[2020] EWHC 2171 (CH)

IN THE HIGH COURT OF JUSTICE **Claim No. D30BM405**
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

B E T W E E N

PAMELA SUSAN CARDWELL MILLS **Claimant**

- and -

(1) THE ESTATE OF PHILIP JOHN PARTRIDGE (DECEASED)
(represented by Lynette Alaine Partridge)
(2) LYNETTE ALAINE PARTRIDGE **Defendants**

Representation
Mr David Mitchell, instructed by mfg solicitors LLP, for the Claimant
Mr David Holland QC and Mr Matthew Haynes, instructed by Shakespeare Martineau LLP, for the Defendants

Trial : 22-25 and 28-29 October 2019, 29 November 2019, 2 December 2019 and 5 August 2020

JUDGMENT

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript.

JUDGE SIMON BARKER QC :

Introduction

1. These proceedings principally concern rights and obligations relating to three parcels of land at Iverley in the parish of Kinver, Staffordshire. For some years, until 35 to 40 years ago, this land was in the common ownership of a Mr Tolley. The three parcels of land are defined below and referred to in this judgment as 'C's land', 'the Nursery', and 'the Field'.

2. Mrs Pamela Mills, the Claimant, ('C') owns the freehold land and premises, including more than 100 acres of surrounding fields, known as Iverley House Farm, Sugar Loaf Lane, Iverley, Staffordshire ('C's land'). The plan to the registered title of C's land, SF538646, is attached to the Amended Particulars of Claim ('the AP/C')[1]. Iverley House Farm itself is served by a track leading from the public highway known as Sugar Loaf Lane.

3. C's land includes another track, (referred to by the parties and in this judgment as 'the Track'[2]) which runs in a north westerly direction from a junction some 500 metres to the south west further along Sugar Loaf Lane and over which rights of way were granted by Mr Tolley to the Nursery and the Field and other land adjacent to the Track and sold off by Mr Tolley. The Track provides the only means of access to and from the Nursery, the Field, and other land (other than C's land) referred to in this judgment.

4. Mr Tolley conveyed C's land to C's mother on 11.10.85 and leased it back from her during his lifetime for a peppercorn rent. Mr Tolley died in 1987 and C's mother and C then moved into Iverley House Farm. C moved out in about 1995. C's land was transferred to C by her mother on 10.4.08. C returned, with her family, to live with her mother

[1] Trial Bundle 1/C/17

[2] 'The Track' is generally a reference to the full boundary to boundary width of the way comprising, at least at the dates of the relevant conveyances in 1978-1980, a track way, identified by dashed or pecked lines on OS maps attached to the relevant conveyances, and land either side of the pecked lines up to the boundary lines between the Track and adjacent land, including the Nursery on one side and the Field on the other. There is an issue as to whether the right of way is over the full width of the Track or only the track way identified by pecked lines. C contends that right of way is and has been confined to the track way excluding the verge on either side and Ds contend that the right of way is or, so far as they are concerned, has always been treated by them as the full boundary width of the Track. Save when addressing this issue and its consequences, the Parties have referred to the Track as meaning interchangeably either or both the track way and the full width between the two boundaries.

in about 2010. C's mother died in 2016. Since then C and her family have continued to reside at Iverley House Farm and to farm, rent out, or leave fallow – on the Defendants' evidence neglect - the surrounding fields.

5. Mrs Lynette Partridge, the Second Defendant, ('D2') also represents the estate of the First Defendant, her late husband Mr Philip Partridge, ('D1'; collectively with D2 'Ds'). D1 died of heart failure on 21.12.18; D2's evidence is that in his later years D1 also suffered from vascular dementia and diabetes. Ds moved to Iverley in 1975 and rented 1 Highdown Cottages from Mr Tolley. Ds purchased 1 Highdown Cottages from Mr Tolley on 2.7.85. 1 Highdown Cottages is accessed via a right of way over the Track and is on the west side of the Track just beyond the Field (with a turning area forming part of the Track dividing the two parcels of land).

6. The Nursery is about one third of the way along the Track on its east side (right heading from Sugar Loaf Lane). It is about 2.87 acres in area and roughly triangular in shape. Its south eastern boundary adjoins the Track.

7. By a conveyance dated 14.3.79 ('the 1979 Conveyance') D1 purchased the Nursery. The nursery business was started by D2 in about 1980 and carried on by D2 from the Nursery, and later also the Field, The business is known as Highdown Nursery. For convenience I shall use the term 'the Nursery' interchangeably when referring to the land purchased in 1979 and/or the business. By a conveyance dated 8.3.78 ('the 1978 Conveyance') Mr Tolley sold the Nursery to predecessors in title to D1. Ds registered the title to1 Highdown Cottages and the Nursery together in their joint names in 2008 under title number SF540781.

8. The Field is on the west side of the Track opposite the Nursery. It is about 2.66 acres in area, four sided, and its north eastern border runs along the Track. In these proceedings it was referred by the parties as the Unregistered Field, albeit that title to the Field is now registered at HM Land Registry.

9. On an unknown date, but after 16.10.80 and, on D2's evidence, during 1980, D1 or Ds purchased the Field. Mr Tolley owned the Field prior to 16.10.80. The conveyance dated 16.10.80 ('the 1980 Conveyance') to Ds' predecessors in title contains the relevant covenants and easements affecting the Field. Ds registered the title to the Field in their joint names under title number SF633981 in 2018. C has asked in vain for disclosure of the

conveyance of the Field to D1 or Ds.

10. D2's evidence includes that from 1975 Ds or D1 also rented fields in the locality and a barn. D1 began by farming cattle but that was not a success and came to an end at or around the time of the BSE outbreak in the late 1980s. From about 1980 Ds also grew potatoes and other vegetables on the Field, with mixed success, and, from a later date, soft fruit. The vegetable and fruit farming was also phased out during the 1980s as the Nursery's business grew. On D2's evidence, from the early 1980s she began growing bedding plants from seed. D2 proved to have 'green fingers' and the bedding plant business grew quickly and, over the past 35 plus years, has expanded and diversified from bedding plants and is now a business with an annual turnover in the order of £1million. This evidence is not challenged.

11. The documentary evidence includes a series of aerial photographs from 1981 to 2016, and even more recent (but undated) photographs. These photographs are, of course, only a snapshot at a particular time on a particular day but, as a series, they show development of the Nursery and the Field and neither side suggested that they were unrepresentative or presented a distorted picture of the period when each photograph was taken. These photographs show how the Nursery has been expanded by the installation of polytunnels, covered growing areas, a shop, additional outbuildings, and the erection of perimeter brick walls. Since about November 2017 what is referred to by Ds as a tea room ('the tea room') has also operated from a purpose built kitchen and dining area at the Nursery. The photographs also show how activity on the Field, including parking, has changed and increased over time.

12. Ds had two children, Esther ('EP'), who was born in 1976, and Christopher ('CP'), who was born in 1982. EP now lives at 2 Highdown Cottages, a semi-detached dwelling attached to 1 Highdown Cottages, which D2, EP and CP purchased in 2017 and which is also accessed via a right of way over the Track.

13. Also in 2017 D2, EP and CP purchased a 0.92 acre field ('the 0.92 acre field') which is on the opposite side of the Track to 1 and 2 Highdown Cottages and adjoins the north western boundary of the Nursery, and on which they currently keep chickens, goats and geese. Title to this field and to 2 Highdown Cottages were incorporated in the same registered title under title number SF467042 in the names of D2, EP and CP in 2017. The entrance to this field is set back from the Track. There are no issues concerning

use of the Track for access to and from 1 and 2 Highdown Cottages or the 0.92 acre field.

14. There is a dispute about the ownership of a triangular shaped area of land ('the Disputed Land') adjacent to the entrance to the 0.92 acre field. The approximate dimensions of the two sides of the Disputed Land sharing a 90 degree angle at the west corner of the Nursery are : width along the Track from an oak tree ('the Oak Tree') to the Nursery's west corner approximately 2.5 metres, and length along the Nursery's wall to the apex of the triangle approximately 8 to 10 metres. Thus, the area of the Disputed Land is some 10 to 12.5 square metres.

15. EP and CP are involved with D2 in the main businesses carried on from the Nursery and the Field and were witnesses for Ds at the trial. On the unchallenged evidence EP has been involved in the Nursery's business full time for upwards of a decade and CP since about 2013. CP also runs a separate business from the Nursery and the Field selling logs as firewood. EP and CP became partners in the Nursery business some 3 to 4 years ago. EP is said to have inherited her mother's 'green fingers' and is responsible for managing the practical side of the Nursery and the employees; CP is responsible for the structures and maintenance; and, D2 manages the finances.

16. It appears from the evidence that the partnership's accounts and accounting records are not maintained in a way to facilitate the provision of financial management information about the Nursery's business in any detail or to enable D2 to do more than give her own uncorroborated estimates as to component elements (income, costs and profitability) of the various aspects of the Nursery's trading activities. As became clear during cross-examination, D2's evidence as to certain building costs proved erroneous when disclosure finally surfaced and was analysed. Mr David Mitchell, C's counsel, made clear that he did not suggest, and I do not conclude, that there was a deliberate attempt to mislead, but I do conclude that uncorroborated or unsupported financial and business information about the Nursery should be received with some caution and cannot be taken as unquestionably reliable.

17. The use of the Track to access the Nursery (including in particular the tea room on the Nursery) and the Field and the use made of the Field are at the centre of this litigation. Aerial photographs and other evidence show that the Track is undulating and the section from Sugar Loaf Lane to the beginning of the Nursery's south wall (approximately the

first one third of the Track) does not run in a straight line. As currently used it is wide enough for two-way vehicular traffic with grass verges (which are very narrow or covered by stones along sections bordering the Nursery's wall), hedgerows (cut back by the Defendants), and some fencing on both sides of the Track. The fencing on the east (i.e. Nursery) side of the Track stops at the Nursery wall; the fencing on the west (i.e. Field) side of the Track stops part way along the Field and leaves unfenced most of the area of the Field used as a car park. The width of the Track as shown on the 1969 Ordnance Survey map and the plans to the 1978 Conveyance, the 1979 Conveyance, and the 1980 Conveyance is shown by pecked lines within and narrower than the full width of the Track. The width has been scaled for C, by an experienced chartered surveyor (now retired), Mr Nigel Atkinson ('NA'), whose report is annexed to the AP/C but who was not a witness at the trial, at 2.5 metres or single track width. In his written evidence for trial CP also describes the Track as single lane :

"It is a single lane track so if there is a car coming in the opposite direction then one person may have to wait, but this has never caused problems".

18. It is common ground that Ds have stoned and maintained the surface of the Track and, at least to some extent, stoned over grass verges alongside the track way, and have cut back the hedgerows that remain.

19. Ds' use of the Track for access to and from the Nursery is based on a right expressed in the 1979 Conveyance to D1 as part of the definition of the property thereby conveyed. That definition includes a right which incorporates a right of way granted in the 1978 Conveyance. By these conveyances the 2.87 acre plot now the Nursery was conveyed to D1 as purchaser :

> "TOGETHER WITH full right and liberty for the Purchaser and his[3] successors in title to pass and repass at all times for all purposes in connection with the use of the land hereby conveyed as agricultural land only with or without wheeled vehicles and with or without animals along the track way coloured brown on the said plan leading from the said land to the public highway … ".

By clause 2 of the 1979 Conveyance the Nursery was conveyed subject to the matters mentioned in the second schedule to that conveyance which included the covenants in

[3] "Purchasers" and "their" in the 1978 Conveyance

the 1978 Conveyance.

20. Clause 2 of and the second schedule to the 1979 Conveyance were the basis of a preliminary construction point taken for the first time by Mr Holland QC, who, with Mr Haynes, appeared as Ds' counsel in their opening . At an application made immediately before commencement of the trial Ds sought permission to re-amend their Amended Defence and Counterclaim ('ADC/C') to raise a construction issue. The application was opposed and after, hearing argument, I refused permission to amend.

21. The point raised on behalf of Ds, set out in the opening skeleton argument, was that by clause 4(a) of the 1978 Conveyance, the purchaser from Mr Tolley covenanted for the benefit of the land retained by Mr Tolley while owned by him or his personal representatives to use the Nursery as agricultural land and for no other purpose whatsoever. The second schedule to the 1979 Conveyance expressly referred to the covenants in the 1978 Conveyance and at that time Mr Tolley remained owner of C's land. Thus, D1 purchased the Nursery on the basis that (1) it was conveyed subject to an agricultural use only covenant which covenant was itself linked to Mr Tolley's or his personal representatives' continued ownership of C's land and (2) it was conveyed with a right of way for D1 and his successors in title "for all purposes in connection with the use of the land hereby conveyed as agricultural land only".

22. Mr Holland QC and Mr Haynes submitted in Ds' opening skeleton argument that the restriction on the use of the Track only applied so long as the "land hereby conveyed" was itself restricted by covenant to agricultural use only and that the user restriction in the 1978 Conveyance fell away on Mr Tolley's conveyance of Cs' land by Mr Tolley to C's mother in 1985. Their skeleton argument supported this submission by a reference to Hotchkin v McDonald [2004] EWCA Civ 519. In that case the right of way over a private roadway to a manor house was expressed to be "for all purposes in connection with the use of the property hereby conveyed authorised by Clause D in the Schedule hereto". In fact Clause D limited the user of the manor house to offices and ancillary purposes subject to a proviso that, while the purchaser (the NFU Trust) remained the owner, a branch of the NFU could use the property for its meetings and conferences and as living accommodation for a caretaker. The NFU ceased to own the manor house in 1991 on sale to the McDonalds and so the proviso fell away. The critical point was that the right of way was expressly linked to the manor house by express reference to the permitted or constrained lawful use of the manor house, i.e. by express reference to the clause restricting

the use of the manor house. The McDonalds applied to the Lands Tribunal under s.84 of the Law of Property Act 1925 for the discharge or modification of the covenant so as to permit other commercial use, but it fell to the court to consider whether to make a declaration that the right of way could only be used for the purposes as expressly declared in the conveyance to the NFU Trust. The Court of Appeal upheld the judge below's decision that the use of the right of way was not frozen in time but could be used for whatever purposes were permitted by the Lands Tribunal. That seems to me to be a rather different case. Further and importantly, the express words of the granted right of way could have but, unlike the conveyance in Hotchkin, did not cross-refer to clause 4(a) of that conveyance. Further, Mr Tolley had conveyed two fields to the south of the Nursery also served by the Track as one parcel of land to a Mr Jenner less than one month before the 1978 Conveyance. That conveyance is not in evidence but it is likely as an objective circumstance that, when considering the right of way for the 1978 Conveyance, Mr Tolley would have had in mind not only his own circumstances as an owner of land served by the Track but also those of Mr Jenner and at that time all the land adjacent to the Track was used for agriculture and the Track was natural earth. Were the point live before me and argued as set out in Ds' skeleton argument it would have failed.

23. The relevant obligations and rights concerning the Field are contained in the 1980 Conveyance. On D2's evidence Ds have owned the Field on the same terms since late 1980. Covenants for the benefit of what is now C's land include that :

> "THE Purchasers hereby covenant with the Vendor for the benefit of the Vendor's adjoining land and each and every part thereof that the Purchasers and their successors in title will--
>
> (a) forthwith erect (where necessary) and forever thereafter maintain a good and substantial stock proof fence on all sides of the property hereby conveyed which adjoin other property of the Vendor
>
> (b) for the benefit of the residue of the Vendor's land and hereditaments known as Iverley House Farm Kinver aforesaid to use the land hereby conveyed as agricultural land and not to erect any building thereon other than a stable with hayloft and tack room and not to use the said land for any other purpose whatsoever".

The restrictive covenants were registered as class D(ii) land charges under the Land Charges Act 1972 on 20.10.80.

Use of the Track for access to and from the Field is based on a right expressed in the 1980 Conveyance by which the Field was conveyed :

> "TOGETHER ALSO WITH full right and liberty for the purchasers and the owners and occupiers for the time being of the land hereby conveyed to pass and repass at all times for all purposes in connection with the use of the land hereby conveyed as agricultural land only and any buildings erected thereon as stables tack rooms and hay lofts only with or without wheeled vehicles and with or without animals along the track way shown coloured brown on the said plan leading from the said land to the public highway".

24. The underlying cause of the central dispute in this litigation is the expansion and diversification of the businesses carried on at the Nursery, the overspill of these businesses onto and the carrying on of other activities on the Field, the laying of pipes under the Track, and the meaning of the phrase "agricultural land" in the context of the easements and covenant limiting the use of the Track and the Field.

25. Of particular concern to C is the diversification of the businesses carried on at the Nursery. On C's case the Nursery has developed into a garden centre carrying on or hosting numerous non-agricultural business activities as part of the Nursery partnership or independently with Ds' permission. Independent business activities permitted by Ds include the tea room. This is the business carried on by Sugar Loaf Tea Rooms Ltd ('SLTRL'), which is owned and controlled by D2, EP and CP. The tea room opened for business in November 2017. Since then SLTRL's business has expanded to offer a restaurant menu and hosting other events. Hosting events followed the granting, in March 2019, of an every day of the year 9.00am to midnight premises and entertainment licence. The licence permits a wide range of activities, events and functions including performance of plays, exhibition of films, indoor sports events, live and recorded music and dance, other entertainment, and the sale of alcohol from 9.00am to 11.30pm. D2 and SLTRL have plans to expand the footprint of the tea room to include a terrace and al fresco cooking and dining facilities.

26. C's principal complaint in relation to the Nursery concerns use of the Track in connection with the non-agricultural and commercial activities carried on there. C's complaint in relation to the Field is founded on the covenant governing the restriction as to use of the Field as agricultural land, the fencing obligation, and alleged abuse of the easement to and from the Field along the Track. From C's perspective Ds have flagrantly disregarded

the easements and covenants regulating and restricting use of the Track and the Field.

27. Ds deny all allegations of breach of covenant and trespass. They maintain that all activities on the Field and the Nursery fall within the meaning of use of land as "agricultural land only". Alternatively, they rely on C's delay in commencing proceedings and/or acquisition of rights by open long user. By counterclaim they seek to establish and enforce rights to and over the Disputed Land. They also counterclaim that they have acquired certain legal rights pursuant to s.2 of the Prescription Act 1832 to pipes laid under the Track between the Nursery and the Field and declarations to the opposite effect of those sought by C. From D2's perspective, and - although not parties - that of EP and CP, C, having stood by while the business of the Nursery was built up, has shown and declared herself to be determined to make their lives, and particularly that of D2, as difficult as possible.

28. The parties' legal representatives have agreed a 25 point list of issues. The topics covered include : (1) Ds' use of Track in the context of the easement governing its use for access to and from the Nursery and the covenant and easement governing the use of and access to and from the Field, (2) whether the Field should or may be fenced and gated and, if so, whether D should or C may erect a fence and gate, (3) the width of the Track, (4) whether by stoning the Track, installing certain pipes passing under the Track, parking or authorising parking on the Track, and installing ventilation outlets which protrude beyond the Nursery's walls Ds have trespassed on or over the Track and/or C's land, and (5) a boundary dispute concerning the Disputed Land.

29. Relations between C, on the one hand, and D2 and her family, on the other hand, have been poor since, at the latest, Christmas 2012 and remain so. It would also be fair to say, by reference to correspondence in the trial bundle from D1 to C, that, during the latter years of his life, D1 was not well disposed towards C.

The litigation

30. Prior to the issue of proceedings there were two rounds of correspondence between C's solicitor, mfg solicitors, and Ds' or Ds' solicitors, previously Thursfields Solicitors and now Shakespeare Martineau LLP.

31. First, during the period January to April 2015, C's solicitor wrote a pre-action protocol

letter raising use of the Track to access the Nursery and the Field for non-agricultural purposes, use of the Field for non-agricultural purposes in breach of covenant, trespass on the Disputed Land and at the entrance to Highdown Cottages, and harassment. C's solicitor also suggested ADR as a means of settling the dispute. Thursfields replied on behalf of Ds seeking clarification of the alleged misuse of the Track and breach of covenant in relation to the Nursery and the Field, asserting that Ds owned the Disputed Land (then identified as a 20 square metres rectangle), acknowledging that building materials had been temporarily stored by the entrance to Highdown Cottages but responding that the materials had been moved, and asserting that harassment commenced at or around Christmas 2012 and was by C of Ds. D1 wrote separately, concluding with a lengthy refutation of the claims in trenchant terms and asserting that the entirety of Ds' business, including the horticulture, logging, chipping, sale of manure, and sale of allied products, was agricultural and commercial. D1 also asserted title to the Disputed Land (as then identified) and refuted all allegations of harassment.

32. This appears to have prompted C to obtain advice in May 2015 from NA as to the boundaries in issue and use of the Track. NA's advice concluded that the Disputed Land belonged to C and that the width of the track way along the Track from the Nursery to Sugar Loaf Lane was 2.5 metres. As noted above, NA's report was annexed to the AP/C.

33. Subsequently, in April 2017, C's solicitor wrote a further pre-action protocol letter raising trespass to the Track by laying pipes under the Track and trespass to the Disputed Land and to C's Jeep parked there by placing objects on both, and alleging harassment of C. This letter also concluded with a proposal that ADR might be suitable. D2 wrote a lengthy reply challenging C to produce evidence of new pipes and asserting that all that had happened was that an existing pipe leak had been repaired, asserting title to the Disputed Land, and contending that all harassment had been by C and had started about 3 years earlier.

34. C's claim was issued on 11.11.17 and served with Particulars of Claim seeking extensive declaratory and injunctive relief. Following the opening of the tea room and, shortly thereafter, the grant of the premises licence to SLTRL in April 2019 C applied for interim injunctive relief, which I granted on 11.6.19, on which occasion permission was also granted to serve and file the AP/C to introduce allegations about the tea room and the use of the Track to access the tea room as a trespass. The pleadings concluded on 25.6.19 with the service of Ds' ADC/C, amended to respond to the newly introduced

case concerning the tea room. On 30.7.19, following a contested hearing, directions were given for expert evidence from an agricultural expert as to activities that in his experience were or could be undertaken on land with use limited to agricultural land both in 1980 and today, and for the appointment of a single joint expert witness in the field of boundary surveying. There was a PTR on 30.9.19. Immediately before the commencement of the trial, Ds made a very late application to re-amend the ADC/C, which, after hearing submissions, I refused.

35. During the trial and again after closure of the evidence there was substantial very late disclosure from D2. This late disclosure included several hundred pages of invoices and the like said to support Ds' case that £350k had been spent on construction of the tea room, which disclosure had earlier been sought by C and refused by Ds, through their solicitor, as disproportionate. Fortunately, Mr Mitchell, was able to devote the time required to both analyse the voluminous disclosure and also prepare his closing submissions. It is fair to observe here that over the course of the litigation Ds' attitude to disclosure has been less than satisfactory in a number of respects.

36. With regard to the burden of proof, the overall burden of proof rests with C as claimant. However, Ds have raised two matters in particular by counterclaim and delay, in several forms, as a defence. In addition, much of the relevant factual evidence, for example about the Nursery's and SLTRL's businesses and the costs of the recent building works, is under Ds' control and so Ds bear an evidential responsibility.

The Witnesses

37. The relevant events in this litigation traverse some 40 plus years. Determination of many, but by no means all, of the issues is assisted by documents of record, such as conveyances, OS maps and plans, dated third party documents (including aerial photographs), and documents (including photographs and correspondence) disclosed by the parties where their dating is noted or not in dispute.

38. There are a number of factual issues on which the evidence of the parties and their witnesses is highly material and requires assessment in the process of finding facts. In this context I bear in mind the recent decision of the Court of Appeal in Kogan v Martin & Others [2019] EWCA Civ 1645. At [88] the Court of Appeal (Floyd, Henderson and

Peter Jackson LJJ) endorsed the view that the fallibility of human memory must be recognised and that witness evidence is to be assessed :

"… in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. … But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based on all of the evidence. Heuristics or mental shortcuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence".

At [89] the Court of Appeal drew attention to the need to assess the evidence in its contextual setting. Thus, as noted in that case, the position of cohabitees collaborating on a project would be different, including probably less well or less thoroughly documented, from that of commercial parties dealing at arm's length in relation to what becomes a commercial case.

