

IN THE COUNTY COURT AT CENTRAL LONDON

Claim No J10CL152

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 24 August 2023

Before :

HIS HONOUR JUDGE MONTY KC

Between :

**THE RIDGEWAY (OXSHOTT)
MANAGEMENT LIMITED**

Claimant

- and -

**(1) TERENCE DESMOND McGUINNESS
(2) EMMA McGUINNESS**

Defendants

Ms Miriam Seitler (instructed by **IBB Law LLP**) for the **Claimant**
Mr George Woodhead (instructed by **Sherrards Solicitors LLP**) for the **Defendants**

Hearing dates: 1-3 August 2023

Approved Judgment

HHJ Monty KC:

Introduction

1. The Ridgeway is an estate of 47 houses in Oxshott, Surrey, most of which were built in the 1930s. One of the properties on the estate is Birch Mead, which is owned by Mr and Mrs McGuinness. They bought Birch Mead in June 2013, and live there with their two young children. Mr & Mrs McGuinness obtained planning permission, after an appeal, to demolish Birch Mead and build two new houses on the plot. They intend to live in the larger of the new houses and to provide a home for Mrs McGuinness's father in the other.
2. The trial bundle contained a number of plans of the estate, but I think the most helpful for understanding the general layout is the one taken from the online Surrey Interactive Map:



3. At the top of the map is Oakshade Road, and the entrance to the estate is via the traffic island and down The Ridgeway, passing Danes Close on your right. The road reaches a bend where it turns right, immediately outside Birch Mead. At the bend, opposite Birch Mead, is a slightly larger curved road area. Carrying along the road, one comes to

another curved road area outside the property known as Lukenya, where it turns right again at an almost 90° angle, culminating in a roundabout at the end, where one of the properties which will feature later in this judgment, Willow Cottage, is situate to the left.

4. The bundle also contained a large number of photographs, as well as many different versions of plans of the estate. It is principally for this reason that I declined the invitation to undertake a site view. Now that I have heard the evidence, I remain of the view that that was the right decision. I do not think I would have derived any additional assistance from visiting the estate.
5. When Mr & Mrs McGuinness bought Birch Mead, they entered into a Deed of Easement with The Ridgeway (Oxshott) Management Limited (“ROML”), the company which owns the roads and verges on the estate, under which Deed they were granted rights of way over the estate roads in connection with the use of the land as a single private dwelling. The Deed of Easement also granted rights to use Service Media (drainage and so on – I set out the definition at paragraph 10 below) also in connection with the land as a single private dwelling.
6. ROML says that there are no rights under the Deed of Easement which would enable Mr & Mrs McGuinness to use the roads and services for more than one house on the plot, and that the intended use – access over the roadways to the two proposed properties – would be a breach of the easements which are in respect of access and service media for a single private dwelling only.
7. No works have yet taken place at Birch Mead, but ROML has brought these proceedings seeking declarations that the rights granted under the Deed will not accommodate the proposed development, and an injunction preventing Mr & Mrs McGuinness from doing the works envisaged by the planning permission.
8. This is quite a lengthy judgment, and so I will set out at the outset my conclusions. The claim for an injunction succeeds, and I decline to exercise my discretion to award damages in lieu of an injunction.

The Deed of Easement and the Deed of Covenant

9. The McGuinness’s purchase of Birch Mead completed on 28 June 2013. There is a Deed of Easement dated 28 June 2013 made between ROML (defined therein as “the Grantor”) and Mr & Mrs McGuinness (“the Grantee”).
10. The Deed of Easement contains these definitions:
 - (1) ‘the Property’ means Birch Mead, The Ridgeway, Oxshott KT22 being the land and buildings shown edged red on Plan 1 registered at H M Land Registry with title number SY41100
 - (2) ‘Estate Roads’ means the land shown edged red on Plan 2 being the roadways, footpaths and verges of Ridgeway Close, The Ridgeway, Danes Close, the traffic island at the entrance to The Ridgeway, the Ridgeway Close roundabout and the footpath between Ridgeway Close and Danes Close Oxshott registered at H M Land Registry with title number SY569988.

- (3) ‘the Rights’ means the rights set out in the Schedule to the Deed.
- (4) ‘the Service Media’ means pipes, drains, mains, channels, gutters, watercourses, sewers, wires, cables, laser optical fibres, electronic data or impulse transmission communication or reception systems and all other conducting media.

11. Clause 6 provides:

“Release

The Grantee relinquishes with immediate affect [*sic*] all prescriptive rights of way and other prescriptive rights the Grantee and its predecessors have or may have acquired in relation to the Estate Roads and any Service Media on or under the Estate Roads.”

12. The Schedule sets out the Rights granted by the Deed:

- “1. The right for the Grantee and his successors in title the owners and occupiers for the time being of the Property and all persons authorised by him or them to the benefit together with the Grantor and all others entitled thereto to pass and repass over the Estate Roads with or without vehicles for the sole purpose of access to and egress from the Property in connection with its use as a single private dwelling house.
2. The right for the Grantee and his successors in title the owners and occupiers for the time being of the Property and all persons authorised by him or them to the benefit together with the Grantor and all others entitled thereto to connect to and use for the purposes connected with the use of the Property as a single private dwelling house and at all times the Service Media now or within the perpetuity period of this Deed laid through and under the Estate Roads and to access the Estate Roads to renew maintain repair lay and replace the said Service Media.”

13. At the same time, the parties also entered into a Deed of Covenant in which ROML is referred to as “the Management Company” and Mr & Mrs McGuinness are referred to as “the Houseowner”, and “the Property” is Birch Mead, with the same definition as in the Deed of Easement.

14. Under the Deed of Covenant:

- (1) ROML is to maintain the Estate Roads and Services (those terms have definitions broadly similar to the defined terms Estate Roads and Service Media in the Deed of Easement), and the Schedule to the Deed of Covenant sets out other anticipated expenditure by ROML. There are other covenants by ROML but those are not relevant to the issues in this case.
- (2) The Houseowner is to pay ROML its share of ROML’s annual expenditure in connection with the maintenance of the roads and services and the matters set out in the Schedule.
- (3) The Houseowner is to maintain the verges on the roads “in accordance with the character of the Estate Roads and the guidelines issued by the Management Company from time to time”.

- (4) The Houseowner is “Not to block or obstruct the Estate Roads or permit any vehicles in the control of persons visiting or delivering to the Property to do so”.
- (5) The Houseowner is “Not to park on the Estate Roads”.
- (6) The Houseowner is “To make good forthwith any damage caused to the Estate Roads and Services in the exercise of the Rights (as defined in the Deed of Easement) to the Management Company’s reasonable satisfaction”.

ROML’s documents

15. There are two documents which ROML produced which are also relevant, and I need to quote extensively from them.
16. The first is headed “Buying and Selling – 2011”. In that document, ROML explains how it had purchased the road and verges in 1988, and that all the then owners of houses on the estate became shareholders in ROML, which is run by a Board of elected directors and holds general meetings. There is what appears to be an earlier version in the bundle, but I will refer here to what I think is the most recent version, and the one which appears to have been in place at the time of the purchase of Birch Mead – the two are almost the same. The document says:

“New procedures have been introduced by ROML to clarify the rights of access to properties bordering The Ridgeway, Danes Close and Ridgeway Close.

In 1988 ROML purchased the road and its verges and the houseowners of all the above properties became shareholders in and entered into a Deed of Covenant with ROML. ROML is a limited Company which functions with a Board of elected directors and holds general meetings where only shareholders may attend.

In forming the Company, the houseowners intended to ensure their access to their properties and to build up a fund of money in order to maintain and repair as necessary the roads, verges and roundabouts. While the original Deed of Covenant does give assurance in so far as the Company undertakes to do its best to provide the necessary access and will maintain the roads, there has been evidence for some years that purchasers would prefer their rights to be attached to their titles.

The Board has accordingly issued a Deed of Easement to be applied along with a revised Deed of Covenant and share transfer at the sale of any property bordering The Ridgeway, Danes Close or Ridgeway Close. Once entered into, the Deed of Easement will be included in the title of the property concerned. The two documents are related and create a stronger link between the title, the shareholding, the duties of houseowner and ROML.

Hence, at the first sale of a property not already benefiting from this arrangement, the following procedure should be followed:

Two copies of the Deed of Easement and two copies of the revised Deed of Covenant should be signed by the Buyer and returned, undated, to the Company Secretary together with:

- a) a completed, stamped Stock Transfer Form signed by the houseowner or their Executor;

- b) if the latter, a photocopy of the Deed of Probate / Letter of Administration / Power of Attorney (as appropriate)
- c) the old Share Certificate, if possible;
- d) a cheque for £175 payable to "The Ridgeway (Oxshott) Management Ltd" in respect of an administration fee (£150) and expenses (£25).

Two copies of each Deed will be signed on behalf of ROML and returned to the Seller's solicitor for completion on the day the sale is completed. The latter should then return one copy of the signed and dated Deed of Easement and signed and dated Deed of Covenant to the Company Secretary. The other copies will be passed to the Buyer's solicitor.

The Buyer's solicitor will then need to register the Deed of Easement at the Land Registry when they register their purchase. Once the Company has confirmation of this from the Buyer's solicitor, the Buyer's Share Certificate will be forwarded to the Buyer or his solicitor, as preferred.

