JUDGMENT : THE HONOURABLE MR JUSTICE PATTEN : Ch.Div. 7th October 2004.

Introduction

1. This is the culmination of a long and increasingly bitter dispute between neighbours. The Claimant, Mr George Perlman, is a US attorney specialising in tax and trust matters, who divides his time between Europe and the USA. He owns and lives at 6A Elm Tree Road, St Johns Wood with his wife Naomi and their two children. He first occupied 6A as a tenant in 1990, but purchased the house in 1994. It is now worth almost £4m. The Defendants, Mr Paul Rayden and Mrs Claire Rayden, own and live at No 6 Elm Tree Road with their two children. Mr Rayden is the director of a property management company. They purchased this house in 2001. It is now worth about £3m.

2. Both houses form part of a small development of three houses (6, 6A and 8A) which was carried out in the mid 1980s on land formerly owned by the Trustees of Middlesex County Cricket Club. The site backs on to Lords Cricket Ground. Prior to the development it consisted of No 6 and its garden (a house which was built in the 1950s) and accommodation used by ground staff. The site (with other adjoining land) was sold to a development company (Stimbrey Investments Limited) in September 1978. This company sold on the land in 1979 to Satyrus Limited, which then proceeded to carry out the development. This involved alterations to No 6 and the construction of two new houses (6A and 8A) on what had previously been part of the garden of No 6 and a roadway or drive providing access to the cricket ground between Nos 6 and 8 Elm Tree Road.

3. The result of the development was to create what is best described as a cul-de-sac leading off Elm Tree Road. This roadway provides access to all three houses and their garages. It has been referred to throughout the trial as "*the roadway*" and I shall adopt that description in this judgment. The roadway runs, for most of its length, along the front elevation of No 6, which contains the front and garage door of that property. At the end of the roadway furthest away from Elm Tree Road is No 8A, which has its own integral garage and front door, where the roadway terminates. To the right as one faces No 8A is No 6A, in front of which is a short additional length of paved roadway running at right angles to the roadway and leading up to the front and garage door of No 6A. This section of roadway has been referred to as the driveway (to distinguish it from the roadway) and I shall do the same.

4. Both the roadway and the driveway form part of the title to No 6A. The owners of 6 and 8a have rights of way and rights of entry for the purpose of carrying out repairs to their own properties over the roadway. The owner of 6A also has a right of entry over No 6 in order to carry out repairs to his property.

5. Mr and Mrs Rayden completed the purchase of No 6 on 28th July 2001 for the sum of £2.35m. They were already acquainted and on friendly terms with Mr and Mrs Perlman. They had previously lived at a house in Abbey Gardens, London NW8, which was too small for them, and had not been able to obtain planning permission to extend that property. One of the attractions of 6 Elm Tree Road was that it had the benefit of a planning permission to extend the existing accommodation. This had been obtained by the vendor of No 6 (Mrs Sacks) in 1991 and had been extended in duration on 6th November 1996. It permitted extensions to No 6 on the garden side at ground and first floor level and the construction of a portico over the front door, which was situated close to the garage door of No 6 near the Elm Tree Road end of the roadway. This planning permission had not been implemented by Dr and Mrs Sacks, but they had constructed a metal-framed conservatory in the garden of No 6 at ground floor level, leading off from the central bay of the house. One of the issues in this case is how far down the garden towards the boundary fence with No 4 Elm Tree Road this conservatory extended, and in particular what sort of gap there was between the end of the conservatory and the boundary fence. This is relevant to the works involving a new extension to No 6 which Mr and Mrs Rayden carried out.

6. It seems to be common ground that on 5th October 2001 Mr and Mrs Rayden had dinner with Mr and Mrs Perlman and told them something of their plans to rearrange No 6 and in particular the ground floor of that property. I shall come to the evidence in more detail later, but Mr Perlman accepted that he was told that this was likely to include the construction of some kind of family-room extension at the rear of the property and the moving of the front door. Mrs Perlman said that there was no discussion of moving the front door, but I do not accept that evidence. The Raydens had instructed an architect to prepare a design and plans of the proposed extension. This was Mr Kevin Izod. He prepared design sketches and later

measured drawings which were used by Fibbens Fox Associates, a firm of planning consultants instructed by the Raydens, as the basis of a planning application made to Westminster City Council on 5th December 2001. This sought permission for various works of extension and alteration to No 6, including the repositioning of the front door to a central location in the front elevation of the house; the alteration and repositioning of windows at ground and first floor level in that elevation; the extension of the house at first floor level over part of what was then a single-storey extension of the house, including the front door and garage; and the construction of a new ground-floor family-room with a pitched glazed roof in the section of the garden of No 6 closest to its boundary with No 6A.

7. These works had a number of consequences for the Perlmans. The first-floor extension involved altering and extending the roof at the Elm Tree Road end of the house, to accommodate what is now a new bedroom. This necessitated additional guttering, with an overhang above the roadway. The new front door and windows would not only change the appearance of the front of No 6, but would obviously necessitate a new point of pedestrian access to the house. A particular complication was that the section of the roadway in front of the new entrance was at that time a planted area, laid out in accordance with the scheme approved in connection with the planning permission for the original development in the 1980s. The new entrance would involve access over this area. Most obvious, in visual terms, was the effect of the family-room extension. Until then the boundary between the garden of No 6 and the driveway had been maintained by a brick wall (belonging to No 6A) on top of which Mrs Sacks had been allowed to attach a section of painted trellis. Under the Raydens' plans, this would be replaced by a permanent structure in the garden of No 6, close to the boundary. Instead of a trellis, the Perlmans would be faced with a solid wall several feet higher than their existing boundary wall.

8. Planning permission was granted in February 2002. It included permission for the family-room and first floor extension, but the planning authority took the view that the alterations to the windows and doors in the front elevation constituted permitted development under the General Development Order, because they were within the curtilage of an existing building and were to be carried out on land belonging to the owners of No 6. This was in fact wrong, because the Raydens did not, of course, own the roadway, and this error on the part of the planning authority seems to have stemmed from the location plan submitted by Fibbens Fox, which appears on one view to indicate that the roadway and No 6 were in common ownership. One of the issues I have been asked to resolve is whether the plan, coupled with the terms of the planning application, was inaccurate in this regard and, if so, whether this was part of some deliberate attempt by the Raydens to mislead the planning authorities.

9. The other aspect of the planning permission which I need to mention by way of introduction is the length of the family-room extension. Mr Izod's evidence (confirmed by measurements he produced from the relevant plans) is that he based his drawings of the ground floor dimensions on the plans produced by Gebler Tooth Partridge ("GTP"), the firm of architects who prepared the plans used to obtain the earlier planning permission for Dr and Mrs Sacks. From these plans he measured off the size and position of the old conservatory (5.1 metres in length) and drew the new family-room so that it extended only to the same length from the house. Planning permission was granted in February 2002 for a family-room extension of this size. Mr Izod did not confirm the size of the existing conservatory, as built, by taking measurements on site, but following the grant of planning permission he prepared a further set of drawings for use by the contractors who were to carry out the work. These show the proposed internal layout, but also include the position of the boundary fence between No 6 and No 4. There is a 1.6 metre gap between the end of the family-room for which planning permission was granted and that boundary fence. When the Raydens were shown these plans, a decision was made to extend the family-room to the full length of the garden. Mr Rayden says that this was what was always intended and that he had instructed Mr Izod to make the new extension the same length as the existing conservatory, in the belief that the existing conservatory extended most of the length of the garden. I shall come to this evidence later in this judgment. It is, however, beyond dispute that the plans were then altered and the builders were instructed to carry out works for which no planning permission existed. Not only was the family-room, as built, too long, but it also transpired that in order to accommodate air-conditioning equipment, it had been built too high.

10. The works to No 6 began in April 2002. In due course they involved blocking up the existing front door, creating a temporary front door, breaking open the new permanent front door and erecting scaffolding to carry out the alterations for the first floor extension and the new windows. Skips were also placed on the roadway adjacent to the scaffolding. The interior of No 6 was progressively gutted, so that by the summer of 2002 the Raydens were forced to move out. At the same time the family-room extension was erected and by the end of July 2002 the flank wall of that extension alongside the Perlmans' boundary wall was almost complete. It was then that the problems began. Up to September 2002 the Perlmans (as I shall come to later) appear to have accepted what the Raydens were doing, in the sense that they did not positively object to it. There were occasions on which they asked the Raydens not to carry out noisy work because of social functions which were taking place at their home, and in September the Raydens, at the request of the Perlmans, moved a skip out of the roadway over the Jewish holidays. But later in September, when Mrs Perlman returned from holiday, she told the Raydens that she was unhappy about the height of the extension, where it abutted the boundary wall alongside the driveway. What could, and certainly should, have been a resolvable problem rapidly escalated into a major confrontation when the Raydens' contractors began to extend the roof of No 6 at second floor level, overlooking the roadway, in order to create a bedroom in the eaves with a new dormer window. Mr Perlman said that this was in flat contradiction of a promise given earlier by the Raydens that they would not "build up" at second floor level. It was exacerbated by the fact that in March 2002, shortly before the building works commenced, the Raydens, without first consulting the Perlmans, decided to make these additional alterations and applied for and obtained a further planning permission for that purpose. Mr Rayden said in evidence that he regarded his failure to consult the Perlmans on this as his one big mistake. Mr Perlman said that he felt he had been improperly dealt with and was not prepared to tolerate what he had been prepared to tolerate up until that point.

11. That sense of injustice was added to when Mr Perlman also discovered that several layers of bricks had been added to his boundary wall alongside the Raydens' new extension, in order to conceal a drip-tray, and that the new flank wall of the extension had been tied in to his property. Mr Rayden denies responsibility for this, which he says was due to his contractors acting without instructions, but as a result relations between the Perlmans and the Raydens broke down completely. The Perlmans instructed solicitors, who required the Raydens to remove the scaffolding and skips from the roadway, not to cause further damage to the planted area, to use only the old front door for access and not to park on the roadway. The Raydens complied with most of these requests and thereafter used only a temporary scaffolding, ceased to park and kept their skips on the public highway. The Perlmans also objected to applications made by the Raydens for planning permission to allow them to retain the family-room extension, as built.

12. On 13th December 2002 Mr Perlman commenced the first of the two actions which I have tried, seeking declarations, injunctions and damages for trespass in respect of the works carried out to the front of No 6. Mr Perlman alleges that the Raydens had no legal right to park or to enter upon or use the roadway to carry out their building works, nor any right to create and use a new front door. The extension of the eaves and gutters at first floor level, which overhangs the roadway, is also objected to. Mr Perlman also complained to Westminster City Council that the February 2002 planning permission had been obtained on the basis of a false declaration by the Raydens' planning consultants as to the ownership of the roadway and sought the prosecution of the Raydens and their professional advisers. Westminster subsequently refused to take such proceedings and confirmed that the planning permission for the works to the front elevation of No 6 had been validly granted.

13. The attempts, however, by the Raydens to legitimise the construction of the new family-room extension were unsuccessful. Westminster refused permission for a room of those dimensions and the extension has now been demolished. In October 2003 the Perlmans' solicitors wrote to insist that a gap of at least 1.5 metres should be left between the boundary of 6A and the flank wall of any family-room extension in the garden of No 6, so as to enable the Perlmans to exercise their rights of access for purposes of repairing No 6A. A second action was then commenced by Mr Perlman, seeking declaratory and injunctive relief to enforce the right of access by requiring the Raydens to leave whatever gap between the properties the Court considers appropriate for repairing purposes. Damages are also sought for damage to an adjoining

maid's room in No 6A, which has been affected by damp as a result of the Raydens' construction of the new extension. The extension is now admitted to have been the cause of the damp, but part of the damages claimed (based on loss of use of the room) is resisted.

14. All attempts to settle this dispute have failed. There have been two unsuccessful attempts at mediation: the first an informal one involving Lord Grabiner QC, who is known to both sides; the second a formal mediation before Mr John Martin QC. There has been a trial lasting twelve days, after which the parties have submitted their differences to be resolved by the Court. Mr Perlman's claim is that the Raydens had no legal right as part of their title to carry out the works they did by using the roadway or to create a new point of access through the new front door. He says that his rights of access to No 6 for the purpose of repairs have also been obstructed. Apart from injunctions and declaratory relief, he seeks damages calculated on the wayleave principle, together with aggravated damages based on what he says was a flagrant and deliberate invasion of his rights by Mr and Mrs Rayden. A claim for exemplary damages was pleaded, but is not now pursued. The Raydens say that on the true construction of the grant contained in their title, they have a right to open up the new front door and to use it. They accept that they were not granted rights to use the roadway in order to rebuild the house, but they say that Mr Perlman consented to or acquiesced in this use and is now estopped from asserting any legal rights he would otherwise have in respect of what they have done. Liability in the first action is therefore denied. In the second action they admit liability for the cost of remedying the damp and the need for some gap to be left between No 6A and any new extension which they are subsequently permitted to build. But they say that the appropriate gap should be no more than 0.7 metres. I made it clear to the parties at the outset of the trial that I had no jurisdiction to determine the issues between them other than in strict accordance with the law. The time for mediation and perhaps a more conciliatory approach to the resolution of these difficulties has passed. Whether Mr Perlman and Mr and Mrs Rayden will be better served by resorting to their legal rights than by an amicable resolution of their differences is not for me to judge.

The Rights Granted

The Relevant Transfers

15. The first issue to resolve is the extent of the rights granted to the parties as part of their respective titles to No 6 and No 6A. Some of this is common ground, but there are serious issues as to whether the Raydens have a right of way which entitles them to open up and, more particularly, gain entry to their property via the new front door, and (if so) whether this includes the right to construct a step. The other main dispute concerns Mr Perlman's right of entry over No 6 for the purpose of repairing No 6A. How wide a gap should there be between the wall of No 6A and any new extension at the rear of No 6?

16. The relevant transfer in relation to No 6 is that of 20th February 1986 ("the February Transfer") from Satyrus Limited to Megreve Associates Inc, which, as I understand it, was a company used by Dr and Mrs Sacks for the purpose of the transaction. At this time the development of Nos 6, 6A and 8A was complete and this was the first transfer by the common vendor, made at a time when Satyrus still retained ownership of Nos 6A, 8A and the roadway. As already indicated, the land transferred comprised only the house and garden at No 6. The Land Registry plan shows the front elevation of the property as its northern boundary and this is confirmed by a more detailed plan which distinguishes the property transferred from the roadway. The February Transfer sets out a number of covenants by the transferee for the benefit of the land retained by Satyrus. These include a covenant by the transferee during its ownership of No 6 to pay to the transferor and its successors in title, on demand, a one-third part of:

> *"(a) the cost of keeping the private roadway (hereinafter called "the Roadway") edged in brown on the plan bound up within in repair*
>
> *(b) the cost of supplying electricity to the meter and equipment for the control of the electric gate situated between Elm Tree Road and the Roadway and the entry phone system attached thereto*
>
> *(c) the cost of maintenance servicing and repair of the said meter and equipment for the control of the electric gate and entry phone*
>
> *(d) the cost of the renewal or replacement when necessary of the said meter and equipment for the control of the electric gate and entry phone"*

This is followed by a further covenant, also with the transferor and its successors in title: *"Not to park or allow there to be parked any vehicle whatsoever in the Roadway or obstruct or allow the Roadway to be obstructed in any way whatsoever"*

17. The February Transfer then sets out the rights reserved to Satyrus for the benefit of its retained land. These include the right of the owner of No 6A to enter No 6 for the purpose of repairing his property and the reservation of the right of an owner of 6A to alter his property during a period of 80 years from the date of transfer. Both are important to the issues in this action and they are in these terms:

"(a) To the owners and occupiers for the time being of the adjoining properties known as Nos 4 and 6a Elm Tree Road and the Transferor and its successors in title for the benefit of the remainder of the land comprised in the above Title Number retained by the Transferor or any part or parts thereof the right in fee simple after giving reasonable written notice to the Transferee and its successors in title except in the case of emergency to enter upon the property hereby transferred or any part thereof for the purpose or repairing or maintaining the said adjoining and neighbouring property or any part thereof the person exercising such right avoiding any unnecessary damage and making good at its own expense forthwith any damage so caused.

