

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – EASEMENTS AND PROFITS – the rule in Wheeldon v Burrows - section 62, Law of Property Act 1925 and whether contrary intention must be expressed in the conveyance

**AN APPEAL AGAINST A DECISION OF
THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN:
PETER BROWNING
CAROLINE BROWNING
Appellants
-and-

JUNE P JACK
ALISON BRAZINGTON
Respondents

Re: Higher Clennick Farm
Bethany
Trerulefoot
Saltash
PL12 5DE

Upper Tribunal Judge Elizabeth Cooke
29 November 2021
By video

Mr Jonathan Ward for the appellants
Mr John Antell for the respondents, instructed by Prydis Legal Limited

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The following cases are referred to in this decision:

Alford v Hannaford [2011] EWCA Civ 1099
Annetts v Adeley [2018] EWCA Civ 555
Birmingham, Dudley and District Banking Company v Ross (1888) 38 Ch D 295
Commission for New Towns v JJ Gallagher [2002] EWHC 2668 (Ch)
Gregg v Richards [1926] Ch 521
Hansford v Jago [1921] 1 Ch 32
Harris v Flower & Sons (1904) 74 LJ Ch 127
Hillman v Rogers [1997] 12 WLUK 424
P&S Platt Limited v Crouch [2003] EWCA Civ 1110
Shrewsbury v Adam [2005] EWCA Civ 1006
Todrick v Western National Omnibus Co. Limited [1934] Ch 561
Wheeldon v Burrows (1879) 12 Ch D 31
Wheeler v Saunders [1996] Ch 19
Wood v Waddington [2014] EWHC 1358 Ch

Introduction

1. This is an appeal by Mr and Mrs Browning from the decision of the First-tier Tribunal (“the FTT”) on their application for the registration of easements for the benefit of their property, Lower Clennick Farm.
2. I heard the appeal by remote video platform on 29 November 2021. The appellants were represented by Mr Jonathan Ward and the respondents by Mr John Antell, both of counsel, and I am grateful to them.
3. In a nutshell, the appellants say that both their house and its surrounding farmland – registered under separate title numbers and whose title derives from two separate deeds – benefit from a right of way over the respondents’ land. The FTT decided that neither the house nor the land had the benefit of the easement claimed. The Tribunal gave permission to appeal on two points of law.

The factual background

4. The appellants’ property, Lower Clennick Farm, consists of a house, referred to in these proceedings as “the Cottage”, and about 22 acres of pasture, referred to as “the Land”, in Trerulefoot near Saltash in Cornwall. It used to be part of the respondents’ property, Higher Clennick Farm.
5. In 1957 Barbara Jones, the granddaughter of Albert Jones who had owned Higher Clennick Farm since 1922, married Gerald Pote (who worked on the farm), and they lived at the Cottage. In 1994 Gerald Pote bought the Land, and in 1995 the Cottage was conveyed to him by Deed of Gift. That is a simplification of the conveyancing history but it is all that is needed for present purposes. All the parties to the 1994 and 1995 deeds are now dead.

6. The Land and the Cottage lie to the south of the respondents' land. When the two farms were one, a farm lane ran across it from Bethany Road to the north, to what is now the A38 to the south (the Liskeard bypass). Today the farm lane is on the respondents' land from Bethany Road to the northern boundary of Lower Clennick Farm; thence it runs southward over the appellants' land to the A38. The section of the farm lane which is now within the respondent's land, and over which the applicants claim a right of way, I will refer to as the "Brown Track". The Brown Track can be accessed from the Cottage by crossing the Land.
7. The appellants say that both the Land and the Cottage have the benefit of a right of way over the Brown Track to Bethany Road to the north, which was used by Gerald Pote and his family before and after he acquired the two properties in 1994 and 1995. It is not in dispute that the two easements now claimed can only have come into being, if at all, as a result of the 1994 conveyance of the Land and the 1995 Deed of Gift respectively; but they were not created expressly. The appellants rely on two different legal principles, discussed below, to argue that the easements they claim were created despite the silence of the deeds. We shall have to examine the terms of both deeds in due course.
8. In 1998 Gerald Pote transferred the title of the Cottage to the joint names of himself and his second wife Glenys. The first appellant bought Lower Clennick Farm – both the Land and the Cottage – from Gerald and Glenys Pote in 2006 and transferred the property into the joint names of himself and Mrs Browning in 2014.
9. There are two issues in this appeal, one about the 1994 conveyance and an easement claimed for the Land, and the other about the 1995 Deed and the easement claimed for the Cottage.

The 1994 conveyance

The legal principle: the rule in Wheeldon v Burrows

10. The rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 was intended to give effect to what the parties to a deed are supposed to have intended. Thesiger LJ said at p.49:

“... on the grant by the owner of a tenement or part of that tenement ... there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements) ... which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.”