[If the Buyer's solicitor does not register the Deed of Easement and The Company has to do this, the Company's legal costs and expenses will be chargeable to the Buyer.]

The same process, without the Deed of Easement, which is a one-off because it is registered in title, should be repeated at subsequent sales of the house.”

17. In 2010, ROML produced a booklet entitled Notes for Houseowners and Residents which contains a number of passages of potential relevance.

18. In the section headed “ROML” it states:

“The purpose of ROML is to provide effective maintenance of the estate and ensure access and services to and from the houses adjacent to the above roads for the convenience of Houseowners who are its Houseowners and ROML is also responsible for maintaining the ‘character of the Estate Roads’: The respective responsibilities of ROML and the Houseowners are defined in greater detail in the Deed of Covenant signed by each houseowner. Following detailed discussions in 2008, a revised Deed of Covenant is currently in use for new purchasers, in association with a Deed of Easement, these documents provide enhanced assurances concerning access rights (see ‘Buying and Selling’).”

19. There is a section headed “Character of the Estate Roads”, which contains this text:

“Our private estate is, according to its residents, well-located, secluded, charming peaceful, attractive, quiet, leafy and safe. Unfortunately, there have been times when it has also been wet, muddy, untidy and congested; particularly in certain areas. The condition of the road, verges and drainage issues plus construction work, involving skips and heavy traffic, have sometimes done little to enhance its appearance.

Although the ‘character of the Estate Roads’ is not precisely defined, it was clearly the desire of all Houseowners, at the time of the Company’s formation, to maintain the existing character of the estate (i.e. roads and verges etc), in which they had a common interest and ownership, and this tradition has continued. The desire to ensure the concept of ‘character’ continues was sufficiently strong that

an AGM resolution was passed in 2006 whereby any changes that may affect the ‘character of the Estate Roads’ must be approved by a two-thirds majority (of those voting) at a general meeting.

A very important aspect of the character of the estate, are the grass verges, planted with silver birch trees, running along either side of the roads. These verges are owned by ROML and, as such, are the common property of all Houseowners.

It is traditionally accepted that each Houseowner has responsibility for the care of the verge adjacent to their property and the trees thereon. No alterations to the verges should be made without specific ROML approval. The silver birches on the estate are of particular significance to its character and their health needs to be monitored, as does that of other trees, for signs of disease and potential hazards caused by rotting branches. ROML undertakes gardening and tree work, where appropriate, including the financing of silver birch replacement and planting out of the annual budget.

The road itself dates from the early 1930s and is about 3 metres wide, is constructed of reinforced concrete, and varying between 200-300 mm in thickness. Repairing the road with light buff-coloured concrete is intended to maintain one aspect of its character.”

20. In the section “General Guidelines”, the following are described as “well-established” (I have not set out all of the bullet points which appear in the document):
- The roadways must at all times be kept clear of all obstruction.
 - Under no circumstances must the passage of emergency vehicles or Council refuse trucks be obstructed
 - All road users should not exceed the speed limit of 15 miles per hour. House-owners are asked to pass this information to their suppliers and guests.
 - Parking is not allowed on the verges or roadways at any time as this undermines the appearance of the estate, damages the verges and can create obstruction to the passage of other traffic.
 - Parking on the part of driveways crossing ROML’s verge should be short-term only; e.g. for visitors in order not to park in the road.
 - Due to the narrowness of the roadways, all should play their part in helping to ensure that heavy vehicles do not damage the verge (see Contractors’ Guidelines).
21. The “Contractors’ Guidelines” are in a separate section of the document and are as follows:

“For all House-owners, contractors and suppliers, concerning building works and deliveries:

Please give a copy to builders and other contractors including for the delivery of materials.

Working or delivering in this estate can present particular difficulties due to the narrowness of access. House-owners and their contractors undertaking building work need to be sensitive to the impact of their activities on other residents and

road users, including emergency and council vehicles, so that all parties can co-operate to minimise any disruption.

The roads, paths and the verges are the private property of The Ridgeway (Oxshott) Management Ltd ("ROML"). Building materials, spoil and rubbish skips must be kept on House-owners' own property.

In the event that a House-owner and/or their contractor cannot accommodate a skip or delivery, it may be possible to place them on the verge for a short period (no more than a day or two) provided that prior consent has been obtained from ROML. On no account may building materials, spoil or rubbish skips be deposited on the verges, paths or roadways without such consent. Early application is advised.

A daily rental charge may be levied by ROML if ROML's property is used without consent or, in exceptional circumstances, with consent and by agreement for longer periods.

Damage to Company Property

Where lengthy building work is envisaged, the House-owner will be requested to supply fencing or visible plastic netting to place opposite or alongside the main worksite to protect adjacent verges from damage. On completion of any building works, ROML's property must be left in at least as good a condition as before the work began.

Delivery Vehicles

House-owners and their contractors should inform all suppliers that the estate roads are private and single track, with a speed restriction of 15 mph. To avoid excessive road wear, domestic deliveries, materials suppliers and/or spoil removers should be asked to use the smallest practical vehicles and skips.

In the event, that an excessively large vehicle is needed on site which may result in the short term blocking of the road, at least 48 hours notice must be given to ROML and all residents affected. It is unacceptable for residents to find the road blocked with no prior warning.

Large vehicles should reverse in and out of The Ridgeway and not attempt to use the Ridgeway Close roundabout as a turning circle due to its insufficient size.

General consideration to the neighbourhood

Attention of all Houseowners and their contractors is drawn to the Elmbridge Borough Council Code of Practice "Considerate Construction in Elmbridge" which refers to guidelines concerning demolition, noise & vibration, nuisance from smoke & fumes, protection of trees, control of environmental hazards and waste, traffic & parking, use of roads and footways (scaffolding, hoarding, material storage, skips, temporary crossovers, excavation and cranes), mud on roads, treatment of pedestrians, graffiti and fly posting.

Parking

The roadways must always be kept clear of parked cars to allow ease of access. Parking on the verges and roadway is not permitted. If there is insufficient parking available on site, then, other than for deliveries, any contractors' vehicles and those used for personnel transport should be parked in Oakshade Road away from

the entrance to The Ridgeway. House-owners must ask their contractors to observe these requirements.”

22. The document also has a section headed “Planning Guidelines”:

“The Estate

The estate (comprising properties adjacent to The Ridgeway, Ridgeway Close and Danes Close) was originally developed in the 1930s. Over the years many houses have been altered and, indeed, new properties built, but the estate has managed to retain much of its overall character and charm, which is valued highly by both existing and new residents. It is a desirable and enjoyable place to live, largely because of its unique ambience. The roads, verges and trees, together with the type and size of houses and house plots, provide a pleasing visual impact and a peaceful environment.

ROML has a vital role in maintaining this environment and the character of the estate and is concerned with the type, size and number of houses on the estate. Although not wishing to hinder Houseowners' rights to improve or redevelop their properties, situations can arise where the interests of individuals seem at odds with those of the estate as a whole. In these cases the Board will act on behalf of the majority of House-owners. ROML will make representations to the Planning Authorities if necessary.

It would therefore be advantageous if House-owners intending to develop their properties, whether needing to submit formal planning applications or not, would first consult both with neighbours and ROML. Hopefully this will avoid potential conflicts or disputes which could delay any planning application or detract from the peaceful overall environment. Although, since 2008, formal planning requests to the local authority may no longer be required for certain building extensions and alterations, subject to adherence to stated guidelines, consultation with neighbours and ROML is still advised.

Infill Development

A strict ‘one house per title’ policy should apply. This reflects both the restrictive covenants within the titles themselves and majority Houseowner opinion. The Board regards resistance to infill development as a most important responsibility and will use all the resources available to prevent it, including:

- Seeking the support of all residents to object to planning proposal
- Refusing rights of access, including for additional services, across the verges and the roads owned by ROML
- Rigorously enforcing any existing covenants preventing infill development
- Allocating funds to engage professional support in dealing with these items and, if necessary, approaching residents for a ‘fighting fund’
- Lobbying local councillors to oppose planning proposals

Extensions

The building of reasonable extensions to existing houses should be in keeping with the original house in terms of their overall design and the materials used and

should not contravene Elmbridge planning guidelines, particularly in terms of proximity to boundaries and size.”

23. It is perhaps fitting to end with that section; it is the opposition to Mr & Mrs McGuinness’s plans to infill (that is, carry out a development which contravenes the “one plot, one house” policy) which has caused ROML to bring this claim. I was told that the claim had the support of the vast majority of the residents, who are financing this litigation.
24. These documents also show how seriously ROML takes its responsibilities to uphold the character of the estate. Although it only owns the roads, hence the reference to changes to the character of the estate roads, ROML also sees itself as having an important role to play in “maintaining [the] environment and the character of the estate and is concerned with the type, size and number of houses on the estate”.