39. Mr Mitchell did not submit that D2 or her witnesses were generally unreliable but did draw attention to a number of changes of position, for example on the area of the Disputed Land and whether any new pipes had been laid under the Track in 2017, and to contradictions, inconsistencies and gaps both internal and when weighed against independent evidence, for example the build costs of the tea room and D2's assessment of agricultural user of the Field and the Nursery, and, therefore, the Track.

40. Mr Holland QC submitted that C was an unsatisfactory witness for a number of reasons. Her witness statement was crafted for her by her solicitors. She was defensive in attitude; for example, not answering questions about whether and, if so, how much her mother paid Mr Tolley for C's land or her mother's relationship with Mr Tolley, being evasive about her own knowledge of the restrictions contained in the 1979 and 1980 Conveyances as to the Track and the Field, and being evasive about her knowledge of the expansion of the Nursery business expansion from 2008 onwards. Mr Holland QC pointed to inconsistencies or contradictions between or in C's written evidence and her oral evidence; for example, C's evidence and answers about reasons for not challenging the activities on the Field or the Nursery much earlier than 2014/2015. Mr Holland QC also submitted that C was driven by ill-will towards Ds and had, and had declared herself to have, an antipathy to Ds and their business, notwithstanding that C had never actually been into the Nursery. Mr Holland QC also challenged as nonsense, unsupported by

any relevant evidence, and contradicted by independent evidence obtained by Ds, C's stated reason for this litigation and her desire to strictly enforce her rights over the Track and the Field, namely safety reasons; and, that her real motivation was to close down Ds' business.

41. By contrast, Mr Holland QC characterised the evidence given by D2 and Ds' witnesses as open and honest.

42. In addition to D2 and her children factual evidence was given by Mr Ryan Hutton ('RH') who has worked as a labourer at the nursery for about 20 years. His evidence provided some general background information and was intended to be corroborative of Ds' case. On specific topics RH gave evidence about parking and congestion on the Field and the Track. He drew no distinction between the Nursery yard and the Field for vehicular access purposes and regarded it as one general area of land for supplier deliveries and staff and customer parking. RH was also asked some opinion questions by Mr Holland QC about access problems, congestion and delays flowing from refencing the boundary between the Field and the Track and reintroducing a gate to the Field; Mr Mitchell responded that RH was a witness of fact.

43. As to C, I agree that her witness statement went beyond the normal bounds of factual evidence and contained pointers to or submissions as to the conclusions to be drawn from other evidence. I also agree that C appeared defensive and unsure of herself at times during cross-examination and that there were shortcomings in some of her evidence. During cross-examination C appeared to be apprehensive that she might be caught in a forensic trap and was therefore on guard during much of Mr Holland QC's questioning. However, I do not accept the wholesale criticism of C's evidence as unsatisfactory. Moreover, Mr Holland QC's criticisms went too far in some respects; for example, C did not limit her reasons for wanting to enforce the restrictions affecting the Track to safety reasons but explained that she wanted to restrict the use of the Field and the Track to horticulture (in so far as currently pursued at the Nursery) for the benefit of her surrounding land generally and to preserve its rural ambience. C was firmly of the view that the tea room with its liquor and entertainment licence was a marked and unacceptable diversification.

44. I also do not agree with Mr Holland QC that I should accept all of D2's and her witnesses evidence as open and honest. Certainly, in their demeanour they presented themselves

in a more open way than C; but, demeanour is not a telling indicator of reliability. Mr Mitchell's cross-examination showed D2 and CP to be plainly inconsistent or wrong in their evidence on a certain matters. Examples include the evidence about the build costs of the tea room, and evasive and unclear answers to detailed questioning about the Nursery's activities and about intentions as to future activities at the tea room. A further documented example is their willingness to give (or stand by while their agent gave) a misleading impression in relation to their rights over the Track when applying for a premises licence.

45. All of that being said, and allowing for the many years traversed in the evidence and for the fact that the witnesses for each side came to court to justify and argue their respective cases, my impression is that C, D2, EP and CP gave evidence they believe to be true, at least in the main. I shall reserve specific favourable or adverse findings in relation to their relevant or conflicting evidence to my consideration of the particular issues. RH was plainly closely aligned to CP and D2 but his evidence was intended to be supportive rather than address otherwise unaddressed matters; that being said, in the main RH also gave evidence he believed to be true.

46. As to the expert evidence I shall address this in the context of the issues to which it relates.

Development of the Nursery

47. D2's evidence is that, having started the Nursery's business in about 1980, by 1985 it was doing well but D1's cattle business was not successful. D2 says that at around that time Ds acquired and installed a second hand large wooden framed greenhouse to improve growing conditions. The greenhouse does not appear on the 1981 aerial photograph but does appear in the 1989 aerial photograph. An independent insight into Ds' businesses in the mid-1980s appears from correspondence with their then bankers (NatWest) and their then prospective bankers (Midland Bank). The greenhouse is referred to as being in use in the summer of 1986 and D2's Nursery turnover likely to increase to an expected £43k - £45k for 1987. The 1989 aerial photograph also shows a polytunnel in place. In 1995 another bank (Barclays) instructed a local estate agent and valuer (Phipps & Pritchard) to value the Nursery. The business is described as a "commercial nursery/garden centre together with a further area set aside for stabling of horses and associated retail sales". The structures are described as a stable block, open store with corrugated

roof and hard standing, brick construction garden centre, timber greenhouse, 6 single or multi bay polytunnels with some under construction, an 11,000 gallon irrigation plant, and an enclosed paddock area. The 1999 aerial photograph shows 10 polytunnels. D2's evidence is that in and from about 2005 they built brick perimeter walls to improve security; about 10 years ago they drilled a borehole to reduce water costs; in 2011 the shop front was changed; and, in 2014 a potting shed was built. At some point farm pigs and a pony were housed in a stable building on the Nursery as an attraction for children. That building also houses the retail unit for CP's log business.

48. More recently, in 2016-2017 the Nursery was substantially redeveloped with the building of the tea room and an extended retail area for the shop. The current position is that there are 11 polytunnels, 10 of which are used mainly for growing plants or displaying plants bought in for resale and the other is now used for storing and displaying pottery and garden ornaments bought in for resale. Out of season the polytunnels are either empty or used to display stocks of garden plants and bulbs bought in for resale. Other documentary evidence includes a plan accompanying an unsuccessful planning application in 2004 for permission to build a dwelling on the Field; this plan shows that an area in the Nursery's yard was then given over to the display and sale of pots and garden ornaments. Other bought in products sold by the Nursery include compost, insecticides, garden tools, garden artefacts and metal work. In addition, D2 plants up hanging baskets for sale during the main season. These and other bought in products are stored and displayed variously in the enlarged shop, under a covered area, in a polytunnel or on the Field.

49. D2's evidence is that on the Field she originally grew potatoes and other vegetables. This is consistent with the early aerial photographs. However, as the Nursery expanded so the Field has been put to other use. It has become increasingly used as a car park. Aerial photographs from 1999, 2005, 2010 and 2013 show limited use of the Field for parking by a small number of vehicles with much of the area appearing as green space. More recent photographs, taken in 2016 and 2017, show areas of the Field as stoned and more extensive car parking. Parking is now a major function of the Field. In addition, the Field has recently been or is now used for storage of logs, aggregate, landscaping materials, stones and waste materials brought in from elsewhere. The aerial photographs from 2005 onwards viewed alongside photographs taken by Ds and C show other storage on the Field which appears probably to be sacks of compost and peat stored on pallets. Other photographs show the sale of Christmas trees (at least from

2000 albeit not necessarily from the Field) and recent photographs show Christmas tree netting tunnels on the Field. Since about 2017 the Field has been used as the location for a biomass boiler or boilers and a generator, and as a storage area for drying logs.

50. D2's evidence refers to the Nursery's business having expanded as the result of word of mouth recommendation. That may well have been true of the Nursery. However, the tea room advertises through the internet and social media.

51. D2 also refers to the mix of annual sales comprising 250,000 bedding plants, thousands of herbaceous perennials and shrubs, several hundred roses, trees and hedges, bought in plants such as winter pansies and bulbs, and more than 1,000 hanging baskets and planters which D2 prepares. D2 also says that the Nursery has also supplied a garden designer for a competition at the NEC and Stourbridge and Quarry Bank for the In Bloom competition.

52. D2's evidence includes that she and D1 grew the business of the Nursery by constantly reinvesting in the business and not taking holidays. If at all possible, nothing was or is allowed to go to waste; for example, unsold bulbs are potted and grown on for sale in the following season. D2's descriptive evidence of the growth of the Nursery is consistent with the independent evidence and the photographic evidence. Mr Michael Greetham ('MG'), who inspected the Nursery and gave joint expert evidence as an agricultural consultant, corroborated this evidence and referred to unsold plant stocks being split and repotted for growth and sale in the following year. He also referred to stocks being bought in after the growing season for resale; his examples, on his evidence confirmed in his discussions with D2, included camellias and bulbs.

53. The Nursery's annual accounts are made up to 30 April each year. The trial bundle includes accounts for 2009 to 2018, excluding 2011. Over the years ending 30.4.09 to 30.4.13 turnover was broadly constant at around £430k. In 2014 and 2015 turnover increased significantly to circa £550k. Then for the years ended 30.4.16 to 30.4.18 turnover increased significantly again to £619k, £734k, and then to £830k. Other striking facts revealed by the accounts are that in the initial years the net profit margin was less than 10% but from 2013, which coincided with the return of CP to work at the Nursery and by which time EP was also working at the Nursery, profitability increased significantly (since 2013 the net profit margin has consistently exceeded 21%).

54. A further point to note from the Nursery's accounts is that although very extensive building works took place in 2017, the fixed assets figure does not reflect any capital expenditure on building work. That said, repairs and renewals expenditure did increase significantly in the accounts to 30.4.17 and 30.4.18, by an aggregate sum in the order of £80k. CP's evidence is that the Nursery shop and display area and the tea room were built over the course of 2016 and 2017. This indicates that the extensive building work to the Nursery shop and display area was treated as revenue expenditure rather than capital expenditure in the Nursery's accounts, notwithstanding that it represented significant expansion of the Nurseries premises and went some way beyond repair and renewal. Of course, but for this accounting treatment of writing off capital expenditure as it was incurred the net profits would have been some £40k more in each of those two years.

55. I note two more points from the Nursery's accounts. First, each balance sheet includes a figure for creditors, which indicates that accounts are prepared on the accruals basis; however, no balance sheet includes a figure for debtors, which indicates that there are no trade customers, or at least none who buy regularly and at sufficient value to justify a line of credit. This in turn indicates that the Nursery's business is geared more to the end customer than to trade customers. Secondly, D2's evidence that profits were reinvested in the business is consistent with the years up to 2013 but is not borne out by the accounts for the years after 30.4.13. From 1.5.13 onwards drawings have been equal to or have exceeded net profits.

56. D2 estimates that 80% of the Nursery's business is attributable to agriculture and agricultural use of the land and, therefore, the Track. On the basis that D2's 80:20 split between agricultural and non-agricultural business at the Nursery is correct, this relates or translates directly into non-agricultural revenue in 2018 in excess of £166k and net profit in 2018 in the order of £40k on the accounting policies adopted by the Nursery's partners. The Nursery does not produce management or similar accounts, accordingly D2's estimate is neither corroborated nor supported by documentary evidence. At turnover of £166k and net profit of £40k the non-agricultural activity is significant in its own right. This would also be true at a 90:10 split.

57. Mr Mitchell, for C, takes issue with the treatment of building expenditure and also with D2's and her witnesses' evidence asserting and attempting to justify the contention that 80% of the Nursery's business is agricultural. I shall come back to this when considering the issues. Subject to that, he does not take issue with the general description of the

Nursery and its growth, and, subject to having noted above instances of error or unreliability in D2's evidence, I therefore accept the general description in so far as it is not challenged. The classification of the Nursery's business as agricultural, or agricultural only, and the expenditure on the Nursery and the tea room buildings will be considered in the course of deciding the specific issues.

Meaning of the words "agricultural land only" and the additional words "and any buildings erected thereon as stables tack rooms and hay lofts only" in legislation and case law, assistance from the expert evidence, and as used in the 1978, 1979 and 1980 Conveyances

58. These phrases are to be construed in the context of the relevant conveyances and the factual background at the time of each conveyance. That includes the actual and known physical condition of the relevant land at that date and objective facts apparent or reasonably available to the parties. The parties' views as to what the conveyances meant or means are irrelevant. The question is what the terms in each conveyance would be understood to mean by a reasonable person informed, at the relevant time, of the relevant factual background. Where words are unclear or ambiguous extrinsic evidence may be taken into account, but not where the words are clear.

59. As a starting point, both Mr Mitchell and Mr Holland QC made submissions as to the meaning attributed to the phrases in legislation and case law.

60. The parties' counsel agreed that, at least as a starting point, the phrase "agricultural land" in the conveyances is to be construed as having the meaning that the phrase would have had in 1978 and 1980.

61. The phrase "agricultural land" is plainly a reference to land used for agriculture. Both Mr Mitchell and Mr Holland QC referred to s.109 of the Agriculture Act 1947 ('the 1947 Act'). The declared aim of the 1947 Act was to increase domestic food production and to encourage farming in post war times. Agriculture is there defined as including :

> "horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "agricultural" shall be construed accordingly".

62. Mr Holland QC also referred to s.290 of the Town and County Planning Act 1947 and to

s.119 of the Town and County Planning Act 1971. The definition of agriculture in those Acts is substantially the same as in the 1947 Act, albeit with an expanded reference to livestock, as including :

"horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purposes of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "agricultural" shall be construed accordingly".

63. The nouns and activities in those inclusive definitions focus on, but are not confined to, husbandry of land and animals, that is cultivating or using land to grow food or rear animals for food or clothing or use in farming. For example, a market garden is an area of land used for growing vegetables for sale in a market. Growing and rearing, or use in growing or rearing, are the common denominators in the definitions.

64. Horticulture expands the scope of the definition somewhat as it includes growing plants, bushes, shrubs and trees, including but not limited to those which are edible or bear edible fruit, not just for food but also for enjoyment. Similarly, nursery grounds are not confined to, or necessarily even concern, food production but conventionally describe land used for developing or growing seeds and young plants, trees and the like to the point where they may be transplanted. However, in both horticulture and nursery grounds the focus is on growing and developing.

65. A further point to be borne in mind is that the relevant time is 1978 to 1980 not 1947, some 30 plus years earlier, or even 1971. Perhaps with that in mind, in their ADC/C, Ds also placed reliance on the definitions of agriculture in the Town and Country Planning Act 1990 and the Inheritance Tax Act 1984. Mr Holland QC did not make any submission by reference to those statutory provisions. I note that the definition of agriculture in the Town and Country Planning Act 1990 mirrors that in the 1947 and 1971 Town and Country Planning Acts. Thus, the 1947 statutory definitions of agriculture remained constant before, in and beyond the period 1978 to 1980.

66. Mr Holland QC's submission on the passage of time is that, as the rights and obligations were, at least on their face, perpetual, the court is entitled to, and should, take into account that the parties would have envisaged that what constituted "agricultural land" was

not set in stone as at 1978 to 1980 and that its meaning should be taken to move with the times as agricultural practices developed and changed over the years. In support, Mr Holland QC referred to Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57 at [85], Lymington Marina Ltd v MacNamara [2007] EWCA Civ 151 at [33], and to a first instance case, Dutta v Hayes [2012] EWHC 1727 at [29]-[31].

67. In Regency Villas the relevant rights, referred to in the judgments as "the Facilities Grant", included a right of way along the driveways and roadways of an estate which had been converted into a leisure complex with timeshare ownership, however the critical right the subject of the litigation was the right to free use of the recreational, leisure and sporting facilities[4]. Over the years there had been some major and minor changes to the facilities. In breach of covenant the outdoor swimming pool had been filled in; the basement of the mansion house had been redeveloped with an indoor swimming pool being been built in place of a gymnasium; some leisure facilities had been closed; and, the riding stables had been demolished. The issue in the litigation was whether, by the Facilities Grant, the claimants, as freehold or timeshare owners of residential accommodation on the estate, had an easement entitling them to free use of the recreational, leisure and sporting facilities. The claimants succeeded at trial and, broadly, on appeal to the Court of Appeal. However, that court held that new facilities post-dating the grant, in particular the indoor swimming pool, were outside the Facilities Grant. The majority in the Supreme Court held, as stated at [26], that, construed in the context of its factual matrix, which included that there was a common conveyancing solicitor for both the dominant and servient party to the conveyance containing the Facilities Grant, the Facilities Grant was :

> "… in substance the grant of a single comprehensive right to use a complex of facilities, and comprehends not only those constructed and in use at the time of the 1981 Transfer, but all those additional or replacement facilities thereafter constructed and put into operation within the Park as part of the leisure complex during the expected useful life of the Regency Villas timeshare development for which the 1981 Transfer was intended to pave the way. It is, in short, a right to use such recreational and sporting facilities as exist within the leisure complex in the Park from time to time".

The majority disapproved of the Court of Appeal's approach of treating each facility as

[4] "… the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of Broome Park Mansion House, gardens and any other sporting or recreational facilities … on the Transferor's adjoining estate".

the subject of a separate grant of rights. At [74] Lord Briggs observed that the Facilities Grant exhibited the well-settled essential characteristics of an easement (dominant and servient tenement, accommodation of the dominant tenement, dominant and servient owners must be different, and the right must be over land and capable of being the subject of a grant[5]).

68. Against that background, the Supreme Court considered the wider question whether the grant for timeshare owners of comprehensive rights to use and enjoy recreational and sporting facilities at an adjacent leisure complex is something the law of easements ought to comprehend, looking at the matter in the round rather than as a series of compartments. At [76] Lord Briggs observed that :

> "… the common law should, as far as possible, accommodate itself to new types of property ownership and new ways of enjoying the use of land".

At [77] and [78] Lord Briggs noted that recreational easements had become widely recognised in the common law world. At [79] and [80] Lord Briggs noted some of the problems arising : rights of indeterminate length were to be enjoyed by a timeshare set up for a limited period; where the leisure complex reaches the end of its natural life; and, of sharing and enforcing the sharing of the costs of management, maintenance, repair and renewal. At [85] Lord Briggs agreed with the trial judge's view that it was unrealistic to construe the rights under the Facilities Grant as confined to the actual facilities on site or planned in 1981. Reasons included that that would inhibit the servient owners from introducing improvements, replacements or additional facilities. Lady Hale, Lord Kerr and Lord Sumption agreed with Lord Briggs. Lord Carnworth, at [94] - [97], was of the view that the merits all favoured the claimants but that the principle of servient tenement passivity presented an insuperable barrier to recognition of the Facilities Grant as a new kind of easement.

69. In Lymington Marina, the particular point was whether a term should, as a matter of necessity, be implied into an agreement that the agreement should thereafter be interpreted on the basis of the law as it stood at the time the agreement was made or whether later changes in the law could affect its interpretation. The Court of Appeal, Arden LJ at

[5] As to being capable of being the subject of a grant, see Lord Briggs at [58] : clearly defined, not precarious, not subject to the servient owner's whim, not so extensive or invasive as to oust the servient owner from enjoyment or control of the servient tenement, and not requiring the servient owner to be other than passive.

[33] with whom Pill LJ and Sir Martin Nourse agreed, held that the factual matrix included that parties would know that statute law and the common law develop over time and thus it would be wrong to construe an agreement as if made in a form of legal time warp.

70. Relying in particular on [85] in Regency Villas and [33] in Lymington Marina, Mr Holland QC submitted that when construing the easements and covenant the court is entitled to, and should, take into account that in 1978 and 1980 the parties would have envisaged that agricultural practices would change over time and that the scope of the easements and covenant were, therefore, not set in stone. Mr Mitchell did not contend to the contrary.

71. I readily accept, by reference to the authorities cited and as a matter of common sense, that as agriculture develops so easements affecting or covenants governing the use of land for agriculture may develop correspondingly. In any particular case this would have to be determined by the factual matrix and limited by the constraints of practicality and common sense and by respecting the servient owner's rights. In addition, and by way of caution, I observe that it is important not to confuse developments in agriculture or agricultural practices with diversification into non-agricultural activity.

72. I also accept that if or when the statutory definition of agriculture changes that may be relevant to the construction of covenants and easements which confine use of or access to the land to agriculture. However, that has not occurred and no such point arises in this case.

73. As to the word "only", Mr Mitchell submitted that "only" added an important qualification. He referred to Jewell v McGowan [2002] EWCA Civ 145. In that case the tenant of a 110 acre agricultural holding, subject to a clause to use the holding for agricultural purposes only (expressly excluding use as a market garden), was also the freehold owner of adjoining land. He proposed to site a shop, tearoom, schoolroom, museum, and toilets on the adjoining freehold land and to create a new access and to allow visitors to park on the agricultural holding. He also proposed to create a marked trail on the agricultural holding and to provide rides around the agricultural holding on trailers pulled by tractors so that visitors could look at the crops and animals. The tenant had previously carried on these activities for about 10 years but they were discontinued following a threat of service of a notice to quit. The previous activities had been very successful and had increased the farm's income from dairy farming by up to 50%. By his proposal the tenant

sought to revive and expand the discontinued activities. In the relevant statute, the Agricultural Holdings Act 1986, agriculture was defined as in the 1947 Act.

74. In Jewell Mance LJ distinguished the qualification "only" from other terms of limitation such as "in substance" and "mainly". Mance LJ held that "for agricultural purposes only" was "not to be read in any extreme or unreasonable sense" and did not prohibit or exclude "peripheral or minimal" non-agricultural use. Thus, a farmer would not be prohibited from, with his family or friends, walking, picnicking, sketching or fishing on the agricultural land for pleasure; similarly, the use of a field for one day in the year for non-agricultural purposes (say a village garden party) would be de minimis. By contrast, making a film for educational or commercial purposes about farming was impermissible; the film making may relate directly to the primary activity of farming but it would still fall foul of an agricultural purposes only constraint. So too, an open farm arrangement intended to attract several thousand visitors annually would "fall into quite a different category". Mance LJ expressed the point thus :

> "An additional activity or business that is possible only because of some primary activity conducted on land may none the less have a different character and purpose from the primary activity or business".

Mance LJ acknowledged that the proposed revived or new activities were dependent upon the agricultural activity but concluded that, because they were different in character and did not take "their colour or purpose from the principal activity of [agriculture]", they were distinct activities and fell outside the agriculture restriction. Thus, they were not ancillary activities in the sense of being associated or taking their colour or purpose from agriculture.

75. Park J agreed with Mance LJ. Park J considered "only" to be "the vital word" and that it prohibited all activities other than use for agricultural purposes, except for de minimis activities. At [51] Park J observed that if land is used for agricultural purposes at all times and for another purpose it is not used for agricultural purposes only.

76. Mr Mitchell submitted that the ratio in Jewell was clear and stark, and that "only" was an important word which emphasised and constrained the permitted use. Mr Mitchell submitted that the facts in Jewell were closely analogous to the facts in this case and were directly applicable to the permitted use of the Field and the right of way along the Track.

77. Mr Holland QC submitted that the word "only" after the words "agricultural land" added nothing of relevance to the construction of the 1979 and 1980 Conveyances when set in the context of the factual background or matrix. That was because the activities complained of by C were in fact ancillary to, and not different or distinct from, agricultural use of the land.

78. Mr Holland QC also relied on Jewell, in particular Mance LJ's reference to ancillary activities, and submitted that activities which were incidental or ancillary to agriculture would be permitted activities. At [38] Mance LJ rejected the trial judge's analysis that the proposed open farm activities were permitted because they depended upon and were, as the trial judge termed it, ancillary to the principal activity of farming; and, at [46] Mance LJ returned to ancillary activities and held that if by "ancillary" the trial judge had meant that the open farm activities "t[ook] their colour or purpose from the principal activity of farming" that was wrong, the open farm activities "constituted a distinct activity for separate, non-agricultural purposes". Mr Holland QC's point was that the activities challenged by C were not separate but were part and parcel of, or were bound up with and therefore did take their colour and purpose from, the agricultural activity of the Nursery.

