



Neutral Citation Number: [2023] EWHC 153 (Ch)

Case No: PT-2021-BRS-000066

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN BRISTOL**  
**PROPERTY LIST (ChD)**

Bristol Civil Justice Centre  
2 Redcliff St, Redcliffe, Bristol BS1 6GR

Date: 31 January 2023

**Before :**

**MR JUSTICE ZACAROLI**

**Between :**

**KBC DEVELOPMENTS LLP**  
**- and -**  
**(1) WAVIN LIMITED**  
**(2) WILTSHIRE COUNCIL**

**Claimant**

**Defendants**

**Timothy Morshead KC and Ruth Stockley** (instructed by **Howes Percival LLP**) for the  
**Claimant**

**Douglas Edwards KC and Philip Petchey** (instructed by **DWF Law LLP**) for the **First**  
**Defendant**

**Paul Brown KC** (instructed by **Wiltshire Council**) for the **Second Defendant**

Hearing dates: 16 and 17 January 2023

**JUDGMENT**

## **Mr Justice Zacaroli:**

1. This case concerns a small strip of land on the north-west side of the Great Western railway line to the east of Chippenham station, in the ownership of the first defendant, Wavin Ltd (“Wavin”).
2. The land to the south-east of the railway is owned by the claimant KBC Developments LLP (“KBC”). KBC has permission to build a bridge over the railway line, which sits in a cutting, to connect to a road known as “Parsonage Way” which runs across Wavin’s land.
3. Parsonage Way runs in a south-easterly direction on Wavin’s land towards the railway. The gradient of the land beneath slopes away, but the road is built up on an embankment to remain relatively level, as it approaches the railway. Just before it reaches the boundary with Network Rail’s land, it turns 90 degrees to the right. At the turning point, there is a “hammerhead” feature extending towards the boundary. There are three elements to this feature: (1) a tarmacaded area (the “Tarmac Hammerhead”); (2) the verge down the embankment towards the boundary with the railway (the “Verge”); and (3) a narrow strip of level land between the bottom of the Verge and the top of the embankment down to the railway which marks the boundary with Network Rail’s land (the “Level Strip”).
4. The dispute relates solely to the Level Strip. While all of the above-described features sit on Wavin’s land, it is common ground that Parsonage Way, including both the Tarmac Hammerhead and the Verge, have been adopted as a public highway, and so vest in the second defendant (the “Council”). KBC contends that the Level Strip forms part of that which has been adopted as a public highway. It contends that it is therefore entitled with the agreement of the Council, but without more, to build the proposed bridge over the railway and connect to Parsonage Way.
5. Wavin’s principal contention is that the Level Strip has not been adopted as part of the highway but remains in its ownership. If that is right, then it forms a ransom strip, such that KBC cannot build its bridge without negotiating with Wavin for the right to do so. I will refer to this as the horizontal plane argument.
6. Wavin’s second contention is that even if the Level Strip has been adopted as part of the highway, the extent of the area adopted in the vertical plane is not sufficient to enable the proposed bridge to be built. I will refer to this as the vertical plane argument.
7. KBC, as a fall-back, contends that by reason of the terms of a conveyance dated 27 February 1992 (the “Conveyance”) pursuant to which Wavin purchased the land to the north-west of the railway from a Dr Scott-Ashe – who at the time owned all of the relevant land on both sides of the railway – it has a contractual right to connect to Parsonage Way even if the Level Strip has not been adopted as a public highway.

## The facts in outline

8. In 1990, Wavin intended to purchase from Dr Scott-Ashe the land to the north-west of the railway in order to expand its existing site (which was situated to the south-west of Parsonage Way as it then existed). With that in mind, on 27 July 1990 Wavin applied for planning permission for the part construction and part diversion of Parsonage Way, together with a hardstanding and car parking, on the land then owned by Dr Scott-Ashe.
9. The proposed development, according to the approved plan No.14416/03 (“Plan 03”), involved the diversion of Parsonage Way along the course that it now takes, as described above. Plan 03 showed the hammerhead feature extending towards the boundary with Network Rail’s land. The Verge was shown by a series of lines pointing down towards, but not quite reaching, the boundary with the railway. A red line was drawn around the site of the works for which planning permission was given. At the point of the hammerhead, the line was drawn between the series of lines depicting the Verge and the line marking the boundary with the railway.
10. It is Wavin’s case that – by reason of the drawing of that red line on Plan 03 – the planning permission extended to works to be carried out on the Tarmac Hammerhead and the Verge but not over the Level Strip.
11. The plan indicated that the details of the diverted road were shown on a separate drawing: 14901/01A (“Plan 01A”). There is no indication on Plan 01A as to the extent of the precise *area* covered by the planning permission equivalent to the red line appearing on Plan 03. There are, however, a number of annotations on Plan 01A of relevance to the issues in this case.
12. First, it identified the line of a possible extension over the railway line via a bridge connecting with Parsonage Way at the point of the hammerhead, with the words:

