Neutral Citation Number: [2020] EWHC 3030 (QB)

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BIRMINGHAM
ON APPEAL FROM THE COUNTY COURT AT WALSALL
ORDER OF HHJ GREGORY DATED 22 OCTOBER 2019
COUNTY COURT CASE NUMBER E00WJ853
APPEAL REF BM90205A

Birmingham Civil Justice Centre

Date: 13/11/2020

Before :

MR JUSTICE GRIFFITHS

Between :

MANOR FARM BARNS (ESSINGTON) LIMITED	**Claimant / Respondent**
- and –	
STEPHEN JOHN CLAIR	**Defendant/ Appellant**

- -
- -

David Taylor (instructed by **FBC Manby Bowdler LLP**) for the **Appellant**
Anya Newman (instructed by **Woodhouse & Company**) for the **Respondent**

Hearing date: 3 November 2020
- -

Approved Judgment

Mr Justice Griffiths :

1. This is an appeal against dismissal of the Defendant's Counterclaim after a trial by His Honour Judge Gregory ("the Judge") sitting in the Walsall County Court on 22 October 2019.

2. The issue in the appeal is the extent of a right of way granted by the Claimant/Respondent's predecessors in title to the Defendant/Appellant ("the Appellant" or "Mr Clair").

3. I will refer to the Appellant either as "the Appellant" or "Mr Clair". I will refer to the Respondent either as "the Respondent" or "MFB".

4. MFB was the Claimant in the action, and Mr Clair was the Defendant. MFB sued Mr Clair after he unilaterally decided to dismantle and encroach upon part of a drive on MFB's land which adjoined his own property, claiming that it was in fact on his side of the boundary. The Judge found for MFB on this point and awarded damages and an injunction, against which there is no appeal. However, he also dismissed Mr Clair's Counterclaim which concerned, not the precise geographical position of the drive (which is now accepted, and which certainly belonged to MFB and not to Mr Clair), but the extent of Mr Clair's right of way over it ("the Right of Way").

The Right of Way and the Transfer

5. The Right of Way was granted to Mr Clair when he bought a property at 2 Manor Farm Cottage, Bognop Road, Essington, near Wolverhampton in South Staffordshire ("the Property") consisting of a semi-detached house ("the Cottage"), standing in its own small grounds, from David Poyner Homes Limited ("the Vendor"). The conveyance or transfer of the Property to Mr Clair by the Vendor was in a Transfer dated 28 October 2006 made between Mr Clair and the Vendor ("the Transfer"). The Vendor in due course sold on to MFB, which succeeded to the Vendor's rights and obligations under the Transfer.

6. The Vendor was engaged in development of an area comprising two existing Manor Farm cottages (of which Mr Clair's was one, attached to the other) and a number of farm buildings being converted into six new dwellings around three sides of a courtyard, which was designated on the plan attached to the Transfer ("the Plan") as car parking. I am told that Mr Clair was the first person, or at least one of the first, to buy from the Vendor and the development was still a work in progress. But its intended form, including the geographical relationship between rest of the adjacent development and Mr Clair's Property, is set out on the Plan; and it seems that it was in due course realised in accordance with that Plan.

7. The sole basis of Mr Clair's claim to the Right of Way was the grant in the Transfer. The dispute is about the true construction of the Transfer.

8. It is essential in order to understand the arguments and the judgment in the case to look at the Plan attached to the Transfer and to look at it in colour. A copy is attached to the Order made below. The Plan has a compass point which is upside down, so that where 'North' is indicated on the compass point it should actually say 'South'. This means that the top of the Plan is south, the bottom is north, the left side (where the Cottage is)

was east and the new homes around the car parking on the right side were to the west. However, to side-step this confusion, I will refer to the top, bottom, left and right of the Plan wherever possible.

9. The grant of the Right of Way was in clause 13.3 ("Rights granted for the benefit of the Property") and, in particular, sub-clauses 13.3.1 and 13.3.1.5 of the Transfer.

10. Sub-clause 13.3.1 said:

> "The transfer is made together with the following rights over the Retained Land for the benefit of the Property".

11. Those rights included the Right of Way, defined (at sub-clause 13.3.1.5) as follows:

> "**Right of way** – a right of way in common with the owners of the Retained Land and those authorised by them with or without vehicles over and along part of the Shared Driveway constructed on the Retained Land at all times and for all purposes. The benefit of this right is subject to the owners of the Property paying to the owners of the Retained Land a fair proportion (which will form part of the "Transferee's Maintenance Costs"), of repairing, maintaining, replacing, renewing and cleaning the Shared Driveway provided that this right shall not be effective until the Transferor has served a notice on the Transferee that the Shared Driveway is available for use."

