Neutral Citation Number: [2023] EWHC 2146 (Ch)

Case No: PT-2022-BRS-000133

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 23 August 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

MAINLINE PIPELINES LIMITED	**Claimant**
- and -	
(1) THOMAS DERRICK PHILLIPS	**DefendantS**
(2) ELEANOR SIAN PHILLIPS	

- -
- -

Nicholas Taggart (instructed by **Veale Wasbrough Vizards LLP**) for the **Claimant**
The First Defendant in person
The Second Defendant was not present

Hearing date: 8 August 2023

- -

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.

……

This judgment was handed down remotely at 11 am on 23 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application made by the claimant in this claim by notice dated 31 May 2023 (sealed 8 June 2023) for summary judgment in the claim. That claim is for a final injunction, costs and a further or other relief. It arises in the context of a dispute between the parties about the repair of a multi-fuel pipeline which runs under part of the defendants' farm. The defendants decline to allow the claimant access to the pipeline for the purposes of repair without substantial compensation being agreed in advance. The claimant relies on the terms of a lease for 99 years granted by the defendants' predecessors in title in 1972. The claimant has been represented by experienced solicitors and counsel. The defendants are litigants in person. Only the first defendant attended the hearing. He told me that he was speaking for his wife as well.

2. The claim itself was commenced by claim form issued on 16 November 2022. It was accompanied by particulars of claim dated 2 November 2022. The defendants served an informal, and undated, defence, in unnumbered paragraphs. It was not supported by a statement of truth, as required by CPR rule 22.1(1)(a). The consequence is that it is liable to be struck out (CPR rule 22.2(2)), and in the meantime cannot be relied upon as evidence of the facts stated within it (CPR rule 22.2(1)(b)). On 31 May 2023 the claimant served a reply, together with a copy of the defence with paragraph numbers added for ease of reference. At the same time, the claimant also issued the present application notice, for summary judgment on the claim. The application is supported by three witness statements.

3. The first is from Carl Scott, dated 18 May 2023, who is employed on behalf of the claimant. He gives evidence relating to meetings between the claimant's representatives and the first defendant at the site. The second is dated 22 May 2023. It is from Timothy Rudd. He is also employed on behalf of the claimant, and gives evidence concerning certain technical matters connected with the repair of the pipeline. The third is dated 31 May 2023, and is from Philip Sheppard, the claimant's solicitor, who gives certain formal evidence relating to the summary judgment application.

4. The defendants have not served any formal evidence in opposition, but there is in the correspondence an informal, supplementary statement from the first defendant dated 13 June 2023. In addition, they sent an email dated 3 August 2023 to the court attaching certain other documents which they sought to place before the court. I have looked at both of these. Neither the supplementary statement nor the email however contains a statement of truth, and hence either might be the subject of a court direction that it cannot be relied on as evidence (CPR rule 22.3). I note that the claimant's solicitors, in an email of 24 July 2023 to the defendants, pointed out to them that they had not yet filed or served any formal evidence in response to the application, and invited them to do so, so that it might be considered by the claimant, and also included in

the bundles to be placed before the court. The defendants appear not to have taken up this invitation.

The position of litigants in person

5. I have already said that the defendants are litigants in person, and that the first defendant appeared before me at the hearing. He addressed me with courtesy and with care, as he explained his and his wife's concerns about the effects of these works upon the land, and about what might happen if development were permitted on other fields of theirs under which the pipeline passes. But he is a layman and not a lawyer, so his submissions, clear and concise as they were, were of limited assistance to me in considering the legal questions which I have to decide. I do not criticise the defendants for taking this course. Far from it. In this country (unlike in many European countries) it is every person's right not to employ a lawyer, but to represent him- or herself in court proceedings.

6. However, the other side of the coin is that there is no special set of rules in this country for litigants in person. As a general proposition, we do not have two sets of rules, one for those with lawyers and one for those without. We have only one set, which (with a few exceptions) applies to everyone. Litigants in person need to know this. A relatively recent decision of the Supreme Court, in a case called *Barton v Wright Hassall* [2018] 1 WLR 1119, makes clear that lack of legal representation will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. In the present case this is so because the rules do not in any respect relevant to the disposal of this application distinguish between represented and unrepresented parties.

7. Moreover, litigants in person, in choosing to self-represent, cannot excuse themselves from compliance by saying that they do not know the rules. It is their responsibility, in choosing to take part *personally* in formal legal proceedings, rather than by way of professional legal representation, to make themselves aware of the relevant procedural rules, and to follow them. Apart from the many textbooks and handbooks on civil procedure which are published and usually available for consultation in libraries, the relevant rules themselves are available, without charge, via the internet from the Ministry of Justice website. There are many other websites, too, some providing the full texts of legislation and of caselaw precedents, and others proffering free legal advice. In addition, there are Citizen's Advice Bureaux and law centres which offer free legal advice.

8. I note that, in many of the letters and emails from the claimant's solicitors to the defendants, the former positively urged the latter to take legal advice. This was a sensible suggestion. Many litigants in person (though not the defendants in this case) seem to think that it is the judge's job to look after their interests, or at any rate that the judge will do this, and even advise them what to do. But the judge cannot do any of this this. The judge is both independent of the parties and impartial between them. The parties must arrange for their own legal advice.

