Neutral Citation Number: [2023] EWHC 667 (Ch)

Case Nos: CH-2022-CDF-000002, CH-2022-CDF-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY, TRUSTS & PROBATE LIST

ON APPEAL FROM THE COUNTY COURT AT CARDIFF (ORDER OF HHJ JARMAN KC DATED 18TH OCTOBER 2022)

Cardiff Civil Justice Centre,
2, Park Street, Cardiff CF10 1ET

Date: 24 March 2023

Before :

THE HON MR JUSTICE MELLOR

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Between :

1) MARK LEONARD LAMPORT	**Claimants**
2) ANDREW PAUL LAMPORT	
3) NICOLA JAYNE EVANS	
4) MARTIN ANDREW MOORE	
(Claimants 1-4 being the executors of the Estate of TERENCE L LAMPORT, DECEASED)	
5) SYBIL ANN WHITE	
- and -	
STANLEY THOMAS JONES	**Defendant**

- -

David Nicholls (instructed by **JCP Solicitors Ltd**) for the **Claimants**
Alex Troup (instructed by **Loxley Solicitors Ltd**) for the **Defendant**

Hearing dates: 21st March 2023

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Approved Judgment

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

Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. The deemed date of hand down is 10.30 am on Friday 24th March 2023

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

Introduction

1. On 21st March 2023, I heard a rolled-up hearing of (1) renewed applications for permission to appeal made by both the Claimants and the Defendant from the Order of HHJ Jarman KC ('the Judge') dated 18 October 2022, and (2) if I granted permission, the appeals themselves. Since both sides are seeking to appeal I will refer to them as Claimants and Defendant.

2. The underlying dispute is a very unfortunate one which concerns a right of way over a short rough track which is about 155m in length. The track lies at the southern boundary of the Defendant's land known as Y Wern. In his Defence, the Defendant admitted that the Claimants had a prescriptive easement over the track 'for all purposes' for the benefit of Blaen Warn farm, a small strip of land between Blaen Wern and Y Wern and for freehold land known as Golygfa, where a property is situate occupied by the Fifth Claimant.

3. The principal dispute however between the parties was as to the width of the easement over that short track. The Defendant asserted the right of way was limited to a width of 2.15m, whereas it was the Claimants' case that for many years vehicles of up to 2.5m in width had passed along the track, delivering materials to Blaen Wern farm and for the construction of the house at Golygfa. As the Judge recorded in his main judgment at [1], other issues concerned the weight of vehicles which could use the track, whether the right carries with it an entitlement to improve as well as repair the track and the extent to which the right allows the cutting back of hedges and trees along either side of the track.

4. The dispute began in January 2020 when the Defendant placed two steel bollards at each end of the track on the wheelings. One bollard at each end was removed about a month later which allowed a vehicle the width of a quadbike through but not larger vehicles. The action began in June 2020 and in July 2020 an interim injunction was granted to restrain the Defendant from obstructing the track.

5. At the CCMC in November 2021, the C's costs budget was set at just under £200k and the D's at just over £218K. On that occasion the issues identified above were directed to be tried as preliminary issues.

6. On 7th March 2022, an Order was made by Consent for certain repair work to be carried out to the track, albeit that the actual repair work was carried out during the trial in September 2022.

7. The PTR came before the Judge on 19th August 2022. On that occasion the Claimants applied to vacate the trial date, to increase the trial estimate from 4 days to 8 days, to call 7 expert witnesses permitted to give evidence under the CMC order as well as further ecologist evidence and to increase their budget costs. As the Judge recorded at [3], he was already (rightly) concerned about proportionality and he refused each of the orders sought by the Claimants. The Judge made a series of directions aimed at simplifying the trial and thereby making it less costly.

The outcome of the trial

8. The trial commenced before the Judge on 20th September 2022. After hearing evidence on day 1 and submissions for half a day on Day 2, the Judge handed down his main judgment on day 3. In view of some of the issues raised, it is necessary to summarise the Judge's principal findings:

    i) On the principal issue as to the wide of the prescriptive easement, the Judge found on the evidence that, from 2000 and before, vehicles (such as tractors, delivery lorries taking building materials for sheds at Blaen Wern and for Golygfa, other materials such as limestone and oil deliveries) with a wheelbase width of up to 2.5m were likely to have used the track on a regular basis as and when needed [25]. Accordingly, he found the user had been 2.5m at ground level [26]. He found it was unnecessary to place any further limitation by way of weight [27] because the width itself limited the weight of the vehicles.

    ii) As to repair and improvement, the Judge recorded that it was not in dispute that, in general, a right by express grant may carry with it the entitlement to improve the way, but a right by prescription does not [28]. Mr Nicholls for the Claimants had argued that, because the right was 'for all purposes' that was akin to an express grant and allows improvement. The Judge rejected this [29].

    iii) As to the cutting back of vegetation, it was accepted that the Claimants could cut back hedges and trees encroaching onto the track to the extent that it is reasonable to allow the right to be exercised. Again, Mr Nicholls went further and argued that the Claimants were entitled to lop the tops of hedges and trees and the sides on the other side of the wall (i.e. the side away from the track). The Judge found there was no justification for this [30].

    iv) Having decided the issues in dispute, the Judge expressed the hope that any remaining matters, beyond the preliminary issues, could be agreed or determined that day without the need for a further hearing [31].

9. The transcript for the remainder of Day 3 reveals that the Judge then proceeded to hear and determine, in a suitably robust fashion, various outstanding matters which were concerned with (a) the scope of the Claimants' right of repair (b) whether an injunction should be granted against the D and (c) costs. Some of his rulings were extracted into an *ex tempore* judgment transcript and others remain in the transcript of Day 3

10. On the first point, it appears from the transcript of day 3 that the debate before the Judge was as follows. The repairs which had been done that week were in accordance with the March 2022 consent order. The Claimants characterised those repairs as just filling in the potholes. The Claimants argued that the repairs should go further and bring the width of the roadway up to 2.5m along its entire length to give effect to what they contended the Judge had decided. These further 'repairs' would raise the roadway by between 25 and 30 cm. The Defendant objected, arguing by reference to *Mills v Silver* [1991] Ch 271 that the Court of Appeal in that case had said in a prescriptive right of way case you can fill in the ruts with stones but you cannot add an additional layer on top because that would be an improvement.

11. On this issue, the Judge essentially agreed with the Defendant's submissions.

12. On the next issue, which was whether a final injunction should be granted, although the Claimants were initially seeking an indefinite injunction, in the course of argument Mr Nicholls accepted the Judge's point that an indefinite injunction might not be optimal and instead suggested an injunction limited to 3 years in length. The Judge agreed. He mentioned in particular that the parties, in particular Mr Jones and Mr Lamport, had been in confrontation on a number of occasions and that there was little or no love lost between them, even though Mr Troup had submitted that the Judge's clear decision should avoid further disputes.