(b) To the Transferor and its successors in title for the benefit of the remainder of the land comprised in the above Title No. retained by the Transferor or any part or parts thereof of

(i) the full and unrestricted right at any time hereafter and from time to time to erect or permit to be erected any buildings or other erection and to alter any building or other erection now standing or hereafter within a period commencing with the date hereof and continuing for 80 years and such period shall be the perpetuity period applicable hereto (hereinafter called "the Specified Period") to be erected on any part of the land now belonging to the Transferor adjoining the property hereby transferred in such manner as to obstruct or interfere with the passage and access of light and air to any building which is or may during the Specified Period be erected upon any part of the land hereby transferred and so that all privileges of light and air now or hereafter to be enjoyed over any part of the Transferor's said adjoining land by or in respect of the property hereby transferred shall be deemed to be so enjoyed by the licence or consent of the Transferor and not as of right"

18. Finally, the February Transfer sets out the rights granted to the owners of No 6 over the retained land. These include a right of access over No 6A and other retained land in order to carry out repairs to No 6; the right to enter on the roadway in order to connect the property to the drains and sewers under it; the right of way and a right of eavesdrop for the garage door, the first floor overhang and the overhanging eaves and gutters marked on the enclosed plan. Of these the contentious ones are the right of entry for repairs and the right of way, which were granted in these terms:

"(A) the right in fee simple for the Transferee and its successors in title and all persons authorised by them (in common with the Transferor and all other persons entitled thereto) after giving reasonable notice to the Transferee and its successors in title except in the case of emergency to enter upon the properties known as 4 and 6a Elm Tree Road and the neighbouring or adjoining property comprised in the said Title or any part thereof for the purpose only of inspecting carrying out repairs and maintenance to the property hereby transferred and all parts thereof and all services thereto from time to time the person exercising such right avoiding any unnecessary damage and making good at its own expense forthwith any damage caused

…….

(C) the right in fee simple for the Transferee and its successors in title and all persons authorised by them in common with all other persons who may hereafter have the like right at all times and for all purposes connected with the existing use of the property hereby transferred as a private dwellinghouse:

(i) with or without motor vehicles to go pass and repass along the said Roadway but subject to and conditional upon paying forthwith upon demand a one-third part of the costs of keeping the same in repair; and

(ii) to go pass and repass through the said electric gate and to use the entry-phone system attached thereto and to enjoy all security afforded to the property hereby transferred but subject to and conditional upon paying forthwith upon demand a one-third part of the costs of operating the same (including the cost of supplying electricity thereto) the costs of maintenance servicing and repair thereto and any renewal or replacement thereof

Such rights being conditional upon the compliance by the Transferee and its successors in title and all persons authorised by them with their covenant (herein contained) not to park or allow there to be parked any vehicle whatsoever on the Roadway or obstruct or allow the Roadway to be obstructed in any way whatsoever".

19. The ability to exercise any of these rights is made subject to a proviso in these terms:
"PROVIDED ALWAYS that the rights granted hereunder shall be subject to the observance and performance of the provisions herein contained so that no person shall be entitled to exercise the rights herein contained if and so long as that person (or any person through whom he claims) is in material breach of his obligations hereunder"

This has been commonly referred to as the suspension of rights proviso and is relied on by Mr Perlman in support of his claim for damages for trespass in relation, for example, to the use of the roadway by the Raydens for access or delivery purposes. His case is that, having used the roadway for purposes not permitted under the rights granted by the February Transfer, Mr and Mrs Rayden ceased to be able to use it lawfully for any purposes until their illegal use had ceased. Acts which would otherwise have been lawful therefore became unlawful and actionable during that period. The Raydens say that the operation of the proviso is more limited and that only a failure to observe the covenants in the February Transfer would bring about the suspension of their rights.

20. Satyrus then sold off No 6A. The transfer was dated 19th September 1986 and I shall refer to it as the "*September Transfer*". This is the relevant transfer of No 6A for the purpose of determining Mr Perlman's rights and obligations. The principal difference between this and the February Transfer is that it includes a transfer to the purchaser of No 6A of the roadway and the driveway. This is reflected in the inclusion of a covenant by Satyrus to contribute a one-third share of the costs of repairing the roadway and maintaining the electric entrance-gate until the sale of No 8A and to include in any transfer of No 8A similar rights and reservations to those contained in the transfer of No 6. These are set out in the Second Schedule to the September Transfer. Although no copy of the subsequent transfer of No 8A is in evidence, it seems certain from the terms of the September Transfer that when No 8A was later sold, the transfer contained rights of access and way identical to those contained in the February Transfer.

21. The September Transfer itself contains covenants by the purchaser of No 6A which mirror the obligations of the owners of Nos 6 and 8A to contribute to the costs of repairing the roadway and maintaining the use and operation of the electric gate. They include a covenant in identical terms to that in the February Transfer not to park on or obstruct the roadway and a covenant to keep the roadway in good and substantial repair. The September Transfer also transfers to the purchaser of No 6A, as part of the title, the right of access over No 6 for the purpose of repairs, which is reserved out of the February Transfer.

The Rights Granted in Respect of No 6

22. I turn first to consider the extent of the rights granted to the owners of No 6 by the February Transfer. As I mentioned earlier, much of this is now agreed. Mr and Mrs Rayden accept (as they must) that they have no right to park vehicles on the roadway, other than temporarily in order to make collections and deliveries at No 6. The only issue on this is whether the point of access to No 6 is limited to the old front door which existed at the date of the February Transfer. I shall deal with this point in connection with the right of way. They also accept that they are not entitled to use the roadway (as they did) in order to carry out building operations to No 6 which are not limited to works of repair and maintenance. It is conceded that the works to No 6 carried out by the Raydens were not within this category and that their use of the roadway was therefore prima facie unlawful.

23. There is also agreement that Mr and Mrs Rayden would not be entitled to build a canopy over their front door (wherever situated), build a bin store, create new windowsills, eaves or gutters projecting into the airspace above the roadway beyond those expressly permitted under the February Transfer, or permit the new second floor dormer window to be opened into that airspace. Mr Perlman accepts, however, that they are entitled to maintain a ventilator located within the surface of the external front wall of No 6 and to make new drainage and sewerage connections with any of the manholes in the roadway. In fact Mr and Mrs Rayden did seek to exercise this latter right, but, following the dispute with Mr Perlman, they altered their plans to maintain the existing connections with the sewer.

24. What therefore remains in dispute in relation to the rights granted in respect of No 6 is whether the right of way allows the opening up of a new front door and the construction of a step or hardstanding over the planting area, and whether the owners of No 6 are entitled to alter the position and number of windows in the front elevation of the property and to maintain in place the new second floor dormer window and a row of external lights set into the front wall of No 6, which now illuminate the roadway.

25. I can deal with these ancillary items quite shortly. The measure of agreement which exists between the parties about projections into the airspace above the roadway and the absence of any right to add a canopy or bin store is simply an inevitable acceptance of the fact that Mr and Mrs Rayden, as the owners of No 6, have no rights at all to enter upon or use the roadway except and insofar as they have been granted such rights, either expressly or by necessary implication, under the February Transfer. The roadway belongs to Mr Perlman and, subject to those rights, he can refuse access to it. Questions of reasonableness do not arise. Conversely, Mr Perlman has no right to control what Mr and Mrs Rayden wish to do to their own property unless it interferes with rights granted to him. The February Transfer contains no restrictive covenants preventing the physical alteration of No 6, and the Raydens are therefore at liberty to carry our alterations such as the repositioning or addition of windows and the fitting of external lights, provided that in so doing they make no use of the roadway and do not create physical additions to their house which overhang the roadway. In the case, however, of the windows (whether new or old) they have to bear in mind that no rights of light are enjoyed in respect of any window and that they cannot prevent Mr Perlman from carrying out works which interfere with the light to those windows, if those works are otherwise permissible.

26. The answer, therefore, to the questions whether the owners of No 6 can alter the windows, add the lights and maintain a dormer window at second floor level is yes in every case. The ownership of No 6 gives to the Raydens the rights to make these alterations. But the question is an academic one, because in this case none of those works was carried out without the use of the roadway and none of those works was a work of maintenance or repair. The real issue between the parties is whether this makes any difference to the right of the Raydens to maintain these additions or improvements now that they are in place. Mr Perlman does not now require the reinstatement of the windows to their original positions. He seeks only damages for the use of the roadway to carry out those works. He is entitled to damages unless he consented to the use of his property for that purpose. I shall come to that issue generally later in this judgment. He also seeks only damages in respect of the window sills, which now project some 3cm into the airspace above the roadway. Subject to an issue about consent, these are an obvious trespass. In relation to the lights and the dormer window different points arise. The use of the roadway in order to install the lights also gives rise to an award of damages absent consent. But the removal of the lights can only be ordered if Mr Perlman can establish either that a mandatory injunction for their removal is a possible and appropriate remedy for the trespass to the roadway or that the use of the lights (as opposed to their installation) now gives rise in itself to an actionable nuisance. Mr Perlman's evidence on this is that the new lights are unsightly and light up a great deal of the roadway. He said that they shine out at anyone who walks down the roadway. There is, however, no suggestion that they actually blind any passer-by, whether on foot or in a car, and the owner of No 8A has made no complaint. They do not, of course, affect Mr Perlman's enjoyment of No 6A itself, by reason of its location. This evidence does not establish any actionable nuisance and it is fairly clear to me that Mr Perlman's real objection to the lights is that they serve literally to illuminate what Mr and Mrs Rayden have done to their house and give to No 6 a prominence which Mr Perlman clearly finds objectionable. However, as a matter of law I can only order their removal if that is the right remedy for any trespass to the roadway which was involved in their installation. I shall come to the question of remedies later in this judgment.

27. The dormer window is subject to essentially the same issues. Its installation is said to have involved a trespass, because it was delivered and installed via the roadway. The issues to resolve are whether there was a trespass or merely a delivery to No 6 which was permitted under the right of way, and whether (if a trespass) the removal of the dormer window should be ordered as the proper remedy for unlawful use of the roadway. As with the lights, I prefer to deal with the questions of remedy later, but the issue of whether there was a trespass can be dealt with at this stage.

28. There is no doubt that vehicles may use the roadway in order to deliver goods to No 6. Mr Perlman accepts that this could include the delivery of building materials where (for example) internal works were being carried out to No 6. The real issue, therefore, about the delivery of the dormer window is whether the roadway was used merely to deliver the window to the contractors working in No 6 or whether the roadway was in substance used to perform part of the building works comprising the installation of the window. The delivery of the dormer window is highly controversial, because it is one of the matters relied

upon by Mr Perlman as illustrating what he regards as the Raydens' complete lack of integrity and disregard for his rights. Mr Perlman was first informed of the Raydens' intention to extend the eaves of No 6 in order to accommodate a new bedroom at a meeting with Mr Izod and Mr Rayden which took place on 5th September 2002. As indicated earlier, planning permission had been obtained for this additional work on 20th May 2002. This led to a heated argument between Mr Perlman and Mr Rayden on 10th October 2002. Solicitors were then instructed, which led to a cessation of much of the use of the roadway by the Raydens. Mr Perlman's solicitors had required them in terms to cease to use the roadway for purposes of carrying out their building works. On 30th January 2003 there was a site meeting, attended by Mr and Mrs Rayden, Mr Izod and the Raydens' interior designer and contracts manager. The note of that meeting records that the contractor would "require access from the courtyard (meaning the roadway) to deliver second floor dormer window. Neighbours to be advised of requirement". On 4th February 2003 the contractor used what has been described as a fork-lift truck to bring the dormer window onto the roadway and to deliver it to the contractors on the roof. Mr Perlman was given no advance notice of this and it led to the threat of an application for an injunction and generally exacerbated the already tense state of affairs between the parties.

29. Mr Rayden's evidence, contained in a witness statement of 12th February 2003, is that he did not expect this to happen and that it was not, as he put it, "anticipatable". He says that he believed that when the window was delivered, a crane would be positioned in Elm Tree Road and the window hoisted into place without inconveniencing the Perlmans. The contractors, without his knowledge but in good faith, borrowed the fork-lift truck to save money and used the roadway instead. I do not in fact accept this evidence, which is clearly inconsistent with what Mr Rayden had been told at the site meeting on 30th January 2003. I am prepared to accept that the contractors jumped the gun and did not allow the Perlmans to be given notice of the delivery, but there is no evidence to support the suggestion that an alternative method of delivery, using a crane, was ever contemplated. No representative of the contractors was called to give evidence.

30. In the end, however, none of this really matters in relation to the issue of whether a trespass was involved. If the contractors did no more than to deliver the window, that is something which they were entitled to do, as the Raydens' agents or licensees, under the terms of the right of way contained in the February Transfer. Considerations of politeness aside, the Perlmans' consent was not necessary. What matters, therefore, is to determine what actually took place when the window was delivered. There are in evidence some photographs taken of the window being delivered. What has been described as a fork-lift truck was in fact a larger vehicle resembling a JCB, with a long hydraulic arm which was able to extend to the second floor roof level, thereby allowing the window to be deposited onto the roof of No 6. The window came wrapped in polythene and was delivered to the contractors in No 6. The only other evidence I have of what occurred on 4th February is contained in Mr Perlman's witness statement of 7th February 2003, which refers to a fork-lift crane being used to move and lift into place the dormer window. There is no evidence that any use was made of the roadway on that day other than to position the fork-lift vehicle, where it was able to raise the window to roof level. The vehicle was then driven away.

31. It seems to me that the acts I have described did not constitute anything more than the delivery of the window to No 6 and are not therefore actionable in themselves. However (as with almost every aspect of this case) things are not quite as simple as that. The photographs also show that at some later point in time a temporary tower scaffolding was erected and the roadway used to assist the contractors to fix the window in place. Absent consent (which there clearly was not) these acts were trespasses on the roadway for which Mr Perlman can claim damages. I do therefore still have to decide whether the removal of the dormer window should also be ordered as part of the same relief.

32. The principal issue relating to the right of way is whether the Raydens, as the owners of No 6, can open up and use their new front door, If the answer to that question is yes, then subsidiary issues arise about the right to have a step or some hardstanding in front of the door and whether access is to be obtained to it alongside the front of the house or straight ahead across the planting area. It follows from what I have said earlier about alterations to the windows that the question is not whether the Raydens can open up a new entrance, but whether they can use it. If it were possible (which I doubt) to construct a new front door without making use of the roadway, then the Raydens are entitled to do that, but that would be of no value

to them unless they are also entitled to use it. Mr Wood QC submits that the right of way granted in the February Transfer permits Mr and Mrs Rayden to gain access to any part of their house where it abuts the roadway. The only limitation on the use of the roadway is that it should be for purposes "connected with the existing use of the property … as a private dwelling-house". That does not, however, mean that it has to be for a purpose connected with the property in the form it was at the date of the grant. The terms of the grant limit, he says, the quality of the use, not the manner in which it can be exercised. There is no provision in the February Transfer which limits the right of way to a particular route over the roadway or to designated termini. The right is one to pass and re-pass to every part of the frontage of No 6.

33. Mr Driscoll QC accepts that the right of way, as granted, is not in express terms restricted to a specific point of access to No 6. But he submits that the February Transfer has to be construed like any other contractual or transactional document, in the context in which it was entered into. The February Transfer was the first stage of a structured transaction designed to vest the ownership of the roadway in No 6A and to grant rights of access to the owners of the other two houses in the development (6 and 8A) in return for their contributing to the cost of maintaining the roadway and the entrance-gates. The right of way granted to the owners of No 6 has therefore to be construed by reference to two sets of factors: one internal and the other external. The first is the scheme of rights set out in the February Transfer itself, of which the right of way forms but one part. The second is the relevant factual background at the time, which includes the physical layout of No 6 and the roadway at the date of the grant and the terms upon which planning permission for the development was granted.

