Case No: J00PE843

IN THE CAMBRIDGE COUNTY COURT

Judgment Handed Down: 24 April 2024

Before : HHJ Karen Walden-Smith

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Between :

MERLIN REAL ESTATE LIMITED	**Claimant**
- and -	
(1) PETER WILLIAM BALAAM	**Defendants**
(2) MARIAN BALAAM	

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JONATHAN GAUNT KC (instructed by **BIRKETTS**) for the **Claimant**
ANDREW BRUCE (instructed by **HOLMES & HILLS**) for the **Defendants**

Hearing dates: 23, 24 January 2024 and 28 February 2024
Draft provided 18 April 2024

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Approved Judgment

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

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HHJ Karen Walden-Smith:

Introduction

1. This case is concerned with the use of a roadway or track ("the roadway") which runs across land owned by the defendants, Mr Peter William Balaam and his wife Mrs Marian Balaam. The claimant and the defendants are neighbouring land owners: the claimant owns land which it has developed and plans to develop further; the defendants are farmers and they farm their land together with their adult sons and their families (collectively referred to in this judgment as "the Balaams").

2. The roadway forms part of the land to the west of Clatterbury Lane which is registered under Title No. EX279835 which is registered to the first and second defendants. The roadway itself runs from Clatterbury Lane along the southern boundary of Title No. EX279835 and adjoining the land in the ownership of the claimant registered at the Land Registry under Title No. AA13028.

3. The claim has been brought by the claimant, Merlin Real Estate Limited ("Merlin") against the defendants, Mr and Mrs Balaam for declaratory relief with respect to the use of the roadway. The defendants have counterclaimed for both declaratory and injunctive relief.

4. The central issue is whether the present use and the likely increased future use of the roadway by the claimant, and those who either own properties which been have developed and sold on or occupy properties on the Wood Hall Estate, is lawful and whether or not it amounts to (or will amount to) an unreasonable interference with the defendants' own use of the roadway.

5. I had the benefit of very experienced counsel acting for both the claimant and the defendants and I am grateful to both Jonathan Gaunt KC for the claimant and Andrew Bruce for the defendants, for their helpful and focussed written and oral submissions.

The Factual Background

Ownership of the Land

6. The Wood Hall Estate had been owned by Julian Leonard since 1945. He died on 5 September 1978 and on 11 October 1982 personal representatives sold the Wood Hall Estate for the sum of £615,000 to both Peter William Balaam (the first defendant) and to Adrian Pyatt. On the same date, Peter Balaam and Adrian Pyatt partitioned, by deed, the Wood Hall Estate so that the property owned by the Balaams was identified as the Pink Property (albeit it is noted on the plan in red and is referred to throughout as the "Red Property") and the land that was owned by Adrian Pyatt was identified as the "Blue Property".

7. By the partition, the roadway fell into the land owned by the Balaams and by Clause 5 of the deed of partition, the Balaams granted to Mr and Mrs Pyatt for the benefit of the Blue Property or any part therefore "the easements set out in Part One of the First Schedule" which included, under (d)

> "*The full right in common with all other persons from time to time having the like right at all times with or without vehicles to go pass and repass over the access roadway shown coloured yellow on the plan*"

Clause 9 of the Deed of Partition provided that the Balaams covenanted to observe and perform the covenants set out in Part One of the Second Schedule which included, under (f):

> "*To ensure at all times that the access roadway shown coloured yellow on the plan is maintained in a reasonable state and condition and is not obstructed in any way at any time*"

and by Clause 10 of the Deed of Partition, Mr and Mrs Pyatt covenanted to observe and perform the covenants set out in Part Two of the Second Schedule, which included an obligation:

> "*To pay a fair proportion according to user of the costs of maintenance and upkeep of the access roadway shown coloured yellow on the plan*"

8. The yellow on the plan is not easily discernible although it can be seen to run on the Red Property along the boundary with the Blue Property.

9. The Balaams' land is agricultural land farmed by the Balaam family. The land within the claimant's title was formerly a manorial estate lying to the south west of the Balaam's land and comprising a number of buildings – both original dwellings, including former accommodation for staff, but also converted buildings and new constructions. The layout of the buildings and their names gives a clear indication of the history of the properties.

10. The Wood Hall Estate was transferred to the claimant on 9 April 2020. According to the evidence of Mr Sparkes, a Director of the claimant, at the time of the transfer there were 22 dwellings on the Wood Hall Estate all of which had the benefit of a right to use the roadway.

The development of the land and the roadway

11. The roadway, running along the southern boundary of the Balaams's land, is a single lane and runs for several hundred metres, mostly in a straight line. It runs along the edge of the northern boundary of the Blue Land and provides access both for the Balaams accessing their own farm land (a matter I will come back to in further detail in this judgment) and for the properties on the Pyatt land (the Blue Land) down to Clatterbury Lane which is part of the public highway. Mr Pyatt's evidence was that when he and Mr and Mrs Balaam jointly agreed to purchase the Wood Hall estate with the surrounding land, as at 1982, the Blue Land had six dwellings on it – all of which had an entitlement to use the roadway: Wood Hall, House Keeper's Cottage, New Cottage and Cedar Cottage, Foreman's Cottage and Monks Cottage. New Cottage and Cedar Cottage – which are located close to the entrance of the roadway onto Clatterbury Lane - were sold to third parties by Mr Pyatt in 1984 and 1985. In June 1988 Chauffeurs Cottage, mid-way along the roadway and on the north-side, was

sold by the Balaams and in December 1993, Threshers Barn – at the western end of the roadway – was also sold by the Balaams with the right of way over the roadway.

12. Between 1982 and 1996 five of the buildings on the Blue Land, within the ownership of Mr Pyatt, were developed by him in order to create seven further residential units. An outbuilding was developed into a "Granny annex" known as Groom's Cottage in 1988/89, although the property was always used as a domestic dwelling; three properties were created in 1991 from an old granary and, while they were originally granted permission as holiday lets, they were always used as permanent homes; another dwelling, House Keeper's Cottage, was developed in 1993; in the same year, Foreman's Cottage was converted into two cottages; and a former storage shed and then games room was converted into a "Granny Annex", which was immediately used as a dwelling known as Game Cottage. There were consequently thirteen dwellings, including Wood Hall, on the Pyatt Blue Land and two dwellings on the Balaam Red Land all using the roadway as a matter of right by 1993. Wood Hall, the main property, had a right to access and egress onto Clatterbury Lane via the roadway but it also had its own driveway with a turning circle in front of Wood Hall.