Two preliminary points

25. On behalf of Mr & Mrs McGuinness, Mr Woodhead raised two preliminary challenges to ROML’s claim.

(1) *Is the easement void or unenforceable?*

26. First, he contended that the restriction contained in the Deed of Easement is void or otherwise unenforceable for public policy reasons.
27. It is said that the Claimant imposed on the Defendants a restrictive covenant dressed up as an easement; were the rights in a restrictive covenant, Mr & Mrs McGuinness would have been able to challenge them under section 84 of the Law of Property Act 1925 (“section 84”), but as it is, the rights have the same effect as a restrictive covenant but without the section 84 rights.
28. Section 84, in summary, gives the power to the Upper Tribunal to wholly or partially discharge or modify “any restriction arising under covenant or otherwise as to the user thereof or the building thereon” (emphasis added).
29. At first glance, one might think that the words “or otherwise” would include a restriction imposed, as here, under an easement.
30. However, this does not appear to be the case.
31. In *O’Byrne* [2018] UKUT 395 (LC), a decision of the Upper Tribunal from December 2018, the Tribunal referred to a very late submission on this point at [57]:

“Ability to modify easements

This was a very late addition to Mr Hutchings QC’s submissions in that it appeared for the first time in his closing submissions. Unsurprisingly Mr Rosenthal objected to it being considered. Mr Hutchings QC referred us to paras 16.19 – 16.23 of Scamell and Gastowicz in support of a submission that the Tribunal has power to modify easements as well as restrictive covenants. This is obviously a point of law of some importance. Furthermore, in para 16.23 the authors consider it unlikely that restrictions within an easement would be held

to be within section 84 of the 1925 Act. This is a view expressed by Mummery LJ in paragraph 5 of *Hotchkin v McDonald* [2004] EWCA Civ 219. We agree with Mr Rosenthal that it is not appropriate to seek to raise the point in this way. If Mr Hutchings QC had wanted to argue that the Tribunal has power to modify the easement, proper notice should have been given so that it could have been dealt with. Accordingly, we accept Mr Rosenthal's submission that we should not consider it further."

32. *Hotchkin v McDonald* [2004] EWCA Civ 219 was a decision in which Mummery LJ commented at [5]:

"[Counsel for the Appellant] pointed out, rightly, that the Lands Tribunal has no power to vary an easement as such."

33. In its 2011 Paper "Making Land Work: Easements, Covenants and Profits à Prendre" (Law Com No 327), the Law Commission recommended that the jurisdiction of the Lands Chamber of the Upper Tribunal be extended to enable it to make orders for the modification or discharge of easements and profits created after reform. Although I can find nothing in that paper which expressly says so, the clear implication is that easements are not currently within the jurisdiction conferred on the Tribunal by section 84. These proposed reforms were never implemented.

34. There is a reference to paras 16.19 – 16.23 of Scamell and Gastowicz: Land Covenants (2nd Edn) in *O'Byrne*. I cannot find anything in those paragraphs which directly supports the suggestion that easements are within section 84, as had apparently been submitted in *O'Byrne*, and as the Tribunal pointed out in that case, the learned authors comment at 16.23:

"It seems unlikely given the various matters referred to above that restrictions contained within an easement would be held to be within the ambit of section 84(1)."

35. Finally, the learned authors of *Preston & Newsom: Restrictive Covenants Affecting Freehold Land* (11th Edn) do no more than tentatively suggest that "or otherwise" in section 84 "possibly" includes restrictions in easements.

36. I therefore proceed on the basis that it is not open to Mr & Mrs McGuinness to make an application under section 84 in respect of the easements, at least not without having an uphill battle, against the weight of judicial comment, to persuade the Tribunal that it does have jurisdiction.

37. Mr Woodhead's submission is that the limit on the easement should be struck down as being void or contrary to public policy. Mr Woodhead referred me to Chitty on Contracts at 18-013:

"Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups:... thirdly, objects which interfere with the proper working of the machinery of justice."

38. He submitted that this case falls into that third group, for the following reasons. The rights which were granted by the easements were no more than the rights previously

enjoyed by owners of Birch Mead ever since it was built, and prior to ROML's introduction of the Deed of Easement, owners simply relied on long user of their predecessors in title. The Deed of Easement limits the rights of a purchaser (because they cannot apply under section 84 to modify or discharge the easements) and this creates an abuse, prevention and/or impediment to the due course of justice insofar as it gives the effect of a covenant but without the ancillary statutory rights that covenantors enjoy. Accordingly, it is against public policy.

39. I do not accept that submission.
40. I agree with Ms Seitler that an owner of land is freely entitled to determine the rights which are granted over that land even where that limits the use of the land by another; that there is nothing wrong with parties consensually agreeing the grant of a right which does not fall within section 84; that there are strong public policy reasons in favour of upholding contracts between freely consenting parties; and that there was no evidence in this case that ROML deliberately tried to avoid attracting the jurisdiction of the Tribunal by using an easement rather than imposing a restrictive covenant.
41. I cannot see any merit in the submission that the easements should be declared to be void, and I reject it. I also do not see how there is anything here which is contrary to public policy. On the contrary, I also agree with Ms Seitler that it would be against public policy to prevent freedom of contract, which would be the effect of Mr Woodhead's point.

(2) *Has ROML failed to plead a valid claim?*

42. The second of Mr Woodhead's challenges is to ROML's reliance on trespass. In her skeleton argument, Ms Seitler refers repeatedly to this being a trespass claim. At paragraph 1, the claim is described as being "for an injunction to restrain trespass", and when addressing the question of remedy, Ms Seitler refers many times to the claim being in trespass; indeed, she relies on this being a trespass case in support of her submission that "Trespass is a special case and is not to be treated in the same category as nuisance or breach of covenant on the question of remedy".
43. Mr Woodhead makes the following points.
 - (1) The Particulars of Claim do not refer to trespass. CPR PD16 sets out the matters which must be included in particulars of claim where a claim is made for an injunction or declaration relating to land, which includes stating whether or not it relates to residential premises, which the Particulars of Claim do not. The prayer for relief seeks a declaration and an injunction but fails to ask that the Claimants be restrained from committing a trespass; instead, the prayer seeks "Injunctive relief restraining the Defendants from building the Proposed Development", and no court should grant that.
 - (2) After the Costs and Case Management Conference the Claimant applied to amend the Particulars of Claim. The application was made on 9 December 2022, and was accompanied by a draft pleading which attempted to introduce a trespass claim. The application was followed by an email from the Claimant's solicitors dated 23 January 2023 in which they said, "please note that my client also intends

to ask the Court for permission to amend the claim form and particulars of claim to plead a claim in trespass.” Permission to amend was refused.

- (3) In *Preston & Newsom (op. cit.)* at Section 3: Pleading the Injunction, it is said that it is imperative that an injunction is requested and expressed in as clear and unambiguous terms as the circumstances reasonably permit as to what the defendant must do. The claim is to restrain building, not to prevent a trespass.
44. For these reasons, it was submitted that the claim should be dismissed. I asked Mr Woodhead if this was “a knock-out pleading point” and he agreed with that description.
45. I do not agree that it is.
46. There is nothing in the point about the failed application to amend. As set out in the email of 23 January 2023 to which I have just referred, and as is plain from the draft amended pleading, the trespass to which this amendment was directed was in relation to the verges and had nothing to do with the easements which are the subject matter of the claim. The refusal of permission to amend therefore is not relevant when considering the nature of the existing claim.
47. Further, and more importantly, as set out in *Gale on the Law of Easements*, 21st Edn, any user which goes beyond the rights granted by easement (“excessive user”) will be a trespass: see *Gale* at 9-02 and 14-137. I agree with Ms Seitler that, as pleaded, this is not a nuisance claim. As *Gale* says at 14-137:
- “Where user of an easement is excessive, the servient owner will have an action in trespass. Where the exercise of the easement is obstructed or interfered with, the servient owner will have an action in trespass.”
48. It was made clear in the Claimant’s skeleton argument deployed at the Pre-Trial Review (1 June 2023) that the claim was in trespass. I do not accept for a moment that the Defendants were taken by surprise by how Ms Seitler put her case in her skeleton argument for this trial, nor do I see how the Defendants could possibly say that they are prejudiced in any way by this being presented as a trespass claim as there was no substance in the suggestion that the case would have been dealt with differently and it was not seriously suggested that the Defendants’ evidence would have been any different. I reject the pleading points as being immaterial. I agree with Ms Seitler. If the Defendants thought this was a nuisance claim, that was an unfortunate mistake. This is a claim to restrain excessive user of easements, which would be a trespass, and that is entirely clear.
49. Having rejected the Defendants’ two preliminary challenges, I now turn to the substantive issue, which is remedy.

Remedy – Injunction or damages?

50. It is not in dispute that if the easements are not void (and I have held that they are not), and if the pleading point fails (it does), then the use of the roadways and the service media for two houses on the Birch Mead plot would be in breach of the easements, which restricts use to access to a single dwelling.

51. There are two central questions here. Is ROML entitled to an injunction? Should the court award damages in lieu of an injunction?

(1) *The authorities*

52. I agree with Ms Seidler that the authorities she cites support the grant of an injunction to restrain a trespass, regardless of whether the trespass causes harm.

53. In *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411 Stamp J said at page 413:

“It is in my judgment well established that it is no answer to a claim for an injunction to restrain a trespass that the trespass does no harm to the plaintiff. Indeed, the very fact that no harm is done is a reason for rather than against the granting of an injunction: for if there is no damage done the damage recovered in the action will be nominal and if the injunction is refused the result will be no more nor less than a licence to continue the tort of trespass in return for a nominal payment.”