13. So far as costs were concerned, the issues fell into four parts: first, the incidence of costs. On that the Judge decided that the Claimants should have 75% of their costs.

14. The second part concerned the effects of certain Part 36 offers made by the Claimant. On that, the Judge decided that the Claimant had beaten their Part 36 offer dated 27 August 2021, or, to be more precise, the judgment against the defendant was at least as advantageous to the claimants as the proposals contained in their Part 36 offer. CPR part 36.17(b) was engaged.

15. In the third part, the Judge had to consider two offers made by the Defendant marked Without Prejudice Save As to Costs (WPSATC), and whether one or both of them should be taken into account in deciding whether the consequences of the D's refusal of the C's Part 36 offer should not extend beyond the date of the WPSATC letter or letters. Only the second one mattered. The WPSATC letter was dated 2nd March 2022 and the offer was open for acceptance until 10th March 2022. So, what the Judge had to consider was whether, pursuant to CPR 36.17(4) and (5), whether it would be unjust to allow the consequences of the Claimants' successful part 36 offer, as set out in 36.17(4) to continue beyond 10 March 2022.

16. The Judge considered two arguments put forward by Mr Nicholls for the Claimants as to why that offer should not be taken into account. His first point was that the offer made no reference to a final injunction, instead inviting agreement that the interim injunction should be discharged. The Judge dealt with that point in the following terms:

> 'But it seems to me that if that offer had been accepted, then the stress and the bitterness which, no doubt, I have seen in this case would have been less. The parties would have agreed matters, and it is far better for the parties to agree matters than having to work side by side, and coming to court and having the matter canvassed in public before a judge.'

17. Mr Nicholls' second point concerned the offer to pay, so far as the Claimants costs were concerned, the higher of 80% of the Claimants costs for the substantive claim to the date of the offer to be assessed if not agreed or £65K inclusive of VAT or such lower figure as is appropriate if VAT is not properly payable, suggesting that offer had been beaten. The Judge dealt with that argument in the following way:

> 'Mr Nicholls takes the point that had the Part 36 offer been accepted, then the further costs would not have been incurred which, of course, is correct. However, I have to consider whether this offer means that the consequences of that offer not being accepted should continue after March 2022. In my

> judgment, that letter and the offer contained therein is substantially similar to what has been achieved at trial by both parties and, indeed, goes somewhat further in relation to the raising of the surface of the track. In my discretion therefore, in my judgment, the consequences of the refusal of the Part 36 offer should not extend beyond the time for acceptance of that offer….'

18. In the fourth part of the costs issues, the Judge ordered the Defendant to pay £98k plus VAT as appropriate by way of interim payment.

19. Based on those various rulings, a draft Minute of order was drawn up. However, the parties were unable to agree on the terms of paragraph 4 of the draft Order which was concerned with whether the Claimants right of repair extended to the embankment on the northern side of the track. The parties put their rival proposals to the Judge and he incorporated the Claimant's version into his order, albeit without giving any reasons for his choice.

20. The Order was sealed on 18th October 2022. In view of the arguments I have to consider, it is necessary to mention certain of its provisions. The first set were, in effect, a series of declarations:

    i) Paragraph 1 records the details of the prescriptive easement.

    ii) Paragraph 2 was in the following terms:

    > 'The width of the right of way is 2.5m at ground level with the width above ground being equal to the distance between the embankments provided any vehicle exercising the right of way does not touch the sides of the embankments on either side of the Roadway.'

    iii) Paragraph 3 set out the details (which I was told were derived from the experts' joint statements) of the agreed repairs which, as I understand matters, had been carried out during the trial. Amongst the details was that:

    > '(b) any such repair work should be feathered into the existing surface where the Roadway adjoins the entrance to Wern in order to minimise the risk of diversion of surface water towards Y Wern.'

    iv) Paragraph 4 provided:

    > 'In the event that the embankments suffer any damage as a result of natural causes or damage caused by any party and such damage obstructs the Claimants' use of their right of way (as set out in paragraph 2 above) the Claimants are entitled to enter onto the Defendant's land in order to carry out repairs to the embankments in a reasonable and lawful manner and in accordance with the Hedgerow Regulations 1997.'

v) Paragraph 5 made a declaration as to the Claimants' entitlement to cut back vegetation.

21. The remaining paragraphs continued the interim injunction for a further 3 years, reflected the Judge's decisions on costs, on the Claimants' Part 36 offer and the Defendant's WPSATC offer, and on the interim payment. At paragraph 12 the Judge dismissed the Defendant's application for permission to appeal against the decision that the Claimants had beaten their Part 36 offer dated 27 August 2021, for the reasons stated on the Form N460 which had been issued by the Judge on 26 September 2022.

22. Before the Order was sealed, each side had already filed their Appellant's Notices, the Defendant on 11th October and the Claimants on the 13th October. Shortly after receiving the sealed order, the Defendant applied to amend his Appellant's notice to include a further ground regarding paragraph 4 of the Order.

23. With the benefit of hindsight, certain parts of the Order could have been more precisely expressed.

24. Both sides applications for permission to appeal were considered by Mr Justice Lane and in two Orders, each dated 30th November 2022, both applications were refused on the papers. Each side took up the possibility of being able to renew their applications for permission to appeal. Hence the hearing before me.

25. I am grateful to both sides for co-operating to produce a single agreed appeal bundle and to Counsel for their clear and succinct skeleton arguments. Mr Nicholls, Counsel for the Claimants, recently submitted a supplemental skeleton argument which helpfully gathered together and addressed all the issues raised in both the appeals, although as Mr Troup observed, that skeleton involved some changes in the Claimants' arguments to those considered by Lane J.

Applicable Principles

26. The test applicable on an application for permission to appeal is well-known – see CPR 52.6. I should grant permission if the appeal has a real prospect of success or if there is some other compelling reason why the appeal should be heard. It is convenient to summarise the requirement for a real prospect of success using the shorthand of whether any particular ground of appeal is arguable or not.

27. If I should grant permission then I am reminded that the hearing of the appeal is limited to a review of the decision of the lower court (CPR 52.21) and the appeal court will allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

28. Having heard full argument on both appeals, I observe that the distinction between the decision whether to grant permission and the decision on the appeal itself becomes increasingly blurred and somewhat otiose. Nonetheless it remains possible to decide whether any particular ground is arguable or not.

