

**Claim No. C10CL990**

**In the County Court at Central London**

**Chancery List**

**His Honour Judge Parfitt**

**STARHAM LIMITED**

**Claimant**

**- and -**

**(1) GREENE KING PUBS LIMITED**

**(2) GREENE KING BREWING AND RETAILING LIMITED**

**Defendants**

**JUDGMENT**

Dates: 25 to 28 September 2017

**Stephen Jourdan QC & Toby Watkin** instructed by **Mills & Reeve LLP** for the Claimant

**Tom Weekes QC** instructed by **Hill Dickinson LLP** for the Defendants

## **Introduction**

1. The Masons Arms is a pub on the Harrow Road near Kensal Green tube station. The pub is a typical nineteenth century town pub with high ceilings, wooden paneling and a long bar. The pub has a sizeable beer garden which has a number of features including wooden decking, wooden seating, an open snug area and a kitchen with a serving hatch. The issue in this case is whether most of the beer garden is trespassing on land owned by the Claimant (“the disputed land”). It is common ground that the outcome of that issue depends on the meaning and legal consequence of a conveyance dated 24 August 1855 – years before the pub or the beer garden existed.
2. The Claimant acquired the disputed land on 21 October 2014 and claims an injunction and damages for trespass against the Defendants who have been using the disputed land and have owned the Masons Arms since 2012. The diligence of Mr Watkin, for the Claimant, has demonstrated that from 24 August 1855 to 2001 the disputed land was owned by what in law can be treated as the same person – a railway company where each successive railway entity stood in the shoes of the one before. This much is common ground between the parties.
3. I have not been asked to make any meaningful distinction between the Defendants but I understand that shortly before trial the freehold of the title which includes the land upon which the Masons Arms stands was transferred to the Second Defendant (the First Defendant being registered as the freehold owner on 19 April 2012 and the Second Defendant as a leaseholder on 20 April 2012).
4. The Defendants’ case is that they are entitled to use the disputed land as a beer garden because by an express grant dated 24 August 1855 (“the 24 August Conveyance”) the Claimant’s predecessor in title, a railway company, created an easement which allowed the disputed land to be used as a garden. The Defendants accept that such use was limited by the 24 August Conveyance so that the disputed land could not be built on and the Defendants also accept that the snug and kitchen do, to a limited extent, trespass on the disputed land.
5. The Claimant argues that properly construed the 24 August Conveyance created a contractual licence and not an easement. Such a licence was binding on the parties to the 24 August Conveyance but is not binding on the Claimant and cannot benefit the Defendants.
6. I heard evidence from the current pub manager, Mr Bruce, and two valuation experts: Mr Crease for the Claimant and Mr Taylor for the Defendants.
7. The Claimant has been represented by Stephen Jourdan QC and Toby Watkin, the Defendants by Tom Weekes QC. I have been considerably assisted by the amount and quality of work done in the preparation and presentation of their respective cases.
8. In this judgment, I address the relevant material under the following headings: factual background; construction; easement or licence; restrictive covenant; and remedies.

9. I set out here (a) the relevant wording of the 24 August Conveyance (I have edited this by omission but have borne the entirety of the document in mind in my judgment) and (b) the map attached to the 24 August Conveyance. The parties to the 24 August Conveyance were the London and North Western Railway Company (“the Company”), Mr John Brown – who is identified as having been a messenger of the Company and also, although not relevantly for present purposes because his role was to prevent Mr Brown’s wife from gaining any interest in the parcels the subject of the conveyance, a Mr James Greenlaw – a railway booking clerk.

*This indenture...between the London and North Western Railway Company...of the first part John Brown...of the second part...for the sale to him of the pieces of land and the grant of such easement as hereinafter mentioned...that in pursuance of these premises...the Company do...grant and convey unto the said John Brown and his heirs...such part...as is coloured red...and whereas at the time of negotiating such sale...it was agreed that the Company should grant to the said John Brown the limited easement or right of user of the surface of the pieces of land coloured blue...and which Lands are required by the...Company for the purpose of their existing Kensal Green Tunnel and of another tunnel...now this indenture further witnesseth...the...Company hereby covenant and agree with...John Brown his heirs and assigns...that it shall be lawful for the said John Brown his heirs and assigns from time to time and at all times hereafter (subject...to the right of the...Company which is hereby expressly reserved to break up and otherwise use such parts of the same as they...think fit for the purpose of constructing their...tunnel...) into and upon the surface of all such part and parts as is and are coloured blue...and of which such parts as are coloured red have hereinbefore been granted...to enter and for ever thereafter to use and enjoy the same as Garden Ground and for agricultural purposes or for such other purposes except building as the same may be properly applied to without injury to the existing or said intended Tunnel...subject however to the right of the...Company their successors or assigns at all times thereafter whenever necessity shall arise for repairing amending or altering their existing and said intended Tunnel...to enter and break up the same...however after such...making good and restoring so far as practicable the surface and paying such compensation...as may be reasonable...and the...Company...covenant with the said John Brown his heirs and assigns that they will...make good as far as practicable and as nearly restore to its present condition the surface of the hereditaments and premises licence to use which as aforesaid is hereby granted...And John Brown doth...covenant...that the said John Brown...shall not at any time hereafter erect or suffer to be erected on any part of the land coloured Blue...and a licence to use which is hereby granted any messuage Building or erection whatsoever...[there follows a proviso of which the gist is that if John Brown builds on the red land and there is subsidence or damage related to tunnels then that is at John Brown’s risk].*



10. So far as the plan is concerned:

- (a) I have orientated it with north pointing up. Kensal Green cemetery is to the south of the coloured land; the Harrow Road to the north. The plan marks the existing tunnel (in 1855) and shows the path of the intended tunnel.
- (b) In broad terms (and sufficiently precise for present purposes) the small area of red land to the east of the plan is where the Masons Arms is located and is currently owned by the Second Defendant.
- (c) The Claimant's land is a small part towards the eastern end of the blue land which stretches westward for some 14 meters or so and of that land about 10 meters or so in length is occupied by the pub garden.
- (d) The upside-down wording to the top right of the picture reads: *Note: The part colored Dark Red shows the Portion that may be built upon.* This is also clear from the wording of the deed: the red land is owned by John Brown and can be built on; the blue land is owned by the Company and whatever else John Brown can do on it, he cannot build on it.

11. I mention here for completeness (the details having no bearing on liability issues), that the Second Defendant's land extends in a tongue along the southern border of the Claimant's land and that between the Claimant's land and the Second Defendant's land is a 2 metre or so wide unregistered strip. The boundary between the Second

Defendant's tongue and the Claimant's land was an issue but has been resolved by agreement. Whether or not either of the Defendants have title to the unregistered strip is an issue on the pleadings but I have not been asked to rule on it and heard no evidence about it.

### **Non-Technical Summary of Liability Decision**

12. I hope this summary will be useful to any readers who want a one paragraph explanation of why the Masons Arms' use of its beer garden is unlawful.
13. It is agreed that the Masons Arms does not own the land used for the beer-garden. The Claimant owns that land, so the starting point is the Claimant can decide what happens on that land. The Defendants say the Claimant can't object to the beer garden because the right to use the Claimant's land as a garden was given to the owner of the Masons Arms' land in a deed dated 24 August 1855. The court has decided that the rights over the beer-garden land in the 24 August 1855 deed were not tied to the Masons Arms land: the promises made in 1855 cannot be enforced by the Defendants and do not bind the Claimant. Consequently, the owner of the Masons Arms land has no right to use the Claimant's land as a beer-garden and the Defendants are trespassing on the Claimant's land. It has not been argued that the Masons Arms' use of the land for perhaps the last 125 years makes any difference to the outcome.

