At the southerly end of this wall, it curves round what was the edge of the embankment and then goes into the entrance of the stackyard. There was some debate as to whether it has followed the line of the edge of the embankment. As far as it is possible to tell, it has not protruded further beyond the line of the edge of the embankment and may well be behind that line. As one goes round the curved end created by the retaining wall, the surfaced area is fairly steep. However, given that the stackyard is in the same position and at the same height as it always has been and the Strip appears to be at the same level as it historically was, the gradient of this slope must be the same or close to the same as it was previously. There was a camber to be seen, but there was nothing physically to indicate that this must have been changed as a result of any work done by Mr Ward.

As one heads north along the Strip, the old cowsheds are to the western side. The most southerly of the cowsheds on the Strip has been partially developed into unit 1. Mr Ward has created a double garage at the southernmost end of this unit. In front of the garage he

has created a paved area which is intended to be for car parking. It is bounded on the southern and northern edges by low walls. The southern most of these 2 low walls is the height of approximately 1½ bricks plus the header stone where it adjoins unit 1 looking from the south and it extends outwards approximately 4 metres perpendicular to the wall of unit 1, reducing in height to just the height of the header stone at the point at which it meets what is now a surfaced way. When looking from the north, the wall is the height of 6 bricks plus the header stone tall where it adjoins unit 1, reducing in height to 1 brick plus the header stone. There was always a difference in level at this point. The northernmost of these low walls is 7 bricks plus the header stone tall where it adjoins unit 1 and extends outwards by approximately 4 metres perpendicular to the wall of unit 1, reducing in height to 5 bricks and the header stone at the point where it makes a right angle turn. Once the northern most wall turns through right angles, it heads north for about 3 metres, before a short gap, after which it continues on an angle back towards the wall of unit 1, terminating after about another 2 metres in a gate post. There is a 4-metre-wide gate between this post and a further gate post on the retaining wall.

There is a row of blue bricks which has been set into the ground by Mr Ward, which run 4 metres from but parallel to the retaining wall. These are approximately 4 metres from the wall of unit 1 at this point. The blue bricks of themselves do not stand above ground level. Judging from the position of the hinges as shown in various photographs from before the development works were begun, the ground adjacent to the wall of unit 1 looks to be approximately the same height as it would have been before any works.

A window and French door have been put into the wall of unit 1, which is relatively close to completion. These are in the positions where formerly there were doors which gave access to the Strip from the cowshed. The original doors opened outwards as can be seen from the position of the hinges.

As one walks north on the Strip, on the eastern side there is a building which is known as the cornhole. This is opposite the northern end of unit 1 and sits behind the retaining wall. There is then a crossing which comes down from the stackyard, goes across the Strip and into the foldyard through a gap between unit 1 and unit 5.

Beyond the gap on the eastern side, the retaining wall extends a little way, then there is a concrete loading bay, which was put in many years ago in the time of John Geoffrey. This is built into the embankment so that its surface is level with the stackyard. It has a lip which extends approximately 18 inches to 2 feet beyond the line of the retaining wall over the Strip. Beyond the concrete loading bay, the embankment is still in place.

On the other side of the strip are more old cowsheds now known as units 5 and 6. These remain in a state of disrepair and are in need of substantial works to convert them. There are a number of doors still in place which abut the Strip. Inside unit 6, immediately to the other side of the doors, there are some railway tracks which were used to move the feed for cattle within the sheds. As with unit 1, the original doors in units 5 and 6 open outwards on to the Strip.

The Strip at this point is narrower, although not significantly. At the end of the Strip, the track continues up the side of what is now Mr Blakeman's field towards point F some way in the distance. The track is still clearly discernible at this point and looks like a normal rutted farm track with 2 ruts for the wheels of a vehicle, with a hedge to the west and (at the time

of the site visit) a field of maize to the east right up to the edge of the track. Also just beyond the end of the Strip, but still on the track (by now on Mr Blakeman's land) there is to the west the gated entrance to the Meadow. As set out above, this gate is approximately 450 cm wide. To turn into this gate, it would be necessary for any large vehicle to undertake a manoeuvre, most likely as Mr Davies, the sheep farmer said, to go beyond the entrance and then reverse up the track coming down from the stackyard before pulling forwards into the Meadow. There was no suggestion that Mr Blakeman had ever objected to his track towards the stackyard being used in this manner.

While the development is not yet complete, units 2, 3 and 4 have been completed. The development appears to have been well done, but that was only from an external view. Any further development is currently held up by this claim.

The Evidence

I heard oral evidence from 10 witnesses of fact called by the Claimant and cross-examined on behalf of the Defendant. I heard oral evidence from 3 witnesses of fact called by the Defendant and cross-examined on behalf of the Claimant. As to the 8 further witnesses of fact who were to be called by the Defendant, the Claimant's counsel indicated that she did not require to cross-examine them. Accordingly, their evidence was before me but was not challenged. In the circumstances, that does not reduce the weight to be placed on their evidence. Rather where it conflicts with evidence adduced by or on behalf of the Claimant, in my judgment it is to be accepted as being unchallenged and therefore to be preferred.

I have not had the benefit of any expert evidence from land surveyors to assist with any measurements or interpretation of plans, nor as to land valuation in the event of my finding there to have been a substantial interference with the right of way.

A significant number of photographs have been produced. A bundle of the more important ones have been reproduced in a glossy finish. I shall refer to these as the bundle of glossy photographs. They include 4 aerial photographs of Dodecote Grange and the surrounding land. While it has not been possible completely accurately to date them, they appear to date from the period 1969 to 1977. There is one which bore the date of 1972 on its reverse and one which must be around 1977 as it shows Michael Lea's newly-built house near the Childs Ercall Road. The one which has been dated around 1969 looks in a south westerly direction. It clearly shows the Dutch barns, the cornhole, the loading bay and the buildings which Mr Ward is now in the process of developing. It also, importantly, shows the northern end of the Strip and a clearly discernible track on the Strip. The track has grass verges on either side and a grass strip running up the middle. While it is not possible to be sure about this, as the track continues to the north of the Strip heading up towards point F, it does not appear to get any narrower. At that point it is bounded on the one side by a hedge and on the other by a ploughed field which appears to have been ploughed right up to the edge of the track (i.e. is very similar to the current layout as seen on the site visit). As one looks down the Strip to the south, it is possible to make the track out opposite what is now unit 1. Again it appears to have grass verges either side and a grass strip running up the middle. The alternative route through the stackyard can also be seen. It is difficult to discern much about the state of the Strip from the other photographs, each of which is taken looking east. From the 1977 photograph the route through the stackyard appears to very well established, indicating extensive usage.

In the bundle of glossy photographs, there are 7 taken in 1994 shortly after Mr Ward acquired the properties. The first 5 of these show the Strip substantially overgrown, in particular at the bottom end outside what are now known as units 5 and 6. It is difficult to make out any form of track. The buildings are all derelict. Later photographs show in 2003 an articulated trailer truck parked at the southern end of the Strip on the verge and in 2014 a low loader trailer parked on the verge adjacent to unit 1. In both cases there is a discernible track to the east of these verges. There are also photographs showing the garages formed in unit 1 and also later on, the gate and walls which are claimed in this case to obstruct the right of way.

Michael Lea gave evidence first. He is aged 79 and suffers from Parkinson's disease. I repeatedly offered him breaks, in particular when I thought he might be feeling tired. He refused on every occasion and was steadfastly determined to give his evidence and was clearly anxious to get his evidence over and done with. He accepted that in certain respects his memory was not good. After some prevarication he accepted the approximate dating of most of the aerial photographs produced by the Defendant. He was unwilling to accept one photograph as being in approximately 1977 by reference to his newly-built house, but could not offer any other sensible date for this. In the course of his evidence, he mentioned a jetty which had been attached to the cornhole. This had been mentioned by him obliquely in paragraph 10 of his third witness statement and closer inspection of the 1972 aerial photograph appeared to confirm this as did subsequent witnesses. However, in contrast to other witnesses, he suggested that this jetty stuck out 8 to 10 feet across the track. That is wholly unsupported by anyone else, would seem to be contrary to logic, and is an indication of his confusion at least. He said in his witness statement that the whole width of the Strip was used. He said that there was no defined track along any particular part of the Strip. He therefore claimed that the right of way was over the whole of the Strip. He denied that he or his contractors had used the route through the stackyard for many years.

In my judgment, it was telling that Michael Lea said that once Mr Temperton, his land agent had got involved in the matter, it was really his wife and daughter who were running the case. It was plain that he did not want to be in court and once he had given his evidence he left his wife and daughter to it. While I am sure that Michael Lea was not seeking to mislead the Court, the matters set out above cause me to reject his evidence to the extent that it conflicts with the evidence of others, in particular of his brother, Robert Lea whom I will deal with below.