54. In *John Trenberth Ltd. v National Westminster Bank Ltd* [1979] 39 P&CR 104, Walton J at 108 accepted a submission by the plaintiff’s counsel:

“...when one is dealing with the direct physical invasion of a right of property by a trespass one is very close to the line of cases stemming from *Doherty v. Allman* [(1878) 3 App Cas 709] which decide that an injunction to enforce a negative stipulation in a contract goes almost as of course. The parties, having agreed that something shall not be done, the court simply says that what the parties have agreed shall not be done.”

55. In *Patel v W H Smith (Eziot) Ltd* [1987] 1 WLR 853, there was a right of way and a right to park vehicles for loading and unloading exercised by the defendants over the claimants’ land. Overturning the first instance decision, where an injunction had been sought on the basis of the defendants’ excessive user but had been refused, the Court of Appeal held as follows at 858E-F:

“What, then, are the principles which a court should apply in a case of this type? It seems to me that, first, prima facie a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him. In support of that proposition there are two comparatively recent cases at first instance.”

56. Balcombe LJ then referred to *Woollerton and Wilson* and *John Trenberth Ltd*, which I have mentioned above. His Lordship then said, at 859D:

“In normal circumstances the prima facie test should be that indicated by Stamp J in the *Woollerton and Wilson* case, but there may be exceptional circumstances, such as those considered by the court in *Behrens v Richards*, when the court will not think it appropriate to grant an injunction.”

57. *Behrens v Richards* [1905] 2 Ch 614 was indeed an exceptional case. Buckley J refused an injunction sought by the owner of land leading to the foreshore against

fishermen who used the land to gain access to the foreshore, although he held that the fishermen had established no public right of way by long user, saying:

“In permitting persons to stray along the cliff edge or wander down the cliff face or stroll along the foreshore the owner of the land was permitting that which was no injury to him and whose refusal would have been a churlish and unreasonable act on his part. From such a user nothing, I think, is to be inferred.”

58. Returning to *Patel*, Neill LJ held at 863:

“I, for my part, am prepared to assume that there may be exceptional cases, of which *Behrens v Richards* is one, where notwithstanding that a continuing trespass is proved or admitted, the court can properly decline to grant an injunction. But such cases are likely to be very rare.”

59. In *Starham Ltd v Greene King Pubs Ltd and anor* [2017] 9 WLUK 422 (a decision of His Honour Judge Parfitt sitting in the County Court at Central London), the defendants were using land as a beer garden for a public house, and claimed they were entitled to do so by virtue of an easement or restrictive covenant contained in a mid-19th century deed. The judge held that the defendants’ use was a trespass, and cited *Patel* as authority for the proposition that the normal remedy for a trespass is an injunction, save where the trespass was inconsequential (referring to *Llandudno Urban DC v Woods* [1899] 2 Ch 705, *Behrens v Richards*, and *Ward v Kirkland* [1967] 1 Ch 195 as examples of inconsequential trespass). The judge went on to consider whether damages would be an appropriate remedy, and said this:

“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.”

60. *Charlie Properties Ltd v Risetall Ltd* [2014] EWHC 4057 (Ch) is another case where a similar point was made. At [9] Mr Nicholas Strauss QC (as he then was), sitting as a Deputy High Court Judge, said:

“...justification for refusing an injunction in cases of trespass is inherently less likely than in a nuisance case, since the defendant is seeking by the payment of damages to buy the right to interfere, not merely with the claimant’s enjoyment of the property, but with the property itself.”

61. Later, at [22], the judge commented:

“...in any event, there is no justification for allowing the defendants to perpetuate their trespass by the payment of money.”

62. *Higson v Guenault* [2014] EWCA Civ 703 was a boundary dispute, the central issues being whether there was a right of way along a lane and if so what was the extent of that right of way. A question arose as to whether this was a nuisance case, or a trespass case, as this affected the correct test to be applied when considering the “injunction or damages” question (which I will deal with in more detail below). At [51], the Court of Appeal held that if this was a nuisance claim, then the test in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 (“*Shelfer*”) and/or the test in *Lawrence v Fen*

Tigers Ltd [2014] 2 WLR 433 (“*Lawrence*”) are pertinent. I need to return to both *Shelfer* and *Lawrence* later in this judgment, but for the moment I only need to set out what was said towards the end of that paragraph:

“On the other hand, if the matter now has to be considered on the basis that the 2004 fence constitutes a trespass, then, plainly, an injunction is merited and it would not be oppressive to make the order the judge did.”

63. In more recent times, the same approach has been followed in protestor cases. In *Canary Wharf Investments Ltd v Brewer and others* [2018] EWHC 1760 (QB), Warby J held:

“The substantive law is clear and straightforward, so far as trespass is concerned. A landowner in possession is entitled to an injunction to restrain trespass, whether or not the trespass causes damage (see *Patel v Smith...*)”

64. The same point was made in *Fitzwilliam Land Co and ors v Cheesman and ors* [2018] EWHC 3139 (QB), at [42]. At [43], Mr Justice Freedman said:

“It follows that a *quia timet* injunction will usually be justified so long as the Claimants establish that there is a substantial risk of trespass by a defendant.”

65. As well as cases where the trespass was inconsequential and an injunction was refused (see paragraph 59 above), there will be cases where it would be oppressive to grant an injunction, such as *Jaggard v Sawyer* [1995] 1 WLR 269 (which was also a case where the injury to the plaintiff was regarded as small and would be adequately compensated by an award of damages).

66. There was considerable disagreement between the parties as to the test to be applied when considering the question of whether damages should be granted in lieu of an injunction.

67. Mr Woodhead said that the right approach is that set out in *Jaggard* and in *Lawrence*, and in broad terms I agree.

68. Before I look at what was said in those cases, the starting point is I think the four tests laid down in *Shelfer*, because these were the subject of judicial comment in both *Jaggard* and *Lawrence*.

69. In *Shelfer*, the defendant had caused structural damage to a house and nuisance to its occupier. At trial, the judge awarded damages but refused an injunction, but the Court of Appeal reversed the first instance decision and granted an injunction. A L Smith LJ said:

“Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction.

There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section. In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

In my opinion, it may be stated as a good working rule that --

- (1) If the injury to the plaintiff's legal rights is small,
- (2) And is one which is capable of being estimated in money,
- (3) And is one which can be adequately compensated by a small money payment,
- (4) And the case is one in which it would be oppressive to the defendant to grant an injunction,

then damages in substitution for an injunction may be given.

There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £15 might well be held to be not small but considerable; whereas a similar injury to a warehouse or other large building represented by ten times that amount might be held to be inconsiderable. Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception. In the present case it appears to me that the injury to the Plaintiff is certainly not small, nor is it in my judgment capable of being estimated in money, or of being adequately compensated by a small money payment."

70. In *Jaggard v Sawyer*, Millett LJ said at p283H:

"This appeal raises yet again the questions: what approach should the court adopt when invited to exercise its statutory jurisdiction to award damages instead of granting an injunction to restrain a threatened or continuing trespass or breach of a restrictive covenant? And if the court accedes to the invitation on what basis should damages be assessed?"

71. At p283, Millett LJ went on to set out some general propositions, and I need to set some of these out here:

“(3) The nature of the cause of action is immaterial; it may be in contract or tort. Lord Cairns’s Act referred in terms to ‘a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act.’ The jurisdiction to award damages in substitution for an injunction has most commonly been exercised in cases where the defendant's building has infringed the plaintiff's right to light or where it has been erected in breach of a restrictive covenant. Despite dicta to the contrary in *Woollerton and Wilson Ltd. v. Richard Costain Ltd.* [1970] 1 W.L.R. 411 there is in my opinion no justification for excluding cases of threatened or continuing trespass on the ground that trespass is actionable at law without proof of actual damage. Equitable relief, whether by way of injunction or damages under Lord Cairns’s Act, is available because the common law remedy is inadequate; but the common law remedy of damages in cases of continuing trespass is inadequate not because the damages are likely to be small or nominal but because they cover the past only and not the future.”

“(7) In *Anchor Brewhouse Developments Ltd. v. Berkley House (Docklands Developments) Ltd.* (1987) 38 B.L.R. 87 Scott J. granted an injunction to restrain a continuing trespass. In the course of his judgment, however, he cast doubt on the power of the court to award damages for future trespasses by means of what he described as a ‘once and for all payment.’ This was because, as he put it, the court could not by an award of damages put the defendant in the position of a person entitled to an easement; whether or not an injunction were granted, the defendant's conduct would still constitute a trespass; and a succession of further actions for damages could accordingly still be brought. This reasoning strikes at the very heart of the statutory jurisdiction; it is in marked contrast to the attitude of the many judges who from the very first have recognised that, while the Act does not enable the court to license future wrongs, this may be the practical result of withholding injunctive relief; and it is inconsistent with the existence of the jurisdiction, confirmed in *Leeds Industrial Co-operative Society Ltd. v. Slack* [1924] A.C. 851, to award damages under the Act in a *quia timet* action. It is in my view fallacious because it is not the award of damages which has the practical effect of licensing the defendant to commit the wrong, but the refusal of injunctive relief. Thereafter the defendant may have no right to act in the manner complained of, but he cannot be prevented from doing so. The court can in my judgment properly award damages ‘once and for all’ in respect of future wrongs because it awards them in substitution for an injunction and to compensate for those future wrongs which an injunction would have prevented. The doctrine of *res judicata* operates to prevent the plaintiff and his successors in title from bringing proceedings thereafter to recover even nominal damages in respect of further wrongs for which the plaintiff has been fully compensated.”