34. The relevance of the scheme of rights in the February Transfer is that the owners of Nos 6A and 8A (together with the owners of No 6) are required to contribute to the upkeep of the roadway. In the case of Nos 6 and 8A this takes the form of a financial contribution of one-third of the costs. In the case of No 6A the owner covenants to keep the roadway in good and substantial repair, subject to receiving the contributions from the other owners to the costs involved. Mr Driscoll submits that the ability of the owners of No 6 (or for that matter No 8A) to open up an alternative point of access could significantly increase those costs. It would, he says, necessitate a re-ordering of the planting area and (if the Raydens are entitled to construct a step) create a new feature in the roadway which could generate higher maintenance costs than would be the case if the roadway remained in its existing state. The correct approach to the construction of the February Transfer is to assume that the right of way granted was intended to serve No 6 as it then stood. For this submission he relies both on the wording of the grant itself, with its reference to the "existing" use of No 6 as a private dwelling-house, and on the limited nature of the other right which the owners of No 6 enjoy over the roadway: i.e. the right to use it to carry out works of repair and maintenance to their property. Given that the construction of a new front door would almost inevitably involve some use of the roadway (as it did in this case), this is another indication that the rights granted were not intended to allow a new and alternative point of access to No 6 to be opened up and used.

35. Mr Driscoll also emphasises the physical layout of the roadway at the time and the reasons for it. The new front door opens onto part of the planting area, which was laid out as a condition of planning permission for the development as part of an approved landscaping scheme. The parties, he says, cannot have intended that the owner of No 6 should be able to create and use a new front door, even if that would involve the destruction of part of the planting area.

36. In ***Pettey v. Parsons*** [1914] 2 Ch 653 at page 667 Swinfen Eady LJ confirmed that it is a question of construction in every case whether a right of way gives access to every part of the dominant tenement or only to a particular point of access in it. Although questions of construction are often said to be unique to the document under consideration, I have been referred to a number of authorities which give some general guidance as to the principles involved. Mr Wood referred me to a number of cases in which the Court is said to have confirmed the right of the dominant owner to create new points of access onto an adjoining right of way. The first of these was the Scottish case of ***Alvis v. Harrison*** (1991) 62 P & CR 9. This was a case about alleged excessive user of a right of way by the owner of some adjoining woodland. The right of way extended over the whole width of a driveway and its verge and the dominant owner constructed a new tarmacadamed road across his land, which linked the driveway via his land with the A73 highway. The new tarmacadamed roadway was extended over the verge into the driveway by means

of a tarmacadamed bell mouth where the verge had been. The principal issue before the House was whether the dominant owner could exercise his right of way over the driveway and the verge for the purpose of reaching the A73, but there are dicta to the effect that if houses were built on the dominant tenement between the A73 and the driveway, it could be used to obtain access to those houses and, if more convenient, those houses could be accessed from the driveway at more than one point. Consideration of this issue does not, however, go any further than that, and I do not find this decision of much assistance in relation to the question of construction which I have to decide.

37. The next case to mention is an unreported decision of Sir Richard Scott V-C (9th June 1998) in ***Fairview New Homes Plc v. Government Row Residents Association.*** The Claimant in that case was in the process of developing some land formerly owned by the Crown by the erection of about 1,300 dwellings. The site enjoyed a right of way along a 12-foot-wide lane called Government Row. The developer wished to construct a new access point from its land onto Government Row and this was objected to by the Defendant as the servient owner. It was also said that the use of the lane by the occupiers of the new homes would be excessive and unreasonable. The Claimant applied to the Court for a mandatory injunction requiring the Defendant to remove obstructions which had been placed so as to prevent the new access point being constructed. The injunction was refused on the balance of convenience, but Mr Wood relies upon the following statement of principle, which appears at page 2 of the judgment: *"Counsel are, I am happy to say, broadly in agreement as to the legal principles that must be applied to resolve the issue. The legal principles are conveniently set out in the respective skeleton arguments that have been supplied to me. The principles, as there set out but slightly summarised by me, are as follows: (1) It is basically a question of construction whether the grant of a* ***right of way*** *entitles the grantee to open up access to the way along any point of his choice at which the boundary of the dominant land adjoins the* ***right of way****. (2) The owner of the dominant land is not necessarily limited to the access or accesses existing at the date of the grant but is entitled to open up additional accesses as are reasonably required by him in the exercise of the rights that he has been granted, provided that there is no unreasonable interference with the rights of other people entitled to use the* ***right of way****."*

Those conditions are, he says, satisfied in the present case.

38. The next relevant decision is that of the Court of Appeal in ***Carder v. Davies*** (1998) 76 P & CR Digest 33. This was an application for permission to appeal by the Defendants against an injunction prohibiting them from obstructing a right of way. The Plaintiff enjoyed a right of way to her home along a roadway belonging to the Defendants. She converted her garage into an additional room and demolished a garden wall built in 1963, thereby allowing her to obtain vehicular access to her land at a new point. The Defendants claimed that they owned the wall which had been demolished, but the judge held that it belonged to the Plaintiff. The issue therefore was whether the Plaintiff could use the roadway to obtain access to her new parking area behind the demolished wall. The Defendants' argument in the court below was that the Plaintiff had lost any right to obtain access at that point through abandonment by the construction of the wall in 1963. The judge had rejected this argument and held that the terms of the grant entitled the Plaintiff to access the roadway at any point from her land. Permission to appeal was sought on the basis that the judge had misdirected himself on the issue of abandonment, and this was the only point dealt with by the Court of Appeal in refusing permission. This decision is therefore of little assistance to me in the present case.

39. Of much more assistance are two decisions of the Court of Appeal where the court did actually consider whether, on the true construction of the grant in question, the dominant owner was entitled to open up a new point of access. These are the unreported cases of ***Charles v. Beach & Anor*** (1st July 1993) and ***Mills v. Blackwell*** (15th July 1999). In *Charles v. Beach* the Plaintiff owned a house which was separated from the adjoining property by a strip of land in the form of a roadway about 9'6" wide. The roadway enabled the owners of both houses to obtain access to the rear of their properties from the public highway at the front. The houses and the strip of land between them were originally in common ownership, but in 1924 the Plaintiff's property was conveyed away by the common vendor, together with the benefit of a right of way over the intermediate roadway. No plan was attached to the conveyance and the grant was of a general right *"to use the path or roadway lying between the hereditaments hereby conveyed and (the servient tenement)"*. The Plaintiff, who was the owner of the dominant tenement, contended that, on the true construction of the

1924 conveyance, he was entitled to obtain access to his property via the roadway at any point along its boundary and that his right was not limited to access through an existing gate in the boundary fence. The Defendants' case was that in 1924, at the date of the conveyance, there was a flower border which ran along the rear two-thirds of the roadway abutting the Plaintiff's fence. No entry could be made to the dominant tenement through any access point in that part of the fence without walking or driving across the border. The Defendants contended that this was therefore a factor which limited the otherwise general nature of the grant and indicated that the parties to the conveyance intended that the right of way should not afford access to the dominant tenement at any point along that part of the boundary adjacent to the flower border.

40. The Court of Appeal (which reversed the trial judge's finding of fact that the border had not existed at the date of the grant) held that the flower border was not sufficiently substantial to raise the inference contended for by the Defendants. Waite LJ said that: *"Where (as in this instance) the words of grant are apt to accommodate an easement of access to every point along the boundary of the dominant and servient tenements, but there is in existence at the date of grant some feature on the servient tenement which represents a potential obstruction to the free and uninterrupted enjoyment of access by the dominant owner, it is a matter of construction in every case for the court to determine whether the existence of that obstacle calls for the words of grant to be given a restricted meaning so as to deny access at the point of obstruction. It is essentially a question of degree. The more transient or insubstantial the obstacle, the more ready the court will be to infer that it was the intention of the grantor to over-ride the obstruction, and (conversely) the more solid and permanent the obstruction, the greater will be the reluctance of the court to impute to the grantor any intention to give the dominant owner the right to insist upon its removal.*

The relevant considerations, when this principle is applied to the present case, are in my judgment the following:

(1) The use of the words "path or roadway" when applied to the driveway in the deed of grant provide a strong prima facie indication of intention by the grantor to confer the widest rights of both pedestrian and vehicular access.

(2) The imposition upon the grantee of a duty to contribute a one quarter share of the expense of keeping the "path or roadway" in repair provides a further powerful indication of intention to confer a right of user in the widest terms.

(3) Because the dominant owner's frontage to the front one third of the driveway was largely occupied by the flank wall of her house, a right of access to her property with vehicles could only be enjoyed effectively if such access was available from the rear two thirds of the driveway.

*(4) The terms on which the **Beach** and Walker families occupied the respective properties in 1924 are unknown. What is known, however, is that apart from the fact that one had a business user at the rear and the other did not, the two properties were very similar in nature and size, and formed part of a row built along Sebright Avenue. It is a reasonable assumption, therefore, that when the common vendor came to sever the freehold reversion and offer each property for sale to the occupying family, he would have wished on ordinary principles of fair and sensible estate management to achieve parity of rights as between the future users of the driveway serving (or potentially serving) the two properties.*

(5) The existence of the flower bed on the servient tenement at the date of the grant certainly provided a barrier to the ready enjoyment of access to the dominant tenement along the rear two thirds of the driveway. It was a feature which fell, however, very much at the lower end of the scale of potential obstruction. A flower bed may endure (as this one did) for many years and often be a source of pride and pleasure to those who tend it, but it remains nevertheless a feature inherently transient and insubstantial, something that can be quickly formed and as quickly removed.

When all these considerations are borne in mind, the intention that is properly to be imputed to the common vendor is in my judgment an intention to allow the dominant owner access for pedestrians and vehicles at every point along the driveway. The fact that this interpretation would carry with it the right to call upon the servient owner to abandon his flower bed at any point where the dominant owner desired to exercise a right of access does not in my view involve a consequence sufficiently drastic to contradict the plain language of the grant. Nor can it be affected in retrospect by the fact that Miss Walker was a lady who never drove a car and never sought to exercise vehicular access rights in her lifetime. The right was given to her and to her successors in title in language that is too plain to be contradicted by any reference to the contemporaneous topography."

41. The decision in ***Charles v. Beach*** was considered by the Court of Appeal in ***Mills v. Blackwell***. This case concerned a right of way granted in 1981. The issue was whether the owners of the dominant tenement

were entitled to demolish a length of dry stone wall so as to widen the entrance from the right of way to their land from 4'6" to more than 12 feet. The right of way in question was reserved over a strip of land running from the public highway along the southern boundary of the dominant tenement. The boundary was marked out by a dry stone wall which under the conveyance was made a party wall. At the date of the grant access from the strip of land to the dominant tenement was through a gateway in the dry stone wall, which was 4'6" wide. The strip of land, which had been concreted over to make a driveway, was 12 feet wide. The right of way reserved in favour of the dominant tenement (referred to as green land) was in these terms:

" "Except and Reserving:

(ii) unto the Vendor or other the owners or owners and occupiers for the time being of the garage and that part of the Vendor's retained land as is hatched green on the said plan (in this sub-clause (ii) called ´the green land') full and free right and liberty (in common with all other persons entitled to a like right) at all times and for all purposes connected with the present and every future use of the garage and the green land respectively with or without motor and other vehicles of every respective description and whether laden or unladen to go pass and repass along the access shown coloured yellow on the said plan for the purpose of gaining access to and egress from the garage and the green land respectively the Vendor contributing one-third of the cost of keeping the said access in good repair and condition ..." "

42. In 1997 the owners of the dominant tenement moved part of the dry stone wall so as to enlarge the gateway to about 12 feet. The trial judge took the view that the existing 4'6" gateway had to be taken into account in determining whether the right of way granted was any wider than that at the point of entry into the green land. He also rejected the submission that the owners of the green land could access the roadway at any point along the southern boundary, which they could only do by demolishing a section of the wall. The Court of Appeal dismissed the appeal. Morritt LJ set out the correct approach to construction in these terms: *"It is then to the question of the proper construction of the reservation, the first point that Mr Randall particularly relied on, to which I now return. It is not disputed that the reservation in the conveyance of 5th May 1981 must be construed in the context of the deed as a whole, and in the light of the surrounding circumstances. That much is made plain by the passage in Sir John Pennycuick's judgment of the court in* ***St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)*** *[1975] 1 WLR 468 at page 476. It is not necessary, I think, to quote it as I have effectively summarised it. But it is worth referring to the passage on the following page, 477C-D. Sir John Pennycuick's judgment reads as follows:*

> *"Mr Vinelott contended that the proper method of construction is first to construe the words of the instrument in isolation and then look at the surrounding circumstances in order to see whether they cut down the prima facie meaning of the words. It seems to us that this approach is contrary to well-established principle. It is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression upon such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction. Of course, one may have words so unambiguous that no surrounding circumstances could affect their construction. But that is emphatically not the position here, where the reservation is in the loosest terms, i.e. simply ´right of way.' Indeed those words call aloud for an examination of the surrounding circumstances and, with all respect, Mr Vinelott's contention, even if well-founded, seems to us to lead nowhere in the present case."*

Thus, the process of construction does not just start with a consideration of the words, but one has to consider the words, one has to consider the surrounding circumstances, and then one must reach a conclusion as to what the parties' intention was as expressed in the deed.

The surrounding circumstances to which the court is entitled to have regard include, but are not limited to, the physical limitation on the exercise of the right of way. The decided cases indicate that those physical circumstances may or may not be sufficient to enable the court to find that the wide words of the grant are in fact restricted by the surrounding circumstances. Thus, in ***Todrick v Western National Omnibus Co Ltd*** *[1993] 1 Ch 190,* ***St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)*** *and* ***White v Richards*** *[1993] 68 P&CR 105, the physical circumstances did so operate. But, by contrast,* ***in Bulstrode v Lambert*** *[1953] 1 WLR 1064,* ***Keefe v Amor*** *[1965] 1 QB 234 and* ***Charles v Beach*** *[1993] EGCS 124 they did not."*

43. The issue which arose in the *St Edmundsbury* case and in many of the other cases referred to by Morritt LJ in the passage I have quoted was whether the grant of a right of way along a roadway or other strip of land without restriction as to width should, notwithstanding the wide terms of the words of grant, be construed as limited by the physical characteristics of the servient tenement at the date of grant. The most common example of this is when the land comprising the servient tenement includes an entrance-way to the dominant tenement or other physical characteristic which is narrower than the remainder of the servient tenement. In the ***St Edmundsbury*** case both Megarry J and the Court of Appeal held that a right of way along a path between narrow gateposts was restricted to pedestrian access only and did not include vehicular access. The inference from the existence of the gateposts and the other physical features of the path was that nothing more than pedestrian access was intended. In other cases the courts have held that the terms of the grant entitled the grantee to the full width of the driveway comprising the servient tenement and that the narrowing of the driveway by an entrance-gate or similar construction constituted an obstruction which the owner of the dominant tenement could remove. Perhaps the best example of this is the decision of the Court of Appeal in *Keefe v. Amor*. In that case the grant was in terms over the whole width of the servient tenement, and the Court of Appeal rejected the submission that it could not have been the parties' intention that the dominant owner was entitled to widen a pre-existing entrance through a wall between two substantial brick pillars, which was much narrower than the remainder of the driveway. At page 344 Russell LJ said this:

" Bearing all those matters in mind, do they lead to the conclusion that the grant was of a footway only, or alternatively, if the grant was of a vehicular way, then that it was one limited as to the dimensions of the vehicle in the manner I have indicated? For myself, I think not. It is argued that that view, which I have just expressed, means that the plaintiff's parents could, had they been so minded, immediately after the transfer have insisted on the four feet six inch wide gap being widened, by pulling down a post and a part of the wall, if the vendor refused to do so, so as to enable a motor car, if they so wished, to come right up to their property, to enter and leave, and it is said that this surely would not have been a situation intended by the parties at the time of the grant. But there are several aspects of the transfer which I think lead to the conclusion that the greater right was intended.