The Claimant called Henry Hutsby next. He is a solicitor, distantly related to Michael Lea, who has acted for members of the Lea family from time to time since 1997. Contrary to the impression given in his witness statement, he had not actually seen the track at the relevant times and accepted in cross-examination that he was merely recording what he had been told by others. I can and therefore do reject his evidence as to the state of the track prior to the 1979 Deed or at any time thereafter until June 2014. That is when he became involved in this matter after Mr Ward had been to see Michael and Judy Lea to discuss the right of way and a possible alternative right of way across the stackyard. He said that he recommended to Michael Lea that he ought to get some advice from Mr Temperton as to what compensation they might be entitled to for agreeing to an alternative right of way. He was unable to explain why, if he was concerned that the alternative right of way being proposed was across Mr Blakeman's land (which Mr Ward therefore could not grant), he did not flag this up to his clients. I did not find his evidence of any great assistance, save

as to explaining the genesis of the claims to compensation which ultimately fouled relations between Mr Ward and the Leas.

Mr Temperton acted as Michael Lea's land agent. He said he was a great friend of Michael Lea and had used the track on many occasions including in the 1970s so was able to give evidence as to its state at that time. When it was pointed out that he could not have seen cattle being herded along the track, he backtracked from his witness statement saying that he had been talking historically of what must have happened over the previous 200 years. He made other concessions in respect of different types of vehicles which he had implied in his witness statement he had seen using the track, such as bailers and swath turners, only to accept that he had not. Despite being a witness of fact, and this being made abundantly clear, he sought to advocate the case on behalf of his client, Michael Lea. By way of example, he had a lot to say about the difficulty of anyone trying to turn right into the Strip from Dodecote Lane without claiming to have experienced this for himself. On the question of compensation, he initially claimed he had only ever mentioned one figure of £40,000 but when shown an attendance note from Mr Hutsby in which other figures were mentioned he accepted he might have had such a conversation. He denied having had a conversation with Mrs Ward about a figure of £90,000 despite there being clear evidence that he had mentioned a large figure to her and her not being cross-examined on her evidence as to this. On the whole I did not find Mr Temperton's evidence helpful. I got the firm impression that he, having opened a can of worms about compensation, was trying to support his client while justifying his own advice and stance taken. It seems likely that but for his suggestions of large sums by way of compensation, which caused substantial upset to Mr Ward, some agreement may have been found for an alternative right of way to be developed which would have avoided this litigation.

Mr Davies is a sheep farmer from Bala in Wales who has been renting the Meadow from Michael Lea since 2000. He has to make a couple of trips a year to deliver and collect his sheep. He has a 24-foot lorry. When leaving the Meadow he would go down the Strip and then turn left into Dodecote Drive. He said he has to take care getting through a 4-metre gate, but would not take an unnecessarily steep route once through the gate. Had he thought the route he was taking was too steep and therefore dangerous, he would have reversed back, pulled forward significantly further and then turned left. He described the incident in October 2016 when he was delivering sheep to the Meadow. There was nothing stopping him going to the Meadow in the normal way, but he was told by Judy Lea that he should unload the sheep in Dodecote Drive and walk his sheep from there, along the Strip and into the Meadow. He knew that there was a dispute between the Leas and Mr Ward and did as he was told. It was very difficult and his sheep ran everywhere.

Mr Banks is an agricultural contractor who has worked on the farm land at Dodecote since 1975. Michael Lea called him to give evidence as to the size of vehicles he used in an effort to show that the right of way needed to be significantly wider than that being suggested by Mr Ward and to show the interference caused by the walls and gate erected by Mr Ward. In the 1970s he said that the tractors would have been 85 inches (7 feet 1 inch or 220 cm approximately) wide and trailers would have been 8 feet (approximately 240 cm) wide. Having said in his witness statement that he would approach by a particular route which itself limited the size of vehicle he could use, in his cross-examination he sought to explain this away, saying if necessary he would take another route with bigger equipment, but was unable to say with any conviction why this did not appear in his witness statement. He had provided a list of equipment that they would use when working for Michael Lea with

dimensions, some of which appeared to exceed the width available to get into the Meadow. However, it transpired in his cross-examination that he had not actually used this machinery at all. Also he explained for the first time that he had been renting land on the Aerodrome for the past couple of years from Mr Blakeman. Save in respect of his acceptance of the state of the track before the 1979 Deed, Mr Banks' evidence was not

his attempt to do his best to assist the court, but rather he was seeking to assist Michael Lea as he has an interest in as wide an access as possible to allow him to get his larger machinery down the Strip for his own purposes in farming the land at the Aerodrome.

Mark Lewis was called by the Claimant to give evidence of having collected hay since 1999 using the Strip to gain access to the Meadow. He explained that they could get their 2.5 metre lorry with 18-foot trailer into the Meadow without any difficulty and also that he always drove down the track between the verge on the one side and the embankment on the other. When coming out of the Meadow he would take the easiest route which was through the stackyard. His evidence was entirely consistent with the track or way comprising the space between the verge and the embankment as opposed to the whole of the Strip.

Mr Cooper used to live in one of the Dodecote Gates cottages. He gave general evidence of helping with bailing between 1987 when he was 14 and 2008 when he left. His evidence does not assist me as to the state of the track in 1979 nor did he give any evidence as to obstructions being encountered on the Strip. I did not gain any material assistance from his evidence.

Mr Brownsill was a student at Harper Adams Agricultural College who lived at Dodecote Grange from September 1977 to May 1992. He used to use the track in order to get up to the Aerodrome to race his car up there. He would also race it around a building in the stackyard, but would not do any overtaking as the cars would not take it. He did not race down the Strip. He was unable to recall the grass in the middle of the track shown in the 1977 aerial photograph, nor could he recall a grass verge, but he said it was common sense that there would be one because one would not drive close to the wall of the cowsheds. He recalled the remains of the jetty by the cornhole, but it was not usable in the time that he was there, rather it was just some rotten bits of wood dug into the bottom of the embankment. He had not seen the loading bay being used in the time he was there. He did not remember a hollow being dug out by the loading bay. There was nothing to impede the track.

Robert Lea's son, Jon Lea, gave evidence for Michael Lea. I was struck by how partisan he appeared to be. He does not get on with his father, to whom he has not spoken for a couple of years, apparently because of a missed birthday card. He claimed to have seen Mr Brownsill and one of the other students who was lodging at Dodecote Grange racing side by side down the Strip. This was despite the evidence of Mr Brownsill that they had not done so. He also claimed that they had had to go from side by side racing into single file, although this was not mentioned in his witness statement. This seemed to me to be an attempt to explain how they could have been racing past the loading bay given other evidence of a large hollow (which he sought to adopt and embellish) which would have prevented them being side by side at that point. I regret that I simply cannot accept this evidence. Contrary to the suggestion by Ms Hutton on behalf of the Claimant that this was just the sort of exciting thing that would have stuck in the mind of a 7 to 12-year-old boy, in my judgment there is no truth to this. This also causes me to reject the rest of his evidence as to the state and position of the track prior to 1979.

The final witness called by the Claimant was his wife, Judy Lea. They had married in 1959. She did not live at Dodecote until they moved to their new house in 1977. She accepted that while Michael Lea had been involved in the litigation, it was she who had been running it. She accepted that the aerial photograph from 1969 showing a 2-wheeled track with grass running up the middle with a grass verge on the cowshed side accorded with her recollection of how the track looked 10 years later in 1979. She believed that the right of way track was used more than the stackyard. As to the use of the right of way, she said that vehicles would have deviated close to the cowsheds in the vicinity of the loading bay and also close to the cornhole. When shown a photograph from 2003 (number 4 in the loose bundle of glossy copies), she accepted that the track in 1979 would more or less have occupied the same position as shown in that photograph. That photograph shows a substantial grass verge, the width of an articulated trailer, next to the cowsheds, then a track with 2 wheel marks with grass in the middle and the embankment on the opposite side. She described a deep area under the loading bay and occasionally seeing other vehicles passing while one was under the loading bay. While she denied that the track had been overgrown in 1994 when Mr Ward bought the Dodecote Grange Barns, the Claimant chose not to challenge the evidence of Mrs Ward, Mr Owen, Mr Ward's brother, Robert Ward or Robert Reed (who helped with the renovation work), on this. Nor did he seek to challenge the evidence of Jane James (one of the parties' neighbours who said that the track was overgrown for a number of years, during which time she had seen Michael Lea using the track through the stackyard) or the evidence of Jacqueline Ainsworth (another neighbour

who said that the track was overgrown in 1994 and had been for some years before that, so that she had had to ride her horse over the track through the stackyard). The photographic evidence along with the evidence of Mr and Mrs Ward, Mr Owen, Robert Ward, Robert Reed, Jane James and Jacqueline Ainsworth shows that the Strip was indeed overgrown in 1994 and I reject Mrs Lea's evidence to the contrary.

Mrs Lea also gave evidence of events from June 2014 onwards, in particular what transpired at a meeting on 5th June 2014 between her, her husband, Mr Ward and Mr Wilson, his solicitor. She adopted her husband's evidence of Mr Wilson trying to convince them that they did not have a right of way over the Strip. She said he was very repetitive on this point. This was not Mr Wilson's evidence, which was that he explained that the title to Dodecote Grange Barns, which included the Strip, did not mention the right of way, whereas the title to the stackyard did. She accepted that Mr Wilson might have given them a detailed explanation but that she could not remember. She did accept that Mr Wilson said that Michael Lea should speak to a solicitor and that Mr Ward agreed to meet the fees of his engaging a solicitor to sort out the right of way.