### **Background**

#### *Legal Context*

14. In a well-balanced sentence in his skeleton argument, Mr Weekes, said: *the key to understanding this case lies in the legal constraints on a railway company in the mid-nineteenth century disposing of land that, in a lateral plane, it was using for its statutory objects.* The Claimant did not disagree that this was relevant and the substantive points were not controversial:
  - (a) Railway companies were formed by statute which granted them powers to obtain and make use of land necessary for railway construction. The Land Clauses Consolidation Act 1845 ("the 1845 Act") brought together these powers of compulsory acquisition. The 1845 Act scheme included obliging a railway company (a) to retain land that was required for its statutory objects and (b) to dispose of land that was not so required. The 1845 Act provided no general power to sell land but placed a duty on a railway company to sell land that was surplus because not required for its statutory purposes. If the duty was not exercised then surplus land would be vested in adjoining owners.
  - (b) In *Metropolitan District Railway Company v Cosh* (1880) 13 Ch D 607, the Court of Appeal held that the claimant railway company had no power to sell the surface of land when the railway company needed to make use of any part below the surface. The reasoning – see Jessel MR at p616 – was that so long as some part of the land is reasonably required for the company's purposes then the land is not superfluous and so the company would have no power of sale – it mattered not that the part that was needed was well below the surface and that the surface was not needed.

- (c) In *British Transport Commission v Westmoreland County Council* [1958] AC 126, the House of Lords held that a statutory body could grant easements or rights of way over land acquired and required for its statutory purposes so long as the secondary use was not inconsistent with the statutory objects. In so holding the House of Lords expressly overruled *Mulliner v Midland Railway Co* (1879) 11 Ch D 611 which held that a statutory body could not grant easements or rights of way over land it was holding for its statutory purposes because that would be an alienation outside of its powers. It is apparent from the speech of Viscount Simmonds (page 142) that he regarded the law as applied in the *Westmoreland* case as being consistent over the previous 100 years with *Mulliner* as the exception. It seems to me that this latter point matters because the purpose for which these legal principles are said to be relevant is as context to the construction of the 24 August Conveyance – the search is for what might be objective context within which the words of that conveyance should be understood. It would not be relevant for this purpose what the law was (in the sense that in 1958 the law was stated to be other than what had been thought previously) but it might be relevant what the law was understood to be.
- (d) In summary, in 1855 if the Company had tunnels running under the blue land then it could not sell the surface over the blue land but could grant rights over the blue land so long as those rights were not incompatible with the objects for which it required the land. Equally, if the Company had acquired land that it did not need for its railway operation then it had to dispose of that land.

#### *The Land*

15. The 24 August Conveyance envisaged John Brown being able to build on the red land but not build on the blue land. This suggests that at 24 August there was no building on any part of the land the subject of the conveyance but it strongly suggests that both parties to the 24 August Conveyance believed that the red land was likely to be built on.
16. There is an OS map showing the relevant area dated 1850<sup>1</sup> which shows (a) the railway and the tunnel and (b) no other building on the area.
17. I conclude from this material that it is more likely than not that neither the red land nor the blue land had been built on at 24 August 1855 but that both parties considered it likely that building development was intended for the red land.

#### *The Conveyancing History*

18. On 8 October 1852 the Company conveyed to the same John Brown (although described as gentleman rather than messenger) the land which was to become the subject of the 24 August Conveyance. The land was divided into blue and red parcels. The blue parcels are those parts of the land which the Company thought relevant to the tunnel which ran beneath. The red parts are those which were not needed for that tunnel. This conveyance states that the Company had been in occupation of the land, I

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<sup>1</sup> The next map in evidence is 1870-1871 which shows the pub and buildings linked to the pub extending over the disputed area of land. There is also a picture from the late nineteenth century which suggests the pub was using the disputed area at that time, at least as standing for deliveries. This is consistent with the cobbles which are on the surface. It is a curiosity of the case, and nothing more, that the use of this part of the blue land for gardening and/or agricultural purposes has likely been wholly impractical for well over 100 years.

infer to build the first tunnel, and John Brown was the then occupier. John Brown acquired the freehold but covenanted not to build on the blue land – *any messuage building or erection of any kind or sort whatsoever* – without the Company’s consent. If building was done, on the red or blue land, then it was at John Brown’s sole risk. The price was £200.

19. There are material differences between the allocation of the red and blue parcels in the 8 October 1852 conveyance and the red and blue parcels in the 24 August Conveyance. In the case of the 1852 conveyance the blue strip occupies all the land which borders the cemetery and continues westward above and wider than the tunnel which passes beneath. The red land is split either side of that westward part of the blue land. The land which is presently occupied by the Masons Arms was coloured blue in 1852.
20. On 23 August 1855 John Brown conveyed the parcels back to the Company. The background to this conveyance is apparent from its terms. The London and North Western (Crewe and Shrewsbury Extension) Act 1853 had granted the Company the power to acquire the land so that it could build another tunnel. The price was £150.00: the same as that moving the other way in the 24 August Conveyance. As Mr Jourdan speculated, it is likely that no actual money changed hands.
21. What did change, however, was the distribution of blue land and red land between 1852 and 1855. The same principle applied as in 1852: blue land was that needed by the Company for its tunnels and red land was not. The outcome of the new arrangement of blue and red land was that in broad terms the area of red land increased and the blue land decreased. How this was achieved is apparent from the photograph plan that appears above: the land now occupied by the Masons Arms was changed from blue to red and the original westward blue /red divide was rearranged to add a red section between the two tunnels.
22. The outcome of the arrangement was that the Company obtained the land necessary to build its further tunnel but John Brown gained more building land than he had before.
23. Mr Jourdan speculated that another reason for the conveyance (or perhaps another benefit of the conveyance) was that the parties may have realised that the outright sale to Mr Brown under the 1852 conveyance was or might be *ultra vires*. This may well be right and it provides an explanation for why Mr Brown did not just transfer to the Company such of the blue land as it then required for its tunnels – the new transaction gave him a root of title without having to rely on the perhaps *ultra vires* 1852 conveyance.

### **Construction**

24. It is the Defendants’ case that properly construed the 24 August Conveyance granted the owners of the red land an easement over the blue land to use it as a garden, or alternatively that the grant should take effect as a restrictive covenant binding on the Claimant. It is the Claimant’s case that on a proper construction the 24 August Conveyance granted a licence to John Brown and his successors to use the blue land for growing produce or perhaps wider uses not including building but a licence nevertheless and nothing more than a licence.

## The Relevant Law

25. The general principles regarding construction were not in dispute: the court's task is to ascertain the objective meaning of the document from the language used bearing in mind the admissible context relevant to that exercise. The process of construction is also iterative and the court should test rival constructions against the language seen within the material context. The court should not strain for unnatural meanings, the parties to the document chose the words and should be bound by their clear meaning, but the context always includes commercial or practical reality and objective meaning is more likely to accord to a workable outcome (the principles and citation from authorities can be found in *The Interpretation of Contracts*, 6<sup>th</sup> ed. in chapter 1, I refer to this text hereafter as "Lewison").
26. There was some dispute about certain aspects of the law prayed in aid in respect of the construction arguments and these can usefully be dealt with at this point. I have set out the propositions in italics, my conclusions on the points are in the paragraphs that follow.
27. *The court should be hostile to the Claimant's position.* The argument was that the court should strive to uphold bargains rather than defeat them. I was taken to *Re Ellenborough Park* [1956] 1 Ch 131 – at first instance, Danckwerts J saying he had a dislike of seeing the parties' intentions defeated by technicalities; *Associated British Ports v Tata Steel* [2017] EWCH 694, Rose J at [31] to [32] citing various authorities recognizing a court should be reluctant to find a clause or contract void for uncertainty in a contract which was being performed and would continue to be so; and Lewison (albeit the 5<sup>th</sup> edition, but the same principle is at [7.16] of the 6<sup>th</sup>), citing Lord Brougham LC in *Langston v Langston* (1834) 2 Cl & Fin 194 stating that the law, if it has a choice, will preserve rather than destroy a bargain.
28. The principle that the court in exercising its functions should uphold bargains rather than destroy them is clear and without question. It is reflected in the authorities cited by Mr Weekes. However, the principle is not in play in the current case. The Claimant's position is not that the 24 August Conveyance fails for uncertainty or is bad as a matter of technical law but that properly construed it created a licence. It is wrong to suggest that the law should prefer the Defendants' easement over the Claimant's licence because of the general principle to uphold bargains.
29. In this respect, the potential outcome of the Claimant's licence argument – that a piece of land happily and successfully being used as part of a pub for many years might be lost to the pub and exploited by a developer – is irrelevant. The court is concerned with determining and upholding what rights the parties have, not to weigh the competing public and/or private benefit of those rights.
30. The Claimant referred me to authorities where the courts have exercised caution when considering whether a right was an easement unless it was clear both that an easement was intended by the document being construed and that the right satisfied the requirements for being an easement, because certainty is of considerable importance regarding the creation of property rights (one such case was *Voice v Bell* (1994) 68 P & R 441, Dillon LJ at 444). This approach would favour, in a tie-break situation, the contractual rather than the property interest conclusion. I agree with this but do not