13. In the early 1990s three new water mains pipes were installed across the Balaams' property which served the properties around Wood Hall and in 1993 the roadway was resurfaced with Mr Pyatt paying 64% of the cost, Mr Balaam paying 16% and the balance of 20% being covered by the respective owners of Chauffeurs Cottage, New Cottage and Cedar Cottage. Two passing bays were installed at this time.

14. There was, as I heard in oral evidence, a concern that some drivers were driving too fast along the roadway and the occupiers of Chauffers Cottage, New Cottage and Cedar Cottage, the two latter cottages being very close to the entrance with Clatterbury Lane, all had children. In 1995 Mr Balaam consented to the building of the speed bumps on the basis that they were to be paid for by the occupants of those three cottages and with a sign to be erected in order to warn people of the bumps and that they must drive slowly and at their own risk.

15. Mr Balaam and Mr Pyatt agreed that Mr Pyatt would apply for planning permission to develop the property known as The Old Barn which was located on Mr Balaam's Red Land and that he would also upgrade the waste drainage, which at the time ran into a septic tank on the Red Land, in order to allow for additional occupation. The application for planning permission to convert The Old Barn into three dwellings was initially refused, but was then allowed on appeal. Mr Pyatt purchased part of the Red Land including the Old Barn for £150,000 and the property was transferred to him pursuant to a deed dated 8 November 1996 ("the 1996 Deed"). The 1996 Deed included a right of way over the roadway for the benefit of the transferred property and a temporary right of way over part of the driveway included in the transfer was reserved to the Balaams until 31 August 1997.

16. Mr Pyatt paid a further £50,000 to the Balaams for the conversion of another barn, known as the Diary, which had been transferred pursuant to the provisions of the 1996 Deed. Mr Pyatt developed the Old Barn in 1997 and the Dairy in 1998.

17. Subsequent to 1998, Mr Pyatt developed a further 5 residential properties within the Wood Hall estate (1 and 2 Woodman's Cottage; 1 and 2 Farrier's Yard; and Chaff

Cottage), and then, in or about 2018, a further two dwellings were created from the Stables. .

18. Mr Pyatt did not develop any further properties, but did obtain permission to develop the Dairy Lodge (one dwelling) The Old Hangar (with four dwellings), The Squash Court (one dwelling), The Gardener's Shed (one dwelling), and the Wood Cutter's Shed (two residential properties) – a total of a further nine dwellings.

19. It appears from this history that Mr Peter Balaam was not concerned with the development of properties using the roadway before, at least, 1998 as Mr Balaam had entered into the arrangement with Mr Pyatt for the development of the Old Barn. Indeed, his concern appears to have arisen subsequent to the sale of the land to the claimant in 2020. He did not object to the development of the further seven dwellings between 1998 and 2018. On 23 January 2020, a matter of months before the transfer of Wood Hall Estate to the claimant, solicitors for the Balaams set out to Mr Pyatt the following:

> "*The number of vehicles using the Roadway has therefore increased significantly since 1982 and has increasingly hampered our clients' use of the Roadway, particularly during more intensive period of the year (for example harvest). Our clients have therefore occasionally had to avoid use of the Roadway when they would prefer to do so. The alternative access over other land is not guaranteed in the future and our clients wish to ensure that what remains of the Red Land continues to be a viable asset in its own right with its own access. In the circumstances our clients wish to ensure that their use of the Roadway is not interrupted more than it presently is*"

Reference was made in that letter to Lord Denning in *Jelbert v Davis* [1968] 1 WLR 589 (referred to further below).

20. The letter continued by stating that the Balaams believed that there should be no further development as to do so would be excessive *"to the extent that it would interfere with the use of others such as to be beyond the grant of the right of way… Our clients consider that they have been accommodating in not objecting to development of the Blue Land to date even though it has had an impact on their use of the Roadway."*

21. Between the transfer of the Wood Hall Estate in April 2020 through to January 2021, the claimant sold the freehold of seven properties on the Wood Hall Estate and the owners of these properties (1 and 2 The Old Barn, 1 and 2 The Dairy, 2 Woodman's Cottage, Housekeeper's Cottage, and Wood Hall) all have a right to use the roadway. The remaining fifteen properties are all still part of the Wood Hall Estate and the claimant has developed Dairy Lodge pursuant to the planning permission obtained by Mr Pyatt, thereby creating one more dwelling on the Wood Hall Estate. Of those sixteen dwellings on the Wood Hall Estate in the ownership of the Claimant, fourteen are tenanted with Monks Cottage and Grooms Cottage not tenanted. The number of occupied dwellings between the transfer to the claimant and now has increased by one.

22. The claimant has either renewed or modified the remaining planning permissions which have not yet been implemented and obtained permission to redevelop some other properties, but without increasing the number of dwellings. The evidence of Mr Sparkes is that, including Dairy Lodge which has already been developed, there will be nine further dwellings: two at The Old Hangar, One at The Old Squash Court, one at The Gardener's Shed, one at the Wood Cutters Shed, one at the Old Tennis Court and one at a plot opposite Monk's Cottage (for which planning permission has not yet been granted). In addition to those nine additional dwellings, The Stables, Monks Cottage and Grooms Cottage are all to be redeveloped without any increase in the number of dwellings.

23. In addition to the twenty-two dwellings included in the transfer, some of which have been sold off to third parties, the nine additional dwellings for which there is planning permission (of which Dairy Lodge has already been developed) there is also Chauffeurs Cottage, Cart Lodge Barn and Threshers Barn, which all used to be part of the Balaam's holdings, and Cedar Cottage, New Cottage and the Lodge (formerly Gate Keeper's Cottage) which used to be part of the Wood Hall Estate. As I calculate it, there are twenty nine dwellings in existence whose owners/occupiers have a right to use the roadway (although two dwellings are currently unoccupied) together with the use of the roadway by the Balaam family, and there are 8 further dwellings for which there is, or is likely to be, planning permission. The increase in dwellings from the date of the transfer will be nine, together with another potential development which Mr Sparkes has referred to in his evidence, namely the land adjoining Chauffeurs Cottage. There is currently a restrictive covenant attached to that land prohibiting development, but Mr Sparkes gave evidence that he has seen documentation that the Balaams would be willing to release that restrictive covenant for the sum of £200,000.