79. Mr Holland QC submitted that whether activities were incidental or ancillary was a matter of fact and degree. On this point Mr Holland QC referred to several cases including St Marylebone Property Co Ltd v Tesco Stores Ltd [1988] 2 EGLR 40.

80. In my view reference to the judgment of Hoffmann J in St Marylebone Property Co Ltd suffices. The question was whether the business being carried on was only that of a grocer and provision merchant or was of some other composite trade, or differing trades, in addition. Hoffmann J said at p.42 :

> "This must be a matter of fact and degree. For example, a grocer's shop which sells a few electric plugs and batteries might well be said to be a shop which is a grocer but happens conveniently to sell some electrical goods rather than a shop which carries on both the grocery and electrical trades. On the other hand, if non-grocery products are sold in sufficient quantity they will constitute the carrying on of a separate trade, and even if a wide variety of non-grocery items are sold in quantities each of which would not in themselves amount to a separate trade, the cumulative effect may be to make it inappropriate to describe the premises as a grocery and provision merchant rather than a general store or some other composite description".

81. Mr Holland QC also referred to Short v Greeve [1988] 1 EGLR 1 where the issue was

whether a garden centre was an agricultural holding or a business tenancy under the Landlord and Tenant Act 1954. The Court of Appeal, agreeing with the trial judge, held that turnover figures were not conclusive and it was justifiable to take an overall view. Provided the horticulture grown element of the business, even though less than 50%, was not insubstantial the tenancy could still be classified as an agricultural holding. In Short the trial judge had held, and the Court of Appeal took into account, that the business was based on the sale of Mr Short's roses. Mr Holland QC submitted that this approach was correct and applied to the facts of this case supported Ds' case that the Nursery, even with the tea room taken into account, was an agricultural business.

82. Save in respect of the applicability or relevance of Short to this case Mr Mitchell did not take issue with the propositions drawn from the authorities cited by Mr Holland QC, but he did take issue with Mr Holland QC's submissions as to applicability to this case. Mr Mitchell submitted that the issue in Short was very different and further that once the additional constraint imposed by the word "only" was taken into account the decision in Short became obviously distinguishable.

83. I take it as established law that activities which, upon analysis, are as a matter of fact and degree incidental to or take their colour or purpose from (and are in that sense ancillary to) agriculture would not fall foul of an "agricultural land only" user restriction, and, accordingly, enjoyment of a right of way so limited would also extend to those activities. Further, other unrelated activities which are peripheral or incidental and carried on in a small or minimal way and may conveniently be carried on alongside agricultural activities also would not undermine an agriculture only restriction. In each case it is a matter of fact and degree with proper regard being given to the "only" constraint, not so as to be unreasonable but so as to give due weight to the scope and scale of the restriction.

84. As to Short, and the holistic approach, taking turnover and profit mix into account as a factor, but not ruling out - as an agricultural tenancy - a business where the agricultural foundation has been overtaken by similar but nevertheless non-agricultural activities, may well be the correct approach to deciding whether a mixed growing and bought-in business is or is not an agricultural holding; but, the litmus test is different where the requirement is use as or for agricultural land only. Had the issue in Short been whether the business of Mr Short's garden centre was agricultural only the answer would obviously have been in the negative. I agree with Mr Mitchell as to the irrelevance of Short to the present case.

85. As I understand their submissions, and save as to the relevance of Short, Mr Mitchell and Mr Holland QC are not far apart on the relevant principles, where they differ is as to which activities at the Nursery are, or are incidental or ancillary to, agricultural use of the land and the scale of those activities in the context of the Nursery's business. Thus, the difference between them is, substantially, one of application to the facts rather than legal principles.

86. Before leaving the general consideration of the phrase "agricultural land" I should refer to Mr Mitchell's submissions by which he drew a distinction between nurseries and garden centres on the basis that the former are and the latter are not within the definition of agriculture. Typically, a garden centre is a retail outlet for the sale of plants, shrubs, trees, garden equipment and supplies, garden ornaments and furniture, fencing and landscaping materials and, increasingly, homeware. A garden centre buys its stock for retail sale and does not engage in growing its stock as an integral part of its activities.

87. MG, who gave joint expert evidence as an agricultural consultant, proffered the following definitions :

> "A nursery … is an agricultural business which grows plants with a view to sale either retail sale to the public or wholesale to others. The majority of plants purchased will require time and action before resale. The sales from plants grown on site are generally 80% of the total sales accepting that there is a need to purchase some plants for direct resale where they are of a type unsuitable for growing and/or are specialist for example topiary.
>
> A garden centre .. is a retail operation which involves the sale of plants and other gardening products which have been purchased for resale".

In answer to written questions MG said that in his experience 50% of nurseries sold only items grown on site, it being immaterial whether or not the sale was direct to the public, and 50% also sold items purchased for resale. In oral evidence MG clarified these definitions. His 80% figure was taken from rating and planning law and intended to be a yardstick; also, the 80% was not necessarily a measure of sales, whether value or volume, but might be of the proportion of products grown on site; however, it was not a measure of the area devoted to that of nursery growing because the same space may be utilised differently over the course of a year. In MG's professional opinion, an important distinguishing feature is whether or not the business is a retail business; in this context MG did not use the term retail to refer to direct sales to the public; thus, MG was

not referring to the distinction between sales to the general public and trade sales, but was referring to whether the business was engaged in growing or developing as distinct from buying in for onward sale. MG agreed with Mr Holland QC that a nursery's business is seasonal, that in spring and summer the nursery would be busy growing and selling what was being grown, whereas in winter it might resort more to retailing bought in plants and bulbs without ceasing to be agricultural. Further, the sale of compost or peat not required for growing nursery produce would not affect whether a nursery business was agricultural. For MG the 80:20 ratio was to be evaluated on that basis and, further, it was more a guideline than a rigid distinguishing test.

88. MG's view was that the sale of other products such as garden ornaments fell outside agriculture. Questioned further, MG expressed his view that responding to customer expectations or requirements might make good commercial sense but it might also take a nursery business outside that of agriculture. He was also of the view that providing proportionate customer amenities would not change the character of a nursery and take it outside agriculture; but, the disproportionate provision of amenities would affect the character and take the nursery outside agriculture. Thus, for example, the installation of toilets and a vending machine for drinks and snacks would not be a diversification but the establishment of a café or tea room, whether or not an adjunct to a nursery, would be a diversification outside agriculture. In MG's experience and opinion tea rooms were associated with garden centres.

89. The main areas of disagreement between Mr Mitchell and Mr Holland QC are whether certain activities at the Nursery may be classified as incidental, peripheral or ancillary to agriculture so as to fall within the scope of use as "agricultural land only"; as to the scale of any activities at the Nursery which are not actually agricultural or incidental, peripheral or ancillary to agriculture; and, as to the impact of the tea room. In so far as relevant, these disputes are addressed in the context of the agreed issues.

90. As to the further permitted use of the Field and the covenant in the 1980 Conveyance of the Field :

> "to use the land hereby conveyed as agricultural land and not to erect any building thereon other than a stable with hayloft and tack room and not to use the said land for any other purpose whatsoever"

I take the concluding words "not to use the said land for any other purpose whatsoever" to have the same meaning and effect as "only". The additional permitted use of or connected with stabling may, depending on the facts be ancillary to agriculture. However, at all relevant times it is more likely to have been intended to permit a non-agricultural but still 'countryside' use such as liveries and equestrian leisure. In my view, it is emphatically not a general widening of the permitted user to other retail activities or leisure.

91. The question is not one of labelling but one of looking at the substance of the business actually carried on, irrespective of what it calls itself or how it is classified by its proprietors. On this I agree with MG's approach as clarified by answers to written questions and answers given in the course of his oral evidence. What is required is an overall view of the nature and mix of what is bought in, what (if anything) is done to develop, grow or otherwise enhance what is bought in, what is sold, and whether and, if so, to what extent there has been diversification. All of this requires reliable information which can then be the subject of evaluation as to fact and degree.

92. In my judgment, the word "only" and the equivalent phrase ("not … for any other purpose whatsoever") adds an important level of emphasis. It does not operate as a bar to genuinely incidental or ancillary activities but it excludes activities which have a different character or purpose from the primary activity of agriculture. I do not consider a yardstick of 80% (whether applied to turnover, cost of sales, area, or other criteria) or any other high percentage to be the route to identifying the cut-off point between agricultural and non-agricultural use of land or a right of way where the restriction is to agricultural use only. I also accept Mr Mitchell's submission and MG's evidence that nurseries and garden centres are different in substance and that while the former is, the latter is not, agriculture. Here I keep in mind that "horticulture" is within the definition of agriculture and therefore an "agricultural land" use or activity, but the essence of horticulture is growing not buying and selling as a commodity, i.e. retailing.

93. As to the additional right to access the Field via the Track in connection with the use of "any buildings erected thereon as stables tack rooms and hay lofts", Mr Mitchell submitted that consideration of this phrase does not arise on the statements of case and evidence in this litigation. Mr Holland QC submitted that those words were intended to broaden the definition, or rather to broaden the permitted scope of the use of the Track, because keeping horses would not normally be for agriculture but would be for leisure. Mr Holland QC submitted that by the covenants and easement of way in the 1980 Conveyance there

are two permitted uses of the Field.

94. MG was asked for his view and experience of the addition of a permission to erect a "stable with hayloft and tack room" in the context of a covenant otherwise restricting the use of land to agriculture only. In MG's experience the phrase was usually found attaching to parcels of land of up to 12 acres and applicable to equestrian use, but could apply to other animals such as sheep and goats. In the context of the area of the Field, MG's opinion was that it could accommodate stabling for up to 3 horses.

95. Clearly there are two permitted uses of the Field under the 1980 Conveyance, agriculture and stabling and storage of fodder and riding tack. At all relevant times there has not been a stable, tack room and/or hay loft erected on the Field so the construction of these words in context as permitting non-agricultural activity or use is not strictly an issue. Further, in the 1980 Conveyance each permitted use is constrained; the easement over the Track by the word "only", and the covenant by the words "not to use the land for any other purpose whatsoever". These words of limitation are to the same effect and import in that they emphasise the narrow scope of permitted user of the Track and the Field. Were there to have been a "stable with hayloft and tack room" erected on the Field its use would have been limited to the accommodation and keeping of equine animals or livestock and the storage of their tack and fodder. Thus, some equestrian leisure activity would have been a permitted use of the Field in addition to or as an alternative to agricultural activity. If and to the extent that Mr Holland QC meant to suggest that the reference to stables etc is generally permissive of leisure use of the Field, I disagree and reject that submission.

96. Finally, on the meaning and effect of critical phases in the 1978, 1979, and 1980 Conveyances, the ADC/C also pleads reliance on the Nursery having a county parish holding number. As I understand it, this is required for keeping livestock not a nursery. It sheds no light on whether the Nursery's activities challenged by C are agricultural use of land.

97. As to remedies, strictly not a matter for this trial, Mr Mitchell referred to Ashdale Land & Property Co Ltd v Maioriello [2011] EWCA Civ 1618, a case in which the right of way over an access road was limited to agricultural purposes only but part of the site had been sold off and subdivided and used by gypsies for their caravans. Injunctions and enforcement action by the local authority had proved unsuccessful in preventing unlawful use. Self-help measures had been taken with gates, fencing and by placing large

concrete obstacles on the way. Mr Mitchell submitted that the relevance at this stage is that the Court of Appeal held that excessive and unlawful user will constitute trespass and may be restrained by an injunction prohibiting use in excess of the grant and it will then be for the dominant owner of the right of way to work out how to disentangle the permitted use from the excessive and unlawful use. In addition, the servient owner may take practical steps to prevent unlawful use of the easement.

SLTRL, the tea room and the premises and entertainment licence

98. In April 2014 D1 applied for planning permission to demolish the then dilapidated wooden frame greenhouse and build a tea room and retail building. He described the then current use of the site as "Highdown Nursery and Garden Centre". The application sought to add 200 square metres of retail area and 150 square metres of tea room area to an existing 670 square metres of growing, storage and distribution area at the Nursery. C objected through her solicitor. Planning permission was granted in July 2014. Conditions included that the retail space and tea room were to be ancillary to the horticultural use of the Nursery and no other purpose whatsoever.

99. C's claim relating to the tea room concerns use of the Track to access the tea room and parking on the Field while visiting the tea room. From C's perspective the tea room is a separate business attracting its own customers and travel along the Track, whether delivering to or visiting only the tea room or the Nursery and the tea room, constitutes a significant trespass. The underlying issue is whether or not the tea room is incidental or ancillary to the business of the Nursery and within the scope of use of the land as agricultural land only.

100. Following very late disclosure and witness statements by D2 and CP after the conclusion of the factual and expert evidence, it became possible to consider the recent building costs and their allocation between the Nursery (potting shed and shop) and the tea room. Looking at floor areas, the greater proportion was attributable to the Nursery, but considering necessary separation (for example, on CP's evidence, so that dust did not ingress into the tea room areas where food was consumed) and, again on CP's evidence, treating the kitchen and also the toilets as associated with the tea room, the greater proportion of the cost was attributed by D2 and CP to the tea room. After cross-examination by Mr Mitchell, the total costs attributable to building the new parts of the Nursery and the tea room reduced from £350k to £300k including VAT in total and D2's

and CP's evidence as to the costs attributable to the tea room reduced from £350k to £198k including VAT (£165k before VAT) of the £300k. I am not persuaded that either the cost of the wall between the retail area and the tea room or the cost of the toilets should be allocated entirely to the tea room. Nevertheless, on the evidence the difference would probably result in reallocating no more than £15k before VAT from the tea room build costs to those of the Nursery and still leave the tea room build cost at at least £150k before VAT.

101. D2's evidence included that the tea room and the animal menagerie were intended to be attractions which would draw in new customers or customers who might otherwise go to rival businesses which did have tea rooms or similar facilities. That is an understandable commercial motivation but it has no bearing on the distinction between permissible and impermissible uses of the Track and the Field in the sense that it cannot excuse or legitimise an otherwise impermissible use of the Track and the Field.

102. I have already referred to the terms of the premises and alcohol licence and do not repeat those details here. During cross-examination of CP by Mr Mitchell it became clear that SLTRL did wish and intend to hold, and had held, events independently of the Nursery, including outside the Nursery's trading hours. In cross-examination CP referred to events held as being or including a Christmas card fair, a 70th birthday party, a craft fair, and a Chinese food feast. CP's evidence is that, prospectively and if not restrained by an injunction or a policy imposed by D2, he would prefer to host events in the order of 4 times per month, i.e. once a week. During cross-examination CP accepted that the traffic flow along the Track had increased since the tea room opened but said that he did not think it had increased "vastly", rather customers tended to stay longer and visit the tea room as well as the Nursery.

103. There is no traffic flow evidence, such as a traffic survey, and for much of the time that it has been open the tea room has been subject to an injunction limiting its opening hours to those of the Nursery. The aerial photographs show a significant increase in parking since the opening of the tea room; the photographs before 2016 show very limited vehicle parking, including by staff; the 2016 photograph shows a dozen or so vehicles, and most parked at the far boundary of the Field which suggests staff parking; the google photographs after the tea room has opened show more than 50 vehicles parked and this is consistent with a photograph marked as taken by C in 2018-2019. CP's evidence is that car park capacity for visitors is 70 vehicles. At the two site visits I attended

with counsel there was also a steady flow of traffic arriving and leaving between 10.00am and 11.15am in October 2019 and February 2020. On that basis, and in the light of the evidence as to turnover of the Nursery and the tea room (referred to below), my conclusion is that the opening of the tea room in late 2017 has attracted a significant number of additional customers, and therefore increased traffic flow materially. I accept CP's evidence that not many customers visit only the tea room and that there are some customers who do not visit the tea room at all. Further, I am in no doubt that, were the injunction not in place, SLTRL would look to exploit the tea room's business outside the Nursery's hours and those customers would unquestionably only use the Track and park on the Field for the purpose of visiting the tea room. In this context I note that the planning permission limits the tea room's activities to those ancillary to the Nursery, but adherence to or contravention of that is not a matter for this trial; nor does it follow from the planning permission as granted that the tea room might qualify as an ancillary activity to that of agriculture only.

104. That the tea room has been a success from the outset is not realistically open to doubt.

105. In its first accounts, for the period from incorporation on 10.10.16 to 31.10.17, therefore covering the build period but stopping just short of the commencement of trading, SLTRL's balance sheet shows fixed assets at £28k and net current liabilities of £21k. As for trading, D2 agreed during cross-examination that the tea room's turnover for its first accounting period from November 2017 through 2018 was £590k or £49k per month; and, for the first 8 months of the following period through 2019 was £482k or more than £60k per month. On Ds' evidence, the business modelling for the tea room was on a forecast turnover of £202k per annum which was expected to yield an 18% net profit. Business at the tea room far exceeded forecasts and expectations. On any basis the tea room is a thriving business with, from the outset, income equating to more than 50% of the Nursery's turnover. As detailed accounts, whether management or year end, for any period are not in evidence it is not possible to analyse or make specific findings as to profitability. That said, there is no suggestion that the tea room is, or has at any time been, other than profitable. Further, given that a net profit of 18% was forecast on turnover of £202k and that not all costs would be variable, I may realistically and reasonably conclude that the profit percentage exceeds 18%. At just 20% profit margin, the net profit on the disclosed turnover would exceed £200k. During cross-examination D2 agreed, when Mr Mitchell put it to her, that the net profit of the tea room for the period for which turnover had been disclosed exceeded £200k. D2 also agreed that within this relatively

short period the build cost of the tea room had been recouped. Finally on the financial aspect of the tea room, it is relevant to bear in mind that the forecast turnover (£202k per annum) was prepared on the assumption that the permitted opening hours and licence opportunity would be unrestrained whereas the actual sales and net profit have been achieved on the reduced hours and terms imposed by the interim injunction.

106. In his report, written answers to questions, and oral evidence MG expressed his view that the tea room was not ancillary to the Nursery but was a diversification and that the combined value of the turnover from the tea room and non-agricultural activities at the Nursery is so significant that it is not realistic to regard the business as agricultural. MG accepted in his evidence that it is now increasingly common for agricultural businesses to diversify, farm shops and tea rooms being examples. However, MG did not accept that such diversification would be consistent with or permitted where use of land or a right of way is confined to agricultural use only. Proportionate refreshment, as from a vending machine, and toilets were facilities consistent with a nursery limited to agriculture only, but the businesses actually carried on at the Nursery and the Field were not confined to agriculture and incidental or ancillary activities. Moreover, in his experience tea rooms were increasingly seen as destinations in their own right.

107. In the ADC/C Ds allege that the tea room forms part of the Nursery. Mr Holland QC submitted that the tea room would not exist without the Nursery and as currently constituted is within agricultural use because its predominant purpose is to draw customers to the Nursery. Accordingly, looked at as a whole, the business carried on at the Nursery is horticultural and, therefore, agricultural. In this context also Mr Holland QC relied on Short.

108. I note that the tea room carries on business through a separate legal entity, a limited company. The ownership of the shares is in the same proportion as the interests in the Nursery's partnership. However, SLTRL is legally, structurally and operationally independent of the Nursery. The reason for incorporation of the tea room business is said by D2 to have been advice from accountants driven by VAT considerations. Be that as it may, it is another pointer to there being a deliberate distinction or demarcation between the business of the Nursery and that of the tea room, and to the latter not being incidental or ancillary to the former.

109. As I see it, the telling factors are that : the tea room was established as a separate entity;

it is physically integrated into but carries on its business independently from the Nursery; that business is carried on as a separate and distinct trade; but for the restraint of an interim injunction, the tea room would be operating 7 days a week outside the Nursery's hours; and, having regard to fact and degree, including capitalisation and turnover, it carries on its trade at a level that far exceeds what may reasonably be termed incidental or peripheral or ancillary to that of the Nursery. Unlike the garden centre in Short, the tea room business is not based on the sale of the Nursery's horticultural produce; rather it runs parallel to and independently of the Nursery. In so far as there is a connection, the tea room is intended to increase the footfall at the Nursery by attracting new customers and maintaining those existing customers who might otherwise defect to other businesses, whether nurseries or garden centres, also offering a refreshment venue; however, the tea room is a diversification into non-agricultural activity on a very significant scale.

110. D2's view is that without the adjacent tea room the Nursery would be at a competitive disadvantage. That may be correct, but it is nothing to the point where the access route and parking is limited to agriculture only.

111. The tea room has a different character and purpose from the Nursery, its physical integration into the Nursery does not render it incidental or ancillary to the Nursery, and its addition to the Nursery impacts significantly on the view to be taken of the Nursery as a whole.

112. In my judgment Mr Holland QC's submission that the tea room's business is ancillary to that of the Nursery and/or part of the whole and therefore agricultural is unrealistic. Any contrary finding would fly in the face of Hoffmann J's decision in St Marylebone Property Co Ltd and the Court of Appeal's decision in Jewell.

Delay

113. Ds raise delay as an answer to all C's claims. Mr Mitchell acknowledges that aspects of delay as raised by Ds are relevant to some claims, but contends that the blanket or overall way in which delay is raised and relied on is wrong because delay, and the particular way in which particular delay may be relevant, is issue specific. That said, it is convenient at this point to set out and summarise the ways in which delay is raised in Ds' case and also how it is argued by Mr Holland QC for Ds and answered by Mr Mitchell

for C before turning to the agreed list of issues.

114. Ds' case as set out in the ADC/C is that C's claims relate to matters which C had known about for years before commencing these proceedings as a result of which C is no longer entitled to a remedy. Ds' contend that (1) for many years the actual trade of the Nursery has been carried on openly, to the knowledge of, and without objection from C; (2) over the years considerable monies have been expended on expanding the Nursery, including £350k on the tea room, and, throughout the trading from the Nursery, Ds borrowed monies for and reinvested profits in development of the Nursery; (3) it would be unconscionable to grant C relief now, including any restriction on use of the Track and/or use of the Field; and, (4) Ds conduct and C's inactivity over many years (a) entitle Ds to assert presumed release of or consent to any breach of covenant, (b) render any breach of covenant statute barred under the Limitation Act 1980, (c) entitle Ds to rely on the doctrine of laches as a defence, and (d) entitle Ds to rely on C's and her predecessors' acquiescence as a defence to any breach of covenant. Further, and in relation to the Field, (5) Ds contend that the Field had been used to store and display landscaping and other materials for more than 20 years and that cars had been parked on the field for more than 20 years, both without any objection from C and her predecessor in title. In relation to the tea room, (6) Ds contend that delay from 2014, when C objected to the planning application, until the issue of proceedings in late 2017 is relevant delay on C's part.

115. As to (1), the evidence is consistent with Ds having carried on business at the Nursery openly and, at least up to 2015, without objection from C. As to (2), I have found that the evidence does not support that £350k was spent on developing the tea room and the Nursery in 2016-2017; CP said that his labour cost fell to be taken into account as well, but I was not taken to evidence as to his remuneration by the Nursery or, after incorporation, the tea room over that period and so I disregard that as a notional further cost. As to borrowing, as Mr Mitchell pointed out, the evidence is unclear as to any particular borrowing for the Nursery both as to amount and reasoning or purpose. As to reinvestment, the Nursery's accounts clearly show that as from 2013 profits were at least fully drawn out of the business.

116. Thus, Ds case on delay is based variously on laches, acquiescence and presumed release or waiver which Ds interconnect. Further, pleaded reliance is also placed on limitation in the context of the covenants affecting the Field.

117. First, I refer to the arguments on the doctrine of laches. Founded on the maxim delay defeats equity, laches acts as a bar to equitable relief. The passage of time is relevant but, without more, even lengthy delay is not sufficient to defeat a claim to equitable relief. Some form of detrimental reliance is usually an essential ingredient of laches. The court looks at the length of the delay and the events (what was done or not done) over the relevant interval, and determines whether or not, looking at the circumstances over the elapsed time, it would be inequitable to grant equitable relief to the claimant. Examples cited in Snell's Equity 33rd Edition, at 5-011, include delay resulting in loss or destruction of evidence which might have answered the claim and release or abandonment, which require full knowledge, legal capacity and free will.

