Neutral Citation Number: [2024] EWHC 1519 (Ch)

Claim No: BL-2022-BHM 000083

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY AND TRUSTS LIST (ChD)

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date:17 June 2024

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a High Court Judge)

- -

Between:

(1) MOHAMMED SHERAZ AKHTAR
(2) MOHAMMED EYARZ AKHTAR
(3) MOHAMMED SURFRAZ
(4) AMINA BIBI

Claimants

- and –

(1) MOHAMMED ALI KHAN
(2) ZIA KHAN
(3) BILAL KHAN
(4) SAJID KHAN
(5) MAJID KHAN
(6) PERSONS UNKNOWN

Defendants

- -

Paul Wilmshurst (instructed by Hanne & Co Solicitors) for the **Claimants**
Martin Langston and **Feargus Campbell** (instructed by Maya & Co Solicitors) for the **1st to 5th Defendants**

Hearing dates: 1, 2, 5, 6, 7, 8, 9 February, and 17 June 2024
Written additional closing arguments filed 20 February 2024
Draft judgment sent to the parties' legal representatives on 11 June 2024

JUDGMENT

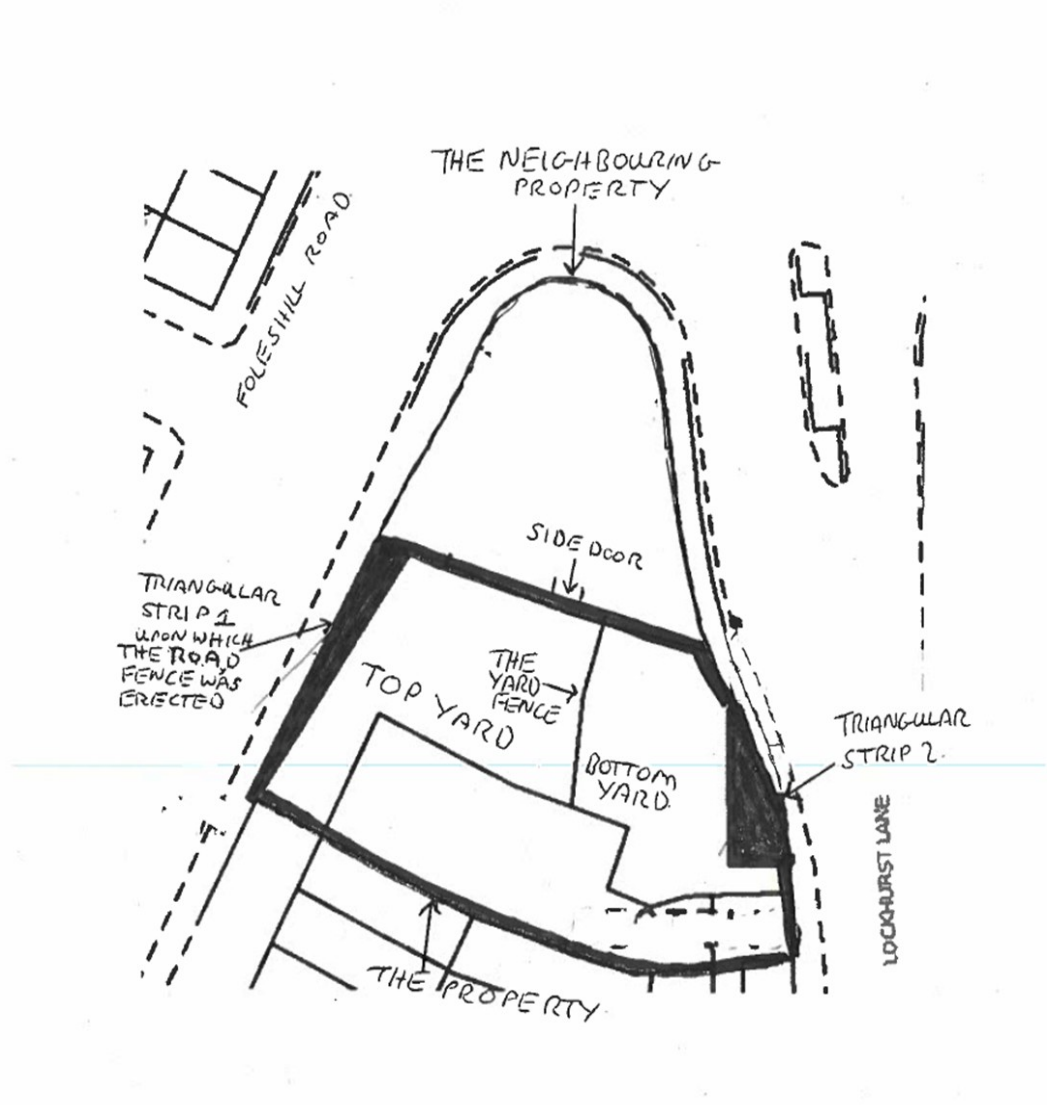
Introduction

1. This is my judgment following the trial of:

    a. cross claims for prescriptive easements for the benefit of and over adjoining properties; and

    b. claims for damages/injunctive relief for assault, battery, harassment, nuisance and/or trespass.

2. To better understand the nature of the dispute, the following is a rough plan of the layout of the relevant properties:



3. C1, C2 and C3 are the sons of C4, and together they are the freehold owners of a commercial property at 401- 403 Foleshill Road, Coventry, CV6 5AQ ("***the Property***").

4. The Property comprises a building and yard area ("***the Yard***"). The Yard is situated next to 367 Foleshill Road, Coventry, CV6 5AQ ("***the Neighbouring Property***"),

which was another commercial property. Until relatively recently, there was a restaurant building located on the Neighbouring Property with a fire door that opened onto the Yard ("***the Side Door***").

5. In 2002 or 2006, the Yard was divided by a gated fence, which was erected across the middle of the Yard ("***the Yard Fence***") thereby establishing the "***Top Yard***" and the "***Bottom Yard***".

6. The Property originally included two relatively small strips of land ("***the Strips of Land***"), which were compulsorily purchased by Coventry City Council in 1990 for a proposed road widening scheme. Ultimately, only part of the acquired land was used for the road widening scheme, which left unused:

    a. The strip of land running the whole length between the Property and Foleshill Road ("***the Triangular Strip 1***").

    b. A strip of land running part of the length between the Property and Lockhurst Lane ("***the Triangular Strip 2***").

7. In 2018, D1 purchased the Triangular Strip 1 and the Triangular Strip 2 (together "***the Triangular Strips***") from Coventry City Council.

8. D1, D2, D3, D4 and D5 are brothers ("***the Defendants***"). From 2006/2007, the Defendants were involved together in a restaurant business operating at the Neighbouring Property initially under a lease. However, in 2013, D2 acquired the freehold title, which was then transferred to D1 in 2015. Following a fire in 2016 the restaurant closed, and in 2017/2019 planning permissions were obtained to redevelop the Neighbouring Property for mixed use as a restaurant with residential units above. The conditions of the planning permissions included that there be residents' car parking spaces located on the Yard.

9. Demolition works commenced at the Neighbouring Property, and as part of those works a temporary fence was erected down the length of part of the Yard ("***the Temporary Fence***"). In the early hours of the morning of 1 August 2019, C1, his 3 sons, and C2 attended the Property and began removing the fence panels from the Yard, and which then led to an ugly confrontation with members of the Khan family ("***the Confrontation***").

10. Shortly thereafter, another fence was erected by or on behalf of D1 on the Triangular Strip 1 ("***the Road Fence***") thereby preventing C1 from gaining vehicular access to the Property from Foleshill Road, although the Property remained accessible from Lockhurst Lane.

11. The Claimants claim that "the Property has the benefit of an easement in the form of a right of way over the Triangular Strip [1] which entitles the occupiers of the Property and their visitors, servants, customers, agents, employees, licensees and the like to pass over the Triangular Strip [1] for all purposes and at all times of the year both on foot and with vehicles".

12. D1 counterclaims that the Neighbouring Property has the benefit of easements (i) "to park cars within the [Yard]" and (ii) to access and egress the Yard for all purposes "at the point of where the [Side Door] formerly existed in the northern building of the restaurant building which stood upon the Neighbouring Property".

13. The claim and counterclaim are for prescriptive easements founded upon alleged uninterrupted user for a continuous period of at least 20 years.

14. The Claimants pursue the following additional claims:

    a. The Claimants claim damages in nuisance/trespass against the Defendants for –

        i. obstructing the use of the right of way over the Triangular Strip 1 primarily being loss of rental income estimated at £80,000;

        ii. placing a blue container ("***the Blue Container***") in the Yard from 2008/2009 to date without permission;

        iii. using the Property to facilitate the demolition and/or construction works on the neighbouring Property, and in doing so causing damage to the surface of the Yard;

        iv. using the building of the Property to store various items previously located at the Neighbouring Property in the now demolished restaurant including sinks, tables, fryers, chairs and glasses.

    b. The Claimants claim injunctive relief –

        i. restraining the Defendants from trespassing onto the Property whether to facilitate development of the Neighbouring Property or otherwise;

        ii. requiring the Defendants to desist from doing anything to impede the Claimants and their visitors, servants, agents, employees, and licensees, and the like from gaining access to and using the Property;

        iii. requiring the Defendants to remove the Blue Container and any remaining building/demolition materials from the Yard;

        iv. requiring D1 to remove the Road Fence erected on the Triangular Strip 1; and

        v. prohibiting D1 from parking vehicles on the Property or encouraging others to do the same.

    c. C1 and C2 claim damages in trespass to the person allegedly suffered during the course of the Confrontation. Specifically, it is claimed that -

        i. all the Defendants assaulted C1 and C2;

        ii. D1 committed a battery against C1 by grabbing him by the back of the neck and throwing him to the ground; and

        iii. D2 committed a battery against C1 by forcing him against the railings located at the junction of Foleshill Road and Lockhurst Lane causing him to be unable to breathe.

d. The Claimants claim that they have been harassed by the Defendants both during the Confrontation and subsequently through abuse, threats, intimidation, mockery and physically preventing access to the Property. Consequential relief is sought pursuant to the Protection from Harassment Act 1997 –

i. damages; and

ii. an injunction prohibiting the Defendants from contacting or communicating with the Claimants in any way (either directly or indirectly).

Background in more detail

15. Mr Mohammed Boota was the father of C1, C2 and C3, and the wife of C4.

16. On 23 February 1982, Mr Boota became the freehold owner of the Neighbouring Property from where he operated a furniture business in partnership with his brother-in-law, Mr Mohammed Fazal.

17. By way of a written agreement dated 23 August 1985, Vinmalpo Limited leased the Property to Mr Boota for a period of 99 years ("***the Vinmalpo Lease***"). Mr Boota's furniture business then operated from both the Property and the Neighbouring Property.

18. On 31 January 1986, the Vinmalpo Lease was registered at HM land Registry under title number WM370906.

19. On 19 November 1986, Mr Boota obtained planning permission for a change of use of the Neighbouring Property to a restaurant ("***the Tandoori Palace***"), which he then ran again in partnership with Mr Fazal.

20. In 1988, Mr Boota transferred the freehold title of the Neighbouring Property to Mr Parvez Akhtar, who is the son of Mr Fazal and the nephew of Mr Boota.

21. On 23 January 1989, Mr Boota became the registered freehold owner of the Property, but Mr Boota's leasehold interest was not closed at the Land Registry such that the Charges Register of the freehold estate of the Property contained the Vinmalpo Lease. It is the Claimants' primary case that this entry was a mistake because, upon Mr Boota having acquired the freehold of the Property on 23 January 1989, the leasehold estate and the freehold estate merged thereby determining the Vinmalpo Lease. The Defendants argue that there was no merger.[1]

22. On 17 October 1990, Coventry City Council completed the compulsory purchase of and became the registered freehold owner of the Strips of Land.

