



Neutral Citation Number: [2019] EWHC 2866 (Ch)

Case No: CH-2018-000330

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
CHANCERY APPEALS

ON APPEAL FROM HIS HONOUR JUDGE PARFITT
SITTING AT THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 08/11/2019

Before :

THE HON MR JUSTICE KERR

Between :

(1) SEBASTIAN RUPERT VANCE
(2) ALEXANDRA ATALANTA CHARLOTTE
VANCE

**Appellants/
Claimants**

- and -

(1) CAROL-ANN COLLERTON
(2) CHRISTOPHER COLLERTON

**Respondents/
Defendants**

Jonathan Gaunt QC (instructed by Kidd Rapinet LLP) for the Appellants/Claimants
Kerry Bretherton QC (instructed by Gardner Leader LLP) for the Respondents/Defendants

Hearing dates: 15th-16th October 2019

Approved Judgment

The Hon Mr Justice Kerr :

Introduction

1. This is an appeal and cross-appeal by permission of Snowden J against decisions of His Honour Judge Parfitt sitting in the County Court at Central London. He decided in a reserved judgment handed down on 19 October 2018 to dismiss a claim and partially allow a counterclaim in a dispute mainly about a right of way which had arisen between neighbours at Taplow, near Maidenhead.
2. He made declarations on the following matters: where the boundary lies between the two neighbouring properties; on ownership of and obligation to maintain a fence dividing the properties; on restoration of the fence and a gate, which had been removed; and requiring rectification of the register of titles at the Land Registry. The judge also made certain monetary orders relating to restoration of the fence and gate and in respect of costs.
3. I shall refer to the parties by their names. The appellants, the claimants below, are the Vances. The respondents and cross-appellants, the defendants below, are the Collertons. The Vances are the owners of Queen Anne's Cottage (the Cottage). Mrs Collerton owns Queen Anne's House (the House).

The Properties

4. The House has six bedrooms. It lies to the south west of the Cottage which, therefore, lies to the north east of the House. As approximations, I will refer to these compass directions as north and south rather than, more accurately, north east and south west. The Cottage was converted from stables in the 1950s. It is smaller than the House and was formerly part of the same title.
5. Access to both House and Cottage is via a tarmac driveway running up the side of the House, approximately perpendicular to the adjoining public road. The driveway belongs to the House and is wide enough for two cars to pass only at the road end, where it widens into a "bell mouth" shape. The rest of the driveway is not much more than the width of a large car or van.
6. At the northern end of the driveway lies what has been called a garage, behind which is a small outhouse belonging to the Cottage. The garage is not currently suitable for parking as it has low beams. At present it is used for storage of equipment. It is within the curtilage of the House. At the back of it is a party wall (called the X-Y party wall on relevant plans) between the garage and the Cottage outhouse. Behind the outhouse there is a small strip of garden belonging to the Cottage.
7. Between the House and the Cottage a narrow alleyway runs from east to west. On the House side it is overlooked by windows set into the north facing wall of the House. On the Cottage side it is bordered by what has been called a "close boarded" wooden fence running up to the south east corner of the Cottage, behind which lies the southern border of the Cottage garden.
8. From a point slightly west of the Cottage, about half way along its western face (at point A on relevant plans), a hedge (called the A-C hedge) runs a short distance to the

west and then (at point B) turns in a right angle to the north, running to a point (point C) at the northern end of a narrow strip of land west of the Cottage.

9. Running diagonally between the south west corner of the garage and the north east corner of the House there was at one time a single structure comprising a white painted shoulder-high wooden picket fence with a gate at each end. Both gates opened outwards onto the driveway. The gate at the House end, removed some years ago, used to close across the narrow alleyway. The gate at the garage end is still in place and provides pedestrian access to the Cottage through its front garden.
10. I shall refer to the fence as the “white fence” including where appropriate the pedestrian gate giving access to the Cottage. For descriptive purposes (though not appearing on any conveyancing plan), the point where the gate on the House side joins the white fence has been called point “F”, while the point where the gate post of the access gate to the Cottage meets the south west corner of the garage has been called point “G”.
11. Behind the white fence, there was until spring 2016 a hedge, called the F-G hedge because it was thus marked on a plan prepared for these proceedings, though again not on conveyancing plans. The F-G hedge, until spring 2016, followed the line of the white fence before curving round, at the House end, and running behind the close boarded fence on the Cottage side.

The Dispute

12. A dispute arose after the Vances removed the white fence and began to park their car in the garden of the Cottage, using the driveway to reach it. The Collertons then started to park at the front end of the driveway, nearest the road. That is the only part of the driveway wide enough for two vehicles to pass each other. They could not park on any other part of the driveway without obstructing the Vances’ vehicular access to the Cottage garden.
13. The Vances object to the Collertons parking anywhere on the driveway. They say it is difficult and dangerous to bring a car onto the driveway past the Collertons’ car. They say the Collertons should park in the garage. The Collertons object that the garage is not fit for parking use and they are entitled to park on their own driveway, to whose upkeep the Vances do not contribute.

Background Facts

14. In the 1950s, the Cottage and House were part of the same land title and were owned by a Mr and Mrs Pope. They proceeded to convert what were then stables into what is now the Cottage, while living in the House. An aerial photograph taken in 1981 shows the two properties when they were part of the same title. The white fence with a gate at either end is in place and (though shielded by a tree canopy) it is agreed the F-G hedge was then behind it.
15. In 1990, the Popes decided to sell the House and live in the Cottage, splitting the title. They agreed with a Mr and Mrs Powell to sell the House to them. During negotiations before the sale certain enquiries were answered by the Popes’ solicitors

on the subject of boundary walls, fences, hedges and ditches. Certain responses given in November 1990 were mentioned in argument.

16. The House was transferred to the Powells, the Popes retaining the Cottage, by a transfer dated 14 February 1991 (the 1991 transfer). For the benefit of “the Retained Property”, i.e. the Cottage, the Powells entered into certain covenants. Only those relevant here need to be mentioned, along with other relevant provisions in the 1991 transfer.
17. The Powells, as purchasers, covenanted, by clause 3(b), not to make any windows doors or openings along the “boundary wall” without the written consent of the Popes. The “boundary wall” was not a boundary at all but the wall of the House overlooking the alleyway running between the properties. By clause 4 of the 1991 transfer, it was agreed that the “X-Y” wall behind the garage was a party wall maintainable and repairable at joint expense.
18. Clause 6 reserved to the Popes, for the benefit of the Cottage, certain matters. Clause 6(b), at the heart of this case, reserved to them:

“a right at all times by day or night with or without vehicles of any description and for all purposes in connection with the use and enjoyment of the Retained Land to pass and re-pass over along the driveway and pathway coloured yellow on the plan including a right to park vehicles on the driveway coloured yellow for the purposes of loading and unloading only and for no other purpose whatsoever”.
19. The land marked yellow on the accompanying plan included the garage. That, everyone agrees, was an error. There was no right of way over the garage land. Aside from that, the yellow colouring on the plan extended to the whole of the driveway and the whole of the alleyway running between the two properties.
20. Clause 6(c) reserved to the Popes a right of access over and onto the House land for the purposes of maintenance and decoration of the Cottage land. Clause 6(d) reserved to the Popes a right to “cut and maintain the conifer hedge along the boundary marked ‘A’ ‘B’ ‘C’ on the plan”. That was the A-C hedge, shown on the plan attached to the 1991 transfer.
21. Probably in 1991, at around the time of the 1991 transfer, the Popes and one of the Powells signed an undated plan which has been described as a “boundary agreement” (the boundary document). It shows a brown coloured line said to mark the boundary between the two properties. It is not very accurate but the brown colouring approximately follows the F-G line on plans prepared for these proceedings.
22. The possible significance of the boundary document is that it includes three small “T” shaped marks (the T marks) on the House side of the brown coloured line. The T marks were later considered by the judge below and were the subject of argument before me as they were later said to indicate, at least, that the owners of the House and not the owners of the Cottage bore responsibility for maintaining boundary features.
23. The Powells only stayed about four years before deciding to sell the House. They sold it to Mrs Collerton. During pre-contract negotiations, in a letter of 14 June 1995 Mrs Powell’s solicitors provided Mrs Collerton’s solicitors with the boundary

document, stating that it showed “clearly which boundaries the Vendor has sole responsibility for”.

24. The House was conveyed to Mrs Collerton on 1 September 1995. She moved in and lived there with her husband, Mr Collerton, though they also spent time in France. The Popes remained in the Cottage until Mrs Pope was widowed and sold the Cottage in 2005. The Collertons were on good terms with the Popes and no disputes arose. They had certain dealings with Mrs Pope over maintenance and repair issues.
25. In 2015, the Vances bought the Cottage. Relations with the Collertons soon became poor. In the spring of 2016 while the Collertons were in France, the Vances removed the white fence (though not the Collertons’ gate at the House end of it) and the F-G hedge behind it, to create a parking space in the Cottage garden.

The Proceedings Below

26. The Vances then brought these proceedings in April 2017. They claimed the Collertons were obstructing their right of way by parking on the driveway. They relied on the reservation at clause 6(b) of the 1991 transfer. They sought declaratory relief to that effect and an injunction to restrain further interference with the right of way, or alternatively damages.
27. The Collertons served their defence and counterclaim in May 2017. They asserted that the right of way did not extend to a right to demolish the white fence and remove the F-G hedge to create a parking space in the Cottage garden. The right of way to the Cottage was limited by the presence of the white fence and the F-G hedge to small vehicles such as a motor-cycle or other vehicle that could fit through the Cottage gate.
28. They asserted that they owned the F-G hedge and the white fence and that the boundary was the F-G hedge. They relied on the boundary document and on answers to pre-contract enquiries. They denied parking so as to obstruct the Vances’ car from entering the driveway; they parked in the “bell mouth” to leave room for the Vances’ car to enter, as a convenient arrangement pending trial.
29. The Collertons counterclaimed that removal of the white fence and the F-G hedge was a trespass. They sought a declaration that they were entitled to park on their own driveway and that they were entitled to erect a new fence and plant a new hedge to replace the ones removed by the Vances. They sought damages for trespass.
30. The Vances served a reply and defence to counterclaim, joining issue with the Collertons’ case. A joint expert report was obtained. The matter came on for trial in October 2018 before His Honour Judge Parfitt. The judge heard evidence from the parties and from another witness, a Mr Bambrough who had bought the Cottage from the Popes in 2005 and then let it out to tenants. The judge considered the joint expert report but did not find it of assistance.
31. He gave a reserved judgment, handed down on 19 October 2018. In it, he decided five issues, which he took from the parties’ written arguments and closing submissions and adapted slightly. He explained his reasoning in the written judgment, in quite a lot of detail. His decision on each of those issues was as follows.

32. First, he decided the location of the F-G boundary. He recorded at paragraph 22(a) that the Vances were saying it was “on the House side of the fence”, while the Collertons contended that it was “the centre line of the hedge within that fence”, i.e. the centre line of the F-G hedge.
33. He decided that although he did not find the expert’s report helpful, his conclusions “do not appear to be substantially different albeit for different reasons” and that he also placed the boundary line “along the line of the fence between F and G” (paragraph 32). Later (paragraph 38) he said “the boundary line runs from the corner of the ... garage in a straight line to the corner of the post which marks the start of the close boarded fence ...”.
34. Next, the judge considered the issue “[w]ho owns the fence and/or hedge on the F-G boundary?” (paragraph 22(b)). He considered this issue under the heading “[t]he ownership of the boundary fence”. At paragraph 39, he recorded that the Vances contended that they owned the white fence while the Collertons contended that they, the Collertons, owned it.
35. In the same paragraph he noted that although neither party was saying the white fence was “jointly owned”, the judge said that “this ... does appear to me more consistent with the totality of the evidence”. He went on to explain his reasoning at some length. At paragraph 46, his finding was that “it was agreed the boundary features I have mentioned should all be jointly owned ...”.
36. The “boundary features” he had “mentioned” included not just the white fence but also the close boarded fence, the A-C hedge and the F-G hedge. The most influential factor weighing with the judge was (paragraph 47) that “an outcome where either party could unilaterally remove a boundary feature” was “so inherently improbable as requiring express wording to justify it”. He found:

“the maintainable boundary features are jointly owned but with the House having the maintenance obligation”; [this was] “wholly likely and consistent with the language of the 1991 Conveyance, the *locus in quo*, the [boundary document] and the relevant subsequent conduct of Mrs Pope”.
37. Next, the judge addressed himself to “[w]hat is the proper construction of the right of way granted in the 1991 [transfer]” (paragraph 22(c)). He considered this issue under the heading (above paragraph 48): “[w]ere the Claimants entitled to remove the hedge/fence?”. After considering arguments and case law, he clearly held that they were not (paragraph 53).
38. The judge then went on to consider whether there had been “substantial interference with this right of way by the Defendants’ parking” (paragraph 22(d)). He considered the legal test for what amounted to actionable interference with a right of way (paragraph 58). He found (paragraph 59) that Mrs Vance’s preferred method of reversing into the driveway was not “unreasonable”.
39. In the same paragraph, he upheld the Vances’ contention that it is “not practicable for her [Mrs Vance] to carry out that manoeuvre while the Defendants’ car is parked in the bell mouth of the driveway”. However (paragraph 60) since the Vances’ use of

the driveway to park outside the Cottage was not (as he had held) legitimate, it could not sound in damages.