72. In *Lawrence*, Lord Neuberger said at [111-113]:

“111 *Jaggard v Sawyer* [1995] 1 WLR 269 was a case where the Court of Appeal upheld the trial judge's decision to award damages instead of an injunction restraining the defendant trespassing on the plaintiff’s land. In so doing, the judge effectively gave the defendant a right of way to his house over the plaintiff’s land, against the plaintiff’s will, in return for a capital payment from the defendant to the plaintiff: see pp 286-287.

112 At pp 282-283, Sir Thomas Bingham MR (with whom Kennedy LJ agreed), specifically tested the trial judge's decision to award damages by reference to A L Smith LJ's four tests, and emphasised that 'the test is one of oppression, and the court should not slide into application of a general balance of convenience test'. He held that the judge had rightly concluded that the four tests were satisfied.

113 Millett LJ said, at p 287, that 'A L Smith LJ's checklist has stood the test of time', but emphasised that 'it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction'. As he immediately went on to emphasise on the next page, the decision whether or not to award damages instead of an injunction is a discretion. Accordingly, he said, the cases where judges have awarded or refused to award damages can be no more than 'illustrations of circumstances in which particular judges have exercised their discretion'. He also suggested that 'The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled?' He then went on to refer to the significance of the defendant's state of mind, including openness, good faith, and understanding."

73. At [120-121], Lord Neuberger said:

"120 The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in *Regan and Watson*. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in *Jaggard* [1995] 1 WLR 269, 288 where he said:

'Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.'

121 Having approved that statement, it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. I would accept that the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not."

74. Lord Neuberger then went on to say at [123]:

“123 Where does that leave A L Smith LJ’s four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as ‘to be a fetter on the exercise of the court’s discretion’. Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.”

75. At [161], Lord Sumption criticised the decision in *Shelfer* as being out of date and commented:

“There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission. However, at this stage, in the absence of argument on these points, I can do no more than identify them as calling for consideration in a case in which they arise.”

76. Mr Woodhead therefore says I should follow the approach in *Jaggard*, as approved in *Lawrence*. He criticised the other cases cited by Ms Seitler as relying on the approach in *Patel*, which was that an injunction should follow as of right.
77. I do not accept Mr Woodhead’s criticism of *Patel*. He says that the cases cited by Ms Seitler rely too much on *Patel*, and do not mention *Jaggard* or *Lawrence*, but I think that is understandable. The protestors cases are obvious examples where it is plain that damages would not be an adequate remedy, for example. In my judgment, the starting point is (as has been accepted in all of the recent authorities cited to me) that as in *Patel*, where there is a trespass, there should be an injunction, but that does not mean that in an appropriate case damages might not be awarded.
78. In my view, the position is in fact relatively straightforward. The right approach in my judgment, based on the authorities, is to look at all of the factors at play in the particular circumstances of the case, and to give them each appropriate weight in order to exercise the unfettered discretion which is afforded to the court, as emphasised in *Lawrence*.
79. Both sides have identified a number of issues which each says may or may not have a bearing on the exercise of my discretion. In my view, the issues are these (the first two are, I would suggest, the most important):
- (1) Whether the grant of an injunction, rather than an award of damages, would be oppressive. This will include looking at the easements themselves, the purposes behind the easements, and what the Defendants knew and understood when they bought Birch Mead.
 - (2) Whether the refusal of an injunction, and an award of damages in lieu, would cause harm to either side. This breaks down into two main categories. First, the inconvenience during the construction period, which may involve considering other developments which historically have taken place on the estate, and whether

the development will cause damage. Secondly, whether this would give the green light to others on the estate to carry out similar developments in the knowledge that they can buy their way out of the easements.

- (3) The fact that planning permission has been obtained by Mr & Mrs McGuinness.
- (4) There are also a number of other more minor factors such as whether Mr & Mrs McGuinness have been ostracised, the motive behind the works, and the conduct of the parties.

(2) *The evidence*

80. I heard evidence from six witnesses for ROML.
81. Ms Ewa Witkowski lives at Eavescote, which is the house next to Birch Mead, having moved to the Ridgeway estate in 2005. In her witness statement, she described how she had been attracted to the estate “as it is a beautiful hidden away secluded gem ... I was absolutely smitten by its ‘fairy land’ qualities of being bounded by hedges and green verges punctuated all along the drive with tall slender white barked weeping silver birches.” She described how over the years she had been inconvenienced by construction work at various properties on the estate, principally Elwood Cottage (which is the other property next door to Eavescote) when that was knocked down and rebuilt between September 2021 and August 2022. She wrote and telephoned ROML board members complaining about the disruption those works had caused her, but she confirmed in cross-examination that nothing was done by the board as a result, even though she said she complained about the non-enforcement of the Contractors’ Guidelines. She was one of those who objected to the Birch Mead planning application, and the terms in which she did so (which she set out in her statement) show that Ms Witkowski values the “one plot, one house” policy. In cross-examination, Ms Witkowski said that whenever there was a building project on the estate, there was disruption. She also gave evidence about another issue, which is whether there is room for cars travelling in opposite directions to pass each other along the estate roads. I accept that there may well be occasions when the narrowness of the roads prevents this (for example, as Ms Witkowski said, when the dustbin van is collecting on Fridays), but I also find as a fact – having heard all of the evidence and seen dozens of photographs – that it is possible for cars to pass other cars, and even medium to large-ish size lorries and vans, by the passing place opposite Birch Mead. I accept Ms Witkowski’s evidence.
82. Mrs Fiona Garrett has lived at Tykes Cottage on the estate since she and her husband Mr Richard Garrett bought it in 2004. Mrs Garrett was a ROML board director from 2007 to 2018, and between 2008 and 2018 she was also company secretary. She left the board in 2018, and rejoined it in 2020. Mrs Garrett explained how a form of deed of covenant was introduced in about 1988, and a form of deed of easement in 2008.
83. The deed of easement came about because in 2008 Clare Cottage was up for sale, and the prospective purchasers wanted a deed of easement as their solicitors thought there may be some doubt about what rights the property had in relation to the roads.
84. Mrs Garrett instructed Mrs Anne Fowler, a solicitor specialising in this area at TWM Solicitors, and Mrs Fowler provided a note of her advice on 18 July 2008. Mrs Fowler

notes that the purchaser's solicitors did not think that the existing deed of covenant was sufficient; Mrs Garrett produced a copy of that deed of covenant in its draft form, and I note that it does not expressly give any rights over the roadways, as Mrs Fowler also observed.

85. Mrs Fowler recommended a deed of easement, and set out what the advantages would be:

“The owners of some private roads do find it useful to be able to deal with this problem by way of the grant of a deed of easement. This deed clearly sets out the extent of the rights of way enjoyed by a particular property and can include any obligations to contribute to maintenance. One advantage of doing this is that the rights of way can be limited, for example to use as a single private dwellinghouse, rather than relying upon the unknown extent of a right acquired by long usage. The Company may also be able to negotiate that in return for the deed of grant of the legal easement, the house owner enters into covenants, binding upon their title to the property, to make contributions towards the maintenance of the road rather than having to rely upon the current arrangements in the deed of covenant which are only binding on the person who has signed the deed of covenant.

The existing deed of covenant does not contain a right of way over the road. It merely contains a covenant by the Company to use its best endeavours to provide full and unrestricted vehicular and other rights of way over the road. Whilst this is almost as good as a right of way, it is of course only personal to the owner of the property who has signed the deed of covenant and does not pass to a future owner until they sign up a similar deed of covenant. A legal easement noted on the title to the property is clear and it will last for all time.”

86. Mrs Fowler also advised on the disadvantages of a deed of easement:

“You enquired whether the Company would be giving up any rights by entering into a deed of grant of a right of way and service easements over the road to a house owner. The Company is already bound by all existing rights of way and service easements that undoubtedly exist over the road. These do not need to be mentioned on the title to exist and can simply be claimed by the persons exercising the rights on the basis that they have done so for over 20 years. I assume that in fact all the houses acquired these rights before the Company purchased the roads. The Company effectively acknowledges the rights that the house owners have over the road in the existing deeds of covenant. It seems to me therefore that a deed of easement simply sets out more clearly the actual rights and obligations of the parties. It also imposes obligations upon the title to the house.”

87. Mrs Garrett explained how the board agreed, on 14 July 2008, to offer the purchasers of Clare Cottage a deed of easement. When there were later sales of properties on the estate, the new purchasers were offered the deed of easement as well. As Mrs Garrett said to Mrs Fowler in her email of 27 June 2008:

“I have said to my colleagues that I cannot see any reason for refusing to enter into a Deed of Grant with Clare Cottage and future purchasers of houses in the

Estate. I think if we can introduce the single dwelling restriction into the Deed of Grant then it should give us protection against multiple developments on some of the larger titles ...”