First and foremost, the right of way was expressed to be over the strip whose whole 20-feet width was coloured brown. It would have been perfectly simple to define it more narrowly if that had been intended, or, of course, to define it as a footway, or as a right of way to and from the then existing gateway. Moreover, the fact that the whole 20-feet width was regarded as available if necessary for the exercise of the right is stressed by the reference to the wall marked with a "T" as being "on the west side of the said right of way," showing that the whole of the 20-feet strip was being referred to as the right of way. Why (I ask myself) should the whole width be regarded as being available, if necessary, for use as a right of way, if all that was intended was the restricted right suggested by the defendant?

I further observe that there was no obligation imposed to contribute to the upkeep of the frontage wall and, further, that an express grant of the footway alone would have been quite superfluous in the circumstances. I refer, of course, to the history of previous user; and, whether one speaks of it as a way of necessity or whether one speaks of it, as I think more correctly, as a grant which would have been implied having regard to the pre-existing user, in either event an express grant in 1930 was technically a superfluity.

Finally I would add that an obligation to pay a fair proportion of the cost of keeping the way in good repair and condition is at least unusual if all that was envisaged was the impact of human feet."

44. In ***St Edmundsbury*** the Court of Appeal treated ***Keefe v. Amor*** as a case in which the express terms of the grant were sufficiently clear to negative any inference which might otherwise arise from the physical layout of the servient tenement, but it is interesting to note that in a later unreported decision of the Court of Appeal in ***Stenquil Investments Limited v. Hicklin*** (23rd February 1966), in which the right of way was held to be limited in width by various physical features of the servient tenement, Russell LJ described ***Keefe v. Amor*** as a case involving special factors. These presumably included the express extension of the right of way over the whole of the servient tenement and the existence of the obligation to contribute to the upkeep of the way.

45. Having reviewed these authorities, Morritt LJ dealt with the question whether the dominant owner was entitled to widen the entrance in the dry stone wall leading to his land, which had existed in its current form at the date of the grant. He said this:

"The features apparent in all those cases do not appear to me to be present here. In this case there is no problem in obtaining access to or from the road, or to or from the garages. The whole of the width of the yellow strip is available for that purpose. Indeed, the reference to a one-third contribution to the maintenance of the yellow strip suggests that the parties envisaged that its primary use was as access to the garages. But the reserved right stops at the boundary between the yellow strip and the green land. That boundary is, or is to the south of, the wall which runs up from the road and was declared by the same conveyance to be a party wall. It would be quite inconsistent with that part of the conveyance to find that the person by whom the party rights were conveyed, Mrs Bain, was entitled to demolish parts of the wall without the consent of the person to whom it was conveyed, Mrs Burke-Jacklin, in order to widen the access from the yellow strip to the green land which she had reserved to herself, even if it takes effect by way of re-grant as a matter of conveyancing. Such a right, if intended, should be reserved by clear words. Indeed Clause 2(a) of the conveyance contemplates that the party wall will be maintained and retained, not that it will be demolished at the wish of Mrs Bain."

This decision is perfectly consistent with the approach of the court in cases like ***St Edmundsbury*.** Clearly a powerful element in determining how to construe the grant was the fact that the dry stone wall had become a party wall under the same conveyance. It was clearly inconsistent with this to infer an intention that the dominant owner had reserved a right to demolish the whole or part of the structure which he had conveyed away, and that was enough to determine the issue of construction and to dispose of the appeal. However, the judgment of Morritt LJ (with which Wilson J concurred) does not stop there, and Mr Driscoll relies particularly on the passage which follows, where Morritt LJ also says this:

"The problem does not stop there. The case for the Blackwells is that they are entitled to vehicular access to and egress from the green land and are entitled to demolish the party wall insofar as it stands in their way. But the conveyance is silent as to the point or points of such access or egress. It would be absurd to conclude, and Mr Randall does not submit, that the Blackwells were entitled to demolish the whole of the party wall so that access and egress might be obtained from any point along the whole length of the strip. But why should they be entitled to choose an access point anywhere they may reasonably select, when it is absolutely plain from the physical layout at the time of the conveyance that the access point was at and through the gate 4 feet 6 inches wide. This is not a case like ***Charles v Beach*** *where access could be obtained at any point, nor* ***Cooke v Ingram*** *[1893] Ch 671 where the grant expressly permitted access at any point along the common boundary. It seems to me that the specific point of access and egress must be ascertained from the physical circumstances prevailing at the time; and if reference is necessary to such circumstances to supply the point of access and egress, I do not see why it should not also supply its limitations. The restriction of the width of the gateway from the strip to the green land was and is of a permanent nature. It had been made eleven years before the conveyance of the strip. I do not accept that there is anything insubstantial or transient about a dry stone wall. There is nothing in the conveyance to suggest an intention on the part of the parties that the point or extent of the access or egress should be anywhere or to any extent greater than what was then capable of enjoyment."*

46. The importance of this passage for present purposes is that Morritt LJ's reason for construing the right of way as limited to a particular point of access does not appear to depend on the fact that the dry stone wall was a party wall. As already indicated, that might well have provided an answer in itself to whether the dominant owner could open up an alternative point of access, but it was the existence of the wall itself, rather than its ownership, which was used to construe the grant in favour of a limited right of access. The Claimant's case is that the sole point of pedestrian access at the date of the grant was the original front door. Why (to use Morritt LJ's words) should the Raydens, as owners of the dominant tenement, be entitled to choose an access point anywhere they may reasonably select, when it is clear that the access point at the date of grant was through the old front door. The physical layout at the time should determine the point of access and egress.

47. The obvious and indeed only possible answer to the question posed by Morritt LJ is that the grant permits the dominant owner to do that. This process of reasoning has an obvious circularity, but it is intended to demonstrate that the answer implicit in Morritt LJ's question depends upon accepting, in any particular case, that the physical circumstances extant at the date of the grant should be the determining factor. Morritt LJ clearly did not intend to lay any such principle down as a rule of construction, and it would have been contrary to the reasoning of the Court of Appeal in the *St Edmundsbury* case (which he adopted) for him to have done so. Essentially the same question was posed by the Defendants in *Charles v. Beach*, but

the Court of Appeal in that case was unpersuaded that the physical characteristics of the site, including the existing gateway, were sufficient to override the express terms of the grant. *Mills v. Blackwell* is therefore simply another case in which the particular physical characteristics of the servient tenement were held, in the light of all the other relevant circumstances, to be sufficient to justify a more limited construction of the right of way.

48. In the present case the right of way granted to the owners of No 6 has a number of distinct features:
i) it is expressed to be for "all purposes connected with the existing use of the property … as a private dwelling-house";
ii) it includes both vehicular and pedestrian rights;
iii) it is in terms a right to pass and re-pass along the roadway without point of limitation: i.e. it extends to the whole length of the roadway and not only as far as the existing garage and front door; and
iv) it is subject to the payment of a contribution to the upkeep of the roadway as a whole and the entrance-gate.

Literally construed, the grant clearly entitles the Raydens to make use of the roadway right along the front of their property and obliges them to make financial contributions to its maintenance and repair, regardless of the fact that, on the Claimant's case, they are only entitled to use it to obtain access via a front door and a garage door which are situated very much at the Elm Tree Road end of the roadway. The terms of the grant, when considered therefore in relation to No 6 as it existed at that date, appear to be inconsistent with the submission that the Raydens are entitled to use the roadway only to obtain access to their property via the original front door.

49. What, then, of the other factors on which Mr Driscoll relies? The significance of the planting area is that it was created pursuant to an approved landscaping scheme as part of the original planning permission for the development. But the February Transfer draws no distinction, in its reference to the roadway, between the planting area and the remainder of the roadway, and the only parts of the planting scheme which are subject to any restrictions or alteration under the planning consent are the trees, in respect of which there is a planning condition stating that they cannot be felled or lopped without the prior consent of the local planning authority. I can see why a strong case could, therefore, be made out for limiting the rights granted so as not to interfere with the trees, but the status of the remainder of the planting area (which is physically separate from the trees) for the purposes of construing the grant is that it is simply one part of the physical layout of the roadway which existed at the date of the grant. The question whether the parties intended to allow the owners of No 6 to obtain entry to the roadway over the planting area depends, therefore, not on its status for planning purposes, but simply upon its existence and amenity value.

50. Although the planting area provided some welcome greenery in an otherwise relatively barren landscape, it seems to me unrealistic to impute to the parties to the February Transfer an intention that it should be immutable for all time. Like all planting schemes it had a finite life in the sense that the plants would in due course require to be replaced and the scheme reconsidered. My visit to the site confirmed that the planting area (apart from the trees) is simply part of the roadway which has been left unpaved. It would be extremely easy to adjust the shape of the area to take account of the position of the new front door. I am also not persuaded that the creation of an alternative entrance to No 6 would have been regarded by the parties to the February Transfer as likely to add significantly to the cost of maintaining the roadway. Mr Driscoll's objection on this ground really depended upon my accepting that the Raydens could also construct a step, but the most that this would do would be to replace some earth with a permanent standing of a similar nature to the paving.

51. The Claimant relies upon two other features of the February Transfer as supporting his case for a limited grant. The first is the reference in the transfer to the right of way being for all purposes *"connected with the existing use of the property … as a private dwelling-house"*. Mr Driscoll submitted that the word "*existing"* emphasised that it was the property in its existing physical state which was intended to benefit. I do not accept that one should attach that emphasis to this word. The reference to use as a dwelling-house is obviously intended to prevent the owner of No 6 from altering the use made of his property (e.g. to business use) whilst still retaining the benefit of the right of way. But the word "existing" qualifies and

emphasises the use made of the house at the date of grant. It does not, as a matter of ordinary language, refer to the physical layout of the property.

52. The second point is, however, more difficult. This is the submission that in construing the terms of the right of way one should take into account the limited nature of the right to use the roadway in order to carry out works to No 6. The overwhelming likelihood was that a new front door would require the roadway to be used for its construction. Since the construction of a new front door would not be a work of repair or maintenance, no use of the roadway could therefore be made for that purpose. In those circumstances it is said that the correct inference is to assume that the parties intended the owners of No 6 to adhere to the existing front door. I was initially attracted to this submission, but in the end I do not accept it. It seems to me that the wide terms of the right of way extending, as it does, along the whole of the roadway, coupled with the obligation to contribute to repairs, point strongly to the owners of No 6 having a right of way which is exercisable along the entire frontage of the property. That is obviously inconsistent with a right of pedestrian access limited to the original front door, and for the reasons already given the planting area is not of such significance as to contradict the express terms of the grant. I take the view that the Raydens are therefore entitled to use the roadway to obtain access to their property at any point at which such access can be reasonably obtained. The effect of the limited nature of the right to use the roadway to carry out works is not, in my judgment, to be regarded as limiting the nature and extent of the right of way as such, but it may of course prevent the Raydens and any subsequent owners of No 6 from doing so, if and so far as they are unable to create an access point without the use of the roadway for construction purposes. The servient owner may therefore (depending on the work involved) have an effective veto. If, however, access is consented to, or the work can be done without requiring access to the roadway, then the right of way granted does enable the new access point to be used.

53. The Claimant's objections to the new front door have therefore to be limited to an allegation that its construction involved a trespass on the roadway and that the proper remedy for this (as in the case of the dormer window and the external lights) is to order its removal. If these arguments fail, then the Raydens are entitled to maintain their new front door in place and to use it. That gives rise to a subsidiary issue about a step. Mr Wood has referred me to the well-known decision in ***Jones v. Pritchard*** [1908] I Ch 630, where at page 638 Parker J refers to the grant of an easement, including such ancillary rights as are reasonably necessary for its exercise and enjoyment. It seems to be well established that the owner of the servient tenement is not, without more, liable to repair the subject of the easement, but the dominant owner would ordinarily be able to enter the servient tenement in order to carry out works of repair and even improvement, if such were necessary for his proper enjoyment of the rights granted. As a matter of principle, the owners of No 6 would therefore be entitled to construct a step, if that were reasonably necessary for the safe and convenient use of the new front door. There is some Australian authority which provides support for this (see ***Hanny v. Lewis*** (1998) 9 BPR 97702), although it is inconclusive on this point.

54. Mr Driscoll submits that in this case, even if the Raydens as the owners of No 6 are entitled to a right of way to their new front door, they cannot construct a step. His case is that the position at common law has been modified by the express terms of the February Transfer, which imposed a repairing obligation on the owner of No 6A and required the owner of No 6 to make a contribution to the expense of those works. The obligation imposed on the owner of the roadway is merely one of repair. This negatives any right on the part of the Raydens to insist upon an improvement. I am not persuaded by this. Although I am prepared to accept that the works carried out by the Raydens (at their expense) in order to facilitate the exercise of their right of way via the new front door should be reasonable and not such as to impose any additional financial burden on the other parties to the scheme, it seems to me unrealistic to regard the contractual arrangements for the maintenance of the roadway from time to time as negativing the right of the owner of No 6 to ensure that he has some hardstanding rather than a flower bed on which to tread when he leaves his front door. The Raydens, as I understand it, wish to do no more than to convert the earth to a step and a short footpath along the front of their house, to the point where it reaches the existing paving. There is controversy about the size of the step, because they have indicated a desire for one measuring 1 x 1.4 metres. Apart from this, however, the works are entirely consistent with the exercise of the right of way to and from the new front door. If (as I have found) they have that right, then they must have the ancillary right in effect to extend the paving across part of the planting area to reach the new door. Thereafter the

scheme of repair under the February Transfer will operate according to its terms. In my judgment they are entitled to construct a shallow step, no wider than their front door, and a paved path. The path should be wide enough for a single person to walk along and to push a buggy or pushchair, and should utilise the same materials as the remainder of the paving in the roadway. The step should be constructed of durable material which is in keeping with Mr Perlman's new paving stones. I believe that the Raydens are prepared to construct the path along the front of No 6, as I have indicated, rather than straight ahead, and that seems to me to be right. They must also pay the cost of restoring the planting area following these works. The planting scheme is for Mr Perlman to choose, but the Raydens would prefer plants which are not likely to cause difficulties for young children (e.g. berberis and other thorn-bearing shrubs). Although this is ultimately a matter for Mr Perlman, I would hope that even at this late stage some measure of agreement and common sense will prevail.

The Rights Granted to No 6A

55. The only real issue about the rights reserved in favour of No 6A concerns the gap to be left between the wall of No 6A and any new extension in the garden of No 6. No issues of consent or acquiescence arise in respect of this, and apart from determining the extent of the right of access granted, the only other issue relates to the calculation of damages. I shall return to that later, in connection with remedies generally.

56. In the Amended Particulars of Claim in the second action commenced on 13th October 2003 Mr Perlman seeks an injunction restraining the Raydens from building any structure on the site of the now demolished extension. Mr Driscoll was reluctant to resile from that position, notwithstanding that I have been asked to determine the size of the gap rather than to prohibit building altogether. In the end the point does not matter, because I am not satisfied that the whole of what is marked on the plan attached to the pleading as the yellow area needs to be left untouched in order to protect Mr Perlman's rights. The real contest is between a gap of 0.7 metres and one of up to 2.65 metres. The size of the gap was the subject of expert evidence, but before I come to that it is necessary to say something about the nature of the right granted.