40. Nor was he persuaded that injunctive relief was appropriate because, in view of his decision that the Vances' right of way did not permit them to park in the Cottage garden, the Collertons would be able to park at the other end of the driveway, by the garage, which would not obstruct the right of way since Mrs Vance would not be impeded in reversing her car into the driveway.
41. Finally, the judge considered what relief to grant (paragraph 62). He declared (so far as material to this appeal) that "the A-C hedge forms a boundary and is jointly owned..." (paragraph 62(b)); "the boundary along the point F-G is along the line of the fence and the Cottage gate ... [t]he fence was jointly owned and its maintenance is the responsibility of the owners of the House" (paragraph 62(d)). The Collertons "are entitled to reinstate the F-G fence", at the Vances' expense (paragraph 62(e)).
42. In relation to the right of way and obstruction thereof, he said (paragraph 62(f)):

"The [Collertons] can park on the driveway but not so as to unreasonably obstruct the [Vances] from exercising their right of way but such right of way is limited, so far as parking vehicles wider than the pedestrian gate are concerned, to loading and unloading."

The Appeal Proceedings

43. The Vances appealed against the finding as to where the F-G boundary lay and against the finding that the Collertons were entitled to reinstate the white fence, including the Cottage gate, at the Vances' expense. They did not appeal against the finding that the white fence was jointly owned.
44. They seek a declaration on appeal that they were entitled to remove the white fence and park in the Cottage garden; and an injunction restraining the Collertons from parking on the driveway, either in front of the garage or in the bell mouth. That would mean, in practice, that the Collertons could not park anywhere on the driveway; they must park in the garage or off the premises.
45. The grounds of appeal were two-fold: that the judge had misconstrued the right of way; and that he should have found that the Vances were entitled to remove so much of the white fence as was necessary to secure their vehicular access to the Cottage garden to park their car there.
46. The Collertons filed a respondent's notice and cross-appeal. They cross-appealed against the finding that the A-C hedge is jointly owned; against the boundary findings in relation to the close boarded fence adjacent to points D-E, continuing along to point F; against the finding that that fence is jointly owned; and against the finding in respect of the F-G boundary and the finding that the white fence is jointly owned.
47. The Collertons also seek on appeal to uphold part of the judge's order on different grounds. They explained in their notice of appeal that their only interest in the boundary issue relating to the boundary opposite points D and E, and from there to point F, is "the impact of this issue on the determination and extent of the right of way". They seek to ensure consistency between the appellate court's decision on the right of way and on the boundary issues.

48. The Collertons, by their cross-appeal and respondent's notice, seek declarations that they own the A-C hedge; that the close boarded fence running from the corner of the Cottage to point F is "situated on the boundary" and also owned by the Collertons; that the F-G boundary "ran ... from the inside of the gate post fixed to the garage ... to the inside of the gate post at point F ..."; that the boundary was marked by the F-G hedge; and that both the F-G hedge and the white fence are owned by the Collertons.
49. They also ask the appellate court to declare that they are entitled to park in the bell mouth or elsewhere on the driveway so long as the Vances have adequate room to park for short periods for the purpose of loading and unloading only and so long as they can obtain access to the Cottage through the pedestrian gate.
50. In their accompanying written grounds, they say that their primary position is that the judge was entirely correct, for the reasons he gave; alternatively, the judge erred in finding that the white fence was jointly owned or that it was a boundary feature; he should have accepted evidence relevant to those issues which he wrongly excluded.
51. He should, say the Collertons, have held that the white fence was owned by the Collertons and/or that the F-G boundary was marked by the F-G hedge, not the white fence; and that the F-G hedge was owned by the Collertons or, alternatively, was jointly owned.
52. They argue, further, that the judge was wrong to find that the white fence and the close boarded fence were jointly owned; he should have held that the House owned all boundary features and the fences were not boundaries; the hedges were. If he had so decided, that would, say the Collertons, have lent further support to his (correct) interpretation of the right of way.
53. They also argue in their written grounds that the judge should have held that there was no unlawful obstruction of the right of way by the Collertons parking in the bell mouth, because Mrs Vance's insistence that the bell mouth should be clear while she reversed into the driveway exceeded reasonable use of the right of way.
54. The Collertons could, they argue, park in the bell mouth or anywhere in the driveway provided sufficient room is left to park on the driveway for loading and unloading only and provided the pedestrian gate to the Cottage is not obstructed.
55. There was also an application by the Collertons to adduce video evidence not before the judge, showing various vehicle manoeuvres inside and outside the driveway by various drivers including Mrs Vance. That application was not opposed, and I watched those videos without objection from the Vances.
56. There was an informal application made in a note from counsel for the Vances a few days before the hearing of the appeal. In it, they pointed out that since the Collertons had by their cross-appeal "opened up the issue of the ownership of the fence and hedge at F-G" and since both parties agree that the judge was wrong to hold that the white fence was jointly owned, "[t]he question thus becomes who does own it".
57. If necessary, therefore, the Vances contend that they should have leave to add a third ground thus:

“Having held that the line of the boundary ran from the corner of the garage at G to the corner of the post at F, the Judge should have held that the fence was the property of the Claimants [the Vances]”.

58. That application was opposed by the Collertons: it had been made too late and without regard to any of the relevant procedural requirements. The Vances argued that it would be wrong for the appellate court, on purely procedural grounds, to be forced to uphold by default a wrong finding of joint ownership of the white fence, supported by neither party below.

Relevant Law

59. Construction of the parcels in a conveyance is approached in the manner explained by Mummery LJ in *Pennock v. Hodgson* [2010] EWCA Civ 873, at [9]-[13], founded on Lord Hoffmann’s speech in *Alan Wibberley Building Ltd v. Insley* [1999] 1 WLR 894. The court must look at (see at [12]):

“evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances.”

60. The surrounding circumstances include knowledge of the objective facts reasonably available to the parties at the date of the conveyance. Extrinsic evidence contradicting the clear terms of the conveyance is excluded. The parties’ subjective beliefs about the boundaries are not relevant or admissible. The question is not what the parties believed the instrument means but “what, against the relevant objective factual background, they would reasonably have understood it to mean” [13].
61. The review of relevant authorities carried out by Carnwath LJ (as he then still was) in *Ali v. Lane* [2006] EWCA Civ 1532, [2007] 1 EGLR 71, was held by him to support the proposition at [36] that:

“[i]n the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended”.

62. That proposition was followed by a discussion of what evidence might be treated as probative. It was not necessary to decide whether admissible evidence of “long usage” or conduct subsequent to a conveyance was to be confined to the conduct of the original parties to the conveyance. Whether or not permissible evidence is so confined, the conduct of the original parties is far more likely to be probative than that of any later occupier of the land.
63. The Court of Appeal in *Norman v. Sparling* [2014] EWCA Civ 1152, [2015] P&CR 6, applying *Ali*, was prepared to look at extrinsic evidence of the parties to the original deed in issue. Elias LJ, giving the leading judgment and after noting that *Ali* had been followed several times, said at [22] that:

“[t]he boundary itself cannot be precisely determined from the terms of the deed and therefore it is legitimate to see how the parties to the original deed conducted themselves with respect to the property”.