118. Both Mr Holland QC and Mr Mitchell referred to Fisher v Brooker [2009] UKHL 41. In that case, Lord Neuberger observed, at [64], that "some form of detrimental reliance is usually an essential ingredient of laches". Then, at [79], after observing that laches can only bar equitable relief and that a declaration as to the existence of a long term property right recognised by statute, in that case joint ownership of copyright in a musical work, is not equitable relief, Lord Neuberger added :

"In order to defeat Mr Fisher's claims on the grounds of laches, the respondents must demonstrate some "acts" during the course of the delay period which result in "a balance of justice" justifying the refusal of the relief to which Mr Fisher would otherwise be entitled".

119. Mr Holland QC and Mr Mitchell also both referred to Lester v Woodgate [2010] EWCA Civ 199 and the judgment of Patten LJ at [20] for the applicable test, as stated in Lindsey Petroleum Company v Barnes (1874) LR 5 PC 221 at p.239 :

"Where it would be practically unjust to give a remedy, either because a party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him in if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy".

Mr Mitchell emphasised the requirement of having regard to each side's conduct and position and the balance of justice, so that, depending on the circumstances, lapse of time unaccompanied by detrimental reliance or altered conduct would render a defence founded on laches inoperative.

120. Mr Mitchell and Mr Holland QC both referred further to Patten LJ's judgment at [22] in relation to the extent to which if at all the conduct of earlier owners may be taken into account. Mr Mitchell submitted that it would be wrong to take into account a predecessor in title's knowledge and conduct when considering every aspect of delay. Mr Mitchell referred to Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 5th Edition, at 38-075 for the proposition that :

"A defendant wishing to make good a deference of laches or acquiescence must rely on the behavior of the plaintiff, not of the plaintiff's predecessors in title".

That proposition is explained in the text by reference to the Privy Council's opinion stated by Viscount Radcliffe in Nwakobi v Nzekwu [1964] 1 WLR 1019 at p.1024, which passage was also expressly cited by Patten LJ at [22]. Laches is essentially personal to and operative against a particular claimant and the immediate defendant; it is not a stigma attaching to the title and blighting future owners; it does not bite as from a particular moment in time; rather, the doctrine requires consideration to be given to all circumstances affecting the current claimant and the immediate defendant; lapse of time being one such circumstance. This is to be contrasted with conduct based estoppel where, as a result of the words and/or conduct of earlier owners which the defendant has relied and acted on by altering his position, the remedy is barred from that point in time at the suit of the claimant as a succeeding owner.

121. Secondly in relation to delay, Ds rely on acquiescence as a defence to any breach relied on by C, that is as a defence to C's claim that Ds are in breach of covenants relating to the Field. A convenient statement of the elements of acquiescence based estoppel is set out in Snell's Equity, 33rd Edition, paragraph 12-034 :

"It applies where B adopts a particular course of conduct in reliance on a mistaken belief as to B's current rights and A, knowing of both B's belief and A's own inconsistent right, fails to assert that right against B. If B would then suffer a detriment if A were free to enforce A's right, the principle applies. It therefore operates in a situation in which it would be unconscionable for A,

as against B, to enjoy the benefit of a specific right".

122. Both Mr Holland QC and Mr Mitchell referred to the judgment of Buckley LJ in Shaw v Applegate [1977] 1 WLR 970 at pp.977-8, who, in the course of doubting whether it is necessary to establish all five of the elements identified by Fry J in Wilmott v Barber (1880) 15 Ch D 96 in order to succeed in invoking acquiescence to deprive a person of the right to rely on a legal right, identified the litmus test as follows :

"The real test, I think, must be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the rights sought to be enforced, to continue to seek to enforce it".

Fry J's five elements included a requirement that consideration be given to the relevant knowledge or state of mind and conduct of both parties. Those matters seem to me to be encompassed in Buckley LJ's reference to "the facts of the particular case" and "the situation" and the conscience of the person seeking to enforce the right.

Mr Mitchell submitted that unconscionability had to be assessed in the round by looking at both parties' behaviour. I agree and do not understand Buckley LJ, with whom Goff and Shaw LJJ agreed, to have been indicating that the test was to be answered by reference only to the plaintiff's knowledge, state of mind, and conduct.

123. Mr Holland QC, referring to the Court of Appeal decision in Gillett v Holt [2001] Ch 210, also agreed that unconscionability is to be looked at in the round. Mr Holland QC further relied on this case for guidance as to what may constitute detriment in the context of estoppel or acquiescence. It is not a narrow or technical concept, nor is it confined to financial expenditure. The touchstone is that there must be something substantial and relevant in answering a broad inquiry whether repudiation of an assurance is or is not unconscionable. Mr Mitchell agreed with these propositions. Where they disagree is on the application of principles to the facts and circumstances of this case.

124. Mr Holland QC referred to two other Court of Appeal decisions for helpful guidance and analogous circumstances. First, in Gafford v Graham (1977) 77 P&CR 73, where the question was whether covenants in a conveyance (1) limiting the permitted use of property conveyed to a livery stable and bungalow and (2) requiring the vendor's permission to be obtained before undertaking building works were enforceable in circumstances

which included that the vendor was aware of building works to a barn, upward extension of the bungalow, and the carrying on of a riding school, but made no objection to the defendant until some three or so years later when the defendant proposed to construct an indoor riding school. The Court of Appeal took into account that the vendor knew his rights, made no contemporaneous complaint of the earlier conversion of the bungalow to a two storey dwelling or to the extension of the barn, and only raised them when complaining of a then current much more serious matter. The Court of Appeal took the view that the vendor regarded the earlier breaches as closed incidents. However, the Court of Appeal rejected the defendant's argument that the earlier acquiescence was a bar to any relief at all. The reasoning and decision as to the appropriate relief is irrelevant to this trial, which is concerned only with liability.

125. Mr Holland QC also referred to Harris v Williams-Wynne [2006] EWCA Civ 104. There Chadwick LJ endorsed the test for acquiescence as formulated in Gafford :

> "Would it be unconscionable in all the circumstances for a party to continue to seek to enforce the rights that he undoubtedly had at the date of the breach?"

In Harris, Chadwick LJ drew a distinction between a case, as in Gafford, where a claimant knows that he can prevent works before they are commenced by withholding approval required under a covenant and a case where a person with the benefit of a similar covenant does not become aware of the breach until works have reached an advanced stage. Again, the issue in Harris was as to the appropriate remedy, not as to the right to a remedy at all. I note here, that it is a yet further question where there is no covenant requiring permission before undertaking works but only an easement to limit the purpose of access to the land so that there is no scope for direct control over what the land owner does on the land.

126. Mr Mitchell referred to Chatsworth Estates Company v Fewell [1931] 1 Ch 224 as an authority demonstrating that acquiescence in certain breaches of covenant did not necessarily preclude successful objection to another or other breaches. The relevant covenant prohibited the use of houses on an estate otherwise than as private dwelling houses. Over time other uses had been licensed – schools, flats, a hotel, and three boarding houses – and other unlicensed breaches had occurred. These circumstances did not preclude the plaintiff from refusing to permit the defendant to use his house as a guest house. Farwell J noted that in all cases the question is one of degree and in many

ways analogous to the doctrine of estoppel. He formulated the test as :

"Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guest house?"

Farwell J disregarded the flats as a breach on the basis that their use was residential and is reported as "having explained the exceptional nature" of the hotel and boarding houses. Given that the injuncted use was as a guest house it is unfortunate that the explanation of the exceptional circumstances is not actually reported. Be that as it may, the important point is that in principle the question in every case is a matter of degree and that the failure to object to some breaches does not of itself have an accumulator effect so as to defeat objection to other later breaches.

127. Thirdly in relation to delay, Ds rely on presumed release or waiver being justified by and resulting from a very long period of open breach. Mr Holland QC referred to the Privy Council decision in Attorney-General of Hong Kong v Fairfax Ltd [1997] 1 WLR 149. The relevant lease of a 2½ acre plot contained a covenant restricting development to one or more villas. Over time the plot was subdivided into 28 smaller plots. The main development took place after 1945 and between 1957 and 1992 development included high density multi-storey and high-rise apartment blocks. The Privy Council adopted as the test principles stated by Farwell J in a Hepworth v Pickles [1900] 1 Ch 112 :

"If you find a long course of usage, such as in the present case for 24 years, which is wholly inconsistent with the continuance of the covenant relied upon, the court infers some legal proceeding which has put an end to the covenant, in order to show that the usage has been and is now lawful, and not wrongful".

The Privy Council took the view that, absent compelling evidence to rebut the inference that everyone knew that the plot was not used for villas but had been transformed into an area of high-density high-rise buildings, it was unrealistic to accept that the Crown as landlord was unaware of the development and that this was the clearest possible case of abandonment.

128. Returning briefly to the introductory paragraphs on delay, I note here that in my view the authorities support Mr Mitchell's overarching submission. Delay is not of general application but must be looked at in the context of the particular circumstances and particular

defence on an issue by issue basis.

The agreed issues

The Field

129. There are five agreed issues raised in relation to the Field. To an extent they overlap or are interconnected and delay is relied on by Ds in relation to all five issues.

Issue 1 the first Field issue : Are the following uses of and activities on the Field breaches of the Covenants contained in the 1980 Conveyance (i) to use the land as agricultural land (ii) not to erect any building thereon other than a stable with hayloft and tack room and (iii) not to use the said land for any other purpose whatsoever :-

(a) the biomass boiler, including for the processing of wood;

(b) the erection of various buildings on the Field, incorporating boilers, plant room, fuel store, chip dryer and log dryer (to the extent that structures erected on the Field constitute buildings);

(c) storage and/or displaying for sale to members of the general public landscaping, building, horticultural and other products, including (but not limited to) sand, stones, compost and peat (to the extent that the Court finds that such activities are being carried out on the Field); and/or

(d) car parking for members of the public attending the Nursery and/or SLTRL's tea rooms / function venue?

130. I start with uses (a) and (b). C seeks declarations that (1) the use of the Field for the biomass boiler, including for the processing of wood, is a breach of the covenant in the 1980 Conveyance restricting the use of the Field and (2) the erection of various buildings on the Field incorporating boilers, plant room, fuel store, chip dryer and log dryer is a breach of the covenant in the 1980 Conveyance restricting the use of the Field.

131. Ds position is that in relation to the Nursery and the Field they are entitled to continue using their land as they have been and are. To this end, by the ADC/C, Ds counterclaim for a declaration that

"[Ds] and their Nursery are entitled to continue to use [Ds'] land and [the Field] for their present purposes".

It is worth clarifying here that, other than in relation to the Field, C's claim is not aimed at the actual use Ds make of Ds' land but at the use Ds make of C's land, and the declaration sought by Ds in relation to "[Ds'] land" is not responsive to any issue raised by C. Ds' land other than the Field is not subject to any covenant for the benefit of C's land. C's claim is principally concerned with the use made by Ds of the Track to access the Nursery and the Field. It is also aimed at confining the use of the Field to that the subject of the covenant in the 1980 Conveyance.

132. Ds' response, summarised in Mr Holland QC's annotation of the agreed list of issues, is that the biomass boiler was designed for agricultural use and to work using a variety of fuels including wood; the other boilers were similarly bought for agricultural use. Their location on the Field may have contributed to their inutility, but did not negate the agricultural purpose. Further, there are no other buildings, but they are all transportable containers or portacabins and ancillary to the boilers. Accordingly, (a) and (b) do not offend the covenant in the 1980 Conveyance.

133. The evidence before me is that planning permission, applied for on Ds' behalf by the biomass boiler provider, AMP Energy Services Ltd, sought permission to erect or install a biomass boiler facility incorporating boilers, plant room, fuel store, chip dryer and log dryer in connection with existing commercial horticultural activities. Permission was granted on 22.3.17 on conditions including that the boiler must only serve the Nursery business and must not be used for processing household waste. At that time the tea room was under construction and, in any event, as a business it has been kept separate from the Nursery. By locating the biomass boiler on the Field, it was inevitable that some conduit was required to convey heat from the boiler to the Nursery. This was via a pipe laid under the Track by CP (and possibly RH) in March 2017 ~ which pipe is one of a number of pipes is the basis of a separate claim in trespass.

134. On C's evidence, which was not shaken and which I accept, C was not aware of the planning permission application for the biomass boiler when made on 31.1.17.

135. On Ds' evidence, which was not challenged, the biomass turned out to be something of a millstone. It is said never to have worked.

136. MG reported that he had seen no evidence of it ever having worked. MG reported that the fuel intended for the biomass boiler was incorrectly stored, not being kept dry, and

that is another reason why the biomass boiler would not have worked. Irrespective of why it failed to work, MG's evidence is that to be of any practical value, because of heat loss in a conduit, the biomass boiler should have been located adjacent to the polytunnels it was intended to heat. He is also of the view that a biomass boiler servicing polytunnels for plant growing would have been agricultural use.

137. I agree with MG's view as to agricultural use, and I did not understand Mr Mitchell to dispute this proposition. In principle, the presence of a biomass boiler would not be a breach of covenant in so far as it was acquired to heat the Nursery's business and aid growing and development of plants. In practice, its location on the Field rendered it not fit for purpose and unable to be put to agricultural use for the Nursery.

138. Had the biomass boiler worked and, as was intended according to D2, been used to heat the tea room a further question of use would have arisen, but that has not happened. Further, although still present on the Field during the trial, the biomass boiler was removed by mid-February 2020.

139. There is also waste, including household waste, stored on the Field together with other plant. C's evidence is that Ds have been and are burning the waste on the Field. Burning something appears to be supported by a 2013 aerial photograph.

140. Mr Holland QC submitted that the plant is not within the definition of "buildings" and is not "erected" on the Field, rather the plant comprises transportable structures (containers and the like). Thus, the question of whether or not the stable provision in the covenant to the 1980 Conveyance is met does not arise. In principle, I agree with Mr Holland QC's analysis of whether or not the plant constituted "buildings". However, the relevant issue is not whether the containers and the like are buildings but whether their presence on the Field was for agricultural use only. To the extent (if at all) that the plant was or is put to agricultural use only on the Field there would not be a breach of the covenant in the 1980 Conveyance. However, other than for housing the biomass boiler, I have not been directed to evidence establishing that that was or is the case.

141. As to buildings on the Field, the photographic evidence, including a photograph annexed to the AP/C, shows a pitched roof wooden and glazed structure in a corner at the Highdown Cottages end of the Field. The evidence does not include whether that structure was erected on the Field but it is an erect structure and it is not a stable, hayloft or tack

room; moreover, there is no evidence that it is put to agricultural use.

142. There is evidence that a generator has been located on the Field which, on D2's evidence, is used to heat both the Nursery and the tea room. That use is not agricultural only.

143. As to the storage and processing of wood (chippings and logs), had this been intended to fuel the biomass boiler and been capable of so doing, as to which MG's opinion is referred to above and is accepted by me, the agricultural use conditions could have been met, but that was not the case. As is apparent from the evidence of MG and my own observations on a site visit, CP carries on a separate log selling business partly from the Field with retailing from the Nursery. On the evidence, the wood is supplied by arborists and tree surgeons. It is received as or converted to wood chippings as well as firewood, and sold as such. This activity falls outside that of agriculture only. Ds' evidence is that the log selling business is entirely separate from that of the Nursery, so even if - which is not the case - there was evidence as to the turnover or profitability, it could not be argued to come within the scope of incidental or peripheral agricultural activity. Any storage, processing or sale of wood on the Field by or with the permission or acquiescence of Ds would be a breach of covenant by them under the 1980 Conveyance. Any transporting of wood along the Track as part of a log selling business, whether delivery by arborists or removal by customers is also a trespass irrespective of whether the destination is the Field or the Nursery. So too is any transportation across the Track between the Field and the Nursery. Since the log and chipping business is CP's it would not have started before 2013. The google photographs (post 2016) show piles of logs on the Field but these are not apparent in the 2016 and earlier photographs. My conclusion is that this use of the Field commenced in mid to late 2016 or in 2017 shortly before or at the time of delivery of the biomass boiler and not more than 15 months before commencement of the proceedings.

144. Finally, as to the waste stored on the Field there is no evidence that this is within the agriculture only constraint. On the evidence, particularly unchallenged evidence of CP, it appears to be largely, if not exclusively, waste from the wood and woodchip delivered by arborists and garden waste from third parties stockpiled for the purpose of fueling the biomass boiler. The receipt and storage of garden waste appears to have started by the time of the 6.5.16 aerial photograph, which was shortly after Ds entered into their agree-

ment for a biomass boiler and CP's unchallenged evidence is that Ds were told to stockpile such fuel to ensure they had adequate stocks to keep the biomass boiler going. If the waste and wood products had been viable fuel for viable boilers to heat the Nursery and aid the growing process there could have been no objection by C.

145. There is no evidence that the fact the boiler was not capable of functioning or that it was intended for other supplemental use was known or disclosed to C. There is no evidence of delay on C's part in relation to these matters.

146. As to (c), storage and display for sale of horticultural products is plainly within the scope of agricultural only use of the Field.

147. As to peat, compost and other growing mediums, MG's view is that it is normal for nurseries to sell peat and compost to customers. Incidental or ancillary sale of such bought in items would be consistent with an agricultural use only restriction. MG reported that Ds had told him that 60% of the peat bought was used for growing at the Nursery and 40% was bought in for resale. D2's evidence at trial was somewhat at odds with that. Her evidence was that 50% of all compost and peat bought is used for growing and the other 50% is sold on to the Nursery's customers. I accept that the sale of compost and peat should be regarded as falling within the scope of agriculture.

148. As to other materials, such as landscaping materials, D2's evidence is that the stones were and are mainly used for maintenance of the Track. CP's evidence is that the sand and building materials had been intended for use in the building works at the Nursery and tea room and were stored for that purpose. D2's evidence is that landscaping and other materials stored on the Field were all usually sold by nurseries. MG noted that the Nursery's customers would expect to purchase products such as aggregates, sand, stones and landscaping materials. However, MG's view is that the sale of landscaping products is a retail activity unconnected with horticulture or agriculture. It is also his view that sale of other bought in products and materials is a retail activity and in order to be ancillary to agriculture would have to within the scope of agriculture as he viewed it (i.e. not exceeding 20% of the total).

149. On the photographic evidence, including photographic evidence annexed to the AP/C, it appears that a commercial quantity of landscaping materials and stones and aggregates are displayed for sale. That is consistent with the observable evidence of storage

at the time of the site visits. Sale on a commercial scale is not on the scale accepted as permissible applying Hoffmann J's test as formulated in St Marylebone Property Co Ltd and is not agricultural use only of the Field.

150. Aerial photographs reveal no discernable use of the Field for storage of such items before 2005. In 1989 the Field was entirely open and appears to have been untended grass land. By 1999 it was divided by a track into a northern third and southern two-thirds but still open untended grass land. A 1997 photograph of a pony trap on the Field taken by Ds shows some white and some dark coloured sacks piled along the southern boundary of the Field but nothing is stored along that boundary in the 1999 aerial photograph; judging by their size, shape, storage arrangements and other photographic evidence, the likelihood is that these sacks contained peat and/or compost for use in the Nursery. By mid 2005 the northern and southern areas had been divided by a fence. In the northern section, a narrow band along the fence dividing the Field appears to be used for materials storage. As already noted, this was probably pallets of sacks containing growing mediums. In the southern section a rectangular area in the top right (north eastern) corner had been fenced off as a paddock. Otherwise the northern and southern sections of the Field were still untended grass land. This remained unchanged on the intervening aerial photographs until 2013. There is a series of google street photographs during that period, dated September 2011, which shows much of the Field being used for storing cut grass or hay baled in plastic, a large quantity of sacks or compost and, near the paddock area, a small selection of trellis of different sizes. In one photograph there is a small quantity of chopped wood in the foreground. In other photographs commercial quantities of pottery and urns are on display near the entrance to the Nursery shop and on the opposite side of the Nursery yard. In photographs taken by NA on 21.5.15 a similar small quantity of trellis is shown in the north east corner of the Field. In later photographs of the Field the trellises are not apparent and, if still sold, must be on display at the Nursery.

151. The 2013 photographs show smoke from a fire burning in the south west corner of the northern section of the Field, storage of materials which I take to be compost and peat (the position and colour in the aerial view is consistent with the 2011 google street view showing piles of large white and other coloured plastic sacks of compost and peat), along the remainder of the southern boundary as before, possible stoning of a route in front of that storage, and possible storage of materials along the western boundary of the northern section (this is also indistinct and unclear in the 2011 photographs). There

is no evidence of waste or wood product being stored or stockpiled in 2013. In the north east corner two vehicles are parked and there are grey shapes equivalent to the volume of three or four small vans, it is unclear what that represents (there is a clear photograph of that area taken by C dated 29.11.18 which shows the area being used quite differently and being prepared for Christmas tree sales and there are further photographs taken for the purpose of and annexed to the AP/C which show the area being used for storage of pallets containing grit and stones and baskets containing landscaping rocks). Thus, there appears to be no settled pattern of storage in this small area.

152. Between about 2011 and mid 2016 a small area of the Field appears to have been used from time to time including seasonally for storage items and materials for the Nursery which were not agricultural or for agricultural only use. The 6.5.16 photograph and undated but subsequent[6] google aerial photographs show that, apart from the paddock (which by then had been sanded), the southern area was split roughly equally between (1) untended grass land and (2) storage of waste, including general waste, and rough wood (logs, branches and tree debris). The same photographs show the northern section of the Field to have been principally open space in 2016, with the same perimeter storage but also storage of large piles of sand where the smoking fire had been in the 2013 photographs, and materials stored along the western boundary and some adjacent car parking (said in evidence to be staff parking).

153. The 2017 and more recent photographs, including 2017 or later google photographs, show an increasing area of the north east corner of the Field being used for storage and display for sale of non-agricultural materials or, depending on the season, Christmas trees, and storage of materials along the western boundary of the northern section of the Field. Storage there and at the north east corner and along the southern border adjoining the fenced paddock extended further into the Field. A vehicular route had been stoned running from the Track along the front of the materials stored adjacent to the paddock and round behind the paddock to the southern section of the Field providing an access way to the piles of waste and rough wood.

154. In summary, the aerial and other photographs show very limited and intermittent or temporary use of the Field for storage other than for peat and compost before mid 2013 and in mid 2015; the commencement of waste and rough wood storage at a commercial

[6] Almost certainly post 2017 as the photographs identify the tea room, which did not open until 1.12.17, as an identified location.

level, on CP's evidence as stockpiling biomass boiler fuel, from about mid 2016; and, expansion of the storage of non-agricultural materials, including for landscaping, from some point after mid 2016. On CP's evidence an area of the Field adjacent to the Track was stoned for vehicle parking in 2014-15; looking at the aerial photographs this may have started for one row of vehicles in about 2013 and been enlarged to accommodate a further row by 2016.

155. Having regard to this evidence I reject Ds' claim that the Field had been used for the storage and display of non-agricultural materials for more than 20 years before the proceedings.

156. On the available financial information disclosed by Ds it is not possible to form a view as to the relative or absolute scale or value at any time of peat, compost or landscaping materials bought for resale to customers. Although the burden of proof rests with C, the responsibility for adducing this sort of evidence must fall on Ds. I can and should, however, fairly conclude from the evidence that storage and sale of a quantity of peat and compost equivalent to that required by the Nursery for its own growing requirements and its own use is not de minime, incidental or peripheral, but is on a commercial scale. However, my view is the storage and sale of this type of material is to be treated as within the agricultural use only requirement.

157. The quantities of other materials, for example waste, rough wood, sand, landscaping materials, trellis of different varieties and sizes, and Christmas trees evident from the aerial photographs, photographs annexed to the AP/C, and photographs in the trial bundle show that (1) commercial quantities of waste and wood products appeared from about mid 2016, (2) small quantities of some non-agricultural materials (disregarding compost, peat and the like) for the Nursery were stored on the Field at least intermittently, but probably continuously between about 2011 and 2016 and storage expanded significantly in and from 2017 (including by then CP's log business), (3) Christmas trees have been sold at the Nursery since 2000 at the latest and, at least latterly sited on the Field, and (4) storage of waste and wood on a commercial scale coincided with and was linked to the biomass boiler with CP's log business as a spin off.