9. In the modern legal services market, it is perfectly possible to obtain short, limited advice on a point of construction from solicitors, or from a barrister operating via direct access, at modest cost without engaging lawyers to defend the whole proceedings. At one stage (in a letter dated 24 March 2021 to the first defendant) the claimant even offered to contribute £400 plus VAT to the cost of taking that advice. That was much more than it was obliged to do. In all the circumstances, it is unfortunate that the defendants did not take up this offer. It might have saved the need for this expensive litigation.

10. I have already mentioned that the defendants' defence is not in accordance with the rules. Nor is the first defendant's supplementary statement of 13 June 2023 or the defendants' email of 3 August 2023. Litigants in person need to understand that, other than in trivial respects, the court is not going simply to ignore their failure to follow the appropriate procedures, or (worse) to treat them as though they had in fact complied. That is not fair on those who do comply. A failure to follow the rules is not without consequences. It imposes extra costs on other litigants (who, if they are commercial enterprises, may have to pass those costs on to their customers in higher prices) and makes litigation slower and more complicated, and thus more expensive for everyone. More court- and judge-time is needed to deal simply with putting things right, rather than advancing the resolution process. This generally not only makes things worse for the litigants themselves, but it also lengthens the time that must be spent by *other* litigants in waiting their turn to be heard.

11. Thus, the failures by the defendants to follow the rules will have made matters more complicated, slower and expensive. The other party (here, the claimant) will probably have incurred more costs than it need have done. Quite often the party in breach ends up worse off as a result. However, this case turns on questions of the legal interpretation of particular documents, and other matters of law, and it is now the subject of an application for summary judgment. So, in terms of the overall result, in all the circumstances of the present case I do not think that those failures will have made any substantial difference to the defendants' own situation. Apart from questions of possible liability to pay costs, they are neither better nor worse off as a result.

Background

12. The background to this matter is as follows. The claimant owns and operates a cross-country network of multifuel pipelines which transport various fuels from Milford Haven in Pembrokeshire to other parts of the United Kingdom. One part of these pipelines runs underneath three fields forming part of the defendants' farmland at Bryncyrnau Uchaf, Cwmffrwd, near Carmarthen in south Wales. This case is concerned only with one of those fields, though the defendants are quite naturally concerned for the impact of any decision the court might make on the others, since I was told that they are actively seeking planning permission for development of the other two. At present, the defendants use the land under which the pipeline passes to grow silage. I was shown photographs of the field concerned.

13. The Pipe-lines Act 1962 was enacted to provide a regulatory framework within which a national grid of underground fuel pipelines could be built. It includes compulsory purchase powers. Against that backdrop, in 1972 the defendants' predecessors in title (along with many of their neighbours) granted a 99-year lease to the claimant of small strips of their land to enable the pipeline to be installed. A standard form of lease, agreed at the time by the claimant with both the National Farmers Union and the Country Landowners Association, was used for this purpose. Each lease was granted in consideration of a small premium, but without any rent. Each lease also contained provision for compensation to be paid in case of damage to the property of the grantor of the lease, and for an indemnity against other losses. (For the purposes of this judgment, the legal terms "lease", "tenancy", and "demise" all mean the same thing, although "lease" is commonly used also to denote the *document* by which a lease has been granted.)