It is to be noted that the Right of Way was granted only over "part" of the Shared Driveway.

12. The capitalised terms in this definition of the Right of Way were defined in clause 13.1 thus:

i) "Retained Land" was the land belonging to the Vendor "other than the Property" i.e. excluding the Cottage and grounds being sold to Mr Clair.

ii) "**Shared Driveway**" was defined as:

> "part of the driveway to be constructed by the Transfer [this must be an error for Transferor] pursuant to planning permission 04/00922/FUL dated 8 September 2004 to serve the Adjoining Land and the Property or any replacement planning permission shown coloured blue on the plan"

Again, the word "part" appears. Thus, the Right of Way was granted by clause 13.3.1.5 over "part" of the Shared Driveway, and the Shared Driveway was itself defined in clause 13.1 as "part" of the driveway to be constructed "shown coloured blue" on the Plan.

13. The Plan duly shows an area strongly coloured blue ("the Blue Area") which is labelled on the plan as "Access Road".

i) The Blue Area leads from Bognop Road (running left to right along the bottom of the Plan) and runs up into the courtyard in front of the six new houses, marked on the Plan as for "car parking". It then stops short of a further area towards the top of the Plan, also marked for "car parking".

ii) As the Blue Area runs up the Plan, it immediately adjoins Mr Clair's Property to its left, at the same time as passing the car parking area for the six new dwellings, which are to its immediate right on the Plan.

iii) That part of the Blue Area at the bottom of the Plan and in front of Mr Clair's Cottage has a little spur to the left (also coloured blue), leading into the grounds of the other cottage to which Mr Clair's cottage was attached. This spur ("the Spur") crosses Mr Clair's own Property.

But a look at the Plan which I will attach to this judgment makes it all clearer than words.

14. The fact that the development was still in progress is reflected in clause 13.4.1.3 of the Transfer which includes:

> "…the right for the owners of the Retained Land and those authorised by them to enter and remain upon so much as is necessary of [Mr Clair's Property] on reasonable prior notice… with or without workmen, plant and equipment to:… (d)… "construct the Shared Driveway and to comply with the conditions of the planning permission 02/01443/COU dated 24 November 2003 relating to the development of the Retained Land."

15. Since the Shared Driveway had not yet been completed, the Transfer granted Mr Clair a temporary right of way which was in a completely different place to the permanent Right of Way. The temporary right of way ran on the other side of Mr Clair's property (although it too started from Bognop Road) and is not shown on the Plan. It was an existing drive which was eventually eliminated at the completion of the development (as, indeed, the planning permissions for the development demanded, it being replaced by the new Shared Driveway being laid out to the west). The old drive ran from Bognop Road, up past the Cottage and then around the back garden of the Cottage into the area of the new development. The temporary right of way granted to Mr Clair along this was defined in clause 13.4.1.8 of the Transfer to include a section marked in yellow, which ended level with the back garden of his Cottage (at the top of the Plan). Clause 13.4.1.8 provided that this temporary right of way would continue

> "…until the Shared Driveway has been completed and the Transferor has served a notice on the Transferee confirming that the right of way granted by this clause is no longer required."

16. Mr Clair entered into a number of positive covenants. One of these was a covenant in clause 13.7.1.2, in relation to "Fencing and boundaries", which obliged Mr Clair to:

> "(a) erect within 12 months of the date of this transfer and then keep in good and substantial repair and condition a close-

> boarded fence along all boundaries marked with a "T" on the Plan or such other fence as required by the local planning authority."
>
> (b) keep the fences and hedges on the boundaries of the Property in good and substantial repair and condition."

Unfortunately, no boundaries were marked with a "T" on the Plan, although the boundary around the whole perimeter of his Property was clearly marked in red. At trial, in cross examination (transcript pp 43-44), Mr Clair said that the wall he erected down the right hand side of his boundary on the Plan (the boundary adjacent to the Shared Driveway) was put up in order to comply with that obligation. This blocked any access to his back garden from the upper stretch of the Shared Driveway, although the Blue Area marched in part with that boundary beyond the point where the back wall of his Cottage stood and his back garden began.

17. The perimeter of the Property (marked in red on the Plan) was an irregular shape, running up the Plan from bottom to top, with the Cottage sitting in the middle of it. The shape narrowed to a point, both at the top and at the bottom of the Plan. The bottom point touched the road, and since it was a point, there was no way of leaving the Property without passing over adjacent land which did not form part of the Property. The Shared Driveway was the natural place for this access from the road to be gained, and the Right of Way (which was not just for cars, but a right of way "with or without vehicles", so it covered pedestrians as well) was suitably located to allow this.