158. I am not in a position to make any finding or estimate as to the value or the revenue or profit generated by this trading at any particular time or generally. It may very well be less than 20% of both the turnover and the profit of the Nursery, but in my judgment that

is not the test. The test is that identified by Hoffmann J in St Marylebone Property Co Ltd. My finding is that the totality represents very much more than the convenient holding and sale of a few non-agricultural items, and is properly characterised as an integral part of a non-agricultural business run in parallel with the agricultural business of the Nursery. Given the timeline appearing from the aerial photographs, I reject the proposition that such trade has been carried on for many years on the Field as part of the Nursery's business and find that the storage and sale of such items (except Christmas trees) on a commercial scale on the Field is relatively recent and within a year or two before the issue of the proceedings. There is evidence of the sale of Christmas trees dating back to 2000 and I accept and find that such sales, whether at the Nursery or on the Field, which appears to have varied from year to year, were at all times conducted openly and for at least 16 years before the issue of proceedings.

159. As to (d), photographs taken by Ds showing the Field in 1990, 1994 and 1997 show variously geese given the run of the Field and horses loose on the Field, but no cars parked. These photographs do show cars parked across the Track on the Nursery's yard. It is clear from the aerial photographs that, particularly in recent years, car parking on the Field has developed from staff only into a, or the, major use of the northern section of the Field. The 1999 aerial photograph shows at least five cars parked on the Field, D2's evidence was that this was Nursery staff parking, and possibly more vehicles or objects in the north east corner. The 2005 aerial photograph shows several cars parked on the Nursery's yard and probably a small number of vehicles in the north east corner of the Field. The 2010 photograph shows possibly one or two vehicles parked at the north east corner of the Field, with that corner otherwise clear, and one at the Nursery's yard; the photograph is dated 2.9.10, which was a Thursday, but the time of day is not shown and I do not exclude the possibility that the Nursery was then closed. The first 2013 photograph shows four vehicles parked on the Field and the second shows a dozen parked on the Field. The 2017 or later photograph shows more than 40 vehicles parked on the Field and more than a dozen at the Nursery's yard. That coincides with the expansion in the Nursery's business coupled with the opening of the tea room. This evidence does not clearly establish Ds' claim that cars have been parked on the Field for more than 20 years prior to commencement of the action without objection.

160. MG observed that, whether operating as a wholesale nursery and/or a retail nursery, given the Nursery's rural location, the provision of adequate parking facilities would be a necessary facility and within the scope of agricultural use. Mr Mitchell agreed with that,

and so do I. However, the photographic evidence corroborates the other evidence to the effect that the opening of the tea room has drawn many more customers to the Nursery for non-agricultural purposes.

161. As Mr Mitchell made clear, C accepts that parking falling within agricultural use only of the Field will be required for staff, deliveries to and collections from the Nursery, and customers buying produce within the definition of agriculture, and is a permitted use. C's principal objection is to parking on the Field and access along the Track connected with visiting the tea room; there is a further lesser issue about parking on the Field and access for other non-agricultural activities such delivery and purchase of landscaping materials and other non-agricultural items (examples are pottery, metal work, trellises and Christmas trees) and CP's log business.

162. Mr Holland QC submitted that car parking was part of the agricultural use of the Nursery, including the tea room. As an unqualified statement applied to any and all parking, I reject that submission.

163. As already noted by me, at present, by injunction, the tea room's hours are confined to those of the Nursery. However, prior to the granting of the interim injunction the tea room operated at different hours and was available for function bookings and held functions. Even during the same opening hours the tea room has held several functions, including a birthday party. It may be that on such occasions some or all guests at the functions also visited the Nursery, but that was not their primary purpose in attending the Nursery. On all of those occasions those persons visiting the Nursery premises to access the tea room who parked on the Field did so for non-agricultural purposes or for purposes not confined to agricultural use only.

164. Viewed another way, if C engaged security personnel to be stationed at the junction of the Track with Sugar Loaf Lane and stop and turn away all delivery drivers bringing food or drink supplies to the tea room or removing tea room refuse, could Ds complain that the right of way over the Track would be unlawfully impeded or that the delivery van or refuse collector would be denied a legitimate right to drive along the Track and/or park on the Field while unloading or collecting? The answer would have to be in the negative. Similarly, those tea room staff who are permitted by Ds to park on the Field while at work are not making agricultural only use of the Field.

165. Further, passing along the Track to go to or from the tea room as a customer and parking on the Field while visiting the tea room as a customer is not passage in connection with use of the Track as "agricultural land only" nor is traversing or parking on the Field in connection with visiting the tea room as a customer use of the Field as "agricultural land".

166. On the same basis, Ds' provision of parking on the Field for members of the public attending and purchasing non-agricultural stock or CP's logs is also inconsistent with and breaches the covenant in the 1980 Conveyance.

167. It follows that Ds are not entitled to the declaration sought in relation to the Field about car parking and, in principle, C is entitled to a remedy.

Issue 2, the second Field issue : Are Ds bound by the 1980 Conveyance to maintain a substantial stock proof fence along the line coloured blue on the Plan, being part of the boundary between the Field and the Track?

168. The relief sought by C relating to this issue is both a declaration and a mandatory injunction ordering Ds to restore and maintain a substantial stock proof fence along a line between points A and B marked on a plan annexed to the AP/C[7]. This line corresponds approximately to the boundary line of the Field opposite the Nursery yard and buildings and the Nursery's brick wall, and is roughly half the length of the boundary of the Field adjacent to the Track.

169. C's case is that, over time, Ds have systematically removed the fence with the result that there is now no fence between the points marked A and B. C relies on clause 2(a) of the 1980 Conveyance by which Ds' predecessors in title covenanted for the benefit of Mr Tolley's adjoining land (which included the Track and other land now part of C's land) that they

> " … and their successors in title will—
>
> (a) forthwith erect (where necessary) and forever thereafter maintain a good and substantial stock proof fence on all sides of the property hereby conveyed".

Alternatively, C seeks a declaration that on her own side of the boundary between the

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Track and the Field she may erect a fence and install one 9ft gate, preferably at a position agreed with D2. This is raised as Issue 19.

170. C's evidence relevant to the fencing of the Field includes that, when the tea room was opened, Ds resurfaced the Track to make it blend with the entrance to the Nursery and the stoned parking area on the Field. C also obtained and disclosed photographs showing the boundary line of the Field opposite the Nursery's walls which show that after the proceedings were issued Ds reinstated a length of rail and post fencing along part of the boundary marked A to B on C's plan annexed to the AP/C. Thus, the unfenced length between the points marked A and B is now approximately one third of the length of the Field's boundary with the Track.

171. In oral evidence C said that she could not say when the fencing was removed, but she remembered seeing fencing. C agreed in cross-examination that she had not at any time complained about removal of the fencing between the Field and the Track. She wanted the boundary between the Field and the Track to be fenced to stop her land disappearing into Ds' land and to keep her land separate from Ds. This was at least in part to bring an end to what she described as the widening of the Track by Ds. C did not accept that her desire to have the fencing reinstated was to make life as difficult as possible for Ds.

172. Ds deny having systematically removed the fence over time and put C to proof. Ds aver that there has been no fence for some 30 years. Ds rely on delay, laches, acquiescence, and presumed release on C's part and limitation as barriers to any reliance on the covenant and relief. They also rely on the fact that neither letter before claim (written in 2015 then 2017) raised these fencing issues.

173. In addition, Ds submit that, being a positive covenant, the fencing covenant is unenforceable by C and that, even if enforceable, any breach would be inconsequential. Ds also contend that the erection of any gate at all, irrespective of size, would impose an unreasonable restriction on, and be an unreasonable interference with, the agricultural use of their land, including the Field.

174. D2's written evidence is that (1) when Ds bought the Field, 1980 on D2's evidence, there was no fence at all and Ds installed the fence, and (2) Ds then removed the fence along the boundary opposite the nursery about 30 years ago, i.e. in the late 1980s. CP's evidence was that he had no recollection of there having been a fence along the boundary

of the Field with the Track. EP also had no recollection of there having been a fence, but added that she understood that the Field had been all grass when bought by Ds and observed that there may well have been something there then.

175. Ds' evidence included undated, but clearly not recent, photographic prints showing views of the Field taken by Ds from Highdown Cottages. In those photographs the Field had a post and rail fence along the boundary opposite the Nursery and a gate on the side facing Highdown Cottages. In her oral evidence D2 said that this was a 12ft wide metal gate.

176. The photographic evidence based on photographs disclosed and dated by Ds and, more recently, C includes (1) a photograph dated 1979 taken by Ds from Highdown Cottages showing the Disputed Land but also showing a corner of the Field opposite the Nursery on which a fence post is clearly visible and rails, although indistinct, are also visible; (2) the same corner showing the post and rail fence is clearly visible in a photograph dated 1982; (3) Ds' photographs dated 1984 showing a post and two rail fence along the boundary of the Field while a ditch or trench is being dug on the opposite (Nursery) side of the Track; (4) further photographs dated 1984, taken in snowy conditions, showing a post and three rail fence running along the boundary of the Field opposite the Nursery; (5) an undated photograph (likely to be 1984 and part of the series of snowy photographs) showing a post and three rail fence and a large metal gate at the Highdown Cottages end of the Field; (6) a 1986 photograph showing a post and three rail fence with piles of bricks for building on the Nursery side of the Track; (7) a photograph dated 1989/90 said by Ds to show the Field opposite the nursery and to show no fence; but, as I view the photograph, towards the Highdown Cottages end of the Track and between a wheelbarrow on the verge by the Track and a large mound of earth and other material, the outline of a post and three rail fence is visible; (8) photographs dated 1994 opposite the old shop on the Nursery site showing fencing removed from part way along the Field's boundary opposite the shop; (9) Google street view photographs dated 2011 showing modern rectangular post and three rail fencing running along the boundary of the Field up to a point just short of the Nursery's yard (i.e. most of the way along the length of the old shop opposite the Field); (10) a photograph taken by NA dated 21.5.15 showing a post and three rail fence at the Highdown Cottages end of the Field; and, (11) photographs taken by C during and after the construction of the tea room, i.e. in or after 2017, showing a new section of post and three rail fencing opposite the extractor outlets (i.e. between points marked A and B on the plan annexed to the AP/C).

177. In addition, the aerial photographs shed some light on the fence along the Field. The 1981 photographs appear to show shadow lines along the boundary between the Field and the Track which are consistent with a fence. The 1989 photograph shows a distinct dark line along the Field's boundary with the Track except opposite the Nursery's yard where the dark line is less distinct. The 2005 and later aerial photographs are consistent with there being no fencing opposite the Nursery's yard and extending a little in either direction, i.e. broadly along most of the line between the points marked A and B on the plan annexed to the AP/C.

178. In closing submissions Mr Holland QC accepted that the evidence showed that there was fencing around the perimeter of the Field through to 1984 but it also showed that very probably by 1990, and certainly by 1994, the fencing along part of the boundary between the Field and the Track as marked A to B on the plan annexed to the AP/C had been removed.

179. I base my findings of fact about the fence on the photographic evidence. This shows that there was fencing along the boundary with the Track before Ds purchased the Field. On this point D2 is mistaken in her recollection. It was probably a post and two rail fence which, in or about 1984, Ds replaced along the full length of the Field's adjacent to the Track by a post and three rail fence. Since then, Ds have removed a section of the fence opposite the Nursery's yard, roughly between the points marked A and B on the plan annexed to the AP/C. On the photographic evidence this was probably done in about 1989 or 1990. Over time Ds have maintained or replaced other sections of the fence, as evidenced by the 2011 Google photographs, the 2015 photograph, and the 2017 or later photograph showing new fencing at part of the car park area on the Field (i.e. within the line from A to B). It follows from this that a substantial section of the Field's boundary along the Track had been unfenced for more than 25 years when the claim was issued in 2017. It also seems that a small part of the boundary opposite the new shop, or there-abouts, has been refenced by Ds relatively recently.

180. The first question is whether the covenant is enforceable. Mr Mitchell acknowledged that the covenant to maintain a stock proof fence is a positive covenant and, therefore, is not enforceable against a successor in title to the covenantor unless it falls within the benefit and burden rule as explained in Rhone v Stephens [1994] 2 AC 310. Mr Mitchell acknowledged that it is not enough that the right (benefit) and condition (burden) arise in the same transaction (here the 1980 Conveyance); the condition or burden must be

relevant to the exercise of the right or benefit. Mr Mitchell submitted that the 1980 Conveyance expressed the correlation as an obligation to fence the Field in order to enjoy right to use the Track to access the Field.

181. Referring to Mills v Blackwell [1999] EWCA Civ 1852 for a case concerning a right of way and Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Limited [2018] 2 AER (Comm) 108, Popplewell J at [8], for a recent general summary of the approach a court should take when construing of a document, Mr Mitchell submitted that the words of the document to be construed had to be considered in the context of the surrounding circumstances at the time.

182. Applying this to the facts and circumstances, Mr Mitchell referred to D2 having accepted in oral evidence that in 1980 the Field was undeveloped grassland and was fenced around the perimeter with a 12ft gate at the northern corner which was the only access point to the Field.

183. Referring to Mills, Mr Mitchell submitted that the point of access between the Track and the Field should be at the same point and of the same dimension as when the 1980 Conveyance was executed. The factual issue in that case was whether the dominant owner had been entitled to demolish a section of dry stone party wall to enlarge an access point from a plot about ¼ acre in area to a strip of land leading to a public highway. The strip of land was some 12ft wide. The right of way was for "motor and other vehicles of every respective description". Since 1970 the width of the access point to the strip of land had been 4ft 6ins. The servient owner objected to the width being increased from 4ft 6ins to more than 12ft by the demolition of part of the party wall. The trial judge held that the access width could not be increased. The Court of Appeal upheld that decision. Morritt LJ explained the decision thus :

"But why should they be entitled to choose an access point anywhere they may reasonably select, when it is absolutely plain from the physical layout at the time of the conveyance that the access point was at and through the gate 4 feet 6 inches wide. This is not a case … where access could be obtained at any point, nor … where the grant expressly permitted access at any point along the common boundary. It seems to me that the specific point of access and egress must be ascertained from the physical circumstances prevailing at the time; and if reference is necessary to such circumstances to supply the point of access and egress, I do not see why it should not also supply its limitations. The restriction of the width of the gateway from the strip to the green land was and is of a permanent nature. It had been made eleven years before conveyance

of the strip. I do not accept that there is anything insubstantial or transient about a dry stone wall. There is nothing in the conveyance to suggest an intention on the part of the parties that the point or extent of the access or egress should be anywhere or to any extent greater than what was then capable of enjoyment".

As Morritt LJ acknowledged in his judgment, the decision meant that the apparently unfettered reference to vehicles would not extend to certain modern vehicles used in construction and agriculture.

184. Mr Mitchell submitted that, viewed objectively, the relevant parties' (that is Ds' and C's predecessors in title) intention at the time will not have been to permit access to and from the Track at any point of the Field owner's choosing, rather the intention apparent from the covenant is that the area of the Field should always be fenced to control livestock or be stock proof from which it followed that access should only be via a controlled opening. At the time of the grant, the opening was a gate at the northern corner of the Field.

185. That said and the decision in Mills notwithstanding, although the gate to the Field was originally not opposite the Nursery, Mr Mitchell made clear that C does not insist that the gate must be reinstated in its original 1980 position but is content for it to be located opposite the Nursery.

186. Further, and as C said in her evidence, C wishes there to be a clear boundary between the Field and her land. That the Ds' land at the Nursery and the Field are at risk of merging into one and absorbing the Track is supported by RH's oral evidence referred to above. Mr Mitchell made clear that, even if the covenant to fence is not enforceable and the benefit and burden principle does not apply, C is willing, and wishes, to erect a fence with a suitable gate, also at a point convenient to Ds, on C's land, i.e. the Track, but along what would be the verge and not so as to narrow the Track.

187. Mr Holland QC submitted that there was no relevant benefit and burden connection or correlation between the burden of the fencing covenant in the 1980 Conveyance and the right of way over the Track. Mr Holland QC referred to Wilkinson v Kerkdene Ltd [2013] EWCA Civ 44. Patten LJ, with whom Rix and Arden LJJ agreed, noted at [27] that the point emphasised in Rhone was that, in order to incur a liability to perform a positive covenant under the benefit and burden principle, the burden must have some

real relation to the right granted which the covenantor does wish to exercise. In Rhone the benefit of the mutual right of support was independent of the burden of the covenant to maintain the roof. Mr Holland QC submitted that the circumstances of this case could not be squeezed into or made to fit the benefit and burden principle as stated in Rhone.

188. Mr Holland QC further submitted that C's connection of fencing the Field with demarcation of the boundary of the Track is not an application of the benefit and burden principle.

189. Next, Mr Holland QC submitted that as there is no fencing in place, it having been removed long ago without objection, there is no obligation to replace it. On this point, Mr Holland QC referred in his skeleton argument to Haddock v Churston Golf Club Ltd [2019] EWCA Civ 544. I read that decision, on a second appeal, as concerned with whether a fencing obligation in a particular conveyance was a covenant or a fencing easement. It was held to be a covenant and, in consequence, not being a negative covenant, the fencing obligation was not enforceable against successors in title. Patten LJ's reasoning included, at [34], that by 1972 it was settled law that only negative covenants could bind successors in title and that any conveyancing solicitor would have known that the problem could be, and usually was, overcome by a chain of indemnity covenants.

190. Mr Holland QC further submitted that the right of way in the 1980 Conveyance was not prescriptive as to a point of access between the Track and the Field. I agree, but as is clear from Mills, a conveyance is not construed in a vacuum. Mr Holland QC referred to the decision of Kerr J in Vance v Collerton [2019] EWHC 2866 (Ch)[8] at [86]-[89]. After referring to Mills and to the review of the authorities on the question of whether, on the true construction of a grant, a dominant owner is entitled to open up a new point of access, by Patten J (as he then was) in Pearlman v Rayden [2004] EWHC 2192 (Ch), Kerr J observed that ultimately such cases turn on their facts and the construction of the grant as formulated in the instrument.

191. Mr Holland QC submitted that in this case there was and is no reason to be prescriptive about the maintenance of either the fencing or a gate. Quite the reverse, Ds' normal use of the Track for its agricultural business would be impeded by the reinstatement of a fence and gate along the boundary between the Track as the result would be to cause congestion and interfere with deliveries by large lorries. So too, the use of the Field for

[8] On appeal from the County Court at Central London.

agricultural purposes, which included offering parking for customers buying from the Nursery, would also be impeded if the car parking area on the Field was gated. C's desire to have a fence and gate reinstated is driven by her attitude to Ds.

192. Mr Holland QC also relied on his general submissions as to the effect of delay by C in asserting her rights as a barrier to any remedy to which C would otherwise be entitled.

193. I start with the 1980 Conveyance. The Field was conveyed subject, amongst other things, to a user restriction by covenant (agricultural land with no building to be erected other than a stable with hayloft and tack room); to a further obligation by covenant to "forthwith erect (where necessary) and thereafter forever maintain a good and substantial stock proof fence on all sides of the [Field] which adjoin other property of [Mr Tolley]"; and, with the benefit of a right of way along the Track expressly containing almost[9] identical user restrictions and permitting passage with or without vehicles and/or animals. Apart possibly from the extent of stabling permitted on the Field, there is no ambiguity or lack of clarity. The use of the Field is limited to agriculture and stabling, and the right of way to and from the Field via the Track is subject to the same limitation. The fencing requirement is to confine any livestock or stabled animals kept on the Field and the right of passage along the Track includes movement and transport of animals to and from the Field. There is an express requirement to fence the boundaries adjoining Mr Tolley's land, at that time all boundaries including the Track. In my view there is a clear correlation in principle between the burden of the obligation to fence the Field and the benefit of the right to move or transport animals along the Track.

194. As to the factual context in 1980, the Field was surrounded by land owned by Mr Tolley and the Track was the only means of accessing the Field; a right of way along the Track was commercially essential to the sale of the Field by Mr Tolley (I accept that there were possible alternatives but each required the grant of a right of way across – if not along – the Track); the Field was at that time fenced with a post and rail fence and gated, the likely width of the gate being 12ft; the Field was then uncultivated rough grassland; there were no stables or other buildings on the Field; Ds were tenants at 1 Highdown Cottages and owned the Nursery both of which were separated from the Field only by the Track; but, a Mr and Mrs Williams of Stourbridge purchased the Field by the 1980 Conveyance, not Ds.

[9] The right of way envisaged that there might be more than one stable tack room and hay loft on the Field.

195. As to changing circumstances, on D2's evidence, within weeks and still in 1980, the Field was conveyed to Ds; by the mid 1980s D2 was growing potatoes and other vegetables on part of the Field (photographs taken by Ds in 1990, 1994 and 1997 show a large area of the Field still given over to uncultivated grass land); D1's livestock were kept elsewhere and that part of Ds' business was not a commercial success; under D2's management the Nursery was established, became profitable and continually looking to expand; livestock have not been kept on the Field at any time since 1980; the fencing in issue was removed in about 1990; C, since 2008 owner of the land surrounding the Field, including the Track, did not require compliance with the fencing obligation before she commenced the proceedings in 2017 (nor had C's mother, C's predecessor in title from 1985 to 2008, before her); during the period of C's ownership she regularly used the Track from 2010 for her own farming purposes and she had occasion to instruct solicitors to write letters of complaint in 2015 and 2017, neither of which mentioned the removed or absent fencing; during cross-examination, C confirmed that her mother had used the Track on a regular basis and would have seen what Ds were doing; all relevant property on either side of the Track is now owned either by C or by Ds; there is no evidence that Ds ever intended or D2 intends to keep or stable any animals on the Field; so, there is no risk of escape and damage to C's land if the Field is not fenced; and, conversely, there is no evidence that any animal or anyone might stray onto the Field and suffer harm if the Field is not fenced.

196. From C's standpoint, the real point of substance on the fencing issue is loss of a clear boundary between the Field and the Track and, as C put it, the risk of C's land being absorbed into Ds' land.

197. As to the benefit and burden principle, in Rhone the obligation to keep the roof in repair was held to be an independent obligation and not a condition of or reciprocal to a right or benefit, such as eavesdrop or support, other than minimally; the quid pro quo for one right of support was the corresponding right of support. In my view, the correlation between the Track and fencing the Field is more substantial. There is a direct reciprocity between the maintenance of a stock proof fence and the right to move and transport animals to and from the Field along the Track. A right of way along the Track was essential to confer commercial value on the Field, but, had the use of the Field not been tied to agriculture, the right of way along the Track could have been granted in other terms not referring to or excluding movement or transport of animals.

198. Another point is that a stock proof fence (commonly post and rail or post and wire) is not a permanent or even a long lasting structure. It is therefore quite different from, for example, a dry stone wall. It is relatively straightforward to enlarge or make temporary openings for access and egress and also to move formal access points such as gates.

199. I also bear in mind that there may be vehicular use of the Track for agricultural purposes and parking on the Field for agricultural purposes. It is sensible, including commercially sensible from Ds' point of view, to have access and egress controlled by a defined entry and exit point, but this may easily be achieved without erecting and maintaining a stock proof fence or one or more gates.

200. Had livestock or horses been kept on the Field, it is very unlikely that this issue would have arisen; and, if it had, the answer would be very straightforward. However, the issue arises from the application of the obligation to the circumstances and history at the time of and since the 1980 Conveyance. On the evidence before me, the settled position for more than a quarter of a century prior to the issue of these proceedings reveals long term non-compliance with the obligation to fence and a long term lack of reciprocity or correlation between the burden and the benefit as actually enjoyed. No less importantly, the constant position throughout the entire nine year period of C's ownership from 2008 to the issue of proceedings was that much of the boundary between the Field and the Track opposite the Nursery had been unfenced.

201. As to demarcation of the boundary, the express fencing obligation is to erect and maintain "a good and substantial stock proof fence on all sides of the [Field] which adjoin other property of [Mr Tolley]". The clear focus is on stock proofing not boundary demarcation.