“FUTURE ROAD EXTENSION AND BRIDGE OVER  
EXISTING RAILWAY”
13. Second, the following words appear with an arrow pointing to the area between the end of the Tarmac Hammerhead and the boundary with the railway:

“AREA OF LAND FOR POSSIBLE FUTURE EXTENSION  
TO PARSONAGE WAY TO BE DEDICATED TO  
WILTSHIRE COUNTY COUNCIL HIGHWAY  
AUTHORITY”
14. Third, the following words appear with an arrow pointing to the same area:

“EMBANKMENT TO NEW ROAD CONSTRUCTION  
SUITABLE MEASURES TO BE ADOPTED IN ORDER TO  
PROVIDE AND MAINTAIN STABILITY OF EXISTING  
AND PROPOSED EMBANKMENTS”
15. Fourth, there is an annotation “LIMIT OF ROADWORKS” with an arrow pointing to the edge of the Tarmac Hammerhead.

16. A further plan, showing a cross-section of the land was also prepared for the planning application and stamped with the Council's stamp as having been considered and approved in 1990 (the "Cross-section Plan"). This showed the vertical elevation of both the existing land and the built-up new road as it approached the railway. At the point marked "limit of works", which corresponds to the point marked "limit of roadworks" on Plan 01A (and is clearly intended to refer to the end of the Tarmac Hammerhead), the Cross-section Plan shows both the Verge (said to have a gradient of 1 in 2) and the road continuing across the railway line (marked as "proposed road vertical and horizontal alignment provision for bridge over railway"). At the bottom of the verge, the Level Strip is identified as "AREA OF LAND TO REMAIN AT EXISTING LEVEL". The following words appear, with one line pointing to the Verge and another to the embankment from the boundary with Network Rail down to the actual railway line:

"SUITABLE MEASURES TO BE ADOPTED IN ORDER TO  
PROVIDE AND MAINTAIN STABILITY OF EXISTING  
AND PROPOSED EMBANKMENTS"

17. Planning permission for the development sought by Wavin was granted on 20 December 1990 (the "1990 planning permission").
18. Pursuant to the Conveyance, in February 1992 Wavin purchased the land to the north-west of the railway with the benefit of the above planning permission. At that time, Dr Scott-Ashe retained the land to the south-east of the railway line. By the Conveyance, Wavin covenanted, among other things, to build along the route of Parsonage Way as diverted pursuant to the earlier planning consent a "New Road" to "full adoption standards". Dr Scott-Ashe reserved the right to enter on the New Road and any relevant part of Wavin's property to complete the New Road if Wavin failed to do so within five years. Dr Scott-Ashe also reserved, by the second schedule to the Conveyance, a right of way over the New Road and a right to "connect to the New Road". These rights were to cease upon the adoption of the New Road by the relevant competent authority.
19. On 8 September 1992, Wavin and the predecessor to the Council executed an agreement (the "s.38 Agreement") for the dedication and adoption of Parsonage Way as a public highway, pursuant to s.38 of the Highways Act 1980 (the "1980 Act").
20. A provisional certificate was issued under the s.38 Agreement on 1 September 1993, and a final certificate was issued on 17 May 1995. The approved plan accompanying the final certificate showed the adoption of Parsonage Way as a highway extending over the whole of the Tarmac Hammerhead, the Verge and the Level Strip.
21. KBC acquired the land to the south-east of the railway formerly owned by Dr Scott-Ashe in two tranches, on 2 September 2014 and 14 July 2015, with a view to developing the land. KBC acquired planning permission to build a bridge over the railway to connect to Parsonage Way on 13 November 2019. By this time, however, Wavin had raised a complaint with the Council over the extent of the adoption. Wavin had first raised that complaint in 2016.