24. Subsequent to the transfer of the Wood Hall Estate to the claimant, the solicitors for the Defendants (Holmes & Hills) wrote to the claimant's (then) solicitors, Hewitsons, setting out in detail the Balaams account of the history of the development of the properties at the Wood Hall Estate and stating, amongst other things, that at the time of the deed entered into in 1982 the Balaams had not been aware that Mr Pyatt was intending to develop the estate. Their view had been that he had purchased Wood Hall to be his own residence and that only later did he start developing the properties on the estate. With respect to the Balaams use of the roadway, the letter set out that the roadway was used throughout the year by grain carts, sprayers and other farm machinery in addition to using the roadway for vermin control and for vehicles involved on shooting days. In that letter, dated 21 June 2021, in addition to referring to case law (which I will consider later in this judgment), the Balaam's solicitors set out their case as follows:

> "Our clients' case is not based on intensification or alteration of user falling outside the grant. As outlined in our previous correspondence, our client's case is that there is a limitation on the use of the Access Roadway derived from the fact that the use is to be in common with all other persons with the like right and that the Access Roadway is being used excessively thus unreasonably interfering with our clients' use of their Access Roadway. The cause of this interference is due to the

> numerous residential developments that have been completed and/or for which planning permission has been granted and the necessary intensification of use of the Access Roadway."

25. The dispute between the parties is, therefore, whether the claimant's current development of properties has resulted in unreasonable use of the right of way by interfering with the Balaam's use of the right of way or, if further development takes place, will result in unreasonable use of the right of way.

26. The Balaams did not bring proceedings seeking declaratory relief but have sought declaratory relief by way of a counterclaim to the claim brought by Merlin for declaratory relief that their current use of the roadway is lawful and not an interference with the Balaam's use of the roadway and, further, that they are entitled to use both the passing places and the verges at the side of the way. Further declaratory relief is sought that the use of the roadway likely to arise from the further development would not unreasonably interfere with the Balaam's use of the roadway. It is accepted by the Balaams that the use of the roadway prior to the sale of Wood Hall did not interfere unreasonably with the Balaam's use of the roadway.

The Legal Framework

The use of the roadway

27. The Balaams are entitled to use the roadway as it falls within their land ownership. The grant of the right to use the roadway was contained in the 1982 deed of partition, as referred to in paragraph 7 above, and the 1996 deed, as referred to in paragraph 15 above. The right granted for the benefit of the "Blue Property" or "the Property" is expressed to be a *"right in common with all other persons from time to time having the like right at all times with or without vehicles to go pass and repass"*. The grants are therefore not limited to be for the benefit of properties that already exist on the land nor is it limited to any particular purpose or time.

28. The use of the land at the time of the grant does not restrict the use of the right of way and a right of way may be used in the manner authorised by the grant, even if the use of the dominant tenement has altered since the date of the grant. In the often cited authority of *White v Grant Hotel, Eastbourne Limited* [1913] 1Ch 113, Cozens-Hardy MR could not have been more succinct or clear that when a right of way is claimed under a grant (as here):

> "the only thing the Court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant and we cannot consider any subsequent user as in any way sufficient to cut down the generality of the grant"

29. As was set out by the House of Lords in *Alvis v Harrison* (1990) 62 P & CR 10, the owner of a right of access granted in general terms was entitled to exercise the right not only for the purposes of the use to which the dominant tenement was being put at the time of the grant, but also for any other lawful purposes to which it might later be put, although the right must be exercised "civiliter", that is in a manner least

burdensome to the servient tenement. In his speech, Lord Jauncey, set out some general principles applicable to servitude rights of access and their use:

> "(1) Where a right of access is granted in general terms the owner of the dominant tenement is entitled to exercise that right not only for the purpose of the use to which the tenement is then being put but also for any other lawful purposes to which it may be put thereafter… "

30. In quoting from the Scottish case of *Irvine Knitters Ltd v North Ayrshire Coop. Society*, from 1978, he referred to the Lord President and Lord Cameron, respectively, setting out:

> "It follows, and this is not in dispute either, that the defenders as proprietors of the dominant tenement are entitled to use the lane for traffic of all kinds which is intended to serve, and which in fact serves, any lawful purpose to which they may choose to devote the dominant subjects. Putting the matter in another way the defenders are entitled to obtain access to the dominant tenement in connection with the purposes for which they elect to use it and to facilitate the carrying on of those purposes
>
> …there is nothing which places any limit on the purposes to which the subjects may be put, and therefore it can be said that not only is there no limit on the extent of user but also no limit on the purpose which the proprietors of the dominant tenement as such proprietors may lawfully pursue with the subjects or for which they may use them"

31. He then made a number of further points including, for the purpose of this matter, (1) the right must be exercised *civiliter* that is reasonably and in a manner least burdensome to the servient tenement; and (2) for the better enjoyment of his right the dominant owner may improve the ground over which that right extends provided that he does not substantially alter the nature of the road or otherwise prejudice the servient tenement.

32. The same principle was enunciated by both Jessel V-C in *Newcomen v Coulson* (1877) 5 Ch 133, where he set out:

> "… It was said that the grant conferred a right to use the way only so long as the allotment was used for agricultural purposes. I cannot find any such restriction. The right is to the owners or owner for the time being of the lands. Now land, according to English law, includes everything on or under the soil; all buildings that you may erect on it; all mines that you may sink under it. If an allottee builds a house, or, as it is said here, twenty-six houses on the land, the owner of each house, with the soil on which it stands, is an owner of part of the lands, and entitled to the benefit of the grant…the right is a general

> right of way, a right of way to all the houses which may be built on the land in question"

and Warrington LJ in *SE Railway Company v Cooper* [1924] 1 Ch 211

> "There is no question that if this were a grant of a way by one person to another, the grantee would be entitle to use it for any purpose without reference to the purposes for which the dominant tenement was used at the date of the grant, and notwithstanding that the burden on the servient land was increased"

33. Fundamentally, and subject to the *civiliter* principle, if there is no limit in the grant then it may be used for all purposes subject to the physical capacity of the right of way, in other words it cannot be used by vehicles that are either too wide to use the way or too heavy for it.

34. The Balaams have relied upon what was said by Lord Denning MR, in *Jelbert v Davis* [1968] 1 WLR 589 where the grant was for a *"right of way at all times and for all purposes over the driveway ... leading to the main road, in common with all other persons having the like right"* and the owner of the dominant land had been granted permission to construct on the land a tourist caravan and camping site with conditions that there were not to be more than 200 touring caravans or tents stationed on the land; that it was only to be used from 1 April to 31 October in any one year and no caravan was to remain on site for more than three weeks. The issue before the court was the construction of the grant and, in particular, the words "the right of way at all times and for all purposes over the driveway leading to the main road." Lord Denning held, that a grant in these terms:

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

35. Reference was also made by Lord Denning MR to the determination of Farwell J. in *Todrick v Western Naitional Omnibus Co* [1934] 1 Ch 190:

> "In considering whether a particular use of a right of this kind is a properuse or not, I am entitled to take into consideration the circumstances of the case, the situation of the parties and the situation of the land at the time when the grant was made … a grant of this kind must be constued as a grant for all purposes within the reasonable contemplation of the parties at the time of the grant.