29. Mr Nicholls for the Claimants also reminds me that the Court is considering an appeal from the order of the lower court, not from its reasoned judgment, although he also

accepted it may be necessary to construe the order under appeal, the correct approach being to consider what the language of the order would convey in the circumstances in which the Court made the Order, so far as these circumstances were before the court and patent to the parties. The reasons for making the Order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which the Court considered relevant and they are admissible when construing the Order: see *SDI Retail Services Ltd v The Rangers Football Club Ltd* [2021] EWCA Civ 790 at [44].

30. It is convenient to deal with all grounds of appeal which concern the Claimants' right to repair first, before moving onto the various grounds which concern costs.

31. Before doing so, I should mention the Judge's earlier summary of the evidence as to the width and nature of the track in [13], [14] and part of [15]:

> '13. It is not in dispute that it is an old very well-established track with a central grassed area and stone ruts (or wheelings as they were referred to) either side. The expert evidence agrees that this shows substantial use over the years so that along the wheelings the core base rock layer is exposed. It is not in dispute that stone has been added to the wheelings from time to time to repair holes and as water has washed away some of the surface stones. Either side of the wheelings is a narrow verge of soil/vegetation leading to a shallow wall faced with sides of stone but with a core of earth. The edge of the wall facing the track inclines slightly away from it. A hedge or trees grows up or out of this wall. The track is some 155m in length with a couple of shallow curves but no severe bends.
>
> 14. The surveying evidence has attempted to establish the width between the walls at ground level. As Mr Troup realistically accepts, because of the unsophisticated construction of the walls, this is not an exact science and involves some judgment. The claimants' surveyor Mr Anderson relied upon 33 laser measurements along the track taken by others with the necessary equipment. This shows, unsurprisingly, a varying width along the track, with the preponderance of the measurements showing around 2.5m. However there are a couple of points where the measurement is 2.1m. This leads the defendant to submit that this is the maximum of the outer tyre to outer tyre (or wheelbase as I shall call it) of any vehicle using the track. It is accepted that as the walls incline away from the track, the upper parts of any vehicle, such as a wheel arch or trailer bed, may be wider than this as long as no damage is caused to the walls.
>
> 15. … The photographs of the pinch points referred to above confirm the expert evidence that at these points there are stones protruding from the wall at ground level but which would not prevent the tyres of a large vehicle going over these stones. Accordingly I am satisfied that the width of the track has not been such as to limit the wheelbase width to 2.1m.'

32. I was shown the survey to which the Judge referred. The measurements are accompanied by a series of photographs. To take an example at XS15, the width measurement of 2.21m at ground level (which is the narrowest measurement) appears to be explained by a large stone protruding from the left hand side of the embankment. There are other pinch points of 2.35, 2.23, 2.26 etc. The Judge seems to have misremembered the dimension of the narrowest points, although it makes no difference.

The Right to Repair

33. In terms of challenges to what the Judge found to be the scope of the right of repair, I will deal first with the challenges made in the Claimants Grounds of Appeal at paragraphs 1-3, as developed in oral argument by Mr Nicholls.

34. Mr Nicholls did not pursue ground 1. It was, in any event, unarguable. It was based on equating or assimilating the prescriptive easement found by the Judge to an express easement.

35. **Ground 2a** The second ground of appeal is in two parts, but Mr Nicholls only pursued the first part. The argument proceeded in the following stages.

    i) First, the argument focussed on the opening words of paragraph 2 of the Order.

    ii) Second, reference was made to the evidence at trial which showed the width of the track was not 2.5m for its whole length (see above).

    iii) Third, it was submitted there is a tension between the evidence of the width of the track and the Judge's acceptance of that evidence on the one hand and the Judge's determination of the width of the right of way.

    iv) Thus, it is said, the Judge erred in refusing to make an order permitting C to undertake repairs to the track which would enable the track to be used to the full extent of the width of the right of way.

36. I do not consider this point to be arguable. Two reasons suffice:

37. First, the whole argument is based on a misunderstanding or misinterpretation of what the Judge found the right of way to be. Mr Nicholls focusses on the introductory words in paragraph 2 of the Order and submits the Judge found the right of way to be 2.5m wide at ground level.

38. This, however, is a summary of what the Judge actually found. I have summarised his findings at paragraph 8.i) above. When making those findings, the Judge cannot have forgotten various pinch points along the track where the width at ground level was less than 2.5m – see his [14] & [15], quoted above. Thus, the Judge did not find that the right of way required the track to be at least 2.5m in width at ground level along its entire length. What the Judge actually found was that the prescriptive easement was established by the passage of vehicles with a wheelbase width of up to 2.5m.

39. Second, what the Claimants propose is plainly improvement and not repair.

40. The second part of Ground 2 was concerned with an application to adduce fresh evidence on appeal. Mr Nicholls did not pursue this second part and in any event, it suffers from the same flaws as the first part. It too is unarguable.

41. **Ground 3** is said to concern a similar tension in the Judgment. It is said that at [17] the Judge concluded that the effect of erosion by rainwater over the years had been to reduce the width of the right of way by a few centimetres. Accordingly, Mr Nicholls submitted that the Claimants should be entitled to repair the track by extending the width by a few centimetres to undo the narrowing. The Ground concludes by asserting the Judge erred in refusing to permit the Claimants to carry out work to the track to remove the effect of erosion AND to ensure the track was 2.5m in width at ground level.

42. This ground is also unarguable. The following reasons will suffice:

    i) What the Judge actually found at [17] was that erosion by rainwater had reduced the width of the wheelings (and therefore the track) by a few centimetres, not the width of the right of way.

    ii) Second, as I understand it, the purpose of the repairs carried out during the trial was to remedy any erosion by rainwater. No further repairs were necessary.

    iii) Any further work, to ensure the track was 2.5m at ground level would constitute an impermissible improvement, for the same reasons as above.

    iv) There is, in any event, no tension as alleged. The only tension is created by the Claimants own misinterpretation of what the Judge actually found.

43. **Defendant's Ground 1**: That leaves the challenge made by the Defendant in his Amended Grounds at paragraph 1. This challenge is concerned with what has been called the embankment issue in paragraph 4 of the Judge's Order. The Defendant takes two points.

44. The first point is presented under the heading 'Right to repair or to remove obstruction?'

45. The essence of the argument is that the dominant owner of a right of way only has the right to repair the 'way' i.e. the land over which the right of way passes, which in this case is the track. The Defendant relies on *Carter v Cole* [2006] EWCA Civ 398 at [8] and passages in *Gale on Easements* (21st Edition) at [1-112] and [9-113]. It is said that the right of way does not pass over the banks, the edges of the banks merely defining the width of the right of way above ground level.