## The Horizontal Plane Argument

### **The Law**

22. At common law, for a way to become a public highway it needs to be dedicated as such, which involves both an intention by the landowner to dedicate land as highway, and acceptance by it as a highway by the public: *Secretary of State for the Environment, Transport and the Regions v Baylis (Gloucester) Ltd* (2000) 80 P&CR 324, per Kim Lewison QC, as he then was, at p.328.
23. Section 38 of the 1980 Act provides a statutory mechanism for such dedication and acceptance via an agreement with the relevant highway authority.
24. Section 38(3) of the 1980 Act provides, relevantly, as follows:
- “A local highway authority may agree with any person to undertake the maintenance of a way—
- (a) which that person is willing and has the necessary power to dedicate as a highway, or
- (b) which is to be constructed by that person, or by a highway authority on his behalf, and which he proposes to dedicate as a highway;
- and where an agreement is made under this subsection the way to which the agreement relates shall, on such date as may be specified in the agreement, become for the purposes of this Act a highway maintainable at the public expense.”
25. Section 38(6) of the 1980 Act, which has been described as a provision that could “hardly be wider in its scope” (*R (Redrow Homes Ltd) v Knowsley Metropolitan Borough Council* [2014] EWCA Civ 1433, per Lord Dyson MR at p.392), provides:
- “An agreement under this section may contain such provisions as to the dedication as a highway of any road or way to which the agreement relates, the bearing of the expenses of the construction, maintenance or improvement of any highway, road, bridge or viaduct to which the agreement relates and other relevant matters as the authority making the agreement think fit.”
26. There are a number of matters of common ground in this case. First, there is no single meaning of “highway”, but in non-technical language it means a way over which the public have rights of passage, whether on foot, horseback or in or on vehicles: *Southwark London Borough Council v Transport for London* [2018] UKSC 63 (“*Southwark*”), per Lord Briggs JSC at §6. Second, the extent of the way to which an agreement under s.38(3) relates, and thus adopted as a highway, is ascertained in the horizontal plane by reference to the terms of the particular agreement. Third, whether the way is to be adopted pursuant to sub-para (a) or sub-para (b), it can include areas other than the path or road itself,

including those upon which no actual construction is to take place. Common examples are verges, areas of land left level for sight-line purposes or areas of landscaping. The extent to which such areas are included in the highway adopted under s.38 also depends on the true interpretation of the agreement.

27. Once adopted, the highway vests (as a determinable fee simple) in the Council, as the relevant highway authority: s.263 of the 1980 Act and *Southwark* at §8.

### **The s.38 Agreement in detail**

28. The recitals to the s.38 Agreement recited that: Wavin owned the fee simple to the land identified on the plan marked “A”; Wavin had been granted planning permission for “certain development namely construction of a hardstanding and car parking”; the Council, as the relevant highway authority, considered that certain works should be carried out, indicated “in outline” on the drawing attached as “B” (“Plan B”); and that Wavin had agreed to carry out those works.
29. Plan B was based on the drawing submitted as Plan 03 with the planning application in 1990. It contained, however, a different red line to that appearing on Plan 03. Whereas the red line on Plan 03 followed the outline of the proposed roadway around the hammerhead corner, on Plan B it followed the line of the boundary with the railway. Mr Edwards accepted that there is no gap on Plan B similar to that which Wavin relies on in the case of Plan 03.
30. Clause 1 contained numerous covenants by Wavin (which were stated to be planning obligations in accordance with s.106 of the Town and Country Planning Act 1990, as amended). The most important of these, for present purposes, were in sub-paras (i), (ii) and (v).
31. By sub-para (i), Wavin covenanted to carry out at its expense:
- “(a) the works which are described generally in the Schedule hereto and indicated in outline on the drawing;
  - (b) such other ancillary works as the Director of Planning & Highways for the time being to the County Council (“the Director”) may reasonably require which for the avoidance of doubt includes kerbing drainage lighting signing and white lining;
  - (c) any accommodation works which are reasonable and which relate to the works referred to in (a) and (b) above;
  - (d) works which may as a consequence of (a) (b) or (c) be necessary to statutory undertakers’ and telecommunications apparatus and all other equipment under or over the highway;
- all which said works are hereinafter referred to as “the highway works”.”
32. By sub-para (ii) Wavin agreed, before commencing any part of the highway works, to submit to the Director for approval a number of documents, most

importantly: “(a) such detailed drawings plans and specifications as the Director may require.”