64. However, “the boundary indicated by subsequent conduct cannot be at odds with the description of the parcel of the land; it must be consistent with it” [24]. Normally (see Elias LJ at [30]-[31]) it is for the judge of first instance to determine the effect of any extrinsic evidence properly admitted; an appellate court should remit the issue if there were any real doubt about the outcome.
65. I was referred to numerous cases on determining the scope of a right of way. Ultimately, each turned on its facts and none was on all fours with this case. I will mention only some of the cases, in historical order starting with *Cannon v. Villars* (1878) 8 Ch 415. The issue was whether a lease of business premises that referred to “ingress and egress” but said nothing about use of vehicles included an implied right to take trucks, carts, vans and horses through a gateway to the premises. The only means of access was through a door too narrow to admit them.
66. Sir George Jessel MR made general observations about rights of way, at 420-421. They have been followed since. I will not set them out in full. I only need mention that he started by saying that “the grant of a right of way *per se* and nothing else may be a right of footway, or it may be a general right of way”, including with vehicles. Which it is “is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding ... the execution of the instrument”.
67. He went on to give examples of what those circumstances might be: the presence of tracks or roads, paved, unpaved, metalled, suitable or not for vehicles, suitable or not for animals, wide, narrow, leading to a dwelling house or to business premises of various types. The principle is that “it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used”.
68. In *White v. Grand Hotel Eastbourne* [1913] 1 Ch 113 (Joyce J and CA), a right of way to what was at the time of the grant a dwelling house was held not to have been excessively used where its use had later been extended to trade use and increased substantially and when the dwelling house became a hotel. Lord Cozens-Hardy MR, at 116, upheld the view of Joyce J that “the right of way is not to be restricted to access to the land merely for such uses as were reasonably required at the date of the grant”.
69. However, the Master of the Rolls held on the facts that the defendant had “no right to any access except through a gate which formerly stood there, and that the plaintiffs were entitled to an injunction to restrain them from exercising a right of way through a new and wider gate recently erected”. The order of the judge below was varied accordingly.
70. *White v. Grand Hotel Eastbourne* was considered and distinguished by Farwell J in *Todrick v. Western National Omnibus Co. Ltd* [1934] 1 Ch 190. The facts were complex. A vendor sold land with a reservation for the benefit of certain land of “a perpetual right of way in common with the Purchaser her heirs and assigns at all times and for all purposes with or without vehicles and animals from and to the public highway” and across it onto another road, together with a right to construct an extension of that road, as defined by reference to points marked on a plan.

71. Farwell J accepted a submission that the grant was not an easement but a personal license reserved to the original vendor which was lost when the vendor parted with the property in question. The plaintiff therefore got the land free from any right of the defendant to enter on it for any purpose. The Court of Appeal (Lord Hanworth MR, Romer and Maugham LJJ.) reversed that part of the decision: [1934] Ch 561.
72. However, the Court of Appeal upheld Farwell J's second (*obiter*) ground for his decision: that if there were an easement created, it did not extend to a right to drive motor omnibuses up and down the road in question. That would not have been in the contemplation of the parties at the time of the original grant: it was "ridiculous to suppose that merely because the grant was expressed to be for all purposes it entitled the owner of the dominant tenement to attempt to use it for something for which obviously it could not be used" (206).
73. Farwell J reached this conclusion by reference to the width and strength of the road which was the subject of the right of way. The road was "somewhat like a short country lane ... bounded by a wall" (207). The road was too narrow and the wall too weak to stand use of the road by omnibuses. Their use was outside the contemplation of the parties at the time of the grant.
74. In *Robinson v. Bailey* [1948] 2 All ER 791, *White v. Grand Hotel Eastbourne* was applied and *Todrick's* case distinguished. The Court of Appeal upheld Harman J's decision that a right of way to what was intended to become a newly built house extended to a right to transport building materials for storage on the property, when the defendant builder was unable to build the house and decided to use the premises for storage instead.
75. Lord Greene MR rejected the submission that there was an excessive use of the right of way and an implied restriction on the contemplated use, confined to the use for the purposes of building a residential dwelling on the plot of land. He regarded Farwell J's decision in *Todrick's* case as founded on the physical condition of the road, which was unsuitable for omnibuses; and not founded on use of omnibuses being an excessive use of the right of way.
76. In *Bulstrode v. Lambert* [1953] 1 WLR 1064 a right of way in a conveyance between the parties' predecessors in title reserved to the vendor and his agents "the right to pass and repass with or without vehicles over and along the road coloured brown on the ... plan for the purpose of obtaining access to the building at the rear of the said premises and known as the auction mart".
77. Upjohn J (as he then was) considered and applied a passage from Sir George Jessel MR's words in *Cannon v. Villars*, finding them "helpful", though, "as was forcibly pointed out by Mr Campbell [counsel for the defendant] ... the Master of the Rolls was dealing only with a right of way per se."
78. He held that the defendant café proprietor could not prevent the plaintiff bringing auction goods vehicles down a narrow passage used by the defendant for his business, not accessible to such vehicles at the time of the original conveyance because of wooden gates which had subsequently been removed. The right of way was unrestricted, the contemplated use was clearly for the auction business (carried on by

the plaintiff's father and predecessor in title and subsequently by the plaintiff). The narrow passage was part of the "land coloured brown" on the plan.

79. The Court of Appeal in *Keefe v. Amor* [1965] 1 QB 334 referred to *Bulstrode* in the course of deciding that the right of way at issue in that case extended to vehicles and not just to access on foot. Russell LJ held that access to the property in question was included in the contemplated use at the time of the original grant. He said (at 345E-F) that it would have been unusual for the defendant to be under an obligation, as he was, to pay a fair proportion of the cost of upkeep of the right of way if "all that was envisaged was the impact of human feet".
80. A different conclusion was reached in *St Edmundsbury and Ipswich Diocesan Board of Finance v. Clark (No. 2)* [1975] 1 WLR 468, where a reserved right of way to and from a church was held to be confined to non-vehicular use. The defendant was the owner of land conveyed to him by the bishop of the diocese. At the time of the grant, the land over which the church's reserved right of way was to be exercised was in poor condition and only usable by vehicles. The defendant had erected a gate to prevent the church authorities from using the strip of land with vehicles.
81. Megarry J dismissed the church authorities' claim that the reservation extended to vehicular use of the pathway to and from the church. He was influenced by the *contra proferentem* rule of construction. The Court of Appeal upheld his conclusion but on different grounds, basing their approach to construction of the right of way by reference to what Sir George Jessel MR had said in *Cannon v. Villars*: see the judgment of the court given by Sir John Pennycuick at 466H-467D.
82. The court attached significance to the point that a dilapidated gate at the churchyard end of the pathway had existed at the time of the original grant. The appellant church authority sought to discount its significance, referring to "cases in which it was held that the owner of a dominant tenement, having once established his right of way, is entitled to remove an obstacle which obstructs it: see *Bulstrode v. Lambert ...* and *Keefe v. Amor ...*" (481G-H).
83. The court was unpersuaded by that reasoning. It accepted that "a broken-down wooden gate is of less significance than, for instance, a solid iron barrier". But, as Sir John Pennycuick then observed, "that does not mean that the existence of the obstruction at the time of the reservation is any the less an important factor in determining whether the right of way has been established at all".
84. I should refer, though briefly, to a few of the modern cases, which apply the principles from the earlier cases and do not alter them. Waite LJ in *Charles v. Beach* (transcript, 1 July 1993), [1993] EG 124 (CS) returned to the subject of obstacles or obstructions existing at the time of the original grant. Waite LJ (sitting with Sir John Megaw) treated the effect of a pre-existing obstruction (a flower bed) as a question of degree. The flower bed was found to be a transient obstacle, intended to be overridden by exercise of the right of way.
85. Waite LJ's judgment is notable for the comment at page 21G-22B in the transcript: "[t]he more transient or insubstantial the obstacle the more ready the court will be to infer that it was the intention of the grantor to over-ride the obstruction, and (conversely) the more solid and permanent the obstruction, the greater will be the