46. It is also said that if the banks are damaged and the right of way obstructed then the Claimants' only entitlement in that scenario is to remove the obstructions so as to abate the nuisance. It is also said that any repair works carried out by or on behalf of the Claimants to the embankments would constitute trespass.

47. In essence, Mr Troup submitted that the Judge should have worded paragraph 4 by replacing the words 'carry out repairs to the embankments' with 'remove obstructions'

48. Mr Nicholls for the Claimants reminded me of the principles applicable to the repair of a right of way and in particular the sixth proposition from *Carter v Cole* [2006] EWCA Civ 398 at [8]:

> 'The dominant owner (in whose interest it is that the way be kept in good repair) is entitled to maintain and repair the way and, if he wants the way to be kept in repair, must himself bear the cost. He has a right to enter the servient owner's land for the purpose but only to do necessary work in a reasonable manner.'

49. Mr Nicholls also drew my attention to two important points from *Jones v Pritchard* [1908] Ch 630 at 638, per Parker J.:

    i) First, '…the grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment.'

    ii) Second, and based on that principle, in *Jones* the Court concluded that 'each party in the present case may do such acts on the property of the other as are reasonably necessary to the continued enjoyment of the easement; for example, each party would be entitled to repair the other's half of the wall in question so far as was reasonably necessary for the enjoyment of any easement impliedly granted or reserved.

50. On the basis of that caselaw, Mr Nicholls submitted that the Judge was perfectly entitled to direct that the Claimants may repair the embankments in the event of damage, provided that damage obstructs the Claimants' use of the right of way. This is clearly work within the scope of doing what is reasonably necessary for the enjoyment of the right of way.

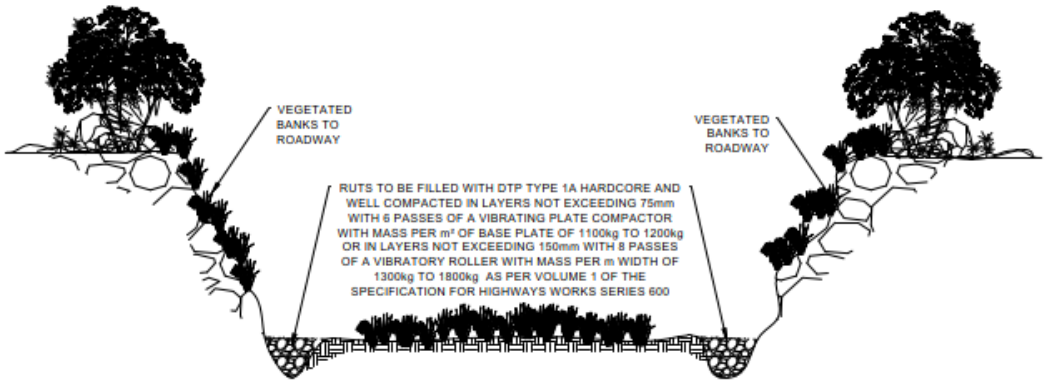
51. For completeness I note that Mr Nicholls also argued there was an alternative basis in law for the Order the Judge made in paragraph 4 of his Order: the Order is clearly intended to enable the Claimants to abate any nuisance that an obstruction caused by damage to the banks may cause. Although the right to abate a nuisance is limited and confined to simple cases which would not justify the expense of legal proceedings and to urgent cases which require an immediate remedy, abatement may require entry onto the offendor's land. Mr Nicholls argued that therefore the Judge was entitled to make paragraph 4 of the Order in order to give effect to and to state the limits on the exercise of Claimants' right to abate a nuisance caused by obstruction to the right of way as a result of damage to the embankments. Obstruction would require an urgent remedy. Furthermore, the Judge was plainly keen to ensure that any further legal proceedings between these two parties were avoided.

52. The Defendant's second and somewhat separate argument is that if the Claimants or their agents have themselves caused the damage to the banks which obstructs the right of way, then their conduct in doing so constitutes a trespass, and a trespasser is not entitled to enter back onto the land in order to remedy the damage he himself has caused because that would constitute a further trespass. It is said that it is up to the landowner, in this case the Defendant, to undertake whatever remedial action he deems appropriate.

Discussion

53. On this ground, I grant permission to appeal because the Defendant's ground is arguable.

54. It helps to understand these issues if one has clearly in mind three things. The first is the nature of the track. One of the surveyor experts produced an illustrative cross-section of the track, showing how the repairs (which were sanctioned in paragraph 3 of the Order) would look:



55. From other photographs in the bundle, I note that the banks are not uniform and often do not appear to be at the angle shown in that illustration. They may be steeper in angle in places although it is difficult to tell because there is significant vegetation which has often been cut back vertically above the outer edges of the wheelings – the impression is of a green-lined corridor with vertical walls.

56. The second point to keep in mind is how the Judge distinguished between the track and the embankments – see Paragraph 2 of his Order, quoted above – vehicles exercising the right of way were not permitted to touch the embankments, although one has to take a practical approach here. With a rough track of this nature, there is no precise dividing line between track and embankment. Take the protruding stone at XS15 by way of example. Clearly the Judge envisaged lorry tyres riding up over that stone. To that extent, the tyres of vehicles would be likely to touch what was strictly the embankment. What I think the Judge had in mind was that, tyres aside, no other parts of a vehicle should touch the embankment. This too, needs to be considered in a practical way and gives rise to the third point which needs to be kept in mind, which concerns the size of the vehicles whose long user has established this prescriptive easement.

57. Whilst the Judge ruled that the sides of vehicles are not permitted to touch the stones or the earth in the embankments, it is likely to be the case that they have and will brush against vegetation, and particularly so in the period just before the vegetation has grown to such an extent that it has to be cut back. This is reflected in paragraph 5 of the Order, which declares the Claimants' entitlement 'to carry out such works to the vegetation encroaching onto the Roadway as are reasonably necessary to enable the right of way to be used to the full width stated in paragraph 2 above …'

58. In my view, in certain places along the track the clearance between the bodywork of vehicles with a wheelbase width of 2.5m exercising the right of way and the embankments is small and it is certainly conceivable that, depending on how often the vegetation is cut back in the prime growing periods and how often the bigger vehicles pass down the track, sturdier plants and branches could get snagged on the sides of vehicles and could get wrenched out of the embankment. There is, therefore, in my view an occasional possibility of damage to the embankment caused by legitimate exercise of the right of way.