33. Sub-para (v) obliged Wavin to carry out the highway works in accordance with the plans, drawings and specifications approved under sub-para (ii).
34. When the highway works were completed, the Director was required to issue a provisional certificate: clause 8. After satisfaction of a number of conditions, including a year having passed since the issue of the provisional certificate, the Director was required to issue a final certificate: clause 9.
35. By clause 10(i), the Council agreed, from the date of the final certificate, to maintain that part of the highway works which constituted alterations to the existing publicly maintainable highway.
36. By clause 10(ii), the Council agreed, again from the date of the final certificate, to do all things as may be required “...for securing that the remaining highway works shall be adopted as part of the highway maintainable at the public expense and the same shall thereafter become and be part of such highway.”
37. Clause 10(iii) identified the extent to which the remaining highway works were to be adopted as a highway under s.38, and provided as follows:

“the plan (or plans) defining the highway works to be adopted by virtue of the preceding sub-clause shall be such of the detailed plans which are to be approved by the Director under Clause 1(ii) hereof as shall be identified by the Director and notified to the Developer at the time of approval thereto being given or such other plans as may subsequently be agreed by the Director for the purpose of this Clause.”
38. Given the passage of time, save for one document neither Wavin nor the Council has retained any of the documents that passed between them between 1992 and 1995 which would have delineated the extent of the works to be carried out under the s.38 Agreement. Both accept, however, that the parties would have acted as required by the s.38 Agreement, so the Council would have identified a requirement for plans, specifications and drawings, those would have been provided by Wavin, and they would have been approved by the Council.
39. The one document that remains is the final approved plan showing the extent of the adopted highway for the purposes of clause 10(iii) (the “Adoption Plan”). The base of the Adoption Plan is Plan 01A. It includes some of the annotations and markings that appeared on Plan 01A as approved for planning permission purposes. Most relevantly, it includes the annotation: “AREA OF LAND FOR POSSIBLE FUTURE EXTENSION TO PARSONAGE WAY TO BE DEDICATED TO WILTSHIRE COUNTY COUNCIL HIGHWAY AUTHORITY”, with the arrow pointing to the area between the Tarmac Hammerhead and the boundary with the railway.
40. The Adoption Plan also contains pink shading, which it is common ground was the colour then used to identify the area which was adopted as public highway.

This pink shading extends over all of the Tarmac Hammerhead, the Verge and the Level Strip. If this accurately records that which was agreed to be adopted in the s.38 agreement then there can be no dispute that the Level Strip constitutes part of the public highway and is vested in the Council.

41. There is no evidence as to who applied the pink shading on the Adoption Plan. Nor is there any evidence that the Adoption Plan was sent at the time to Wavin. The Council also keeps a digital record of publicly maintained highways within its borders. That plan similarly contains shading to identify the highway extending over the hammerhead right up to the boundary with Network Rail's land. These documents, whether or not provided to Wavin at the time, have been available to Wavin since 1995.
42. Both KBC and the Council accept that the shading on the Adoption Plan and on the digital records of the Council is not determinative. Wavin accepts that it is nevertheless evidence in support of the conclusion that the adopted highway extended over the Level Strip, but submits that little weight should be given to it in the face of the arguments it advances as to the limited scope of the highway adopted under the s.38 Agreement, to which I now turn.

#### **Wavin's arguments in outline**

43. Wavin's contention that the highway adopted pursuant to the s.38 Agreement excludes the Level Strip proceeds as follows.
44. First, the 1990 planning permission extended, so far as the hammerhead is concerned, only to works carried out on the Tarmac Hammerhead and the Verge.
45. Second, on the true construction of the s.38 Agreement the area to be adopted was limited to that which was the subject of the 1990 planning permission.
46. Third, and alternatively, because under the s.38 Agreement what is adopted is highway "works", and because Wavin was not entitled to do any works except those for which it already had planning permission, that which was adopted under the s.38 Agreement does not extend beyond the works which could be carried out pursuant to the 1990 planning permission.
47. Fourth, although Wavin accepts that the adoption under s.38(3)(b) of a way which is to be constructed could include land on which no actual work was carried out, on the true construction of the s.38 Agreement such land had to have some functional relationship with that part of the road itself.
48. I will address these points in turn.