reluctance of the court to impute to the grantor any intention to give the dominant owner the right to insist upon its removal”.

86. In *Mills v. Blackwell* [1999] EWCA Civ 1852, on the other hand, the obstruction at issue was a dry stone wall which was also a party wall. It was not transient and, the Court of Appeal held, could not be destroyed to facilitate exercise of the right of way in question. Morritt LJ (sitting with Wilson J, as he then was) after referring to some of the cases observed (transcript, p.8):

“The surrounding circumstances to which the court is entitled to have regard include, but are not limited to, the physical limitation on the exercise of the right of way. The decided cases indicate that those physical circumstances may or may not be sufficient to enable the court to find that the wide words of the grant are in fact restricted by the surrounding circumstances.”

87. And in *Perlman v. Rayden* [2004] EWHC 2192 (Ch), in a complex and multifaceted dispute between neighbours, the issue arose, as it had in *Mills v. Blackwell*, “whether, on the true construction of the grant in question, the dominant owner was entitled to open up a new point of access” (per Patten J, as he then was, at [39]).

88. The judge reviewed a number of the authorities already mentioned. He concluded (see his judgment at [46]-[47]) that there is no overriding principle or rule of construction enabling the court to determine whether or not, in a given case, “the physical circumstances extant at the date of the grant should be the determining factor” when deciding whether the grantee was, or was not, entitled to open up a new point of access to the right of way.

89. I therefore end where I started, with the observation that the cases cited to me and to the judge below in this case ultimately turn on their facts and on the construction of the rights of way as formulated in them in each case.

90. I can turn next to uncontroversial authority on the question what amounts to unlawful interference with a right of way. It is common ground, as it was before the judge, that the answer is to be found in two passages in the judgment of Blackburne J in *B&Q plc v. Liverpool & Lancashire Properties Ltd* [2001] 1 EGLR 92. The first is at 96G-H:

“(1) the test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence upon being able to continue the use of the whole of what he contracted for is reasonable; (2) it is not open to the grantor to deprive the grantee of his preferred *modus operandi*, and then argue that someone else would prefer to do things differently, unless the grantee’s preference is unreasonable or perverse...”

91. The second passage is at 96L-M:

“... if the grantee has contracted for the ‘relative luxury’ of an ample right, he is not to be deprived of that right, in the absence of an explicit reservation of a right to build upon it [the right of way land], merely because it is a relative luxury, and the reduced, non-ample right would be all that was reasonably required.

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

The Issues, Reasoning and Conclusions

Location of Boundary and Ownership of Boundary Features

92. Mr Jonathan Gaunt QC made submissions for the Vances. I paraphrase his main points as follows:
- (1) The judge's finding that the F-G boundary ran along the line of the white fence, was right and was properly reached, for the reasons he gave at paragraphs 31-37 of his judgment.
 - (2) The finding was, in line with the expert's finding, that the F-G boundary lay on the face of the white fence, on the House side. It was not a finding that the boundary followed the centre line of the white fence.
 - (3) That conclusion was correct applying the *Pennock v. Hodgson* approach and there was no need, nor was it legitimate, to have regard to evidence of subsequent conduct in order to interpret the 1991 transfer.
 - (4) The finding of joint ownership of the white fence is eccentric and verging on non-sensical. Joint ownership of a fence is unheard of unless it be a statutory "party fence wall" as defined in the Party Walls Act 1996.
 - (5) The conclusion that the fence was jointly owned was inconsistent with the finding that the boundary lay on the face of the white fence on the House side.
 - (6) That finding meant that the fence stood entirely on the Cottage's soil and therefore must be owned by the Cottage's owners as a fixture on the soil.
 - (7) Since the cross-appeal had opened up the issue of ownership of the white fence and the finding of joint ownership could not be sustained, the court should entertain the Vance's proposed amended ground of appeal and hold that the Vances owned the white fence.
93. For the Collertons, Ms Kerry Bretherton QC made detailed submissions; her main points can be paraphrased in the following way:
- (1) The judge should have held that the white fence and the F-G hedge were owned by the Collertons. The judge did not agree with the expert. He rejected the expert's report completely.
 - (2) Under the 1991 transfer, the owners of the Cottage had a right, but not an obligation, to cut the A-C hedge. That would have been unnecessary if they had jointly owned it.
 - (3) The only jointly owned feature was expressly provided for in the 1991 transfer and that was the X-Y party wall. The 1991 transfer would not have been silent on other jointly owned features if there had been any.
 - (4) The gate across the alleyway at the House end of the white fence was, as everyone agreed, the Collertons' property. Since it formed a single structure with the white

fence (including the Cottage gate at the other end), the white fence too must have been owned by the Collertons.

- (5) The judge should have held that the boundary (apart from the X-Y party wall) was the hedge, not the fences (the white fence and close boarded fence) and that save for the party wall were all owned by the Collertons.
 - (6) The boundary document was admissible extrinsic evidence of ownership of the boundary features and that the boundary was the hedges. The answers to conveyancing enquiries in November 1990 confirmed that also.
 - (7) The Collertons had maintained the hedge, including on the Cottage side at times. They would not have done this if it was entirely on the Cottage's land and on the Cottage side of the boundary.
 - (8) The judge was wrong to exclude the extrinsic evidence showing the proper boundary to be the hedge and not the two fences. The wrong use of the word "boundary" in clause 3(b) of the 1991 transfer produced an ambiguity, justifying recourse to extrinsic evidence. So did the judge's finding that the lines on the plan were not clearly drawn.
 - (9) Alternatively, if those submissions were incorrect, the judge's finding of joint ownership should be upheld and the Vances should not be permitted to challenge it long out of time and without having complied with any of the applicable procedural requirements.
94. I come to my reasoning and conclusions on the issue of boundary location and ownership of boundary features. The judge preferred to determine, separately, where the boundary lies and who owns the boundary features. He acknowledged the overlap between the two issues. He determined location first and ownership second. I think it would have been better to deal with both issues together. They are closely linked in at least the following three ways.
95. First, there is the principle that the owner of the soil owns a fixture on that soil. That means, at any rate absent clear words to the contrary, that a fence one side of which forms the boundary between two properties should be owned by the party on the other side, the side not forming the boundary.
96. Second, as the judge rightly observed, a person carrying out the *Pennock* exercise (looking at evidence of the physical condition of the land at the date of the conveyance with the plan in hand on the spot and construing the conveyance against the background of its surrounding circumstances) would be likely to regard a fence rather than a hedge behind it as a more likely boundary. Otherwise, there is a strip of sterile land between hedge and fence.
97. Third, it would be unusual, to say the least, for a boundary fence to be jointly owned, as the judge found was the case here. Fences are less naturally susceptible to joint ownership than hedges. Fences are normally thin and not suitable for joint upkeep and hence joint ownership. Hedges are usually wide enough to have a centre line forming a convenient boundary and lend themselves to joint upkeep with each owner pruning his or her side.