59. Accordingly, I accept Mr Nicholls' argument based on *Jones*, as set out in paragraph 50 above.

60. Furthermore, the Defendant's argument is founded on too narrow a view of what the right of way is. The 'way' is not simply at ground level. This right of way was established by the passage of vehicles i.e. 3-dimensional objects, driving down this narrow track. Due to its geometry (discussed above, and which is not at all unusual for tracks of relatively ancient origin), it is necessary to ensure that the sides of the track do not interfere with the exercise of the right of way. One type of interference is not in dispute – that created by vegetation growing on or out of the embankments. However, for the reasons I have explained above, it seems to me that the clearance between vehicle and embankment is small at certain points, and sufficiently small to give rise to the risk, as I have explained, of vegetation snagging on vehicles, giving rise to an occasional possibility of damage to an embankment. Thus a right to repair the embankments in the event of such damage occurring which either does interfere or has the potential to interfere with the exercise of the right of way is properly to be considered a right ancillary to the right of way.

61. Although as I have mentioned, the Judge did not give reasons as to why he preferred the Claimants' proposal for paragraph 4 of his Order, he has considerable experience in dealing with these types of cases and is likely to have taken a practical approach, along the lines I have set out above.

62. On this basis and due to the geometry of this track (which is not at all unusual for tracks of relatively ancient origin) I consider the Judge was entitled to word paragraph 4 as he did in his Order.

63. However, having granted permission to appeal, it is right to consider Mr Nicholls' alternative argument, which I consider also to have force. Although paragraph 4 was not framed in terms of abating a nuisance, the argument supports the same degree of entry onto the Defendant's land.

64. As to the Defendant's second argument, it is not really a separate point. In any event, it seems to me to suffer from the flaw that it neglects to take account of the fact that the Claimants have the right of way and the right to repair to remove or remedy obstructions to that right of way. Let me take an extreme example in which the Claimants' agent has managed to bulldoze part of the embankment onto the track. The Claimants would have the right to remove the obstruction from the track and to repair the embankment in so far as that was necessary to allow enjoyment of the right of way. That would not necessarily entitle the Claimants to restore the embankment to its original state and it would not remove the D's right to claim for the original trespass.

65. By way of a far less extreme example, consider the position in early summer just before the vegetation is cut back. Cars have passed down the track without hindrance, but now a lorry with a wheelbase width of 2.5m drives down the track. The vegetation brushes against the sides of the lorry. Although I accept there is no evidence that this has occurred in the past, it is nonetheless conceivable that some vegetation snags on the side of the vehicle to such an extent that it is pulled out of the embankment. Although this may well not happen on each occasion, it is also conceivable that, over time, stones in the embankment may get dislodged onto the track. These might not trouble a lorry but could be more troublesome for a car. On an occasional inspection, the Claimants

would be well within their rights to take those stones and to replace them in the embankment and if they observed the embankment appeared likely to suffer a further fall of stones, to repair the embankment so as to preserve their enjoyment of the right of way. Such activities would be, in my view, properly ancillary to their prescriptive easement.

66. I also bear in mind that the vast majority of the user of this right of way will be by the Claimants or their agents. It will be rare indeed that a delivery lorry drives down this track which is not delivering to Blaen Wern or to Golygfa, since delivery drivers are now generally wise to SatNavs taking them astray.

67. Accordingly, the Defendant's second argument seems to me to be a highly technical point which suffers from the flaw I have identified. Not only does it have no merit, it would be likely to give rise to further disputes in the future about who is responsible for damage to the banks, something which is in neither party's interests.

68. Overall, however, and for the reasons explained above, I dismiss the Defendant's Appeal on this ground. That disposes of all the arguments from either side which relate to the right of repair.

The Appeals concerned with Costs.

69. I now deal with the various grounds advanced by each side in which they contend the Judge went wrong in his treatment of various offers made by each side. Since both sides have spent large sums in costs, I suspect that these points are in fact the most important which I have to consider.

70. To be more precise, all these grounds are concerned with the effect of the Claimants Part 36 offer dated 27 August 2021 and the effect of the later WPSATC offer made by the Defendant which was open for acceptance until 10th March 2022.

71. In essence, what the Judge decided was that the Claimants had beaten their Part 36 offer, but that the later Defendant's offer made it unjust for the consequences of CPR 36.17(4) to continue to apply after 10 March 2022.

72. In his Appeal, the Defendant contends the Judge was wrong to find that the Claimants had beaten their Part 36 offer and advances four reasons which I discuss later. Obviously if the Defendant succeeds on that point, a number of consequences follow. Amongst the possible consequences is the Defendant's further argument that the Claimants should have accepted the Defendant's later WPSATC offer in March 2022.

73. In their Appeal, the Claimants contend the Judge was wrong in his finding that it was unjust for the consequences of CPR 36.17(4) to continue beyond the 10 March 2022.

74. It is convenient to consider all the arguments arising on the Claimants' Part 36 offer first and then to turn to those relating to the Defendant's WPSATC offer. Before I do that, I must orient myself correctly as to the applicable legal principles.

Applicable principles.

75. As the notes in the White Book state at 52.1.14, it can be important to distinguish, when dealing with an appeal on a costs issue, whether the submission is that the Judge erred

in law on the one hand or whether, on the other hand, the discretion, although exercised in accordance with correct principles, was exercised in a manner which yielded an unjust result:

i) For the former contention; '*Before the court can interfere it must be shown that the judge has erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is force to the conclusion that he has not balanced the various factors in the scale*.' A pre-CPR dictum of Lord Woolf MR in *AEI Rediffusion Music v PPL* [1999] 1 WLR 1507 at p1523, later adopted by the CA in post-CPR cases e.g. *Islam v Ali* [2003] EWCA Civ 612 at [20].

ii) For the latter contention, it is clearly established that the appeal court should only interfere where the judge's exercise of discretion has '*exceeded the generous ambit within which reasonable disagreement is possible'* see *Tanfern v Cameron-MacDonald* [2000] 1 WLR 1311 (CA) at [32].

76. CPR 36.17(1) to (5), in relevant parts, provides as follows, in which I have underlined key expressions:

> 36.17— Costs consequences following judgment
>
> 36.17(1) Subject to rule 36.21, this rule applies where upon judgment being entered—
>
> ….
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.
>
> (2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.
>
> …
>
> (4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.

77. The following points from caselaw are applicable.

78. For money claims, with the words ‘however small’, CPR 36.17(2) specifies a bright line test to ascertain whether a defendant’s Part 36 offer was more advantageous than the judgment obtained. Where (as here), the claim in question is a non-money claim, a

comparison between the offer and the judgment still has to be undertaken. That comparison, as the Claimants submitted, was described by Hildyard J. in *Re Lehman Brothers International* [2022] EWHC 3366 (Ch) at [21] in the following terms:

> '…the comparison required can reasonably be undertaken by identifying whether the relief obtained in the proceedings was in broad terms more advantageous to the claimant than its offer.'