#### *(1) The scope of the 1990 planning permission*

49. Wavin's argument that the scope of the 1990 planning permission did not extend to the Level Strip is based on the red line appearing on Plan 03.
50. So far as the layout of the diverted road is concerned, however, Plan 03 does not appear to have been designed to be precise or definitive. It contained a note:



“nb for details of diverted road layout refer to [Plan 01A]”. The red line is drawn by hand without great precision. For example, there is sometimes a slight gap between it and the end of the markings indicating the embankment along the length of the road, and sometimes it cuts across those markings.

51. As I have noted above, Plan 01A includes the annotation (indicating the area beyond the end of the Tarmac Hardstanding) referring to “suitable measures” to be adopted to provide and maintain stability of the “existing and proposed” embankments. The proposed embankment refers to the Verge. The existing embankment can only refer to the area beyond the Verge in the direction of the railway.
52. Mr Morshead KC, who appeared for KBC, contended that this also encompassed measures to be taken on the embankment within Network Rail’s ownership, on the basis that – while the planning permission obviously could not authorise Wavin to carry out works on a third party’s land – the permission could nevertheless extend to such works being carried out later with the permission of Network Rail.
53. Whether this is right or not, the reference to the “existing embankment” clearly included such land within Wavin’s ownership beyond the end of the Verge, i.e. the Level Strip. This is reinforced by the annotations, and arrows drawn, on the Cross-section Plan (referred to above at [16]).
54. Mr Edwards contended that the phrase “suitable measures *to be adopted*” was ambiguous, and might refer to an intention to do something in the future in connection with the possible rail bridge. I do not accept that reading. The reference to “suitable measures to be taken” is prefaced by “Embankment to new road construction”. It is not relating it to possible future works relating to the bridge, but to the embankment for the new road. The Adoption Plan uses similar phrasing, identifying something “to be” done elsewhere, referring to the diversion of existing power lines, but it is not suggested that this is referring to an intention to do something in the future unconnected with the existing planning permission.
55. Accordingly, I do not accept the premise of Wavin’s arguments as to the scope of the s.38 Agreement, namely that the Level Strip fell outside the scope of the 1990 planning permission. I will nevertheless go on to consider its arguments on construction of the s.38 Agreement on the assumption that the 1990 planning permission did not provide for works to be done beyond the end of the Verge.

*(2) On its true construction, the s.38 Agreement relates only to the area covered by the 1990 planning permission*

56. Mr Edwards described the s.38 Agreement as being “grounded” in the 1990 planning permission. In fact, the only express reference in the s.38 Agreement to the planning permission is in recital (2), which identifies the planning permission previously obtained by Wavin for “certain development”, but then refers only to the construction of a hardstanding and car park and makes no reference to the work on Parsonage Way and its diversion. The remainder of

the s.38 Agreement naturally relates *only* to Parsonage Way, as neither the car park nor the hardstanding were intended to form part of a highway.

57. Mr Edwards' principal submission was that because the works to be undertaken were described only "in general" in the Schedule (see clause 1(i)(a)), and because Plan B only indicated the works which the Council wished to be carried out in "outline" (see recital (4) and clause 1(i)(a)), it follows that it is necessary to look elsewhere for the details of the works to be undertaken. In circumstances where Wavin had already been granted planning permission to do the works, he submitted that the obvious place to look is that existing planning permission.
58. There are, as Mr Morshead submitted, three points in answer to this submission. The first is that since the purpose of a s.38 Agreement is to identify the extent of land which is adopted as a public highway and (as is common ground) a highway will commonly include land on which no physical work is undertaken (such as verges or land left open as sight-lines), there is no reason why the extent of *works* for which prior planning permission has been given should dictate the extent of *land* which is adopted pursuant to a s.38 agreement.
59. The second point is that the s.38 Agreement contained within itself the machinery for identifying with precision what was to be adopted, pursuant to clauses 1(ii), 1(v), 10(ii) and 10(iii) (all referred to above). These envisaged drawings, plans and specifications, as required by the Council, being submitted by Wavin after the date of the s.38 Agreement and, critically, they defined that which was adopted as the new highway (in clause 10(iii)) by reference to the final plan for the works as approved by the Council. Nowhere in this machinery for identifying the detail of the highway works to be carried out and adopted is there any reference to the 1990 planning permission. Indeed, nowhere in the agreement is there any link drawn between the works to be done in respect of the diversion of Parsonage Way (as opposed to the car park and hardstanding) and the 1990 planning permission.
60. The only remaining connection with the 1990 planning permission is the fact that the base drawing used for the Adoption Plan was Plan 01A. That is plainly insufficient to lead to the implication that the area of the property to be adopted under the s.38 Agreement was limited to that for which planning permission was given in 1990.
61. Accordingly, while I agree with Mr Edwards that the fact that Plan B contained only an "outline" of the work to be done, and that the work in the Schedule is only a "general" description which indicates that further detail is to be provided elsewhere, I disagree that the further detail is to be found, as a matter of implication, in the previous planning permission. On the contrary, the s.38 Agreement expressly states that the further detail is to be found in the drawings to be subsequently submitted and approved by the Council.
62. The third point is that even if the works referred to in clause 1(i)(a), by reference to the schedule and Plan B, were intended to identify that for which planning permission had already been given, clause 1(i)(b) widened the scope of the works to be undertaken pursuant to the s.38 Agreement to include such ancillary works as the Council reasonably required.