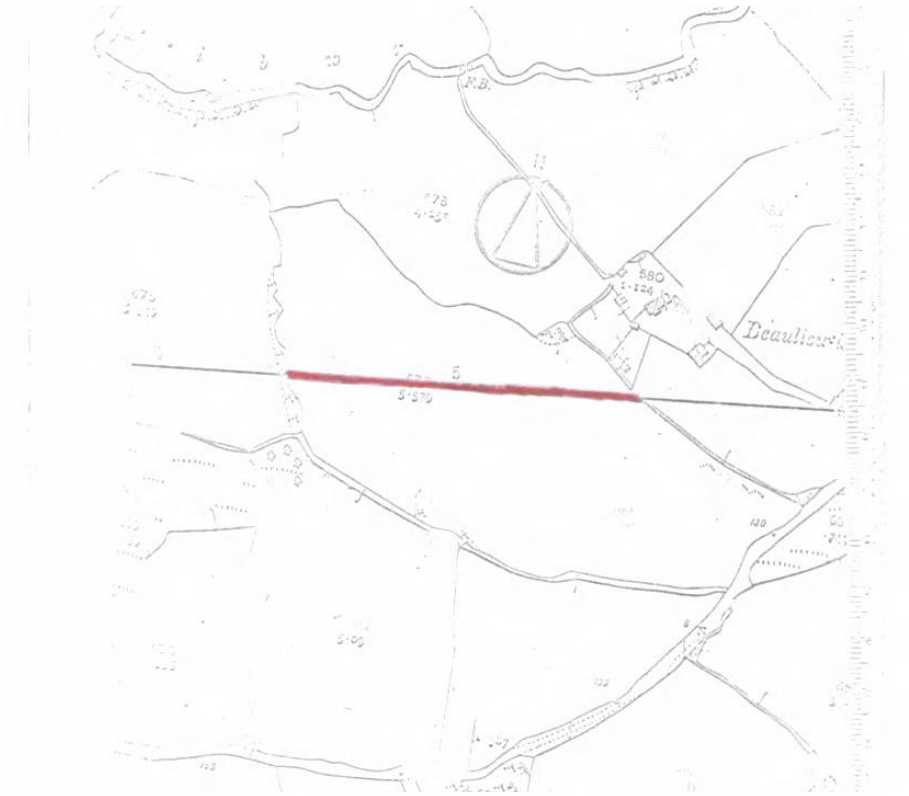
The lease

14. The relevant parts of the lease granted by the defendants' predecessors in title provide as follows:

> "WHEREAS
>
> (i) The Company is proposing to lay a pipeline from Milford Haven to the Midlands and Manchester for which the Secretary of State for Trade & Industry has granted a pipeline construction authorisation under the Pipelines Act 1962
>
> (ii) The Grantor has agreed to grant to the Company a lease and rights for the purpose of laying and maintaining the part of the pipeline which will pass through his land on the terms hereinafter contained
>
> NOW THIS DEED WITNESSETH as follows: –
>
> 1. In consideration of the sum of one hundred and seventy seven pounds paid by the Company to the grantor … the Grantor hereby demises unto the Company ALL THAT strip of land three feet in width and thirty feet in depth (but … excluding the top two feet six inches thereof) indicated by the line marked in red on the plan annexed hereto and forming part of the Grantor's land TOGETHER WITH the right to enter upon the land of the Grantor with all necessary materials and equipment and to lay constructive use maintain repair alter renew inspect remove and replace the pipeline or any part thereof in the strip of land above referred to and the right to erect and keep marker posts at appropriate points on the surface over the pipeline …
>
> 2. THE COMPANY HEREBY COVENANTS with the Grantor that: –
>
> (A) in exercising the said rights the Company will do as little damage as possible to the said land and the crops (if any) for the time being growing thereon

> (B) The Company will make good or pay compensation to the Grantor and/or his tenants for all damage so done the amount of such compensation to be determined in default of ageement [sic] by an expert to be agreed between the parties or failing agreement to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors …
>
> […]
>
> (D)(i) The Company will keep the Grantor indemnified against all costs claims and liabilities arising by reason of the exercise by the Company its servants or contractors or agents of the rights hereby granted except any claims and liabilities occasioned by the negligence or wrongful act or default of the Grantor or his tenants or licensees or other lawful occupiers of the Grantor's land or their respective servants or workmen.
>
> […]
>
> 6(a) The Grantor hereby ACKNOWLEDGES the right of the Company to the production and to delivery of copies of the documents mentioned in the First Schedule hereto and undertakes with the Company for the safe custody thereof …
>
> […]
>
> THE FIRST SCHEDULE above referred to
>
> 23 November 1956 CONVEYANCE made between Wlater [sic] Phillips and Ethel Anne Phillips of the one part and the Grantor of the other part … "

15. I should say that, unfortunately, no one (and in particular not HM Land Registry) seems to have kept a copy of the 1956 conveyance. In the event, this probably does not matter, though it would have been at least helpful to have it. In another case it might have been vital. I set out below the relevant part of the plan attached to the lease. The copy available to the court is unfortunately of poor quality. The line of the pipeline runs from west to east through the corridor shown by the red line. North is slightly to the right of the centre of the top, as depicted by the arrow. To the south-east is shown the public highway abutting the defendants' land.



In the centre of the plan, just above the red line denoting the track of the pipeline appears the number "5". Each field on the map has a separate number. The number of the field across which the pipeline runs is unfortunately obscured by the red line itself. The claimant says that the field number is 677, and that this is confirmed by a certificate of good title dated 29 March 1972, given by the Grantor's solicitors. The solicitors state that the Grantor "is the freeholder of … all that field or enclosure on the Ordnance Survey Map numbered 5 being OS no. 677".

"Field 677"

16. The 1964 Ordnance Survey Map shows that the field across which the pipeline runs was, in 1964 at least, subdivided into two. On that map, at least, the pipeline runs across the northern part. In the extract from that map below, the blue marker symbol slightly below the centre of the plan is situated mostly in the southern part, and a boundary line runs from south-west to north-east to divide the two parts.