18. The Cottage, as I have said, sat roughly in the middle of the irregular shape formed by the boundary of the Property marked in red on the Plan. On its left was the other old cottage, which was attached to it. On its right was a narrow alley which separated the Cottage building from the boundary line to its right on the Plan. Above the Cottage on the Plan was an open area. Below the Cottage on the Plan was another open area, in a roughly triangular shape ("the Front Area"). The Front Area was entirely assigned to the Property. The short side of the triangle formed by the open Front Area was at the top, bounded by the front wall (including front door) of the Cottage. The long side of the triangular Front Area was on the left of the Plan, marking the boundary between the Cottage and the other cottage next door. The bottom of this long left side of the Front Area was the point which touched the road, as I have mentioned. From that point, going up the plan, was (as it were) the hypotenuse of the rough triangle formed by Mr Clair's Front Area. The Blue Area marched with this hypotenuse boundary of the Front Area, going up the Plan, towards the car parking courtyard.

19. At the approximate meeting point of (a) the Blue Area to the right (b) the top of the hypotenuse of the Front Area and (c) the front wall (including front door) of the Cottage, the Plan indicated a line (presumably some form of barrier) between the Cottage and its alleyway and the Property's right hand side boundary. In line with this, on the other side of the Property boundary, the Plan showed a pair of gates bisecting the Blue Area and opening inwards towards the six new dwellings and around the courtyard marked "car parking". Again, a glance at the Plan makes this clear. These gates ("the Gates") were important to the dispute and to the judgment appealed from.

20. The Gates are marked on the Plan. They bisect the Blue Area into two parts. The bottom part is that part of the Blue Area between the highway and the front of Mr Clair's

Cottage. The top part, on the other side of the Gates, runs along part of Mr Clair's garden wall, which neither on the Plan nor on the ground at the time of trial had any opening in it.

21. **Planning permissions**

22. Two planning permissions were referred to in the passages from the Transfer I have quoted.

    i) "Planning permission 02/01443/COU dated 24 November 2003" referred to in clause 13.4.1.3 (quoted in paragraph 14 above).

    ii) "Planning permission 04/00922/FUL dated 8 September 2004" referred to in the definition of "Shared Driveway" in clause 13.1 (quoted in para 12 above). I was not shown this.

23. The first of these (planning permission 02/01443/COU dated 24 November 2003) ("the 2003 Planning Permission") was in relation to proposed "Change of use of agricultural buildings to form 6 dwellings". It was, therefore, in relation to the proposed change of use of the farm buildings around the courtyard designated on the Plan as for car parking. The following provisions have been referred to in argument:

    i) The development was to be carried out in accordance with certain plans which were referred to (Condition 1).

    ii) Before the development began, a landscape scheme had to be submitted for approval (Condition 2).

        In argument, Counsel for Mr Clair took me to a sheet which he linked to this condition. It was entitled "Landscape proposals" and was dated August 2006, being approved on 9 November 2006 (which was after the Transfer date of 27 October 2006). It was agreed that there was no evidence Mr Clair had seen it before the Transfer, and it is not attached to the Transfer. It did show the Gates. It did not show the boundaries of Mr Clair's Property, although the general area of the Cottage and its neighbour was shown in white space labelled "Cottages". Apart from indicating that the area covered by his Property, so far as it was indicated at all, consisted of grass, with various trees (including the Front Area), it did not seem to add anything much to the argument.

    iii) "The access, parking and turning areas shall be surfaced and thereafter maintained in a bound material" (Condition 7).

    iv) By Condition 8, "6.0 metre radius kerbs shall be provided each side of the site access" and, by Condition 9, "The access shall be ungated."

    v) By Condition 11:

        > "Before the development is brought into use, a vehicle turning area shall be constructed within the site and thereafter retained and available for this use throughout the life of the development."

vi) I have already referred to the old drive running to the left of Mr Clair's Property on the Plan, and to the grant of a temporary right of way along part of this drive while the Shared Driveway was being constructed on the other side. This has been linked in argument to Condition 12, which said:

> "Concurrent with the proposed access being brought into use the existing site access shall be permanently closed and the access crossing re-instated as verge/footway."

24. Counsel for Mr Clair also took me to another planning permission, dated 18 October 2006. He conceded that there was no evidence that Mr Clair saw it before the Transfer of 27 October 2006, and it is not referred to in that Transfer. However, he relied on it as a public document which, he said, should form part of the factual matrix available to the reasonable person construing the definition of the Right of Way in the Transfer. This planning permission ("the October 2006 Planning Permission") contrasted with Conditions 8 and 9 of the earlier 2003 Planning Permission, which had said that the site access should be ungated. The October 2006 Planning Permission said (at Condition 9):

> "Any gates shall be set back a minimum of 6 m from the highway boundary and shall open inwards."