It was following this that she contacted Mr Hutsby. Unfortunately, her very first email to him accused Mr Ward of trying to "con" her and her husband. This appears to have been her mindset throughout thereafter. She simply did not trust Mr Ward and continues not to do so. Her position was not aided, in my judgment, by Mr Hutsby who failed to explain to her that the proposed alternative right of way which Mr Ward was willing to grant in return for a release of the right of way granted under the 1979 Deed did not involve crossing Mr Blakeman's land, but was all to be on Mr Ward's land in the stackyard title. She told me that had she been told this, she and her husband would have considered this. She said that the reason that she sought advice from Mr Temperton was to ask him to look over the deed of easement and was not for the purpose of seeking advice about compensation. While it seems unlikely one would go to a land agent for advice about a deed of easement when one

has already instructed a solicitor, Mrs Lea did go on to say that Mr Temperton did tell them that they could get compensation and suggested a figure of £120,000. She was told by Mr Temperton to leave it to him. She claims to have been unaware of the discussion between Mr Temperton and Mrs Ward (which Mrs Ward says, and was not challenged, was in respect of a figure of £90,000), but says that she and Michael Lea did have a discussion with Mr Temperton about seeking £40,000, being £10,000 for each of their grandchildren.

While she said in her evidence that the £40,000 was not the be all and end all, she never told Mr Temperton or the Wards not to worry about the money.

After this activity in July 2014, Mrs Lea did not hear anything further until January 2015 when Mr Temperton told her he had been told by Mr Ward that he was altering his development so as not to utilise the right of way. She claimed that in this period she and Michael Lea were concerned that Mr Ward might go ahead and develop the right of way without any agreement. She began to correspond with the planning authority, raising concerns. She accepted that the purpose of doing this was to cause problems for Mr Ward and his development. This would only have served to worsen relations between Mr Ward and the Leas.

In April 2015, Mr Ward was continuing with the development and in the course of doing so, he erected Heras fencing the whole way across the Strip. Mrs Lea says, and this is not controversial, that he did this without consulting the Leas. It was only in July 2015 that the Leas complained about this and got Mr Hutsby to write a letter dated 15th July 2015 complaining. Mr Wilson wrote on behalf of Mr Ward by email, emphasising that Mr Ward did not challenge Mr Lea's right of way, but rather fully acknowledged it. He explained that the Heras fencing had been erected because of concerns about the structural stability of units 5 and 6, attaching photographs annotated to show the problems. As a temporary measure Mr Lea was asked to use the route through the stackyard. When this was forwarded to Mrs Lea by Mr Hutsby, she complained that the alternative route was virtually impossible for machinery. In her evidence under cross-examination, she accepted that she was exaggerating when she said this. She continued to do what she could to make life difficult for Mr Ward, objecting to his varied planning permission in October 2015. While she claimed that she did this because she thought the variation involved putting their right of way through the stackyard, it is clear that it did not do so and this was simply an attempt by Mrs Lea to justify her actions after the event.

Mrs Lea also gave evidence about the incident where Mr Davies was asked to drive his sheep along the Strip in October 2016 rather than driving his lorry to the Meadow as he usually did. Given that by this stage, proceedings were on foot which would determine the parties' rights, I reject her evidence that this was an attempt to find a solution to a problem that Mr Davies did not like driving down the camber from Dodecote Drive to the Strip.

Had that been her real intention, the obvious and easy answer would have been for Mr Davies to come up along the Bolas Lane. In my judgment, this was another example of her trying to make life difficult for Mr Ward, possibly by way of a warning that such occurrences would happen more frequently in the future.

In my judgment, Mrs Lea's evidence and her attitude towards this dispute has been tainted by her distrust of Mr Ward and what he is up to with the development, as well as by a sense that her husband (and/or her family) ought to be entitled to some form of financial benefit. The latter was stirred up by the attitude of Mr Temperton, who raised the prospect of very significant sums being payable to Mr Lea. Since June 2014 when the request for payment

was met with silence, Mrs Lea has done what she can to be difficult. This has led Mr Ward, as I will set out below, to take some steps which might be considered with the benefit of hindsight not to have been the smartest steps. In so far as Mrs Lea's evidence differs from that of Robert Lea, Mr Ward and Mr Wilson, I prefer the evidence of the latter 3.

Mr Wilson was the first witness to give oral evidence on behalf of Mr Ward. He was crossexamined by Ms Hutton at some length about his conveyancing practices, which crossexamination I found to be of little assistance in determining the issues I have to determine. The issue of the potential right of way had been raised by Newtons, a firm of solicitors acting for Helmsley from whom Mr Ward was trying to raise the necessary development finance. It is clear that it was this which had led to the discussion between Mr Ward and Mr Lea and to the meeting on 5th June, 2014 attended by Mr Wilson. He said that he first met Michael Lea and his wife, Judy, in connection with this issue at that meeting (having known Mrs Lea for many years). He said that he explained the deeds of Mr Ward did not support a right of way, and that most of the discussion that took place concerned the feasibility of the alternative route and the fact that because of ownership changes in the meantime, part of the route was owned by Mr Blakeman. At this stage he thought that the Leas were claiming a right of way by prescription. At the conclusion of the meeting, he told the Leas that they should seek their own legal advice and asked who they would use. They told him they would be using Mr Hutsby. Mr Wilson produced an attendance note of the meeting which he had prepared at the time. It reflects his evidence before me.

The next morning Mr Wilson sent Mr Hutsby an email introducing himself. He also shortly thereafter prepared a note for Mr Hutsby and enclosed plans, setting out his understanding of the position and Mr Ward's willingness to grant an express right of way over the stackyard. He also pointed out that this left the issue of crossing the Blakeman land, but suggested that Michael Lea probably had the right to do this in any event. After some exchanges of correspondence, by 19th June 2014, Mr Wilson had emailed Mr Hutsby with 2 plans showing the proposal that the Leas give up all rights over the Strip in exchange for a right of way over the stackyard and Mr Ward's land down towards the access into the Meadow. It is plain from the plans that the proposed new route was not over the Blakeman land, but all on Mr Ward's land. Mr Ward was prepared to engineer the slope of the bank so that the Leas did not have to cross the Blakeman land until they would have had to cross it in any event (the area abutting the entrance to the Meadow being Blakeman land). Mr Ward was not offering, as he could not do so, any new rights over the Blakeman land. There was a further discussion between Mr Hutsby and Mr Wilson after which the latter produced on 26th June 2014 revised Deeds of Grant and Deeds of Surrender to grant the right of way over the stackyard and the other part of Mr Ward's land.

Mr Hutsby did not deal with this, rather Mr Wilson was told that he was to deal with Mr Temperton. Mr Wilson had a short meeting with Mr Temperton in the latter's office in which Mr Temperton explained that the position of the Leas was so great that Mr Ward should be offering them compensation and that the amount of this should be based on the ability to develop the barns. Mr Wilson left the discussions as to the amount of any compensation to Mr Temperton and Mr Ward.

The issue with Helmsley was resolved when Mr Ward said he would redesign the development to take account of the track, that is to say that he would not build over the entirety of the Strip. Mr Wilson said Helmsley were content with the security they were going to have on units 2, 3 and 4 which would unaffected by any right of way dispute. They accordingly

released the funds to allow Mr Ward to develop the units. Mr Wilson thereafter dropped out of the picture for a while. The matters he dealt with when he returned do not need to be considered further in this judgment, given that the counterclaim by Mr Ward was discontinued.

Mr Ward provided 4 witness statements in total. The first 2 were to do with procedural matters, the 3rd was his substantive evidence and the 4th was to clarify an issue as to the public footpath. Mr Ward purchased Dodecote Grange and the farm buildings as set out above in 1994. He subsequently acquired the stackyard and is currently the owner of the parcels as set out above, his wife being the sole registered owner of Dodecote Grange and he being the sole registered owner of the Dodecote Grange Barns and the stackyard. When he and his wife acquired these properties, they were in a very poor state of repair and needed a lot of work doing to them. He said that the grounds, including the Strip, were heavily overgrown with trees and brambles. He was supported in this by the evidence of his wife and Mr Owen, neither of whose evidence was challenged, and by the photographs taken in 1994. I accept that Mr Ward's description of the state of the Strip in 1994 is accurate. I also accept his evidence that at this stage and while Mr Ward undertook the necessary works over a considerable period of time to clear the Strip, Michael Lea and members of his family were using the route through the stackyard in order to get to the Meadow.

Mr Ward explained his plans were to live in Dodecote Grange and develop the barns and outbuildings. Initially this was to develop the barns into 16 holiday cottages and permission for these purposes was granted in 1999. There was no objection from Michael Lea. However, Mr Ward abandoned that plan and decided to try and develop the barns into 6 residential properties. He gave evidence that an articulated trailer was parked on Strip on the verge in the position shown by a photograph taken by Mr Owen in 2003 (the lower photograph on sheet 4 of the glossy photographs) by what is now unit 1 for a number of years after he had cleared the Strip. No one had ever complained about this as being on, or interfering with, a right of way. In 2007 Mr Ward applied for planning permission for the 6 residential properties. He says that after the application had been submitted, but before the time for objections had expired, he met Michael Lea in the vicinity of point D and had a discussion with him about the planning application. Mr Ward said that Michael Lea said that while he did not particularly like the idea of neighbours, he was not going to object. In my judgment, it is likely that Michael Lea did know of the planning application in 2007. However, in my judgment it is unlikely that he had appreciated the details of the planning application and in particular that it involved developing gardens over the Strip. Having seen them give evidence, I have little doubt that had Michael Lea or his wife appreciated the potential removal of the newly-restored access along the Strip, he or his wife would have raised concerns and possibly formal objections.