17. But, on the lease plan, the field through which the pipeline runs is not subdivided. It may be that the whole of the field shown in the lease plan was then field 677. But it really does not matter. This is because it is clear that the claimant is using the expression "field 677" to refer to the whole of the field (according to the lease plan) through which the pipeline runs. In the Particulars of Claim in this case, at paragraph 2.2 the claimant defines the expression the "Defendants' Land" as meaning

> "certain freehold land … at Bryncyrnau Uchaf … which forms part of the title registered at HM Land Registry under title number WA952150 …"

At paragraph 9 of the particulars, the claimant says that

> "The Defendants' Land… is identified by Ordinance Survey Field Number 677, as shown on the plan annexed to the Lease … "

18. At paragraph 2.2 of its Reply, the claimant says that

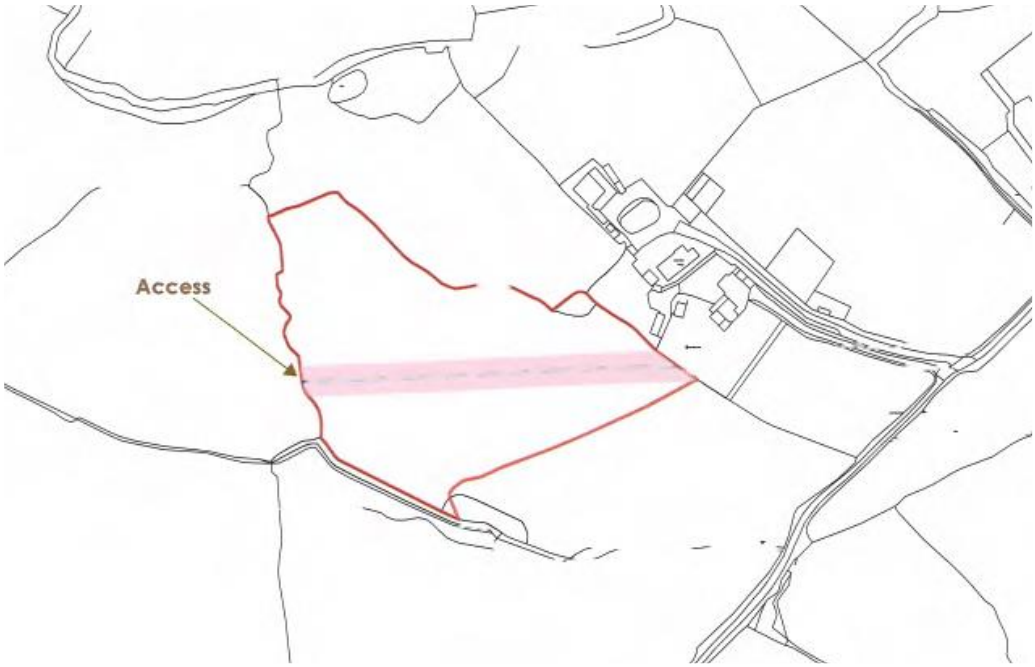
> "the defined expressions used in the Claimant's Particulars of Claim in this action have the same meaning herein …"

And in paragraph 10.4 the claimant says that

> "the Right 'to enter upon the land of the Grantor' for the purposes therein specified is not restricted to the area above the demised 'strip of land three feet in width and thirty feet in depth' but forms an easement over all of the Defendant's Land".

So, the easement claimed by the claimant is over "field 677" (as defined by the claimant), and not over the whole of the defendants' farm. For simplicity, I shall from now on refer to the *whole* field over which the easement is claimed (whether properly called "field 677" or not, but including *both* halves in the 1964 OS plan) as "the Field".

19. A much better quality plan of the relevant area was prepared by the claimant's surveyors in 2022. An extract is shown below. The extent of the top half of the Field is shown by the red line. The blue line shows the track of the pipeline, and the pink bordering to the blue line depicts a 60-foot wide corridor. The word "Access" on the left-hand side is written on a part of the plan denoting adjoining land belonging to Mr and Mrs Evans, across which the pipeline also runs. The claimant currently proposes to access the Field across the boundary from the Evans's land, and not (as originally proposed) from the public highway, on which the southern half of the land called "field 677" in the lease plan abuts.



Events leading up to the application

20. The lease granted in 1972 has been registered at HM Land Registry since December 2007 under title number CYM 376482. The land out of which the lease was granted was originally unregistered land. It is only a part of the land now owned by the defendants. Since February 2000, their title has been registered at HM Land Registry under title number WA 952150. The 1972 lease is noted in the charges register against this title, and details are set out in

the schedule of leases. In January 2021 representatives of the claimant met the first defendant to discuss the inspection and repair work on the pipeline which the claimant wished to undertake. A letter of 25 January 2021 from the claimant's surveyors records this meeting, stating that the works would be undertaken under existing rights, so no new rights would need to be acquired, and compensation for any damage caused would be paid afterwards, rather than upfront. The defendants did not accept either of these propositions.

21. On 25 February 2021 a letter before claim was sent by the claimant's solicitors to the defendants to say that, if access were not provided, the claimant would have to apply to the court to require the defendants to comply with their obligations. A further letter chasing a response was sent on 12 March 2021. The first respondent replied by email on 15 March 2021 confirming his position. He said that he accepted that the claimant had a lease of a strip across his land, but that he would not allow access to the remainder of the Field without prior agreement and compensation. There then followed a lengthy correspondence between the parties by email and letter, which included an offer by letter dated 24 March 2021 to contribute £400 plus VAT towards the cost of the defendants' taking legal advice. The correspondence concluded with a statement in a letter dated 7 April 2021 by the claimant's solicitors that they had instructed counsel to prepare the court proceedings which would be necessary in order to obtain an injunction.