88. Mrs Garrett was also involved in drafting the Guidelines and she referred in her witness statement to the section about infill development.
89. Mrs Garrett then went on to describe her involvement in the sale of Birch Mead to Mr & Mrs McGuinness. At that time, Mrs Garrett was company secretary and she dealt with the pre-contract enquiries raised by the solicitors acting for the seller of Birch Mead, providing a pack of documents which included the Buying and Selling Guidelines, the deed of covenant, the deed of easement, and an extract from the Notes for ROML Houseowners and Residents. Mrs Garrett also forwarded an engrossed deed of easement and deed of covenant to the McGuinness’s solicitors and the sale completed on 28 June 2013.
90. Mrs Garrett did not speak to Mr McGuinness until he joined the ROML board in 2016. She described her relations with him as friendly.
91. Mrs Garrett said that she was aware that every time there were construction works on the estate, there were problems with the use of the roads. She said that often the roads can be blocked for more than half an hour, and that “this disruption can dominate discussion at board meetings or AGMs”.
92. Mrs Garrett was also one of those who objected to the plans to build two houses on the Birch Mead plot. She described how she held the “firm belief that, if two houses were built on Birch Mead, this would be out of character and start to undermine the amenities which ROML back in 1987/8 was established to preserve. I also felt (as I still do) that the McGuinness’s should adhere to the deed of easement which they signed”.
93. Mrs Garrett agreed, in cross-examination, that ROML’s documents do not mention that it is one of ROML’s purposes to preserve the character of the houses on the estate, and agreed that was because each house was privately owned, there was no common stylistic theme, and nearly if not all of them have at some point been extended or altered and some have been demolished and rebuilt.
94. Mrs Garrett was also taken to ROML’s Special Resolution of 15 November 2017, which stated:

“A Special Resolutions in respect of the Charging Structure:

The Company proposes to introduce the following charges, which will be applied to future Property Sales and to new Houseowners in the Estate, for the purposes of providing for the effective maintenance and repair of the Estate Roads and Services and to offset wear and tear arising from the Construction Works and/or Extension Works

Al. A Construction Contribution: in the case of the construction of a new or replacement house upon a Property in the Estate (‘Construction Works’) a Contribution equal to £30 (or such other amount as the Management Company may from time to time determine) per square metre subject to a minimum payment of £10,000 or such other minimum sum as the Management Company

may from time to time determine to be applied to future Property Sales and to new Houseowners in the Estate.

A2 An Extension Contribution: in the case of the construction of an Extension and / or the erection of a detached garage or garages for which planning permission is required ('Extension Works') a Contribution equal to £30 (or such other amount as the Management Company may from time to time determine) per square metre to be applied to future Property Sales and to new Houseowners in the Estate.

A4 A Deposit: in the case of Construction Works the sum of £10,000 or such other sum as the Management Company may from time to time determine, or an insurance policy benefiting the Management Company, in each case to be held against the cost of making good any specific and identifiable damage caused to the Estate Roads and Services or other properties on the Estate by the Works to be applied to future Property Sales and to new Houseowners in the Estate.”

95. Mrs Garrett was asked in particular about the wording at A1, “in the case of the construction of a new or replacement house upon a Property in the Estate”, and it was put to her that this covered the McGuinness’s if they were to build one replacement house. Mrs Garrett took the view that this wording did not cover building a second house on a single plot, and that the Resolution did not in any event apply to the McGuinness’s as it did not have retrospective effect.
96. Having referred to the Special Resolution, I should say at this point that it does not in my view cover second houses on a single plot. A “new or replacement house upon a Property” clearly means a build of a new house where there was no house before on a plot (for example, there was a single house called Pikes which straddled two plots; it was demolished and two new houses were built, one on each plot), or a house which replaced one which had been demolished. I see nothing here which covers a second house on a single plot; as indicated in its documentation, and as explained by Mrs Garrett, the ROML policy was and is “one plot, one house”.
97. Mrs Garrett accepted in cross-examination that the McGuinness’s had offered to indemnify ROML against any damage caused during the works, and that this offer, together with the contribution covered by the Special Resolution, would adequately compensate ROML. I am not sure Mrs Garrett was right about that, because the Special Resolution did not apply to Mr & Mrs McGuinness.
98. Mrs Garrett also agreed that ROML had not enforced any of the Contractors’ Guidelines, even though they could have done.
99. Mrs Garrett was an impressive witness, and I accept her evidence (with the one exception I have mentioned).
100. Mr Peter Barrand owns Cawsand Cottage, where he has lived with his wife since 2005. In his witness statement, he described himself as “very concerned about the plans to build two houses on Birch Mead and the disruption it will cause to us on the Estate in terms of substantial increases in traffic, parking and noise. We believe it will have a significant knock-on effect to our neighbours on Oakshade Road and pose a danger to pedestrians using Oakshade Road (which consists mainly of school children and their parents at school drop off and pick up times).”

101. Cawsand is the property opposite Eavescote (Ms Witkowski's house), and Eavescote has Elwood on one side and Birch Mead on the other. Mr Barrand talked about the works at Elwood during 2021-22 – he talked about noise, disruption, parking problems, issues when driving along the roads when there was construction traffic, and how contractors would park on the verges. He also talked about the refurbishment and extension works at Spinney Hatch in 2015-6 having caused similar problems with parking, and how deliveries during works at Phoenix Rising in 2022 caused blockages in the road. In 2014-5, Mr & Mrs Barrand carried out their own extension works at Cawsand Cottage, and he accepted that on occasion his builders and third party deliveries had blocked the roads. Mr Barrand set out his concerns about deliveries and building contractors at Birch Mead, were the project to go ahead, and he said it would cause “huge disruption” to anyone wanting to use the estate roads. He also was concerned about the noise and parking generally.
102. Mr Barrand came in for particular criticism from Mr Woodhead in cross-examination and in closing submissions. Indeed, Mr Woodhead pulled no punches and called Mr Barrand a hypocrite for having himself caused significant disruption and inconvenience during the works at Cawsand Cottage, and yet he was now objecting to the Birch Mead development. Mr Barrand agreed that his works had taken longer than expected, that his builders sometimes parked on the road and possibly on the verges, that deliveries sometimes happened before 8 am but he did not give notice (as the Contractors' Guidelines required). I thought this criticism slightly misplaced, because the theme of ROML's witnesses was that it was the two houses and excessive development they objected to, which they all thought was contrary to the “one house, one plot” policy and the deeds of easement which many properties had signed up to – and Mr Barrand himself made this clear, when he said exactly that. It is really the outcome which is more important to the residents because they could not object to the demolition and reconstruction of a single house despite the noise and inconvenience that would cause – although I am prepared to accept that a project such as that proposed by Mr & Mrs McGuinness is a more substantial one than that and would take longer than were it to be a single demolition and rebuild. I therefore accept Mr Barrand's evidence.
103. Mr Richard Garrett is Mrs Garrett's husband. His witness statement sets out the issues he has had with nuisance and inconvenience from building works on the estate, the worst of which he says was Elwood Cottage. He said that the proposed works at Birch Mead “will change the character of the Estate and open us up to further development. Birch Mead is on the corner of two stretches of The Ridgeway. Construction of two houses will inconvenience at least 31 Houseowners by obstructing the single lane road way with delivery and contractors' vehicles and I would think at least 10 Houseowners will be inconvenienced with noise, dirt and dust and the additional traffic, especially from heavy construction vehicles, will obviously put real and substantial strain on the old road surface.” Mr Garrett was cross-examined about whether two cars can or cannot pass each other on the roads; he said it was impossible outside Birch Mead, but in my view that was a bit of an overstatement. Apart from that, I accept Mr Garrett's evidence, in particular that past works, particularly at Elwood, resulted in what he said was “a pretty traumatic period”. I also accept his more general comments in relation to his objections to Birch Mead being that it is about integrating in the environment of a private road as representing his genuinely held views (which he candidly accepted might not be held by everyone).