> In that case Farwell J. held (and the Court of Appeal approved it) that a way, which was only 7 feet 9 inches wide, could not be used for omnibuses which were 7 feet 6 inches wide, leaving only 1 ½ inches clearance on each side between the gateposts. That was obviously not within the contemplation of the parties…"

36. Warner J. referred to the dicta of Lord Dennng MR in *National Trust v White* [1987] 1 WLR 907, and explained them as follows:

> "To understand what Lord Denning MR meant by those words, it is necessary, in my opinion, to bear in mind three things. First one must bear in mind that, as his judgment itself shows, Lord Denning did not intend to cast any doubt on the authority of *White v Grand Hotel Eastbourne Limited*. Secondly, one must bear in mind the facts of *Todrick v Western National Omnibus Co Limited,* which Lord Denning MR regarded as the main authority establishing the proposition. In that case it was held, essentially that it could not have been within the contemplation of the parties at the time of the grant that a road that was only 7 foot 9 inches wide should be used for omnibuses 7 foot nches wide, leaving only 1 ½ inches clearance on each side. Thirdly, one must bear in mind the facts of *Jelbert v Davis* itself. The crux there was that the use that the dominant owner proposed to make of the way would cause such congestion on it as to interfere unreasonably with the use that the servient owners were themselves entitled to make of it."

37. HHJ Paul Matthews in *Bucknell v Alchemy Estates (Holywell) Ltd* [2003] EWHC 83 (Ch) set out the following:

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

38. In my judgment, what the court is required to do is to construe the grant in order to determine whether the current (and intended future) use of the trackway falls within the grant or whether it amounts to an unreasonable interference with the Balaams use of the roadway.. The grant here is: "*The full right in common with all other persons*

from time to time having the like right <u>at all times with or without vehicles to go pass and repass over the access roadway</u> shown coloured yellow on the plan." (my emphasis) and that it does not unreasonably interfere with the use of the right of way by the servient owners of the land, the Balaams.

39. The grant of the right of way being described as the full right at all times with or without vehicles to go pass and repass over the access roadway is only limited by virtue of that right being "in common with all other persons from time to time having the like right". The user is not limited to such use as was reasonably required at the date of the grant (*White v Eastbourne)* but is limited to what the servient tenement can reasonably accommodate *(Todrick v Western National Omnibus Company Ltd)*. The user of the roadway is limited to the extent that the use must be exercised reasonably and in a manner least burdensome to the servient tenement. The issue of fact is whether the user of the right of way has crossed that line, so that its user is now excessive in the sense of being beyond what the servient tenement can reasonably accommodate. The Balaams contend that, with the number of dwellings constructed on the Wood Hall Estate already and then, going forward, with the additional dwellings for which permission has been granted; the use of the driveway for cars belonging to the occupants and their visitors, supermarket delivery vehicles, oil delivery vehicles, postal vans, and other assorted vans and cars visiting and delivering goods, the use of the driveway is excessive in that it unreasonably interferes with the Balaams use of the roadway, their case being that they consistently use the accessway – not just with farm equipment but with other farm vehicles – and that use is particularly intensive during harvest time.

40. Reliance has been placed upon the decision in *Bee v Thompson* [2010] Ch 412 where, on the facts of that matter, the first instance judge was found by Mummary LJ to have been entitled, on the evidence that he heard, to conclude that the proposed user would be excessive. Mummary LJ found that reference to "all purposes" in a grant

> "does not authorise use to the point of an unreasonable level of interference with the rights of the servient owners to their property and to use the way in common with the occupiers of the dominant tenement … even a right granted in wide terms like "at all times and for all purposes" is not a sole right if it is used in common with others, and it does not authorise unlimited use."

Plainly, each case will be determined upon its own facts.

<u>The width of the roadway</u>

41. The parties are also in dispute with respect to the physical extent of the roadway and whether it is limited to the made-up surface of the roadway (a metalled strip of 3.1 to 3.4m width) or whether it also encompasses the verges and the passing bays alongside the roadway. As Floyd J, as he then was, held in *Carpenter v Calico Quays* [2011] EWHC 96, the label "roadway" (in this case it is formally called the "access roadway") does not necessarily exclude or include verges but *"it is at least capable of including the grass verges"*. The only way of determining whether verges and, in this case, the passing places, form part of the roadway is from interpreting the grant, including the circumstances surrounding the grant.

42. In *Lea v Ward* [2017] EWBC 2231, Lance Ashworth KC, sitting as a Deputy High Court Judge had to consider the physical extent of right of way across a strip , where it was said by the defendant that, contrary to the claimant's case, the right of way was only across that part of the strip which was a discernible track at the time of the deed. What he found was that the most natural reading of the right of way being "over the track of way" is to limit the right of way to the track that was actually in existence at the time of the grant which would be evidenced by what was physically discernible at the time:

> "In my judgment the most natural reading of the right of way being "over the track or way" is to limit the right of way to the track that was actually in use at the time of the 1979 Deed. What was actually in use would be evidenced by what was physically discernible on the ground at that time. The natural meaning of the expression "track or way" is something recognisable having been beaten by use. In my judgment, this would not include the verges, but would be the physical extent of the track in use in 1979."

43. The grant over this roadway is for all purposes, with or without vehicles. Given the length of the roadway – originally approximately 560 metres reduced to 400 metres (after Mr Balaam sold the top in order to protect his fields) – and the width of the roadway, it is inevitable that there was the possibility of vehicles meeting each other somewhere along the roadway and, for the purpose of passing one another, at least one would need to pull off the made-up surface onto the grass.

44. If the construction of the grant does not support the roadway encompassing the verges and passing bays, consideration must also be given to the potential of there being an implied easement of necessity, alternatively a prescriptive right by reason of their use for 20 years or more. The evidence supports two of the passing bays were surfaced by Mr Pyatt in 1993 and the third one not until 2017. The evidence of Mr Pyatt was that he mowed the verges and cut the hedges between 1982 and 2019 and that throughout that period, of nearly 38 years, there had never been a complaint by Mr Balaam.