202. Drawing all the strands together, I consider that, while there is a real correlation in the 1980 Conveyance between the burden of the fencing obligation and the benefit of an express element of the right of way over the Track in the 1980 Conveyance sufficient to engage the benefit and burden principle, it would be unjust so to do in the circumstances of this case. The critical factors are open and long term disregard of the obligation and the absence of any complaint by C. Here it is relevant that C's evidence was that she had used the Track regularly, from which I conclude that she must have been aware of the lack of stock proof fencing. In addition, albeit more recently, she had had occasion to complain about matters to which she objected, but she did not raise any complaint about the removed fencing. Further, there is evidence of regular use of the Track by C's

mother and acceptance by C that her mother knew what Ds were doing on their land, but there is no evidence of any complaint by C's mother (C's predecessor in title)[10]. The likely explanation is or includes that, there being no animals kept on the Field, the fencing obligation was regarded as otiose. While the attitude and conduct of C's mother may not be relevant to defences founded on laches or acquiescence, it is relevant to presumed release or waiver, moreover, viewed from Ds' point of view it is part of all the circumstances relating to their conduct.

203. I do not accept that the desire to be clear as to the boundary between the Track and the Field is a reason justifying the enforcement of the positive covenant to fence in the 1980 Conveyance upon the covenantor's successors in title, i.e. Ds.

204. As to whether C claim for a declaration that she may erect a fence on her own land, that is a different question.

Issue 3, the third Field issue : Does Ds' alleged historic long user of the Track, the Field and 1 Highdown Cottages infer a presumed release of the Covenants and/or mean that C and/or her predecessor in title has consented and/or approved and/or acquiesced to the alleged breaches of Covenant?

205. In Hepworth a house had been conveyed in 1874 subject to a covenant prohibiting, amongst other things, use as an inn and the sale of wine, beer and intoxicating liquor. Very shortly afterwards beer was sold from the premises and shortly after that spirits, both pursuant to an off-licence. A sign publicising the licence was and continued to be displayed prominently above the door for some 24 years. Basing his decision on two earlier cases (in one of which[11] he had appeared as counsel), Farwell J held that an open and long course of usage wholly at odds with the covenant sufficed for the court to infer some legal proceeding which had put an end to that covenant. Farwell J found that a period of 24 years open conduct sufficed to meet the test.

206. In relation to the stock proof fencing covenant in the 1980 Conveyance, there is evidence of long open breach of even greater duration. On at least three occasions prior to the issue of proceedings (2014, 2015, 2017) C took legal advice in relation to Ds' activities

[10] Mr Holland QC cross-examined C as to whether her mother purchased or was given C's land by Mr Tolley in 1985. Mr Mitchell drew attention to the fact that the conveyance had been stamped as £600 duty paid; This points to a payment to Mr Tolley of £90k.
[11] In re Summerson [1900] 1 Ch 112

and she, personally and/or through her solicitors, may be taken to have considered the 1980 Conveyance and its covenants. In cross-examination C acknowledged that her mother used the Track regularly and knew Ds were doing; the logical conclusion is that C's mother was aware that Ds had removed the post and rail fencing during her ownership. On the evidence before me, at no point before the issue of proceedings in 2017 had C or her mother raised the removal of the post and rail fence with Ds.

207. In my view, the trigger for the litigation was the grant of planning permission in 2014 followed up by building works pursuant thereto in 2016 and 2017. Then, following the opening of the tea room, the grant of a premises licence in early 2019, and the consequential increase in use of the Track, C applied for interim injunctive relief and to amend her claim. Following the grant of planning permission C took the view that the business at the Nursery was being expanded outside the scope of agriculture only and she took the view that the time had come to act by asserting her rights. This was done first through the 2015 letter. The 2015 letter complained of commercial activities at the Nursery (logging, wood chipping and the sale of allied products) and the presence and burning of commercial waste on the Field. This was met with a response that Ds were intent upon intensifying their commercial activities at the Nursery and the complaint about the Field was sidestepped by asserting that the area of land in question was unclear. No complaint was made then or in the 2017 letter about fencing the boundary of the Field. Having regard to these circumstances and to the full background facts and circumstances referred to above in this judgment I consider that, much as in Gafford, where the proposed construction of an indoor riding school provided an opportunity to also raise complaints about earlier works to the bungalow and barn, so too here Ds' then recent and threatened further increase in non-agricultural activities prompted a wider review of potential scope for objection on C's part.

208. On this aspect of this issue I am satisfied that it is appropriate to infer a presumed release or waiver of the stock proof fencing covenant.

209. As to the agricultural use only covenant, the evidence does not support findings that the Field was openly used for many years for non-agricultural purposes. Here I have in mind in particular the photographic evidence, the story told by the Nursery's accounts, and D2's and CP's evidence. Certainly, there is photographic evidence that materials were being stored on the Field from 2005 at the latest, but Ds' own photographs show these items to have been large plastic sacks, in all probability compost and peat which do not

offend the covenant. Also, there was limited vehicle parking by 1999, but Ds' evidence, including that of RH, was that staff working at the Nursery would park on the Field; again, the likelihood is that this parking did not offend the agriculture only covenant. The paddock for horses evident from 2005 would also not offend the covenant given the permission for a stable. A burning fire is apparent from the 2013 aerial photographs and there is limited vehicle parking, but there is no evidence, either photographic or from Ds, including CP, of storage of waste products until mid 2016. That said, the pre-action letter of 9.1.15 does complain about Ds burning non-agricultural waste on the Field. The 2013 fire is also consistent with Ds' evidence of third party fly-tipping and the disposal of unsolicited and unwelcome rubbish, that may also apply to the waste burning referred to in the 9.1.15 letter. The vehicle parking would only breach the covenant if unrelated to agriculture only and there is no evidence sufficient for fact finding or inference drawing as to this. The first clear evidence of non-agricultural use of the Field on a scale more than incidental is the 6.5.16 aerial photograph. These proceedings were begun 18 months later.

210. In my judgment, the evidence before me provides insufficient arguable foundation for a finding of historic long user of the Field in breach of the agricultural use only covenant in the 1980 Conveyance. It follows that there is no basis for a finding of presumed release or consent or approval or acquiescence to the breaches of that covenant alleged and complained of by C.

Issue 4, the fourth Field issue : Is C's claim for breach of Covenant wholly or partly barred pursuant to the Limitation Act 1980 and/or by reason of the doctrine of laches?

211. In the light of my finding and conclusion above in relation to the fencing covenant in the 1980 Conveyance this question is academic. Had it been a live issue I would have found that, in relation to laches, the period of C's ownership (2008 to 2017) coupled with Ds' open removal of the fencing, relocation and expansion of the access point to the Field, and C's admitted knowledge of the circumstances from, at the latest 2010, would have justified upholding a laches based defence as between C and Ds in relation to the fencing covenant. Further, the total period from 1990 onwards and the openness of Ds' conduct would have justified a limitation defence to the fencing covenant.

212. Given my findings in relation to the agricultural use only covenant in the 1980 Conveyance there is no scope for a limitation or a laches based defence to succeed in relation to that covenant.

Issue 5, the fifth Field issue : Is C entitled to relief (the extent of which is to be determined subsequently) concerning any breaches of Covenant by Ds, which the Court find proven or are Ds entitled to continue to use the Field as they presently do?

213. C is not entitled to relief in relation to the fencing covenant in the 1980 Conveyance. She is entitled to relief in relation to the agricultural use only covenant, which is a matter for subsequent determination. Whether C may also obtain a declaration as to fencing her own boundary with the Field is raised as Issue 19.

The Track

214. There are 14 issues relating to the Track. Some of the issues overlap with issues already raised and answered in relation to the Field.

Issue 6, the first Track issue : Do Ds, their staff, customers, suppliers and visitors have the benefit of a Right of Way over the Track to gain access to / egress from:-

(a) the Field, pursuant to the Grant in the 1980 Conveyance, for the purpose of:-

(i) parking their cars so they can visit the Nursery and the Tea Rooms/Function Venue;

(ii) accessing landscaping, building, horticultural and other products stored and/or displayed for sale to members of the general public;

(iii) the Biomass Boiler and/or wood processing; and/or

(b) Ds' Title Number SF540781 pursuant to the Grant in the 1979 Conveyance, for the purpose of visiting the Nursery and/or the Tea Rooms/Function Venue?

215. I start with Issue 6(a)(i). It is based on paragraphs 19 to 22 of the AP/C, 19 to 26 of the ADC/C and the declarations sought at (5) and (6) of the AP/C, and paragraphs 26 to 28 of the Reply. Paragraph 19 of the AP/C C refers to use of the Field for parking in connection with the Nursery and the tea room and alleges that both are breaches of the user covenant in the 1980 Conveyance. At paragraphs 20 and 21 C refers to the right of way in the 1978 Conveyance and trespass in excess of the right of way by Ds' staff

and customers when accessing the Nursery along the Track to purchase retail, i.e. non-agricultural, items and/or to visit the tea room.

216. Ds' response is at paragraph 7 of and the section about delay in the ADC/C, and at paragraphs 19 to 22 of the ADC/C, and the contrary declaration is sought at (a)(iv) of the ADC/C. Ds admit that the Nursery business is in part retail and that it includes the tea room but aver that the activity is within the meaning of agriculture. Ds deny that use of the Track constitutes a trespass on the basis that the business is all, or all save for a de minime element, within the definition of agriculture.

217. This issue concerns accessing the Field to park in order to visit the Nursery and the tea room. It raises dual purpose use of the Track, both to park on the Field and to visit the Nursery and the tea room. Thus, in addition to the user covenant in the 1980 Conveyance, the rights of way under both the 1980 Conveyance and the 1978 Conveyance (and therefore the 1979 Conveyance) are engaged, but they are identical. This issue overlaps with Issue 6(b).

218. Mr Mitchell's overarching submission was that the tea room is at the centre of the litigation. The tea room had not opened when the litigation began and was introduced into the action by the AP/C in June 2019. It is common ground that there is no relevant delay over that period November 2017 to June 2019. C's claim concerns both accessing the Nursery via the Track for non-agricultural purposes, and parking on the Field and accessing the Field via the Track for non-agricultural purposes. Mr Mitchell submitted that although excessive and unlawful user of the Track by staff, customers, suppliers and visitors to access both the Nursery, for the tea room, and the Field, for parking connected to the tea room, may have been threatened before December 2017, the trespass by staff, customers and suppliers followed the opening of the tea room.

219. As noted above, Mr Mitchell relied on Ashdale Land & Property Co Ltd for propositions that excessive and unlawful user constitutes trespass and that it is for the dominant owner of the right of way, here Ds, to disentangle the permitted use from the excessive and unlawful use. Mr Mitchell submitted that it was not open to realistic argument that the tea room fell within the agricultural use only constraint in the 1980 Conveyance covenants or the agricultural use only restrictions in the rights of way under the relevant conveyances. Mr Mitchell accepted that there is evidence of parking on the Field going back to 1999, some 18 years before the proceedings began, but no evidence of parking

for non-agricultural purposes until recently. Further, in relation to the tea room no staff, customer or supplier parking occurred before the proceedings began because the tea room had not opened.

220. Mr Mitchell also referred to the pre-action letter of 9.1.15 by which C raised the planning permission and intended or threatened intensified misuse of the Track. In cross-examination D2 said that she had understood that C was complaining about the consequence of building the tea room and that Ds instructed their solicitor to play it dumb when replying on their behalf. By a further letter dated 18.3.15 C's solicitor referred to the permission for construction of the tea room as a threatened intensification of commercial activity. It incorrectly referred to the proposed works as a breach of covenant but correctly referred to the restriction as being as to the use of the Track. In cross-examination D2 said that, had C started proceedings, Ds would have held off from building the tea room to see what the court decided. Mr Mitchell then put to her that that was inconsistent with Ds' expansion of the tea room after commencement of the action by extending the kitchen and undertaking building work on a patio area, and with the later application for a premises and entertainment licence; D2 had no real answer. Mr Mitchell referred to D2's written evidence and the absence of any reference to change of position or reliance on C's failure to take legal action after the 2015 correspondence. Mr Mitchell submitted that the correct analysis of Ds' approach to the tea room was that they decided to carry on with their expansion plans without regard to C's views or conduct because expansion was central to their business plans.

221. Mr Holland QC submitted that Ds deny that there has been any trespass in the use of the Track by them, their staff, customers, suppliers, and/or visitors because all use of the Track, including for parking on the Field, was agricultural. Mr Holland QC also relied on Ds' case as to construction of the conveyances, prescription and delay.

222. Mr Holland QC raised a further delay argument relating to the Track based on the proposition that C stood by, knowing of Ds' intention to build a tea room following the grant of planning permission, while Ds incurred significant expenditure over the course of 2016 and 2017. He submitted that it would be unconscionable for C to be granted relief and it is no answer to say that the tea room's profits have more than paid back the costs incurred.

223. Mr Holland QC submitted that I should stand back and look broadly and in the round at

all issues, and especially the central issues. Ds and their children had put immense effort into the Nursery over a period of 30 years from the mid 1980s; they had incurred mortgage liabilities to fund the expansion, including the tea room. Closing the tea room would adversely affect the Nursery's income, staff would lose their employment and livelihood; the Nursery would suffer if the tea room was now to close and the Nursery business would be stigmatised; and, Ds would be left with a building suitable only for catering. It would be unconscionable now for the tea room to be closed. The 9.1.15 pre-action letter had not been followed through and the 2017 further letter made no mention at all of the tea room. This case was similar to, but even stronger than Gafford. In this case, it had taken C three years to take action in relation to the tea room and by that time it had become an established part of Ds' business. The tea room was an integrated part of the Nursery business, customers saw it as one business. Mr Holland QC relied extensively on the judgments in the House of Lords decision in Fisher v Brooker for observations that the court may refuse to grant injunctive relief in cases including trespass to land where the grant of an injunction would be oppressive to the defendant.

224. Strictly those accessing the tea room via the Track or accessing the Field via the Track to park and then go to the tea room will not have been or be staff, suppliers, customers and/or visitors of Ds but rather of SLTRL's, which is not a party. C's complaint against Ds stems from Ds' impliedly licensing and encouraging such use. Much of the alleged unconscionability, even if relevant, would affect a third party not Ds.

225. I have already set out my reasons for concluding that the business of the Nursery is not within the scope of the phrase "use as agricultural land only" in the 1980 Conveyance user covenant and the rights of way over the Track to the Nursery and to the Field. I have also set out my reasons for concluding that the tea room is not part of the Nursery, rather that it is a separate non-agricultural business.

226. I agree with Mr Mitchell's analysis that C's inactivity following objecting to planning permission was not causative of or influential on the decision (which was SLTRL's) to build the tea room. In so far as Ds were involved, in my view, they looked to their own business interests, and expansion of those interests, without regard for and uninfluenced by C's views, conduct or inactivity.

227. Prescription is not arguable in relation to use of the Track or parking on the Field connected with the tea room; neither is there a realistic delay based argument.

228. Looked at in the round, Ds decided to expand the Nursery to include a separately structured tea room for Ds' and their family's commercial advantage, knowing that C considered the presence of the tea room to be an unlawful infringement of her rights but deciding to take their chances. At this stage the question is not about the granting of a remedy but about whether a cause of action has been established to which there is no operative defence precluding a finding of liability. There was delay on C's part between 2014 when planning permission was granted or 2015 when the first pre-action letter was written and 2017 when this action was begun. However, Ds also delayed in starting their building work and it is not clear when it became apparent to C that the tea room was being built as distinguished from Nursery expansion work being undertaken. It is also not apparent on the evidence that Ds' delay in commencing building works was to allow C an opportunity to take proceedings for threatened breach of the agriculture only restraints. I accept and agree with Mr Mitchell's analysis that the delay was not relied or acted on by D's. That this is so is supported by the fact that, since the commencement of proceedings, further building works have been undertaken to expand the tea room and a liquor and entertainment licence has been applied for and obtained.

229. Any genuine uncertainty felt at the time could and should have been explored by Ds or SLTRL. On the evidence before me C had no knowledge of the structuring of the tea room business. Ds, for themselves, or SLTRL, as a licencee of Ds, could have applied to the court for clarity as to the meaning and effect of the rights of way and the user covenant in the 1980 Conveyance.

230. In my judgment the clear answer to Issue 6(a)(i) and issue 6(b) is that Ds, their staff, customers and visitors do not have the benefit of a right of way over the Track to access the Field for the purpose of parking to visit the tea room or to visit the Nursery for other non-agricultural purposes, nor do they have a right of way over the Track to access the Nursery to visit the tea room or to visit the Nursery for other non-agricultural purposes. In principle, C is entitled to a remedy.

231. Issue 6(a)(ii) raises parking on the Field to access landscaping materials, building, horticultural and other products stored and/or displayed for sale to members of the general public.

232. Mr Holland QC submitted that such access is conferred by the right of way granted in the 1980 Conveyance. By way of example he submitted that materials stored on the

Field are used for horticultural purposes such as maintenance and replanting and potting on a considerable scale, as evidenced by the need to build a new potting shed at the Nursery.

233. That submission neatly illustrates that there is not a binary answer to this issue. Of course, materials such as compost and peat may be stored on the Field and accessed by Nursery employees for use in potting and the like. Similarly, such materials may be stored and displayed for sale to the public on the Field. So too, a reasonable stock of repair materials may be kept on the Field for the maintenance of the Nursery. However, the line is crossed by landscaping materials, logs and chip wood, and non-agricultural waste.

234. Issue 6(a)(iii) concerns accessing the Field in connection with the Biomass Boiler and/or wood processing. For reasons already given, accessing the biomass boiler on the Field via the Track would not offend the right of way over the Track. However, and also for reasons already given, accessing the wood processing would be inconsistent with use of the Track for purposes in connection with use of the Field as agricultural land only.

Issue 7, the second Track issue : If the Court finds (under the previous issue) that Ds do not have the benefit of a Right of Way to use the Track for the purposes set out, would such use be a trespass?

235. On my findings, and for reasons already given, C has not lost the right in principle to a remedy for trespass by reason of delay, acquiescence or waiver.

Issue 8, the third Track issue : Do Ds, their staff, customers, suppliers and visitors have the benefit of a Right to Park on the Track?

Issue 9, the fourth Track issue : If they have no such Right to Park, are Ds, their staff, customers, suppliers and visitors in fact parking on the Track and does such parking constitute a trespass?

236. These issues arise from the relief claimed at declaration (8) of the AP/C which seeks a declaration that parking on the Track by Ds, their customers and staff in connection with the biomass boiler or wood processing is a trespass.

237. There is no allegation in the AP/C and no evidence at all of any parking on the Track in connection with the biomass boiler or wood processing. The evidence and argument is more general about parking on the Track.

238. C's written evidence is that commercial vehicles, including HGVs, park on or across the Track almost daily when making deliveries to the Nursery, the tea room and materials stored on the Field. The fact, but not the frequency, of such parking is supported by photographic evidence. There is also some evidence of customers stopping on the Track to load purchases into their vehicles. Read in context, I understand this evidence to be linked to the expansion of the Nursery business. Parking across the Track while delivering to the tea room would also be a recent occurrence.

239. Mr Holland QC submitted that by delay, acquiescence or waiver C has lost her right to enforce such objection. Mr Holland QC also pointed out that there is no allegation in the AP/C to support this claimed relief.

240. My conclusion on the material before me is that there has been and is on an ongoing basis some obstruction of the Track. There is evidence of commercial deliveries to the Nursery and the Field partially and completely blocking the Track, and, to a much lesser extent, partial blocking of the Track by private vehicles loading purchases from the Nursery. There is no evidence of parking, which I mean stopping the vehicle, turning off the motor, and leaving it unattended for a length of time. Further, there is no evidence of Ds or their staff parking on or obstructing the Track.

241. That said and found by me, there is no contrary evidence to found a conclusion that Ds have established a right to park on the Track or to obstruct it, whether for themselves, their staff, their suppliers, customers or visitors whether by waiver, acquiescence or delay.

Issue 10, the fifth Track issue : By virtue of any delay found by the Court in C commencing proceedings and/or any acquiescence/laches/presumed release and waiver found by the Court, are Ds entitled to continue to use the Track as they presently do (although C does not accept that Ds have pleaded a Defence to the use of the Track based on acquiescence and/or laches and/or presumed release and/or waiver or that in any event such is available as a Defence to a claim for pure trespass)?

242. This issue covers and embraces in one issue the full range of uses made of the Track. I would divide the uses into four connected categories of use of the Nursery and/or the Field : (1) use of the Nursery and/or Field as agricultural land only, (2) use of the Nursery and/or Field for other purposes as part of the Nursery's business, (3) permitting or licensing the use of the Nursery and/or Field for the tea room, and (4) permitting or licensing the use of the Nursery and/or Field for other purposes.

243. Mr Holland QC submitted that C's delay, coupled with the open expansion of the Nursery's range of products over the years entitles Ds to use the Track as they presently do. Mr Holland QC submitted that since the 1980s Ds have stoned the Track and used it for all purposes connected to the Nursery.

244. The Track certainly appears stoned in the first colour aerial photograph (1999) and in the google street level photographs of 2011 is shown as stoned across a width leaving only narrow verges.

245. As to (1), use of the Track to access the Nursery and Field as agricultural land only is obviously unobjectionable.

246. As to (2), use of the Track to access the Nursery and Field for other purposes as part of the Nursery's business, there is cogent evidence of non-agricultural materials being offered for sale at the Nursery for many years. The google street photographs show commercial quantities of pottery displayed for sale at the Nursery in 2011 but pottery storage on the Field is not apparent from aerial or other photographs. The photographic evidence does show Christmas trees in photographs dated 2000 (albeit the location is unclear) and much later on the Field in 2018. D2 gave evidence of other retail activities at the Nursery, such as creating and selling large numbers of hanging baskets. All of this has been done openly and has become an established part of the Nursery's business. Although the evidence as to when the sale of landscaping materials commenced is less clear, it was part of an expanding business expanding the retail element of the Nursery's business. While the evidence of storage of materials other than compost and peat on the Field until shortly before commencement of the proceedings is limited and unclear, the evidence of such activities on a commercial scale at the Nursery site is clear. I regard this aspect of C's claim as analogous to that in Gafford in that I consider that it would have continued without complaint, or at least without litigation, but for the tea room. I should make clear here that (1) I exclude any acceptance of waste and wood from tree

surgeons and arborists from this general expansion of the Nursery's business because this seems to have started in or around 2016, i.e. a matter of months before the proceedings; and (2) I regard the landscaping materials and the like as distinguishable from pottery, Christmas trees, and hanging baskets because there is no clear evidence of sale for a period of years.

247. As to (3), Ds have permitted or licensed a third party to convert an area of the Nursery to non-agricultural use and, as from a date after commencement of the proceedings, use an area of the Nursery for a tea room and the Field for tea room customers' parking, the Track for deliveries, customers' access and waste removal. I have rejected Ds' delay arguments. Ds are not entitled to authorise or permit the use of the Track in connection with the tea room business owned and run by SLTRL.

248. As to (4), permitting or licensing the use of the Track to access Nursery and/or the Field for other purposes, the only evidence of other purposes is of the firewood and log business operated by CP. On D2's evidence it is not part of the Nursery, but is was clearly permitted by Ds. The evidence before me relating to this business is not consistent with delay, acquiescence, laches or presumed release on C's part and Ds are not entitled to authorise or permit any third party non-agricultural use of the Track.

Issue 11, the sixth Track issue : By reason of s. 2 of the Prescription Act 1832, does Ds' land have the benefit of a right of laying and maintaining both future and existing pipes and conduits under the Track for all purposes and at all times?

249. This issue concerns the Track being dug up and pipes laid across it between the Field and the Nursery. In the 2017 pre-action correspondence the question of pipes being laid was raised to which D2 replied "What evidence does [C] have regarding the installation of new pipework? We have been repairing existing pipework as we had a water leak".

250. The AP/C repeats the pre-action correspondence allegation and alleges that the Track was dug up and a waste pipe installed. The ADC/C confirmed that D2's reply was correct and added that, when repairing a water leak, CP had laid a conduit for pipes between the biomass boiler on the Field and the tea room at the Nursery, i.e. under the Track. The Defence further averred that during C's and her predecessors' ownership pipes had been laid openly under the Track and that such installation was ancillary to agricultural use. In Further Information details are given of three trenches being dug and pipes laid

: two for rainwater from the Nursery to the Field, and the third for a conduit between the biomass boiler and the Field. In addition, Ds aver that over the past 40 years drainage, electricity and water pipes have been installed as of right and that Ds have a prescriptive right so to do.