98. For those three reasons, I think with great respect it would have been better if the judge had treated the location and ownership issues as more closely interlinked than he did. To the extent that permitted grounds of appeal allow, I propose to take the two issues together, although he did not.
99. I also consider that the judge would have been justified in admitting limited evidence of the subsequent conduct of the Popes and the Powells on the issue of where the boundary lay, as well as on the issue of ownership of boundary features. The same evidence was, logically, capable of being probative on both issues, given the overlap between the two issues.
100. Carnwath LJ's proposition in *Ali v. Lane* is that where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended.
101. The 1991 transfer was ambiguous, on several counts. It was imprecisely drawn. The red lines on the attached plan were, it was agreed below, of little help. It included, wrongly, the garage as part of the right of way. It described as a "boundary wall" a wall of the House that was not a boundary at all (clause 3(b)). It mentioned joint ownership only of one party wall. It reserved a right for the Cottage owner to prune the A-C hedge (clause 6(d)) but did not otherwise deal with ownership or responsibility for hedges or fences.
102. The features that really mattered (on which I concentrate) were those that could affect the right of way. If the Vances had owned the white fence and the F-G hedge, they could have removed them without invoking the right of way. And, the right of way would be likely to bear the meaning contended for by the Vances if the white fence and F-G hedge were theirs to remove anyway.
103. The Vances claimed below to own both. The Collertons claimed to own, at least, the white fence. The judge set out the pleaded cases. At paragraph 24 and following, he declined to entertain evidence of subsequent conduct in relation to the boundary issue. He distinguished the location of the boundary from that of "responsibility" for maintenance. On the issue of ownership of boundary features, he did entertain evidence of subsequent conduct.
104. At paragraph 32 of the judgment, the judge found that the boundary line was "along the line of" the white fence, between point F and point G. Explaining his reasoning, he said (among other things) that "the fences are the far more likely boundary marker" than the hedges because, if hedges (and presumably their centre line) were boundaries, they were all on the Cottage side of the fences and there would be "a pointless area of transferred land" between hedges and fences.
105. I think that in finding that the boundary was "along the line of" the white fence, the judge may be taken to have meant a line down the centre of the white fence, thin though it is. Mr Gaunt, for the Vances, suggested the judge must have meant that the boundary line was the edge of the white fence on the House side, so that the white fence was located entirely within the Cottage side and was a fixture on its soil.

106. Mr Gaunt based his interpretation on the judge having said his conclusion did not appear to be substantially different from that of the expert; the latter's conclusion was that the boundary was the House side of the white fence, not its centre line. If that were correct, the natural owners of the white fence would be the Vances, as owners of the soil on which the fixture stands. Hence Mr Gaunt's proposed amended ground of appeal asserting the Vances' sole ownership of the white fence.
107. It is a pity the judge's finding is not more clearly expressed, but I do not think Mr Gaunt's interpretation is correct. The expert's report is not clear on the point. The judge did not tie his conclusion securely to the finding of the expert. And his later finding of joint ownership of the white fence would stand uneasily with a finding that it is a fixture located entirely on the soil of the Cottage, yet not wholly owned by the Cottage's owners.
108. The judge's findings should be interpreted if possible in a manner that is internally consistent. Certainly, he strove to make findings in harmony with one another. To avoid violating the principle that the soil owner owns fixtures on his soil, the finding of joint ownership of the white fence should be taken to mean that the half-a-fence-width on the Cottage side is owned by the Cottage and the other half-a-fence-width on the House side is owned by the House.
109. Now, the Vances are content with the judge's finding that the line of the boundary ran from the corner of the garage at G to the corner of the post at F. The Collertons say that is wrong: the judge should have found that the white fence was owned by them and/or that the F-G boundary was marked by the F-G hedge, which was also owned by the Collertons, or jointly.
110. In support of his finding of joint ownership of the boundary features – fences and hedges – the judge relied on extrinsic evidence, including the T marks on the boundary document, bearing on responsibility to maintain those features, and the conduct of Mrs Pope and her dealings with the Powells.
111. He also relied on the improbability that when the title was split in 1991, either party would, objectively speaking, have countenanced a right in the other to remove any of those features.
112. In my judgment, he was justified in deploying this reasoning and in drawing the conclusion that it was unlikely either party to the 1991 transfer would have consented to what became boundary features being destroyed by the other. The *raison d'être* of the transaction in 1991 was that the Popes and the Powells would become neighbours living side by side with the Powells living on land formerly owned by the Popes within a single title.
113. I also agree with the judge that to an objective observer on the spot with the plan in hand, the white fence (and the close boarded fence) is a more natural boundary than the F-G hedge (and the A-C hedge behind the close boarded fence).
114. The judge reasoned that since neither party could destroy the white fence, it was jointly owned; that was a more sound conclusion than that the white fence was solely owned, but by one of the parties who was under an obligation to preserve and not

destroy it. The latter conclusion would require clear words which are missing from the 1991 transfer.