25. The Gates indicated on the Transfer Plan appear to have been consistent with this.

26. The October 2006 Planning Permission also gives the best indication available to me of the approximate dimensions of the Blue Area on the Transfer Plan. The dimensions in Condition 7 are that the access road (which was provided by the Shared Driveway) "shall have a minimum width of 5 metres and be straight for the first 15 metres rear of the carriageway edge" i.e. the 15 metre length connecting with the junction with Bognop Road. This is potentially relevant because of the importance attached to vehicle turning in the submissions of Counsel for Mr Clair (which he linked to Condition 11 of the 2003 Planning Permission (quoted above), requiring that "a vehicle turning area shall be constructed within the site and thereafter retained and available for this use throughout the life of the development.") It seems clear that there was room to turn a vehicle in the Blue Area on the near (bottom) side of the Gates, although there was a broader turning area in the Blue Area on the other (top) side of the Gates.

The auction particulars

27. Counsel for Mr Clair also relied upon auction particulars for the sale of the Property, although the sale of the Property was not by auction and the auction particulars were not referred to in the Transfer and the terms of the Transfer were not the same as the terms offered at auction (in particular, the Transfer did not include any parking rights outside the Property). The auction took place, I am told, in February 2006 but the Property did not sell at that time. Mr Clair's evidence at trial did not suggest that the auction particulars formed any part of the negotiation between him and MFB when he made an offer for the Property later in the year, leading to the Transfer.

28. The auction particulars were for the Property. They said "OUTSIDE: Garden. Allocated parking spaces to be provided." They also contained the following note:

> "N.B. there is to be a vehicular right of way over an adjoining access road which is to be installed by the vendors. Upon completion No. 2 Manor Farm Cottage will have right of access to two allocated parking spaces. A new drive will be installed across the front of No. 2 in favour of No. 1".

29. As I say, this has very little correlation with the eventual sale of the Property by the Transfer, some eight months later. No right of access to any allocated parking space was included in the Transfer, nor was it claimed that any such right had been agreed at that time, or subsequently, between Mr Clair and the owners of the rest of the development.

The trial

30. The trial took place over a single day, starting at 11 am and ending with an ex tempore judgment, subsequently transcribed and approved by the Judge ("the Judgment"). More issues arose for determination than are pursued on this appeal. Evidence was given by witnesses on both sides, who were cross examined (Mr Jeffs of MFB for the Claimant, and Mr Clair himself as Defendant).

The Judgment

31. The Judgment set out the facts and the evidence. It included the following findings:

    i) "It is quite plan from [the Plan] that what [Mr Clair] was purchasing was a small area or parcel of land at the front of the cottage, the cottage itself and a larger parcel of land forming the back garden, I suppose, at the rear of the cottage." (para 4).

    ii) The Judge noted that, although car parking rights had been mentioned in the unsuccessful attempt to sell at auction, Mr Clair had not acquired any car parking rights in the Transfer. "That, it seems to me, has been the source of the continuing sore which exists in this litigation" (para 5).

    iii) The Judge found that Mr Clair had built a brick wall "along the boundary between his property and the retained property now owned by the defendant" (para 6). This was the wall which, as I have observed in para 16 above, Mr Clair said in evidence he had constructed in compliance with the requirement in the Transfer that he put a fence up along the boundaries which should have been indicated by T marks on the Plan. It ran down his western boundary, the one on the right of his Property as drawn on the Plan.

    iv) The Judge noted that the area of Property in front of the Cottage was "a small lawn", with another "very small lawn indeed" nearer to the highway, with the Spur in between them. "What was not provided here was any specific parking space at all, but the driveway did grant access to this front part of the house should one wish to drive to it and park initially upon the gravel" (para 6). The Spur made it "difficult to leave a car in that position" but Mr Clair later negotiated with his neighbour to abolish the neighbour's right of way over the Spur (para 6).

v) The Judge rejected Mr Clair's case, in the dispute before the Judge, about exactly where his boundary was (which is not pursued on appeal).

vi) The Judge rejected Mr Clair's evidence of fact in some respects (para 11). This is also not challenged on appeal, and it follows that the Judge was not proceeding on the basis that anything asserted by Mr Clair on any topic should be taken as agreed fact or common ground.

vii) The Judge noted that Mr Clair had never lived in the Property, but always let it to tenants. "At the moment it is let, he says, to a family of at least four. They have four cars…" (para 11). There was not room for all four cars on Mr Clair's own Property, and the Judge found that he had tortiously created a hard standing to accommodate them all which did not respect the boundaries of his own Property. He awarded damages for trespass upon and damage to MFB's property, against which there is no appeal.

viii) The Judge found, however, that even within the curtilage of Mr Clair's own Property "it is possible to park some cars, possibly two" (para 15).