57. The right of access was reserved for the purpose of repairing or maintaining the adjoining property at No 6A, subject to the owner making good any damage at his own expense. At the time of the grant No 6A was complete and, as constructed, has a single-storey garage (now a maid's room and cloakroom) adjoining No 6 with a flat tarmacadamed roof. Apart from the brick wall which acts as the boundary with No 6 but forms part of No 6A, the flat roof is the only part of No 6A which is likely to require repair conducted from No 6, and it is only the repointing of the boundary wall which would actually require to be carried out from No 6. The replacement of the tarmacadamed flat roof over the former garage could more easily (for access purposes) be carried out from a vehicle parked on the driveway in front of No 6A. There is, however, the right for the owners of No 6A to alter the property, and the right of access has therefore to accommodate a building which may subsequently change.

58. At the date of reservation there was no structure at all on the site of the new family-room extension. Both parties have therefore approached the question of the gap in terms of whether an extension of any particular size would constitute a substantial interference with the easement. The most recent authority on this point (and one which is binding on me) is the decision of the Court of Appeal in ***West v. Sharp*** (2000) 79 P & CR 327. There Mummery LJ (at page 332) set out the test to be applied these terms:

"**(2)** ***The principles governing infringement of easements***

Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him. Authority for that is to be found in the judgment of Russell L.J. in ***Keefe v. Amor*** *[1965] 1 Q.B. 334 at 347. As Scott J. held in* ***Celsteel Ltd v. Alton House Ltd*** *[1985] 1 W.L.R. 204 at 217:*

"There emerge from the three cases I have cited two criteria relevant to the question whether a particular interference with a right of way is actionable. The interference will be actionable if it is substantial. And it will not be substantial if it does not interfere with the reasonable use of the right of way."

59. In the later case of ***B&Q plc v. Liverpool & Lancashire Properties Ltd*** [2001] 1 EGLR 92, Blackburne J (after referring to ***West v. Sharp*** and to the decision of Scott J in ***Celsteel Ltd v. Alton House Ltd*** [1985] 1 WLR 204) summarised the position as follows:

" In my view, those passages justify the following propositions advanced by Mr Gaunt: (1) the test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence upon being able to continue the use of the whole of what he contracted for is reasonable; (2) it is not open to the grantor to deprive the grantee of his preferred modus operandi, and then argue that someone else would prefer to do things differently, unless the grantee's preference is unreasonable or perverse. I call them Mr Gaunt's first and second propositions.

After considering the impact on another tenant's ability to gain access to his garage, Scott J considered whether the narrowing of the driveway would constitute an actionable interference with the tenants' reasonable use of it. A p218C-G he said:

There are 56 flats at Cavendish House [the block of flats]. The rear driveway may be used by all of them, their visitors and licensees. Vehicles using the rear driveway may range from small cars to large commercial vans. On occasion, lorries may require to use the driveway. The plaintiffs were granted rights of way over a driveway nine metres or thereabouts in width, but with the usable width capable of being reduced by about two metres in the event of cars being parked along the east side of the driveway. I am reluctant to accept that a grantor, having granted a right of way over a nine-metre driveway, can reduce the width of the way by more than a half over an appreciable distance and then require the grantees to accept the reduction on the ground that what is left is all that they reasonably need. It seems to me that the proposed reduction will materially and permanently detract from the quality of the rear driveway and of the plaintiffs' rights over it… It does not seem to me possible to say that the permanent narrowing of the rear driveway from nine to 4.14 metres over the length of the proposed car wash would leave the rear driveway as convenient for the reasonable use of the plaintiffs as it was before the reduction. The plaintiffs have been granted a right of way over a nine-metre driveway. The enjoyment thereof to which they are entitled under their respective grants cannot, in my judgment, be limited by requiring them to accept a 4.14 metre driveway. If the freeholders wanted the right to construct a car wash on the driveway and thereby to reduce its width to 4.14 metres it was, in my judgment, incumbent on them to reserve that right in the leases. Not having done so, they are not, in my view, entitled to remedy the omission by arguing that 4.14 metres is all the plaintiffs reasonably need. The plaintiffs are, in my judgment, entitled under their grants to the relative luxury, if that is what it is, of a nine-metre right of way. That, after all, is part of what they have paid for.

That passage justifies the following further proposition advanced by Mr Gaunt, which I call Mr Gaunt's third proposition, namely that if the grantee has contracted for the "relative luxury" of an ample right, he is not to be deprived of that right, in the absence of an explicit reservation of a right to build upon it, merely because it is a relative luxury, and the reduced, non-ample right would be all that was reasonably required.

In short, the test, as Mr Gaunt submitted, is one of convenience, and not of necessity or reasonable necessity. Provided that what the grantee is insisting upon is not unreasonable, the question is: can the right of way be substantially and practically exercised as conveniently as before?"

I am not sure that I would have accepted what is referred to as Mr Gaunt's third proposition in quite the way it was formulated, but it is clear from *West v. Sharp*, as Blackburne J accepted, that the test is one of convenience and not a matter of determining the minimum space necessary in order to exercise the right.

60. The expert evidence has in the main been directed to the two possible types of work which are most likely to require access from No 6: the repointing of the boundary wall and the replacement of the flat roof. I accept that it is not open to Mr Wood to argue that the latter could more conveniently be carried out from the driveway (which I accept) and he has not done so. It is also irrelevant, to my mind, that the repointing of the wall might only be necessary every 50 years. The space must be there for it to be carried out. The two experts (Mr David Mills MRCS and Mr Robert Eaves FRICS) have met and are agreed that the minimum space necessary to carry out the works, having regard to current health and safety requirements, would be 0.7 metres, with 0.5 metres being left at the end of the extension adjacent to the boundary of No 4 Elm Tree

Road for access purposes. They are not agreed on any maxima, which obviously depend upon the test to be applied.

61. Although the 0.7m figure may comply with health and safety requirements and allow a workman to stand in the gap, it would make the erection and removal of scaffolding very difficult and the storage of materials a real problem, if not an impossibility. The conditions would also be extremely cramped. This is evident both from some diagrams produced by Mr Mills and from a photograph taken during the works carried out in the garden of No 6. Mr Mills thought that the optimum convenient gap in order to carry our repointing would be 1.5 metres, and I accept that evidence. This would leave space to mix mortar in the area adjacent to the wall. For the re-roofing of the garage, a convenient width would be 2 metres and a minimum width 1.1 metres. In the less likely event of reconstruction being necessary, he considers that a convenient gap would be 2.65 metres, although this could be reduced to 2.1 metres by scaling down what he describes as the circulation area to a minimum. Taking all this evidence into account, and having visited the site, I consider that the proper gap which should be left is one of 2 metres wide. This will in my judgment allow all the foreseeable building operations which may require to be carried out from No 6 to be conducted in a convenient and efficient way, with space for the storage and preparation of materials and a convenient, rather than minimal, area in which the contractors can actually carry out the work. On this basis I am content to accept a gap of 0.5 metres as being the appropriate gap to be left at the end of any new extension. Mr and Mrs Rayden tendered some evidence to suggest that a gap of this size might render it impossible to construct a useful extension on that side of their house, but that consideration, even if right, is to my mind irrelevant.

The Trellis

62. One of the matters raised by Mr Perlman is whether he is entitled to erect a trellis on part of the roadway. He has produced a plan which shows a line of trellis starting on the right-hand side of the second large window from the end of No 6 closest to the entrance to No 6A and extending to a point beyond the front door. It will be 3.6 metres high in its central section, reducing to about half that height when it passes the new front door. The trellis will be positioned 500mm out from the front elevation of No 6, in front of the windows, and a little further away in front of the new door. A hole will be constructed in it to allow light through to the small window next to the front door.

63. The Raydens regard this as a piece of spite by Mr Perlman, designed in effect to block out or screen the front of their house from view. I think that there is a lot of truth in this, but that does not determine whether Mr Perlman is entitled to erect it. Mr Wood accepts, I think, that Mr Perlman may construct a trellis to this or another design, provided that it does not substantially interfere with any right granted over the roadway. It seems to me that it is almost certain to interfere with the Raydens' right to access the roadway for repairs, and Mr Perlman accepts that it will have to be removed as and when the need to do such works arises. If that is the case, then it seems to me that the Raydens cannot object to its construction, however unreasonable that may be.

The Rights Suspension Proviso

64. This is relied on in both actions as suspending all rights otherwise enjoyed by the Raydens over the roadway during the period in which there was an actionable interference with the right of access over No 6, caused by the construction of the extension, and a trespass on the roadway due to its use by the Raydens for parking and for construction purposes. Quite what this claim adds to the case on damages is unclear, but the Defendants say that the proviso does not have the effect claimed by Mr Perlman, even assuming that their use of the roadway and the construction of the extension were in some relevant sense unlawful.

65. It is clear from the terms of its grant that the right of way over the roadway is conditional upon compliance with the covenant not to park there or to allow any parking on, or obstruction of, the roadway. That is spelt out expressly in the February Transfer. To the extent, therefore, that the Raydens were in breach of that covenant, their right of way was suspended. But the use made of the roadway to carry out building works could not have been accommodated within the terms of the right of way in any event, and the suspension of that right is therefore irrelevant to the question whether the Raydens' use of the roadway was otherwise unlawful. The same goes for the right of access. The Raydens accept that the building works carried out were not works of maintenance or repair. Absent consent, there was therefore an unlawful use of the

roadway. Suspension of the right of access is therefore irrelevant to this. It follows that the only effect of a suspension of rights would be to make personal access by the Raydens to their house and garage a trespass.

66. The right of way was clearly suspended during the period in which Mr and Mrs Rayden continued to park in the roadway. Although this was a practice that had developed over a number of years, it did constitute non-compliance with the covenant not to park. Compliance with the covenant is made a condition for the exercise of the right. The Raydens ceased to park in the roadway after receiving the letter from Mr Perlman's solicitors in October 2002. The only issue is whether their right of way ceased to be suspended from that time or whether the suspension continued until April 2004, when the rear extension was demolished. This has some relevance to the delivery of the dormer window in February 2003, which would otherwise have been lawful as an exercise of the right of way.

67. The Claimant's case that there was a suspension of rights until April 2004 depends upon construing the reference to "the provisions herein contained" in the proviso as including matters other than non-compliance with the covenants to observe the terms of the wayleave, not to park and to pay contributions to the upkeep of the roadway. Mr Driscoll submits that the other "provisions" referred to are the rights of access and way themselves, and that the use of the roadway otherwise than in accordance with those "provisions" amounts to their non-observance and non-performance and a material breach of the "obligations hereunder".

68. That is not what the words used mean. The proviso was clearly intended to suspend the rights granted over the roadway if the owner of No 6 failed to observe or perform the provisions of the February Transfer, which imposed "obligations" upon him. The reference to the "obligations hereunder" is, in my view, a reference to the obligations arising under the provisions of the February Transfer. The only such provisions which impose obligations as such on the owner of No 6 are the three covenants I have just referred to. By contrast, the right of way and the right of access are referred to in the same proviso as rights which the owner of No 6 may exercise subject to compliance with those obligations. The consequence is that the proviso operated only until the Raydens ceased to park on the roadway in October 2002.

Consent, Acquiescence and Estoppel

69. In the first action Mr and Mrs Rayden say that Mr Perlman consented to and/or is estopped from asserting any rights he might otherwise have arising from the work which they carried out to No 6 using the roadway. The same goes for the allegation of unauthorised parking. In the light of my decision that the Raydens are entitled to a right of way to their new front door, no issue of consent or estoppel arises in relation to its future use, but there remains the issue about the legality of its construction. Of the new features added to the front elevation of No 6, only the new windowsills and gutters project into the airspace above the roadway, but (as already indicated) Mr Perlman does not seek the removal of these items, but only a remedy of damages in respect of them. In the second action, where the principal issue is the interference with Mr Perlman's rights of access over No 6, no issues of consent or estoppel arise.

70. The consideration of these defences in the first action requires me to deal in more detail with certain aspects of the history of events leading up to these proceedings, but before I do that, it is useful to summarise the findings of fact which are necessary for the defences to succeed.

71. Every entry onto land is an actionable trespass, regardless of whether actual damage is caused. It is, however, a defence to a claim of trespass that entry was made pursuant to or in exercise of a legal right or with the licence or consent of the owner of the land. In relation to the works carried out using the roadway (which include the creation of the new front door and the fixing in place of the dormer window) no defence of legal right is available. The same goes for parking. The only remaining issue, therefore, is whether Mr Perlman in some way consented to what was done on his land. Any licence to enter the land granted in these circumstances is prima facie revocable, and Mr Perlman did of course revoke any licence that may have existed, when his solicitors wrote to the Raydens in October 2002 requiring their use of the roadway for building purposes and parking to cease. If the Raydens are right, that they did have Mr Perlman's licence or consent to do the work, then that is a complete defence to the claim. None of the works carried out created permanent encroachments onto the Claimant's property, except for the additional guttering and eaves and the new windowsills. Mr Perlman is content for these items to remain in place and

I am not therefore concerned to determine whether the conditions are satisfied to estop Mr Perlman from seeking their removal. Estoppel is, however, relevant to the claim for damages so far as it seeks to compensate Mr Perlman for what would otherwise be a continuing trespass, as opposed to the temporary trespass involved in the use of the roadway to carry out the work of construction and installation. If Mr Driscoll had been successful in his contentions about the right to open the new front door, it would also have been necessary for the Raydens to establish some kind of equitable or proprietary estoppel, to enable them to obtain an extended easement of way to their new entrance. In the event, they have established a legal right to do so.

72. The Claimant submits that silence in this case did not amount to an implied licence, but could, at most, constitute acquiescence. Mr Driscoll has submitted that the Raydens never asked for consent to carry out the works using the roadway and were never given any such express consent. He invites me to find that there were no relevant meetings in 2001 and, in particular, that the meeting which Mr Rayden says occurred on 18th November of that year did not take place. There was, he says, a meeting with the Perlmans in March 2002, but they were not told (as is accepted) about the proposed extension at second floor of the roof, nor were they told precisely where the new front door would be. Similarly, there was no mention of alterations to the gutters, eaves and windows, nor of the addition of new external lights. The highest it is said that it can be put is that Mr Perlman failed to respond to the proposals which were disclosed to him and which he subsequently saw being put into effect after the work began in April 2002.

73. A significant difference between consent and acquiescence is said to be that the former precedes, and therefore sanctions, what would otherwise be an unlawful entry on the land, whereas the latter postdates entry and is not a defence to a claim of trespass unless it amounts to an estoppel. I think that an express licence to do the work, even after entry, would probably be a defence to the claim of trespass, because so far as necessary it would amount to a waiver of the tort, but in general I can accept the distinction made. Absent consent as such, a mere failure or delay in seeking relief (sometimes called laches) may disentitle the Claimant to an injunction, but it will not bar his right to damages unless the claim has become statute-barred. Acquiescence is sometimes confused with laches, but it is properly used to describe the type of passive conduct which is sufficient to give rise to an estoppel in the Defendant's favour. What is required to be shown is that the person with the legal right has stood by in knowledge of the infringement so as to cause the Defendant to believe that he assents to what is being done. Conduct of this kind is sometimes described as giving rise to an implied representation that the legal right will not be enforced, but a representation as such is not a necessary ingredient of the equity. What the Court is looking to identify is conduct which resulted in the Defendant, to the Claimant's knowledge, proceeding to expend money or otherwise act to his detriment in the belief that there would be no objection to what he was doing. In such circumstances it would be unreasonable for the Claimant to be allowed subsequently to assert his legal rights.