79. To similar effect, Hildyard J. also cited with approval from *Carver v BAA Plc* [2008] EWCA Civ 412, to the effect that the test must be more '*open-textured'* and it *'permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight'.* I note that *Carver* is no longer good law in relation to the application of CRP 36.17 in money claims (because CPR 36.17 was amended in 2014 to provide the specific definition in CPR 36.17(2)), but Mr Nicholls submitted that there was no good reason why the observations of the Court of Appeal should not apply to non-money claims (as occurred in *Lehman*). In any event, I note these observations are in accordance with the approach approved in *Webb*, see below and in particular [13c)] in *Smith.*

80. The jurisdiction to make the orders provided for by CPR 36.17(4) arises provided the judgment against the defendant is '*at least as advantageous*' to the claimant as the proposals in the claimant's Part 36 offer, and the court must make the orders provided for by CPR 26.17(4) '*unless it considers it unjust to do so'.* As Simon Brown LJ observed in *McPhilemy v The Times Newspapers No. 2* [2001] EWCA Civ 933 at [28]:

> '[These provisions are] not designed to punish unreasonable conduct but as an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement. That incentive cannot work unless the non-acceptance of what ultimately proves to have been a sufficient offer ordinarily advantages the claimant in the respects set out in the rule.'

81. In *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365, the Court of Appeal considered an earlier version of CPR 36.17, then in CPR 36.14. It is sufficient to cite the following passage at [38] from the judgment of Sir Stanley Burnton, with whom Simon and Gloster LJJ agreed, to which I have added my own emphasis:

> '38. It follows from the above, and in particular that Part 36 is a self-contained code, that the discretion under 36.14 relates not only to the basis of assessment of costs, but also to the determination of what costs are to be assessed. I agree with the Judge that Part 36 does not preclude the making of an issue-based or proportionate costs order. However, a successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to "all the circumstances of the case". In exercising its discretion, the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have

done. The principles were aptly summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch):

> "13. … For present purposes, the principles which I derive from the authorities are as follows:
>
> a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see Matthews v Metal Improvements Co. Inc [2007] EWCA Civ 215, per Stanley Burnton J (sitting as an additional judge of the Court of Appeal) at paragraph 32.
>
> b) Each case will turn on its own circumstances, but the court should be trying to assess "who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been." : see *Factortame v Secretary of Stat*e [2002] EWCA Civ 22, per Walker LJ at paragraph 27.
>
> c) The court is not constrained by the list of potentially relevant factors in Part 36.14(4) to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part 36.14 should follow: see *Lilleyman v Lilleyman* (judgment on costs) [2012] EWHC 1056 (Ch) at paragraph 16.
>
> d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

82. In *Re Lehman Brothers International,* Hildyard J. at [46] summarised the passage above and continued as follows, citing at [47] the full passage from *Lilleyman* at [16], which is worth consideration. Again, I have underlined passages of particular relevance in this case:

47. In *Lilleyman v Lilleyman (No. 2)* [2012] EWHC 1056 (Ch), another decision of Briggs J, he said at [16]:

> "It is plain that the court's discretion to depart from CPR r 36.14(2), constrained as it is by a precondition that its full enforcement would be unjust, is much more circumscribed than the court's broad discretion under Part 44. Furthermore, the four specific considerations identified in paragraph (4)(a)–(d) disclose a common thread which focuses the injustice analysis upon the circumstances of the making of the offer and the provision or otherwise of relevant information in relation to it, rather than upon the general conduct of the proceedings by the parties. None the less, I consider that the requirement to take into account all the circumstances of the case does enable the court to take a broader view in an appropriate case, so that it is not entirely disabled from having regard to questions of justice or injustice arising from the manner in which the offering party has made use of its costs expenditure prima facie now recoverable from the unsuccessful offeree, in the pursuit of its defence to the claim."

48. In *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB), Sir David Eady (sitting as a High Court Judge) observed at [61] that:

> "It is elementary that a judge who is asked to depart from the norm, on the ground that it would be 'unjust' not to do so, should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm."

49. In exercising its circumscribed discretion, the court must have regard to the objective of the provisions of CPR 36.17(4), which Sir Geoffrey Vos, when Chancellor of the High Court sitting in the Court of Appeal described in *OMV Petrom SA v Glencor International AG* [2017] 1 W.L.R. 3465 at [32] as being "*…in large measure, to encourage good practice*" and to incentivise both the making and acceptance of genuine Part 36 offers. Sir Geoffrey Vos accepted that this could result in awards which are "*not entirely compensatory*". Briggs LJ (as he then was) described the approach as being both "*carrot and stick*" and as operating '*pour encourager les autres*' (see *PGF II SA v OMFS Company I Limited* [2013] EWCA Civ 1288 at [40] and [56])

The Defendant's Appeal

83. As I mentioned, the Defendant advanced four points in support of his contention that the Judge was wrong to hold that the Claimants had beaten their Part 36 offer of 27 August 2021. It is not necessary for me to set out the details of the Part 36 offer. In

summary, it invited the Defendant to acknowledge and agree with, in Paragraph 1, the nature of the 'Prescriptive Easement' and, in Paragraph 2, the Claimants' entitlement (a) to repair but not improve the Roadway and (b) to cut back vegetation which substantially interferes with the enjoyment of the Prescriptive Easement. For the avoidance of doubt, the Defendant was also invited, via Paragraph 2(a), that the works specified in Appendix B were works of permitted repair. I can discuss the arguments by referring to the specific parts in issue.

84. Anticipating my analysis of each of the four points below, where I reject each of them, there is a general point of principle raised by all four of them, and by the arguments presented by the Claimants in their Appeal on costs which I deal with below. It concerns the level of generality at which one should make the comparison required by CPR 36.17(1)(b) between the Part 36 Offer and the Judgment (or, in the case of the Claimants' Appeal, the comparison between the Defendant's Offer and the Judgment). The arguments in this case demonstrate that in non-money claims, it can be easy to descend into ever greater levels of detail to find some distinction which can be said to make the Judgment less (or more) advantageous than the Offer. In the present case this was particularly the case bearing in mind the Judge decided the issues in his Main Judgment and then asked the parties to agree the specific terms of an Order.

85. The Court depends on sensible co-operation between the parties to reach agreement on the types of subsidiary matters which were covered in the draft Order. Even if there is no love lost between the parties, their legal advisers have a duty to assist the Court to resolve matters in a proportionate manner. This case cried out for agreement on the details, for example, as to how the repairs should be carried out to avoid further disputes arising. In these circumstances, as a general matter I consider the Court should be loath to allow these types of agreed points to provide ammunition for attacking a trial Judge's discretionary costs decisions, unless they reveal a real error of principle in his or her approach.