23. The Re-Amended Particulars of Claim assert:

> "[8.] In or around 1990, Mr Boota ~~sub-~~let the Property to Mr Tom Gormley who ran a car sales business "*T G Cars*" at the Property. At some point HSS

[1] The merger is an important issue to be determined because, if there was no merger and the Vinmalpo Lease continued, D1 claims that the alleged user over the Triangular Strip 1 would have been exercised by right as a consequence of the entitlement arising out of the Vinmalpo Lease and until that lease was closed at the Land Registry in 2013.

> Tool Hire took over occupation of the Property from T G Cars and occupied the Property until in or around 2000 when they surrendered their lease."

In his written evidence, C1 was unsure whether HSS Tool Hire took over occupation of the Property by way of an assignment of the existing lease to Mr Gormley or by the grant of a new lease. No copies of any lease agreements are now available, but it is the Defendants' case that because the Vinmalpo Lease continued to exist, the lease to Mr Gormley must have been a sub-lease as originally pleaded in the Particulars of Claim.

24. In 1992/1993, there was a fire at the Neighbouring Property causing the Tandoori Palace to close. Following a period of refurbishment, Mr Parvez Akhtar, by way of an oral agreement, leased the Neighbouring Property for use as a restaurant to an acquaintance, but the Neighbouring Property was repossessed towards the end of 1995 due to non-payment of rent.

25. By way of a written agreement dated 22 July 1996, Mr Parvez Akhtar leased the Neighbouring Property for a period of 20 years to Messrs Iqbal Hussain and Jabed Ali ("***the Hussain/Ali Lease***"), who ran a restaurant business from the premises ("***the Shahi Palace***").

26. By way of a written agreement dated 28 November 2000, Mr Boota leased the Property to Griffin (Nuneaton) Limited ("***Griffin***") for a period of 10 years ("***the Griffin Lease***"). Griffin operated a car sales/repairs business from the premises.

27. It is not disputed that Griffin erected the Yard Fence in order that motor vehicles could be securely parked in the Bottom Yard at night. It is the Claimants' case that it was erected in 2002, whereas it is the Defendants' case that it was erected in 2006. Nothing turns on the disputed date.

28. In 2005, the Hussain/Ali Lease was assigned to D4. After a period of refurbishment the Defendants opened their own restaurant ("***Café Khan's***"). It is not disputed that the refurbishment works were substantial, although the period of the works and the corresponding length of time that the restaurant business was closed are disputed. It was the evidence of Mr Parvez Akhtar that the refurbishment works took 6 to 9 months, maybe a year. It was the evidence of D2 and D5 that the refurbishment works took 3 to 4 months before the restaurant re-opened.

29. In 2008, the shares in Griffin were acquired by Mr Ilyas Khokhar, who continued to operate the car business from the Property.

30. In 2010, Griffin commenced proceedings in the County Court at Coventry for an order for the grant of a new tenancy of the Property pursuant to Part II of the Landlord and Tenant Act 1954 ("***the Lease Renewal Proceedings***"), which were opposed by Mr Boota on the ground of alleged breaches of the tenancy including in respect of repairs, maintenance and payment of rent. In its Reply to Defence, Griffin asserted that:

> "[2.] …. Although the Lease dated 28 November 2000 was between [Griffin] and [Mr Boota], [Griffin] was sold by its directors to Mr. Ilyas Khokar on 6th June 2008. Therefore as from 6th June 2008, the new and sole director of [Griffin] was Mr. Ilyas Khokar…."

31. The Lease Renewal Proceedings were compromised by way of a Tomlin Order dated 17 June 2011 on terms that Mr Khokhar be granted a lease in respect of the Property on similar terms to the Griffin Lease.

32. On 29 November 2012, Mr Boota passed away, and the Claimants inherited the Property. Probate was granted on 11 September 2013, and C1 and C4 were appointed as personal representatives of Mr Boota's estate.

33. On 3 October 2013, the Claimants were registered as the freehold owners of the Property, and the registered leasehold estate that had been created by the Vinmalpo Lease was closed at the Land Registry.

34. Also in 2013, Mr Parvez Akhtar sold his freehold interest in the Neighbouring Property to D2.

35. On 5 March 2015, D1 became the registered freehold owner of the Neighbouring Property.

36. In the period 2015 to 2017, correspondence passed between solicitors for the Claimants, Mr Khokhar and D2 over a lease renewal/assignment being granted to D2. Ultimately, the Claimants were not agreeable due to continuing concerns over in particular unpaid rent/insurance due from Mr Khokhar.

37. On 25 January 2016, there was a fire at Café Khan's, which then closed and did not re-open.

38. On 20 March 2017, Mr Khokhar applied to court to enforce the terms of the Tomlin Order made in the Lease Renewal Proceedings.

39. On 24 April 2017, planning permission was granted in relation to the Neighbouring Property for the "erection of a building for mixed use with restaurant in basement and ground floor and residential flats above". The approved plan showed 8 car parking spaces located on the Yard.

40. By way of a written agreement dated 10 May 2017, the Claimants granted Mr Khokhar a "Renewal Lease" of the Property for a term of 10 years commencing on 15 September 2011 ("***the Khokhar Lease***").

41. On 11 July 2018, Mr Khokhar commenced proceedings in the County Court at Coventry seeking a declaration pursuant to s.54 of the Landlord and Tenant Act 1988 that the Claimants had unreasonably refused to give consent to an assignment of the Khokhar Lease to D2 ("***the Assignment Proceedings***"). The Claimants counterclaimed alleging various breaches of the lease by Mr Khokhar.

42. On 2 August 2018, D1 became the registered freehold owner of the Triangular Strips.

43. On 21 January 2019, planning permission was granted in relation to the Neighbouring Property to "rebuild to incorporate ground floor use of restaurant.. first and second floor for use of 8 Residential Apartments". The approved plan showed 9 car parking spaces located on the Yard.

44. On or around 31 July 2019, and in anticipation of the demolition works commencing on the Neighbouring Property, the Temporary Fence was erected by or on behalf of D1.[2]

45. In the early hours of the morning 1 August 2019, initially C1 and his 2 younger sons attended the Property and began removing the fence panels from the Yard. They were then joined by C2 and C1's oldest son. Whilst the fence panels were being removed, the police were driving past and stopped to find out what was going on. The police officers were wearing video and audio cameras, and the relevant BodyCam Footage has been disclosed into these proceedings albeit after the parties' witness statements had been prepared and exchanged. Whilst C1 was talking to the officers, the Khan family began arriving having been tipped off about what was going on by an associate of the Khan family who was already on the scene. This all then led to the Confrontation taking place.

46. Later on 1 August 2019, another fence ("***the Road Fence***") was erected this time across the whole length of the Triangular Strip 1 and thereby preventing vehicular access to the Property from Foleshill Road.[3]

47. On 24 March 2020, the Claimants granted a lease of the Property to C1 for a term of 20 years with a peppercorn rent payable for the first 15 years and to reflect the fact that C1 is covering the costs of the present litigation.

48. As evidenced by (i) the invoice raised and (ii) the Torts Notice issued by Commercial Rent Bailiffs Limited, the Khokhar Lease was determined by forfeiture on 26 February 2020 when the bailiffs gained entry to the Property.

49. By order dated 18 August 2020, the Assignment Proceedings were dismissed and upon it being recorded that the Khokhar Lease had been forfeited.

50. The present proceedings were issued on 4 May 2021.

51. I undertook a site visit on 1 February 2024.

Disputed facts

52. The parties and their witnesses have radically different accounts stretching back over many years of what happened, what was said, for what purpose and with what effect. Ultimately, a party who alleges a disputed fact bears the burden of proving it.

53. This is not a Criminal trial where the standard of proof is beyond reasonable doubt so that I must be sure before making a finding of fact. Rather, I must apply the lower civil standard of proof being the balance of probabilities. In other words, in making a finding of fact, I must be satisfied that more likely than not it is true. In ***Re B*** [2008] UKHL 35, Baroness Hale said

> "[32.] In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for

[2] By letter dated 6 August 2019, D1's solicitors stated that the Temporary Fence had been erected with the permission of Mr Khokhar.

[3] The Road Fence was reinforced in February/March 2020.

one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

54. There are very significant and extensive factual disputes arising between the parties. It has not been an easy task on the available evidence to piece together events and conversations going back so long. However, with no pun intended and in the words of Baroness Hale, I cannot sit on the fence, but must decide, on balance, which of the competing versions I prefer as being more likely than the other.

General observations upon the evidence of witnesses of fact

Indicators of unsatisfactory witness evidence

55. In ***Painter v Hutchinson*** [2007] EWHC 758 (Ch) at [3], Lewison J (as he then was) identified a non-exhaustive list of indicators of unsatisfactory witness evidence including:

    a. Evasive and argumentative answers;

    b. Tangential speeches avoiding the questions;

    c. Blaming legal advisers for documentation (statements of case and witness statements);

    d. Disclosure and evidence shortcomings;

    e. Self-contradiction;

    f. Internal inconsistency;

    g. Shifting case;

    h. New evidence; and

    i. Selective disclosure.

Interference with memory

56. It is a striking feature of this case that the witnesses were seeking to recall events and conversations that took place going back very many years, which necessarily gives rise to particular problems. Apart from the fact that, quite understandably, it is often difficult for witnesses to remember accurately what happened or what was said so long ago, witnesses can easily persuade themselves that the accounts they now give are the correct ones.

57. In ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J, as he then was, made the following observations about the interference with human memory introduced by the court process itself:

    "[19.] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses

> often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
>
> [20.] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.″

Importance of corroborating contemporaneous documents, if available

58. In ***The Ocean Frost*** [1985] 1 Lloyd's Rep 1, Robert Goff LJ observed (and which observation was described as "salutary" by Lord Mance in ***Central bank of Ecuador v Conticorp SA*** [215] UKPC 11 at [164]):

> [57] "…….. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

59. Similarly, in ***Gestmin SGPS SA v Credit Suisse (UK) Limited***, Leggatt J, having commented upon the unreliability of human memory, concluded that:

> "[22.] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to

avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

Adverse Inferences

60. The court may draw adverse inferences from the failure of a party (i) to produce contemporaneous documents that would have otherwise existed and supported their case, and/or (ii) to call as a witness at trial a person who might be expected to give important evidence.

Absence of contemporaneous documentary evidence

61. In ***Re: Mumtaz Properties Ltd*** [2011] EWCA Civ 610, Arden LJ said:

> "[14] In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence."

Failure to call a witness of fact to give evidence

62. In ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR P323 at P340, Brooke LJ said:

> "From this line of authority I derive the following principles……
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

63. However, in ***Royal Mail Group Ltd (Respondent) v Efobi (Appellant)*** [2021] UKSC 33, Lord Leggatt said:

> "[41.] The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in ***Wisniewski v Central Manchester Health Authority***….is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

Lucas Direction

64. I remind myself that witnesses can often lie and for different reasons. Lies in themselves do not necessarily mean that the entirety of the evidence of a witness should be rejected. A witness may lie in a stupid attempt to bolster a case, fear of the truth, misplaced sense of loyalty and torn loyalties, but the actual case nevertheless remains good irrespective of the lie. A witness may lie because the case is a lie.

Assessment of the witnesses of fact in this case

65. The principal witnesses in this case were C1, C2, D2, D5 and Mr Khokhar, all of whom were cross examined at length. Save for C2, in my assessment their testimony was tainted to a significant and material extent by indicators of unsatisfactory/unreliable witness evidence.