74. Traditionally the conditions which must be satisfied to raise the estoppel were taken to be those set out by Fry J in his judgment in ***Willmott v. Barber*** (1880) 15 Ch D 96 at page 105, where he said this:
"It requires very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document. It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make if fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possesser of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possesser of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possesser of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will

entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

More recently, however, judges have moved away from these five so-called *probanda* to a more flexible approach to the issue of when it becomes unconscionable for a party in such circumstances to insist upon his strict legal rights. In ***Habib Bank Ltd v. Habib Bank A.G. Zurich*** [1981] 1 WLR 1265 at page 1285, Oliver LJ said this:

"For myself, I believe that the law as it has developed over the past twenty years has now evolved a far broader approach to the problem than that suggested by counsel for the plaintiff and one which is in no way dependent on the historical accident of whether any particular right was first recognised by the common law or was invented by the Court of Chancery. It is an approach exemplified in such cases as ***Inwards v Baker*** *[1965] 1 All ER 446, [1965] 2 QB 29 and* ***Crabb v Arun District Council*** *[1975] 3 All ER 865, [1976] Ch 179. We have been referred at length to a recent judgment of my own in* ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*** *[1981] 1 All ER 897, [1981] 2 WLR 576 in which I ventured to collect and review the authorities. I said this ([1981] 1 All ER 897 at 915–916, [1981] 2 WLR 576 at 593):*

> *'Furthermore, the more recent cases indicate, in my judgment, that the application of the* ***Ramsden v Dyson*** *((1866) LR 1 HL 129) principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.'*

Whilst having heard the judgment read by counsel I could wish that it had been more succinct, that statement at least is one to which I adhere."

This approach follows the earlier lead given by Buckley LJ in ***Electrolux Ltd v. Electrix Ltd (No 2)*** (1953) 71 RPC 23, where at page 33 he said this: *"So I do not, as at present advised, think it is clear that it is essential to find all the five tests set out by Fry J. literally applicable and satisfied in any particular case. The real test, I think, must be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it."*

More recently the judgment of Oliver LJ in the ***Habib Bank*** case has been applied by the Court of Appeal in ***Jones v. Stones*** [1999] 1 WLR 1739.

75. In his written closing submissions Mr Driscoll also contends that acquiescence is not a defence to a claim for trespass, because it bars equitable relief but not a claim in damages. That is not, in my judgment, a correct statement of the law, nor does the authority cited (***Tottenham Hotspur Football & Athletics Co Ltd v. Princegrove Publishers Ltd*** [1974] 1 WLR 113 at page 122) support it. As already mentioned, mere delay or laches is at most a bar to equitable relief in the form of an injunction, but acquiescence giving rise to an estoppel bars the enforcement of a legal right and, with it, any claim in damages.

76. I therefore turn to consider whether Mr Perlman either consented to what have been referred to as the temporary trespasses on the roadway and the permanent trespass involved in the overhanging eaves, gutters and window sills or is otherwise estopped from complaining about them. The Raydens became interested in No 6 in 2001, when they were living in Abbey Gardens. As indicated earlier, this house was inadequate for their needs and they were unsuccessful in obtaining planning permission to alter it by erecting a single-storey rear extension. It is clear to me from the evidence, and from listening to Mr and Mrs Rayden when they gave it, that they are intelligent, determined people, who have the financial means to convert No 6 into the house which ideally suits them, and are prepared to expend considerable amounts of time, money and energy in order to achieve that. They were unable to do this in Abbey Gardens and they became interested in No 6 largely because it already had planning permission for significant alterations. They were therefore likely to be granted permission for an alternative scheme, unless it significantly exceeded the scope of the existing planning permission.

77. Mr Rayden, with his brother, runs a business which includes managing the development and renovation of residential property. Although somewhat modest in his evidence, it is clear to me that he is a shrewd

and experienced businessman operating in the property field, who is fully conversant with planning procedures and building projects. Although Mr and Mrs Rayden engaged an architect and planning consultants, the management of the alterations and renovation of their home was very much a hands-on exercise, and I was unimpressed by a number of Mr Rayden's protestations of ignorance during the course of his evidence. I will come to some of them a little later.

78. As part of their pre-contract enquiries the Raydens obtained a copy of the February Transfer. They also received through their surveyors (Nixon & Associates) copies of the Gebler Tooth plans used in connection with the existing planning permission. The February Transfer prompted Mr Rayden to ask his solicitors (Wallace & Partners) to find out from the vendor who owned the roadway and the details of the costs of its upkeep. It is apparent from this that he must have and did realise at once that the roadway was not part of the title to No 6. Mr and Mrs Rayden say in their written evidence that they were told by the former owners of No 8A and by Mrs Sacks that residents habitually parked one car outside their homes on the roadway without objection. An additional enquiry was raised about this and Mrs Sacks' solicitors replied to the effect that the owner of No 6 did in practice park one car in the roadway. In answer to the queries about the ownership of the roadway and the cost of its upkeep, the Raydens were told that it was presumably Mr Perlman who was the owner and that the information about costs was probably available from him. Mr Rayden expressed some annoyance to his solicitors about the uncertainty of the ownership of the roadway, but prior to exchange they were able to inform him, from a Land Registry search, that it was Mr Perlman.

79. This was on 11th July 2001, but before then Mr Rayden's planning consultants (Fibbens Fox) had worked up a preliminary scheme of alterations for No 6, designed to show what could be achieved. In a letter to Mr Rayden of 19th June Mr Murdoch of Fibbens Fox advised him that planning permission would be required for the works, because the scheme differed materially from the one for which Mrs Sacks had obtained permission. Mr Rayden had already noticed from the Gebler Tooth drawings that no consent existed to move the front door, change the size or location of any of the windows, or to construct an extra bedroom on the second floor. Mr Murdoch concluded his letter of 19th June by advising Mr Rayden to have a word with Mr Perlman, who had expressed an interest in meeting him. At the same time Wallace & Partners had asked Mr Rayden whether he wished to contact Mr Perlman directly in order to obtain confirmation about the right to park one car on the roadway. Although the Perlmans and the Raydens were by then known to each other, the question about parking does not seem to have been taken any further, and contracts were exchanged and the transaction subsequently completed on 28th August 2001 without any further discussion between Mr Perlman and Mr Rayden on this or any other topic relating to the use of the roadway. Mr Perlman suggests that this was deliberate. Mr Rayden's evidence was that, having been told that it was the practice of the residents to park a car on the roadway, he was content to proceed. He did not look further into the legality of the practice. I suspect that, having seen the express covenant not to park contained in the February Transfer, Mr Rayden was anxious not to upset the established practice by inviting Mr Perlman's comments on it. This was, I think, a mistake, because there is every reason to suppose that Mr Perlman would in fact have appreciated the courtesy and have been content for the practice to continue. This was therefore a misjudgement by Mr Rayden, who had made a calculation that it was better to let sleeping dogs lie, but I do not believe that it was anything more sinister than that. The Raydens were in touch with Mr Breslauer, who had purchased No 8A in April 2001 and who was engaged in carrying out extensive renovations to the property. He had become involved in detailed discussions with Mr Perlman about these works, and Mrs Rayden says that she got the impression that the Perlmans could be difficult about planning matters. It is not entirely clear when these discussions took place, but it is, I think, possible that Mr and Mrs Rayden had this perception of Mr Perlman prior to the completion of their purchase and thought it best to keep any direct discussion with him to a minimum.

80. Once the Raydens had moved into No 6, they continued the practice of parking one of their cars on the roadway outside their home. Mr Rayden said that he did not ask Mr Perlman for consent because everyone did it. When asked to stop in October 2002, he did so. By October 2001 a scheme of alterations had been produced, which included the extension of a bedroom on the flat roof above the garage, the moving of the front door, the rearrangement of the front windows and the construction of some kind of rear extension. There were also to be considerable changes to the internal layout so as to create a centrally located

entrance-hall behind the new front door and to convert space close to the existing door into a bedroom. The scheme of improvements would involve the removal of the existing conservatory which Dr and Mrs Sacks had erected in the garden of No 6. The position of a conservatory was shown on the Gebler Tooth drawings, one of which is a cross-section. This indicates that there was a significant gap between the end of the conservatory and the boundary fence with No 4. It is unclear whether the conservatory which was erected by the Sacks was of the same dimensions. The permitted scheme for which planning permission existed was not implemented, and there is no evidence whether the existing conservatory demolished by the Raydens predated or postdated that permission. The question whether a gap existed and, if so, how wide it was is material to the decision made in the summer of 2002 to extend the new family-room to virtually the entire length of the garden and also to the events of November 2001. As already indicated, Mr Rayden says that he had always intended that the family-room should extend as far as the existing conservatory, which itself went almost to the boundary with No 4. It seems to me, however, that there was clearly a gap between the boundary fence and the end of the old conservatory, as is apparent from one or two of the photographs which are in evidence. It is impossible to be precise as to its exact width, but it certainly looks as if the gap was at least 2 or 3 feet wide. This is what one would expect. Although the gap seems to have been partially obstructed by trees and other plants which were allowed to grow untended, it seems likely that Dr and Mrs Sacks would have left enough room to walk around the end of the conservatory, so as to enable it to be cleaned and maintained. I do not accept that it was constructed right up to the boundary with No 4.

81. The scheme for No 6 had been prepared by Mr Izod, who had been supplied with the Gebler Tooth drawings. In his witness statement he says that he was instructed by Mr and Mrs Rayden to produce a scheme involving a single-storey rear extension, as opposed to the two-storey extension for which planning permission had been obtained. He says that his instructions were that the extension should run to the bottom of the garden of No 6. He prepared his own drawings, taking measurements from the Gebler Tooth drawings, and then prepared the plans which were used for the new planning application. He says in categoric terms that at no stage was any drawing prepared by him or any instruction given to obtain planning permission for a shorter extension than the one that was built. The intention was always to build the extension to the end of the garden and he prepared his plans accordingly.

82. I do not accept this evidence and I should say at once that I regard Mr Izod as a totally unreliable witness, whose evidence should not be accepted unless corroborated by documentary or other evidence. I do not accept any of the main points made in his witness statement. It is clear from the first drawing he prepared in September 2001 (2725/1), which was a hand-drawn sketch plan, that the family-room was not to extend beyond the central bay of the house. In October he produced a set of measured drawings, including a ground floor plan (2725/5), showing for the first time a family-room extension projecting 5.1 metres into the garden from the rear wall of the house. This was superseded in November 2001 by drawing 2725/8, which shows the new extension running straight out (with no gap between it and the wall of No 6A) to the same length as the existing conservatory, the position of which is shown by a dotted line on the drawing. At my insistence, rather than on his own initiative, Mr Izod measured the length of the existing conservatory as shown on the drawing. It extends 5.1 metres from the rear wall of the house. This measurement was obtained from the Gebler Tooth drawings. There is therefore no doubt that the plans for the new scheme were prepared on the basis that the new extension should run for the same distance as the existing conservatory, which was, after all, Mr Rayden's evidence.

83. On the next drawing in the series (2725/9) the extension is shown with a pitched glass roof at an angle of about 45°. It also shows the front elevation of the house with its revised windows and the centrally located front door. A third drawing (2725/10) shows the south elevation of the house with the pitched glass roof over the extension and an enlarged bathroom window on the first floor, looking towards No 6A. Mr Izod was asked during the trial to produce his diary for November 2001. This shows that he worked on the 2725 drawings on 9th November and on revisions to them on Friday 16th November. It also reveals that he was at home on Monday 19th November in the morning, because he had to wait for a replacement windscreen to be fitted to his car. His diary for 19th November contains no reference to working on the 2725 drawings, and he told me that his practice was to note in his diary any professional work done on the relevant day. It therefore seems clear (and I find) that on 16th November Mr Izod revised the 2725 drawings and produced

drawings 2725/8A, 2725/9A and 2725/10A. These show a lowering of the pitch of the new conservatory roof and the first floor bathroom window reduced in size.

84. The timing of these revisions is highly material to the issue of whether a meeting took place on 18th November 2001 at which Mr Rayden discussed his plans with Mr Perlman. What is pleaded about this meeting by Mr and Mrs Rayden is that on Sunday 18th November Mr Rayden discussed the proposals with Mr and Mrs Perlman and showed them detailed plans, indicating the position of the new front door, the altered windows, the extension over the garage, the new family-room extension and the internal layout. It is also alleged that, as a result of discussions during this meeting, the 2725 drawings were altered to take into account comments and requests made by Mr and Mrs Perlman in relation to the scheme. In his first witness statement of 12th February 2003 Mr Rayden says that the meeting took place at 6pm and was held at No 6. It is obvious from the sentence in which it appears that the reference to No 6 is a typographical error for No 6A. The meeting, he says, lasted for some time, and the Perlmans seemed happy with the drawings and pleased that the original 1991 scheme would not be going ahead, involving as it did a two-storey extension to the rear of No 6. The only amendment they requested was the lowering of the pitch of the glass roof over the extension. Mr Rayden says that it was drawn with a 15° pitch. In fact, as I have indicated, it was drawn with a 45° pitch, which was reduced on drawing 2725/9A to 15°. Mr Rayden goes on to say that after the meeting he instructed surveyors to amend the pitch, then on 26th November sent copies of the revised plans to Mr Perlman and to Mr Breslauer, prior to the planning application being made. I shall come to that letter in a moment.

85. In his later witness statement of 7th May 2004 Mr Rayden says that Mr Perlman was present throughout the meeting on 18th November, but that Mrs Perlman was present only intermittently. Mr Driscoll has submitted that by the time that his later witness statement came to be prepared, the Perlmans had disclosed their telephone bills for November 2001, which show that Mrs Perlman spent most of the early evening on the telephone, making various social arrangements. She confirmed this in her evidence to me. Mr Rayden says that he is sure that the meeting took place on 18th November, because in his diary he has recorded what he describes as the intended meeting and has then crossed it out, indicating, he says, that it took place. The witness statement goes on to say that the Perlmans raised no concerns about the extension, the front door or the windows, except in relation to two matters: the height of the glass roof over the extension and the size of the first floor bathroom window. These were altered as a consequence of the meeting.

86. The plans which Mr Rayden says that he took to the meeting are identified in his first witness statement as 2725/8A, 2725/9A and 2725/10B. This is clearly wrong on any view, and in a further witness statement of 9th June 2004 he has corrected this and says that those revised drawings were the ones which Mr Izod made following the discussions with the Perlmans on 18th November. As a result of Mr Izod's evidence, however, it is now clear that those revisions were made before the 18th November meeting, and I am satisfied (and find) that no meeting of the kind alleged by Mr Rayden took place on 18th November. I am prepared to accept that Mr and Mrs Rayden may have anticipated opposition from Mr and Mrs Perlman to the two features of the design which were changed and therefore instructed Mr Izod to alter the drawings, once they had received the original 2725 series of plans. But I do not accept that Mr Rayden visited the Perlmans on the evening of 18th November to discuss either set of plans, nor that he obtained some kind of *de facto* approval of the planning application from them at such a meeting. Quite apart from Mr Izod's evidence and the inconsistencies in the various accounts given by Mr Rayden, there are other pieces of contemporaneous evidence which indicate that no meeting took place. We now know from evidence given by Mr Breslauer that on 26th November Mr and Mrs Rayden sent to all their neighbours (including Mr Perlman) copies of the plans which were to form the basis of the planning application. Unfortunately (and quite extraordinarily) Mr Rayden's secretary managed to put the documents and covering letter intended for Mr Perlman into the envelope sent to Mr Breslauer. He did not bother to look at the contents and only discovered that he had got Mr Perlman's documents about a year later. The letters are, however, in standard form and merely enclose the plans, with the request to direct any queries to Mr Rayden at the phone number given. It seems to me unlikely that a letter in those terms would have been sent to Mr Perlman if a meeting of the kind alleged had taken place as recently as 18th November. But the matter does not stop there. Following the confrontation which took place between Mr Perlman and Mr Rayden outside

No 6A on 10th October 2002, notes were prepared, recording what had occurred. Both the note prepared by Mr Perlman and that of Mr Pritchard, his surveyor, record Mr Rayden as referring to a meeting not in November 2001, but in March 2002. When the Raydens' solicitors wrote a long letter of reply on 14th October 2002, following the request to the Raydens by Mr Perlman's solicitors not to use the roadway, they also referred to the Perlmans having been shown detailed plans "on several occasions earlier this year".