104. Mr Alan Couzens and his wife have lived at Tamarisk since 2003. In his statement, he talked about congestion and blockages on the roads being a general problem which has “over recent years been exacerbated by construction works plant and vehicles due to several major refurbishment and rebuilds by residents and developers.” As with the other witnesses, he focussed principally on the works at Elwood, which caused numerous problems with access being blocked, construction traffic exceeding the speed limit on the estate, parking on the roundabout, and damage to the roundabout and to the verges. He also referred to 8 months of works at Fairings in 2016-7 which he said caused similar problems. He said that every development on the estate has caused broadly similar issues, and mentioned works at Westcroft for 6 months in 2021, Straddlestone for 5 months in 2012-13, Clare Cottage for 4 months in 2007, and Oakwood and Redwood (the two new properties on the two plots where Pikes had previously stood) for 12 months. He concluded his statement by saying: “My strong wish is to stop this inappropriate development to ensure the character of the road is maintained by adherence to the one house per plot agreement and to avoid further development disrupting my quiet enjoyment of my property.” Mr Woodhead criticised Mr Couzens for not having mentioned the works carried out by two of the other ROML witnesses, Mr Barrand and Mr Armistead. Mr Couzens did not think that a clique had formed against Mr & Mrs McGuinness. I do not think that Mr Couzens had deliberately failed to mention Mr Barrand and Mr Armistead for tactical reasons. I accept his evidence.
105. Finally, I heard from Mr Anthony Armistead. He and his wife moved into Ridgeway Cottage in late 1993. Mr Armistead was a director of ROML from 2000 until 2017. He said in his statement how he formed the view, once he was a director, “that there was clearly a need to standardise the titles to houses accessed from The Ridgeway, Ridgeway Close or Danes Close which were all within the Estate. In particular, it seemed that every title should specify a right of access to one house on its individual plot as well as to use the utilities.” When the property known as Belas Knapp was sold in 2001, and when Pikes was developed in 2006-7, there were one-off deeds granting rights of way along the roads and for services. The need to have a standardised deed came to the fore when Clare Cottage was being sold in 2008, and his evidence concurred with that of Mrs Garrett about how ROML took advice about a common form deed of easement. Mr Armistead explained how the intention was for there to be a standard arrangement for all future sales to achieve consistency. He said there was very little discussion about the “one plot, one house” policy as this was the assumption of every board member. Mr Armistead gave evidence about issues with nuisance and inconvenience, in particular the “significant” disruption during the development on the two plots where Pikes had stood. He also mentioned a number of other properties where works had caused similar inconvenience, namely Granta Cottage, Wood Rising, Stepping Stones, Lukenya, Rose Cottage, Staddlestone, Ridgeway Cottage, Tamarisk, and Fairings. He said that this was a problem that “can happen where overcrowding takes place when planners and architects have limited appreciation of the estate’s design and original character. Uncontrolled development would probably further compromise the character that residents value so much. This would very likely happen at Birch Mead.”
106. There was some cross-examination of Mr Armistead about the compensation payment made when Pikes was demolished, but he said he did not know what it was for specifically.

107. I thought the cross-examination about whether the ROML documents said anything expressly about protecting the estate as opposed to the roads was a little nit-picky. Mr Armistead accepted that if the Contractors' Guidelines were enforced, it would reduce the disruption during the Birch Mead works, when compared with Pikes. Again, in broad terms I accept Mr Armistead's evidence.
108. ROML also served a Civil Evidence Act 1995 Notice in respect of statements from six further witnesses, which I have read. Each of these statements variously refer to issues during construction works in the past, and how they have objected to the Birch Mead development, essentially for the same reasons as those who gave live evidence. I do not need to set out what was said in those six statements.
109. There were two witnesses for the Defendants.
110. First was Mr Simon Barnett. Mr Barnett is Mrs McGuinness's father. He said in cross-examination how he has had health issues all his life, but these had become more acute as he got older, and he had serious complications after surgery in 2012 and following heart problems a few years later. He also sustained injuries in an accident in October 2020. He now uses a stick when he walks, and also frequently uses a wheelchair. Mr Barnett used to work for His Majesty King Charles III, but is now retired. He said in his statement how he has now relocated from his house in France (which was no longer suitable for him due to his disabilities) to a flat in London with disabled access, which he rents, and how he and his wife want to move in to the second of the new houses on the Birch Mead plot to be close to Mr & Mrs McGuinness and their children. In cross-examination, Mr Barnett explained how he wanted to live next door to them, not in the same property. He said he had not explored the option of them all buying two houses near to or next to each other but not on the estate, or of buying another house on the estate, as that would not suit his objective of living next to his family in Birch Mead. I accept Mr Barnett's evidence.
111. Mr Terence McGuinness, the First Defendant, was the second witness for the Defendants. At the start of his evidence, he produced (without objection from Ms Seitler) some photographs which he had taken the evening before, which I am satisfied showed that it is possible for cars to get past another car parked on the road outside Birch Mead, although it may be a bit of a squeeze if the parked vehicle is a construction lorry or other large vehicle.
112. In his witness statement, Mr McGuinness had appeared to complain that he had signed the deed of easement, at the time of the purchase, in a bit of a rush but he was quick to accept when taken to it that the contemporaneous documentation showed that any delay in his seeing it was probably down to his conveyancing solicitors, and that in any event he had obtained advice about the deed, which he had read and understood was effective as granting a limited right of way which was legally binding.
113. He said that when they bought in 2013, it was not their intention to build a second house on the plot. What they did was to apply in 2014 for permission to extend Birch Mead, and eventually they obtained permission for a slightly revised development which they applied for in 2015 which was supported by many of the residents on the estate. However, their intentions changed in around 2019 because of Mr Barnett's failing health. In his statement, Mr McGuinness explained how he had a meeting with Mr Barrand, who was then chairman of the ROML board, to explain his plans, and how

he visited all his near neighbours to tell them about it; some of them objected but most did not at the time, although there was a ground swell of opposition once the planning process got underway. Eventually, planning permission was obtained following an initial refusal when an appeal was allowed in December 2020.

114. There was some evidence in Mr McGuinness's statement – and it was the subject of cross-examination – about how he and his wife had been ostracised by other residents, and about how much they had participated in social events on the estate in the past, but now in the light of this dispute they had been ignored. In my judgment, absolutely nothing turns on any of this. Feelings are undoubtedly running high amongst residents on the estate, and it would not be surprising if there was some bad feeling towards the McGuinness's. Whether or not that is misplaced is I believe not for me to say, as I do not think it has any impact on the decisions I need to make, so I do not make any findings in this regard.
115. Mr McGuinness was cross-examined about various other properties on the estate which might possibly be developed into two houses on single plots, and Mr McGuinness expressed his views about whether these were viable developments; he thought some were and some were not, depending on the size and location, which all seemed to me to be a sensible and realistic response.
116. It was put to Mr McGuinness that the plot at Birch Mead was not naturally suited to two properties; I accept his answer which was that he had obtained professional advice that it was.
117. He thought that the works would take 18 months, but would defer to the expert evidence in this case, and both experts think it would take 21 months.
118. Mr McGuinness said he would accept that there would be disruption and obstruction during the works, but that there were rules and he would follow them. He was referring here to two things. First, Condition 7 of the planning permission states that no development shall commence until a Construction Transport Management Plan is in place and approved by the planning authority, which must include at Condition 7(f) "before and after construction condition surveys of the highway and a commitment to fund the repair of any damage caused". Secondly, he was referring to ROML's Contractors' Guidelines.
119. I thought Mr McGuinness was a very genuine, honest and open witness. He said, and I accept, that he had not appreciated the level of objection that there would be to his plans for Birch Mead (some 82% of the residents have voted against it and to take this present action). I see no reason not to accept his evidence.

The relevant factors in the light of the evidence

120. Having identified the factors relevant to the exercise of my discretion, I intend to deal with them as follows.

Will the development cause damage?

121. In my view, the damage which might be caused by the development would be somewhat although not entirely ameliorated by planning Condition 7(f), the Contractors' Guidelines, and the Defendants' promise to make good any damage.
122. I would not go as far as to endorse Mr Woodhead's submission that ROML's position is hypocritical, having failed to enforce their own Guidelines in relation to other works, but it would clearly help minimise damage if the Guidelines were actually enforced (and it would probably have served to lessen some of the past issues in relation to other developments if they had been).

Will there be disruption, obstruction and inconvenience?

123. Inevitably there will. Every one of ROML's witnesses says there has been in the past on all of the other projects, and Mr McGuinness accepts that there will be. I am not convinced that the disruption would be quite as bad as the residents anticipate it would be, but I accept that it would be more than a minor inconvenience.
124. I also accept that the disruption and so on would be of a more extensive nature than in relation to the other projects, particularly the recent ones, and this is because (a) the development is for 2 houses, (b) it will take 21 months at least, and (c) the position of Birch Mead at the turning area means that problems with access might be more acute.
125. I have also concluded that even though Mr & Mrs McGuinness have every intention of minimising any problems and of complying with the relevant Guidelines, things can go wrong, and I think Ms Seitler is right when she says that there is a difference between what may be agreed or required in writing and the reality on the ground. I also take into account that ROML does not have unlimited resources, and is run by volunteers, but I think that is a less weighty point than some of the others.

Will damages rather than an injunction give the "green light" to other developments on the estate?

126. For ROML, Ms Seitler said that if an injunction is not granted, it would undermine the entire system of deeds of easements which ROML has put in place, and other owners will be encouraged to infill (over-develop) single plots. In particular, Willow Cottage (a small property on a very large plot) has obtained planning permission for the demolition of the existing house and the building of 5 new houses on the single plot. The owners of Willow Cottage supported Mr & Mrs McGuinness at the 2022 AGM (and Mr McGuinness supported the Willow Cottage proposal to buy off their restrictions for £300,000 at the 2016 AGM, a proposal which was not accepted). There are a number of other plots which might be large enough for two houses, possibly up to 15 or so. If an injunction is refused, it is said this will encourage others to think they can buy off the easements and that in practical terms they will not be prevented from infilling.
127. Mr Woodhead says that there is no evidence that the owners of Willow Cottage are waiting for the outcome of these proceedings, and in any event that property is subject to a covenant as well as an easement. Furthermore, as one can see when looking at the

expert evidence in this case, the Birch Mead development is financially unviable, so no-one else will want to do something similar on the estate.