32. The Judgment then turned to the dispute about the extent of the Right of Way and, in particular, the true construction of the Transfer. The Judge cited *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28 and *Arnold v Britton* [2015] UKSC 36, which have also been cited to me (paras 16-17). He therefore recognised the point which has been much insisted upon in this appeal, to the effect that interpretation "is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" (para 16).

33. The Judge said (and there is no challenge to this): "…Mr Clair bought a property which did not come with any parking as such. That was in commercial terms not a very clever thing to do. It is not what he intended to do, but it is plainly what he did do…" (para 18). He found "It is not the case that he ever needed a right of way to access a parking space at the rear of his property because he did not have one" (para 18).

34. The Judge rejected an argument based on Condition 11 of the 2003 Planning Permission that the turning area required by that Condition "must indicate that he had a right, if one interprets the right of way in his favour, to drive through the gate and make use of it". He said: "…that turning space was created not for his house but as part of a planning permission granted for the creation of the six barns. It had nothing to do with his property. It cannot be relied upon to grant him or to interpret his right in the way in which he would like it to be interpreted." (para 19).

35. Before me, Counsel for Mr Clair produced a document which, he said, suggested that the "Site" defined for the purposes of this planning permission included the Cottage as well as the six barns. The document was not in the appeal bundle and the Judge below does not appear to have been referred to it. It was not obvious to me that it proved the point but, even if it did, Condition 11 required the vehicle turning to be constructed "before the development is brought into use" and to be "available for this use throughout the life of the development". The Cottage was not part of the development, even if it was within the boundaries of the site indicated on the planning permission

plan, or of a plan associated with the planning permission. The Cottage did not require development, being an existing dwelling, a relatively old house. The development was the conversion of the farm buildings into six new dwellings. This is confirmed by the 2003 Planning Permission being explicitly in relation to "Change of use of agricultural buildings to form 6 dwellings". Therefore, the Judge's finding in para 19 cannot be faulted.

36. In para 21, the Judge rejected a construction argument which is no longer pursued on appeal. This was that the Right of Way could be over substantially the whole of the Blue Area if the use of the word "part" in its definition merely referred to the Spur over his own land, which was also coloured blue but (according to this argument) excluded. The Judge rightly pointed out that this was unsustainable, because the Right of Way was "along part of the Shared Driveway constructed on the Retained Land" (clause 13.3.1.5) and the Spur over Mr Clair's own Property was not constructed on the Retained Land but on his land.

37. The Judge then concluded (in para 22) as follows:

> "The obvious and sensible construction, it seems to me, adopting the approach from the two cases to which I have referred, bearing in mind that the gates existed on the plan before the transfer took place before the driveway was constructed, is that the part of the driveway over which Mr Clair has a right of way is that part of the driveway which leads up to the gates and no further beyond. That is the part of the driveway which serves his property. It is in my judgement this construction of the right of way which more fairly and properly fits with ascertaining the meaning of the document which it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. That is the right of access which he was granted by this document. It is the right of access by which he has conducted himself in effect for many years since the barns were completed. What he has not sought to do is to drive beyond the gates for some years. He did initially but that stopped and he built the brick wall which would have made doing so utterly pointless. I am therefore satisfied for the reasons that I have given that that does properly define the right of way to which he is entitled and upon that basis, the counterclaim is dismissed."

The Grounds of Appeal

38. There are four Grounds of Appeal, but the third and fourth only arise if Mr Clair succeeds in either or both of the first two. The four Grounds of Appeal are:

    i) "The trial judge erred in construing the Appellant's express right of way as extending only over that part of the access road which lies to the north of the gates which are shown on the plan to the transfer dated 27 October 2006. He should have construed the Appellant's right of way as extending over the whole of the area which is cross-hatched and coloured blue on that plan."

ii) "Without prejudice to the generality of the foregoing grounds of appeal, the trial judge failed to consider at all the argument based on constructive interpretation which had been advanced in paragraph 57(c) of the Appellant's skeleton argument for trial."

iii) "Because of the conclusion which he had reached about the extent of the Appellant's express right of way, the trial judge did not separately consider the question whether the Respondent's actions in locking the electronic gates (and refusing to provide the appellant with a key fob) amounted to a substantial interference with the Appellant's right of way. But if the right of way was as extensive as the Appellant contends, these actions plainly did amount to a substantial interference, and should be restrained by injunction."

iv) "Because of the conclusion which he had reached about the extent of the Appellant's express right of way, the trial judge did not separately consider the question whether, on the proper construction of the right of way, the Appellant was entitled to open a new access and the right of way into his rear garden. The trial judge should have concluded, for the reasons described in paragraph 53 to 63 of the appellant's skeleton argument for trial, that the appellant was so entitled."