63. For these reasons I reject the contention that the s.38 Agreement limited the property to be adopted pursuant to s.38 to that which was the subject matter of the 1990 planning permission.

*(3) Limitation because the s.38 Agreement contemplates only the adoption of highway “works”*

64. The second reason Mr Edwards advanced for why there was no adoption of the Level Strip is because the s.38 Agreement refers to the adoption of “highway works” as defined in clause 1(i), and Wavin was simply not able to carry out any works for which it had no planning permission.
65. The first point to note is that, although the s.38 Agreement uses the phrase “highway works” to identify that which was to be adopted, it is accepted by Mr Edwards that this is extended to land on which no physical works were carried out. This included verges and an area marked as “forward visibility” on the Adoption Plan, needed to provide proper lines of sight. That necessarily implies that “highway works” in the s.38 Agreement is broader than just the actual construction or alteration works. In my judgment, it is to be understood as referring to the area within which those works sit, including surrounding areas that are to be adopted with the construction or alteration works themselves.
66. In light of that acceptance, even if Wavin was not permitted to carry out any physical works on the Level Strip because it was excluded from the area covered by the 1990 planning permission, its argument under this third head is academic. It is advanced on the assumption that the 1990 planning permission did not authorise any works at all beyond the end of the Verge. There is, however, nothing on the Adoption Plan which points specifically to any work being done on the Level Strip (I note that the annotations on Plan 01A referring to the work on existing and proposed embankments are in fact not present on the Adoption Plan). Accordingly, even if no physical works can be carried out other than those for which prior planning permission has been granted, that has no relevance here. The point is, however, relevant to the fourth step in Wavin’s argument, which I deal with below.
67. Mr Morshead’s response to Wavin’s argument is that there is nothing in s.38 which precludes an agreement being reached with the Council for adoption of land, on which something is to be constructed, notwithstanding that no planning permission has been obtained for that work. While it is unnecessary to resolve this point, it was not specifically answered by Mr Edwards and I accept it as correct.

*(4) Functional Relationship*

68. Mr Edwards submitted that, while a highway adopted under s.38 may include property on which no construction work has taken place, and there is nothing in s.38 which limits the extent of such other property to that which had a functional relationship with the road itself, such a limitation is nevertheless to be implied into this s.38 Agreement.

69. I do not accept this. The extent of that which it was agreed to be adopted is that which was to be identified in the plans approved by the Council under clause 10(iii), following the machinery for submission of plans and specifications as set out above. There is nothing in clause 10(iii) or any other part of that machinery which limits the scope of that which could be adopted.
70. In any event, I accept Mr Morshead's submission that the Level Strip had a sufficient functional connection with the relevant part of the actual road that was adopted – the Tarmac Hammerhead and Verge – to satisfy this requirement even if it existed. The Tarmac Hammerhead and the Verge associated with it had no discernible purpose other than as the commencement of the possible future extension over the railway line and the point of connection with that extension. The fact that until the bridge was built, there was nowhere for that extension to go does not prevent it being adopted as highway, and it is common ground that it was so adopted. The purpose of adopting the Tarmac Hammerhead and the Verge, as the point of connection with the intended bridge, could only be achieved by using (in the sense of passing through the airspace above it) the Level Strip.