consider it relevant because, for the reasons I give for my conclusions below, I do not consider this to be a tie-break situation.

31. As part of their arguments that the court ought to be hostile to the Claimant's conclusion on construction, the Defendants started with an assertion that the 24 August was intended to be a garden easement and that the court should respect rather than destroy that intention.
32. There is circularity here: the court should find that the parties intended a garden easement; if that was the intention then the court should strain the interpretation of the conveyance to give effect to the parties' intention and consequently find that it created an easement. However, the starting point for the iterative process of construction is not to presume what the intention of the parties must have been independent of the language they have used but to look at the language used, in context, and consider the extent to which it supports the rival constructions. This process is better done without preconceptions as to what was intended save to the extent that those intentions are common ground between the parties or can be found in the totality of the words used or other admissible evidence.
33. There is also a question of how defined the relevant intention needs to be: at one level, the intention of the parties to the 24 August Conveyance can be described, without controversy, to be allocating which bits of the relevant land could be built on and which not. At this level of definition, a general statement of potential intent can be helpful as a factor in the construction process. But to zoom in the definition of intention to include the very construction question that the court needs to decide is less likely to assist.
34. *Contra Proferentem*. It was suggested that this principle favours the Defendants' arguments. The Claimant reminded the court that the principle was only relevant when there was ambiguity – which would mean two otherwise equally balanced meanings – and there was no such ambiguity here. I agree with the Claimant and cannot see any need for an application of the doctrine in this case.
35. *Ejusdem Generis*. The Claimant prays in aid this principle to interpret: *as Garden Ground and for agricultural purposes or for such other purposes except building as the same may be properly applied to without injury to the existing or intended Tunnel* to mean that the generality of such other purposes is limited to the same genus as garden ground and agricultural use. The rule is discussed in section 7.13 of Lewison.
36. I was taken to the summary of Devlin J in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, quoted in Lewison at page 418. I have drawn my conclusions from that description: the literal meaning of the general words here is not too wide; the rule is a guide to ascertaining the intentions of the parties and if it is not useful in doing that then it can be left to one side.
37. It has not been suggested before me that the rule does not exist (which is a view) but I do not consider it helpful as a guide to the construction of the 24 August Conveyance because the general words are not left by the 24 August Conveyance as words without limitation – the other purposes are given a definition (those that don't injure the tunnels) which itself defines the relevant genus. There is no need to imply a more limited genus – use of the blue land for cultivation.

38. A further potential difficulty with application of the *ejusdem generis* principle in this case is that the Claimant's argument for a genus of cultivation assumes that the phrase Garden Ground means use of the land as a market garden which itself is disputed – the Defendants say that it means use of the ground as a garden. In the same way that it may be of limited assistance to use a disputed and too limited definition of intention to assist in construction, so it is not likely to be helpful to assume a particular genus to guide the construction of one of the constituent parts of that genus.

#### The Defendants' Construction Case

39. I summarise the Defendants' arguments in the next few paragraphs. I deal with some of the points made when addressing the counter-arguments put forward by the Claimant but for the most part my discussion of the competing arguments occurs below.
40. The Defendants argued that the starting point was that the parties wished to grant to John Brown the most extensive right that could be given but which would not conflict with the statutory powers of the Company for which it needed the land. The solution was an easement for the use of the land as a garden. A garden easement had been recognised in the case of *Duncan v Louch* (1845) 115 ER 341 and so would have been well in the minds of the conveyancer. The capitalized "Garden Ground" shows that it was of particular importance and there is no reason for that phrase to be given any meaning other than that of a garden ancillary to another property (whatever the type of other property, a garden is always a useful facility). The proper construction of the user provision is that the blue land must be used as a garden but other use was permitted so long as the main use was as a garden – this follows from the use of "x" and "y" or "z". The phrase "garden ground" should be considered similar in meaning to "pleasure ground" which is found in the authorities.
41. The Defendants referred to the following features of the 24 August Conveyance:
- (a) It was clear from the 24 August Conveyance that what was intended was the grant of a property right, an easement, and not a mere licence: the grant is contained in a formal conveyance; the words "grant" and "easement" are expressly used in the recitals rather than words such as permit and licence.
  - (b) The grant was limited to the surface of the blue land and so preserved the absolute right of the Company, the freehold owner, from accessing the blue land for its statutory purposes – which were limited to that necessary for running the railway – namely constructing and maintaining the tunnels.
  - (c) It was clear that the purpose of the rights granted over the blue land was to benefit the red land because they appeared together in the same conveyance and any reasonable use of the red land (assuming it would be built on) would gain a benefit from having access to a garden.
42. The Defendants pointed out that in a plan to a conveyance dated 14 July 1898 there was use of some of the blue land described on the plan as "tea gardens" which while not evidence of intention for construction purposes did evidence that garden use was a potential and likely use of the land.

43. The permitted user would allow the Defendants to use the disputed land as a beer garden because that is a type of garden and the various elements of beer garden are all within the right to use because they (a) do not carry any risk of damage to the tunnels and (b) are all reasonably ancillary to the permitted use of a beer garden. Whether or not the use is permitted is a matter of fact and degree bearing in mind those two overarching requirements.

#### The Claimant's Construction Case

44. The gist of the Claimant's case is that the 24 August Conveyance gave John Brown a licence over the blue land. A number of detailed points were made, for the most part I deal with the arguments in the discussion section which follows but two of the points can be best dealt with in this section.

- (a) The totality of the language of the 24 August Conveyance is more consistent with a licence than an easement: the right to continue using the blue land is not tied to ownership or occupation of the red land; the operative words, *covenant*, *agree*, and *shall be lawful* are words of licence not easement; the use of *easement* in the first recital would not be definitive but is coupled with *or right of user*; later in the document the right granted is expressly referred to as a licence.
- (b) *Garden Ground* would have referred to use of the land for market gardening rather than as a recreational garden. The Claimant referred to the judgment of Scott LJ in *Bomford v Osborne* [1940] 1 All ER 91 from 103 which contains a thorough exploration of the use of the word "garden" in its "ground for being cultivated" sense. The learning evidenced in the judgment shows that market gardening was widespread in London during the mid-nineteenth century. The Claimant was also able to point to a Tithes Act from 1779 in which the phrase "Garden Ground" was used to mean ground used by Gardeners for growing produce for sale. The coupling of *Garden Ground* with *agricultural use* supports this meaning of garden rather than the recreational one.
- (c) It was not necessary for there to be an easement rather than a licence for John Brown's rights to be protected because it would have been anticipated at the time that the Company and its need to access, through the surface land, the tunnels for maintenance and/or repair would endure and that the licence, expressed to be for the benefit of John Brown's heirs and assigns forever, would continue to bind the Company, which would not have the power to dispose of the land if it was needed, and if it wasn't needed would have to offer it to Brown and his successors. Furthermore in 1855 the law was understood to be that a subsequent purchaser with notice of a covenant would be bound by it - an easement would not have been required.