The Evidence of Use of the Roadway

45. At the time of the purchase of the land in 1982, Mr Pyatt had been notified of the potential of purchasing the Wood Hall Estate by his friend Tony Mullocks, a local estate agent. He was informed that Mr Balaam was interested in purchasing the land but not Wood Hall or its outbuildings and Mr Pyatt saw the opportunity of purchasing a large family home together with the potential for development of the outbuildings. It was agreed that the roadway would belong to Mr and Mrs Balham, as it was easier to have one owner and one with rights of way. Mr Pyatt said that no limitation of the use of the accessway was ever discussed. Both Mr Pyatt and Mr Balham agree that the roadway was in a poor condition with grass growing through and potholes, although it lasted through to 1993 when it was resurfaced together with the two passing bays. Before the resurfacing in 1993, Mr Pyatt said that his estate manager dealt with any potholes or other disrepair to the roadway without any difficulties. The cost of the work in 1993 was shared with Mr Pyatt paying 64%, Mr Balaam paying 16% and the remainder being shared by the owners of Chauffeurs Cottage who paid 10% and the owners of Cedar Cottage and New Cottage each paying 5%. Mr Balaam

was not amenable to putting in speed humps. As set out above, the speed bumps were added to the roadway in 1995, after further complaints. It was at that time, when the two speed bumps were constructed, that time the sign was put up alerting users to the fact that it was a private drive, that they should drive slowly, that speed bumps were in place, and that drivers use the driveway at their risk.

46. As the roadway is wide enough to take lorries, but is only a single track width, it is inevitable that anyone using the roadway who met another vehicle coming from the other direction, would need to move onto the verge or into a passing bay. Mr Pyatt occupied the property for 36 years and six months, moving out approximately 12 months before the sale of the property to the claimant, and during that lengthy period he used the roadway regularly. While he also had the benefit of a drive directly up to Wood Hall, he said he used the roadway as much – due to convenience. Throughout his ownership of the Wood Hall Estate and use of the roadway, even in the later years, on no occasion did he find he could not use the roadway with ease as a consequence of oncoming traffic and he did not always meet a car coming the other way, even in the later years.

47. Mr Pyatt says that he received the letter dated 23 January 2020 from the solicitors then acting for the Balaams, Tees Law, in April 2020. That letter set out the history of the ownership of the land and the developments on the land belonging to the Balaams and the land belonging to Mr Pyatt. In that letter, Tees Law set out the following:

> "The number of vehicles using the Roadway has therefore increased significantly since 1982 and has increasingly hampered our clients' use of the Roadway, particularly during more intensive periods of the year (for example harvest). Our clients have therefore occasionally had to avoid use of the Roadway when they would prefer to do so. The alternative access over other land is not guaranteed in the future and our clients wish to ensure that what remains of the Red Land continues to be a viable asset in its own right with its own access. In the circumstances our clients wish to ensure that their use of the roadway is not interrupted any more than it presently is."

The letter continued by saying:

> "Our clients believe that there should be no further development of the Blue Land which would have any further increase in the use of the Roadway. To do so would, in our clients' view, be excessive to the extent that it would interfere with the use of others such as to be beyond the grant of the right of way.
>
> Our clients consider that they have been accommodating in not objecting to development of the Blue Land to date even though it has had an impact on their use of the Roadway. Our clients also note that the Blue Land has its own access which could have been used to access some of the developed dwellings.

> There appears to have been a preference to preserve that other access largely unused while increasing the burden on the Roadway significantly. ”

48. Mr Pyatt had operated a number of businesses from Wood Hall including a building business, which meant that several cars were going up and down the roadway, a logging business, a helicopter business and he had a hanger where paint spraying would take place. In addition to his businesses and the traffic that created, he said he also had friends and family coming and going. None of this had caused a problem and he said he did not see farm traffic using the roadway, although he did see the gamekeeper come up the roadway. I think it unlikely that he did not see any farm vehicles on the roadway during the time that he was Wood Hall but I think it likely that he did not see much movement of recognisable farm vehicles, tractors and the like. He said he had a very good rapport with Mr Balaam, said that he was *“flaming mad after 38 years to get a letter like this”* as there had been no complaints over the use of the roadway over the entire time and, in his view, the complaint was being made because Mr Balaam’s sons had taken over the running of the estate. He considered the letter to be *“an incredible stab in the back.”* By the beginning of 2020, Mr Pyatt was progressing the sale of the Wood Hall Estate to the claimant having told Mr Balhaam that he was selling up. In March 2020, prior to the time he says he received the January 2020 letter, Mr Pyatt had entered into a statutory declaration stating that he was not aware of any dispute concerning the use of the roadway. Mr Pyatt had physically moved out of Wood Hall in 2019 and by the time he got the January 2020 letter, the claimant had exchanged contracts but not completed. Mr Sparks of the claimant was informed of the letter pre-completion and decided to go ahead with the purchase.

49. With respect to the physical width of the roadway, Mr Pyatt contended that he had agreed with Mr Balaam that the boundary between the properties was the edge of the track so that the grass verge fell within the land that he purchased. When the various title plans (including that for Chauffers Cottage registered at the Land Registry under title number EX281157) seemed so show the grass verge as forming the verge his response was to the effect that if the original plan was inaccurate then every plan afterwards would have contained the same inaccuracies. Mr Peter Balaam relied upon the plan to the 1982 Deed showing the verges and hedgerows and not forming part of the roadway and in my judgment it is more likely than not that Mr Pyatt and Mr Balaam did not give great thought to the matter at the time of dividing the land. Mr Balaam was a farmer who was interested in the land for the purpose of being able to farm it, and was therefore not interested in Wood Hall or the various outbuildings. It was to Mr Balaam’s advantage to divest himself of the various properties and he would not have been looking to keep a length of land to operate as a ransom strip. It is clear that vehicles passing each other on the single track would always have moved on to the grass verge and it was Mr Pyatt who tarmacked two passing bays in 1993 and another in 2017 and also cut the grass verge.

50. I am satisfied that, even though the plan to the 1982 Deed appears to show that the Balaams do own the whole of the area between the hedges, the parties have behaved on the basis that Mr Pyatt owned the grass verge to the south of the roadway. That is consistent with the two cottages (New and Cedar) having access across to the roadway and the use of the passing bays by Mr Pyatt and the other owners of property

on the Wood Hall Estate, and the resurfacing by Mr Pyatt of the passing bays and, with respect to two of the passing bays, which were metalled by Mr Pyatt in 1993, there is at the very least a prescriptive right established.

51. The use of the word "access roadway" or "driveway" in the grant does not define whether the grass verges are included or not (see Follet J in *Carpenter v Calico Quays*, above). Given that this single-track roadway is of a length that it does not allow for users to simply wait at one end or the other and inevitably, and as the evidence establishes, the users of the roadway respectfully pull into the side either into the passing bays or the land next to Chauffer's cottage or near to the car park at the top to allow others to pass, it is more likely than not that in granting the right of way over the road way, it was part of the grant that the users would be permitted to pull into the sides (i.e. the grass verges) to enable vehicles to pass. The alternative would have been a stand-off between vehicles every time they met and that simply does not accord with the amiable relationship between Mr Pyatt and Mr Peter Balaam. The alternative to the grant itself including use of the grass verges for the purpose of passing where necessary, is that the right is implied as an ancillary easement it being reasonably necessary for the enjoyment of the roadway. Without a right to pass each other along the roadway, the right to use the roadway as expressly granted could not be reasonably exercised.