251. Apart from the March 2017 pipe laying, the only clear evidence of other pipes being installed is of a trench being dug in a photograph dated 1984. The location is unclear and if on what is now C's land is likely to have been with the then owner's permission. Indeed D2's evidence was that Mr Tolley had given permission for the trench to be dug for laying mains water. That is not evidence to establish a prescriptive right.

252. In written evidence CP and RH, who did the work together in 2017, were more forthcoming about what happened and when. RH referred to the fact that C had probably not seen the work being carried out but might have noticed changes in the surface of the Track. CP said that C and her husband confronted him about the work. D2's evidence was that she knew little about the pipe laying. CP said that the leaking pipe was caused by him when laying new conduits, i.e. in March 2017.

253. In oral evidence D2 maintained that all trench digging and pipe laying was done openly, albeit after the Nursery had closed for the day. However, D2 had no response to a question challenging the need for an evasive and misleading answer as given in the pre-action correspondence if everything had been done openly.

254. Cross-examination of D2 also established that the trench digging and pipe laying in 2017 included installation of a waste pipe from toilets installed at the Nursery when building the tea room to a septic tank at the Field. D2 volunteered that the tank could have been at the Nursery but it was more convenient to site it at the Field.

255. Pausing here, I am not able to accept as credible that D2 knew little about the pipe laying. She was a partner in the Nursery business, a director of SLTRL, and still active and on site at the Nursery, and responsible for the Nursery business' finances.

256. There is no evidence to support the proposition that Ds have established a prescriptive right to lay and maintain future and existing pipes and conduits under the Track for all purposes at all times. There is no evidence of such a right for any purpose at any time.

Issue 12, the seventh Track issue : Subject to agreement/approval of Ds' proposed Re-amended Defence and Counterclaim: Does Ds' land have the benefit of a prescriptive right of way over the Track for themselves their customers and suppliers with or without vehicles to access the Nursery and the Field for all purposes connected with the present use of both properties?

257. I did not permit Ds to re-amend the ADC/C on the application made at the outset of the trial. If I had, given my findings of fact as set out in this judgment, I would not have found right of way over the Track for all non-agricultural uses of the Nursery or the Field based on prescription, that is uninterrupted use for 20 or more years.

Issue 13, the eighth Track issue : Subject to agreement/approval of Ds' proposed re-amended Defence and Counterclaim: Does Ds' land have the benefit of a prescriptive right of way over those parts of the Track as presently constructed which did not form part of the "track or way coloured brown" in the 1978 Conveyance and/or the 1980 Conveyance?

258. I did not permit Ds to re-amend the ADC/C on the application made at the outset of the trial. This issue has not been addressed.

Issue 14, the ninth Track issue : Is the laying of / maintaining in their present position the following pipes by Ds under the Track a trespass:-

(a) the water pipes (marked on the plan attached to the FI[12] of D2's Defence);

(b) the electricity pipes (marked on the plan attached to the FI of D2's Defence);

(c) the conduit which contains various pipes / cables relating to the biomass boiler (marked on the plan attached to the FI of D2's Defence);

(d) the rainwater pipe (pipe 1 on the plan attached to the FI of D2's Defence); and

(e) unspecified drainage pipes (referred to at Reply 11(b)(iv) of the FI)?

259. Mr Holland QC identifies the water pipes at (a) as providing water to 1 Highdown Cottages and being installed with Mr Tolley's permission and the pipes at (b) as having been installed in 1980-82 after Ds became tenants of, but before they purchased, 1 Highdown Cottages and as serving that property. The evidence is that Mr Tolley consented to mains water and the likelihood is that he consented to the laying of electricity

[12] Further Information

pipes or conduits to 1 Highdown Cottages. C has not raised any issue relating to 1 Highdown Cottages. That permission was given 35 to 40 years ago in respect of a different property the subject of a tenancy and different conveyance to the properties and conveyances relevant to this action renders the reliance by Ds irrelevant.

260. On C's evidence the installation of the pipes at (c) and (d) came to her notice at Easter 2017 when she noticed that the Track had been recently dug up. On Ds' evidence the pipes at (c) and (d) were installed a matter of months before the issue of the claim. Thus, the evidence as to date of installation is common ground. One of the pipes in the conduit referred to at (c) was said by CP to be a replacement for a pipe he could not find. One of the pipes at (c) and (d) is understood by C to carry electricity cabling from a generator on the Field to the Nursery and the tea room.

261. Mr Holland QC's submitted that pipes under the Track had been installed with the permission of Mr Tolley and were installed well over 20 years ago. That may be true of some pipes but not those under the Track between the Field and the new Nursery building.

262. Mr Holland QC further submitted that the pipes from the Field to the Nursery laid by CP were for agricultural use of the land in any event. That said, Mr Holland QC realistically recognised that the recently installed pipes were problematic for Ds. Relying on Armstrong v Shepherd & Short Ltd [1959] 2 QB 384, produced during his reply to Mr Mitchell's submissions, Mr Holland QC submitted that an injunction should be refused where the trespass by laying pipes was trivial. That may be so, but the remedy is for a later hearing. For present purposes, that authority serves to support Mr Mitchell's point, relevant to the present hearing, that the pipes constitute a trespass.

263. As to Mr Holland QC's submission that the recent pipes were installed for agricultural use of the land, that is not the evidence before me. Certainly, pipes between the biomass boiler and the Nursery were intended for agricultural use in so far as the intention was to heat the Nursery, but on D2's evidence that was not the sole purpose of the biomass boiler. In any event, the biomass boiler has gone so that or those pipes no longer serve any purpose. Other pipes service the tea room, at least in part, or are of dual purpose serving both the tea room and the Nursery.

264. I agree with Mr Mitchell that these pipes constitute a trespass.

265. As to (e), Mr Mitchell and Mr Holland QC referred to the test for acquisition of rights in relation to pipes by prescription as set out in Gale on Easements (20th Edition) at 6-88:

> " … the test is whether successive owners of the servient land, assuming them to have been reasonable persons, diligent in the protection of their interests, either must have known or must be taken to have had a reasonable opportunity of becoming aware of the existence of the pipe or drain in question under or through their property".

266. Mr Mitchell submitted that there is no evidence that C, or her mother before her, knew or had a reasonable opportunity of becoming aware of any such pipe. On the evidence before me that submission is correct. Ds have not established a prescriptive right to this pipe.

Issue 15, the tenth Track issue : What is the extent or width of the Right of Way granted by the 1978 and 1980 Conveyances?

267. The issue between the parties is whether the width of the right of way from the public highway to the Nursery and the Field is restricted to the "track way (shown) coloured brown" expressly referred to in the 1978 Conveyance and the 1980 Conveyance or extends to the full width of the Track. The starting point is to consider the terms of the 1978 Conveyance and the 1980 Conveyance.

268. The 1978 Conveyance describes the Track as "the track way coloured brown on the said plan leading from the [Nursery] to the public highway". The 1980 Conveyance describes the Track as "the track way shown coloured brown on the said plan leading from the [Field] to the public highway". The plan used in each case is the 1969 OS map[13]. This OS map is scaled at 1:2500 and shows general rather than accurate measurements and boundaries. However, it is the means chosen at the time by the parties to the 1978 Conveyance and the 1980 Conveyance to identify the land conveyed and the location and description of the rights of way granted. The plan attached to the 1980 Conveyance is better quality than that attached to the 1978 Conveyance.

269. My observation of the 1969 OS map from the copies in the trial bundle includes that the

[13] The are several different copies in the trial bundle. 1/I/29 is a copy of that attached to the 1978 Conveyance. 1/I/45 is a copy of that attached to the 1980 Conveyance. 1/I/9 is a an unmarked copy in the trial bundle section for conveyancing documents. 1/C/45 is a copy enlarged by NA as Appendix 8A to his report annexed to the AP/C.

"track way (shown) coloured brown" is not represented to extend to the full width of the Track, rather the colouring masks pecked or dashed lines running the length of, and within the boundaries of, the Track. Along the section of the Track between the Nursery and the Field the pecked lines are closer to the boundary with the Field than that with the Nursery but do not touch either boundary. The section of the Track between that point and Sugar Loaf Lane is shown on the 1969 OS map as having a kink and bulging out on the Nursery side of the Track so that that section to the public highway is wider than the section between the Field and the Nursery. Roughly halfway along the Track and by the boundary with the Field the word "Track" is noted. Along the section of the Track between the end of the Field/the Nursery and the public highway, the "track way (shown) coloured brown" is shown as close to the Nursery side of the Track, and is portrayed as considerably narrower than the full width of the Track until just before it reaches the junction with Sugar Loaf Lane. At that point the track way veers away from the Nursery side of the Track towards the Field side of the Track and splays outwards at the junction with Sugar Loaf Lane. I also observe that, on the 1969 OS map Sugar Loaf Lane itself is also marked with pecked lines and Sugar Loaf Lane itself is described on the OS map as "Sugar Loaf Lane (Track)". It appears from the 1969 OS map that much of the width of Sugar Loaf Lane was then, or was shown as, verge or hedgerow with some wooded areas between boundaries of private land and the "(Track)".

270. In the AP/C C avers that the Track is a single farm track approximately 2.5m wide and that Ds have stoned a much wider area and dramatically cut back hedgerows and vegetation on each side of the Track so that almost the whole width of C's land between the Field and the Nursery running back to Sugar Loaf lane has been absorbed and become the track way. The 2.5m width of the Track is based on a report for C prepared by NA[14], a chartered land surveyor, annexed to the AP/C. The stoning and cutting back are alleged by C to be trespasses.

271. In the ADC/C Ds do not admit stoning the Track to a width significantly in excess of 2.5m nor do Ds admit C's ownership of the Track extending to a width of 2.5m. Ds admit cutting back a small part of the hedgerow to prevent vehicles being scratched when passing. Ds aver that the Track has been in its present state for many years and stoned and used without complaint by C, including no complaint in either the 2015 or the 2017 pre-action correspondence. Ds also contend that any breach is minimal and should not

[14] Identified at [17] above

give rise to any relief. In replies to a Request for Further Information Ds state that they have stoned an area of the Track that was not stoned in 1980.

272. C's evidence is that Ds have stoned or resurfaced the Track gradually and in so doing have widened the Track and effectively created a two way road. In cross-examination C was taken to a photograph of the Track taken by Ds in 1986 showing D1 building a wall at the southern end of the Nursery. C agreed that in that photograph the section of the Track is much the same as today. I observe here that that photograph shows the Track as stoned with noticeable grass or earth edges on both sides and two tracks of vehicle wear marks with a darker central section of some stoning over grass. The vehicle wear marks show the Track to be used as a single track way.

273. The trial bundle also includes photographs dated 1984 showing a trench being dug parallel with the Track and at the boundary of or including some of the verge alongside the Track. The Track does not appear stoned in those photographs and the central section of the Track between the two vehicle wear tracks is rough grass, like the verges on each side. The implication is that stoning began between 1984 and 1986, that was during Mr Tolley's or C's mother's ownership of the Track. That is consistent with Ds' evidence dating the stoning as having commenced in about 1985.

274. D2's evidence is that the boundary of the Track has not changed. Ds have stoned what would otherwise have been a dirt track and the stoning has gradually covered some of the grass and weed forming verges along the length of each side of the Track. D2 said that she was not aware of a 2.5m width prior to commencement of the proceedings. Rather, the Track had simply been used as delineated by its grass and weed edges or verges.

275. In his written evidence CP describes the Track as "a single lane track so if there is a car coming in the opposite direction then one person may have to wait, but this has never caused problems". In oral evidence CP explained that his understanding of the width of the right of way is boundary to boundary, i.e. the full width of the Track. In cross-examination CP said that the stoned area had widened gradually over the years. This was the result of a combination of traffic dispersing the stones and re-laying and repairing the stoned way which in turn was dispersed latterly by traffic use.

276. EP's written evidence described the Track as originally sand which was covered over

with stones in or around the 1980s. I note that sand or earth is consistent with the colour of the Track near 1 Highdown Cottages in photographs taken by Ds and dated 1982 and 1985. EP said that stoning was necessary for agricultural machinery and vehicles to use the Track when wet and churned up. EP said that at one point, 5-6 years ago, a tarmac spray had been overlaid on the stones. EP said that the stones may make the Track appear widened but none of the boundaries have changed. Like CP, she regards the right of way width as the entire width between the Track's boundaries with adjacent land.

277. RH, in his written evidence, described a range of vehicles, including JCBs, which he had driven along the Track without incident or difficulty, including encountering horses from livery. He also referred to supervising deliveries to the Nursery to avoid obstruction and inconveniencing other Track users. RH's evidence is consistent with photographic evidence, including some adduced by C, which shows that large articulated lorries are able to and do drive along the Track.

278. The difference in the position of the opposing parties is that C treats the track way the subject of the easements in the 1978 and 1980 Conveyances as identified and defined by the descriptive words "track way (shown) coloured brown" and Ds treat the track way as defined by the boundaries of the Track.

279. Mr Andrew Troughton ('AT'), a chartered surveyor, is the single joint expert witness addressing the issues about the Track and the boundary dispute. AT noted that the 1978 Conveyance plan is of poor quality but the 1980 Conveyance plan is clearer and shows more detail. They are both taken from the 1969 OS plan and, in origin, are identical. Originals were not made available to AT or at trial. From the plan AT scaled the general width of the track way shown by pecked lines as 2.75m to 3.00m with occasional extreme widths at 2.5m and 3.25m. AT caveated those measurements on the basis that OS maps have inherent inaccuracies, including that the width of a line drawn on a map scaled at 1:2500 represents 0.6m.

280. AT also conducted a width survey on the ground using the current OS map to show his measurements. He has measured the width of the Track as stoned and drivable at 27 points between point on the Field where vehicles can turn into the Field (taken as an end point because the boundary between the Track and the Field has been stoned over) and the neck of the Track just before the splay to Sugar Loaf Lane. At 15 points along the Track bordering the Nursery and the Field, starting at the north end at the opening

for the car park on the Field, the measurements were taken between the Nursery's brick wall or structure and the Field's post and rail fence, thus incorporating the edge or verge. The widths were in the range 3.99m to 5.68m. For the remainder the measurement was of the stoned and drivable section of the Track at 11 points from the end of the Nursery wall to the neck of the junction at Sugar Loaf Lane, ignoring the splay, in the range 4.6m to 5.8m. AT's conclusions include that removal of much of the boundary hedging has enabled the width of the track way to be expanded.

281. AT also overlaid the 1969 and the current OS maps and a 1989 aerial photograph. AT observed that the comparison showed that the width of the track way had increased between 1989 and the present time. In the section bordered by the Nursery and the Field hedgerow and vegetation had been removed on the Field side. Along the other section of the Track, the track way appeared of consistent width for its entire length. Comparing the 1989 aerial photograph with later images AT observed that trees along the Track had been cut back. In answer to written questions AT said that the 1969 OS map was highly likely to have mapped hedges or fences as the solid black lines of the Track and the actual path of the track way as the dashed line. Mr Holland QC put it to AT in oral questions that the area on each side of the Track between the solid line and the dashed line would represent verge, AT agreed.

282. In written questions AT was asked to revisit the width of the track by reference to a 1981 aerial photograph. He enlarged the photograph to a 1:1250 scale and took 16 measurements at 10m intervals. The range was 2.5m to 4m. One 2.5m width was at the Sugar Loaf Lane end of the Nursery's boundary with the Track where there was then a kink in the Track; the other was nearer Sugar Loaf Lane where there was thick hedgerow on the Nursery side of the Track. Of the 16 measurements 11 were 3.0m to 3.5m.

283. Questioned by Mr Holland QC, AT agreed that a track way's width could change as vehicles moved up and down it and that what was shown on the 1969 OS plan would not necessarily correspond with the position in 1978, 1979 or 1980, but AT's view was that the position would be close to it. AT had measured the width of the pecked lines along the 1969 OS plan and the 1981 aerial photograph as enlarged at numerous intervals. The 1969 OS plan showed a track way in the range 2.75m to 3.0m and the 1981 aerial photograph, which had been enlarged and scaled, showed a width of 2.5m to 4.0m.

284. AT's instructions did not raise the width of the track way in 1997, 20 years before the issue of proceedings, presumably because Ds neither make out a positive case nor seek any relief in the ADC/C. When AT gave oral evidence Mr Holland QC took him to the aerial photographs for 1981 and then for 1999. Mr Holland QC suggested, whatever the track width before that photograph, the 1999 aerial photograph shows a track width roughly the same as today. AT disagreed. In answering AT referred to the 1989 aerial photograph which showed a kink in the Track at the southern point of the Nursery which was not apparent in the 1999 and later photographs. Mr Holland QC then said that he was not suggesting that they are the same, just that in 1999 and today they are in a similar state. AT answered that he was not sure without seeing the Track today, but "probably", i.e. that would be his expectation. The conclusion of that evidence was, of course, speculation.

285. AT was also taken to ground level photographs of the Track including one from 1986 looking towards Sugar Loaf Lane showing the building of a brick wall along the Nursery and two, dated 1997, showing the same wall as built from opposite ends of the wall. Mr Holland QC asked AT to agree that the track way was wider in 1997 than in 1981. AT agreed that it probably was but he said he would not like to say by how much. Mr Holland QC then took AT to other photographs he had taken of the same location when preparing his report (dated October 2019) and asked AT to confirm that the grass verge showing in 1997 had disappeared and been covered by stones. AT agreed that, at these points, "give or take" the verge had disappeared between 1997 and the date of his photographs.

286. The 1997 photographs show the brick wall built a full brick length wider than the Nursery building wall (in his report AT had measured that outward step in the wall at 25cm). There are people standing by the brick wall on the verge. At that point the width of the verge is comfortably more than an adult shoe length and, judging from the photograph, also comfortably more than 25cm. In a 1997 photograph, viewing the wall from the opposite direction, that section of verge appears straight; on that basis the width of the verge along the Nursery building wall will have been more than 50cm. By October 2019 that had been all but eliminated as the result of stoning the track way.

287. Mr Mitchell submitted the pecked lines shown on the 1978 and 1980 Conveyance plans represented the track way for agricultural use the subject of the right of way along the Track. The colouring in brown followed that line and was a conventional means of linking the description of a way in a conveyance to its identification on a plan or map. All of this

was clear from the language of and plans to the 1978 and 1980 Conveyances. That it was a single lane track way is common ground on the factual evidence, and in cross-examination CP accepted that the track way had been widened by stoning and traffic use. AT's evidence was the best evidence and should be accepted; from this it followed that the track way had widened to absorb more of the Track as a result of both cutting hedges and verges and stoning.

288. Mr Holland QC submitted that the area coloured brown can only be taken as a guide and not a reliable one given the crudity of the colouring on the various plans. Similarly, the aerial photographs are also of only limited assistance. The width would need to be broad to accommodate agricultural vehicles and this is reflected by the breadth at the junction with Sugar Loaf lane. Further the word "Track" midway along the Track was an indication that the track way was the entirety of the Track.

289. Taking Mr Holland QC's last point first, I disagree. The legend "Track" by the Track and "(Track)" after Sugar Loaf Lane merely indicate the presence of a track way; the actual track way is delineated by the pecked lines in both cases. That is consistent with standard OS marking. The colouring, as both Mr Mitchell and Mr Holland QC submitted, does not assist in determining the dimensions of the track way but it does make clear where the track way is located on the conveyance plan, and that is the purpose of colouring.

290. As to the width of the right of way along the Track granted by the 1978 and 1980 Conveyances, I regard the language of the 1978 and 1980 Conveyances considered with the pecked lines of the plan to each conveyance as clear. There are no track way width dimensions stated in either of the 1978 and 1980 Conveyances. The plan shows the track way narrower than and within the Track; this is less obvious for the length along the boundaries adjoining the Nursery and the Field than for the southern section of the Track leading to Sugar Loaf Lane, but nevertheless apparent in the 1980 Conveyance, and by inference the 1978 Conveyance. I accept AT's evidence that on each side of the track way the space between the dashed lines and the solid outer lines of the Track was intended to represent verge, hedgerow and the like. I regard AT's measurements taken from the larger scale 1981 photograph as the best evidence of the width of the track way in 1981 and, therefore, at the time of the 1978 and 1980 Conveyances. That places it in a probable width range at different points from 2.5m to 4.0m.

291. The factual witness evidence supported by the earlier ground level photographs make

clear that the track way was unquestionably single track and that there were significant verges and hedgerows.

292. As to being wide enough to accommodate any agricultural machinery, the track way was the width it was. The right of way did not purport to, nor did it, confer a right to convey any agricultural machinery however wide along the track way. The width of the track way was not uniform in 1981 nor is it today. That is clear from AT's measurements from the enlarged 1981 aerial photograph and his present day measurements.

293. The ground level photographic evidence is clear that before stoning, and even after stoning, the track way was bordered with verges and hedges within the boundaries of the Track. That these have diminished was accepted by Ds and CP. That hedges have been trimmed was also accepted by CP and D2. The evidence shows that the verges and hedges have diminished materially. This is evident from photographs in the trial bundle and from AT's report and evidence.

294. Having regard to AT's report, which together with his written and oral evidence, I accept as carefully prepared and providing reliable information and data, I find that the track way as conveyed in 1978 and 1980 was narrower than the width of the Track and, at different points, was between 2.5m and 4.0m wide. AT's present day measurements of the track way are significantly wider. The constraining feature, limiting the maximum vehicle width, of the right of way along a track way which is not of uniform width is the narrowest point.

Issue 16, the eleventh Track issue : In so far as Ds have stoned an area of C's land wider than the extent or width of the Granted Right of Way, is such a trespass?

295. It is clear from the evidence referred to under Issue 15 above that stoning the Track has had the effect of significantly widening the track way along the Track.

296. Mr Holland QC submitted that the clear evidence of Ds' witnesses was that the Track has not been widened. That is correct, but not the issue. It is clear from CP's evidence, the photographic evidence, and AT's evidence, and accepted by Ds' witnesses in cross-examination by Mr Mitchell, that the track way has been widened by stoning. I also reject Mr Holland QC's submission that Ds' witnesses evidence as to the width of the track way is to be preferred to that of AT. My reasons include that whereas AT had carefully

considered the question of the width of the track way along the length of the Track, Ds' witnesses did not distinguish clearly between the track way and the Track and gave contradictory evidence in that they accepted in cross-examination by Mr Mitchell that stoning had encroached onto the verges and widened the track way for use.

297. Mr Holland QC further submitted that, even if it has been widened, the track way has remained the same width since 1999. Under questioning by Mr Holland QC AT did not agree with that proposition. Indeed, Mr Holland QC's own oral questioning of AT served to point out that significant areas of the verge alongside the track way had been eradicated or obliterated and absorbed into the track way by Ds' stoning after 1999. Further, the 2011 google street survey photographs are also telling here. A number of them show the same section of the Nursery building and wall as the 1997 and 2019 photographs put to AT. These clearly show extensive verge on both sides of the Track, that is along the Nursery building and wall and also along the Field. At least one photograph[15] shows an established green verge along both sides of the track way, that is within the outer boundaries of Track, from the Nursery building / Field car park entrance to the horizon of the photograph along the Track. This puts paid to the argument that the width of the track way has remained unchanged since 1999.

298. Mr Holland QC submitted that even if the track way is narrower than the Track, the difference is verge there to accommodate overhang, and that is how the parties appear to have regarded it. I agree with that submission on a limited basis but not on the expansive basis intended by Mr Holland QC. On an occasional basis, verges may accommodate overhang and even assist in oncoming vehicles being able to pass, particularly where the track way is at its narrowest points; but, if they were intended to be in regular use as part of the track way they could and would have been designated as such.

299. Mr Mitchell submitted that the evidence of widening is overwhelming. Further, there is clear evidence of cutting back foliage along the Track as well as stoning over the verges. Indeed, D2's evidence included that hedges were trimmed to avoid scratching vehicles. Mr Mitchell submitted that such widening, whether by stoning and/or cutting back hedges, is a trespass.