These points in favour of licence to some extent weaken the Defendants' point that an easement was the only way that John Brown could get maximum benefit from the land he was having to give up. However, I consider both arguments to be ancillary to the main question which is what did the conveyance do, rather than what might it have done or what might the parties have thought that it did.

- (d) A right to use and enjoy a garden was not well established in 1855. The Claimant answers the Defendants' argument based on *Duncan v Louch* by pointing out that

in the edition of Gale published in 1879 there was no mention of a garden easement as such and no mention of *Duncan v Louch* as an example of such an easement. The Claimant notes that it was not certain that a garden was capable of being an easement even as late as *In Re Ellenborough Park* since that was the very question decided in that case.

The right granted in *Duncan v Louch* dated back to 1675 but contained no reference to garden, rather it was a right to make use of “Tarris Walke”. The court’s decision was that the right claimed (which was a right of way across the walk to a gate and the Thames) was less than the right granted and referred to counsel’s argument that such a right was like a right to use a garden square granted to the inhabitants of the houses surrounding the square. I confess I do not see how the decision would have alerted conveyancers more generally to an easement to make use of a garden. On the other-hand counsel’s analogy referred to in the judgment suggests that garden squares were familiar – otherwise the analogy would have been pointless. Again, I consider that what matters is the language of the 24 August Conveyance, without reference to inconclusive preconceptions culled from some pointers outside of the document as to what might or might not have informed the notional minds of the parties in 1855.

- (e) The right of user could either be limited to (i) market garden and agricultural use or similar; or (ii) use that was not building and did not interfere with the Company’s tunnels. The Defendants’ proposed construction that it had to be used as garden use but with additional use for agriculture or other use but not building, does not make sense of the language.
- (f) The proper construction of the permitted use needs also to take into account the restrictive covenant *not to erect or suffer to be erected...any messuage Building or erection whatsoever* and this precludes any of the various structures which the Defendants have placed or permitted within the disputed land: those including railings, gates, pergola, booths attached to the pergola, lamp-posts, walls, a bin store and decking. All are clearly erections because they need to be built in situ, just as the low wall was in *LCC v Allen*.

#### *Discussion and Conclusion on Construction Issues (1) the meaning of Garden Ground*

- 45. Mr Weekes recognized in argument that his careful construction of the permitted use as being limited to that of recreational garden but with other use allowed so long as garden use was maintained was protective of his argument for an easement – when the court asked whether it could still be an easement if the permitted use was anything that did not injure the existing or intended tunnels then Mr Weekes accepted that it would be not impossible but more difficult.
- 46. The starting point is that while John Brown owned the blue and red land immediately before the two conveyances in August 1855, the Company had a right to acquire some part of that land because of the need to build the new tunnel. It is a reasonable inference, which I am prepared to make, that the August conveyances were an agreed resolution to those competing interests. The outcome was that the Company could build its new tunnel, John Brown gained an increase of red land (which he could build on) and while he lost ownership of the blue land he was still able to make use of it.

47. His use of the blue land, between 1852 and 1855 when he was its owner was limited to the extent that he had agreed not to build without the Company's consent. All other use was permitted.
48. I agree with the Claimant that restrictions on John Brown's use of the blue land as defined in the 24 August Conveyance that went significantly beyond that which he had been forbidden to do prior to the August 1855 conveyances are less likely than restrictions which allowed him to continue his actual use, or were more consistent with his rights over the blue land, before the August conveyances. Why would he agree to more restrictions than were necessary to enable the Company to exercise its statutory powers?
49. The Defendants' proposed construction would limit John Brown's use of the blue land to recreational garden use. In the context, this seems to be unlikely – there were no dwellings or buildings at the time that might wish to take advantage of such gardens. I have considered whether this point is answered by the apparent intention to build on the red land but I do not think it is. Any building on the red land was prospective only. As is clear from the map above, the blue land extended over quite some area and occupied three separate plots. If I assume, to test the proposition, that residential terraces were going to be built on all 4 parcels of the red land, there is still no reason for John Brown to confine his use of the long strip of the blue land on the eastern side of Occupation Road to that of a recreational garden. Moreover, there would be no reason for him to want to accept such a restriction. It is far more likely that he would want to have the freedom, subject to the Company's need to build and keep safe its tunnels, to use the blue land however he might wish, other than to build upon.
50. A wider construction of garden than being a necessary and limiting part of the rights granted to John Brown is also supported by the use of the phrase *and agricultural*. I agree with the Claimant that the construction proposed by the Defendants is not a natural construction of the words *to use and enjoy the same as Garden Ground and for agricultural use or for such other purposes...* The Claimant's construction of Garden Ground meaning ground used for gardening in the growing produce sense makes much more sense of the "and" between the two expressions than the Defendants' requirement that agricultural use could only happen if it was ancillary to use as a recreational garden. Moreover, a construction that leads to a conclusion that agricultural use would be not permitted unless there was also use as a recreational garden strikes me as highly unlikely.
51. I agree with the Claimant that the use of the phrase *Garden Ground* in context appears more likely to apply to market gardening type use rather than merely recreational use. I have been shown nothing from the Defendants' side that illustrates the use of the phrase in such a way that it would be limited to a recreational type garden. If it is not so limited then, as the Claimant's argue, its coupling with *and agricultural use* does suggest some common ground between those two expressly permitted uses rather than the two uses being in conflict (I do not consider land being used for agriculture and land being used as a recreational garden to be uses that naturally go together). I do not consider that Scott LJ's exegesis about "garden" requires this answer but it helpfully demonstrates that market gardens were common in London at the relevant time – thus it provides context which makes the market garden construction more likely.

52. There is also nothing to indicate that at the date of the conveyance anyone would have wanted to have a recreational garden on all 3 parcels of blue land. This is not to discount the possibility that such a use might subsequently arise but it would be unlikely for John Brown to agree to limit what he could do with the entirety of the blue land in the way the Defendants suggest. It was not necessary at that time for him to do so – the parties had no reason to suppose that the Company’s need to use the blue land would not endure but even if the Company did not need it any longer it was likely to have to offer it to John Brown or his successors. Rather the need for a binding garden easement that would attach to the blue land for the benefit of the red makes more sense anachronistically from the Defendants’ current position.
53. I conclude that “Garden Ground” was intended to describe use of the blue land for the purposes of growing garden produce – it was ground for gardening rather than a garden.

*Discussion and Conclusion on Construction Issues (2) the extent of the user clause*

54. The Claimant argues that because of *ejusdem generis* the clause does not permit any use other than the growing of produce for sale. I disagree. I consider that the general words that follow garden ground and agriculture are intended as defining the nature and extent of the permitted use, which would include but not be limited to the use for gardening and agriculture.
55. It is more likely that *garden ground* and *agriculture* were intended to catch what the blue land was being used for or was likely to be used for in the short term (it not being necessary for the draftsman to worry about any distinction between the two, so long as both were permitted) and the “or” was to permit wider future uses. The overarching requirement of any use of the blue land was that it would not interfere with the Company’s tunnel requirements. It follows that on a proper construction the permission did not restrict John Brown and his heirs and assigns from using the blue land for a garden, or not, or for gardening for produce, or not, or for agriculture, or not or any other use, apart from building, that would not injure the tunnels – just walking about on it for example. I consider this a far more likely construction, and it takes account of the permission being expressly *for ever thereafter*: it would be curious to make a user envisaged as carrying on forever but then restrict the use of the blue land in the way suggested by either party as their primary case.