52. Other users of the roadway provided evidence of regular daily use in the course of normal living. Mr Eagle, who has lived at 2 Foreman's Cottage since October 2009, estimated his use as being 4 to 5 times a week (a total of 8 to 10 journeys along the roadway one way or the other) and that whenever he met another vehicle he would simply pull into a passing bay and wait for it to pass. The record of use captured on camera suggested 6 journeys in a one week period during July 2023 and his recollection therefore appears reasonably accurate, given that use will change from week to week. Mr Eagle acknowledged that there was an increased use of the roadway, for example with an increased use of delivery vehicles, but that had not interfered with his own use of the roadway in anyway. Mr Walrond, who lives at 1 Woodman Cottage, gave evidence that he had lived on the Wood Hall Estate for approximately 5 years and that in his role as an IT Engineer he estimated that he would use the roadway approximately four to six times a day. Again, the record from the CCTV footage for a week in July 2023 showed that he used the roadway 17 times so, like Mr Eagle, a reasonably accurate estimation but maybe slightly less than he thinks. He also said that he had not experienced any difficulties in using the roadway. He had not usually come across delivery vans and although he had seen more site traffic because of the development works that had been carried out it was very rare to see HGV or construction lorries, it he simply made use of the passing bays. He also said that during harvest time he would come across one or two tractors with their trailers but that it was very rare and did not create any difficulties as, if at the top of the roadway, he would simply reverse or he would use the passing bays.

53. Mr O'Shanohun, who currently lives at Game Cottage on the Wood Hall Estate, gave evidence that he has lived on the Wood Hall Estate for approximately 23 years in different properties – 3 The Granary, Grooms Cottage and then Game Cottage, which directly abuts the roadway, from 2021. The roadway has always been his sole means of access to the properties he has lived in and when he was working in Chelsea, between 2007 and 2008, he would commute and use the roadway twice a day during

the week and at least that at weekends. His more recent use has declined and he estimated approximately 6 uses a week. In fact his use over the 7 day period recorded in July 2023 was 12 trips, therefore slightly more – but not greatly so. He said that there was a noticeable increase in farm traffic during the harvest season in 2021. He said that the use with farm traffic had reduced 2022 and further reduced in 2023, but that in 2021 in particular farm tractors and trailers were coming in empty and going out full. He assumed that the roadway was being used as an access to enable the collection of the harvest. He was also aware of an increased use of the track by heavy construction vehicles but said that he uses the passing bays to allow vehicles to pass. With respect to oil deliveries he said that he, like others on the Wood Hall Estate, arranges for his own independent delivery of oil which takes place twice, and sometimes three times, a year. Each delivery takes about 5 minutes and the delivery lorry pulls into the entrance area of his property.

54. Mr Middleton is one of the regular visitors to the Wood Hall Estate using the roadway as he is the director of MM Plumbing, Heating & Property Services Limited who carried out plumbing and heating maintenance for Mr Pyatt between 2018 to 2020 and has subsequently worked for the claimant, Merlin, in carrying out refurbishment work to properties on the Wood Hall estate. He estimated his use of the roadway to be approximately 2 visits (that is, 4 journeys) every month up until 2020 and since then approximately 2 visits, or 4 journeys, a week. The record from the CCTV does not show that level of activity but Mr Middleton thought that he may have been using a number of different vehicles. He thinks that for approximately two to three months his use had increased to almost daily (4 visits or 8 journeys a week) and he said that he had never had problems with gaining access along the roadway or that there had been any significant obstruction. He has seen farm vehicles use the roadway during the summer and harvest, but not combine harvesters or grain lorries as he imagines those vehicles to be too wide to fit down the roadway. With respect to the use of the roadway for lorries unblocking sewage pipes he said that he was aware of one occasion but because the sewage system is in the Wood Hall Estate, the lorry was not parked on the roadway. With respect to the use of the roadway for oil deliveries, his understanding was that a number of residents would obtain their deliveries together on the same day and that the driver would move around the estate – pulling off the roadway as he made his deliveries. He was not aware of any oil deliveries causing an obstruction as "there was plenty of room for everyone to get through" and further, since 2020, he has been involved in converting the oil heating systems into more modern alternatives with any new properties having more modern alternatives. Overall, he estimated that the number of oil deliveries making use of the roadway has reduced by one-third since 2020.

55. Mr Sparkes, the director of Merlin Real Estate Limited, gave evidence that his aim when purchasing Wood Hall Estate from Mr Pyatt was to refurbish and implement the development for which planning permission (which required renewal) had already been granted and to make a further application for another smaller eco-house on plot 5. That would amount to a total of 10 further dwellings, if planning permission is granted for plot 5, an increase of one to the 9 additional dwellings Mr Pyatt had planning permission for when he sold. Refurbishment works have been continuing at Wood Hall Estate and by September 2023 work had been commenced at all the properties but Mr Sparkes gave evidence that his plan had been to complete the building and refurbishment works and then sell off all the properties had been

thwarted. The only property he had agreed not to sell was that occupied by Mr Eagle (namely 2 Foreman's Cottage) and that was as a result of an agreement with Mr Eagle's late wife. The claimant has not been able to sell the properties since January 2021 as a consequence of the current dispute (a purchase of Game Cottage withdrew in January 2021 part way through the conveyancing process and Mr Sparkes said that once he notified prospective purchasers of the dispute they all pulled out) and the properties are currently tenanted, albeit that 7 of the 22 properties that were transferred to the claimant in 2020 have already been sold and are owner/occupied by third parties.

56. Including the properties that the Balaams sold off from their land, I understand that it is agreed that there are 27 dwellings that have the right to use the roadway by virtue of the grant and that the claimant has an intention to construct a further 10 dwellings which will also have the benefit of the right of way. The owners of Chauffeurs Cottage are also seeking to develop the land in their ownership next to Chauffeurs Cottage and are in negotiations with the Balaams to pay for the release of a restrictive covenant. Mr Sparkes has made the point that it seems contradictory for the Balaams to complain about the over use of the roadway interfering with their own use when they are willing to release a restrictive covenant for payment which would allow further development and thereby further use of the roadway. It is Mr Sparkes' concern that the Balaams are using the use of a roadway as a means of extracting monies.