66. I set out below by way of illustration specific examples of such indicators.

C1

67. I did not find C1 to be a reliable or at times a credible witness.

68. Internal inconsistencies:

    a. It was C1's case that the Khan family are notorious within and feared by the local community. However, if true, why then did C1 decide that it was a good idea to take his three sons (including two of whom were then minors) with him in the middle of the night to remove the fence panels in what was clearly intended to provoke a response from the Khan family and bearing in mind –

i. In his oral evidence C1 admitted telephoning D1 earlier in the day to get him to remove the fence.

ii. A few hours before the Confrontation a call was logged by the Police from D1, who reported "landlord of next[door] had made threats to caller and to damage property – this is over construction work caller is doing – offender has gone but threats to come back tonight."

iii. C1 sought to remove the fence panels at a time when the Assignment Proceedings were ongoing and solicitors were acting on his behalf in that regard. If C1 was so fearful of the Khan family why not instead instruct his solicitors to apply for injunctive relief to secure the removal of the fence. Indeed, the day after the Confrontation, C1's solicitors wrote to D1 threatening to make such an application if the replacement fence erected shortly after the Confrontation was not removed within 7 days.

iv. In his oral evidence, and having been taken to the BodyCam Footage of the police officer initially telling C1 to "just chill out, just chill out… explain calmly", C1 admitted that at the time he felt "frustrated" and was "not thinking correctly."

v. A couple of minutes later one of C1's sons can be seen on the BodyCam Footage deliberately hurling a concrete support down onto one of the metal fence panels and being told by the police officer to "calm down".

vi. The police officers struggled to hear what was being said to them by C1 because of all the noise being generated by the way in which the fence panels were being dragged along the ground and then dumped outside the Neighbouring Property. It was certainly not a clandestine operation but rather appeared intended to draw maximum attention to what was going on.

vii. Rather than leaving the scene with his sons under the protection of the police and after the Khan family members had arrived, C1 chose to remain for a prolonged period of time actively engaging in the feud. C1 sought to explain this on the basis that he "wasn't thinking."

b. It was C1's written evidence that following the Confrontation he was repeatedly threatened, intimidated, and harassed by the Khan family and their associates to such an extent that he "really feared for both my own safety and that of my family". Despite those expressed fears, C1 did not apply for an interim protective injunction until 14 April 2021, some 19 months after the Confrontation. Even then the interim injunction that was sought was only to prohibit the Defendants from harassing C1, and no specific protections were sought against threats or use of violence. In those circumstances, it is perhaps unsurprising that the interim application was refused by Mr Justice Murray on 16 April 2021, and notwithstanding that it was made without notice and without hearing from the Defendants.

c. It was C1's written evidence that the erection of the Road Fence on the Triangular Strip 1 has adversely impacted upon his ability to attract and retain paying tenants. In support of that assertion, C1 relies upon:

   i. A copy of a written agreement that C1 signed dated 18 January 2022 granting a license to Fastlane Tyres Limited ("***Fastlane Tyres***"), which was owned by C1's son, in respect of part of the Property for a period of 15 months expiring on 31 March 2023 for a fee of £1,100 per month.

   ii. A copy of a handwritten letter dated 29 November 2022 signed on behalf of Fastlane Tyres terminating the license because the company was "unable to operate the business… any longer".

   iii. A copy of a written agreement that C1 signed dated 5 December 2022 granting a license to Fastlane Motors Ltd ("***Fastlane Motors***") again in respect of part of the Property for a period of 15 months expiring on 5 March 2024 for a fee of £1,000.

   iv. A copy handwritten letter dated 27 March 2023 signed on behalf of Fastlane Motors terminating the license "due to lack of business. For such a busy location, the fences covering Foleshill Road entrance male the property look derelict and empty."

   There are a number of curious features regarding this documentary evidence relied upon by C1:

   v. The license agreements are in substantially the same form each running to 3 typed pages. In his oral evidence, C1 confirmed that the license agreements were prepared when he retained solicitors. They each refer to the licensee having "a License to occupy part of [the Property] highlighted red on the attached plan". Yet later each license states that "The Licensee may not trade from the premises."

   vi. The plan attached to the Fastlane Tyres license, which is dated 23 January 2022 and records on its face that it was prepared professionally on C1's instructions by DESIGNFORMULA, shows the licensed part as including the Triangular Strip 2. However, by the time this license was purportedly granted, the Triangular Strip 2 was owned by D2 and the Vinmalpo Lease had been closed at the Land Registry.

   vii. Whilst the termination letter from Fastlane Motors complained about the lack of business because of the fence covering Foleshill Road, under the terms of the license agreement Fastlane Motors was only ever occupying that part of the Property on Lockhurst Lane.

69. New/shifting evidence:

a. In his written evidence C1 stated that when Mr Boota passed away he "took the lead in looking after the Property", but he did "not recall entering any deed of surrender in respect of any lease". In his oral evidence, C1 initially said that so far as the Vinmalpo Lease having been closed at the Land Registry in 2013, he had "no idea it was done", "beyond me", "don't

know who ended the lease in 2013" and "not aware about the lease back then". That claimed lack of knowledge is somewhat surprising when considering that the Vinmalpo Lease was closed at the same time as the Property was transferred to the Claimants as part of their inheritance following the death of Mr Boota. At that time, not only had C1 in his own words "taken the lead in looking after the Property", he was also a personal representative of the estate of his late father. Later in his oral evidence, C1 sought to blame the probate solicitor, another Mr Khan allegedly related to the Defendants by marriage, for unilaterally closing the Vinmalpo Lease.

b. The plan attached to the Fastlane Tyres license marks the Yard as "Shared Car Park". In his written evidence, C1 explained that this "means shared with any other occupier of the Property for example a person leasing or having a licence of the front portion of the Property". Initially, in his oral evidence, C1 said that he retained the front portion of the Property on Foleshill Road, which he was "running as a sole trader" before changing his evidence to say that he and his son were "running two businesses between us", and so there was "nothing to be divided between us". When asked, if that was the case, why was it necessary to grant a license, C1 again changed his evidence to say that the businesses were split between him and his son.

70. Disclosure shortcomings - C1 said in his oral evidence that he had been told by Coventry City Council that there was no longer any paperwork available in respect of the compulsory purchase of the Strips of Land, which I accept is very likely having regard to the length of time that has now elapsed. However:

    a. In light of C1's oral evidence that the title to the Vinmalpo Lease was closed by the solicitor then the probate file relating to Mr Boota's estate was potentially an important piece of evidence throwing light upon why the Vinmalpo Lease was only closed in 2013. I repeat that C1 was a personal representative of his late father's estate and so he could have, but failed, to disclose the probate file into these proceedings.

    b. In his oral evidence, C1 said that he made a couple of video recordings in connection with the Confrontation, one made before the police arrived and one made in the immediate aftermath. He said that he had not disclosed the videos into these proceedings because it was all in his written statement. However, that explanation made no sense -

        i. For the purpose of these proceedings such videos are treated as a document, which C1 was under a duty to disclose, if relevant.

        ii. C1 has disclosed videos of other alleged incidents referred to in his written evidence.

    c. Later in his oral evidence, C1 said for the first time that he had lost his phone, which he claimed had other potentially relevant videos on it.

71. Contradictions:

    a. The Re-Amended Particulars of Claim positively assert that, following the merger of the leasehold and freehold titles in 1989, the registered title of the Vinmalpo Lease was by mistake not closed until 3 October 2013.

However, in his oral evidence, C1 admitted that he had no knowledge of his late father's businesses whilst his father was alive, which begs the question how does C1 know that there was a mistake as alleged.

b. The Re-Amended Particulars of Claim allege that "the First Defendant grabbed the First Claimant from behind by the neck and threw him to the ground causing bruising to the First Claimant's legs".[4] Having been shown the Bodycam Footage, C1 accepted that it was D2, not D1, who caused C1 to fall to the ground . It was C1's evidence that at the time of the incident he had not seen who pushed him to ground and it was C2, who told him D1 was responsible.

c. In his written evidence, C1 stated that he sustained "bruising to my legs when I had been thrown to the ground" during the Confrontation. C1 disclosed photographs of bruising to the front of his thighs. However, the mechanics of the fall(s) shown on the BodyCam Footage are not consistent with causing the alleged injuries. In his oral evidence, C1 was unable to explain how it was that he had sustained bruising to the front of his thighs as a result of the alleged battery.

72. During his oral evidence, C1 repeatedly failed to answer questions that were put to him in an attempt to avoid saying something that might be contrary to his own case. For examples, in relation to (i) the circumstances surrounding the license agreements and (ii) whether C1's actions in taking down the fence panels were designed to provoke a response from the Khan family.

C2

73. C2's evidence was tainted to a degree by indicators of unsatisfactory/unreliable witness evidence, although overall I found C2 to be an honest witness. I was struck by the fact that during his oral evidence, C2 was readily able and willing to make concessions that did not support his or indeed his brother's case:

a. The leaseholder under the Vinmalpo Lease can cross the Triangular Strip 1 by right.

b. The boundary lines of the Property, particularly in respect of Foleshill Road, are shown to be the same on the plan annexed to the Vinmalpo Lease and the plan annexed to the Griffin Lease with both incorporating the Triangular Strip 1.

c. Mr Boota was an honourable man, who would "not lease something not entitled to do."

d. Mr Boota intended to continue the Vinmalpo Lease after purchasing the freehold of the Property. Following Mr Boota's death the Vinmalpo Lease was terminated by mistake.

e. After being moved across the road by the police, he "couldn't really see what was going on" because of the "police vans and cars in front……[and] I'm not sure I told my brother" that D1 pulled C1 over.

[4] The Re-Amended Particulars of Claim were prepared after disclosure of the BodyCam Footage.

f. At the "critical time" of the Confrontation there were only "5 or 6 Khans present".

D2

74. I did not find D2 to be a reliable or at times a credible witness.

75. New evidence - In his oral evidence, D2 said for the first time that after the Yard Fence was erected by Griffin, one of its directors, Mr Michael Thom, gave the Defendants a key to the gate to allow the staff of Café Khan's to park in the Lower Yard at night.

76. Inconsistencies/shifting evidence:

a. In his oral evidence, D2 initially said in evidence that he did not really know about the acquisition of the Triangular Strips from Coventry City Council in 2018, which he said was dealt with by D1. Later D2 said in evidence that it was "mostly me and [D2] who in negotiations with Coventry City Council" regarding the redevelopment of the Property. The relevant planning permissions were obtained in 2017 and 2019. In those circumstances, it is inconceivable that D2 did not know fully about the acquisition of the Triangular Strips in the intervening period.

b. The Claimants' solicitors sent by recorded delivery a letter dated 6 October 2014 addressed to Café Khan's ("***the Cease and Desist Letter***") requesting inter alia that it refrain from unlawfully using "a side access door which leads to our client's property… without consent" and permitting "your customers to park their vehicle on our clients' property during the evenings without consent." When shown the Cease and Desist Letter, D2 sought to distance himself from the Café Khan's business by incongruously claiming that "I am involved in the business but not a stakeholder." D1 had of course originally acquired the Neighbouring Property in 2013 before transferring the freehold title to D1 in 2015. Further, on his own evidence, D2 was closely involved in the negotiations with Coventry City Council from 2017 to 2019 over the proposed redevelopment of the Neighbouring Property. Still further, later in his oral evidence D2 went into considerable detail about the frequency and timings of deliveries by suppliers accessing Café Khan's via the Side Door.

c. D2 denied in his oral evidence that the Cease and Desist Letter was ever received. He further said that "We discuss things as a family. If had received letter we would discuss with family. I believe it is fake. He has changed so many solicitors' firms." Later in his oral evidence, D2 said that he did not know about the business arrangements made between D5 and Mr Khokhar. Therefore, it appears on D2's evidence that the Khan family would have discussed the Cease and Desist Letter, if received, but would not have discussed either D1 acquiring the Triangular Strips or D5 taking over the running of Mr Khokhar's business operating on the Property next door.

d. D2 said in his oral evidence that it was never a condition of the planning permission that there be parking in the Yard for the proposed residential units. D2 was then taken to the planning conditions dated 21 January 2019, which included that "[5.] Prior to occupation of the proposed development

hereby approved the car parking area shall be provided in accordance with the approved details Block Plan …. And the car parking area shall not thereafter be used for any other purpose." The Block Plan attached to the Construction Management Environmental Plan dated December 2018 clearly shows 9 car park spaces marked out on the right hand side of the Yard. In addition, the Block Plan records – "CLIENT Zia Khan".

e. Perhaps unsurprisingly when faced with this documentary evidence, D2 changed his oral evidence to say that the Block Plan merely "reflects what we already entitled to do", but earlier in his oral evidence he had said that the Defendants "always parked on the left hand side of the Yard." D2 then changed his oral evidence again to say that "when the sales cars removed at night our customers parked in the opposite spaces with no objections."

f. It is the Defendants' case that the Yard was shared with the Property such that the Neighbouring Property primarily used the Yard at night for customer parking. Taking the Defendants' case at its highest, such user would not give rise to an easement for permanent residents' parking over the Yard as envisaged by the Block Plan.