*Discussion and Conclusion on Construction Issues (3) the extent of the user covenant bearing in mind the restrictive covenant*

56. It was common ground that the permission to use also needed to be construed by reference to the restrictive covenant which appears later in the 24 August Conveyance – the Defendants accepted that it was not permitted to use the blue land in breach of the restrictive covenant and that to do so would be outside the permission granted by the right of user. The relevant construction is straightforward: it means that “building” in the user covenant needs to be construed so as to mean: *erect or suffer to be erected...any message Building or erection whatsoever*.
57. The Defendants’ argument is that the proper construction of the clause is a matter of fact and degree depending on what John Brown (or his successors) wanted to do on the blue land (or more specifically what type of garden and other use) and what might

interfere with the Company tunnels. The Claimant says that the clause prohibits any building at all.

58. I disagree with the Defendants that its construction is a matter of fact and degree depending on the circumstances. I prefer the Claimant's construction that it catches anything that needs to be built upon the disputed land. I agree that this construction is consistent with the decision on the similar covenant in *LCC v Allen* [1914] 3 KB 642, but reach my conclusion on the language of the clause and the natural meaning of *erected* in this context, which I agree connotes anything that needs to be built or put up.
59. It follows that the presence in the beer garden of: the decking, the walls, the bin-store and its gates (but not the bins, which are mobile), the railings (in far as they are on the Claimant's land), the pergola, and the lamp posts are all outside the user covenant in any event.

*Discussion and Conclusion on Construction Issues (4) was an easement or licence intended?*

60. The parties argued that the 24 August Conveyance should be construed so as to conclude that the Company and John Brown intended to create respectively an easement or a licence. I do not consider that either conclusion would necessarily mean that the rights that had been created would be properly categorized as an easement or licence – that would be a legal conclusion drawn from what was agreed rather than how the parties chose to categorize it. However, since it was addressed I conclude that the better construction is that the rights were intended to be a licence rather than an easement:
- (a) The highpoint of the easement argument is that in the first recitals the rights created by the 24 August Conveyance over the blue land are referred to as easements on two occasions: *...and the grant of such easement as hereinafter mentioned...* and then later *...it was agreed that the Company should grant to the said John Brown the limited easement or right of user on the surface.*
  - (b) However, I agree with the Claimant that this usage in the first recitals is not consistent with other parts of the 24 August Conveyance which describe the right granted differently: *licence to use which as aforesaid is hereby granted and the land coloured Blue on the said plan and a licence to use which is hereby granted.*
  - (c) If totting up was conclusive (and I do not think it is) then this would be 1.5 easements (the second is only half because it refers to *or right of user*) and 2.5 licences.
  - (d) What matters more is the language used in the parts of the 24 August Conveyance which create the right: *covenant and agree...that it shall be lawful...to enter...to use and enjoy...* I consider this language is more consistent with an intention to give a licence rather than grant a proprietary interest. It is the language of permission rather than the language of a substantive grant.
61. I conclude that in so far as the parties' intentions can be drawn from the conveyance then the intention was to give John Brown a licence rather than an easement.

## Easement or Licence

62. The legal requirements for an easement were not in dispute. The textbook case is *Re Ellenborough Park* and it is useful to note that these legal requirements were taken in that case from the then edition of *Cheshire's Modern Real Property Law* and were treated by the Court of Appeal as long settled: (a) there must be a dominant and a servient tenement; (b) an easement must accommodate the dominant tenement; (c) dominant and servient owners must be different persons; and (d) a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant. I will take each in turn, except for (c) which is not controversial.

### *There must be dominant and servient tenement*

63. The Claimant referred to a number of authorities where this requirement was not met but it is sufficient to mention just two: *Clapman v Edwards* [1938] 2 All ER 507 and *Voice v Bell*. In *Clapman* an argument for an easement to advertise on a wall fell at the first hurdle because the relevant language allowed any advertisement to be placed on the wall not just advertisements that benefited the business run at the potential dominant tenement. In *Voice v Bell* an argument for an easement failed when there was no certainty as to the identity of the dominant tenement.
64. It is apparent from both those cases that an easement cannot exist *in gross* and that it is necessary to be able to identify what the dominant tenement is and that such identification must be by reference to the particular right granted. In this case I have construed the relevant right as one to use the blue land for any purposes, other than building, which do not interfere with the Company's purposes regarding the tunnels. There is nothing in that description of itself that indicates that it is a right to be attached to any other tenement.
65. The Defendants argue that because the 24 August Conveyance deals jointly with the red land and the blue land that demonstrates that there is a sufficient connection. Of course, one of the accepted advantages of the recreational garden construction was that it would be of benefit to potential buildings on the red land. Once, that construction has been rejected then there is nothing in the right of use that points to there being any relevant association between the right to use the blue land and the ownership of the red land.
66. The mere fact that the blue and red parcels are mentioned in the same conveyance is not sufficient. Of itself, it reflects nothing more than John Brown had been the owner and occupier of all the land prior to the August 1855 transfers. He then sold it all to the Company and then he got back the red and was granted rights over the blue. It is the nature of those rights that would need to provide the basis for a conclusion that the red land was intended to be the dominant tenement for the right to use the blue land for gardening, agricultural or other purpose. There is nothing in the language of the 24 August Conveyance that would lead to that conclusion: there is no linking of the red land with the right to use the blue land and the red land is not identified as being a dominant tenement.
67. In considering whether the rights over the blue land are tied to the ownership of the red at all I have considered the language of the conveyance. The closest the language comes to linking the two parcels occurs in three respects:

- (a) The first recital of the 24 August Conveyance states: *WHEREAS the said Company have contracted with the said John Brown for the sale to him of the pieces of land and the grant of such easement as hereinafter mentioned...* I have already indicated my view that overall the parties' intention expressed in the document is more likely licence than easement and to argue that "easement" would not have been used unless it was intended that the rights over the blue land were intended to be annexed to the red land is nothing more than restating the problem. This usage supports the Defendants position but that argument cannot survive a construction which balances the totality of the 24 August Conveyance.
- (b) The recital introducing the blue land states, *AND WHEREAS at the time of negotiating such sale as aforesaid it was agreed that the Company should grant to the said John Brown the limited easement or right of user of the surface of the pieces of land coloured blue...* This links the red and blue land temporally but is nothing more than an accurate statement of fact – the sale of the red and the grants of rights over the blue happened at the same time and were effected in the same instrument. However, of itself that does not take any further whether the rights over the blue land were only for the benefit of the owner of the red. This must depend on more than features which are explained completely by John Brown having been the owner of all the land prior to August 1855.
- (c) The drafting decision to reference the red land in the middle of the section creating the rights over the blue land: *it shall be lawful for the said John Brown...into and upon the surface of all such part and parts as is and are coloured blue in the said plan of and in the pieces or parcels of land hereinbefore described and of which such parts as are coloured red have hereinbefore been granted and aforesaid to enter....* But the reference to the red land at that point is not to add any information that relates to the right described over the blue land but to add description about the plan.
68. I do not consider there is anything in the language of the 24 August Conveyance which links the ownership of the red land with the rights to be exercised over the blue land. The contrast with *Re Ellenborough Park* is, as the Claimant pointed out in argument, stark: there the use and enjoyment of the garden square was expressly granted as part of the rights given to the owner of No. 21 Ellenborough Crescent and there was a promise by the owners of the square to keep it as an ornamental garden. None of these factors are present in the 24 August Conveyance: the language makes no attempt to make the grant of rights over the blue land to be a benefit given to the owners of the red land.
69. It would not be fatal to a finding of an easement that the conveyance did not make clear that there was to be a dominant tenement, so long as it was clear from all the circumstances that the red land was the dominant tenement (Megarry & Wade, [27-007]). However, I do not consider there is anything in the circumstances that would make it clear. On the contrary, the circumstances indicate that tying the rights over the blue land to the red was probably not the intention – so far as John Brown was concerned, why would he want to limit what he might want to do, and so far as the Company was concerned it would have no concern with what John Brown did with the blue or red land beyond maintaining and/or building its tunnels.
70. In the absence of any inference that can be drawn from the nature of the right, or any language in the 24 August Conveyance that would point to the red land as being the

dominant tenement, there is no dominant tenement associated with the user right created and the right does not meet the first necessary criteria of an easement.