Ground 1

39. Ground 1 is that the Judge "should have construed the Appellant's right of way as extending over the whole of the area which is cross-hatched and coloured blue" on the Plan.

40. Similarly, in his pleaded Counterclaim, Mr Clair claimed that the right of way "extended over the whole of the area which is hatched in dark blue on the Transfer Plan", i.e. over the whole of the Blue Area.

41. Before me, Counsel for Mr Clair says that he does not now argue (and did not at trial argue) that it extended over the whole of the Blue Area, but only over that part of the Blue Area which falls outside Mr Clair's own land. That makes sense (as one does not need the grant of a right of way over one's own land), but the failure to plead it thus, either in the Counterclaim, or in the Grounds of Appeal, is an example of a general lack of precision in the Appellant's approach to the construction of the Transfer.

42. Counsel for Mr Clair says in his skeleton argument on appeal (para 43) that, at trial, MFB accepted that the Shared Driveway comprised the whole of the Blue Area, and relies in this respect on para 45 of MFB's skeleton argument for trial, which said:

> "The Defendant does not therefore have a right of way over all of the area coloured blue on the transfer plan (the blue representing the Shared Driveway). Instead he has a right of way over *part* of the Shared Driveway coloured blue, the question is which part."

This seems to be correct. The Blue Area and the Shared Driveway are, therefore, by agreement between the parties, the same.

43. He then argues that the Shared Driveway represented only part of the larger "driveway to be constructed by the Transfer[or]", and that this reference to the driveway must, therefore, have been a reference to the Access Road together with the Spur and/or the various car parking areas outside the Blue Area and to which the Blue Area led, on the other side of the Gates from the highway.

44. He seemed to recognise that his construction did some violence to the definitions of the Right of Way referring to only "part" of the Shared Driveway, as Mr Clair is claiming a Right of Way over all of it (bar only the Spur, which he now concedes is not part of the Shared Driveway at all). He therefore says that the question the Judge had to decide was:

> "a. whether the Transfer should be interpreted as having granted a right of way over an undefined *part* of the Shared Driveway (and if so what part), alternatively;
>
> b. whether something has gone wrong with the language of the Transfer."

He argues for a construction which decides that something has gone wrong with the language of the Transfer and, therefore, a construction which allows him to depart from that language in a way that the Judge's construction did not. The Judge's construction – that the Right of Way stopped at the Gates – was consistent with a Right of Way that was over only "part of the Shared Driveway" as stated in clause 13.3.1.5. The Judge's construction demarcated that "part" by reference to a feature present on the Plan (the Gates).

45. Mr Clair's Counsel relied on a trio of cases in support of his journey away from the language of the Transfer actually granting the Right of Way and towards a point where Mr Clair might enjoy a Right of Way over the whole of the Shared Driveway.

46. First, he referred to the well-known and oft-cited passage in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 per Lord Hoffmann at 912H-913F:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of

> subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:
>
> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense." ”

47. Lord Hoffmann is not, in this passage, saying that the background facts should be the starting point for determining what the parties agreed, with the words they used to express their agreement, as it were, bringing up the rear. An agreement reduced to writing must (subject to questions of rectification, which are not raised by this appeal) be found in and through the words of the agreement, with the background facts acting as an aid to construction, even if they lead one to conclude “that something must have gone wrong with the language”. This is particularly clear from paragraph (5) in Lord Hoffmann’s summary.

48. Second, he relies on *Arnold v Britton* [2015] AC 1619 per Lord Neuberger at paras 15-23. However, within that passage, Lord Neuberger warns at para 17:

> “…the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101, paras 16-26) 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."

49. Lord Neuberger also observes (at paras 19-20):

> "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. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB* (*The Antaios*) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.
>
> Fourthly, 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. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. 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."

50. Finally, Counsel for Mr Clair relies on *Chartbrook v Persimmon Homes Ltd* [2009] AC 1101 per Lord Hoffmann at paras 21-25. This included the observation that "there must be a clear mistake" (at para 22), although "in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration." (para 24). However, "…it should be clear that something has gone wrong with the language and… it should be clear what a reasonable person would have understood the parties to have meant." (para 25).

51. Earlier in his judgment, Lord Hoffmann affirms (at para 14) the point made in *Investors Compensation Scheme v West Bromwich* that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents". I observe that there are

very few documents as formal as a conveyance or transfer of real property containing the express grant of a right of way.

52. Lord Hoffmann goes on to say (at para 15): "It clearly requires a strong case to persuade the court that something must have gone wrong with the language".