86. **Ground 2.1:** The Defendant submitted that the Judgment entered against the Defendant is less advantageous than the proposals in the Part 36 Offer because it imposes greater restrictions on both the type of works and the manner in which they can be carried out. The Defendant contended that the Judge's Order in paragraph 3 only entitled the Claimants to carry out certain limited repairs whereas the Claimants' Offer entitled the Claimants to carry out repair and maintenance works generally without any qualification, save that those works include the works specified in Appendix B.

87. The Defendant drew particular attention to the requirement in paragraph 3 that the repair work should be feathered into the existing surface where the Roadway adjoins the entrance to Wern in order to minimise the risk of diversion of surface water towards Wern. In argument, Mr Troup explained this was a significant risk since Blaen Wern and Golygfa were both above Y Wern and rain water flows down the track towards Y Wern.

88. This is a point of detail. It was sensibly agreed between the parties in paragraph 3 of the Order. However, it seems to me that even if the Claimants' Part 36 offer had been accepted, some agreement would still have been required between the parties as to precisely how the repair works were to be carried out. This does not make the offer invalid or incomplete. The Court is entitled to proceed on the basis that the parties would have given effect to the offer in a sensible manner. If that was not the case then

any offer in a case of this type could be criticised for being incomplete and that would defeat the whole purpose of Part 36 and the necessary encouragement to achieve sensible settlements of disputes.

89. In any event, I do not consider the Defendant's point to be arguable. It rests on a misunderstanding of paragraph 3 of the Order. As the Claimants submitted, paragraph 3 was not prescriptive but represents the repair required at that point in time. It certainly did not preclude the Claimants carrying out further repairs in the future. As the Claimants also submitted, the Judgment makes it clear that the Claimants have a general right to repair to ensure the right of way can be exercised.

90. **Ground 2.2**: For his second point, the Defendant suggests that the Part 36 offer included an unrestricted right to repair the track and the northern embankment.

91. This point is also not arguable. It rests on a misinterpretation of the offer. In particular, it ignores the opening words of Paragraph 2 of the Offer which begins with the words 'Incidental to the Prescriptive Easement aforesaid…' Thus all the repairs specified in the remainder of paragraph 2 and in Appendix B are expressly incidental to the prescriptive easement. Accordingly, the Defendant is wrong to suggest that the offer included an unrestricted right to repair the track and the northern embankment.

92. **Ground 2.3:** The third point is the 'tractor mounted grader' point. In their open letter sent on the same day as the Part 36 Offer, and as part of an on-going discussion, the Claimants' solicitors set out a lengthy passage under the heading of 'Work to the surface of the road'. They enclosed a draft letter of instruction to the contractor relating to the proposed work to the surface of the road, with a specification of works. In the second sentence, they said 'As ever, we welcome a productive dialogue relating to these proposed works.' There followed a series of 10 points in response to an earlier proposal from the Defendant's side. After those 10 points, the Claimants' solicitors made some suggestions as to the work needed including the introduction of some hardcore. These included these sentences on page 3 of 4:

> 'We are instructed that with the material crushed, it will then be graded out to give an even surface. We anticipate that this work may be done with a tractor-mounted grader. At this time the grader will also be used to add a camber to the track to prevent water pooling and forming more potholes or ruts.'

93. The Defendant points to the fact that paragraph 3 of the Order refers not to a tractor-mounted grader but to the use of a vibrating plate compactor. He suggests that the Part 36 Offer envisages the work being done by a tractor-mounted grader, relying on the mention in the open letter.

94. The Judge held that the distinction between the compactor and the tractor-mounted grader was insignificant in determining whether the Claimants had beaten their Part 36 Offer. I agree.

95. This point is not arguable. As the Claimants submitted:

i) The Part 36 Offer is clear in its terms. There is no ambiguity in the Part 36 Offer which might require a process of interpretation by reference to the open correspondence.

ii) Furthermore, there is nothing in the Part 36 Offer which suggests it should be read in the context of the open correspondence.

iii) As I have noted, in their open letter, the Claimants invited a dialogue with a view to reaching agreement on the repair works.

96. **Ground 2.4:** The fourth point is concerned with the cutting back of vegetation. Paragraph 2(b) of the Part 36 Offer is clear. It stated that the Claimants were entitled at their own cost to cut back vegetation growing on the Defendant's property on or along the Roadway which substantially interferes with the enjoyment of the right of way by the Claimants etc.

97. The Defendant points to what the Claimants maintained up to and during trial: that they were entitled to cut the top and field sides of the hedges and trees (as they had done in August/September 2020). The Judge rejected this argument in his Judgment at [30].

98. It is then said that when the Claimants made their offer in paragraph 2(b), they intended they would be entitled to cut the top and field sides of the hedges and trees. Once again, this ground is not arguable. The whole point of a Part 36 Offer is that it leaves the offeror free to run other arguments at trial which may be inconsistent with it, but there is no warrant to construe the clear terms of an offer by reference to other arguments which an offeror choses to run.

99. Having dealt with the four parts of the Defendant's Ground 2, I can leave Grounds 3-5 on one side, since all were dependent on the success of Ground 2.

The Claimants' Appeal on costs.

100. The Claimants contend that the Judge was wrong to find that it was unjust to continue the effects of CPR 36.17(4) beyond 10 March 2022 because they contend that it is demonstrably the case that the Claimants obtained a better outcome at trial than the terms of the Defendant's WPSATC letter dated 2 March 2022.

101. Before the Judge, the Claimants argued two points to demonstrate they obtained a better outcome and I have quoted the way in which the Judge dealt with those points at paragraphs 16 and 17 above.

102. Mr Nicholls ran the injunction point again but took a different approach so far as the costs point was concerned. Overall, his submission was that the Judge's discretionary decision was so plainly wrong that it can be described as perverse, alternatively that the Judge wrongly left out of account matters which demonstrate that the Claimants substantially beat the Defendant's offer.

103. The arguments which Mr Nicholls presented to me were very much more detailed than before the Judge. In his Supplemental Skeleton, he analysed every point in the Defendant's offer, suggesting that the Claimants either matched or beat the offer on every point. He also relied on the fact that his clients obtained an Order that they were

permitted to repair the embankments. It is not necessary for me to discuss this analysis because the principal points remained the injunction and costs, as before the Judge.