22. The correspondence then ceased for a little over a year, but was taken up again in August 2022. In a letter dated 12 August 2022, the claimant's solicitors once more explained the rights which their client claimed under the terms of the lease. They said that these included rights of way over the Field belonging to the defendants. However, the solicitors also put forward proposals for minimising disruption to the defendants. There followed email and letter correspondence in which the defendants raised a number of concerns and the claimant's solicitors sought to deal with them. However, on 18 August 2022 there was a confrontation between the claimant's contractors, then working on the section of the pipeline immediately adjacent to the western side of the Field (the Evans's land) and the first defendant. He found that part of the hedge between the two properties had been demolished, and (not unreasonably) feared that the contractors were about to enter the Field. The defendant accepts that at that meeting his

> "choice of words was not as diplomatic as [the contractors] may have been used to, but they got the message and pulled out the following day".

As I have already said, these proceedings were issued on 16 November 2022.

23. Email correspondence between the first defendant and the claimant's solicitors continued in December and January. There were some negotiations between the parties in that correspondence, but no agreement was reached. Finally, the defendants produced their informal defence on 18 January 2023. Some five months later, on 12 June 2023, the claimant's solicitors wrote to the defendants to say that, having considered the defence, their client had decided to apply (and, indeed, in the last few days had applied) for summary judgment

on the claim. Further correspondence followed between the parties, including correspondence relating to case management, with which I am not currently concerned. This correspondence makes clear that the parties disagreed fundamentally on the interpretation of the lease. Indeed, the first defendant in an email of 17 July 2023 said that "there is no point arguing the point further, let the judge rule on the subject". However, on 20 July 2023 the first defendant suggested that the parties, before going to court, should put the matter to a third party to obtain an independent legal opinion on the matter in dispute. On the same day the claimant's solicitors repeated the offer made in March 2021 to contribute to the costs of the defendants' taking legal advice. They also said that it was too late to refer the matter to a third party now that the court application was due to take place in two weeks' time. That is the hearing which I have now held.

The parties' statements of case

The Particulars of Claim

24. The Particulars of Claim set out the claimant's case in detail. For present purposes, the important points are as follows. Internal examinations of the pipeline by means of an automated device caused the claimant to conclude in late 2019 that it was desirable to enter onto the particular field of the defendants through which the pipeline runs (that is, the Field), to expose the exterior of the pipeline for inspection, and then to repair it as necessary. However, the particulars say, the defendants have consistently refused to allow the claimant to enter the Field in the exercise of its claimed rights to do so, unless the claimant pays them a substantial sum of money by way of compensation in advance of entry. The particulars go on to refer to the confrontation on 18 August 2022 between the parties at the boundary between the Evans's land and the Field, and the fact that the claimant's contractors withdrew. The claimant says that the defendants have breached the terms of the lease, and will continue to do so unless restrained by the court. The particulars do not however claim the right to place canteen, toilet and office facilities on the Field without agreement.

The Defence

25. The informal Defence filed by the defendants states that there were two meetings between representatives of the claimant and the first defendant on behalf of the defendants, in which the claimant explained its need to examine and potentially repair the pipeline, and for this purpose to go on to the Field, as well as placing canteen, toilet and office facilities on the Field. The first defendant made plain that the defendants would not permit the claimant to enter the Field (other than the strip of land actually demised by the lease) without compensation agreed and paid in advance.

26. Subsequently, the first defendant was informed that the claimant proposed to enter the Field from the Evans's land directly above the pipeline. The first defendant said that this would require (i) written consent (a) from the Evans and their tenant, (b) from the local authority (to demolish a portion of hedge

between the two properties), (ii) confirmation from the Ministry of Agriculture as to the non-impact of these works on single farm payment, (iii) an agreement in writing for a fencing arrangements required to keep the contractors within the demised land, (iv) an agreement in writing for a suitable gate arrangement to control access from the Evans's land and keep their tenant's sheep from the field, (v) an agreement in writing for gated access across the demised land from the southern part of the Field to the northern part, and (vi) agreement on the cost implications of the above, and the post-works reinstatement of the demised land, hedge, and the rest of the Field. The first defendant also gives his version of the confrontation between the parties on 18 August 2022, in which he made clear that the claimant's contractor was not to come into the Field.

The Reply

27. The Reply joins issue with the defendants on the questions whether (a) the claimant is entitled to exercise the rights ancillary to the demise only in relation to the demised land, or in relation to the remainder of the Field, (b) the exercise of the ancillary rights is subject to any conditions precedent of the kind referred to by the defendants in their defence, and (c) the defendants are entitled to require the payment of money compensation in advance of the claimants entering the Field and carrying out its inspection and repair work.

Facts for the purposes of this application

28. In considering the claimant's application to the court for summary judgment, a number of facts are indisputable, or if not indisputable have been admitted. They include the fact of the lease of 1972, in the terms which I have set out above, and its registration. They also include the request by the claimant to the defendants for access to the Field for the purposes of uncovering, inspecting and if need be repairing the pipeline under the Field. They further include the refusal by the defendants to permit access to the Field for these purposes *without* certain pre-conditions being satisfied, including certain pre-consents, and agreement on compensation in advance. Some of those pre-conditions have *in fact* been met (though the claimant's case is that that was not necessary *as a matter of law*), but not all of them have been met. (It does not therefore matter whether the defendants agree or not on those which the claimant says have been met.) In particular, there has been no agreement between the parties on compensation in advance, and the defendants accordingly continue to refuse access to the Field for the stated purposes. That, in summary, is the factual basis on which I must decide this case.