115. As I have already noted, a jointly owned boundary fence that is not a statutory “party fence wall” is unusual. Normally, one would expect that either one or other owns a boundary fence, with the boundary following the opposite edge of the fence from that of its owner. But neither counsel submitted that joint ownership was legally impossible.
116. The judge’s finding as to where the boundary lay was one of construction, but it was also in part a question of fact, applying the right principles of construction to the facts. The factual content of the issue explains why expert evidence is admissible on that issue. It also explains why Elias LJ would have remitted to the county court judge in *Norman v. Sparling* the question where the boundary lay if there had been more than one possible answer.
117. There was arguable merit in both parties’ claims to own the white fence. On the Collertons’ side there was, among other things, the single structure point and the gate closing onto the alleyway. On the Vances’ side, there was the point that the white fence enclosed the Cottage and its outer rather than inner edge was the natural and more likely boundary, which would make the Cottage the owner of the soil on which it stood.
118. However, the Vances did not appeal against the finding that the white fence was jointly owned, being content to rest their case on the right of way. They did not attempt to raise on appeal their assertion of ownership of the white fence until long after the respondent’s notice and cross-appeal. They neither made an application nor sought relief from sanctions.
119. Between the two extremes, there was also much to be said for the judge’s unorthodox view that the white fence (and the close boarded fence) were jointly owned. It was strongly supported by the rationale for the transaction, the creation of a new relationship between the parties of adjoining neighbours, with neither able to alter the physical features of the former single title.
120. I am, in the end, not persuaded that his unorthodox finding was marred by any error of law or approach or misunderstanding of the evidence. I conclude that neither party to the appeal succeeds in displacing the judge’s reasoning and conclusion. Joint ownership of a boundary fence is unusual but not impossible and is an appropriate finding for the judge to have made in this case.
121. I would have concluded also that the Vances are, in any case, too late to raise the point. There is no good explanation for the lateness, no application for relief and I accept Ms Bretherton’s argument that the Collertons are taken by surprise and would have prepared for the appeal differently if the point had been taken in timely fashion as it should have been. However, that conclusion does not affect the outcome in the light of my support for the judge’s finding.

Scope of the Right of Way

122. For the Vances, Mr Gaunt's main submissions were as follows. He argued that the observations of Sir George Jessel MR in *Cannon v. Villars* were not relevant. That was a case of implied grant, not an express grant of the right to use vehicles over the right of way as in this case, where the words used are very wide and use of vehicles unrestricted.
123. There was a difference, Mr Gaunt submitted, between "mode of access" cases where the issue is by what means a right of way may be exercised, for example, whether or not with vehicles or vehicles of a particular kind; and "obstruction" cases, where the issue relates to the physical territory on and over which the right can be exercised and whether physical obstructions impeding its exercise may be removed by the grantee.
124. Mr Gaunt accepted that the Vances' right had to be "read down" to some degree, since any vehicle would have to fit into the driveway. He would therefore not contend for a right to use a combine harvester or other vehicle wider than the driveway. He did not suggest that the Vances could insist on the mouth of the driveway being widened.
125. However, he submitted that, subject only to that limitation, the words used must be given their full content and meaning. The right was to use vehicles "of any description" and "for all purposes". The only limitation on the purpose of the use was that it must be "in connection with the use and enjoyment of" the Cottage.
126. Mr Gaunt submitted that a vehicle "of any description" must include a car and that the purpose must necessarily include the parking of a car on the Cottage land. Otherwise the right would, in practice, be restricted to loading and unloading on the driveway which was a right separately conferred in the second half of the reservation. That would deprive the first part of the right of all its practical content.
127. He therefore contended that the proper analogy was with cases such as *Bulstrode v. Lambert* and *White v. Grand Hotel Eastbourne*, *Keefe v. Amor* and *Charles v. Beach*. The Vances were, he submitted, entitled to remove the white fence and the F-G hedge in order to give effect to their right of way; otherwise, its exercise would be unlawfully impeded.
128. Mr Gaunt disputed the proposition that it was unlikely the parties to the 1991 transfer had the intention, objectively ascertained, to permit the destruction of the white fence and F-G hedge given that the right of way was not subject to, or accompanied by, an obligation on the Popes' part to contribute to the maintenance or cost of upkeep of the driveway. Mr Gaunt said this was not relevant: the Popes as vendors would not wish to undertake such an obligation.
129. Ms Bretherton, for the Collertons, submitted that the starting point in the case law was the observations of Sir George Jessel MR in *Cannon v. Villars*. They were of general application and not confined to particular kinds of right of way. There was no distinction of principle to be drawn between mode of access cases and obstruction cases. The observations in *Cannon v. Villars* applied to both.
130. Ms Bretherton submitted that the judge was right to reject the proposition that the Vances were entitled to destroy the white fence and F-G hedge to create a parking space. He was right to draw on the factual analogy with cases such as *Todrick* and *St*

Edmundsbury and Ipswich Diocesan Board of Finance v. Clark (No. 2). The case was clearly one where the scope of the right was restricted by physical features present on the land at the time of the grant, she said.

131. She submitted that it would be bizarre if the right of way enabled the Vances to destroy the physical boundary between the two properties, to contribute nothing to the upkeep of the driveway, to require the Collertons to maintain it and pay for the whole of its upkeep, to load and unload on the driveway as well and (subject to the issue of reasonable user) to exclude the Collertons completely from parking on their own driveway.
132. She submitted that the judge had been right to treat the second part of the right of way - the right to load and unload on the driveway - as necessary and practical precisely because the right did not extend to parking in the Cottage garden. If it did extend that far, there would have been no need for the right to load and unload on the driveway.
133. Ms Bretherton argued that the first part of the covenant – the right to pass and repass for all purposes in connection with the use and enjoyment of the Cottage – was not deprived of content if the judge’s construction is upheld. There is a right to take vehicles to the Cottage provided they fit through the Cottage gate as, for example, a motor-cycle would.
134. She also noted that the right to pass and repass extends also to the “pathway”, i.e. the narrow alleyway between the two properties, down which a car plainly could not pass. That made sense, she submitted, because there is also a right of access over and onto the House land for the purposes of the maintenance and decoration of the Cottage land: clause 6(c) of the 1991 transfer.
135. Turning to my reasoning and conclusions: I start with the difference that arose between counsel over whether the cases support a distinction between the approach taken in “mode of access” cases, where the way in which the right may be exercised is in issue; and obstruction cases, where it is the physical scope of the right conferred that is in issue.
136. I think Ms Bretherton is right to say that the two classes of case are not conceptually distinct. The extent of the right conferred is always a question of construction, whether by reference to the means of its exercise or its territorial extent. Nor do I see any reason to apply a different approach in cases of implied grant and cases of express grant; in the former case there may be no or few words to construe, but the question remains one of construction.
137. I agree with the Vances that, in considering the scope of the right to pass and repass, effect must be given to the words “with ... vehicles of any description” and to the words “for all purposes in connection with the use and enjoyment of” the Cottage. I also agree with the Vances that the second part of clause 6(d) starting with the words “including a right to park”, to load and unload, are not words of limitation and that they confer an additional right.
138. Thus far, I agree with Mr Gaunt’s submissions. He also accepts, rightly, that the words “vehicles of any description” cannot be read literally; they do not permit a combine harvester to bulldoze its way into the driveway and from there into the

Cottage garden. The vehicle “of any description” must be one that fits through the mouth of the driveway.