128. In my judgment Ms Seitler is right about this. The concern that the Willow Cottage development may turn on the outcome of this case is genuine. I do not accept Mr Woodhead's submission that ROML has no interest in any of this because they are concerned with roads not houses, for the reasons I have referred to earlier in this judgment. I also agree that the refusal of an injunction would undermine the system of easements which has been developing on the estate over the years and which ROML intends to expand whenever there is a future sale. I also think that damages, rather than an injunction, will seriously and adversely impact a significant aspect of ROML's *raison d'être* and the strength of views held by the residents (not just those who have given evidence in this case) shows how highly valued the "one plot, one house" principle is.
129. There is a cross-over between the "green light" point and the next issue.

Would the grant of an injunction, rather than an award of damages, be oppressive?

130. On this point, I entirely agree with Ms Seitler. Mr & Mrs McGuinness entered into the deed of easement knowing what it said, understanding it placed a restriction on their use of their property, and having been advised about it and that it was legally binding on them, just 10 years ago. When Mr McGuinness was on the ROML board, he was well aware how opposed people were to infilling. Mr & Mrs McGuinness received the ROML documentation before their purchase. They therefore made their planning application with their eyes open, as it were, to the rule against infilling and the binding nature of the easements. Whilst it is perhaps a matter of personal opinion, I can well accept that it would be possible to provide suitable accommodation for Mr & Mrs Barnett by extending Birch Mead so that any additional area had its own entrance. I recognise that there was no direct evidence about this, but it seems to me to be a matter of common sense to conclude that building two houses on the plot cannot be the one and only way to deal with the family's situation. Like Ms Seitler, I also detected what she describes as "stubborn reluctance" to explore any alternatives. I also reject the allegations of hypocrisy, because there is a real difference between an extension to an existing house, and two new houses on one plot.
131. I agree with Mr Woodhead that Mr & Mrs McGuinness have acted properly in that they discussed their plans with ROML and their neighbours at the outset, and they did not attempt to "steal a march" by starting the development. However, that does not mean that the grant of an injunction would be oppressive when set against the other matters I have mentioned.

Other factors

132. In my view, the fact that planning permission has been granted is of no real weight here. I note that although Lord Sumption thought it was (in *Lawrence* at [161]), Lord Mance was not persuaded (*Lawrence* at [168]). It seems to me that Lord Mance was right when saying that this would be "putting the significance of planning permission and public benefit too high, in the context of the remedy to be afforded for a private nuisance."

133. I do not think that the fact that permission was only obtained on appeal is of any significance. Nor do I think that anything that was said in the context of that appeal and the grant of permission is of relevance to the decision I have to make. I readily accept that any planning application is to be dealt with on its merits, and I do not read the appeal decision as giving *carte blanche* to other similar developments any more than it gives a definitive answer to any of the issues I have to weigh up.
134. I do not place any weight on whether the Defendants have been ostracised or not (as I have already said, I decline to make any findings in that regard – as a factor here, it seems to me to be completely neutral and it can be ignored).
135. I think it is also a relevant factor that although the intention is presently to house Mr & Mrs Barnett in the new smaller property, there will inevitably come a time when that property is sold, perhaps to a family. I am prepared to accept the expert evidence that an additional property will not cause a huge increase in traffic on the estate, nor will it result in any significant increased call on the services, but that might change when the property is sold at some time in the future.

Conclusion on remedy

136. I have no doubt that applying the law and in the exercise of my discretion an injunction should be granted in the terms sought by ROML.
137. Ms Seitler is in my judgment correct in submitting that it is the process of building the two properties which would be an excessive user, as well as the actual use of the two properties, because the rights under the easements are limited to the use of the plot for a single dwelling house.
138. Balancing all the factors, it seems to me that an injunction would not be oppressive, and damages would not be an adequate remedy. The whole basis of the scheme of easements and deeds which over the years have been put in place, and which the McGuinness's knew all about and accepted, would be entirely undermined if there was simply an award of damages. I am of course conscious of the fact that in *Jagger*, as summarised by Lord Neuberger in *Lawrence* at [111], damages effectively bought off the trespass. In my judgment, in the present case, damages would not adequately compensate ROML for what would be a clear contravention of the "one plot, one house" policy it has so strenuously attempted to impose and enforce. I also agree with Ms Seitler's "green light" submissions, which I have summarised above.
139. In this judgment I have dealt with a lot of legal principles, and have summarised the evidence at some length, but in the end I have not found the conclusion I have reached to have been a difficult one. I have no doubt that this is not one of those unusual cases where an injunction should not be granted, and having reached that view, I also have no doubt that I should not exercise my discretion and award damages instead. I will also make the declaration sought by ROML.
140. I was particularly struck by the genuinely held views of the residents, supported by ROML itself, that the "one plot, one house" principle is of great importance to them.
141. In my judgment, the McGuinness's bought Birch Mead knowing that there were restrictions in place (and, if properly advised, they would have been told that they

could not apply under section 84 to remove them), and they should be held to their bargain.

Damages

142. If I am wrong about that, and damages ought to be awarded in lieu of an injunction, what would be the right level of damages?
143. Each side called expert evidence. Each expert took a different approach to damages. In my view, neither approach was soundly based.
144. Mr Christopher Smart FRICS was called by ROML. He carried out a valuation on the basis of his calculation of the uplift in value that would be derived from the release of the restriction contained in the easement. He noted that the development was economically unviable, and rejected what might be described as the conventional “negotiating damages” approach as resulting in a nil sum, which would be unfair to ROML. He therefore assessed damages on the basis of an alternative economically viable development of the additional house on the plot. He set out his figures in a spreadsheet, which showed that the profit would be £226,000, and expressed the view that the right figure for damages would be 35% thereof, thus £80,000.
145. Mr Ruairaidh Adams-Cairns BSc (EstMan), FRICS gave evidence for the Defendants. His was an entirely different approach. He took the view that there would be a (notional) negotiation between the parties based on the figures set out in the Special Resolution, and concluded that the right figure for damages was £10,500.
146. In my respectful view, neither expert took the right approach. I accept Mr Woodhead’s criticisms of Mr Smart’s figures, which Mr Woodhead labelled in closing submissions as “appalling”, and many of which he demonstrated in cross-examination were wrong, or based on incorrect assumptions. Mr Woodhead suggested that if I was going to approach damages on the basis of Mr Smart’s evidence, I should adopt some alternative and perhaps more realistic figures which he put forward in his closing submissions, and sent me a revised spreadsheet after the hearing. I cannot accept that an approach based on a hypothetical development and sale which is never going to take place is the right one. I also think that Mr Adams-Cairns’s approach was unrealistic, because it did not take into account what would actually happen in any negotiation and was based principally upon what ROML would charge in a wholly different situation from the present.
147. I do not want to over-criticise both experts, who were doing their best to assist. Since I have concluded that I will not be making an award of damages, I do not intend to spend the time on the expert evidence which I would have done had I reached a different conclusion. To do so now would be to lengthen a judgment which is already long enough.
148. In my view, the position is clear. The principles are those set out in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 as explained in *Pell Frischmann Ltd v Bow Valley Iran Ltd* [2009] UKPC 45 and in *Morris-Garner v One Step (Support) Limited* [2019] AC 649 (see in particular the summary at [95] in the speech of Lord Reed and the observation that “It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent

for what is lost by the refusal of the injunction”), namely to award the sum of money that might reasonably have been demanded as a quid pro quo for permitting the breach, or releasing a party from the effect, of the easements, known as “negotiating damages”. This is a very much briefer summary of the law in this area than I might otherwise have given; as the authorities show, this is a fairly complex area albeit one with which the courts deal with regularly.

149. In the present case, ROML would start on the basis that £10,000 per new property was the bare minimum, as per the Special Resolution, but that here the McGuinness’s were proposing to do more than building. They needed a release from the easements, and in the light of ROML’s infill policy that would come with a substantial cost, because this would be the first time the situation had arisen, and ROML would want to set down a marker for the future. I also think that there would have been an attraction to Mr & Mrs McGuinness to overpay, in order to achieve the project which they genuinely wanted to see through, and a clear interest on the part of ROML to extract as much as possible to deter others from thinking that they could do the same “on the cheap”. Any figure has to give proper and realistic recognition to the “green light” effect, the genuine and strongly held concerns of residents about the “one plot, one house” policy as well as the disruption and inconvenience over a long period of almost 2 years, as well as the possibility that if negotiations did not result in an agreement, the Defendants might (as indeed they have) lose an injunction claim.
150. In my judgment, the right figure for damages, had I been persuaded to award them, and having regard to the figures put forward by both experts as well as considering the various issues which would have been raised in a negotiation, would have been £60,000.

Conclusion

151. Counsel are invited to draw up an order which reflects my conclusions. If it is not possible to agree everything, I will decide whether we need a further hearing, or whether we can deal with matters by written submissions.
152. Finally, I want to pay tribute to both Ms Seitler and Mr Woodhead for the excellent and helpful way in which they marshalled all of the issues and presented their respective cases. I have not dealt with every single point which was raised, nor with all of the many authorities which were cited to me, but I have carefully read and re-read all the written submissions and my notes of the oral submissions and I have taken into account all of the points made on both sides.

(End of judgment)