300. In my judgment, AT's evidence of the widening of the track way married up with the clear

[15] 3/N/40 in the trial bundle

picture of the track way and the verges apparent from the 2011 photographs is telling. My conclusion is that with intensification of use of the Track since the opening of the tea room so, in all probability, the stoning and maintenance of the track way has increased and the recent significant increase in use has led to greater dispersal of stoning and, in turn, to more frequent maintenance. It is also the case that the track way is not regarded as a single lane way. During my site visits domestic vehicles passed each other. All of this appears on the evidence to which I was referred to be recent. It is this new intensification which has really caused the significant expansion of the track way, particularly along the Nursery's boundary. Providing access for increased traffic flow in both directions also, in my view, explains the extent of the trimming or cutting back of hedges along the section of the Track leading from from Sugar Loaf lane to the beginning of the Nursery and the Field.

301. To establish a track way width as currently stoned by prescription, as contended for by Mr Holland QC in submissions, Ds would have to establish not just increased stoning of the track way for 20 years and use but use to the width asserted, which is the full width of the Track, for 20 years before the issue of the claim in 2017. The evidence falls well short of that. Moreover, and more cogently, as Mr Mitchell submitted, there is no pleaded basis in Ds' case.

302. I conclude this issue by reference to the ADC/C. At paragraph 24(a) Ds do not admit that they have stoned the Track to a width significantly in excess of 2.5m; much may depend on the meaning of "significantly". The evidence is clear that along the Track between the Nursery building and Field in 1981 the width of the track way was in the range 2.5m to 4.0m and generally 3.0m-3.5m; and, since then, in fact since 2011 and probably (bearing in mind the evidence of parking shown by the aerial photographs) since 2017, a further 0.5m plus has been stoned between the track way and the Nursery building and wall. At 24(b) Ds deny having "dramatically" cut back hedgerows/vegetation; be that as it may, the hedgerows and vegetation have been cut back to further widen the usable width of the Track beyond the track way. At paragraph 25 Ds raise their plea of delay, laches and acquiescence on the basis that the track way has been in its present state for many years and C had not complained at all before issuing proceedings; on the facts I have rejected the contention as to the length of time for which the track way and the Track have been in their current state. At paragraph 26 Ds contend that any breach is de minime; again I have set out my reasons for finding that the widening of the track way and cutting back of hedgerows and vegetation or verge is not minimal.

Issue 17, the twelfth Track issue : In so far as Ds have cutback C's vegetation that does not overhang the Track, is such a trespass?

303. On my findings at Issue 16 above, the cutting back of vegetation not overhanging the track way and the stoning of the verges are trespasses.

304. In closing submissions Mr Holland QC raised the point that the land between Sugar Loaf lane and the Field is not owned by C so any cutting back of hedgerows or vegetation would not be a matter for complaint by C. The 2011 google photographs show grass verge, hedgerow and one tree along that section adjacent to the track as stoned. The hedgerow overhangs the grass verge. I was not taken to evidence to establish that the hedgerow, or that part from the mid-point facing the Track, does not belong to C. On the other side there are also thick hedgerows and some trees overhanging the grass verge.

Issue 18, the thirteenth Track issue : Is C entitled to relief (the extent of which is to be determined subsequently) concerning any trespass which the Court finds proven or are Ds entitled to continue to use the Track as they presently do?

305. I have found that Ds are not entitled to use the Track as they presently do. The present user (1) includes non-agricultural use, (2) is excessive as a result of the non-agricultural use, (3) has resulted in trespass beyond the track way and to the verges and hedgerows and vegetation, and (4) includes trespass under the Track between the Nursery buildings and the Field. In principle C is entitled to relief.

306. In principle C is entitled to relief in respect of the trespasses found to have occurred.

Issue 19, the fourteenth Track issue : Is C is entitled (on her own land) to fence the boundary between the Track and the Field (including the installation of one 9ft gate at a position preferably to be agreed by Ds)?

307. When considering issue 2 I did not find the positive fencing covenant in the 1980 Conveyance enforceable by C against Ds. In so doing I did not consider that the loss of a clear boundary between the Field and the Track and, as C put it, the risk of C's land being absorbed into Ds' land was, viewed in the context of all the circumstances, a reason to require Ds to erect and maintain a stock proof fence on the Field.

308. It is a different question altogether whether C may erect a fence on her own land to maintain the integrity of her boundary.

309. RH gave cogent oral evidence that he regarded the Nursery yard and the Field as one area distinguished only by a ridge between the Track and the entrance to the Field.

310. RH also gave evidence that he is responsible for supervising deliveries. Asked about deliveries by two lorries at the same time RH said that one would park in the Field along the line of the Track while the other was reversed to deliver at the Nursery. He did not accept that there had been parking on the Track. In re-examination by Mr Holland QC RH was asked what gate width would be needed if a gateway was the only means of access to the Field. RH said that it would be very difficult because lorries would not be able to swing round to back up when delivering and the result would be traffic congestion. Also, it would not be worth doing because customers would be deterred by having to wait and cause congestion while opening and shutting a gate.

311. Certainly, C could not erect a fence and gate on her land in a way which impeded or obstructed access to the Field for agricultural purposes only or obstructed use of the Track to access the Nursery for agricultural purposes only, whether by suppliers' delivery lorries or customers' vehicles or otherwise (e.g. waste collection).

312. On the other hand, like any landowner, C is entitled to protect and maintain her boundaries. This is conventionally done by fencing. Given the long user of open access to the Field and across to the Nursery, it may not be necessary or reasonable to have a fence along the full unfenced length of the Field, broken only by a permanent gate, in order to mark the boundary line. In principle C is entitled to fence the Track on her own land, but to what extent and in what way is a matter for the remedy hearing.

The Boundary Disputes

Issue 20, the first boundary issue : Where is the boundary between C's land and Ds' land?

313. I have identified the Disputed Land as a triangle of land with an area of some 10 to 12.5 square metres. I have also referred to the pre-action correspondence in 2015 and Ds' change of position by which a rectangular area of some 20 square metres reduced to the triangular area. It is relevant to note the basis on which the alleged trespass on the

Disputed Land was answered. Ds', by their then solicitors, said that when Ds acquired the Nursery there was no building along the northern boundary, rather the area was a field accessed via a gate attached to a post by the Oak Tree; the gate was removed when the building was erected; the gatepost remains and marks Ds' boundary. Reference is also made by Ds to an enclosed plan with the tree marked as a dot; I was not taken to such plan in the trail bundle. Ds' reply also says that the land was originally a paddock, that it had been used for 33 years to store agricultural materials, and that Ds have family photographs to evidence such storage.

314. In the AP/C C asserts that over recent years there have been disputes between her and Ds as to the position of their respective boundaries. C instructed NA to assist in reaching a conclusion as to the boundaries. NA's plan relating to the boundary of the Disputed Land is at Appendix 13 to his report annexed to the AP/C. This shows the north boundary line of Ds' land to be a straight line leading to a right angle at the north west corner and excluding from Ds' land (i.e. the Nursery) the triangle which is the Disputed Land.

315. In the ADC/C Ds note that C did not invite them to combine in the joint instruction of a surveyor and set out a case that the north west corner of the Nursery at the time of the 1978 and 1979 Conveyances was the Oak Tree to which a gate to the Nursery, then a field, at least in that area, was attached. Ds also allege, and D2 said in her evidence, that Ds pollarded the Oak Tree without objection and that, after building barns in the 1980s they used the triangular area for storage. Ds alternatively claim title to the Disputed Land by adverse possession (alleged continuous exclusive possession, including by fencing off and storage, for 30 years) or prescription (use for storage for in excess of 20 years since 1980). By the ADC/C Ds seek declarations as to their title or acquired rights to the Disputed land. In her Reply C denies Ds' claims to title and allegations of storage.

316. In her written evidence C said she had no knowledge of a gate. C referred to a plan annexed to a conveyance of 10.7.80 between Mr Tolley and Mr and Mrs Russon of the 0.92 acre field which does not show a gate but C acknowledged that there may have been a gate historically. C said that after 14.2.03 Ds straightened up their boundary by building on an area of the Track. C drew attention to the fact that Ds first registered the Nursery and 1 Highdown Cottages in June 2008 and said that the two plans appear consistent. C also exhibited and referred to an office copy of her registered title, registered in April 2008, and relied on that as showing that the Disputed Land is within her title. C also referred to and relied on a plan marked to show Ds' boundaries submitted

with an unsuccessful planning application in 2004[16] which C said shows that the Disputed Land is not included as part of Ds' land.

317. C also said that Ds only started storing items on the Disputed Land shortly before the 2015 pre-action letter was written. C referred to disclosed 1996 photographs showing telegraph poles lying on the Disputed Land which, C said, would have been purchased by her mother for cutting and use as fence posts to her fields.

318. In cross-examination C accepted that there is a gate post embedded in the trunk of the Oak Tree. She maintained her evidence denying that Ds had been storing items on the Disputed Land for decades. She also maintained that, during her mother's ownership of C's land, Ds had made the northern boundary line of the Nursery a straight line by building over the Track and that her mother's failure to stop that building did not mean that it had not happened. This evidence is C's explanation for the difference in the shape of the northern boundary line of the Nursery as conveyed in 1978 and as first registered in 2008.

319. In her written evidence D2 referred to the Oak Tree as being about 1 metre north of the brick buildings forming the north corner of Ds' land. D2 said that Ds had pollarded the Oak Tree about 15 years ago because they believed it to be theirs and that when Ds came to the Nursery the gate in the Oak Tree provided an access point from the Track to the Nursery, that in the 1980s D1 built the building back from the boundary, at which time the gate was removed, and that that area of their land was used to store pallets and other items.

320. In cross-examination D2 said that there was a gate and a barbed wire fence at the time when Ds bought the Nursery. She also said that the wooden poles seen on the ground by the wall in 1996 photographs belonged to Ds and disputed C's evidence that they were C's mother's poles; D2 said that D1 used telegraph poles for the barn and for fencing. D2 said that in 2014 she had asked CP to clear the Disputed Land and then place compost there.

321. CP corroborated D2's evidence about storage in his written evidence. CP said that pallets, compost and other items have been stored on the Disputed Land for years. He also said that D1 had told CP that he had built the brick building at the northern boundary of the Nursery back from the boundary line to avoid it being at an unusual angle.

[16] Trail bundle 2/K/20

322. AT also gave expert opinion evidence in the form of a written report, written answers to questions and oral evidence. In his report he explained that the 1978 plan is very poor quality but that the quality of the 1980 plan, also based on the 1969 OS map, is better. By comparing the 1969 OS map with a current digital map reflecting Ds' title as registered in 2008 and having regard to the plans with the conveyance of 1 Highdown Cottages, albeit that AT did not regard them as particularly helpful, AT concluded that the Disputed Land is within C's title. Submitting written questions, Ds provided AT with a better copy of the 1978 Conveyance plan from which AT concluded that at the most northerly point the right of way continues beyond the Nursery and then turns sharply back on itself towards the land from which AT said he assumed that the intention was to enter the Nursery at this point through a gate.

323. Mr Holland QC developed this point in his oral questioning of AT. Mr Holland QC's questioning was on the basis that, having regard to the 1969 OS map, there was no building on the land at the time. Mr Holland QC also referred AT to the "T" marks inside the boundaries of the Nursery on the 1978 Conveyance plan and to clause 4(b) of that conveyance which required the permanent maintenance of a good structural fence along the boundaries marked with "an inward "T" mark", including the northern boundary.

324. AT's opinion was that he was not able to conclude that Ds' boundary reached the Oak Tree. I note that in his closing Mr Holland QC submitted that AT accepted that it was likely that there was a gate in the fence at the Oak Tree and that marked Ds' boundary. That is not my understanding of AT's evidence. His final evidence was that he could not express an opinion one way or the other whether Ds' boundary was at the Oak Tree for a number of reasons which included that the Oak Tree was not a feature plotted on the plans.

325. I start with the parties' evidence about the situation on the ground. I think D2 must be mistaken in her evidence about that area of the Nursery having been a field and there having been a barbed wire fence when Ds bought the Nursery, which was in 1979, and about a gate at or close to the Oak Tree then providing access to the Nursery. Ds have disclosed photographs taken from Highdown Cottages dated 1979, 1982 and 1985. These show an existing barn type structure along that section of the northern boundary and having its north west corner noticeably south of the Oak Tree. The roofs of a series of buildings along the northern boundary of the Nursery are also clear from a 1981 aerial photograph. These buildings are at or near the northern boundary of the Nursery from

the north west corner to a point where the north east corner of the buildings meet or overlap with a stable on the other side of the Nursery's boundary (on the 0.92 acre field). Thus, any gate at the Oak Tree would have not have provided access via a field to the Nursery nor could there have been a barbed wire fence to a field or paddock in 1979 through to the 1980s.

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326. The barn type structure in these photographs had been replaced by a brick walled building by 1996. This is presumably the brick building referred to by D2 and CP as having been built by D1 south of Ds' boundary in the 1980s and which C said was partly built over an area of the Track.

327. There is a clear, in the sense of neither coloured nor annotated, 1969 OS map in the conveyances section of the trial bundle[17]. This shows the broadly triangular shape of the Nursery as field 1883 with an area of 2.87 acres. The triangular shape has a small square included at the north west corner. Immediately to the east of that small square and north of the north boundary of field 1883 is a small irregular four sided area with a gate symbol in its north side. These features appear clearly in the 1969 plan to the 1980 Conveyance. When I look at the plan to the 1978 Conveyance, by which Mr Tolley sold what is now the Nursery, it seems to me to be probable, based on the shape of the northern boundary on the 1978 Conveyance that the land conveyed included both the small square shown as part of field 1883 and the irregular four sided shape. This is also consistent with the plan to the 1979 Conveyance by which Ds acquired the Nursery. The result of that as depicted on the unmarked 1969 OS map was not a straight line but a jointed line where the north east corner of the small square area on field 1883 meets the north west corner of the small irregular four sided area.

328. I also note that the 1969 OS map shows a gate symbol on the northern boundary of the irregular four sided area of land and that the 1969 OS map does not show the outline of any buildings on that area or field 1883, i.e. the Nursery. It may well be that the Nursery was a field in 1969 but, having regard to the photographic evidence disclosed by Ds, that had changed, and was no longer the case, by 1979.

329. AT has produced a 1:2500 plan taken from the OS digital promap, which is the basis for the registered titles, and has overlaid a same scale copy of the 1969 OS map. Lining up the two for the best fit, one noticeable feature is that the most northerly point of the

[17] 1/I/9

Nursery in the 1969 OS map, which formed the basis of the Nursery conveyed in 1978 by Mr Tolley and in 1979 to D1, is to the south of the stables on the 0.92 acre field. Those stables are immediately to the north of the brick walled building built by D1 at or near the Nursery's northern boundary. The Oak Tree appears in aerial photographs (the google 2017 or later is clearest[18]) and ground level photographs to be plainly to the north of the brick walled building built by D1. On a site visit with counsel I asked whether either counsel would disagree with an estimated distance of 2.5 metres from the Nursery building's brick wall to the oak Tree, neither counsel disagreed. Even allowing for OS mapping tolerances that is a noticeable distance.

330. AT's overlaying of the 1969 OS map on the OS digital promap plan also supports C's evidence that when D1 built the brick walled building running along the length of the Nursery's northern boundary he incorporated a small triangular area of the Track near the entrance on the Track to the 0.92 acre field, thereby straightening out the joint in the boundary of the Nursery as conveyed.

331. From this analysis it follows that the Disputed Land was not conveyed to Ds when they purchased the Nursery.

Issue 21, the second boundary issue : Have Ds acquired the Disputed Land (marked on the plan to the expert's instructions) by way of adverse possession?

332. Mr Mitchell submitted that because C's land was first registered on 10.4.08 Ds will have to establish that they had been storing items on the Disputed land since 10.4.96. The only photographic evidence potentially in that date range is the 1996 photographs showing telegraph poles. Each side claimed that the poles were theirs. C so claimed in her witness statement and D2 in cross examination.

333. As noted, C raised the Ds storing items on the Disputed Land as a trespass in the 2015 pre-action letter. In the pre-action correspondence Ds' solicitor referred to other family photographs evidencing such storage but none have been drawn to my attention as being disclosed and/or included in the trial bundle.

334. The material before me falls well short of that necessary to make a finding of long term persistent storage on the Disputed Land or of title acquired by adverse possession.

[18] 3/R/12, 3/R/18

Issue 22, the third boundary issue : Alternatively, by reason of s.2 of the Prescription Act 1832, does Ds' Land have the benefit of a right of storage for all purposes and at all times over the Disputed Land?

335. For the same reasons I am not able to make a finding of 20 years open and uninterrupted storage of items by Ds on the Disputed Land.

Issue 23, the fourth boundary issue : Is C's parked Jeep located on Ds' land and is it a trespass?

336. The Disputed Land at trial is a triangle with the northern boundary line running from the point where the Nursery meets the boundary of the 0.92 acre field to the Oak tree. The Jeep is parked to the north of that line and is, therefore on the Track. This issue effectively fell away when Ds revised their claim from a rectangular area to a triangular area. Further, on my findings, C's Jeep is not parked on, or even near, Ds' land and, therefore, it does not constitute a trespass or impede access to Ds' land.

Issue 24, the fifth boundary issue : Are Ds' pallets which are located on the Disputed Land, located on C's Land and are they a trespass?

337. The pallets as shown in the photographs taken on 25.5.15 by NA and annexed to the AP/C as Appendix 9 to NA's report and taken by C and annexed to the AP/C as "PSCM6" are on the Disputed Land to the east of the Oak Tree. They are or were[19] located on C's land and are or were a trespass.

Issue 25, the sixth boundary issue : Is the metal box (as defined in the Particulars of Claim) located on C's land and if it is, does it constitute a trespass?

338. The allegation in the AP/C is that Ds had recently installed two extractors, referred to as metal boxes, protruding from the wall of the Nursery adjoining the Track and overhanging the verge or the Track. C claims that the Nursery wall is built to the boundary line of Ds' land and that the extractors constitute a trespass and should be removed.

339. In the ADC/C Ds admit that the extractors were installed recently. They aver that there is an indent or dog leg where the tea room has been built so that the extractors overhang

[19] They appeared in photographs but have been removed.

Ds' land.

340. AT's written evidence includes a photograph which shows a step in the Nursery wall where the tea room begins with the tea room brick wall being recessed or set back by some 25cm from the line of the brick wall running south to Sugar Loaf Lane. AT has measured the extractors as protruding by 33cm with the result that there is a net over-hang of 8cm. AT's report is that he is unable to confirm that the extractors overhang C's land and it is his opinion that it is equally likely that they overhang Ds' land.

341. CP gives a detailed explanation of the building work along the line of the nursery's west-ern boundary. In his witness statement he said that the section of the wall that sticks out furthest is the section built by D1 when he, CP, was about 12 years old (about 1994). This was 4ft when built by D1 and was taken up to 9ft in about 2009 or 2010. CP said that when building the new shop and tea room he made sure to set the new walls back from this because there was a slight dog-leg in the boundary line and he wanted to avoid crossing the boundary. He also said that Ds had always considered the boundary line to be at the telegraph poles, which Ds thought marked the boundary because they ran along the old fence line.

342. Cross-examined by reference to the aerial photographs, CP agreed that the old shop had not been built by 1989, but it had been built by 1999. CP agreed with Mr Mitchell that the old shop appeared further into the Track than the hedge visible from above. CP said that the wall was deliberately built inside the telegraph pole to avoid hitting it but the telegraph pole had previously been in the "green feature". CP disagreed that any part of the western Nursery wall had been a land grab.

343. The earliest relevant photograph is probably a 1984 photograph taken in winter showing what looks like a fence along the Nursery's western boundary. The extent of any verge Track side of the fence is not evident because the ground is covered in snow. What is apparent is that there is a noticeable margin of clear snow between the Nursery fence and the used, or driven on, part of the Track. The next photograph is dated 1986. This shows bricks laid out on the Nursery and to the edge of the Track, across the verge, for building a wall along the Track (west) side of the Nursery. The next photograph is dated 1994 and is taken from the Field looking across the Track to the old shop at the Nursery. This clearly shows a green verge between the Track and the shop's brick wall. Next in time are 1997 photographs showing a low brick wall, approximately 10 courses, set 1

full brick length forward of the shop wall and still leaving an ample width of grass verge, greater than the length of the shoes or boots of the men shown leaning against the wall.

344. The next photographs are the 2011 google street level photographs. This is a series of photographs showing the full length of the Track to Highdown Cottages. Some of these photographs[20] show the south west corner of the Nursery where it adjoins the north west corner of the neighbouring field, 2979 on the 1969 OS map. On the 1969 OS map, looking at the alternative 1978 Conveyance plan sent by Ds to AT, the north west corner of field 2979 is to the west of the south west corner of the Nursery causing a slight dog-leg or kink in the Track. The 2011 google photographs show the south west corner brick wall of the Nursery to be approximately 3 brick lengths (60cm – 75cm) to the west of the fence boundary to field 2979. In addition, the Nursery brick wall protrudes beyond a telegraph pole situated in the verge of the Track and just to the west of the fence to field 2979. Progressing northwards, the next section of the Nursery wall sits ½ brick further out towards the Track than the first section. This then meets and runs into the section that was built in 1997. This section has either been rebuilt or had a further 20 or so courses added. In the 2011 google photographs a grass verge runs the full length of these sections of the Nursery wall and there is a further telegraph pole in the middle of the verge about mid way along the section of wall built in 1997. The old shop appears in the 2011 photographs, stepped back from the 1997 or rebuilt section of the Nursery wall. A grass verge runs in front of the old shop. Beyond the old shop is a section of low brick wall and a telegraph pole appears on the Nursery side of this wall.

345. Photographs taken by C in 2016 show the grass verge still present along the front of the newly built shop and tea room exterior. Photographs taken by C in 2017 showing the extractors being fitted show the verge almost eradicated by stones.

346. Mr Mitchell submitted that the first step is to find the line of the boundary between the Track and the Nursery. The first structure was the old shop and the natural inference would be that it had been built to the boundary line. Extrapolating southwards from this, the brick walls, which step out by some 25cm, would have been a land grab. The new shop followed the line of the old shop. The conclusion must be that the extractors overhang the Track. Mr Mitchell submitted that telegraph poles would not be sited on the boundary line or in the middle of a hedge as a boundary feature. Telegraph poles would

[20] 3/N/18-20

be way side of a boundary feature adjacent to a way or road. In other words, they would not be sited in a field if they could equally well be sited in a verge forming part of a road or track. Further, far from setting the old shop or the new shop and tea room back from the boundary they had been built to the boundary or beyond and the brick wall from the southern boundary to the new tea room had encroached onto the Track.

347. Mr Holland QC noted that Ds' evidence was that the extractors overhung their land and that AT was unable to reach a conclusion either way. He submitted that there was insufficient evidence on which to reach a conclusion either way and therefore the allegation of trespass had not been made out.

348. It is a fact that the Nursery's western wall was built Track side of two of the three telegraph poles along that stretch of the Track. It is also the case that the most southerly of the three telegraph poles stands Track side of the boundary fence of the field 2979 adjoining and immediately to the south of the Nursery but behind the line, if extended southwards, of the Nursery's wall. The 1986 photograph, showing the bricks laid out for the 10 course section of Nursery wall, show two telegraph poles to the south one behind the Nursery wall already built and the other sited in the verge and set back from the Track.

349. On CP's evidence the telegraph poles are at the boundary line, not Ds' side of it. That is not how I read the historic photographic evidence. As I see it the telegraph poles are set Track side of the boundary with the Nursery. This appears from the photographic evidence (e.g.1994 and 2011) and is common sense not least because this makes for ease of access for maintenance work along a line of poles. I also accept Mr Mitchell's submission that Ds' would not have fenced the Nursery, as seen in the 1984 photograph with fencing set back from their boundary. It is common ground that the wall replacing the fence was built for security reasons. There is no evidence that the wall was sited inside the line of the fence, nor would it have made sense for Ds to build a wall set back from, or within, their boundary. Logically Ds would have wanted to maximise their land area not exclude a strip in excess of 0.5m. On the evidence it appears probable that to an extent the boundary with the Track has been transgressed. There is clear evidence that until about 2016 the land beneath the extractors was grass verge. The 1994 and 2011 photographs show grass verge Track side of the old shop building. In my judgement, Mr Mitchell's submission that this was part of the Track is also consistent with the 1969 OS map which shows land forming part of the Track or a boundary between the

track way and the Nursery's western boundary.

350. Having regard to all of that it seems to me more likely than not that the extractors overhang C's land.