77. Contradictions – It was D2's written evidence that at no time during the Confrontation was C1 thrown to the floor. The BodyCam Footage clearly shows C1 being pushed to the ground on two occasions including on one occasion by D2 himself.

D5

78. I did not find D5 to be a reliable or at times a credible witness.

79. In his oral evidence, D5 repeatedly sought to avoid answering questions by giving long and irrelevant speeches.

80. Inconsistencies/contradictions:

a. In his written evidence, D5 stated that he "was in actual occupation [of the Property] from 2015 as I had taken over the business given [Mr Khokhar] was focused on retirement." However, in his oral evidence, D5 variously said -

i. D5 was not in occupation of the Property as he was only running and managing the business for Mr Khokhar.

ii. D5 was paying the rent and business rates, whilst Mr Khokhar was paying the utilities. They shared the profits equally.

iii. There were no profits as money needed to be spent on the business. D2 spent £15,000 to £20,000 on the business.

iv. Mr Khokhar approached D5 because he wanted to get rid of the lease. D5 was in control of the Property from 2015, and Mr Khokhar would only visit once every couple of weeks because he wanted to see how things were getting on.

v. Just because D5 was managing the business did not mean the lease was his. D5 was only working for Mr Khokhar.

D5's evidence was confused and confusing. It was not clear whether D5 believed he had taken over Mr Khokhar's business, was employed by Mr Khokhar or was in partnership with Mr Khokhar.

b. D5 said in his oral evidence that he had been frustrated that the Claimants were not agreeable to assigning the Khokhar Lease to him because it had always been his childhood dream to run a business doing up cars. I found that evidence to be utterly fanciful –

i. The negotiations were in connection with an assignment of the Khokhar Lease to D2 and not to D5.

ii. D5 had no relevant previous experience. He had trained as an architect and worked in the building trade before becoming involved in Café Khan's.

iii. Mr Khokhar's car business was loss making and clearly in financial trouble.

iv. After the Claimants regained possession of the Property, C1 took a number of videos of the Property including of the inside of the garage building which was shown to be derelict and cluttered with catering equipment including sinks and fryers.

Mr Khokhar

81. I did not find Mr Khokhar to be a reliable or at times a credible witness.

82. Contradictions: In his written evidence, Mr Khokhar stated that "[23.] …. "*the right of way* at the front access [over the Triangular Strip 1] was never in constant use during my occupancy of the [P]roperty between the period of 2008 – 2020…. any *right of way* that was exercised was infrequent, if not at all." However, in his oral evidence Mr Khokhar stated that "I there open every day. Yes I using dropped kerb to access the car park. Yes, when test drive cars would use Foleshill Road entrance not the back gate. Yes, bring cars in the same way if going to park them."

83. Inconsistencies:

a. In his written evidence, Mr Khokhar stated that "[5.] I was the occupier of the [Property] between the period of 2008 – 2019". In his oral evidence, Mr Khokhar confirmed that "I was still running the place in 2019."

b. However –

i. Later in his written evidence, Mr Khokhar stated that the ongoing dispute with Mr Boota, and then C1, over repairs to the Property took a heavy toll in terms of his mental, physical and financial health. "[16].. I became increasingly disenfranchised with the business and wanted to effectively leave occupation of the [P]roperty as my mind was focused on retirement in Pakistan. Indeed, it was at

this point that [D5] became involved in the business during 2012 with the view of taking over which he did in 2015."

ii. In his oral evidence, Mr Khokhar said that "[D5] was running the place on my behalf. I not go there, too stressful to go…. I stopped running the place when asked [D5] to do so."

c. Later in his oral evidence, Mr Khokhar said that "In 2015, I was still working at the Property on a daily basis. I don't remember working there in 2016. Think I handed over the business to D5 in 2017 or 2018."

Mr Khokhar's evidence as to when he ceased to be involved in the business at the Property was also confused and confusing being any of 2015, 2017, 2018 or 2019.

84. Shifting evidence:

a. In his oral evidence, Mr Khokhar said that he never gave permission for the Khan family to use the Yard for parking, since it was always a shared area. "It basically belongs to both sides."

b. However, in his witness statement dated 2 May 2018 filed in support of his claim for a declaration that the Claimants had unreasonably refused to give consent to an assignment of the lease to the Property, Mr Khokhar stated –

> "[5.] Although the [P]roperty was empty at the time of completion of the lease I allowed Mr Khan to utilise the grounds of the [P]roperty for the parking of customers' vehicles. Mr Khan is the proprietor of… a restaurant business carried on next door to the [P]roperty. His premises lack sufficient convenient parking facilities and it was and continues to be useful to him to utilise the [P]roperty for this purpose. The effect of this arrangement, which is informal in nature, is that Mr Khan pays the rent that I am liable to pay under the lease. By doing so it is not alleged by me or claimed by Mr Khan that he has taken an assignment of the lease already. The arrangement is simply a convenient way of ensuring the rent and other obligations are complied with.
>
> [6.] Although the rent and other payments are not made by me but are made direct by Mr Khan I am assured by him and believe that the rent is up to date. This includes obligations to pay insurance which I am also assured by Mr Khan has also been paid up to date.

c. When asked to explain this inconsistency, Mr Khokhar said in his oral evidence of his earlier witness statement –

> "No its not the truth. I don't remember. I didn't read it. Lots of things I not read and just sign. I signed it without reading it. I don't remember it. It was drafted by the solicitor."

d. When then asked how did the solicitor know what to put in the witness statement if not told by Mr Khokhar, he replied in his oral evidence –

> "I cant say as I don't remember this witness statement."

e. Mr Khokhar's explanation lacked any credibility.

85. Powerful biases: Mr Khokhar blamed the Claimants for causing his mental/physical ill health and bankruptcy, whereas he saw the Defendants as his saviours.

Other witnesses

86. Mr Parvez Akhtar was called as a witness on behalf of the Claimants. Mr Hussain and Mr Thomas Davie (a local resident from 1968 to 2023) were called as witnesses for the Defendants. I have no reason to doubt that they were honest witnesses doing their best to assist the court. Further, I did not find that their evidence was tainted by indicators of unreliable witness evidence.

Overall approach to the findings of fact in this case

87. I did not find C1, D2, D5 and Mr Khokhar to be reliable or at times credible witnesses. Therefore, I am unable safely to accept their evidence unless it is corroborated by other reliable evidence, or is contrary to their own interests.

88. So far as the other witnesses of fact, I consider that there is a very real and substantial risk of interference with their memories and bearing in mind that:

    a. They were seeking to recall events and/or conversations going back over many years; and

    b. With the exception of Mr Davie, none of them can be regarded as detached or objective observers –

        i. C2 is a party to these proceedings;

        ii. Mr Parvez Akhtar is closely related to the Claimants being the nephew of Mr Boota; and

        iii. Mr Hussain is on friendly terms with the Khan family, who he got to know socially in 2018. Although "not really involved in business together, they talk about things."

    Therefore, these witnesses were subject to significant motivating forces and powerful biases.

89. In such circumstances, there is a real risk that even an honest witness can nevertheless be mistaken. By way of illustration:

    a. It was the evidence of Mr Parvez Akhtar that -

        i. Mr Boota made clear to him that the Yard could not be used by the Neighbouring Property for parking.

        ii. Mr Parvez Akhtar's tenants understood that the Yard was not to be used for parking and he never gave permission to any of his tenants to use the Yard for car parking.

iii. In any event, there was sufficient space at the front of the Neighbouring Property and other parts of Foleshill Road for customers visiting the Shahi Palace.

b. It was the evidence of Mr Hussain that -

i. The Yard was used as a shared parking space with HSS using the Yard during the day to 5pm (the morning only on a Saturday with the tool hire business being closed in the afternoon) and the Shahi Palace using the Yard in the evening/night for customer parking.

ii. Whilst the Hussain/Ali Lease did not confer any car parking rights over the Yard, Mr Parvez Akhtar specifically told Mr Hussain that he could still use the Yard for car parking, which was a "perk of taking the premises", since parking on the forecourt was limited to "about 4 cars".

c. Whilst I did not find that the evidence of Messrs Parvez Akhtar and Hussain was tainted by indicators of unreliable witness evidence, it strikes me that they cannot both be correct in their recollections.

90. For these reasons, I have approached the evidence of all the witnesses of fact with a substantial degree of caution.

91. In making my findings of disputed facts in this case, I have had particular regard to the undisputed facts, the inferences properly to be drawn from those undisputed facts and any missing relevant evidence, the contemporary documents and the overall probabilities including by reference to the parties' motives.

92. I am unable in the course of this judgment to refer to all the evidence and argument relied upon by the parties, but I have taken it all into account in making my findings of fact.

Applicable legal framework – easements acquired by prescription

93. There is no dispute between the parties as to the applicable legal principles, which can be summarised as follows:

a. The Claimants' and the Defendants' respective claim and counterclaims for easements are based upon acquisition by prescription and the doctrine of "lost modern grant".

b. Under the doctrine of "lost modern grant", an easement is presumed if it can be shown that there has been at least 20 years' uninterrupted use.

c. Such use must be "as of right", which means without force, without secrecy and without permission (*nec vi, nec clam, nec precario*).

94. The legal burden of proof rests upon the party claiming the prescriptive right, but once that party has established that the right was used openly and without interruption for at least 20 years, it is presumed that the easement was used "as of right". It then falls upon the other party to rebut that presumption by calling sufficient evidence in which case the legal burden shifts back to show that the user was either without permission (nec precario) or without force (nec vi). Permission

granted by a tenant in possession of the land over which the easement is claimed is sufficient to defeat a claim under the doctrine of "lost modern grant".

"as of right"

95. In ***R (Barkas) v North Yorkshire County Council*** [2014] UKSC 31, Lord Neuberger explained:

> "[14.] …… the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right – hence "as of right". The significance of the little word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right"."

"without secrecy"

96. The use must not be secret in the sense that such use would not be known to an owner reasonably diligent in protecting his rights. The use may be secret, either by reason of the mode in which a party enjoys it, or by reason of the nature of the easement itself – ***Gale on Easements*** (21st Ed.) (at para [4-132]).

97. In ***Union Lighterage Co v London Graving Dock Co*** [1900-03] All ER Rep 234, Romer LJ stated the principle in these terms:

> "On principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired where the enjoyment has been open - that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment."