57. Mr Sparkes said that he does not recall being shown the letter from Tees Solicitors, acting on behalf of the Balaams, that was sent to Mr Pyatt on 23 January 2020 but that he decided to complete on his purchase of the Wood Hall Estate as he was advised that there had not been excessive use and there had been no earlier complaints or objections. He recalled having been telephoned by one of the Balaams and being told something along the lines that they were seeking payment of money for the increased usage. Mr Sparkes said that he endeavoured to resolve matters by offering to purchase the roadway and giving the Balaams the same rights, but that was not agreed.

58. It was accepted by the Balaams that as an alternative to using the roadway, their fields can be reached by an internal network of pathways but that it is not possible to use those tracks throughout the year (particularly between October and March) as the tracks can be too wet to be used which is damaging of the soil. Peter Balaam accepted that at harvest time there is not a problem as if it is dry to harvest the internal tracks can be used. Understandably, the Balaams want to use whichever means of accessing their fields is the most economic and efficient and I accept that includes them using the roadway as part of their land holding as a means of accessing their fields when that is the most economic and efficient.

59. The case advanced by the Balaams set out in the letter from their solicitors dated 4 March 2021 was that

> "… it is without doubt that the Access Roadway is used throughout the year by sprayers and grain carts and other farm vehicles. One of our clients' employees uses the Access Roadway regularly to access the woods for carrying out vermin control. On any given shooting day where the farm is hosting

> the Access Roadway is used by tractors at least four times a day. The increase in the use of the Access Roadway by the new occupiers of the dwellings on the Wood Hall Estate has had a negative impact on farm productivity due to the large amount of waiting time for cars to pass"

and in his written statement Mr Peter Balaam referred to the present use of the roadway by the claimant and the various dwellinghouses

> "interferes unreasonably with our agricultural use of the Access Roadway. Our access is frequently blocked or obstructed by vehicles belonging to or visiting the occupiers of the dwellings… as outlined further in the witness statements of James and Andrew [Balaam], we often meet school buses, heating oil deliveries, bin lorries, drainage contractors which block the drive for considerable periods of time. This is in addition to the meeting of vehicles in connection with the regular vehicles movements of the occupiers of the various dwellings and their visitors"

60. Despite that general statement of unreasonable interference with their use of the roadway, when questioned about the detail of any interference, Peter Balaam was not able to assist. In the course of being cross examined, Mr Peter Balaam accepted that the use of roadway altered through the seasons with, for example, their agronomist travelling along the roadway every week, with one of the Balaams, and that other vehicles would use the roadway through the year as necessary including for tilling the fields, fertilising and spraying. The greatest farm activity is during the harvest. The roadway is used as and when it is needed. He accepted that when it came to resurfacing the roadway in 1993 the division of the cost of maintenance meant that Balaams were only paying 16%, even though they had use of the full length of the roadway, with Mr Pyatt paying the vast majority (64%) and the properties that had been sold, Chauffeurs half way up the roadway (10%) and the two cottages nearest to the opening, Cedar and New, each paying 5%. That division is an indication of the comparatively modest use of the roadway by the Balaams. That is not to suggest that the Balaams do not make use of the roadway, but it is objective evidence that it was not extensive use. Peter Balaam accepted that he had not raised concerns with Mr Pyatt prior to the solicitors letter in 2020 and that he had been content to enter into the sale of further property for development together with an overage agreement. The reasons he gave for lack of concern at that time was that he had a good rapport with Mr Pyatt and that the use of the roadway by the occupiers of, and visitors to, the dwellings then on the Wood Hall Estate were not "really interfering with our farm vehicles." He said that as the number of dwellings increased so there was an increase in the traffic using the roadway and "we realised we would have to change tactics." Peter Balaam was told by Mr Pyatt in January 2019 that he wanted to sell up as some of his staff were leaving and he did not want to continue but it was not until a year later, in January 2020, that any point was made with respect to the use of the roadway as, Peter Balaam said, they wanted to have "things clarified for future owners". Peter Balaam said that farm vehicles could get along the roadway, with time, but there was obstruction and they did not want any more properties than those that were already there. Peter Balaam accepted that at the moment if a car pulls into one of the passing

bays or a passing place then a tractor can pass by without a problem. His concern was more with respect to the potential increase in traffic.

61. Andrew Balaam, the younger of the two brothers, set out in his witness statement that the dwellings constructed on the Wood Hall Estate

> "interferes unreasonably with our agricultural use of the Access Roadway. The Access Roadway is a single lane farm road and ur access is frequently blocked or obstructed by vehicles belonging to or visiting the occupiers of dwellings on the Blue Land. The frequency with which we meet vehicles along the Access Roadway has increased with the residential development of the Blue Land and with the further residential development of "the village" on the Blue Land the frequency of the obstructions will no doubt increase."

62. The evidence of Peter Balaam is that he had no problem with the use of the roadway up until 2020. Consequently, the concern Andrew Balaam expresses with respect to interference caused by development must be from 2020 rather than 1982. He was plainly irritated by the fact that the claimant has sought details of every incidence of interference when using the roadway and considered that as being a means of trying to undermine or belittle the level of interference. However, it is clearly important, when seeking to establish a case that the use of the right of the way is an unreasonable interference, that evidence can be provided of that unreasonable interference. It is not enough to make general allegations that, because of an increase in the number of properties there must inevitably be an increase in the number of journeys along the roadway, which must inevitably lead to an increase in the number of occasions when the Balaams vehicles are obstructed, which must inevitably mean that the there is an unreasonable interference with the Balaams use of the roadway. There is simply not an inevitability about an increased number of dwellings meaning that there will be an increased number of obstructions and an unreasonable interference. Two obvious points with respect to that is, with the building work completed, there will be fewer construction lorries on the roadway and as the evidence is that the established properties are having their oil fired heating replaced with heat pumps, that will require fewer visits from oil delivery lorries, and as the new properties are also being fitted with heat pumps, that part of the Balaams concern will be reduced. With respect to the properties themselves, while as Mr Sparks said he has been unable to sell due to the concern about access, the properties are currently occupied by tenants and there is nothing to suggest that their use of the roadway would be any less or more than a home owner.

63. I accept entirely Andrew Balaam's evidence that the existence and use of the roadway is a very important means of access for them, particularly when they are unable to access the fields by the internal access tracks as the land is too wet, or if there are unexpected closures of public roads for road works. However, while access with farm vehicles that are of a size that can use the single width roadway is important, as they understandably wish to use the most convenient, economic and efficient means of getting to both their own fields and those that they contract farm, the Balaams do not have exclusive use of the roadway. The fact that when the deed was entered into in 1982 the advice was that one own the roadway and the other have an equal right of way, means that both have to allow for the others use. The issue is whether that use

becomes an unreasonable interference as there is almost inevitably always going to be some interference.