*An easement must accommodate the dominant tenement*

71. This requirement was summarised by Evershed MR in *Ellenborough Park* at p. 170: *reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connexion, therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all but a mere contractual right personal to and only enforceable between the two contracting parties.*
72. I agree with the Claimant that this is apposite to describe the circumstances in the present case. The reasons overlap to some extent to what I have said under the first heading above about why the red land was not a dominant tenement. In addition, the ability to make use of the blue land has no connection with the red land: the red land is spread across four parcels, the most easterly of which is some way from the others; the blue land consists of three parcels, the largest of which is for much of its length not particularly proximate to any of the red parcels. Although proximity is not a necessary requirement of an easement, benefit is and the lack of physical connection in this case is an example of a general lack of the blue benefitting the red.
73. It also relevant that until the 24 August 1855 conveyance there was no boundary between the red land and the blue land – and no reason to think that normal use of the red land, made any use of the blue land. There is no evidence from within the conveyance or otherwise (either would be sufficient) that when the different ownership between red and blue was created on 24 August that the red land benefited or would benefit from any rights over the blue land. A discrete and material example is the red land upon which the Masons Arms stands: until the 24 August Conveyance it was land which could not be built upon so was in no different a situation vis a vis the blue land as any other part of the blue land.
74. I also agree with a related point made by the Claimant which is why would John Brown want to limit his use of the blue land to that which would be reasonably necessary for the better enjoyment of the red? Assume, again for the purposes of testing the proposition, that John Brown decided to sell off the red land for building but wanted to continue using the blue land for market gardening. That would be an entirely likely scenario but limiting his blue land rights to being an easement granted to the owners of the red land would prevent that.
75. Another illustration of the lack of connection is the requirement that an easement will be conveyed with every part of the dominant tenement, if the ownership of the dominant tenement is severed. Posit a sale of part of the north-west parcel of red land, if the rights over the blue land are an easement benefitting the red land then the owner of this part would have the right to enter onto any part of the blue land, including that part which abuts the most eastern parcel of the red land for the purpose of exercising the right to use. On the facts, I cannot conclude that this would be for the benefit of that part of the red land. Although it might be said in answer to this that the easement would not pass with that particular part of the red land (see Megarry & Wade 8<sup>th</sup> ed, at 27-006), this answer only goes so far, because given the relationship between the red and blue lands, the same problem would arise with severance of any part of the red land

until eventually the blue land would be shown to not in fact be accommodating any of the red land at all.

*A right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant*

76. In Megarry & Wade this is broken down into a series of sub-rules, some of which are addressed in the Claimant's closing submissions.
77. The rights as between the owner of the blue land and the putative owner of the red land (assuming, contrary to my findings above that the red land is a dominant tenement) are that (a) the red land owner has the right to use the blue land for market gardening, agriculture or any other purpose apart from building; and (b) the blue land owner reserves the right [my emphasis] to enter and break up the blue land when it is necessary to repair or maintain the tunnels. I emphasize the reservation because it is an owner of the land reserving as against a third party a right to enter the land – which outside the context of lease or licence is curious.
78. One of Megarry's sub-rules is that an easement must be within the general nature of rights capable of being an easement. Although I have held the right is wider, the starting point is a right to grow produce (whether by way of market gardening or agriculture or both). There do not appear to be any cases where such a right has been recognized as an easement. The Claimant unearthed an Australian case, *Clos Farming Estates v Eaton* [2002] NSWCA 389 where an alleged easement to use the servient tenement to grow grapes for wine failed because of the lack of a dominant tenement and the rights being so extensive as to render the owner's right illusory.
79. Although the category of easements is not closed (a point noted in *Clos Farming*) I do not consider that a right to enter on the blue land for the purpose of cultivating it is sufficiently akin to rights commonly recognised as easements to be capable of forming the subject of a grant – it has all the characteristics of a licence for exclusive occupation of the surface and none of those associated with an easement: the assumed intention is for the land to be exploited by the owner of the red land not merely used. If the more limited right (to cultivate) would not be an easement, then I do not consider that the wider right that was granted by the 24 August Conveyance was capable of being an easement either. I agree with the points made by the Claimant with reference to *Powell v McFarlane* (1979) 38 P&CR 452 that, at least so far as the surface was concerned, John Brown was given rights that amounted to absolute possession subject to the rights relating to the tunnels.
80. A related issue is whether the easement would have failed because it left the ownership of the servient land illusory. I was referred to the controversy surrounding the test, in this respect, applied in the car parking case of *Batchelor v Marlow* [2003] 1 WLR 764 and its criticism in *Moncrieff v Jamieson* [2007] 1 WLR 2620. I do not consider it necessary or helpful to address the controversy over these two cases in this judgment.
81. The Defendants argue that the problem of exclusive occupation does not arise in this case because of the Company's rights in relation to the tunnels. I remind myself of the decision in the *Cosh* case where the reasoning included an application of the maxim that a landowner's rights extend up to the sky and down to the centre of the earth – this was the reason why the land was not superfluous, the railway company needed the

tunnel space and consequently it needed the land (which should be treated as a whole). The same recognition of lateral use means that the Company's rights over the blue land were not illusory – it was not ousted because it continued to use and maintain tunnels under the land, which would be sufficient of itself, and in addition reserved the right to come on to land otherwise granted to John Brown for the purpose of maintenance and repair. I accept the Defendants' arguments on these points. If the suggested easement was valid otherwise, and I have held that it fails all the other disputed requirements, it would not have failed under the ouster principle (and for this purpose I have applied the *Batchelor* test).

### **Conclusion on Easement or Licence**

82. I find the parties created a contractual right and not an easement. This also accords with my findings, as a matter of construction, as to what was intended.

### **Is the licence binding on the Claimant as a restrictive covenant?**

83. When the Claimant acquired its interest in the disputed land, it knew about the rights granted to the Defendants because they were registered at the Land Registry as an easement. The Defendants' alternative argument is that as a result of that notice, the Defendants' right to use the disputed land became binding on the Claimant. The Defendants rely on *Sharpe v Durrant* (1911) 55 SJ 423.
84. In *Sharpe* a reservation by a vendor of a right to nominate two crossings over a tramway failed because of perpetuities, but the court nevertheless gave effect to one crossing by identifying an obligation, which arose once that crossing had been selected, not to interfere with the right to cross the tramway. This was binding on the plaintiff in the case because it was a negative promise necessarily made by his predecessor in title, which related to the land acquired by the plaintiff and of which he had notice.
85. The Defendants' argument is that the Claimant's position here is equivalent to the plaintiff in *Sharpe*. The reasoning was not explored in detail but it must run as follows:
- (a) The permission to use the blue land can take effect as an implied obligation not to interfere with the Defendants' use of the blue land.
  - (b) The Claimant had notice of that implied obligation when it acquired the land.
  - (c) Accordingly, the Claimant is bound not to interfere with the Defendants' exercise of their rights (as John Brown's successors to the red land) under the 24 August Conveyance.
86. The Claimant criticizes this argument in a number of ways. I agree, for the reasons stated (save in one respect):
- (a) *Sharpe* cannot survive the clarification of the law regarding the *Tulk v Moxhay* doctrine given in *LCC v Allen* to the effect that the doctrine does not depend on notice but on a restrictive covenant being an interest in land and that the relevant covenant must touch and concern land held by the person who seeks to enforce it. I have held above that the right to use the blue land was not ancillary to any use of the red land.