#### Conclusion on the horizontal plane argument

71. I return to the fact that the Adoption Plan unambiguously identifies the whole of the hammerhead area, including the Level Strip, as that which was adopted as a highway under the s.38 Agreement.
72. Clause 10(iii) requires the Adoption Plan to be provided to Wavin. On other aspects of the process for submission and approval of plans pursuant to the s.38 Agreement, the parties are content to proceed on the basis that Wavin and the Council did what the agreement required of them. In the absence of any evidence either way on what actually happened in relation to the Adoption Plan, I consider the most likely inference is that the Adoption Plan was provided to Wavin at the time. The fact that Wavin cannot find a copy in its possession is irrelevant, since it has not retained its records from that time.
73. I do not need, however, to rely on this inference. I consider, in agreement with the submissions made on behalf of KBC (supported by Mr Brown KC for the Council), that even without the pink shading the Adoption Plan clearly identifies the whole of the area between the limit of the road works (i.e. the end of the Tarmac Hammerhead) and the boundary with Network Rail's land as adopted land. The words "area of land for possible future extension to Parsonage Way to be dedicated to [the Council]" had appeared on each iteration of the relevant plan forming the base of the Adoption Plan since its first revision in September 1992, so were clearly not added at the last minute by the Council.
74. Mr Edwards submitted that the words are ambiguous, and may refer to a possible future dedication if and when the extension was built. I disagree. The annotation points to the area encompassing both the Verge and the Level Strip without distinguishing between them. Both the Tarmac Hammerhead and the Verge had no obvious purpose other than as preparation for the future bridge, yet it is common ground that they were dedicated and adopted as highway under the s.38 Agreement, as opposed to being left for some future potential adoption.

It is therefore difficult to discern any reason for drawing a distinction between these parts of the hammerhead feature and the Level Strip.

75. I have reached this conclusion without reference to the Conveyance. If necessary, however, I would conclude that the terms of the Conveyance (as I construe them – see below at §83 to §95) provide support for that conclusion.

#### The vertical plan argument

76. Wavin’s second argument is that even if the horizontal plane extends over the Level Strip, the extent to which the air space above it, and the ground below it, were adopted is insufficient to enable a bridge to be built over the railway.
77. There was again much common ground between the parties as to the law. The area above and below the highway which is adopted under s.38 is limited to the “zone of ordinary use”: see *Southwark* at §9.
78. In particular, Mr Edwards accepted that the zone of ordinary use of the Tarmac Hammerhead and the Verge is sufficient to enable a bridge to be built on it if, for example as is the case here, the Council wished the existing highway comprising Parsonage Way to be connected with a road over the railway line.
79. He submitted, however, that because at the time of the adoption effected under the s.38 Agreement the Level Strip was used only as a footpath, its zone of ordinary use was also similarly limited.
80. I do not accept this argument. It only arises if my conclusion that the Level Strip formed part of the highway adopted pursuant to the s.38 Agreement is correct, and it then requires a distinction to be drawn between the zone of ordinary use of the Tarmac Hammerhead and the Verge, on the one hand, and the zone of ordinary use of the Level Strip, on the other.
81. For the reasons given already, I regard the Level Strip as being adopted together with the Tarmac Hammerhead and the Verge because it is to be regarded as one of a piece with them. It is part of that which was adopted as a highway that, at present, goes nowhere but whose purpose was to form the connecting point with the proposed extension and bridge if and when they were built. The envisaged use of the Level Strip was clearly not as a way upon which people would pass on foot and the zone of its ordinary use in the vertical plane cannot sensibly be considered in that context.
82. Put into the context in which it was adopted, it seems to me to be beyond dispute that the zone of ordinary use of the Level Strip included such of the airspace above it and (if relevant) the ground beneath it as would enable the proposed extension to be built.

#### Conveyance

83. In light of the above conclusions, it is unnecessary to deal with KBC’s fall-back argument. Since it was fully argued, however, I will deal briefly with it.