Planning permission was granted in 2007, but Mr Ward was unable to raise the necessary finance to carry out the development because of the financial crisis which hit the country and caused banks to stop lending. It was not until 2014 when Mr Wilson started to take steps to assist Mr Ward obtain finance from Helmsley that the project came back to life. At this point, the issue of whether there was a right of way and, if so, where it ran came to the fore, leading to the meeting on 5th June 2014 and the draft Deeds of Gift and Surrender to arrange the exchange of rights as set out above. Mr Ward said in cross-examination that on 6th June 2014 he had gone to see Mr Blakeman to talk about the right of access over his land. He said that Mr Blakeman had no objection at all and gave Mr Ward details of his solicitors. This was surprising evidence, which one would have expected to have been in his witness

statement given its potential importance. It also is surprising that there should have been no mention of this by Mr Wilson either at the time or in his evidence. I reject this evidence, but given its marginal relevance to the issues which I have to decide it does not affect my overall perception of Mr Ward's evidence.

He described the conversation between his wife and Mr Temperton (which she also confirmed in her unchallenged witness statement) in which Mr Temperton asked for £90,000. He emailed Mr Temperton following this and received back an email saying that the Leas wanted £40,000 plus their legal costs, stating that this was well below the consideration that they should receive. Mr Ward felt Michael Lea and his wife were being unreasonable and did not respond. There is no doubt that Mr Ward felt aggrieved at the Leas' stance, he thinking that this was all a matter of money as far as Michael Lea and his wife were concerned. He decided to leave the track in place as it would be a better solution for the owners of units 5 and 6 when they were developed.

Mr Ward continued the development without further contact with the Leas or Mr Temperton, until he saw the latter at a shoot in December, 2014 and told him that he would not be accepting the Leas' offer. In April 2015 Mr Ward erected Heras Fencing at either end of the Strip. This was done without any consultation with Michael Lea. He says that this was done because of the dangerous nature of the building works and, in particular, the state of units 5 and 6. He accepts that the Strip was blocked, but says that this caused no practical difficulties because the route through the stackyard was always available. It was only in July 2015 that the Leas complained about it, i.e. after it had been in place for 2-3 months. Mr Wilson in response explained that it had been done on safety grounds, and included with his response annotated photographs showing the dangerous state of units 5 and 6. He subsequently sent Mr Hutsby a copy of the letter from Mr James Mewis, a structural engineer, confirming that he had advised that the buildings were not stable and that fencing should be erected to keep people away from unit 5. The response from Mr Wilson had also asked that the Leas continue to use the route through the stackyard, which was available to them. It was suggested to Mr Ward in his cross-examination that he was making things up to frustrate the use by Michael Lea of the right of way. In my judgment, there were good reasons for erecting Heras Fencing around unit 5. However, it was not necessary on grounds of safety to have erected Heras Fencing at either end of the Strip in addition to that around unit 5. In my judgment, while I do not accept that he did this on a tit for tat basis in retaliation to the Leas' attempts to make life difficult for him, Mr Ward erected the fencing in order to make the development easier for those working there, particularly in respect of the creation of manholes in the Strip in this period and he did this in disregard of Michael Lea's right of way. He ought to have consulted them before doing this, as he would accept with the benefit of hindsight. The Heras fencing was, however, removed following a notice from Shropshire County Council dated 1st September 2015 requiring its removal and was no longer there when Mr Davies made his next trip to the Meadow to deliver sheep.

Subsequent to this, in November 2015 Mr Ward erected the low walls coming out from unit 1, the return wall, the retaining wall and the gate posts, for the purpose of fixing a 4metre-wide gate. He says that this was done for security and safety reasons as there had been a problem with vehicles speeding down the track which threatened the safety of the workmen and potential new resident occupiers. It is his view that none of the walls stand on the right of way. When he received a complaint about this from Mr Hutsby on behalf of the Leas, he took the view that they were simply being difficult because he had refused to pay them a large sum of money to divert the right of way. In the correspondence between solicitors

that followed, Michael Lea's solicitor asserted that the right of way had to be a minimum width of 5 metres in order for machinery to pass along the right of way and into the Meadow. Once the gate had been put in place, there was further correspondence from Michael Lea's solicitor dated 13th January 2016 alleging that the right of way had been obstructed by the gate and that it was proposed to issue injunctive proceedings against him.

Because of the dispute and the subsequent proceedings (issued in May 2016), Mr Ward has not been able to sell unit 1. Units 5 and 6 are as yet undeveloped.

The final witness to give live evidence was Robert Lea. He was the most impressive of all of the witnesses who gave evidence as to the state of the track and the Strip leading up to the 1979 Deed. He had not been to the farm for about 25 years. Despite having fallen out with his brother many years ago, he had no axe to grind. He made appropriate corrections to his witness statement at the commencement of his evidence agreeing with some of his brother's observations as to when there were sheep on the farm and the dates when his brother had been away from the farm. He confirmed the approximate dates of the dairy herd being culled and clarified the situation with the beef herd.

As to the right of way, he was clear that the right of way that he understood was reserved by the Deed of Gift was a right over the track as it could be seen on the ground at that time and was not over the whole of the Strip or anything beyond the worn track. He explained that the route through the stackyard was the route used for the vast majority of the time, it being more convenient than the track which he described as bumpy, uneven and pitted. In cross-examination he said that the track was a rough track. There were two wheel tracks, with grass growing up the middle. It was a cobbled type of track. It was full of holes that needed patching up.

He explained in some detail in cross-examination what buildings had been where (the Dutch barns had fallen in) and what each building had been used for. As to unit 5, he said that had been used for tipping roots and mangles which would go up an elevator to the first floor of the building into the slicer, be cut and then come back down into the next part of the building where they would be put into the trucks on the railway lines and would go through to be fed to the cattle. What has now been described as unit 6 was used for cattle when he was a boy. The cattle would be tied up in this unit or allowed to run loose into the yard behind the unit. His father had finished cattle farming a long time before 1979, although Robert Lea did reintroduce cattle in about 1982. By the time of the 1979 Deed the cowsheds and barns stood empty and were derelict. He said that there was never any need to access them from the track.

He said that a Bill Hughes had kept pigs in the first stalls of unit 1 under an agreement with John Geoffrey. This was nothing to do with Robert Lea, but he thought it was in the late 70s or early 80s. Attached to the cornhole, there was a wooden platform or jetty that was in front of the door. It did not extend across the track. As to the loading bay, it had a lip which extended out about 2 feet. He said a lorry would reverse under the lip. A hollow had been jack hammered out below to let the lorry get under the lip. He said that the hollow extended about 4 feet. The hollow would fill up with water, which would be the best part of 2/3rd of the way up the lorry wheel, about 2 feet 4 inches. The puddle edge went up to the edge of the track. The lorry used was about 15 feet long. The front wheels would be out of the puddle on the sandstone, the lorry would be at an angle back towards the loading bay. On the other side of the track, he said there was a drop of about 2 feet to the bottom

of the doors to unit 6. The doors would not open back to the wall. He said one would not have wanted to drive into that drop or one would be in trouble.

As the person who was most closely involved with working the farm in the period up to the 1979 Deed and as someone without any interest in these proceedings, I have no hesitation in accepting Robert Lea's evidence as to the state of the track and the buildings.

In addition to these witnesses who gave live evidence, I have also read and taken into account the evidence in the witness statements of those whose evidence was not challenged.

The most relevant of this evidence is as to the state of the track in 1994 and before, which I have commented on above. I accept their evidence in this regard.

I was also referred to a 1969 Ordnance Survey map of the area. This shows marked with dotted lines a track going along the Strip. I am told that a dotted line indicates a difference in elevation of less than ½ a metre. The OS map appears to show a track which does not run completely straight but rather is slightly curved starting away from the southern end of unit 1, appearing to get very close to the northern end of unit 1and the southern end of unit 5 before curving away from the northern end of unit 6. The difficulty with relying on a plan like this is that 1 mm on the plan equates to 2.5 metres on the ground, so that making an estimation of where the track is shown to be is inevitably prone to significant inaccuracy.

Issues

It is against this evidence that I have to address the issues in the case. The legal principles as to interpretation of the 1979 Deed, which reserved the right of way, are not in dispute between Counsel for the parties. Each agrees that the normal principles for interpretation of contractual documents are applicable, albeit that each refers to different authorities to show how they have been applied to cases on conveyances. The most recent exposition of these principles by the Supreme Court is the decision in *Wood v. Capita Insurance Services Ltd.* [2017] 2 WLR 1095 at paragraphs [10] to [15]. Without quoting these, I will apply those principles to ascertain the objective meaning of the language which the parties have chosen to express their agreement. As Morritt LJ (as he then was) said in *Mills v. Blackwell* [1999] EWCA Civ 1852:

"*Thus, the process of construction does not just start with a consideration of the words, but one has to consider the words, one has to consider the surrounding circumstances, and then one must reach a conclusion as to what the parties' intention was as expressed in the deed.*"

I have also been referred by Counsel for Mr Lea to extracts from the 19th and 20th editions of Gale on Easements in connection with general principles as to the construction of a grant.