87. The only contemporaneous evidence which is relied on by Mr Rayden in support of his case that there was a November meeting is his diary entry. The entry records a time of 6.00pm, with the words *"Perlmans - plans"* after it. Below the word "Perlmans" is written "Joseph". This is a reference to Mr Sucharewicz, who lives at No 4 Elm Tree Road. It is obvious to me that Mr Rayden, when he prepared his witness statement, had no clear recollection of the meeting on 18th November or what was discussed at it. It seems likely that he visited his diary and merely assumed that a meeting took place on that date. But the entry is equally consistent with an intention to phone the Perlmans and Mr Sucharewicz about the plans, or simply to send copies of the plans to them. It has not been suggested that Mr Rayden had a meeting with Mr Sucharewicz about the plans on the same day. The diary entry is inconsistent with the remainder of the evidence and I attach no weight to it.

88. I also believe that the absence of any meeting as such and the sending instead of the 26th November letter is consistent with the way in which the Raydens thought it best to handle Mr Perlman and their other neighbours. As already mentioned, Mr and Mrs Rayden had been told by Mr Breslauer that he had had dealings with Mr Perlman about the works to his own house, which took place between October 2001 and September 2002. Mr Breslauer said that these involved a major refurbishment of his property, including the construction of a gym. Mr Breslauer chose to be very open with Mr Perlman about his plans and said that he had had a number of discussions about the works and his use of the roadway. In October 2001 Mr Perlman asked for a meeting on site to discuss the effect of a wall being built in connection with the gym and asked at one stage for the construction of the gym to be postponed. In the end agreement was reached, but Mrs Rayden said in evidence that the Perlmans had complained to her about not being given the plans for Mr Breslauer's alterations, and it was from this that she knew that they could be difficult. It seems to me likely that the Raydens were concerned that there should be no undue delay in making their own planning application for the scheme. They knew that they needed to keep the Perlmans informed of what they were doing and to give them the plans, but it is more likely that they attempted to anticipate difficulties by requesting revisions to the drawings and then sending them to Mr and Mrs Perlman, rather than involving the Perlmans in a detailed discussion of what was proposed. Any attempt to reach agreement with Mr and Mrs Perlman might well have led to protracted discussions which they were anxious to avoid.

89. That said, it is also clear that there was a considerable amount of social contact between the Perlmans and the Raydens in the period leading up to the commencement of the works and thereafter. It is common ground that on 5th October 2001 they had dinner together and discussed the plans to remodel No 6. In his witness statement of 7th May 2004 Mr Perlman says that he and his wife had been friendly with Mr Rayden's brother and his family and also knew Mrs Rayden's parents. They were pleased when they knew that the Raydens were going to buy No 6 and encouraged them to do so. The discussion on 5th October (during the Festival of the Tabernacles) was, he says, one in brief conceptual terms, but there was mention of moving the front dorr and the creation of a new conservatory. Thereafter Mrs Rayden and Mrs Perlman spoke regularly and assisted each other in taking and collecting children from school and in other social arrangements. On one occasion during August 2002 Mrs Perlman went to visit the Raydens, with their children, at a house they were renting in the Cotswolds. They obviously enjoyed a close and happy relationship, which is perhaps why Mr and Mrs Perlman feel so betrayed now by what they regard as the underhand conduct by the Raydens in relation to the construction of the extension and the second floor bedroom.

90. Until, however, the late summer of 2002, this harmonious state of affairs continued. No objection was ever raised by Mr Perlman to the continued use of the roadway for parking, even though his permission had not been formally asked. Similarly, when the building works began, no objection was made to the erection of scaffolding or to the placing of the skip on the roadway, although the Raydens were asked to, and did, move it over the Jewish holidays in September 2002. Thereafter it was put back and the works continued.

Mr and Mrs Perlman clearly saw the scale of the works being carried out, as can be seen from the photographs. The old front door was boarded up and a temporary front door created while the new front entrance was constructed. The windows were moved or enlarged. The new extension over the garage was constructed, thereby altering the roof line and creating additional guttering under the new eaves. During this work, men trampled down part of the planting area and created the kind of noise and disruption inevitable in all building projects.

91. In his witness statement Mr Perlman says that all this continued without objection from him, because he wanted to be seen as an accommodating neighbour, until October 2002, when the situation changed following the discovery that the family-room extension had been built in excess of planning permission and a proposal existed, with the benefit of planning permission, to create the extra bedroom in the roof-space on the second floor. I shall come to these problems relating to the extension in more detail later, because it is said to be relevant to the claim for aggravated damages. It was also a disaster for the Raydens, because it led to Mr Perlman instructing solicitors, revoking any licence they had to use the roadway, other than for entry, and taking legal action against them. They in turn became defensive, denying initially that the extension had been built without planning permission or that it had caused damage to the Perlmans' property. None of this reflects at all well on the Raydens and I shall have to consider in due course whether I should increase the award of damages in respect of the extension to take account of this. But the consequence of those events has unfortunately been to cause Mr Perlman to object to matters which, had the problem with the extension not arisen, would never, in my judgment, have been the subject of any complaint. It has also led to Mr Perlman regarding everything which Mr and Mrs Rayden said or did, from the time of their purchase, as part of what can best be described as a conspiracy to obtain planning permission and to carry out the scheme in disregard of his rights. The first action was essentially responsive to the discovery of the problems about the extension, but it relates to matters involving the use of the roadway which have nothing to do with the extension. Mr Perlman said in cross-examination that he felt sick when the full planning history was finally revealed and he realised what had been going on. What he was referring to was the fact that the Raydens had built in excess of the planning permission obtained in January 2002 and had obtained planning permission for the second floor extension in March 2002 without telling him. The first action, he said, was about his having been taken for granted. It was about the Raydens' bad behaviour and the way he regards them as having treated him. His property has, he said, been taken and used without his consent.

92. There is clearly a great depth of anger here and I do not wish to add to it. But it is, I think, necessary to inject some reality into this. Mr Perlman accepts (as he must) that he was fully aware of what works were taking place to the front elevation of the house at least from April 2002, when the work started. If he is right about the meeting which he says took place in March 2002, then he saw the detailed plans at that stage, if not before. He received a letter from Nixon & Associates before the work commenced, informing him of what was to be done and advising him as to who he could contact if there were any problems. Their letter of 11th April 2002 enclosed drawings of what was proposed. Mr Perlman did not in fact need that advice, because he and his wife remained on good terms with the Raydens and could and did raise any problems with them. When Mrs Perlman wanted to celebrate the Jewish holidays without the skip in the drive, or for the work to be halted during a lunch party for Lady Grabiner, she asked for that and got it. Westminster City Council sent to Mr Perlman notice of both planning applications. He said that he did not receive the first and overlooked the second. But the planning process is an open one and the Raydens could not have thought that Mr Perlman would not have been given notice of the second application by the planning authority, even if they themselves had not done so. The same goes for the first. If Mr Perlman had become aware of the second planning application in time, he could have objected to it. But I am entitled to proceed on the basis that he would not have vetoed the other works which he was prepared to and did tolerate, simply as some tactical means of preventing work to the second floor. I am entitled to assume, and do assume, that he would have limited his objection to what he genuinely disliked.

93. It all therefore comes down to the extension and the subsequent work to the second floor. Mr Perlman now seeks damages and injunctions for the works to the front elevation of No 6 which were carried out using the roadway. But that relief is not available to him if he consented to the works which were carried out. I am fully satisfied that he did consent. Even though no meeting took place in November 2001, the Perlmans

(especially Mrs Perlman) remained closely in touch with the Raydens and were clearly aware of the use being made of the roadway. Mrs Rayden said that during a car journey Mrs Perlman even offered to write a letter supporting the first planning application. I am not convinced about that, and there is also controversy about a letter which Mrs Rayden says that she sent to Mr and Mrs Perlman, notifying them of the intended removal of some of the shrubs in front of their house in connection with the building works. But I am not convinced that that really matters. It is common ground that both parties continued to meet socially, and I accept Mrs Rayden's evidence that she had frequent conversations with Mrs Perlman, in which the progress of the works was mentioned. Both Mr and Mrs Rayden seem to accept that there was never an occasion on which they asked Mr Perlman in express terms for consent to use the roadway. Even their account of the 18th November meeting stops short of that. But there are the admitted occasions after the works had started, such as when the skip was removed and the works were halted during the luncheon. Mrs Rayden also recalled an occasion (admitted by the Perlmans) on 13th July 2001, when they came to visit her at home, soon after the birth of a child, and came inside the house. It was obvious by then that the front door and some of the windows were being relocated and the extension added on over the garage. Therefore, even if there was no meeting in November 2001, nor even one in March 2002 (which the Raydens deny took place), there is a consistent line of conduct by the Perlmans towards the use of the roadway during the period of the works. Everything points to their accepting what was being done. A failure to object does not necessarily imply consent. It may be explained by other factors such as, for example, a fear of the consequences of objecting. But in this case there were no such inhibitions. Mr Perlman struck me as more than capable of standing his ground and making his position known, if he did truly object to what was being done. He was on friendly terms with Mr Breslauer, but he was still insistent that certain aspects of his plans should be changed. He also made it clear to Mr Breslauer what could and could not be allowed to take place on the roadway. I accept that Mr Perlman wanted to be a good neighbour to Mr and Mrs Rayden, but it was for that reason that, in my judgment, he consented to and acquiesced in the carrying out of the works using his property. The most striking indications of this are the requests I have referred to, to remove the skip and to stop the work during social occasions. If one wants to be technical, this was Mr Perlman revoking a licence and asserting his rights. But the request to refrain from doing these acts for a limited period of time carries with it the clear implication that outside and following that period the works were to be permitted. In short there was consent.

94. If it is necessary to go this far, there was also, in my judgment, conduct which makes it inequitable and estops Mr Perlman from now asserting his rights in respect of the use of the roadway. This seems to me to be the clearest possible case of someone standing by, aware of his own rights, but allowing the other party to believe that they would not be enforced against him and acting to his detriment in that belief. Mr Perlman knew, on his own evidence, that a planning application had been made and that the Raydens intended to carry out the alterations to the front and the interior of their house. No attempt was made to object to the grant of permission, even though Mr Perlman knew the scheme would include the repositioning of the windows and the front door. He says that there was a meeting held in March 2002, before the works commenced, at which Mr Rayden gave certain assurances that none of the construction work would adversely affect the Perlmans' property. They were, however, shown the plans, which made it clear what was intended, and according to their evidence they expressed some concern about the height and size of the family-room. It is significant that all their concerns were directed to the rear extension and not to the works to the front of No 6. It was at this meeting that Mr Rayden is also said to have assured the Perlmans that he would not build *up*, which they took to mean that he would not be building above the ground floor level at the southern end of the house.

95. Mr Rayden denied that any such meeting took place. On balance, I am inclined to believe that there was such a meeting. It is supported by the contemporaneous evidence I have referred to. But even if the meeting did occur, it does not provide material to negative consent or to make it any less inequitable for Mr Perlman now to seek relief in respect of the work done to the front elevation of the house. The works to the front of the house do not adversely affect the Perlmans' property, and it is clear from Mr Perlman's attitude to them when they were taking place that that was the view he then took. What those works have done is to make No 6 a more attractive and probably more valuable house, but that has not caused Mr Perlman's property any harm. It is also difficult to see what harm has been caused by the works in

connection with the new dormer window. That extension does not face No 6A and, apart from an alteration in the roof line, has no material effect on Mr Perlman's property. Mr Rayden accepts that he did not disclose the second planning application to Mr Perlman. This was unfortunate, but its disclosure would at most have resulted in the Perlmans refusing consent to the use of the roadway for works in connection with that extension. The second planning application was an additional element of the works which could, if necessary, have been excluded. It seems clear that the main cause of concern was the rear extension, but although the Perlmans could not have anticipated that it would be built in excess of planning permission or constructed in the way that it was, they were certainly aware that an extension was to be built, hard against their property, at the rear of No 6. There was certainly no deception about what planning permission had been sought for. The criticism of the Raydens is that they subsequently built in excess of what was permitted, but there is no evidence to suggest that this was their intention in March 2002. More to the point, remedies exist for the way in which the extension was constructed, in the form of damages and, but for its prior demolition, an injunction. The Perlmans will therefore be compensated for the damage they have suffered as a result of those works. But the estoppel relied upon by the Raydens does not relate to the extension. It relates to the works carried out to the front of No 6 apart from the lights and the second floor window. I do not see why their conduct in relation to the extension (or, for that matter, the second floor bedroom) should disentitle them from relying upon the consent and acquiescence by Mr and Mrs Perlman in the works to the front elevation.

96. For the same reason I attach no relevance to the allegations that Mr Rayden was responsible for leading Westminster City Council to believe that the roadway was owned by him rather than by Mr Perlman. Fibbens Fox submitted a location plan in connection with the first planning application which marked out not only the site of No 6 but also the roadway. Mr Wood submitted that the plan (which seems to have originated from Mr Izod) in fact complied with the relevant statutory procedures, but even if it did not do so, I am not persuaded that this was due to an intention on the part of Mr Rayden to obtain planning permission for the work to the front of his house by deception. When the error was pointed out to Westminster City Council, they confirmed the planning permission for the alterations to the front of No 6, which they had assumed were covered by the general development order, and declined to prosecute Mr Rayden despite invitations from Mr Perlman to do so. I regard these allegations as a complete over-reaction by Mr Perlman and to be unfounded.

97. In my judgment, the works to the front elevation of the house were carried out at considerable expense in the belief on the part of the Raydens, encouraged or acquiesced in by Mr Perlman, that no objection would be taken to the use of the roadway in that connection. That belief was entirely justified, because there was in fact no objection to the works, and there would not have been any objection but for the unfortunate events which took place in the summer of 2002 in connection with the extension. By then the front of the house had literally been pulled apart. The old door was blocked up, the windows changed and the interior gutted. By then it was too late, in my judgment, for Mr Perlman to object to the use of his roadway for those works, particularly when (as I have explained) the source of the objection was unrelated to those works. He was entitled to prevent the construction of the rear extension (for which no consent is alleged) and he was also, I think, entitled to object to the use of the roadway in connection with the works to the second floor dormer window, of which he had been given no notice. In respect, however, of the other building operations, he was estopped. This estoppel extends to the new eaves and guttering above the garage and to the new window sills. Mr Driscoll submitted that these alterations were not shown on any drawings seen by Mr Perlman before October 2002, but they were an obvious part of the alterations to the windows and the construction of the new bedroom above the garage, which Mr Perlman was aware of and, in my judgment, acquiesced in. No claim for damages lies in respect of them. The claim for damages in the first action therefore fails, except in relation to the use of the roadway in connection with the installation of the dormer window and the fitting of the external lights. The evidence is that the lights were not installed until sometime in 2003 and there is no suggestion that they were anticipated in any drawings or conversations before October 2002. I shall return to this when I consider the question of remedies.

Remedies

The First Action

98. In the light of my findings on liability the only three matters to be considered in the first action are:

i) the use of the roadway in connection with the second floor works;
ii) the use of the roadway to install the external lights; and
iii) the exercise by the Raydens of their right of way until October 2002.

99. In respect of the first two matters, Mr Perlman seeks an injunction ordering the removal of the second floor extension and the lights as a remedy for the trespass on the roadway. Neither the dormer window nor the lights project over the roadway so as to constitute a continuing trespass. I am not therefore concerned with the type of issue that arose in cases like ***Shelfer v. City of London Electric Lighting Co*** [1895] 1 Ch 287, as to whether the Court should allow a wrong to continue by refusing an injunction and ordering the payment of damages in lieu. The issue for me is whether an injunction is an appropriate remedy for a past trespass.