- (b) Furthermore, in *Ashburn Anstalt v Arnold* [1989] 1 Ch 1 the Court of Appeal confirmed (albeit obiter<sup>2</sup> but after full argument and with extremely detailed reasons) that a contractual licence would not run with the land unless the facts were such as to give rise to a constructive trust. It would be absurd if that principle could be overridden by simply turning a contractual licence into a restrictive covenant (every licence to occupy could in some way be said to be a negative covenant not to interfere with the consequence of that licence).
- (c) Even if the user covenant could be turned into a restrictive covenant, it would fail to meet the requirements under which the benefit and burden of restrictive covenants can run with the land: it did not restrict what the Company could do with the blue land (I disagree with this – it is implicit in the 24 August Conveyance that the Company cannot interfere with the right of use granted to John Brown except under the proviso inserted, if that was not the case the proviso would be redundant); the covenant is not for the protection of the red land (this is plainly right for the reasons I have already stated when considering dominant tenement issues); the covenant must be annexed to the Defendants’ land, been expressly assigned to the Defendants or be part of a building scheme. I agree that the Defendants have not proven that any of those requirements apply. The only one that might be remotely possible would be annexation and there is nothing in the 24 August Conveyance, either express or by implication, that would annex the user covenant to the red land for the reasons given above.

87. I dismiss the Defendants’ alternative case based on *Sharpe v Durrant*.

### **Remedies**

88. As a result of my findings on liability, the Defendants have had no right to make use of the Claimant’s land. It follows that in every respect in which the Defendants are present on the Claimant’s land they are trespassing and have been, as against the Claimant, since the Claimant acquired title on 21 October 2014.

### Injunction

89. The Claimant’s position is that the normal remedy for a trespass is an injunction and it is entitled to that remedy (*Patel v W.H. Smith (Eziot) Ltd* [1987] 1 WLR 853, Balcombe LJ at 858D: *prima facie the plaintiffs are entitled to an injunction to restrain trespass on their land*).

90. Mr Weekes has referred to cases in which injunctions have not been granted even though a trespass has been proven: *Llandudno Urban DC v Woods* [1899] 2 Ch 705; *Behrens v Richards* [1905] 2 Ch 614; *Ward v Kirkland* [1967] 1 Ch 195. However, the submission based on those authorities was premised on the court finding in this case, as it had in those three cases, that the trespass was inconsequential. I have not so found and the cases cited have no traction. The Defendants are in substantial occupation of the Claimant’s land and have no right to be there.

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<sup>2</sup> In any event as pointed out by the Claimant the *Ashburn Anstalt* reasoning was approved in *IDC Group Ltd v Clark* [1992] 2 EGLR 187

91. There was some discussion as to whether or not it would ever be appropriate for the court to sanction a permanent deprivation of property from a claimant in a trespass case by awarding *Wrotham Park* type damages instead of an injunction. In *Lawrence v Fen Tigers* [2014] AC 822 the Supreme Court sanctioned an award of damages and not an injunction in a nuisance case, thus allowing a tortfeasor to continue its nuisance and buy off the claimant's right to occupy its property free from nuisance. In *Higson v Guenault* [2014] EWCA Civ 703, Aikens LJ at [51] identified that nuisance cases and trespass cases were different but his conclusion: *if trespass...plainly an injunction is merited and it would not be oppressive to make the order the judge did* does not lead to the conclusion that in all trespass cases a party is entitled to an injunction as of right so much that in most trespass cases an injunction will be the plain and appropriate response. I make a similar point about the other case relied on by the Claimant in this respect, *Charlie Properties v Risetall* [2014] EWHC 4057, Nicholas Strauss QC at [9]: *justification for refusing an injunction is inherently less likely than in a nuisance case...*
92. The cases in which the court might consider it appropriate to order a payment in compensation of a permanent trespass (or an occasional but continuing trespass) are likely to be extremely rare but there can be no justification for such an order when a claimant cannot without an injunction exercise the normal rights associated with his ownership of the property concerned (if nothing else there are ECHR A1P1 issues). On my findings above the Claimant is without any real use of its land because of the Defendants' unlawful actions – an injunction of some sort is the only just response.
93. In the circumstances, the appropriate order is one that the Second Defendant remove its property (and/or those things for which it is responsible) from the Claimant's land.
94. I understand it has been agreed that three months should be allowed for this to happen.

#### Damages

95. The Defendants have trespassed on the Claimant's land since 24 October 2014 and the Claimant is entitled to damages in respect of that wrong. I agree with the Claimant that the appropriate measure of those damages is to assess the amount which would be agreed in a hypothetical negotiation between reasonable persons in the position of the parties for the grant of the right to do what the Defendants have done, which will equate to a market rent (*Enfield LBC v Outdoor Plus Ltd* [2012] 2 EGLR 105, Henderson J (sitting in the Court of Appeal) at [32] to [36] and [53]).
96. The evidence in this area was produced by valuers: Mr Crease for the Claimant and Mr Taylor for the Defendants. The parties had put an agreed set of questions to the valuers. One of the working assumptions within those questions was that the Defendants did not as at 24 October 2014 have any rights over the Claimant's land. This led the valuers to focus on what would have been paid in the hypothetical negotiations for the right to go on to the land and make the use of it as the Defendants had. In argument Mr Weekes suggested the valuers had been wrong to consider the valuation issues in relation to the encroachment of the kitchen and the snug on the basis that those structures were already in place. He asserted that the starting point should include a counter-factual assumption that the buildings had not yet been put up. This raised some concern with Mr Jourdan who considered it contrary to the basis agreed and put before the experts and, in any event, it would be wrong in law.

97. Since I have found that the Defendants’ occupation was unlawful altogether I do not think there is any relevant difference between these two positions for assessment purposes: the market rent will be the same one way or the other.
98. The experts had to deal with all the various possible outcomes of the liability process. The court is in the fortunate position of only needing to deal with assessing what an appropriate market rent for the Claimant’s land would be for the period the Defendants have been trespassing.
99. The Claimant’s suggest rent per annum is £86,250 and the Defendants’ is £31,110. Given how wide the difference was it might be thought that there was a completely different approach. Not so. The methodology is common ground. The difference between the experts is on: (a) the appropriate fair maintainable turnover figure; and (b) the appropriate percentage of that figure that would be attributable to the beer garden. I can usefully set out the differences and my conclusions in a table:

Values	Mr Taylor (Defendants)	Mr Crease (Claimant)	Decision
Fair Maintainable Trade	£1,037,000	£1,150,000	£1,037,000
% of FMT attributable to the beer garden	20%	50%	30%
Agreed market rent adjustment	15%	15%	15%
TOTAL p.a.	£31,100	£86,250	£46,665

100. Mr Weekes argued that neither expert was impressive. Mr Jourdan argued that the Defendants’ expert, Mr Taylor, was worse than the Claimant’s. I do not consider either submission a helpful starting point.
101. The court’s approach to expert evidence was well summarised by Jacob J in *Routestone Ltd v Minories Finance Ltd* [1997] 1 EGLR 123, 127 (cited with approval by Lewison LJ in *Watt v Dignan & ors* [2017] EWCA Civ 1390 at [32]):

“What really matters in most cases is the reasons given for the opinion. As a practical matter a well constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.”

102. In this case neither expert’s reasons taken all together stand up to much scrutiny: Mr Watkin’s cross examination of Mr Taylor, backed up by Mr Watkin’s own research and detailed statistical analysis of material which Mr Taylor relied upon, demonstrated that Mr Taylor’s use of such material was entirely misguided – it provided no evidence whatsoever for the conclusions that Mr Taylor was putting forward. Likewise, Mr Taylor’s anecdotal reference to other pubs without outside space was shown to be wrong because Google Maps suggested those pubs did have outside space (the obvious possibility that the Google Maps photos might be out of date was not raised, which if nothing else showed how little Mr Taylor really knew about the pubs he had referenced in his report).