84. KBC’s fall-back argument is that, even if it does not have the right to connect to Parsonage Way in reliance on its adoption as a public highway, it has that right by virtue of the Conveyance. In particular, it relies on the right to connect to the “New Road” granted by para (1) of the second schedule to the Conveyance.
85. In response, Wavin relies on the fact that, by sub-para (1)(e) any rights conferred by para (1) ceased when the New Road was adopted by the Council.
86. If, on the true interpretation of the Conveyance, the “New Road” means that which was in fact adopted as a highway, and what was adopted does not extend to the Level Strip, then Wavin must succeed on this point.
87. In my judgment, however, in agreement with the submissions advanced on behalf of KBC, on the true construction of the Conveyance, the New Road means all that part of Parsonage Way which, when constructed pursuant to the 1990 planning permission to full adoption standards, would enable the owner of the retained land to connect with it. Accordingly, if what was adopted fell short of that which was necessary to enable KBC to connect to the New Road, then the condition for the termination of the rights reserved by para (1) of schedule 2 has not arisen, and the rights remain.
88. The “New Road” is defined in the Conveyance as “the road and footways to be constructed by [Wavin] in accordance with the provisions of the [1990 planning permission], the approximate provisional route of which is shown edged green on the plan numbered 3 attached hereto...”. The provisional nature of the route was reinforced by the fact that the Conveyance contemplated the possibility of Wavin constructing the New Road over an alternative route: the right to connect to the New Road reserved to the owner of the retained land by para (1) of schedule 2 was a right to connect to the New Road “or any such alternative road as shall be provided by the Purchaser from time to time”.
89. The definition of the New Road must be read in the context of the Conveyance as a whole. By clause 2, Wavin covenanted to construct the New Road in accordance with the requirements of the Planning Authority “and Highway Authority and other statutory authorities to full adoption standards”. It was clearly envisaged, therefore, that the New Road was to be one which, when constructed, was capable of being adopted as a highway by the Council. If Wavin failed to construct the New Road within five years, then the owner of the retained land had the right, within the perpetuity period, to construct the New Road itself.
90. The obvious purpose of the covenant given to the owner of the retained land to build the New Road to adoption standards, in combination with the reservation of the right to connect to the New Road, was to provide to the owner of the retained land the ability to pass over the railway line to connect with the highway on the other side.
91. In addition to the reservation of a right to connect to the New Road, the owner of the retained land also reserved a right of way over the New Road, once

constructed. Both this right of way, and the right to connect, ceased when the New Road was adopted as a highway: para (1)(e) of Schedule 2.

92. In seeking to interpret the Conveyance, it is relevant to ask what the purpose was in those rights ceasing on adoption of the highway. Mr Edwards suggested the purpose was to place a sensible time limit on the rights of the owner of the retained land to develop its own land and to build the connection to the New Road. I do not accept this. It is true that Wavin was given a five year period itself to build the New Road. If it failed to do so, however, the owner of the retained land had the rest of the perpetuity period in which to complete the New Road itself.
93. Moreover, Mr Edwards' construction leads to an odd, if not absurd, result. Even if the bridge had been built and the connection with the New Road was made before the New Road was adopted, and thus before the rights in para (1) had ceased, then on Mr Edwards' construction as soon as the New Road was adopted the owner of the retained land would lose the right to pass from his own land onto Parsonage Way. That is because, on Wavin's case, while the owner of the retained land would have had the right to pass over the bridge up to the point at which it crossed over the Level Strip, and the right to pass over Parsonage Way as from the other side of the Level Strip, it would not have had the right to pass over that part of the road which passed through the airspace over the Level Strip.
94. The more likely purpose of the para (1) rights ceasing on adoption of the highway is, as Mr Morshead submitted, that they would then not be needed. The right of way over the New Road and right to connect to the New Road were essential while it remained in the ownership of Wavin. They were unnecessary, however, once the New Road vested in the Council.
95. In my judgment, the provisions relating to the New Road in the Conveyance were intended to operate seamlessly, enabling the owner of the retained land to pass from its land to the New Road without the need to acquire any further rights from Wavin, whether before or after the New Road was adopted. Accordingly, if for whatever reason the Level Strip has not been adopted as highway, then on the proper construction of the Conveyance the "New Road" has not been adopted and the right to connect to it under para (1) of schedule 2 remains.

### Conclusion

96. For the reasons given above, KBC is entitled to the declaration sought by it, that there is no gap between Parsonage Way and the legal boundary between Wavin's land and Network Rail's land and KBC may therefore connect the proposed railway bridge to Parsonage Way.