At paragraph 9-26 of the 20th edition the editors say:

"*... in construing a grant the court will consider (1) the locus in quo over which the way is granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used*" *Cannon v. Villars* (1878) 8 Ch D 415

I accept the Defendant's Counsel's submissions that admissible aids to construction include:

The contents of the 1979 Deed including the plan to the Deed; (b) The background circumstances, including:

The historic use of the land which was the subject of the 1979 Deed (and of the retained land over which rights were reserved under the 1979 Deed);

The nature of the transaction (i.e. splitting a working farm in circumstances in which one of the 2 partners of the farming partnership, the grantor, was on the point of retirement);

The physical appearance and condition of the land at the date of the 1979 Deed.

Where is point D?

Logically the first issue that I have to decide is where point D is. As I have said above, the plan to the 1979 Deed is not sufficiently detailed to enable the precise position of point D to be ascertained from it. It is, however, the place where Dodecote Drive, Bolas Lane and the track running up to point F intersect. It cannot literally be a point, but must be a place of some area, given that each of Dodecote Drive, Bolas Lane and the track have width. Dodecote Drive effectively continues in a straight line into the main entrance to Dodecote Grange. Therefore, in my judgment point D (or rather area D) must be opposite the entrance to Dodecote Grange at the position where Dodecote Drive intersects with the track coming up from Bolas Lane. As the track from Bolas Lane does not abut the outbuildings to Dodecote Grange, but is some way out beyond them, point D is not a point or an area which is in line with the southern end of unit 1 but is some way further out into the middle of this intersection. It must lie within the land now comprised in title SL79512, that is the land owned by Mrs Ward as that title includes the whole of Dodecote Drive and Bolas Lane in this area. Doing the best that I can on the available evidence, in my judgment, point or area D is located just to the south of the southernmost of the walls coming out from the parking area in front of unit 1. Its precise location will be the end of the right of way under paragraph (a) of the First Schedule to the 1979 Deed, which is the question to which I must next turn.

What is the width of the strip of land over which the Claimant is entitled to exercise a right of way under paragraph (a) of the First Schedule to the 1979 Deed?

The Claimant contends that as regards the land in Mr Ward's ownership, the right of way is over the whole of the Strip from the walls of the cowsheds to the embankment on the opposite side. This is approximately 8 metres and is a much greater width than the width of the track continuing after the northern most point of unit 6 up towards point F. The Defendant contends that it is limited to the width of the track physically discernible on the ground as at the date of the 1979 Deed.

It is to be noted that the 1979 Deed was professionally drawn up and different terms were used in different parts of it, indicating that the draftsman intended there to be differences between what was being described at various points.

The starting point in construing the grant reserved under the Deed must be to look at the words of the reservation in the Deed itself. There is a distinction within the 1979 Deed between the wording used in respect of the 3 rights of way reserved, the first being over "the road or way" from Dodecote Grange to Dodecote Gates cottages, the second being "over the track or way" being enclosure number 5622, the third (the one in issue) also being "over the track or way along the south-westerly side of enclosure number 4362".

In my judgment the most natural reading of the right of way being "over the track or way" is to limit the right of way to the track that was actually in use at the time of the 1979 Deed. What was actually in use would be evidenced by what was physically discernible on the ground at that time. The natural meaning of the expression "track or way" is something recognisable and having been beaten by use. In my judgment, this would not include the verges, but would be the physical extent of the track in use in 1979. I am supported in this conclusion by the observations of Elias LJ in *Oliver v. Symons* [2012] EWCA Civ 267 at paragraphs [11] and [12] in which he approved the first instance judge's finding that

"accessway" meant the track which physically existed at the date of the grant and did not extend beyond that to include verges on either side of the track.

Had the draftsman intended that the right of way was to extend across the width of the whole of the Strip, he could and (it is submitted on behalf of the Defendant) would have said so expressly, such was the care that he demonstrated elsewhere. That he did not do so suggests that he was intending to limit the right of way to something less than the whole Strip. It is to be noted that the right of way is not described as being along the "edge" of enclosure number 4362 which would imply it was right up to the cowsheds, but "along the south-westerly side", being a more general description of location. Again, this is a further indication that it was not intended that the right of way would extend the whole way across the Strip.

However, the Claimant places reliance on sub-paragraph (d) which reserved rights to the grantor in the following terms:

"*the right with or without workmen and necessary materials to enter from time to time into or upon so much as may be necessary of the drive or way between the points marked C and D on the said plan and so much as may be necessary of the track or way between the points marked D and F on the said plan where the same adjoin any buildings on the Retained Property for the purpose of inspecting repairing and maintaining the said buildings doing thereby as little damage as possible and making compensation for all damage done*"

The Claimant says, and it must be correct, that the right of way reserved in sub-paragraph (a) would not include a right to enter onto or open up the track or way for the purpose of inspection, repair and maintenance. Therefore, the Claimant's argument runs that in order to inspect, maintain and repair the buildings on the Retained Property (which at that time included the Dodecote Barns) from the land gifted away, it was necessary for an express right to be reserved to enter onto the land gifted away for these purposes. The only express reservation is not one to enter onto the gifted land generally for the purposes of inspection, repair and maintenance, rather it is to be found in sub-paragraph (d). If the track or way between points D and F did not extend the whole way across the Strip, there could be no places where the track or way could "adjoin" any buildings on the Retained Property. Therefore, sub-paragraph (d) would be of no effect in respect of the track or way between points D and F and there would be no right reserved by the grantor to enter onto any part of the gifted land for the purpose of inspection, repair or maintenance.

While the easement was extinguished in 1987 when Robert Lea became the owner of both the stackyard, which at that time included the Strip, and the Dodecote Barns and there is now no need for any such right of entry because the Strip is in the same ownership and now forms part of the same title as Dodecote Barns, that does not in my judgment prevent the Claimant from relying on sub-paragraph (d) as an aid to construction of the words "track or way between the points marked D and F" in sub-paragraph (a) of the First Schedule to the 1979 Deed.

In my judgment, this argument based on sub-paragraph (d) is a forceful one. The only other sub-paragraph which could have reserved a right to enter onto the gifted land is subparagraph (e) of the First Schedule. This would be on the basis that the right to inspect, repair and maintain was caught by this sweeping-up provision. However, in my judgment to so hold would be to do violence to the language of sub-paragraph (e) which talks about "*all other privileges in the nature of light air support drainage way or passage and other*

like privileges of a continuous nature …". A right to inspect, repair and maintain is not a privilege in the nature of, or like, the others identified in sub-paragraph (e).

The Defendant seeks to counter this by saying that an interpretation that the "track or way between points D and F" extends across the whole of the Strip would call into question all other references to a "track or way" used elsewhere in the 1979 Deed, because it could not be assumed that those words should have their natural meaning. The short answer to this is firstly that there are no issues before me as to the rights of way granted elsewhere by the Deed of Gift and secondly, this would appear to render sub-paragraph (d) of no effect.

The Defendant submits that the wording of sub-paragraph (d) can be explained on some other ground. He suggests that there may have been some points (e.g. to the south of point D) where the physical track did in fact meet the adjacent unmade track i.e. without any intervening grass verge. However, the track to the south of point D is that between points C and D and not that between points D and F, so that cannot assist the Defendant. Next the Defendant says that the track may have extended to the south east to form entrances to the external doorways to the cowsheds in a comb like pattern, so that sub-paragraph (d) only conferred a right of access at those points, and the Claimant would have to prove the particular points at which the track met the external elevations of the buildings as at the date of the 1979 Deed. It is said that on this basis it is entirely conceivable that subparagraph (d) did not reserve any right of access for the purposes of inspecting, repairing or maintaining any part of Dodecote Barns lying to the north of point D. Again, however, that would mean that the reference to the track or way between points D and F in subparagraph (d) would serve no purpose.

The Defendant's final submission in this respect is that sub-paragraph (d) can be interpreted consistently with a narrow interpretation of "track or way" simply by reading the word "adjoin" as if it meant "lie adjacent to" and in so doing effectively undertaking rectification by construction as described by Lord Hoffman in *Chartbrook Plc v. Persimmon Homes Lt* [2009] 1 AC 1101 at [23]. If it was so interpreted, this would mean that there would be a right of entry onto the track, but there would be no right of entry onto the verge between the edge of the track and the walls of the cowsheds. That would be a strange conclusion to come to.

Accordingly, in my judgment, the wording of sub-paragraph (d) does support the conclusion that the expression "track or way between points D and F" includes the whole of the Strip, contrary to the natural meaning of the words. But this is but one part of the iterative process of interpretation.