53. In my judgement the judge was fully entitled to reach the decision he did for the reasons he gave. His conclusion was to be drawn, as the Appellant himself argues, not merely from the words of the document but from the surrounding context. He therefore had to consider the evidence in order to make findings of fact, some of which was disputed. This included identification of the background knowledge which would reasonably have been available to the parties, and ascertainment of the meaning of the Transfer in the light of all the facts, including the words used and those background facts. This was a decision of mixed fact and law, and one which an appellate court must be particularly cautious about second guessing or overturning. The Judge was in a position to conduct a judicial decision-making exercise of mixed fact and law of particular sensitivity which the appellate court cannot be confident of conducting correctly without the benefit of the trial process, including the witness evidence, which the judge had.

54. However, I will go further than that and say that, not only do I think the Judge's decision was unimpeachable, I am confident that it was obviously correct. Even having listened to the arguments addressed to me by Mr Taylor on behalf of Mr Clair, I would unhesitatingly reach the same conclusion even if I were not constrained by the respect I must properly pay to the judgment below.

55. There are a number of flaws in the Appellant's line of argument on Ground 1 which I would particularly single out.

56. The Judge's construction was consistent with the words used, which was that the Right of Way was over and along "part" of the Shared Driveway, whereas the Appellant's construction was not, leading to his assertion that "something has gone wrong with the language". A construction consistent with the language is more persuasive than one which requires a departure from it.

57. The arguments from background facts in support of the argument that "something has gone wrong with the language" are based upon Mr Clair's frustration that he has nowhere to park or to turn his car. However, there are a number of objections to this reasoning.

    i) He was not granted a right to park in the Transfer, or before the Transfer, or, indeed, afterwards. The parking envisaged in the auction particulars was in connection with a different transaction which did not take place. Mr Clair did not claim that he ever acquired parking rights over MFB land.

    ii) Mr Clair did, in fact, have room to park a car, in front of his Cottage, to which the Right of Way before the Gates clearly connected. That it was not big enough for the four cars owned by his tenants, long after the Transfer, is not relevant.

    iii) He did, in fact, have room to turn a car, in front of the Gates.

58. The Right of Way was, not only to be distinguished from a right to park, but was also stated to be a right of way "with or without vehicles". The most obvious reason that a Right of Way was being granted was that, without it, there was no access to the highway at all without passing over MFB's land, since Mr Clair's boundary narrowed to a single point as it reached and touched the highway at the bottom of the Plan. The Judge's construction provided Mr Clair with a Right of Way between the front door of his Cottage and the highway "with or without vehicles… at all times and for all purposes". It therefore made perfect sense in accordance with the background facts, as well as with the language. Much as Mr Clair might have liked a right of way which passed within the Gates, there was no need for it. There was, however, an obvious need for a right of way outside the Gates, between the Cottage and the highway. That is what the Judge's construction gives him.

59. The Transfer itself required Mr Clair to build a barrier along the boundary of his Property. Although the Plan's absence of T marking made the line of this barrier uncertain from the Plan alone, the evidence before the Judge was that it included at least the line of the solid wall which Mr Clair agreed he had built in accordance with this obligation. That wall made a Right of Way within the Gates pointless for the purposes of connecting with Mr Clair's own Property, because it was separated within the Gates from that Property by a solid barrier of fence or wall. Although by the time of trial Mr Clair wanted to break into that wall in order to introduce parking into his back garden, there was no evidence that this was agreed at the time of the Transfer.

60. The Judge's construction neatly and plausibly solved the Appellant's conundrum that the "part" of the Blue Area covered by the Right of Way was not defined. The Gates, which were on the Plan referred to in the grant of the Right of Way, provided a logical point at which to mark off the "part" of the Blue Area of Shared Driveway included in the Right of Way (the part in front of Mr Clair's house) from the "part" not so included (the part inside the Gates, leading to other people's houses).

61. Counsel for Mr Clair also argued that his construction was supported by the obligation in clause 13.3.1.5 on the owners of Mr Clair's Property to pay to the owners of the Retained Land "a fair proportion… of repairing, maintaining, replacing, renewing and cleaning the Shared Driveway…"; an obligation imposed in the very clause which granted and defined the Right of Way. He argued that "a fair proportion" seemed to relate to the whole of the Shared Driveway.

62. However, if anything I would say the opposite is the case. If the Right of Way was over the whole of the Shared Driveway, one would expect the "fair proportion" to be fixed and defined. It might be one seventh of the total (reflecting six households in the converted barns, and Mr Clair as a seventh in the Cottage), or some other proportion, but if everyone including Mr Clair was to benefit from the whole of the Shared Driveway, there would be no reason to leave state his contribution as vaguely as "a fair proportion", whatever definition of a fixed proportion might be agreed. On the other hand, if Mr Clair (as the Judge found) had a Right of Way over only part of the Shared Driveway, what could be said to be "a fair proportion" would depend on the particular nature of the costs to be defrayed. Works which affected only the Shared Driveway inside the Gates would, if they did not benefit the part of the Shared Driveway covered by the Right of Way, not fairly justify any contribution at all, so "a fair proportion" would, in that case, be nothing. Works which affected the whole of the Shared Driveway would justify "a fair proportion" reflecting the proportion of the work which

did benefit the Right of Way, as compared with the proportion which did not. Works which affected only the Shared Driveway between the Gates and the highway would exclusively relate to the Right of Way, and "a fair proportion" would then be greater still.