139. Furthermore, the class of vehicles that may park on the driveway to load and unload is not, even on the Vances’ construction, the same class as those that may park in the Cottage garden. The mouth of the driveway is wider than the opening at F-G leading to the Vances’ hardstanding. The former is (at the scale of the A3 plan at “D19”) 3.6 centimetres wide, though it narrows further up the driveway. The latter is 1.7 centimetres wide, using the same scale.
140. So the driveway is, at its widest, a little over twice the width of the F-G opening. The right of way does not permit widening of the F-G opening. Mr Gaunt does not suggest it does. The Vances can, however, load or unload using a van too wide to park in their garden. Whichever construction is right, there is a class of vehicles in which the loading and unloading right can be exercised but the passing and repassing right cannot.
141. It is therefore not correct to submit that, on the Collertons’ interpretation, no useful content is given to the right to load and unload, over and above the right to pass and repass. The loading and unloading right is more expansive. But it is true that, on the Collertons’ construction, the content of the right to pass and repass is restricted to a narrow (in both senses) class of vehicles: motor-cycles, scooters, bicycles and the like.
142. In the light of that reasoning, I think the Vances are wrong to condemn out of hand the reasoning of the judge who, at paragraph 52(b), observed:

“... even before the context of the existing 1991 layout is taken into account, the express reference to a right to park *on the driveway* [italics in original] strongly suggests that it was not being contemplated that the right of way being granted was itself wide enough to allow cars to be parked on the Cottage. If that was intended then there would be no need to include a limited right to park on the driveway ... It would not be necessary to park on the driveway if cars or vans could drive on to the Cottage.”
143. Next, I consider the solidity or otherwise of the barrier which the Vances wish to remove. Is it transient, like the flower bed in *Charles v. Beach*? Is it durable and permanent like the party wall in *Mills v. Blackwell*? Was the judge right to equate it with the wooden gate in *Clark (No. 2)*; rickety, yet serviceable and influential on the court?
144. In my judgment, the judge correctly characterised the case as one where the pre-existing obstacle was, objectively speaking, intended to remain in place and the right of way, widely though it was drawn, is restricted in its application so that it does not permit removal of the obstacles to parking in the Cottage garden. The obstacles were longstanding features of the undivided title. They had been in place for at least 10 years when the 1991 transfer was executed.
145. As I have accepted in the earlier part of this judgment, they were not intended to be removed as a consequence of the transaction and the splitting of the title, aside from the right of way. I also consider that these obstacles fall on the solid and durable side of the line rather than the fleeting and transient side. There is not one obstacle but

two. The second (the F-G hedge) lies behind the first (the white fence), like a second line of defence.

146. I also think Ms Bretherton was correct to draw attention to the absence of any obligation on the Popes to maintain the driveway or contribute to the cost of its upkeep. This factor has been mentioned as significant in a number of the cases. It is unlikely that the Powells, objectively speaking, took on full responsibility to maintain a driveway mainly if not entirely for the benefit of the Popes.
147. I do not accept Mr Gaunt's submission that cost of upkeep is irrelevant here because the Popes as vendors would not naturally wish to undertake any such obligation. That is true of any case where the original grant is made as part of an economic transaction. Yet the issue of upkeep has been treated as relevant in cases where a right of way is granted for valuable consideration.
148. For those reasons, which are similar to the judge's, I support his conclusion that the right of way did not entitle the Vances to remove the white fence and the F-G hedge.

Interference with right of way

149. The judge (at paragraph 59) found that Mrs Vance's "risk averse approach" to reversing from the road onto the driveway was not unreasonable and that "it is not practicable for her to carry out that manoeuvre while the [Collertons'] car is parked in the bell mouth of the driveway".
150. He went on to decide, however (paragraph 60) that while parking in the bell mouth was an undue interference with the Vances' right of way, it may not be actionable, and there was no need for any relief, because his finding that the right of way did not include a right to park at the Cottage meant that the Collertons, in future, could park by the garage, which would solve Mrs Vance's problem.
151. The evidence on this issue included video evidence I viewed during the appeal hearing, but the judge did not, because the videos were of manoeuvres carried out after the hearing before him. He also had some video evidence of earlier manoeuvres. The impact of all this evidence, combined with the geography and topography of the site, was clear to me.
152. It established three things. First, you cannot safely reverse out of the driveway into the road. Everyone agrees about that. Second, if you drive in forwards you are storing up trouble because you then have to reverse out, which is dangerous. There is no room to turn in the driveway. Third, it is possible to reverse into the driveway without difficulty when the bell mouth is clear of any obstruction, such as the Collertons' car.
153. The question for the judge was whether the Vances were entitled to insist that the Collertons must not park their car in the bell mouth. Mrs Vance's evidence was that she cannot safely reverse into the driveway if their car is present. Although there is physical space to get past it, Mrs Vance does not feel safe doing so, either for herself or her young child.

154. Mr Gaunt defended the judge's reasoning and conclusion. He pointed to the test from the *B&Q Ltd* case, cited above, which the judge set out, uncontroversially. The judge was entitled to find, and did find, that Mrs Vance's preferred method of entry to the driveway was not unreasonable or perverse. That was a finding of fact which was open to the judge on the evidence, Mr Gaunt submitted.
155. Ms Bretherton begged to differ, saying that Mrs Vance's stance was capricious and unreasonable and that the judge should have so found. She pointed out that the video evidence showed numerous examples of tradespeople reversing into the driveway without difficulty straight past the stationary Collerton car. They also showed Mrs Vance performing the same manoeuvre, doing a reverse turn from a position on the pavement outside the driveway.
156. On this issue, I am quite clear that Mr Gaunt's defence of the judge's reasoning and conclusions is sound. The issue was one for the judge, on the evidence before him. The subsequent video evidence did not include any instance of Mrs Vance being seen to perform the reversing manoeuvre with the Collertons' car parked in the bell mouth. She was only seen to do it when their car was not there and nor was any other obstacle.
157. I reject Ms Bretherton's submission that because other drivers were able to perform the manoeuvre without difficulty, Mrs Vance's insistence on an unobstructed bell mouth must have been capricious and unreasonable. Drivers are different and while all must have a minimum level of skill, some may reasonably say they are less or more adept than others at manoeuvres in confined spaces.
158. The Vances contracted for, in Blackburne J's words borrowed from Mr Gaunt, the "relative luxury" of a right of way that could be exercised freely, without the stress and anxiety of a difficult manoeuvre on each entry to the driveway. The judge was entitled so to decide. It was a matter for him and I can find no fault with his finding. It would therefore not be right for me to interfere with it. In any case, I respectfully agree with his finding.

Conclusion; remedies

159. The judge decided that no injunction was necessary to restrain the Collertons from parking in the bell mouth. That was because his interpretation of the right of way meant that they could henceforth park up by the garage, without fear of blocking access for a car to the Cottage garden. He also made various other declarations and monetary orders, some of which I have mentioned.
160. The judge's exercise of his discretion to grant or withhold relief consequent on the substantive decisions he made is not vitiated by any of those substantive decisions having been altered on appeal. I have upheld all his findings and decisions.
161. No other error of law or principle or approach to the exercise of the judicial discretion as to relief has been shown by either party. I therefore leave the judge's order undisturbed. I uphold his decision in its entirety and I dismiss both the appeal and the cross-appeal. I am very grateful to counsel for their helpful submissions.