As to the background circumstances, the Claimant prays in aid that the whole of the Retained Property which was to have the benefit of the right of way between points D and F was in the hands of one owner, John Geoffrey, as at the date of the 1979 Deed. The right was therefore reserved not just for the benefit of the Meadow (which is the land now owned by Michael Lea) but for the benefit of the foldyard, the Dodecote Barns, the Big Field and
the Aerodrome. It is said that as John Geoffrey was entitled to use the Retained Property for the purpose of farming (even if not by himself but on his authority for example by his son, Michael Lea, in respect of the Meadow), or as Bill Hughes was entitled to use what is now unit 1 for his pigs, and that for such purposes the accessway into the foldyard or the doors on unit 1 facing the Strip could be used, it must have been in the contemplation of the parties that the whole of the Strip would be shared. It is precisely where there is likely to be shared

use that the parties would have wished to make sure there was ample space, which there would be if the right of way was over the whole Strip. It is pointed out that no reason has been put forward as to why John Geoffrey would have wanted to limit rights to only one part of the Strip.

As to the physical characteristics of the Strip, there were 3 ways leading to or from the Strip:

The field track from point F, which as described above was a clearly discernible track bounded on one side by a hedge and on the other by an arable field which was farmed right up to the edge of the track;

Dodecote Drive coming from point E, which had the pinch point observed above at the site visit;

Bolas Lane coming from point C, which had the gate and the pinch point observed above at the site visit.

There is no doubt that each of these 3 ways leading to the Strip is narrower than the Strip itself which is some 8 to 9 metres wide. In my judgment, it is clear that a vehicle wider than 370 cm could not get to the strip if coming up Dodecote Drive, nor could one wider than 430 cm if coming up from Bolas Lane. It is said on behalf of the Claimant that there is no basis for limiting the right of way to this width as there are many more internal movements than there are external movements on a farm. However, there has been no evidence adduced before me to show any vehicle having used the farm prior to the 1979 Deed, which approached 370cm in width let alone exceeded it. In my judgment, there is every reason for supposing that the original parties to the 1979 Deed intended that the width of the right of way between points D and F would not exceed that which had been habitually used up to the time of the Deed. I therefore reject the submission made on behalf of the Claimant that what the parties to the 1979 Deed intended was that the right of way should be of sufficient width to accommodate all agricultural machinery in the future, regardless of how big such machinery became, subject to the overall limitations of the width of the Strip.

As will be clear from my review of the evidence set out above, I find that as at the date of the 1979 Deed there was a clearly discernible physical track which did not extend the whole way across the Strip. The track was similar to that shown in the 1969 photograph. It was formed of worn stone. It had grass growing up between two wheel tracks. There was a grass verge on the side adjacent to the cowsheds and the embankment on the other side. I accept Robert Lea's evidence that the puddle created by hollowing out the stone under the loading bay extended about 4 feet and went up to the edge of the track, but not onto it, and reject all evidence suggesting that the hollow extended any further and on to the track. As lorries had to reverse into this at an angle from the track, the likelihood is that the embankment extended out to the south of the loading bay up to the edge of the track.

The width of the embankment is shown in the January 2003 photograph which was taken before any of the embankment was cut back (this was the photograph by reference to which Mrs Lea accepted that the track in 1979 would more or less have occupied the same position as shown in the photograph). This photograph shows a verge running up against the cowsheds which is wide enough to park an articulated trailer on, the width of a typical trailer being approximately 2.5 metres. Allowing for the fact that the articulated trailer can be seen not to be right up against the wall of unit 1 but some way away from it, the verge must be at least 3 metres wide at that point and appears to be approximately the same width the whole way down. The 2003 photograph also shows the track running past the loading bay and not diverting towards it, just as Robert Lea had described it.

While the photograph shows at the gap between the northern end of unit 1 and the southern end of the as yet undeveloped unit 5 a visible entrance into the foldyard, which appears to be in use, by contrast the 1972 and 1977 aerial photographs show nothing like the sort of wear in this area as on the track. Therefore while it was clearly possible to access the foldyard between units 1 and 5 and it must have been accessed occasionally, in my judgment this access had fallen into disuse by the time of the 1979 Deed, as is consistent with Robert Lea's evidence of the foldyard not being in use at this time, or was not of such regularity, so as to extend the track into that entrance.

As to the jetty by the cornhole, I find that this was built into the embankment and did not extend out over the track itself. However, it was no longer in a usable condition by the date of 1979 Deed (according to the evidence of Mr Brownsill) and I find the jetty was not in the contemplation of the parties to the 1979 Deed when they entered into it.

I reject the evidence adduced on behalf of the Claimant that the track covered the whole width of the Strip. In particular, I reject the evidence of Jon Lea, Robert Lea's son, as to 2 cars having been racing side by side down the Strip. Even if this had happened, contrary to the evidence of one of the 2 alleged drivers, there is no evidence of it happening more than once so as to establish a greater width to the track.

It is possible that there was the odd occasion when a lorry would be parked under the loading bay when another farm vehicle came down the track and had to divert around the lorry. However, there is no evidence of this having happened with any regularity, such as to have widened the track at this point. It is entirely possible that if this happened, the diversion would have been made using the entrance into the foldyard.

I reject the submission that people walked or drove vehicles at will over the Strip. To the contrary, I find that people drove vehicles down the track physically on the ground.
The occasional diversion was not sufficient to widen the track physically.

Nor do I accept the evidence of Michael Lea and his wife that they drove sheep (on foot) over the Strip many times in the period from 1967 until 2000. In 1967, Michael Lea kept his sheep on Dorset Field and Snake Field. There would have been no need for sheep to have been driven up and down the Strip on a regular basis prior to the 1979 Deed. I note here the distinction between the right of way granted to the donee in sub-paragraph (1) of the First Schedule which was "*at all times and for all purposes with or without vehicles of all descriptions and with or without animals*" and the right reserved in sub-paragraph (a) of the same schedule was "*at all times and for all purposes*" with no reference to vehicles or to animals. I therefore find that whatever the extent of the right of way, it was not one which extended to use with animals (see *Alford v. Hannaford* [2011] EWCA Civ 1099 at paragraphs [13]-[14]), albeit that I accept that the right of way does extend to use with vehicles.

As to the doors of the cowsheds facing onto the Strip, I find that in 1979 none of these doors was in use. The cowsheds had begun to fall into some disrepair. By 1979, the dairy herd had gone and the beef herd had gone. While the doors might have been capable of use, there is no evidence that at this time they were being used. Access to these units was possible from the foldyard and from the western side of what is now unit 1, as is shown by

the 1977 photograph. There was therefore no need for any right of way to be maintained to the doors on the Strip.

In my judgment, the physical track on the Strip is highly likely not to have been wider (or at least significantly wider) than the track once past the northern most end of unit 6 heading up to point F. While the latter does not necessarily limit the width of the right of way over the Strip, it would be a very unusual situation where the right of way halved in width part way along its length.

Doing the best that I can on the evidence available to me, therefore, I find that the track physically present on the Strip was no more than 3.75 metres wide along the whole length of the Strip. I reach this conclusion on the following basis. The distance between the retaining wall and the cowsheds close to unit 1 is approximately 8 metres. The retaining wall is at the approximate position of the top of the embankment. The embankment would have extended approximately 4 feet or 1.25 metres out from its top, being the distance which the hollow extended under the loading bay, but which did not extend into the track. On the other side the verge was approximately 3 metres wide. The distance therefore across the track would be 8 - 1.25 - 3 = 3.75 metres. While the width of the entire Strip may have narrowed or widened at other places along its length, there is no suggestion that the track on the Strip narrowed or widened.

In passing, I should say that the existence or otherwise of a public footpath on the Strip is of no relevance to the grant of the right of way. I therefore do not need to lengthen this already lengthy judgment by addressing arguments as to the public footpath.

I am therefore faced on the one hand with an argument based on sub-paragraph (d) that the expression "track or way" should be construed widely to extend to the whole of the Strip otherwise sub-paragraph (d) appears to have little or no effect and on the other hand with clear findings that the physical track or way on the Strip extended only to a physically discernible track of no more than 3.75 metres width.

In my judgment the Defendant's arguments are correct on this issue and the right of way was limited to the physically discernible track of no more than 3.75 metres in width. I so find because this interpretation fits much more closely with the natural meaning of the words "track or way" used in the 1979 Deed. While the effect of this is to give little, if any meaning, to sub-paragraph (d) of the First Schedule, in my judgment the explanation for this is that something has gone wrong with the wording of sub-paragraph (d) and it cannot properly be read as intending to extend the natural meaning of the words used in subparagraph (a) to the whole of the Strip, including the verges, from the wall of the cowsheds to the embankment.

The Claimant has sought to rely on sub-paragraph (e) of the First Schedule to the 1979 Deed in support of his claim that in the event that I find (as I have) that the right of way was restricted to the physical track and did not extend to the whole of the Strip, it nevertheless carried with it the right to overhang, swing and manoeuvre vehicles and equipment over the verges. In my judgment, this argument fails. It is clear law that an owner of land is entitled to build right up to the boundary of his land, so that building right up to end of his land does not interfere with a right of way which abuts his land. A dominant owner has no cause for complaint if he is restricted in his user of the way to the exact width of the way (see *Minor v. Groves* (2000) 80 P&CR 136 at 143).

Further, as Elias LJ noted when rejecting a claim for swing space in *Oliver v. Symons* [2012] P&CR 19 at paragraph 41:

"*… That is not to say that it could never be the case that a purposive interpretation of an express grant, having regard to which the purpose for which the right was granted, could justify a construction extending the width of a track beyond its physical dimensions. But in my view before the Court could consider this possibility there would need to be cogent evidence that a narrower construction, concentrating on the physical features of the land, would not achieve the objective which the parties must have attended. In this case there is evidence that some agricultural machinery can use the track without difficulty.*"

There has been no evidence before me, let alone cogent evidence, that the narrower construction of limiting the right of way to the physical extent of the track would not achieve the objective that the parties must have had. There is plenty of evidence that agricultural machinery could, did and continues to, use the track without difficulty.