63. I am, therefore, not persuaded by Ground 1.

Ground 2

64. Ground 2 is, on one view, not wholly distinct from Ground 1 but, rather, an argument in support of the same proposition, leading (the Appellant would say) to the construction advanced under Ground 1, that the Right of Way should have extended over the whole of the Blue Area on the Retained Land, on both sides of the Gates. This is how it was put to the Judge in the Claimant's closing oral submissions (as "the alternative way of reaching the same conclusion").

65. Ground 2 is that the Judge "failed to consider at all the argument based on constructive interpretation" advanced in paragraph 57(c) of the Claimant's skeleton argument for trial. That paragraph argued that "though a process of constructive interpretation", clause 13.3.1.5 should be read "as if the words 'part of' did not appear".

66. Once again, this faces the difficulty that it requires, quite unnecessarily in my judgment, a construction of the Right of Way which does violence to the words of the clause defining it. It also engages the same considerations as to the relationship between the background facts and the true construction of the words granting and defining the Right of Way that I have discussed under Ground 1.

67. Mr Clair's Counsel developed the point before me somewhat more fully than he had before the trial judge, either in para 57(c) of his opening skeleton argument for trial, or in his oral submissions in closing at trial. On appeal, he relied principally on the discussion in *Chartbrook v Persimmon Homes Ltd* [2009] AC 1101 per Lord Hoffmann at paras 21-25. He had not specifically referred to that passage in his closing submissions at trial and so I do not think that any complaint that the Judge did not specifically refer to this passage in his judgment would be a fair one. Opening submissions, whether in a pre-trial skeleton, or made orally, are necessarily provisional. The trial which follows, including the evidence of witnesses, must be understood as a process of development and refinement, and it is from the closing submissions that the judge takes the parties' closing positions, upon which he or she must give judgment. If a party insists on consideration of a point which has not been mentioned since the opening, that must be made clear at the end (which is easily done).

68. Moving to the substance of the point, however, it proceeds on the assumption that the "process of constructive interpretation" contended for in Ground 2 is to be understood as additional to the process of construction conducted by the Judge, which I have already discussed under Ground 1, in order to make good the argument in Ground 2 that "the trial judge failed to consider [it] at all".

69. That does not seem to me to be correct. On the contrary, Lord Hoffmann stresses in para 23 of *Chartbrook* that "correction of mistakes by construction' is "not a separate branch of the law" or "a summary version of an action for rectification". Rather, he agreed with Carnwath LJ, in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus

LR 1336 at para 50, that correction of mistakes and construing the passage 'as it stands' are "simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."

70. Therefore, Lord Hoffmann's formulation is that: "As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration" (para 24). In his Judgment, the Judge in the present case did exactly that and, moreover, for the reasons I have given, I am satisfied that he reached the right conclusion having done so. I do not think that this was a separate exercise overlooked by the Judge, or which the Judge failed to perform adequately or at all.

71. Nor do I consider that the emphasis on this approach in Ground 2 strengthens the Appellant's argument. Lord Hoffmann concludes the passage relied upon in *Chartbrook* by saying (at para 25) that it is a requirement, even of this approach, both that "it should be clear that something has gone wrong with the language" and that "it should be clear what a reasonable person would have understood the parties to have meant". In the present case, the Judge below was entitled and, in my opinion, correct to decide both that nothing had gone wrong with the language (which could be understood to mean what it said, giving weight to every word in it), and that a reasonable person knowing the background facts and circumstances would have understood the parties to mean that the Right of Way extended over "part" of the Blue Area, ending at the Gates, and not, as argued on behalf of Mr Clair, over all of it, notwithstanding the reference in the clause to "part".

72. I therefore reject Ground 2.

Conclusion

73. Grounds 3 and 4 revive the points on the Counterclaim that did not arise unless Mr Clair succeeded on the point of construction, and which the Judge was not, therefore, required to decide, and which he did not decide. Since I, too, have rejected Mr Clair's case on the true construction and extent of his Right of Way, Grounds 3 and 4 do not fall to be considered further on this appeal either.

74. The appeal must therefore be dismissed.

ANNEX TO JUDGMENT: The Plan