64. The particular evidence that Andrew Balaam refers to as evidence of the interference during a five week period from 21 March 2022 to 25 March 2022 is photographic images of 14 occasions when cars or other vehicles have been on the roadway. The vast majority of these show cars pulling into the passing bays to allow an unobstructed way and one occasion when there is an oil delivery which, while disputed by the claimant, the Balaams said caused a delay of 4 or 5 minutes. If he is right about that single incident, I cannot find that amounts to an unreasonable interference.

65. He gave evidence that they have put a combine harvester on the 20-acre field from Clatterbury Lane and then move the machinery from field to field internally. He explained how their farming operation is over 4,500 acres, including their contract work, and that they will travel wherever necessary to harvest during the harvest period. His evidence was that there is interference with what he referred to as "the farm road" with the intensification of the development on Wood Hall Estate. He said that his concern was with respect what could happen, particularly at the intense time of harvest, as the use of the roadway by the occupiers and visitors to the dwellings could result in their farm vehicles being held up which they did not want to happen.

66. The Balaams have suggested in their statements that they would like to explore the growing of sugar beet and also for straw, but that "due to our concerns over movements along the Access Roadway we are not able to provide for this." However, it is clear that in order to carry out the operation with the sugar beet the Balaams would need to park lorries along the roadway which would prevent access and egress for the others who have the "like right" to use the roadway. Quite clearly that is not something that the Balaams would be entitled to do and it has nothing to do with the use of the roadway by the properties on Wood Hall Estate. The example of how the restrictions on the use of the right of way prohibits the Balaams from further or alternative farming activities does not go to the issue of an excessive user by others but rather indicates that the Balaams, and more particularly James and Andrew Balaam, consider the roadway to be for the benefit of the farm with the others impinging upon what is theirs and for their use. That is not the situation. This roadway is for the use of them all, what is important is that it is not excessively used. A shared use of an access inevitably means that there needs to some degree of compromise. There will inevitably be some encounters between vehicles travelling in opposite directions along a single width track, but that had been managed for the twenty plus years that the land was in the ownership of Mr Pyatt. One of Andrew Balaam's concerns was that he has observed that on the public roads people have been more reluctant to give way but he accepted that was not something he had observed on the roadway. He also accepted that even in the days of the harvest, cars and other vehicles associated with the dwellings are entitled to be on the roadway.

67. In addition to the witness statements and the oral evidence, the Balaams rely on three sets of photographs taken by them, their families and employees and subcontractors. In my judgment, this photographic evidence either does not show any interference or, if the photograph shows anything, it shows de minimis interference. Insofar as it is a

"snapshot" of what is happening, it is not showing use of the roadway which amounts to an unreasonable interference by those who have a right to use the roadway

68. With respect to the fourteen photographs originally referred to by the Balaams in their correspondence, there is one which shows the obstruction by a oil delivery lorry James Balaam said delayed the tractor for approximately 4 to 5 minutes. The other photographs show cars being pulled into the side, including the passing bays, to allow a tractor or other farm vehicle to pass (four photographs) with nine photographs showing the farm cars using the right of way. With respect to the other photographs relied upon by the Balaams there were thirty-four images taken during the period from 1 August 2022 to 1 May 2023 (including the August 2022 harvest) and the fifteen images taken over a period of two months from 13 June 2023 to 14 August 2023 (including the August 2023 harvest). In my judgment, none of these photographs show obstruction being caused to the Balaams and their agents. The fact that the Balaams take the view that these photographs show interference does support the view that the Balaams, or at least James and Andrew, do not consider that anyone should be on the roadway when they are using it. That is simply not how this shared roadway is to be used.

69. The final evidence available to the court is the survey evidence of the respective experts, Ms Swift of the Transport Planning Practice for the Claimant and Mr Bradshaw of Connect Consultants.

70. It is agreed that it is a single width roadway with six passing places. It is a straight roadway, save for the last part, with good visibility. The peak usage of the roadway is between 8 and 9am and 5 and 6pm. That is consistent with people leaving and returning from work and, possibly, school runs. The maximum number of times when a vehicle has encountered another is seven, but that is a high point and it is usually much less. On none of those occasions was there a difficulty as the passing bays were used.

71. In her report on behalf of the claimant, Ms Swift did not observe any difficulties with the vehicles being able to pass each other along the roadway, with use of the passing places; and she did not, in the time she was observing the roadway, see any large farm vehicles using the roadway. That of course does not mean that large farm vehicles never use this roadway. Her report was criticised by the Balaams as it was essentially for the purpose of planning and assessing whether the roadway could sustain traffic from the Wood Hall Estate. However, the information contained within the report is of relevance as it enables there to be an assessment of the actual use of the roadway rather than the perceived or feared use. In his report on behalf of the Balaams, Mr Bradshaw made a number of mathematical calculations as to what the potential for conflict between vehicles using the roadway (not taking into account the passing places). Mr Bradshaw had not visited the roadway and carried out his analysis on calculator conflicts rather than what he observed. The hypotheses he set out with respect to the possibility of conflicts between farm vehicles and cars were not based on the evidence.

72. A CCTV survey undertaken for the period 6 May 2023 and 14 July 2023 was for a period of 10 weeks and does not show any significant interference, with twenty two vehicles having a "clear run" along the roadway. The only evidence of any interference appears to be the hedge cutting on 13 July 2022 which was for three

minutes of hedgecutting and the tractor moving aside to allow two cars to pass for a matter of seconds.

Conclusion

73. For the reasons set out in detail above, it is my judgment that the use of the roadway by those entitled to the benefit of the grant are doing so in a way which does not unreasonably interfere with the Balaams use of the roadway on their land. Further, on the basis of the evidence presented to me I am not satisfied, on the civil standard, that use of the roadway by all of those who will live on the Wood Hall Estate (together with their visitors) once the current plans for development are complete, will amount to an unreasonable interference with the Balaams use of the roadway. I am not able to look to the future and I, of course, do not know whether that anticipated use may change and the Balaams are not by this judgment prohibited from bringing future claims if there is such an interference.

74. On the basis of what is before the court, the declaratory relief sought in the prayer to the particulars of claim must be granted and the counterclaim dismissed.

75. I would be grateful if counsel for the parties could seek to agree an order reflecting this judgment. If it is not possible to reach agreement then a further hearing can be arranged (remotely if more appropriate) for that order to be made.