"without permission"

98. As stated by ***Gale on Easements*** (at para [4.139]), there is a legal distinction to be drawn between permission, which involves a positive act, and acquiescence, which involves passive toleration. This legal distinction is important because acquiescence is "as of right" but permission is not:

> "The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is "as of right"; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not "as of right". Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. The positive act or acts may take different forms. The grant of oral or written consent is the clearest and most obvious expression of permission. But there is no reason in principle why the grant of permission should be confined to such cases. Permission may also be inferred from the owner's acts. It may be that there will not be many cases where, in the

absence of express oral or written permission, it will be possible to infer permission from an owner's positive acts. Most cases where nothing is said or written will properly be classified as cases of mere acquiescence. But there is no reason in principle why an implied permission may not defeat a claim to use "as of right". Such permission may, however, only be inferred from overt and contemporaneous acts of the owner."

"without force"

99. The phrase "without force" carries more than its literal meaning of physical force. Therefore, a prescriptive claim will be defeated if it is shown that the use was contentious in the sense that the owner of the land against which the right is claimed had sufficiently protested to the use being made of his land

100. In ***Winterburn and another v Bennett and another*** [2016] EWCA Civ 482, the car park in question was owned and used by the Conservative Club Association, but also used by the owners (including their customers and their suppliers) of a fish and chip shop located over the road. Richards LJ said:

> "[13.] The phrase "without force" carries rather more than its literal meaning. It is not enough for the person asserting the right to show that he has not used violence. He must show that his user was not contentious or allowed only under protest. This appeal is concerned with what constitutes protest on the part of the owner of the land for these purposes.
>
> …….
>
> [31.] …….. In the present case, there were two sign clearly visible to all users of the car park and clearly informing all users that it was a private car park for the use of Club patrons only. The signs were never vandalised or, until 2007, removed and no occasion arose for their replacement. In those circumstances,…… the answer would appear to be clear that the signs were by themselves sufficient to make contentious the parking of cars and other vehicles by the appellants, their suppliers and customers."

<u>Alleged easement benefiting the Property over the Triangular Strip 1</u>

20 years' user

101. It was the evidence of D2 and D5 that:

a. In the course of their car sales/repair businesses, Griffin, and later Mr Khokhar, would park motor vehicles across the whole of the Top Yard thereby blocking vehicular access to the Yard from Foleshill Road and across the Triangular Strip 1.

b. Therefore, Griffin and Mr Khokhar would usually access the Yard via the entrance from Lockhurst Lane, which was controlled by a gate.

c. At the end of the working day, Griffin and Mr Khokhar would move the motor vehicles to the Lower Yard to be secured safely behind the Yard Fence thereby enabling Café Khan's to use the Top Yard for parking during the evening/night.

102. On balance, and contrary to the evidence of D1 and D5, I find that the user claimed by the Claimants over the Triangular Strip 1 has been in near constant and obvious use for the period 1990 – 2019. I make that finding for the following primary reasons:

a. Having undertaken a site visit it was abundantly clear that, prior to the recent erection of the Road Fence, Foleshill Road would have been used as the main entrance to the Property by the businesses operating there from time to time.

b. Historically, the entrance to the Yard from Foleshill Road was unrestricted with a dropped kerb to the road running along the whole length of the entrance to the Yard. The front of the building faced onto Foleshill Road and was situated between the fronts of (i) the restaurant(s) on the Neighbouring Property with parking spaces on the forecourt and (ii) a row of shops again with parking spaces on the forecourt. The obvious and established entrance to the Property was over the Triangular Strip 1.

c. By contrast, Google Street View Images captured during the day in November 2010, October 2012, September 2015, July 2016 and April 2017 show the gate on Lockhurst Lane shut. Indeed, the later images show the banner on the gate hanging off and weeds growing in the entrance entirely consistent with the back entrance being used only occasionally.

Determination of the Vinmalpo Lease

Parties' respective cases

103. It is the Claimants' claim that:

a. Upon Mr Boota's acquisition of the freehold estate of the Property, on 23 January 1989, the leasehold estate and the freehold estate merged such that the Vinmalpo Lease was consequently determined.

b. In the alternative, the Vinmalpo Lease was determined on or around 17 October 1990 by way of the compulsory purchase by Coventry City Council of all the existing interests and rights in respect of the Triangular Strip 1, including the freehold estate and any leasehold estate.

c. By mistake the following entries at the Land Registry were not updated following the determination of the Vinmalpo Lease (whether in 1989 or 1990) and as such are incorrect –

i. Entry C2 in the Charges Register relating to title number WK204483 (being the registered freehold estate of the Property) (edition date 26.08.2010) which mistakenly contains the Vinmalpo Lease; and

ii. Registered title number WM370906 (being the registered leasehold estate which had been created by the Vinmalpo Lease) (edition date 19.05.2006) which mistakenly was not closed until 3 October 2013.

d. There ought to be alteration and/or rectification of the Land Register (in particular with regards to the above entries) so that it reflects the Vinmalpo

Lease being determined on 23 January 1989 (or in the alternative on 17 October 1990).

104. The Defendants deny that the Vinmalpo Lease was determined at any time before being closed at the Land Registry on 3 October 2013.

105. As already noted, this is an important issue to be decided. If the Vinmalpo Lease did not determine before 2013, when it was closed at the Land Registry, then it is argued on behalf of D1 that the user over the Triangular Strip 1 relied upon by the Claimants before that date was not 'as of right', but was rather 'by right'. The 'by right' being the entitlement otherwise arising under the various sub-leases, including the Griffin Lease and the Khokhar Lease, granted out of Mr Boota's subsisting leasehold estate, which included the Triangular Strip 1.

Applicable legal framework

106. In ***BOH Limited and another v Eastern Power Networks Plc*** [2011] EWCA Civ 19, Rimer LJ considered the legal principles as to when a merger of a lesser interest in a greater one will take place:

> "[30.] ….. Where the lesser interest is a tenancy, the greater interest is the reversion immediately expectant upon its determination and both estates become vested in the same person, the judge observed that at common law a merger would be regarded as occurring automatically. That is, I consider, correct, at any rate in cases in which the two estates become vested in the same person in the same right. The approach of the common law does not, however, provide a solution to the present case because a different principle applies in equity and the equitable rule now prevails. The rule in equity was that there would only be a merger if the party in whom the two estates vested intended a merger. Section 185 of the Law of Property Act 1925, headed 'Merger', (and substantially re-enacting section 25(4) of the Judicature Act 1873) provides that:
>
> > 'There is no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.'
>
> It is, therefore, upon the equitable principles relating to merger that attention must be focussed. Mr Warwick's submissions raised an issue as to the equitable solution that the court should apply to the facts of the present case in circumstances in which there was (as the judge found) no evidence as to EDF's intention in relation to merger when the two estates became vested in it.
>
> [31.] We were referred to just two authorities on merger. The first was ***Ingle v Vaughan Jenkins*** [1900] 2 Ch 368, a decision of Farwell J.…..
>
> ……
>
> [33.] The second authority was ***Capital and Counties Bank Limited v Rhodes*** [1903] 1 Ch 631, a decision of this court ……
>
> ……

[40.] With respect to Mr Warwick's careful submissions, both in opening and reply, I regard them as mistaken at every point and would not accept them. The starting point is that whereas the ordinary rule at law was that the coalescence of a lease and its reversion in the same person ('A') in the same right would result in a merger and extinguishment of the lease, in equity it was open to A to form an intention, and declare accordingly, that there should be no such merger and extinguishment. Equity further developed the principle that in any case in which A did not expressly evince such an intention, or in which there was no other evidence of such an intention on his part, there was a presumption against any intention for a merger if such would be against his interest. In a case in which there was no express declaration or other evidence as to A's intentions, the focus of equity's inquiry was therefore exclusively on his interests: and if a merger would be against his interests, he is presumed to have intended against any merger. That is the principle that was applied in ***Ingle*** and this court in ***Rhodes*** made it clear that it regarded ***Ingle*** as having been correctly decided. The equitable principles now prevail over the principles applicable at law.

……..

[44.] In my judgment the task for the judge in relation to this issue was to consider whether there was any evidence of any intention on the part of EDF as to whether there should be a merger. He found, in paragraph [69], that there was none. Having so found, he had next to consider whether it was or was not in EDF's interests that there should be a merger. He found that it was not and that finding led him, correctly in my judgment, to the conclusion that he should presume that no merger was intended. That was the approach that ***Ingle*** (endorsed by ***Rhodes***) required him to adopt and he was correct to do so. That it may perhaps have been, or might turn out to be, contrary to the interests of the co-reversioners that there should be no merger is irrelevant."

107. Schedule 4 of the Land Registration Act 2002 provides as follows:

"*Alteration pursuant to a court order*

[2] (1) The court may make an order for alteration of the register for the purpose of—

(a) correcting a mistake,

(b) bringing the register up to date, or

(c) giving effect to any estate, right or interest excepted from the effect of registration.

(2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.

[3] (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.

(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—

(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or

(b) it would for any other reason be unjust for the alteration not to be made.

(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.

(4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land."

Determination of the Vinmalpo Lease on 23 January 1989?

Any e*vidence of any intention on the part of Mr Boota as to whether there should be a merger?*

108. The Griffin Lease does not expressly state whether it was granted by Mr Boota in his capacity as a freehold owner or a leasehold owner, it merely refers to Mr Boota in his capacity as "the Landlord".

109. However, the plan annexed to the Griffin Lease mirrors the plan annexed to the Vinmalpo Lease in that the boundary lines of the Property are the same. In particular, the boundary lines on both plans indicating the extent of the demised property incorporate the Triangular Strip 1 consistent with the Griffin Lease having been granted out of Mr Boota's leasehold estate, which had been created by the Vinmalpo Lease. In his oral evidence, C1 said that he "cant say" and was "not sure" if the plans were of the same dimensions, but they clearly are and as conceded by C2 in his oral evidence.

110. Further, C2 said in his oral evidence that:

> "Mr Boota intended to continue it as far as I'm aware. The lease was terminated by mistake without our knowledge. Solicitor did it without instructions. Mr Boota would never have intended to close the leasehold title."

111. The only direct evidence of any mistake having been made came from C1 and C2. However, they were clear in their evidence that the mistake that was made was the Vinmalpo Lease having been determined in 2013. They sought to blame the probate solicitor, Mr Khan, who they claimed had unilaterally closed the leasehold title at that time at the Land Registry without instructions.

112. C1 and C4 were the representatives of the estate of Mr Boota, but have failed to (i) disclose the probate file into these proceedings, and/or (ii) call Mr Khan, the probate solicitor, as a witness. This missing evidence would have been highly material going as it would to explain why the Vinmalpo Lease was only closed at the Land Registry in 2013 and not at any time earlier. In all the circumstances, I consider it appropriate to draw an adverse inference that, if made available, such evidence would not have supported and/or been contrary to the Claimants' pleaded case that by mistake the Vinmalpo Lease was not determined until 3 October 2013.

113. The Claimants rely upon a copy Defence to the Lease Renewal Proceedings, which states:

> "[7.] The Defendant possesses the freehold interest in the property and the Defendant is not a Tenant and so there are no other person or entities who have an interest in the reversion other than the Defendant….."

114. However, largely for the reasons given on behalf of the Defendants, I am unable to place any real weight upon the Defence document as evidence of Mr Boota's intention:

    a. The document is dated 20 August 2010 some 22 years after Mr Boota acquired the freehold title.

    b. Although dated, the document was not signed.

    c. The document was not put to any of the witnesses at trial, and so the provenance of the document is uncertain.

    d. The Lease Renewal Proceedings were settled by way of a Tomlin Order dated 17 June 2011, which provided that Mr Khokhar be granted a new lease on similar terms to the Griffin Lease subject to certain changes in respect of the term, the rent, the deposit and completion. However, the extent of the Property being demised remained unchanged. When finally granted in 2017, albeit after Mr Boota's death and the leasehold title having been closed at the Land Registry, the demised property was defined by reference to the plan attached to the Griffin Lease, which included the Triangular Strip 1.