The arguments for the parties

The claimant

29. The claimant first argues that the words "TOGETHER WITH the right to enter upon the land of the Grantor" and following, in clause 1 of the lease, create an easement over *the remainder* of the Field (that is, the part not demised to the claimant) in favour of the claimant for the benefit of the strip of land actually demised. For the benefit of the defendants, and that of any other lay reader, I

say this. An easement is a right granted over one piece of land (technically called the "servient tenement") so as to burden it, for the benefit of another piece of land (called the "dominant tenement"). A right of way is a typical example, though there are many others. In this case the easement is leasehold rather than freehold, and lasts only as long as the lease does. It benefits the land the subject of the lease (that is, the strip through which the pipeline passes) and burdens the remainder of the Field. I will come back later to the legal requirements for an easement.

30. Accordingly, the claimant says that it may enter the remainder of the Field, as the lease says, "with all necessary materials and equipment and to lay construct use maintain repair alter renew inspect remove and replace the pipeline or any part thereof in the strip of land above referred to". (The same clause also refers to the right to erect marker posts showing the track of the pipeline, but that is not in question in this claim, and was not argued before me, so I say nothing about it.) The claimant says that there are no conditions precedent to the exercise of this right such as the defendants have suggested. On the other hand, the claimant does not claim the right to enter any other part of the defendants' farm. Nor does it claim the right to place canteen, toilet or office facilities on the Field without prior agreement with the defendants.

31. The claimant next argues that, under the lease, compensation for damage done by the exercise of the rights to enter, inspect and repair is to be paid only after the work has been done, the actual damage can be seen, and the value of compensation assessed. The right to compensation arises only in respect of damage to the remainder of the Field (which of course includes the – undemised – surface of the land over the strip through which pipeline passes), and to any crops for the time being growing there. Any other heads of loss suffered by the defendants are the subject of the indemnity contained in clause 2(D)(a) of the lease. There are no provisions in the lease for any payment in advance of the works being done.

The defendants

32. The defendants say that the ancillary rights granted by the lease do not extend beyond the strip of land demised by the lease, or at least the land actually demised and the strip of surface land directly above the underground "box" through which the pipeline runs. In particular, the ancillary rights do not extend over the remainder of the Field, much less over any other part of the defendants' farm. The defendants also argue that a number of other consents are needed before the ancillary rights can be exercised, including those of the adjoining landowner, their tenant and the local authority.

33. In addition, they say that certain confirmations must be first obtained, in particular one that there will be no impact by these works on the rights of the defendants or their neighbours to single farm payment. Next, they say that there must first be agreements between the claimant and the defendants for the fencing of the land while the works are being carried out, and for the installation of gates and the fencing to enable the defendants to cross the Field.

Finally, the defendants say that they are entitled to be paid compensation for any use of the Field before entry into it is made.

The law relating to summary judgment

34. This is not the trial of the claim. Instead, the claimant's application is for summary judgment. In ordinary cases, the claimant has to prepare a full case and take it to trial, at which all the evidence will be gone into and the defendant will provide a full defence. This is both time-consuming and expensive. But, where a party considers that the opposing party's case is so weak that it should not be allowed to go to trial, that party may apply for summary judgment. CPR rule 24.2 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
>
> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

35. On an application for summary judgment, the burden of proof rests on the applicant (here, the claimant): *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [9]. The claimant also cited the well-known passage in the judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), [15], concerned with summary judgment applications. This has been approved by the Court of Appeal on a number of occasions. The passage referred to was set out by the claimant's counsel in full in his skeleton argument (so the defendants will have seen it), and is too well known to need to be set out once again. What I will emphasise here, essentially for the benefit of the defendants, are three points.

36. The first one is that I have to consider whether the defendants have a 'realistic' as opposed to 'fanciful' prospect of successfully defending this claim at trial. If they do have a 'realistic' prospect of success, I cannot give summary judgment against them. If they do not, I can. The second point is that, in dealing with this, I must take account of all the evidence available to me, but also consider and take into account whatever further evidence might reasonably be expected to be available at trial. The third point is that, where the application gives rise to a short point of construction of a document, and the court is satisfied that (i) it has all the evidence necessary for the proper determination of that question and (ii) the parties have had an adequate opportunity to address it in argument, then the court should grasp the nettle and decide it.

37. In the present case, the dispute between the parties is about the meaning of the terms of the lease. It is a question of construction of the lease, for which comparatively little background evidence is needed, and which background evidence has, so far as I can see, already been supplied. It seems to me highly unlikely that, if this matter went to trial, any further evidence would emerge which would have more than a negligible bearing (if any at all) on the interpretation of the lease.