100. Mr Driscoll bases this part of the claim on the decision of Bridge J in ***Esso Petroleum Co Ltd v. Kingswood Motors (Addlestone) Ltd*** [1974] I QB 142, where an injunction was granted in effect to compel the undoing of the consequences of a tort. In that case the Defendant company, whose petrol station was subject to a solus agreement, deliberately transferred it to a connected third party without procuring a direct covenant with Esso for the continuation of the agreement. The purpose of this was to break the tie. Bridge J ordered the transferee to re-convey the property to the Defendant so as to reinstate the agreement. The decision was followed by Jacob J in ***Hemingway Securities Ltd v. Dunraven Ltd*** [1995] 1 EGLR 61.

101. Even if I have jurisdiction to make such an order in the present case, I decline to do so. The consequences of ordering the removal of these items would, in my judgment, be wholly disproportionate to the damage suffered as a result of the use of the roadway which is complained of. Although Mr Perlman dislikes both the second floor extension and the lights, they have caused no damage to his property, as opposed to his feelings, and the use made of the roadway to carry out the works was comparatively slight. Damages are an adequate remedy. The experts have agreed that the maximum sum that would have been negotiated as the price for the temporary trespasses would be £5,000. This includes not only the works to the lights, but also the works to the windows and door. It does not, however, include the works to the second floor. To this sum, the experts say, should be added a further amount to take account of the additional bargaining power which the owner of No 6A would have from knowing that the Raydens also wished to have an extension in their garden. This would increase the sum which the owner of No 6A could reasonably require for consenting to the works to as much as £37,500.

102. These calculations have been put forward on the premise that this is a case in which the Court should award damages on what is often described as the wayleave principle, which aims to reflect the price which the Claimant as a reasonable person would charge and which the Defendant as a reasonable person would pay for the use of the Claimant's land: see ***A-G v. Blake*** [2001] 1 AC 268. Although damages in tort have, as a general rule, to be measured by the loss to the injured party rather than the gain to the Defendant, the Courts have recognised that in appropriate cases justice will require damages to be measured by the benefit received by the trespasser from the unlawful use of the Claimant's land. I am prepared to award damages on that basis, but am far from convinced that the reasonable owner of No 6A would have sought to exact a hugely inflated price for the works to the front elevation of No 6 simply because the scheme also involved the creation of an extension to the rear. As Mr Wood pointed out, the hypothesis on which the experts have done these calculations is that the rear extension was itself a lawful operation. I am also, I think, entitled to bear in mind that on the figures available the Raydens have expended far more on the building works to date than they have gained in value from carrying out these works. Although the trespass caused by the installation of the lights and the use of the roadway in connection with the second floor works was more serious than the other temporary trespasses complained of, in the sense that it enabled the Raydens to complete the construction of works which Mr Perlman was strongly opposed to, the wayleave principle assumes a willing and reasonable claimant and not one who would seek an exorbitant fee for the use of his land in order to deter consent being sought. I think that the right award of damages for items (i) and (ii) is the sum of £10,000.

103. The third item arises from what I have found to be the limited operation of the rights suspension proviso. Even though (as I have found) Mr Perlman consented to the casual parking by the Raydens on the roadway until October 2002, there is a technical argument that the proviso operated regardless of such consent, simply as a result of the Raydens' failure to observe the covenant not to park contained in the

February Transfer. However, even if this is right, the trespass involved in the continued use of the right of way until October 2002 was at best trivial. But for the existence of the proviso, I would have refused relief in respect of parking on the drive, on the basis that Mr Perlman had consented to it. Although the experts seem to have agreed that a substantial payment could have been asked for the right of way up to April 2004, I do not intend to award any more than nominal damages in respect of this part of the claim.

104. For completeness, I need to mention the damage to the planting area. It has been agreed that the Raydens should pay the costs of restoration in the sum of £3,125.50 and I will so order. In the light of my earlier findings, not all of this sum is payable by way of damages as such, but the technicalities hopefully do not matter.

The Second Action

105. The rear extension has now been demolished and I will make a declaration about the gaps which have to be left in relation to anything built in the future. No injunction is therefore necessary. The only issue is one of damages.

106. Damages are sought on the following bases:
i) for the interference with the right of access between August 2002 and April 2004;
ii) for the consequences of the damp; and
iii) for trespass.

Damages for trespass have been agreed at £587.50. The controversial items are (i) and (ii). I shall deal first with item (ii).

107. It is agreed that Mr Perlman should be put back into the position he would have been, had no tort occurred. He should therefore recover the cost of repairing the damage caused by the damp, which is agreed at £5,230, and a contingency figure of £1,175. It is also accepted that £300 is reasonable as the cost of hiring dehumidifiers. The two items claimed which are not agreed are the costs of investigating the cause of the damp (said to be in excess of £20,000) and a claim for the loss of the use of the maid's room.

108. There will have to be an enquiry in relation to the costs of the investigations, but the claim for loss of use is denied on the basis that no such damage was incurred. Mr Perlman seeks payment of damages calculated at a rate of £160 per week for the period when the maid's room was affected by the damp. This is the notional cost of renting alternative accommodation for a maid in the St John's Wood area during that period. In fact Mr Perlman did not have a live-in maid who required to use the room during that time and has not incurred the expense of providing such accommodation. Mr Perlman is only entitled to damages for nuisance, calculated by reference to the loss he has actually suffered. This head of damages is not, in my judgment, recoverable.

109. The other item is the claim for damages for the interference with the right of access over No 6. It is accepted by the Raydens that their extension did interfere with this right until it was demolished. But Mr Perlman never had cause to exercise the right of access during that period and the obstruction has now been removed. Notwithstanding this, Mr Perlman seeks damages in the sum of £15,750, which he says represents loss of amenity during the period in which the extension was in place. This sum is calculated by reference to a figure of £150,000, which is agreed by the experts to be the amount by which the value of No 6A would have been diminished, had the extension remained in place. The reason for this drop in value is apparently that the flank wall of the extension made No 6A appear to be semi-detached rather than detached, which has an adverse impact on value. The valuers have calculated that the income equivalent of the capital sum is 6% of £150,000: i.e. £750 per month. This is said to be the reasonable price which the parties would have agreed for the temporary interference with Mr Perlman's rights. Over a period of 21 months this amounts to £15,750.

110. I readily accept that the owner of No 6A is entitled to recover damages for a temporary nuisance, even if the value of his property is not permanently reduced. Mr Driscoll has referred me, in that connection, to the speech of Lord Hoffmann in ***Hunter v. Canary Wharf Ltd*** [1997] AC 655. If, for example, the nuisance is caused by smell, damages can be calculated to compensate the Claimant for the loss of amenity he has suffered in the enjoyment of his property during the relevant period. But my difficulty lies in accepting the basis upon which the claim has been calculated in this case. The £150,000 (and therefore its income

derivative) represents the loss which was occasioned by the appearance of No 6A being semi-detached. The original appearance of the property has now been restored, following the demolition of the extension. Damages for the loss of amenity are intended to compensate a claimant for the loss, during the temporary period of the nuisance, of his reasonable enjoyment of his property. It is not intended to compensate him for some notional drop in value which has nothing to do with loss of amenity. Nor are the rights of access which have been infringed by the construction of the extension designed to safeguard the appearance of No 6A. The right of access is designed, and serves, to enable the owner of No 6A to repair his property. That right has not been interfered with and any payment for its temporary suspension would, in my judgment, fall to be calculated on the wayleave principle by reference to the likely cost and inconvenience of having to carry out repairs in a different way during the period of suspension. A view would be taken as to whether any repairs to No 6A were likely to be needed during the relevant period. In this case I consider that the sum involved would have been modest. The correct award should be the sum of £1,000. The proper remedy for the interference caused by the extension was an injunction. The structure has now been demolished, due to the Raydens' planning difficulties, and no injunction is necessary. In these circumstances Mr Perlman has in effect achieved all that he needs in order to secure his rights, by my declaration about the gap and by the award of damages for the loss he has actually suffered due to interference with the right of access.

Aggravated Damages

111. The purpose of aggravated damages is to compensate a claimant for the mental distress he has suffered, when that has been increased by the defendant's conduct either during or after the commission of the tort. The Court can take into account the defendant's motives and conduct in committing the tort and in resisting a claim for compensation for it. The pleaded allegation in both actions is that Mr and Mrs Rayden blatantly abused the trust and confidence which existed between the parties prior to the building works by either misleading them as to what was proposed or seeking to ensure that the Perlmans did not become aware of what was planned.

112. This allegation is, in my judgment, too wide. I do not accept that the failure of the Raydens to enter into detailed discussions with the Perlmans was part of some kind of deliberate plan (which must have existed from the time they purchased No 6) to mislead the Perlmans in relation to the scheme of renovation. Their silence about the second planning application was unfortunate, but they could not have hoped to have kept the application silent or to prevent it from being advertised by the local planning authority. The lack of communication about the second planning application, and the failure by the Raydens to provide the Perlmans with the plans relevant to the first application until after permission had been granted, is, I think, merely symptomatic of the attempts made by the Raydens to keep on good terms with Mr and Mrs Perlman, but at the same time to ensure that the necessary planning permissions were obtained. I do, however, think that the delivery of the dormer window and the subsequent use of the drive did demonstrate a lack of consideration for the Perlmans feelings and, for that matter, for their rights. But, as I have already indicated, this was probably due to the contractors jumping the gun. It seems to me most unlikely that the Raydens would have deliberately arranged for the delivery of the dormer window via the roadway, knowing how provocative an act that would have been.

113. The biggest and essential cause of complaint is the construction of the new family-room in excess of planning permission. I have already outlined the way in which the plans submitted with the first planning application came to be prepared and what they showed. It is clear that the Raydens did not apply for, or receive, a planning permission to construct an extension beyond the length of the existing conservatory, which did not itself extend the whole length of the garden. Mr Rayden says he was under the impression that it did, but I do not accept that. It must have been obvious to him, simply from sitting in the old conservatory, that there was a significant gap between the end of that structure and the boundary with No 4. On 18th February 2002 Mr Izod produced drawing 2725/21, which shows the internal layout of the ground floor. The end of the extension is shown short of the existing conservatory, but 1.6 metres from the boundary fence with No 4. The disparity between the length of the old and new conservatories may be due to the fact that Mr Izod measured the new extension slightly short of its length as shown on drawing 2725/8A. Drawing 2725/21 was sent to Mr Rayden on 18th February 2002 and passed on to Ms Amanda Bond, their interior designer. She was then asked to and produced a sketch showing the layout of the

family-room extended to the boundary with No 4. This request came from Mr Rayden. Ms Bond's sketch was then sent to Mr Izod, who on 25th February 2002 revised drawing 2725/21 to show the family-room extended by 1.8 metres to the boundary fence. All this was obvious from the plans and it was, in my judgment, obvious to the Raydens at the time. Although it was clear that the plans submitted to Westminster did not extend the whole length of the garden, they nevertheless went ahead and built out that distance. The permitted height of the extension was also exceeded, to accommodate the air-conditioning equipment.

114. Later, in August 2002, Mrs Perlman returned from holiday and complained about the height of the extension adjacent to her front door. On 5th September the Perlmans met Mr Rayden and Mr Izod to discuss this, and Mr Rayden proposed that the adjoining parapet of the single-storey extension to No 6A should be raised to lessen the impact. Mr Perlman would not agree to this. He was also then told about the plans to extend the second floor of No 6. Mr Perlman said that Mr Rayden became defensive and slightly aggressive about this, and I accept that evidence. On 14th September Mr Izod wrote to the Perlmans, saying that the discrepancies in the height of the new flank wall were due to differences in the floor levels of the two buildings. The top of the extension wall was, however, in line with the approved scheme. This was not correct. Mr Perlman then appointed Mr Pritchard as his surveyor. At about the same time Mrs Perlman arrived home to find Mr Izod and the builders completing the addition of two or three courses of matching brown bricks on top of the Perlmans' boundary wall. They said that the purpose of this was to tidy things up.

115. It subsequently transpired that in the course of this work a drip-tray was inserted into the Perlmans' wall to accommodate the Raydens' extension and that the new bricks had concealed it. I have little doubt that this was deliberate on the part of Mr Izod and the builders and that the reassurance given to Mrs Perlman was positively misleading. The drip-tray was discovered in 2003, when the additional courses of bricks were removed. Mr Rayden accepted in cross-examination that this was a deliberate act of trespass by his builders and that he was shocked when he discovered what had happened. This was in January 2003. However, in February 2003 he made a witness statement rejecting the allegation that his builders had put two extra layers of bricks on the Perlmans' wall, and similar denials were made in relation to the ingress of damp. It was only much later that the true position was conceded. On 3rd October 2002 Mr Pritchard wrote to Mr Nixon querying the construction of the flank wall and asking him to confirm that it was independent of Mr Perlman's property. He had had an earlier meeting with Mr Izod, at which he made it clear that the Perlmans did not wish to be difficult, but were seeking assurances about what had been done. On 9th October Mr Izod wrote to Mr Pritchard confirming that there was no bond between the two properties and that the flank wall of the extension did not rely in any form on the existing wall of No 6A. Similar statements were made to Westminster. It was only in October 2003 that Mr Nixon acknowledged that steel straps had been secured into the wall of No 6A.

116. On 10th October 2003 there was the meeting outside Mr Perlman's front door which led to the confrontation I have already referred to. This time Mr Perlman was seeking copies of the plans used to obtain planning permission, in order to compare them with the extension as built. Everybody accepts that there was a confrontation. Mr Perlman's main complaint was about the second floor extension. Mr Rayden said that he had been misunderstood in terms of what he said about not building up, and all that he had meant was that he was not going to implement the 1991 permission. Thereafter Mr Perlman consulted solicitors and the letter of 19th October was written. On 29th October Mr Rayden sent Mr Perlman not the approved plans, but rather the detailed drawings showing what was being built. Westminster (who had been contacted by Mr Perlman) then discovered that the extension was longer than permitted, and the Raydens began a series of unsuccessful applications to obtain retrospective planning permission for what they had built. Eventually the extension was demolished.

117. I have rejected the allegation that the Raydens sought from the start to mislead the Perlmans and that they always intended to carry out their works regardless of the Perlmans' rights. That is not justified on the evidence and is inconsistent with what we know about the dealings between the parties. I do, however, accept that the Raydens did decide to press ahead with the extension regardless of the terms of the planning permission. What is in dispute is whether and to what extent they were also aware that their

extension would impinge on the Claimant's property and his rights of access in the way it did. It is, I think, important to bear in mind that Mr Perlman is not entitled to damages for a breach by the Raydens of planning control. His cause of action is one in nuisance or trespass. There is no clear evidence that the Raydens knew in advance how their builders intended to construct the extension, any more than they planned the delivery of the dormer window via the roadway. But these were the Raydens' builders and they must, in my judgment, take responsibility for their actions. It also seems to me unlikely that Mr Rayden was not told by Mr Izod or the builders at least something about the attempts that were being made to deal with the level of the flank wall. Neither Mr Nixon nor anyone from the builders has been called to explain why they acted in the way they did. What is, I think, particularly important and significant is that when the queries were raised about the construction of the flank wall, Mr Rayden continued to deny any wrongdoing, even at a time when he must have known what the true position was and indeed was prepared to admit it to the planning authority. This is a case where I can. I think, properly make an award of aggravated damages, but in doing so I am entitled to take into account the fact that the extension has now been demolished, at considerable cost to the Raydens, and my declaration about the gap to be left ought to prevent problems of this kind occurring in the future. There has therefore been, by those orders, a substantial vindication of Mr Perlman's rights. I propose to order that there should be an additional award of damages, on an aggravated basis, in the sum of £5,000. I will hear Counsel in due course as to the form of order I should make and on the question of costs.

Michael Driscoll QC and Kevin Leigh (instructed by Lucas McMullan Jacobs) for the Claimant

Derek Wood QC and Marc Dight (instructed by Teacher Stern Selby) for the Defendants