"If the right of way does not extend the whole way over the Strip, what is the location of the right of way within the Strip?"

It will be clear from my conclusions set out above, that the right of way does not extend the whole way over the Strip. Its location is that occupied by the physical track before 1979. For the reasons set out above, doing the best I can on the evidence before me, in my judgment, the right of way lies approximately 1.25 metres from the retaining wall on the eastern side of the Strip and extends for 3.75 metres towards the western side of the Strip. That is to say that its westernmost edge is 5 metres from the retaining wall. It runs to the north parallel to the line of the retaining wall and then to the concrete face of the loading bay at a distance of 1.25 metres from such features. Thereafter, its edge is at the bottom of the embankment but it continues to extend 3.75 metres to the west.

It also extends south to point D. The western edge remains on a straight line 5 metres out from the line which would be a continuation of the retaining wall if it continued in a straight line south from the point it curves until it meets the right of way coming up from Bolas Lane. On the eastern side, the right of way follows the line of the retaining wall as it curves at a distance of 1.25 metres from the wall and then meets the right of way coming up from Dodecote Drive.

Was the right of way substantially obstructed by the Heras fencing erected by the Defendant in April 2015 and removed on 18 September 2015 such that it constituted a nuisance by way of substantial, albeit temporary, interference?

The test to be applied is that set out in *B&Q Plc v. Liverpool & Lancashire Properties* (2001) 81 P&CR 20 at [39], [45] and [48], namely there must be a substantial interference with the enjoyment of a right of way. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. The test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence on being able to continue the use of the whole of what he contracted for is reasonable. Provided that what

the grantee is insisting on is not unreasonable, the question is: can the right of way be substantially and practically exercised as conveniently as before?

There can be no doubt that while the Heras fencing was in place, the right of way was completely obstructed. It might have been possible for Michael Lea to have moved the Heras fencing on each occasion he wished to use the right of way, but even so that would have amounted to a substantial obstruction. It cannot have been unreasonable for Michael Lea to have insisted on being able to use the right of way, and it is plain that the right of way, being blocked by the Heras fencing, could not be substantially and practically exercised as conveniently as before: it could not be exercised at all. Accordingly, in my judgment, there was a nuisance by way of substantial, albeit temporary, interference.

The Defendant's counsel accepted in his oral closing submissions that this must be the case.

Is the Claimant entitled to general damages at common law for the nuisance caused by the Heras fencing, if any, and, if so, in what sum?

In my judgment, the Claimant must be entitled to damages at common law for the nuisance caused by the Heras fencing.

However, although a nuisance was caused, the practical effect on Michael Lea was limited. He took no steps to complain about this for 3 months after the fencing was erected. When he raised a complaint via Mr Hutsby, the Defendant's solicitor responded acknowledging the Claimant's right of way, explaining the need for the Heras fencing and inviting Michael Lea to use the alternative route through the stackyard. While, as I have said above, it was not necessary on grounds of safety to have erected Heras Fencing at either end of the Strip in addition to that around unit 5, damages for nuisance are not to punish, but to compensate. In addition, the Heras fencing had been removed before Mr Davies came to deliver his next load of sheep. There is no evidence of any substantial inconvenience having been caused to Michael Lea. I agree with the submission made on Mr Ward's behalf that but for the events which followed, it is highly unlikely that the complaints about the Heras fencing would ever have seen the light of day in a courtroom.

In all the circumstances, in my judgment, the appropriate award to make for this is an award of nominal damages. I therefore award Michael Lea the sum of £5.00 by way of damages in this respect.

Is the width of the way available for use so restricted as to be substantially interfered with by the items constructed and erected in the period from early November 2015 to the end of January 2016 and maintained ever since given the layout of those structures and erections and their physical relationship with the profile of the ground over which vehicles are legally entitled under the right of way to approach them either from the south or from the north?

The pleaded case on behalf of Michael Lea as to the obstructions complained about by reference to annotations on photographs appended to the Particulars of Claim are the retaining wall on the eastern side of the Strip, the gate posts, the reverse wall joining the northernmost of the 2 walls protruding from unit 1 and the northernmost of the 2 walls protruding from unit 1. Mr Ward's Counsel complains that the Claimant is now trying to expand his claim beyond that pleaded by adding the southernmost retaining wall and the parking space/garage entrance created by and between the 2 retaining walls. While it seems to me that there is some justification in the complaint, given that I have made a ruling as to the location of the right of way, it makes sense to consider each of the items identified.

The test for substantial interference is as set out above derived from the *B&Q* case.

It is also well established that a servient owner has no right to alter the route of an easement of way unless such a right is an express or implied term of the grant of the easement or is subsequently conferred on him (*Greenwich NHS Trust v. London & Quadrant Housing* [1998] 1 WLR 1749 at 1754G-H). A servient owner cannot by provision of a new right of way prevent acts of obstruction of the old route from being in principle actionable. The availability of the new route goes to remedy, but does not extinguish the original right. Where an equally convenient alternative route is available, the court may decline to grant an injunction to enforce use of the original route, but there is no reason in principle why it should not grant other relief, such as a declaration as to subsistence of the right or compensation (*Heslop v. Bishton* [2009] EWHC 607 (Ch) at paragraph [25]).

It follows from my finding as to the position of the right of way that I reject the submission on behalf of Mr Ward that the western boundary of the current track (being the western end as it goes through the gate) is in the same location as it always was. The current track is 4 metres wide, running from the current position of the retaining wall. In my judgment, the western edge has moved approximately 1 metre to the east. The eastern edge has moved approximately 1.25 metres to the east. The overall effect has been to widen the track which is available for vehicular use to 4 metres from 3.75 metres. There has been no claim that there is an express or implied term allowing the servient owner, Mr Ward, to alter the route of the right of way. Accordingly, the provision of this new and wider route does not prevent acts of obstruction of the old route from being actionable.

It also follows that the retaining wall on the eastern edge of the Strip and the gate post attached to it have not been built on the right of way and there cannot be any substantial interference with the right of way by having built the wall and erected the gate post.

However, the western gate post has been built on the right of way, as has the reverse wall joining the northernmost of the 2 walls protruding from unit 1. At the easternmost point, the reverse wall is approximately 1.5 metres into the right of way, but as it angles towards the gate post, that intrusion reduces to 1 metre. The northernmost retaining wall similarly extends approximately 1.5 metres into the right of way, as does the southernmost retaining wall and the car parking area.

It is not unreasonable for Michael Lea to insist on being able to exercise his right of way over the whole of the width of 3.75 metres. That is his entitlement, as I have found it. In light of my findings as to the positioning of the items which have been constructed, it cannot be said that the right of way can be substantially and practically exercised as conveniently as before. The effect of the position of the northernmost retaining wall is that Michael Lea is left with only 2.25 metres of the right of way.

In my judgment the profile of the ground is not relevant to this question although it may become relevant to the following one.

Accordingly, I find that the erection of the easternmost 1.5 metres of the northernmost retaining wall, the reverse wall leading from the end of that to the gate post and the gate post does amount to a substantial interference with Michael Lea's right of way. I also find that the erection of the easternmost 1.5 metres of the southernmost retaining wall also amounts to a substantial interference. There is no cogent evidence of any change in gradient over the first 1.5 metres of the parking space from what was there before, so I do not find that the

parking space (including the blue bricks) amounts to a substantial interference with the right of way.

Is the Claimant entitled to a mandatory injunction to remove any or all of those physical structures/erections?

It is accepted that whether a mandatory injunction is to be granted is a matter of discretion for the Court. If I were to hold that the alternative route which has been created is equally convenient for Michael Lea, it would be open to me to decline to grant an injunction to enforce use of the original route (see *Heslop v. Bishton* (supra)).

I was referred by counsel for Mr Ward to the principles set out in *Morris v. Redland Bricks Ltd.* [1970] AC 652 in particular to the passage at page 665G to 666G. It is submitted by counsel that this is not a case where there is a very strong probability that grave damage will accrue to Michael Lea in the future. In my judgment, this all depends on whether the alternative route which has been created is equally convenient for Michael Lea. If it is not, then in my judgment the damage which he will suffer will amount to "grave damage" in the circumstances of this case. I would then have to take into account the cost to Mr Ward of having to take down the obstructions. No evidence has been put before me of the cost of reducing the length of the retaining walls attached to unit 1 or of demolishing the reverse wall or the gate post, but having seen these items on site, it is unlikely that the costs would be of such significance that they should deter me from granting a mandatory injunction if I were otherwise minded to do so.

I am also entitled to take into account the conduct of the parties. As I have stated above, the parties appeared to be getting on fairly well and were content to negotiate until the issue of compensation was raised and very substantial figures were suggested by Mr Temperton.

From that point on, the parties fell out and clearly distrust each other.