115. In my assessment there is persuasive evidence to substantiate that Mr Boota had the intention that there should not be a merger when he acquired the freehold estate of the Property.

116. However, in the event that I am wrong about that, such that there is insufficient evidence of any intention on the part of Mr Boota as to whether there should be a merger, I will now go on to consider whether or not it was in Mr Boota's interests that there should have been a merger in 1989.

Whether it was or was not in Mr Boota's interests that there should be a merger?

117. The Claimants have not articulated any reason why it would have been in Mr Boota's interests that there should be a merger in 1989. Indeed, C1 said in his oral evidence that, if he had known at the time of his father's death about the Vinmalpo Lease:

> "I wouldn't have closed it……why surrender something that didn't cost me anything. Silly of me."

118. Rather, there is evidence to suggest that it would not have been in Mr Boota's interests that there be a merger:

    a. The compulsory purchase completed in 1990. Compulsory purchase is a relatively protracted process, and so it is likely that the process was ongoing at the time that Mr Boota acquired the freehold title in 1989. Indeed, it may well be the reason that Mr Boota exercised the option at that time to acquire the freehold title in order to seek to maximise the level of compensation payable by Coventry City Council. If there was no merger

then when Coventry City Council finally acquired the freehold title of the Strips of Land, including the Triangular Strip 1, it would have been subject to Mr Boota's continuing leasehold interest. It was the written evidence of C1 that Mr Boota had only received a small payment from Coventry City Council by way of compensation. Therefore, had Coventry City Council proceeded with the road widening scheme to the full extent as originally planned there was the potential for Mr Boota to re-negotiate additional compensation for the purchase of his continuing leasehold interest. It was argued by counsel for the Claimants that Mr Boota lacked the commercial acumen to realise or understand this opportunity, but the evidence before me was that Mr Boota was a successful businessman.

b. If there was a merger, then in the absence of any easement being reserved for the benefit of the Property then, pending the planned road widening scheme, there would be no lawful access to the Property over the Triangular Strip 1. It was argued on behalf of the Claimants that it is probable that an easement would have been reserved for the benefit of the Property as part of the compulsory purchase process. However, under the Land Registration Act 1925 s.19(2) (as then applicable), any such reserved easement would not take effect as a legal interest unless and until entered on the register against the registered freehold title of the Strips of Land. There is no evidence of any such registration, which in my view makes it unlikely that an easement was reserved for the benefit of the Property, and so it would clearly not have been in the interests of Mr Boota that the Vinmalpo Lease be determined by way of merger.

119. Therefore, I am not persuaded that it was in Mr Boota's interests that there should be a merger.

Determination of the Vinmalpo Lease on 17 October 1990?

120. The acquisition by Coventry City Council of Mr Boota's freehold interest would not on its own have had the effect of determining Mr Boota's leasehold interest. This particular claim pre-supposes that Coventry City Council as part of the compulsory purchase process acquired both Mr Boota's freehold and leasehold interests in the Strips of Land. It was argued on behalf of the Claimants that:

a. It would make no sense at all for Coventry City Council to acquire only the freehold interest and leave a subsisting leasehold interest.

b. It is very likely that full enquiries would have been made at the Land Registry to identify those estates in the Strips of Land which subsisted and had to be acquired.

121. The difficulty with this argument is that it is entirely speculative. In the absence of the compulsory purchase documents, which are no longer available, there is absolutely no evidence that Coventry City Council ever acquired Mr Boota's leasehold interest. Certainly, no application was subsequently made by or on behalf of Coventry City Council to alter/rectify the register on the ground that mistakenly the entries at the Land Registry were not updated to reflect that the leasehold estate affecting the Strips of Land had also been acquired by Coventry City Council.

122. It strikes me that in all the circumstances it is at least equally plausible that, if there was a mistake on the part of Coventry City Council, it was a mistake by

failing to (i) make full enquiries at the Land Registry prior to completing the purchase of the freehold estate, and/or (ii) identify the continuing existence of the Vinmalpo Lease and then take the necessary steps to acquire both estates subsisting in the Strips of Land.

123. As explained by ***Gale on Easements*** (at para [4-120]):

> "If the user is equally consistent with user by permission and user as of right the user is not sufficient for prescription. Thus, in referring to the doctrine of lost grant, it was said by Fitzgibbon LJ [in ***Hanna v Pollock*** [1900] 2 I.R. 664 at 671]:
>
> > "The whole doctrine of presumed grant rests upon the desire of the law to create a legal foundation for the long-continued enjoyment, as of right, of advantages which are prima facie inexplicable in the absence of legal title. In cases such as this, where the grant is admittedly a fiction, it is all the more incumbent on the judge to see, before the question is left to the jury, that the circumstances and character of the user import that it has been 'as of right.'……."""

124. In ***Poste Hotels Ltd v Cousins*** [2020] EWHC 582 (Ch), Morgan J summarised the position as follows:

> "[35.] Where the court is asked to choose between two explanations for the user both explanations must produce the result that the user was lawful. Where there are said to be two explanations for the user, each of them involving a lawful origin for the user, one has to ask whether both explanations are reasonably possible. If there are two reasonably possible lawful origins then the position is as stated in ***Gardner v Hodgson's Kingston Brewery Company*** [1903] AC 229 per Lord Lindley at 239: "[i]f the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established …". This approach was applied in ***Odey v Barber*** [2008] Ch 175 at [36]."

125. In the present case, I consider that each suggested explanation for the lawful origins of the user (whether pursuant to the notional grant of an easement or pursuant to an entitlement arising under the subsisting Vinmalpo Lease) were reasonably possible such that user "as of right" is not established.

Conclusion

126. The Claimants' claim for a prescriptive easement is dismissed. There was no user 'as of right' for the requisite 20 year period:

a. There was no merger and the Vinmalpo Lease subsisted until 2013 when it was closed at the Land Registry.

b. The user before 2013 was 'by right' being the entitlement arising under the various sub-leases, including the Griffin Lease and the Khokhar Lease, which were granted out of Mr Boota's subsisting leasehold estate and which included the Triangular Strip 1.

Alleged easement benefiting the Neighbouring Property

127. The Amended Counterclaim of D1 (at para [46]) claims as follows:

> "[c.] the First to Fifth Defendants have been familiar with the site since 1996, when Mr Akhtar leased the Neighbouring Property to Mr Hussein and Mr Ali. Between 1996 until about 2002, the staff and customers of the restaurant which was operated from the Neighbouring Property, as well as other visitors and licensees, would habitually park in the yard which comprises the Top Yard and the Bottom Yard;
>
> [d.] following the erection of the fence by Griffin in about 2002, and until 2016:
>
> i. staff of the restaurant would habitually park in the Bottom Yard, and;
>
> ii. staff, visitors, licensees and customers of the restaurant would habitually park in the Top Yard;
>
> …….
>
> [f.] throughout the periods which are referred to in paragraphs (c) and (d) (above), the door in the northern elevation of the restaurant would be used by staff of the restaurant and visitors and other licensees (but not customers) as a means of access to the restaurant building from the car parking areas which they used;"

20 years' user

128. On balance, I find that the Defendants have established at least 20 years' uninterrupted user (both parking over and accessing the Side Door via the Yard from 1996 to 2016) and for the following primary reasons:

a. As already noted prior to the erection of the Road Fence, there was unrestricted and easy access to the Yard from Foleshill Road with a dropped kerb across the whole length of the entrance.

b. The car sales/repairs businesses operating from time to time at the Property would close at around 5pm, which broadly coincided with the opening times of the restaurant businesses operating from the Neighbouring Property.

c. Having regard to the open nature of the Yard and the cross over of the operating times of the neighbouring businesses, it was inevitable that the staff, customers and suppliers of the restaurant businesses at the Neighbouring Property would park in the Yard from the late afternoon/early evening until late at night. It was Mr Hussain's evidence that the Yard was "very accessible" and was used for parking by his customers. Mr Parvez Akhtar conceded that Café Khan's "was very busy and when I used to visit there were lots of vehicles and they probably did park on the Yard." It was Mr Davie's evidence that he regularly drank at the pub located on Lockhurst Lane opposite to the Property. At closing time, he would go to eat for about an hour at the Shahi Palace, and later Café Khan's, two or three times a week. He would see other customers parking in the Yard.

d. Having parked on the Yard, it was also inevitable that suppliers would then access the restaurants at the Neighbouring Property via the Side Door. It was the oral evidence of Mr Hussain that there would be deliveries once or twice a week.

e. C1 was unable to challenge the evidence of Messrs Hussain, Parvez Akhtar and Davie in this regard because in his oral evidence C1 admitted that it was only on "very few occasions" that he would attend the Property in the evenings because he himself was working evenings at his family's restaurant business in Rugby.

129. I am also satisfied the user was open in the sense that it would have been known to an owner reasonably diligent in protecting his rights. Indeed, the Cease and Desist Letter makes express references to the user, which was therefore actually known to the Claimants.

"without permission"

Car parking Bottom Yard

130. It is not disputed that Griffin erected the Yard Fence so as to enable Griffin to secure safely the more valuable motor vehicles in the Bottom Yard overnight.

131. It was the evidence of D2 and D5 that Café Khan's was still able to access the Bottom Yard for parking because they had been provided with a key to the gate on the Yard Fence in 2006 to enable them to do so. It was argued on behalf of the Defendants that the provision of a key was not fatal to their case and relying upon the decision in ***Roberts v Fellowes*** (1906) 94 L.T. 279. However, in my judgment, the facts reported in that case are very different to the facts in the present case:

a. In ***Roberts v Fellowes*** -

> "The lower riparian proprietor claimed a right of way by prescription to repair the bank of the stream where it ran through the higher riparian proprietor's property. The gate by which he entered the higher riparian proprietor's property had always been kept locked and the key kept by the higher riparian proprietor or his servants; but this key had always been asked for as a matter of right when it was required, and had never been refused: Held (1) the lower riparian proprietor had such a right as mentioned in ***Beeston v Weate*** to keep the bank in repair on the higher riparian proprietor's property and for that purpose to have access to his premises. Such a right was from time immemorial, and the fact of the gate being kept locked did not affect such right."

b. It was the oral evidence of D2 that –

> "We always parked on the left hand side of the Yard and when the gate went up to protect the more expensive cars, we said ok as long as we had a key for staff to park in the Bottom Yard."

c. It was D5's evidence that –

> "We parked throughout the Yard. Cars parked behind the closed gate. We had the keys. We parked our cars there….. if upper car park full, we also parked customers' vehicles in the lower car park."

132. Therefore, on the Defendants' case the key was not provided from time to time at the request of the Defendants. Rather, the key was provided to the Defendants from the outset specifically to enable them to continue to access the Bottom Yard on a nightly basis even after the erection of the Yard Fence. If true, the overt and positive act of giving the Defendants their own permanent key to the gate is more consistent with permission/license having been granted by Griffin, the then leaseholder of the Property, to allow Café Khan's to use the Bottom Yard for parking, rather than mere acquiescence.

133. Therefore, I find that any car parking in the Bottom Yard by the Defendants from 2006 was permitted/licensed by Griffin in their capacity as tenant of the Property.