103. On the other hand, Mr Crease's responses in cross-examination tended to be a restatement of views without any substantial reasoning. Although I do not accept Mr Weekes' criticism that Mr Crease was woolly or wafflely in his answers – they were understandable but lacked any persuasive features.
104. Mr Crease's reasoning on fair maintainable trade was as follows:
- (a) Turnover for 2011/12 was £1,133,777, for 2012/13 was £1,131,433 and for 2013/14 £1,036,679.
  - (b) The two earlier figures are consistent with each other and the latter one is less.
  - (c) In a market report issued by Greene King 8 weeks into the 2014/15 trading year, its chairman said like for like sales for the division for which the Masons Arms was part were up by 7.4% on the previous year.
  - (d) Therefore, the notional turnover figure should be £1,150,000 because optimism was appropriate.
105. Mr Taylor's reasoning on fair maintainable trade was equally brief:
- (a) The latest figures at the valuation date would be the year end 2014: £1,036,679.
  - (b) Management accounts would have shown that trade was continuing to decline.
  - (c) Nevertheless, a FMT can be fairly based on the 2014 figures and rounded up to £1,037,000.
106. The joint report did not take matters much further except it demonstrated that Mr Taylor had access to management accounts which Mr Crease had not seen. This was wrong – it is essential and obvious that experts have access to the same common material<sup>3</sup>.
107. I am also not convinced that the parties were right to instruct the experts not to take into account later management accounts or other trading information later than the valuation date. It is clear from Anthony Mann QC's discussion in *AMEC Developments Ltd v Jurys Hotel Management (UK) Ltd* [2001] 1 EGLR 81 that for the purposes of the hypothetical negotiation, even though deemed to take place (in that case) before the building works had started, it would be appropriate to look at the actual benefit accrued to the wrongdoer when assessing the envisaged gain (see [13]). If that is relevant to an assessment of a fee that might reasonably be agreed for the right to breach a covenant, it is hard to see any principled distinction for an assessment of market rent where that market rent will itself be based in part on an assessment of the benefits likely to be gained (i.e. turnover). The court might as well have the benefit of hindsight when the actual figures can be established.

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<sup>3</sup> I suspect Mr Taylor was rather hoisted with his own petard in this respect, since his reference to other statistical material which was not contained within an expert common bundle exposed him to Mr Watkins's cross-examination. I would have expected, had that statistical information been a common part of the expert material available for lawyers and experts to consider, that its weaknesses would have become apparent prior to Mr Taylor employing it.

108. It follows, that I consider it right that Mr Taylor had regard to the management figures and, indeed, I consider that the experts should have been shown the trading figures throughout the period.
109. I can see no good reason why Mr Crease ignored the 2013/14 figures when he reached his view, they were the nearest in time, and I do not understand why a statement to market some 8 weeks into the trading year would have had any bearing at all on the particular turnover that might have been expected of the Masons Arms as at October 2014.
110. Doing the best I can in limited circumstances, I cannot do better than accept Mr Taylor's figure – if anything I suspect it might be too high. I have taken account of the evidence that there had been capital expenditure in the May 2014 period but also have had regard to the turnover figures provided which do not show any increase – at best the expenditure was necessary to maintain performance or slow a decline.
111. Mr Crease's reasoning on the 50% figure is as follows ([24] to [39] of his report):
- (a) He has seen articles about traditional pubs declining because of the smoking ban and more food being served. It is preferable to offer dining facilities to include an outside area. Plainly smoking also needs an outside area. In general pubs without an attractive outside smoking and dining area have struggled or closed.
  - (b) He considers there are two areas which impact on his assessment: direct sales because of the garden area and the percentage of customers that only come because of the garden. To make sense of what follows I note here that thereafter the only element which Mr Crease takes into account is the percentage of customers because he has not reliable information about takings (in which case it might have been better not to mention them as having an impact on his assessment).
  - (c) He refers to Mr Bruce's evidence that about 30% overall of the pub's trade is generated by the beer garden and disagrees with it but says even if that were to happen, the Masons Arms would be more like a traditional pub and would lack the draw of the garden. It would therefore go into decline and generate a turnover well below the £500,000 level.
  - (d) Accordingly Mr Crease assesses the contribution of the beer garden at 50%. Essentially because without the beer garden it becomes an old-style pub that would not be viable.
112. Mr Taylor's approach was different but also focused on Mr Bruce's evidence:
- (a) He had looked at figures produced by Christie's about the Greene King estate relating to pubs with and without gardens and came up with a series of percentages of the difference between pubs without outside areas and pubs with. Mr Watkin cross-examined about this information and the consequence is it is wholly unreliable and no useful conclusions can be drawn from it.
  - (b) Mr Bruce had referred to 30% business generated by the beer garden and to a drop in business of between 20-30% without the beer garden.

- (c) But without the beer garden the pub would trade in a different manner (reference was made again to the statistical analysis).
  - (d) Mr Taylor's opinion is that 25% of trade is attributable to the outside area as a whole and since the beer garden is only part of the space available outside, then 20% is a better figure.
113. In the joint statement, apart from repeating previous arguments, Mr Crease emphasized that each pub needs to be looked at in its particular circumstances and repeated his view that without the garden the pub would cease to be viable. Mr Taylor made reference to three pubs said not to have external area but which were doing well (Mr Watkin demonstrated they did have external areas), to the month by month figures which, it was said, did not show significant seasonal variation, and to other internal Greene King figures (again Mr Watkin demonstrated this evidence was of no assistance).
114. I am wholly unpersuaded by either expert or their reasoning which I consider superficial, ill-thought out and for the most part unhelpful. I suspect that the issue about the extent to which the garden contributed to the turnover of the pub was really outside the expertise of these valuers. An expert in pub management might have been able to give better assistance and might have had better experience to justify their views.
115. In addition to the matters I have already mentioned, the Claimant referred me to Mr Crease's view about the viability of the Masons Arms being supported by his reference to a pub called the Flora which had closed. I get nothing from this – as Mr Crease himself recognized on occasion in his evidence, what matters is the trading of a particular pub, whether or not another pub provides a helpful comparison will also depend on its particular circumstances. Reference was also made to the Claimant's witness evidence, which was not subject to cross-examination, when in pre-action negotiations a representative from the Defendants had stated that the Masons Arms value would be reduced by 50% without the Claimant's land. I do not consider what these parties have said to each other in negotiation helpful evidence (or evidence that deserves much weight) when considering this issue.
116. The overarching question is how to estimate the turnover obtained from the use of the Claimant's land. Mr Bruce was the manager of the pub for the period and I do consider he was best placed to have an understanding about what that value was. I recognize that his evidence merited some criticism for his inability to explain why he considered that on a sunny day during a summer weekend 150 people might be outside and 10 people inside, yet only 50% of the trade would be generated by outside sales. Nevertheless, I consider his 30% figure, drawn from his own experience of the pub, is better evidence than anything put forward by either expert.
117. The Claimant says it would be wrong to prefer the evidence of Mr Bruce, who is not an expert, over that of Mr Crease, who is. But this is to misstate the issue: Mr Crease is not an expert on the extent to which the turnover of the Masons Arms should be attributed to the garden, that is a particular issue on which, having heard from the two experts and Mr Bruce, I consider Mr Bruce's views should carry more weight than those of the experts – his reasons can at least include actual experience of the pub.

118. I get some, limited, support for my 30% conclusion from the seasonal figures that have been provided (I understand belatedly, since they were not referred to in either expert report). These do show an increase in trade during the summer months, compared to the Jan/Feb to March/April period most obviously but also show a seasonal rise in food sales during Nov/Dec & Dec/Jan. This suggests that the attractiveness of the pub as a destination for a meal (thought to be a significant factor by Mr Crease) is likely not just to do with the garden but other factors as well – the food and ambience for example.

### **Conclusion**

119. The Claimant's claim succeeds. I consider the Claimant is entitled to an injunction requiring the removal of the fixtures, fittings and other items being used by the Defendant for the beer-garden from the land and damages assessed at a daily rate of £127.76 from 24 October 2014 until possession is given up.

**His Honour Judge Parfitt**

**Thomas More Building  
Royal Courts of Justice**