38. I am also satisfied that the defendants, both through the medium of the lengthy correspondence which has taken place between the parties in this matter and also by the provision of an attended hearing in which they might put forward their own interpretations of the terms of the lease and explain to me why they considered that those interpretations taken by the claimant were wrong, have been given an adequate opportunity to argue the points in issue. Indeed, the first defendant himself, in correspondence to the claimant's solicitors, said that the judge should now decide the matter. I agree with him. In my judgment, it is appropriate to deal with this matter of construction on this application for summary judgment.

The construction of written contracts and leases

39. The law on the construction (or interpretation) of written contracts, including leases, was recently summarised by Carr LJ, giving the judgment of the Court of Appeal in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645, [2021] BLR 97:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;
>
> ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The

exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one

> involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

The law of easements

40. In *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2019] AC 553, Lord Briggs, on behalf of the Supreme Court, set out much of the law relating to easements in summary form. Of particular significance to this case, he said this:

> "35. … it is convenient first to summarise what, by the 1950s, were the well-established conditions for the recognition of a right as an easement. Writing in 1954, Dr Cheshire described the four essential characteristics as follows: (i) there must be a dominant and a servient tenement; (ii) the easement must accommodate the dominant tenement; (iii) the dominant and servient owners must be different persons; (iv) a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant. …
>
> […]
>
> 39. Save only for easements of support (which may be said to benefit the land itself), easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings. Thus, a right of way makes the dominant tenement more accessible. …
>
> […]
>
> 58. … the condition that the rights must be capable of forming the subject matter of a grant … has come to be a repository for a series of miscellaneous requirements which have been held to be essential characteristics of an easement. They include the requirements that the right is defined in sufficiently clear terms, that it is not purely precarious, so as liable to be taken away at the whim of the servient owner, that the right is not so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement, and that the right should not impose upon the servient owner obligations to expend money or do anything beyond mere passivity."

Discussion

41. There are three main issues to consider. First, what does the 1972 lease mean? Second, what rights are created by the 1972 lease? Third, does the answer to that question, coupled with the undisputed facts in this case, mean that I should give summary judgment for the claimant?

The meaning of the lease

42. The first point is the meaning of the lease. There are positive and negative aspects to this. First of all, the express words of the demise seek to create a

lease of an underground "box" or tunnel passing beneath the Field, defined using the words "ALL THAT strip of land…" *etc*. The defendants do not challenge this. But they say that the ancillary rights, granted by the words "TOGETHER WITH" and following, create rights which have effect (if at all) only in relation to the underground "box" or tunnel and (perhaps) also to the strip of surface land running directly above that underground "box" or tunnel, but *not* in relation to the rest of the Field. In my judgment, that is incorrect. I ask myself what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean.

43. The ancillary rights (including access to the demised land) are expressed to be created over "the land of the Grantor", not over "ALL THAT strip of land" *etc*, or anything similar. So, the draftsman has used two different expressions. The natural inference is that one is being used for the land the subject of the lease, and the other is being used for the land the subject of the ancillary rights. That would mean that they are two separate parcels of land. The Grantor (the defendants' predecessors in title) owned the Field, and granted the lease out of that ownership. It would make no commercial sense to grant a long lease of a strip of land and then purport to grant a right of access to it only over itself (or the surface lying directly above it). The commercial purpose of this arrangement is to allow the claimant to lay a pipeline under farmland and then to look after it. So, it would make far more sense to grant a right of way over the surrounding land (*ie* the Field) to get to the strip.

44. Moreover, in order for the ancillary rights to be granted as an effective easement in law, the ancillary rights must be exercisable over *different* land (the servient tenement) to the land thereby benefited (the dominant tenement), owned, whether freehold or leasehold, by two different people. A leasehold right of access over the demised land would be a right granted to the leaseholder to go on *his own land*. It therefore could not amount to a valid easement for the benefit of that land. That would not be a sensible thing to do. The ancillary rights would add nothing of value to the lease. Accordingly, I hold that the meaning of the words "TOGETHER WITH" and following is that the parties to the lease intended to create rights over *the remainder of the Field* (but not any other part of the defendants' farm) for the benefit of the land demised.

45. The second, negative aspect of the words used in the lease is that there are no limitations on the exercise of the ancillary rights of the kind alleged by the defendants. To be clear, there are no words providing for other consents to be obtained before the ancillary rights can be exercised, whether of the adjoining landowner, their tenant or the local authority. Nor is there any express requirement for any confirmations to be first obtained, such as that there will be no impact by these works on the rights of the defendants or their neighbours to single farm payment. Nor are there any words stating that agreements must first be entered into between the claimant and the defendants for the fencing of the land while the works are being carried out, or for the installation of gates and the fencing to enable the defendants to cross the Field.

46. Such pre-conditions, like any contractual term, can of course be *implied* instead of express. But the courts will not imply non-expressed terms merely because one party or the other would like them to be implied. Nor will they imply them merely because the court considers the term sought to be implied a reasonable one. The court starts from the position that what the parties intended is first and foremost expressed by the words used: see Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, [17]. It is true that, in the cases of certain types of contract, the courts regularly imply certain common terms, unless they are expressly excluded. These are sometimes referred to as implied terms by default. This case is not however one of those. The other kind of implied term is one which fills a gap *on the facts of the particular case*. Here, anything to be implied must be either so obvious as not to need stating, or necessary to give business efficacy to the transaction. It is still a question of the *parties'* intention.