Use of the Property

134. In my judgment, and for the following primary reasons, Mr Khokhar was not merely tolerating the Defendants' use of the Yard, he expressly permitted/licensed the Defendants to use the Property for their own purposes including car parking and accessing the Side Door for the benefit of Café Khan's:

a. It is not disputed that Mr Khokhar's was in financial difficulties and wished to rid himself of the obligations under lease.

b. In his witness statement dated 2 May 2018, Mr Khokhar stated "Although the [P]roperty was empty… I allowed Mr Khan to utilise the grounds of the [P]roperty for the parking of customers' vehicles……. His premises lack sufficient convenient parking facilities and it was and continues to be useful to him to utilise the [P]roperty for this purpose. The effect of this arrangement, which is informal in nature, is that Mr Khan pays the rent that I am liable to pay under the lease."

c. Whilst Mr Khokhar initially sought in his oral evidence to distance himself from that earlier written evidence, later in his oral evidence he said that he told D5 to "run the business on my behalf and do whatever you want from there…. They can run the business and they have all the rights I had [under the lease]".

d. It is not seriously disputed that, by 2015 at the latest, D5 was in occupation of the Property and paying the rent.

e. D5 stated in his written evidence that:

> "[26.] ….. The use of this shared area, particularly the top yard was more important for [the Neighbouring Property], especially during the night when Café Khan's would be open. Further, from 2015 onwards, the top yard was almost exclusively used by [Café Khan's].

f. The BodyCam Footage shows D5 telling the police that the Defendants were entitled to erect the Temporary Fence on the Yard because they had taken a sublease of the Property from Mr Khokhar.

135. Therefore, I find that the Defendants' use of the Property from at least 2015 was permitted/licensed by Mr Khokhar in his capacity as tenant of the Property.

"without force"

136. If I am wrong about the user of the Bottom Yard and the Property more widely being permissive from respectively 2006 and 2015, I turn now to consider the legal effect, if any, of the Cease and Desist Letter dated 6 October 2014.

137. In his oral evidence D2 queried why it was that the Claimants had taken no legal action after sending the Cease and Desist Letter and despite Café Khan's having remained open for the period of 2 years thereafter.

138. In ***Winterburn v Bennett***, the appellants argued that, when it was clear to the landowners that the signs were being ignored, they ought to have taken further more potent steps to register their protest including communicating directly with the appellants by way of "a stiff letter from the secretary of the Club or its solicitors", and leading ultimately to the commencement and the prosecution of legal proceedings. In rejecting that argument, Richards LJ held:

> "[21.] In the light of the development of the authorities, it cannot now be said, even if it ever could, that to avoid acquiescence, the owner of the relevant property must take steps through physical means or legal proceedings actually to prevent the wrongful user.
>
> …..
>
> [40.] In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings."

139. Therefore, a letter of protest against unauthorised use may be sufficient to render that use contentious and without the need to issue legal proceedings. The Cease and Desist Letter was expressed in clear and unambiguous terms, which would have brought home to the Defendants that their continuing use of the Yard was contentious. Nevertheless, the Defendants argue that the Cease and Desist Letter was not sufficient because it was never received by them.

140. On balance, I find that the Defendants did receive the Cease and Desist Letter for the following primary reasons:

a. An inability to park cars on the Yard would adversely impact upon, initially Café Khan's business, and later upon the Defendants' ability to redevelop the Neighbouring Property. In his oral evidence D2 acknowledged that "it would have been a problem." The Defendants were clearly strongly motivated by a desire to secure rights over the Yard once their use was challenged by the Claimants.

b. It is therefore no coincidence that shortly after the Cease and Desist Letter was sent the Defendants began to take steps to acquire control over the Yard -

   i. In the period 2015 to 2017, correspondence passed between solicitors for the Claimants, Mr Khokhar and D2 in connection with negotiations over a lease renewal/assignment being granted to D2. Ultimately, the Claimants were not agreeable.

   ii. Following the breakdown of those negotiations, on 20 March 2017, Mr Khokhar applied to court to enforce the terms of the Tomlin Order made in the Lease Renewal Proceedings. By way of context, it was the evidence of Mr Khokhar that, during 2012, Mr Boota continued to pressure him to make repairs to the Property. Mr Boota then assured Mr Khokhar that if he signed the Tomlin Order in the Lease Renewal Proceedings that would resolve the dispute. However, after Mr Boota died, C1 continued the unreasonable demands regarding the repairs. As a result, Mr Khokhar became ill, wanted to abandon the Property and retire to Pakistan. Therefore, it was clearly not in Mr Khokhar's interests at that time to have compelled the Claimants to grant the Khokhar Lease. It was, however, clearly in the Defendants interests bearing in mind that:-

      - D5 was already in occupation of the Property and had been since at least 2015;

      - On 25 January 2016, there was a fire at Café Khan's, which then closed and did not re-open;

      - On 24 April 2017, planning permission was granted in relation to the Neighbouring Property with the condition that there be 8 car parking spaces on the Yard. It was recorded that the planning application had been registered on 27 February 2017 a few weeks before Mr Khokhar commenced the Lease Renewal Proceedings.

   iii. On 11 July 2018, Mr Khokhar commenced the Assignment Proceedings to secure the assignment of the Khokhar Lease to D2.

   iv. On 2 August 2018, D1 became the registered freehold owner of the Triangular Strips.

   v. On 21 January 2019, further planning permission was granted in relation to the Neighbouring Property with the condition that there be 9 car park spaces on the Yard.

c. It was a striking feature of this case that D1, who is the registered owner of both the Neighbouring Property and the Triangular Strips, failed without any proper explanation to give evidence at trial. In addition, D2 confirmed in his oral evidence that he had not considered it necessary to disclose the conveyancing file relating to the acquisition of the Triangular Strips. He explained that "My brother have it….. he knows more about it, he deal with it…..My brother dealing with paperwork." I consider that this missing

witness and documentary evidence would have been highly material going as it would to address (i) whether or not the Cease and Desist Letter was received and (ii) the rationale for purchasing from Coventry City Council the Triangular Strips, which had no real value in and of themselves. In all the circumstances, I consider it appropriate to draw an adverse inference that, if made available, such evidence would have strengthened the Claimants' case that (i) the Cease and Desist Letter was received and (ii) the Triangular Strips were acquired as ransom strips as part of a wider scheme to seek to secure control over the Yard for the Defendants' benefit after receiving the Cease and Desist Letter.

141. Even if I am wrong that the Cease and Desist Letter was received by the Defendants, I would still have found that the act of sending the Cease and Desist Letter was in itself sufficient to render the user contentious thereafter.

142. In ***Taylor v Betterment Properties (Weymouth) Ltd*** [2012] EWCA Civ 250, the landowners erected signs stating that the land was private. However, the signs were repeatedly vandalised and removed by some members of the public such that there was evidence from local residents that they did not see any signs. The fundamental question of law identified in that case was "whether and to what extent signs stating the landowner's opposition to the use of his land must ultimately come to the knowledge and attention of all users if the landowner has in fact taken all reasonable steps to achieve this." Patten LJ said:

> "[52.] I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowner's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case….."

143. In my judgment, the sending of the Cease and Desist Letter by the Claimants' solicitors, initially by recorded delivery and then by ordinary post, was a perfectly reasonable and proportionate attempt to communicate the Claimants' protest to the Defendants' unauthorised use of the Yard. In those circumstances, it would be unjust to treat the Claimants as having acquiesced to the Defendants' continued use of the Yard simply because the Defendants had not received the Cease and Desist Letter. To do otherwise would effectively impose an obligation upon the Claimants to effect personal service of the Cease and Desist Letter, which would be a wholly disproportionate form of protest in the circumstances.

Conclusion

144. D1's counterclaim for prescriptive easements is dismissed. There was no user 'as of right' for the requisite 20 year period:

a. The Defendants' use of the Bottom Yard was "by right" from at least 2006 when that use was permitted/licensed by Griffin in their capacity as the then tenants of the Property.

b. The Defendants' use of the Yard more generally was "by right" from at least 2015 when that use was permitted/licensed by Mr Khokhar in his capacity as the then tenant of the Property.

c. In the alternative, from 2014, the Defendants' use of the Yard was rendered contentious as a result of the Cease and Desist Letter.

The Claimants' claims for damages/injunctive relief for nuisance/trespass

145. The Claimants' claim for damages in nuisance as a consequence of the obstruction of the right of away over the Triangular Strip 1 is dismissed, since I have now determined that there was no such right of way.

146. The Claimants' claims for damages in trespass in respect of (i) the use of the Property to facilitate the building works on the Neighbouring Property, (ii) the use of the Property for storage, and (iii) the placement of the Blue Container on the Property are dismissed for the following reasons:

a. For the period prior to 26 February 2020, being the date that the Claimants forfeited the Khokhar Lease -

i. As Mr Khokhar was the tenant of the Property, he was the only person who could sue in trespass. In the absence of any permanent harm to the reversionary interest, a landlord cannot maintain an action in trespass when the land is in the possession of their tenant – ***Baxter v Taylor*** [1832] 4 B & Ad 72.

ii. The Claimants claimed that Mr Khokhar permitted the Defendants to park motor vehicles on the Property so that such user was "by right". However, I have found that Mr Khokhar also permitted/licensed the Defendants' wider use of the Property such that there was no trespass in any event.

b. It is not seriously disputed that on 8 March 2020, approximately a week after the Claimants forfeited the Khokhar Lease, C1 encountered the Defendants, who were at the Property removing their goods from storage in the building. The Torts Notice displayed by the bailiffs, who effected the forfeiture of the Khokhar Lease, expressly stated that "the goods.. being held on the site… are available for collection.."

c. C1 claimed that the Defendants left debris on the Property arising from the demolition works at the Neighbouring Property and which had to be cleared away. However, there is no documentary evidence confirming the extent and/or cost of any such clearing up.

d. For the period from 26 February 2020, the Blue Container remained, for no good reason, on the Property and even now some 4 years after the Claimants regained possession. However, the Claimants have not pleaded or evidenced any loss or damage caused by the presence of the Blue Container. Nor have the Claimants evidenced the commercial rates that might otherwise be chargeable for equivalent storage. In my judgment, the Claimants have failed to prove this particular claim in damages, which is dismissed. However, the Defendants do need to remove the Blue Container immediately, and I will make a mandatory injunction to that effect.

147. The Claimants' claim for damage allegedly caused to the surface of the Yard as a result of the use of the Property to facilitate building works on the Neighbouring Property is dismissed. Whilst such damage, if suffered, would constitute permanent harm to their reversionary interest thereby entitling them to sue in trespass, the Claimants have failed to evidence any such damage or the cost of remedying it.

148. I consider that it is just and convenient to make a final injunction restraining the Defendants from trespassing onto the Property whether to facilitate development of the Neighbouring Property or otherwise. I do so for the following reasons:

a. I have found that the Defendants embarked upon a campaign to appropriate the Property, and which ultimately led to the Confrontation.

b. The Defendants have continued to place the Blue Container on the Property even after the Claimants forfeited the Khokhar Lease thereby terminating the permission/license granted by Mr Khokhar for the Defendants to do so. I further find that the continued presence of the Blue Container is an attempt by the Defendants to exert continuing control over the Property and as a means of 'staking out their territory'.

The injunction will be for the period of 4 years, which corresponds broadly to the length of time that the Blue Container has remained on the Property since the Claimants regained possession.

Alleged assault and battery during the Confrontation

Applicable legal framework

Assault

149. An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person. The defendant's act must also be coupled with the capacity of carrying the intention to commit a battery into effect. Mere threatening words do not constitute an assault. Nor is it an assault for one person to stand in front of another and refuse to move if there is no threat to touch him. It is, however, assault to take or threaten active measures to block or obstruct another - ***Clerk and Lindsell on Torts 24 Ed.***, at paras 14.12 and 14.13

Battery

150. The direct imposition of any unwanted physical contact on another person may constitute the tort of battery. There is no requirement to prove that the contact caused or threatened any physical injury or harm. An intention to injure is not essential to an action for trespass to the person. It is the mere trespass by itself which is the offence. Not every deliberate touching of another constitutes a battery. A degree of physical contact is an inevitable part of everyday life – ***Clerk and Lindsell on Torts***, at paras 14.09 and 14.10.