104. In response Mr Troup supported the Judge's decision. He characterised the Defendant's offer as essentially one of capitulation, giving the Claimants everything that they achieved at trial. It was an offer therefore which the Claimants should have accepted, so, at the very least, the Judge was right to say it would be unjust for the consequences of 36.17(4) to continue after the date for acceptance.

105. So far as the injunction is concerned, Mr Troup submitted that it is evident from the Judge's reasoning that he considered having an injunction in place for the limited period of 3 years would benefit both sides. I agree. Furthermore, the Judge would have been entitled to think that the terms of the Defendant's offer were a strong indication that he had learnt his lesson, not least from the time and money which this dispute had taken up. So, in reality, the grant of the injunction for 3 years was there as a reminder as opposed to being necessary to restrain a real threat to obstruct the right of way. In any event, the Judge plainly knew that the Defendant's offer had not included an injunction, but this was just one of the circumstances he was entitled to take into account.

106. In view of the arguments, I need to discuss the costs issue in more detail. Mr Nicholls' primary submission was that the costs could not be taken into account in determining whether the Claimants achieved a better result at trial because at the time, it was impossible to know whether the Claimants had beaten the offer on costs or not. He pointed out that the information was not available because a bill of costs had not been prepared at that time and therefore submitted that a comparison of the costs position was not a relevant factor when assessing whether the Claimants should have accepted the offer.

107. Mr Nicholls' secondary submission was to rely on some calculations set out in a letter dated 13th March 2023 from the Claimants' costs draughtsman to say that the costs position was now known. These calculations were based on the Claimants' actual costs but applying the rules of thumb of 70% recovery for standard assessment and 90% on the indemnity basis, and applying an assumption that the Claimants would reasonably assume that the Defendant's offer was subject to assessment of costs on the standard basis. Those detailed calculations revealed the following:

    i) The Defendant's offer would have resulted in a payment of costs as at 10.3.2022 of some £80,661.

    ii) Following trial, and taking into account assessment of the Claimants' costs from 18th September 2021 to 10th March 2022 on the indemnity basis, the Defendant's liability for the Claimants' costs down to 10th March 2022 was around £85,386 which increased to £89,780 when one added the 10% windfall on assessed indemnity costs.

    iii) Accordingly, Mr Nicholls argued that the Claimants had beaten the Defendant's offer.

108. In response, Mr Troup presented figures taken from the Claimants' N252 which revealed the following:

i) By 10th March 2022, the Claimants had incurred costs totalling £199k (a figure greater than their total budgeted costs).

ii) After 10th March 2022, in relation to the PTR, Trial Preparation and Trial, the Claimants had spent a further sum just under £228k in costs.

iii) So the Claimants' overall costs were £427k odd, against budgeted costs of £190k.

iv) The Defendant's costs budget was £218k odd and, in response to my question as to how much the Defendant's total costs were relative to his budget, I was told they were 5-10% higher.

109. In the light of those figures, Mr Troup questioned whether the 'rules of thumb' are reliable in these particular circumstances.

110. Overall, Mr Troup supported the Judge's approach.

Discussion

111. I confess I do not understand Mr Nicholls' first argument on the costs issue. The situation where the Court does not have the information available to assess whether an offer has been beaten or not is not unknown. It is open to either side (and in this case, particularly the Claimants) to invite the Court to defer consideration until the relevant information is available, whether it is a skeleton bill of costs or more detailed information. By way of example see *Crooks v Hendricks* [2016] EWCA Civ 8 (referred to in the notes under CPR 36.17). That was a personal injury case where the defendant's offer was a sum of money 'net of CRU' (a reference to recoverable benefits issued by the Compensation Recovery Unit). In that case, the parties knew that the CRU's certificate was to be reviewed in the light of the Judge's findings on causation and the Recorder adjourned the question of costs until after the CRU had reached its final determination. One of the issues on Appeal was whether the Recorder had been entitled to do so. This involved an issue of interpretation of the words 'upon judgment being entered' which are now in 36.17(1). The Court of Appeal held those words are properly to be read as meaning 'once judgment has been entered and not before', recognising that '*There will be cases in which a judge is entitled not to proceed straight away to make his decision on costs'*, even though it is preferable for a court to rule on costs without delay at the conclusion of the litigation.

112. In this case the Claimants unsurprisingly wished to press ahead and have all questions of costs decided. Having done so, it seems unfair for them to criticise the Judge for reaching a decision which both sides were urging him to make.

113. On the second argument, we now have more information but we still do not have a definitive answer as to whether the Claimants have actually beaten the Defendant's offer on costs. That would only be supplied by a detailed assessment of the Claimants' costs, and the Claimants are still not asking the Court to defer a decision on this point (unsurprisingly). However, the figures presented by Mr Troup suggest there are major issues as to the proportionality of the Claimants costs and this may well be a case where the actual recovery is less than is indicated by the rules of thumb on which the

calculations rely. It is not clear that the Claimants would beat the Defendant's offer on costs.

114. Reverting to the Judge's decision, it is clear that he had relevant factors in mind – the injunction and costs in particular – but he was also ideally placed to take the broader view even in the circumscribed circumstances of CPR 36.17(4), having all the matters in 36.17(5) in mind.

115. I leave Mr Nicholls' embankment repair point out of account, because that issue only arose after judgment had been given. As Mr Troup submitted, in no way was this case about the right to repair the embankments. However, the question remains: why did the Claimants fight on after the Defendant's offer? Mr Troup suggested the answer can only be that they fought on to achieve matters which they did not achieve at trial, notably to raise the level of the track to produce a smooth surface of 2.5m in width at ground level, which the Judge rejected as plainly being an improvement and not repair. I consider there is force in this point.

116. Overall, I am completely unpersuaded that the Judge's decision was perverse or that he left out of account matters he should have taken into account or was outside the generous ambit within which reasonable disagreement is possible. For what it is worth, I consider the Judge was entirely right.

Conclusions

117. For all the reasons set out above, I dismiss both Appeals. Each side served a Costs Schedule for this hearing, but sensibly did not divide the costs between the Appeals. I note that the total for the Claimants' costs is considerably larger than that for the Defendant.

118. In all the circumstances, I make no order as to the costs of each Appeal.

119. Finally, I am acutely conscious that this Judgment is very much longer than the totality of the Judgment and the Rulings which the Judge gave, but it is a product of the lengthy and detailed arguments which each side sought to raise by way of appeal. These arguments demonstrate, once again, that this dispute has been conducted in an entirely disproportionate way and at entirely disproportionate cost. Nonetheless I am grateful to both Counsel for their assistance. It is to be hoped that these parties will be able to resolve any disputes which may arise in the future in a sensible and amicable way, without spending large sums on lawyers.