47. In *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, Lord Neuberger (with whom Lord Sumption and Lord Hodge agreed) put it this way:

> "15 … In *The Moorcock* (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, 'it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have'. In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, Scrutton LJ said that '[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract'. He added that a term would only be implied if 'it is such a term that it can confidently be said that if at the time the contract was being negotiated' the parties had been asked what would happen in a certain event, they would both have replied "Of course, so and so will happen; we did not trouble to say that; it is too clear".' And in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, MacKinnon LJ observed that, '[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying.' … "

Lord Carnwath and Lord Clarke delivered concurring judgments agreeing generally with Lord Neuberger. The same passage was referred to with approval by the majority of the Supreme Court in the recent decision in *Barton v Morris* [2023] AC 684, [21].

48. In the present case, there is no need for any other consents to be obtained before the ancillary rights can be exercised and the contract given effect to. The only person directly affected by their exercise is the lessor (the defendants). But the lessor (or his or her predecessor) granted the rights. Nor is there any need for any confirmation that there will be no impact by these works on the rights of the defendants or their neighbours to single farm payment. The defendants have an indemnity from the lessee (the claimant) for any loss that the works may cause. Nor is there any need for agreements as to fencing of the land while the works are being carried out, or for gates. Again,

if any damage is caused to the land or the defendants suffer any other loss because of the works, the claimant must put it right or pay compensation.

49. In my judgment, it is simply not obvious, and does not go without saying, that these consents, confirmations and agreements must be obtained, given or entered into before the ancillary rights can be exercised. On the contrary, all the circumstances point in the other direction. Accordingly, I consider that there are no implied terms to this effect, and accordingly the claimant was not obliged to obtain, give or enter these consents, confirmations and agreements. In fact, the claimant's evidence was that some of them had been obtained or given. But this is irrelevant.

50. The third point on the wording of the lease is that there is nothing to indicate that the parties must agree the amount of compensation before the claimant can exercise the ancillary rights. Indeed, the wording of clauses 2B and 2D(i) is directly contrary to the defendants' argument. Clause 2B requires the claimant to put right or pay compensation for any "damage … done". That obligation to put right or compensate can arise *only* once the damage has been done. It cannot arise in advance of any damage arising. Moreover, the clause requires that "the amount of such compensation to be determined in default of agreement" by an expert to be appointed. No expert can determine the amount of compensation before knowing what damage has been caused, and the expert cannot know that before the damage itself has been caused.

51. Clause 2D(i) requires the claimant to indemnify the defendants, with certain exceptions, against "all costs claims and liabilities arising by reason of the exercise … of the rights hereby granted". Once again, that cannot require any indemnity to be paid before the "costs claims and liabilities" have arisen or been incurred. In my judgement the defendants are not entitled to require the claimant to agree, much less pay, any money compensation under these heads before it enters the Field and exercises the ancillary rights.

What rights are created by the lease?

52. The parties agree that the defendants' predecessor in title granted a lease of a narrow strip of land to the claimant in 1972. The principal question under this head therefore is whether the ancillary rights expressed in the phrase "TOGETHER WITH" and following create a valid easement in favour of the claimant. If they do, then, as easements are property rights, and have been properly registered, they bind the defendants. I set out above a summary of the relevant law.

53. The ancillary rights are granted for the benefit of the demised land over and in relation to the remainder of the Field. There is therefore a dominant tenement (the demised land) and a servient tenement (the remainder of the Field). The ancillary rights "accommodate" the dominant tenement because they allow the leaseholder of the demised land to enter the servient tenement and gain access to the demised land, for the purposes of inspecting, repairing and renewing the pipeline which is laid in the demised land. This improves the general utility of

the dominant tenement. The dominant and the servient tenements are owned by different persons.

54. Finally, the ancillary rights created by the lease are capable of forming the subject matter of a grant. The rights are expressed in sufficiently clear terms, they are not exercisable only with the consent of the defendants, and they do not confer so much control of the Field on the claimant as to oust the defendants from their ownership of it. Nor do they require the defendant to spend any money or indeed to do anything positive. In my judgment, the ancillary rights do amount to an easement in law, binding upon the defendants. That easement is exercisable without the defendants' consent, and without any agreements for compensation (or anything else) being agreed in advance.

Summary judgment

55. So, I turn to the third question. Is this a case in which the court should grant summary judgment to the claimant, without requiring the matter to go to a full trial? In my judgment, on the undisputed or accepted facts of this case, the meaning and effect of the 1972 lease are so clear that there is no real prospect of the defendants successfully defending this claim at trial. There is no other compelling reason for having a trial that I can see, and the first defendant did not suggest any. Accordingly, it is appropriate that I grant summary judgment to the claimant.

Conclusion

56. For the reasons given, I grant summary judgment to the claimant on the claim. That will involve the making of a final injunction. I will consider the exact terms of the order to be made once this judgment has been handed down.