151. It is lawful for one person to use force towards another in the defence of his own person or of another person, but this force must not transgress the reasonable limits of the occasion. What is reasonable force is a question of fact in each case. There must be some proportion between the aggression and the defence. Ordinary

violence must be repelled by ordinary means - ***Clerk and Lindsell on Torts***, at para 28.02.

Analysis and conclusion

152. C1 states in his written evidence that

> "[71.]….. the large group rushed to where we were from where they had parked. I kept backing off…..The group seemed to circle us. One of the group grabbed me from behind by my neck and threw me to the ground. Afterwards I was told by [C2] that [D2] was the one who had thrown me down.
>
> [72.]…. more police arrived. I saw that my sons and my brother were across the road and I tried to join them. I thought that I could get away from the group by leaving via the Neighbouring Property/the junction of Foleshill Road and Lockhurst Lane. It was very scary and in the commotion this is where I found myself. [D2], a large man of over 6 feet tall, forced me back up against the railings and leant against me. I could not breathe – I told him that I could not breathe. Thankfully, he leant off me and in that moment I managed to jump over the railings of the Neighbouring Property at the junction."

153. C2 states in his written evidence that:

> "[20.] …… We were rushed by the group who were acting aggressively towards us. The group were verbally abusive and aggressive towards me, my nephews and my brother. One of them, I think it was [D2], grabbed [C1] from behind and threw him to the ground. The police (the first two officers who were at the scene) were present but did very little.
>
> [21.] More police had arrived at the scene and I was told by the police to move across to the opposite side of the road and I followed their instructions……..
>
> [22.] The Khan family and their associates were aggressive and threatening towards us for around 45 minutes from across the road. They swore, shouted, and used threatening phrases…."

154. In preparation of this judgment, I have viewed the BodyCam Footage of the Confrontation several times. What is shown in that footage is very different to the events described by C1 and C2 in their written evidence. The footage lasts around 25 minutes and I do not propose to undertake a detailed commentary. The headlines are:

    a. It may well be that, if the police officers had not by chance been present as events unfolded, the incident could have been very much worse. However, generally what I saw is a lot of bad tempered shouting, swearing, squaring up, posturing, pushing and shoving from both sides interspersed with repeated shouts of "whose the gangsta?"

    b. D3 is heard shouting and gesturing, "You threatened me before, come on then" before being told by a police officer, "Any more of that and you'll be locked up."

c. C2 is told by a police officer, "Your causing a breach of the peace and if you stay here you'll be arrested." The police officer moves C2 to the opposite side of the road and then tells C2, "If you cross this road again, I'll arrest you."

d. Rather than backing off as he alleges, C1 is shown advancing towards a Khan family member, who is arguing with one of C1's sons. He grabs the Khan family member before D2 intervenes and pushes C1 away causing C1 to fall to the ground.

e. C1 then quickly jumps up and advances towards D1 with his arms raised pushing D1 in the chest back towards the road before D1 pushes C1 back and to the ground.

f. A period of relative calm then breaks out during which the Khan family members speak separately to the police officers urging them to arrest the Akhtar family members for criminal damage.

g. During the early part of this lull, C1 is stood further down the road with his back to the railings, which are only waist high, and with D2 leaning against him. D2 said in his evidence that he only did that to get C1 to calm down. The video shows that C1 is not isolated as he alleged, but surrounded by his 3 sons and a police officer all looking up the street. Nobody, including C1, appears concerned in any way. C1 taps D2 on the chest and D2 immediately moves away. Contrary to C1's evidence, there is no dramatic escape to safety with him jumping over the railings.

155. Further, it is striking in my judgment that:

a. The police log records (with my emphasis) - "Disorder….No further police action required……Both parties advised that the matter is civil and needs to be settled through court and it was not something that is going to get sorted out in the middle of the night. <u>There were no allegations of assault</u>….. The group who owned the fencing and the neighbouring property felt that the steel metal fence had been damaged but there was no evidence of this as it was put back together before police left……Log can be closed – civil dispute. <u>Public safety/welfare concern for safety....None</u>."

b. Unconvincingly, C1 sought to explain away not reporting the alleged assault and battery to the police because they "had been wearing body video cameras and I had assumed everything had been recorded". However, the police log further records that "both parties given… this log number should they wish to report anything further at a suitable time where it can be dealt with appropriately. Officers have BWV footage of this incident that will be saved [in] evidence…"

c. Although the photographs of the alleged bruising to his thighs are not time stamped, it was C1's evidence that he took them immediately after the Confrontation when he got home. Yet he apparently chose to make no further report to the police with that photographic evidence and despite having been given the police log number for that very purpose.

d. The alleged injuries are not consistent with the mechanics of C1 having fallen backwards to the ground. The more plausible explanation for the cause of any such injuries caused that night is C1 admittedly having to drag the fence panels when removing them because they were so heavy. In his oral evidence, C2 said that it was only possible to lift the large metal panels to knee height. The BodyCam Footage shows the fence panels being dragged between knee and waist height.

e. On 2 August 2019, C1's solicitors wrote to D1 threatening injunctive relief if the replacement fence was not removed. The letter also stated:

> "It is further concerning when [C1] sought to remove the fence from his property that he was approached by 10-15 individuals who sought to intimidate him. A matter which is the subject of a police report."

However, at the time the letter was written, the police had already advised that no further action was being taken. More importantly, no mention was made in the solicitors' letter, which was written the day after the Confrontation and presumably on C1's instructions, of C1 having been the victim of an assault or battery or of any injuries having been sustained as a result.

156. Whilst members of the Khan family undoubtedly behaved aggressively during the Confrontation, C1 and C2 have failed to establish their claims for assault and/or battery, which are dismissed for the following primary reasons:

a. C1 was clearly frustrated by the Defendants' refusal to remove the Temporary Fence erected on the Property without the Claimants' permission such that he was well up for the Confrontation that he had deliberately provoked.

b. C1 was clearly highly agitated and, rather than backing off, he was very much on the front foot. He was first to lay hands on members of the Khan family, which then resulted in him being pushed back.

c. C2 was also an aggressor as evidenced by him having to be removed by the Police and threatened with arrest.

d. D2's actions towards C1 were justified, reasonable and proportionate in circumstances where he was seeking (i) to protect another person being violently confronted by C1 or (ii) to calm C1 down.

Alleged harassment

Applicable legal framework

157. The Protection from Harassment Act 1997 ("***the 1997 Act***") provides that a person must not pursue a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other. Damages may be awarded for amongst other things any anxiety caused by the harassment and any financial loss resulting from the harassment. The court may also grant an injunction to restrain the relevant person from pursuing any further conduct which amounts to harassment.

158. Although harassment is not defined under the 1997 Act, it includes causing alarm or distress. In the case of ***Majrowski v Guy's and St Thomas' NHS Trust*** [2006] UKHL 34, Lord Nicholls said this:

> "[30.] …… Where….. the quality of the conduct said to constitute harassment is being examined, Courts will have in mind that irritation, annoyances, even a measure of upset arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct, which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable, the gravity of the misconduct must be an order which would sustain criminal liability…."

Analysis and conclusion

159. It was the written evidence of C1 and C2 that they were bullied, threatened and intimidated by the Defendants during the Confrontation. It was C1's written evidence that he was further bullied, threatened and intimidated by the Defendants during several subsequent incidents arising during the period from 1 August 2019 to 8 March 2020. I find on balance that these claims have been exaggerated for dramatic/tactical effect. I make that finding for the following primary reasons:

a. I have already found that rather than being an innocent victim, C1 was an aggressor during the Confrontation.

b. Nor was C2 an innocent victim and as evidenced by the Bodycam Footage, which shows that during the Confrontation the police (i) moved C2 to the opposite side of the road because he was causing a breach of the peace and (ii) warned C2 that if he moved back he would be arrested.

c. Rather than leaving the scene under the protection of the police, C1 and C2 chose to remain for a prolonged period of time in order to continue the feud.

d. C1's solicitors' letter dated 2 August 2019 referred to C1 having been intimidated by 10-15 individuals during the Confrontation. However, the letter fails to mention that:

    i. The police were in attendance throughout the Confrontation with no arrests made and no further action being taken.

    ii. C1 was not alone, but accompanied by his 3 sons and C2.

    iii. As shown on the BodyCam Footage and confirmed by C2, there were 10 individuals directly involved in the Confrontation with 5 individuals on each side of the dispute.

e. C1 has disclosed a video taken on 29 February 2020. I have viewed the video, which shows C1 standing outside the front of the Property filming the Neighbouring Property and two of the Defendants stood outside their property several feet away from C1. A few innocuous words are exchanged including C1 saying "Yes I can see you clearly now." There is no allegation of harassment arising from this particular incident. However, it is inconceivable that, if C1 was so fearful of the Khan family following

the Confrontation as is claimed, C1 would simply have turned up at the Property by himself a few months later, stand next to two of the Defendants, and film them and the Neighbouring Property.

f. The next day, on 1 March 2020, C1 returned to the location. It was C1's written evidence that he was sat in his car over the road watching the firmed up Road Fence being erected when D4 mocked him by gesturing at his crotch and coming towards C1. In his oral evidence C1 said that D4 "wanted to bash my head in. The car was locked but his body language was intimidating. I have the right to park there and record him." Again, I have viewed the video. It does show D4 touching his crotch in a mocking way, but it does not show D4 coming towards C1 whether in a threatening manner or at all. D4 can be seen laughing and joking with passers-by one of whom he then approaches.

g. In his written evidence, C1 stated that, on 8 March 2020, he was "chased from the Property" having attempted to gain access from Foleshill Road. When asked why he had not disclosed a video of this alleged incident C1 replied that he was worried that his phone, which was expensive, might be damaged "by the shoving and pushing." However, that explanation made no sense. C1 has disclosed several videos taken on his phone of other alleged incidents including the video of the alleged incident that occurred immediately afterwards when he was "forced from the Property" by D2. Therefore, the reasonable inference that I draw is that a video of this particular alleged incident was not taken because C1 did not feel threatened, intimidated or harassed in any way.

h. C1 has disclosed a video of the 2nd alleged incident that occurred on 8 March 2020 when he was "forced from the Property" when attempting subsequently to gain access to the Property from Lockhurst Lane. I have viewed this video, and there is no evidence whatsoever of D2 having used force against C1. D2 is seen calmly ambling towards C1 with both hands in his pockets before closing the gate across which there is an unremarkable exchange of words with each claiming it is their land.

i. The last alleged incident took place on 8 March 2020. It makes absolutely no sense that, if C1 was being harassed, intimidated and threatened as alleged, it then took him a further 13 months to make an application to the court for a protective injunction. Unsurprisingly, in light of the unreasonable delay in making the application, the injunction was refused.

160. The claims under the 1997 Act are dismissed.

Overall conclusions

161. The Claimants' claims are dismissed save that I make:

a. an injunction mandating the Defendants to remove the Blue Container from the Property; and

b. an injunction for a period of 4 years restraining the Defendants from trespassing onto the Property whether to facilitate development of the Neighbouring Property or otherwise.

162. D1's counterclaim is dismissed.

163. As a result of my dismissal of the cross claims for prescriptive easements, it strikes me that there will need to be further negotiations between the Claimants and the Defendants. However, in light of what has happened in the past, there is clearly the risk of further conflict. Therefore, in an attempt to keep the peace, I make cross injunctions prohibiting the Claimants and the Defendants from communicating with each other (either directly or indirectly) other than through solicitors. Again, the injunction will be for a period of 4 years.