Mr Ward says that this case is all about money from the point of view of the Leas, having failed to obtain any payment in June 2014. He relies on the fact that there had been

no complaint about the presence of the articulated trailer or of the low loader which had been there for many years without anyone suggesting it restricted Mr Lea's right of way. Mr Ward points to the conduct of Mrs Lea in trying to cause as much difficulty as she could for his development both by herself and her daughter and son-in-law and also by the attempted use of the track for the purpose of driving sheep in July 2016. Mr Ward says all of this conduct is because of her desire to extract money. As she was the one running this litigation for the benefit of her husband, her acts must be attributed to him for these purposes. In her evidence before me, Mrs Lea said that money was not the be all and end all, albeit she never told Mr Temperton or the Wards not to worry about the money.

It is therefore submitted on Mr Ward's behalf that this is a case similar to that of *Gafford v. Graham* (1999) 77 P&CR 73, where a plaintiff had made it clear that he would not object to building in breach of a restrictive covenant in return for a payment of a cash sum. In that case the Court of Appeal held that it would be oppressive for the defendant to be required by mandatory injunction to demolish a riding school he had built in blatant disregard of the claimant's rights.

In my judgment, this case is a very long way from that one, as Ms Hutton for Michael Lea submitted. What the Leas thought they could get was compensation for accepting a right of way through the stackyard instead of what they believed to be was a right of way across

the Strip. They only appeared to have done this as a result of being led down this route by Mr Temperton. These discussions all happened significantly in advance of Mr Ward constructing the items I have identified above as amounting to a substantial interference with the right of way.

Mr Ward also asserts that there has been delay on the part of Michael Lea which on the principle of *Shelfer v. City of London Electric Lighting Company* [1895] 1 Ch 287 should lead to no mandatory injunctive relief being granted. In my judgment there was on the facts of this matter no great period of delay on the part of Michael Lea which should on this ground disentitle him to injunctive relief if it is otherwise appropriate. He had threatened injunctive proceedings in January 2016 and issued this claim in May 2016. In the interim the parties' solicitors were in correspondence seeking to resolve or at least narrow the issues. While it is true that he did not seek interim injunctive relief, there has been no work done since January, 2016, so he has in effect achieved all that he could have done by way of interim relief.

As to Mr Ward's conduct, Michael Lea points to the erection of the Heras fencing without any warning and the erection of the walls and gate and the creation of the parking space when the parties were in a dispute about the extent of the right of way, which had started in June 2014. He says that these were acts in blatant disregard of his rights and therefore should weigh in favour of granting an injunction.

In my judgment, each party has behaved in a way towards the other which was unfortunate against the background of having got on relatively well until this matter arose. However, each's behaviour was understandable and not unusual in the context of claims of this nature. I do not think the parties' conduct tips the balance either in favour of or against granting an injunction.

The question of whether or not I should grant a mandatory injunction comes down, in my judgment, to whether the alternative route which has been created by Mr Ward is equally convenient for Michael Lea as the right of way. As regards approaching the right of way from Dodecote Drive or exiting it into Dodecote Drive, I find that it is equally convenient. Although there were suggestions that it was difficult or perhaps even dangerous for Mr Davies to make the turn out of the Strip into Dodecote Drive, there is no evidence of anyone else having difficulties with this. I have seen a video of a smaller sheep lorry making this turn with no difficulty. Even Mr Davies said in answer to a question from me that had he thought the route he was taking was too steep and therefore dangerous, he would have reversed back, pulled forward significantly further and then turned left. He did not say that he actually did so. Accordingly, I reject the suggestion that the turn into Dodecote drive is any less convenient than accessing the original right of way would have been.

However, as regards the approach from Bolas Road, the effect of the layout with the way that the reverse wall causes a vehicle to have to move a significant way to the right and up towards the slope that goes up to Dodecote Drive so that a vehicle is leaning slightly to one side before being able to access the gate on an angle as opposed to straight on does, in my judgment make the alternative route less convenient for Michael Lea than the right of way. Subject to what I say in the following paragraph, I would be minded therefore to grant a mandatory injunction requiring Mr Ward to remove the most easternmost 1.5 metres of both the southernmost and northernmost retaining walls in front of unit 1, to remove the return wall and to remove the gate post. Of course, Mr Ward would be able to put up a

reverse wall and gate post 5 metres from the eastern retaining wall. Were he to hang a 5metre gate on those posts that would not amount to a substantial interference with the right of way. Similarly, if he were to move the gate post out 1 metre from the eastern retaining wall and use the same 4 metre gate that would not amount to a substantial interference as it would maintain the original right of way in its original position. Further, for the avoidance of doubt, should Mr Ward choose to build a wall on the Strip no less than 5 metres from the eastern retaining wall, there could be no objection to that as it would maintain the width of the original right of way in the place that I have found it to be.

Having said I would be minded to grant an injunction as set out in the preceding paragraph, I would not do so if Mr Ward were to be prepared to remove the last ½ metre of the 2 retaining walls extending from unit 1 and to straighten the reverse wall so that it went in a straight line to the gate post in its current position and he were to agree to grant a formal right of way to Michael Lea over a 4 metre width out from the eastern retaining wall and continue such a 4 metre width the whole way down to the end of unit 6. In such circumstances (and the precise wording would need to be worked out by Counsel), I would be prepared to make a negative declaration fashioned on the *Greenwich NHS Trust* case that Michael Lea can have no right to an injunction and should be satisfied by and be restricted to an award of damages in respect of the interference with the right of way. I would hear further submissions from Counsel as to both the wording of this and whether such an order can be extended to cover the position of any other person otherwise entitled to use the right of way that I have found to exist.

Is there a real risk of future substantial interference with the exercise of the right of way such that the Claimant is entitled to a restraining order?

The Claimant has not satisfied me that there is real risk of future substantial interference by Mr Ward with the exercise of the right of way that I have found to exist. Having seen Mr Ward give evidence in this case, I have no doubt that he would accept the consequences of my ruling (subject, of course, to any rights of appeal). I have no reason
to believe that he would erect any further obstructions on the right of way. Therefore I decline to make any restraining order.

Is the Claimant entitled to general damages at common law for the nuisance caused by any of those physical structures/erections that have been found to amount to substantial interference?

The Claimant is entitled to an award of general damages at common law. However, the damages can only be in respect of the nuisance caused by the physical structures I have found to amount to a substantial interference. They have only been in place since late 2015. The degree of interference has not been significant. There is no evidence of Michael Lea or any of his licensees having had great difficulty in using the route through the gate, rather it has been less convenient for those coming up from Bolas Lane. In my judgment the amount of general damages should be relatively low and I assess these at £500.00 on the basis that either the physical structures/erections will be removed pursuant to mandatory injunction and I would expect that to happen in very short order or Mr Ward will have provided an equally convenient alternative route, again in very short order.

If injunctions are not granted requiring removal of any of those physical structures/erections is the Claimant nevertheless entitled to damages in lieu in equity and, if so, calculated on what basis?

At present, for the reasons set out above, it is not clear whether I will in the end grant a mandatory injunction requiring removal of the physical structures/erections which I have found amount to substantial interference. However, if I do not do so, it will be because Mr Ward will have provided an equally convenient route for Michael Lea. In such circumstances, it would not be appropriate in my judgment to make any award of damages in lieu in equity. Accordingly, the issue of the basis on which such damages should be calculated does not arise.

Conclusions

I will make the following declarations or orders:

As to the width and location of the right of way, these are as set out above. I invite Counsel to come up with a form of wording which reflects accurately my findings for me to approve;

A declaration that the erection of the Heras fencing between April and 18th September,

2015 did amount to a substantial interference with the right of way;

An order that Mr Ward pay Michael Lea nominal damages in the sum of £5.00 in respect of such interference;

A declaration that the erection of (1) the easternmost 1.5 metres of the southernmost retaining wall extending from unit 1, (2) the easternmost 1.5 metres of the northernmost retaining wall extending from unit 1, (3) the reverse wall leading from the end of that to the gate post, and (4) the gate post, amount to a substantial interference with the right of way;

Unless Mr Ward indicates that he is prepared to remove the last ½ metre of the 2 retaining walls extending from unit 1 and to straighten the reverse wall so that it goes in a straight line to the gate post in its current position and to agree to grant a formal right of way to Michael Lea over a 4 metre width out from the eastern retaining wall and continue such a 4 metre width the whole way down to the end of unit 6, a mandatory injunction requiring Mr Ward to remove the easternmost 1.5 metres of both the southernmost and northernmost retaining walls in front of unit 1, to remove the return wall and to remove the gate post;

If Mr Ward indicates that he is prepared to remove the last ½ metre of the 2 retaining walls extending from unit 1 and to straighten the reverse wall so that it goes in a straight line to the gate post in its current position and to agree to grant a formal right of way to Michael Lea over a 4 metre width out from the eastern retaining wall and continue such a 4 metre width the whole way down to the end of unit 6, a negative declaration that Michael Lea can have no right to an injunction and should be satisfied by and be restricted to an award of damages in respect of the interference with the right of way (subject to hearing further submissions on the form of the order if it cannot be agreed between Counsel);

An order that Mr Ward pay Michael Lea the sum of £500.00 general damages at common law for the nuisance caused by the physical structures/erections that have been found to amount to substantial interference.

As stated above, I will hear Counsel further on the form of the order and any other consequential matters arising.