11. For example, if the owner of a farm generally uses a track to get from his field to the road, across the rest of his property, and it is “necessary to the reasonable enjoyment of the land” to use the track to get a tractor from the field to the road, then a conveyance of the field will also be a grant of a right of way, with vehicles, along that track.
12. The rule in *Wheeldon v Burrows* can be expressly excluded by a conveyance, and it will not operate if its creation of an easement would be inconsistent with the express terms of the conveyance. Morgan J in *Wood v Waddington* [2014] EWHC 1358 Ch at paragraph 144, summarised the requirements of the rule; the right claimed must be:

“(1) continuous and apparent in that they were used and enjoyed for the benefit of the land conveyed;

(2) necessary for the reasonable and convenient enjoyment of the land conveyed; and

(3) not inconsistent with the express terms of the conveyance.”

The arguments about Wheeldon v Burrows before the FTT, and the FTT’s decision

13. Before the FTT the appellants argued that when the 1994 conveyance took effect an easement was created over the Brown Track for the benefit of the Land, northwards to Bethany Road, by the operation of the rule in *Wheeldon v Burrows*.

14. The 1994 conveyance transferred the Land (22 acres of pasture) to Gerald Pote, who lived at the Cottage as a licensee and had been working on Higher Clennick Farm for many years. Clause 1 of the second schedule reserved the following rights in favour of the vendors’ retained land, Higher Clennick Farm:

“All such rights and easements quasi-rights and quasi-easements liberties privileges and advantages as are used and enjoyed in connection with the Retained Land over and through the Property hereby conveyed (save for the right of way presently enjoyed over the farm land running from the Retained Land through the land hereby conveyed to the dual carriageway public highway to the south thereof which right shall be extinguished from the date hereof and shall not be reserved to the Vendors for the benefit of the Retained Land) as if the Retained Land and the Property hereby conveyed had hitherto belonged to different owners and such rights and easements and quasi-rights and quasi-easements liberties privileges and advantages had been agreed by prescription.” (emphasis added)

15. This is known as a “reverse *Wheeldon v Burrows* reservation”; the idea of such clauses is to create expressly, in favour of the retained land, the easements that would have been created by the rule in *Wheeldon v Burrows* had the retained land been sold and the conveyed land retained. The reference to prescription at the end of the clause is a bit odd but the reference to quasi-easements and the other terms of the clause make its effect clear. Importantly, the reverse *Wheeldon v Burrows* clause is stated (by the wording underlined above) not to apply to the quasi-easement along the farm lane southwards to the A38.

16. The 1994 conveyance also reserved to the Vendors a right to the “continued run of the electricity services to the Retained Land over the Property” together with ancillary rights of access “for the purposes of inspection maintenance repair and renewal thereof.

17. The 1994 conveyance said nothing about whether the Land sold was to have a right of way northwards over the Brown Track to Bethany Road.

18. The judge in the FTT at paragraph 34 of his decision found as a fact that the Brown Track was in use in 1994 for the mutual benefit of the different parts of the farm and that it was

“necessary for the reasonable enjoyment” of the Land then being conveyed. It was, obviously, a visible track and therefore “continuous and apparent”. So the first two requirements (see paragraph 12 above) were met. The issue was whether a *Wheeldon v Burrows* grant of the claimed easement was inconsistent with, and so excluded by, other terms of the conveyance.

19. The 1994 conveyance included a covenant on the part of the purchaser:

“To maintain and repair forever hereafter in a good and stock proof condition the boundary hedges and fences between the points marked A-B-C-D-E and F-G on the Plan and will also within one month after being so required by the Vendors erect a stock proof hedge or fence across the site of the lane between the points marked E and F on the Plan and forever thereafter maintain and repair the same in a good and stock proof condition.”

20. The line A to G is the boundary between the land conveyed and Higher Clennick Farm; it will be recalled that Lower Clennick Farm is to the south of Higher Clennick Farm, so the line A to G runs more or less east-west although not in a straight line. The Brown Track enters the Land between points E and F, and the line E-F is pretty much the width of the track, so a fence between those two points would prevent access from the Land to the Brown Track. The respondents therefore argued before the FTT that the obligation to put up a hedge or fence when required was inconsistent with a *Wheeldon v Burrows* easement for Lower Clennick Farm northwards along the track to Bethany Road.
21. The appellants argued that the obligation to fence might never have been triggered and that, in any event, it could have been complied with by putting up a gate rather than a fence and so preserving the access to the track in a way that was consistent with the easement they claimed.
22. The judge in the FTT made a careful analysis of the authorities and found in favour of the respondents on this point, so that no easement was created.

The arguments for the appellants about the 1994 conveyance

23. On appeal, the appellants argue that the FTT erred in finding that the positive covenant to fence was inconsistent with the right claimed.
24. Mr Ward’s principal argument is that a fencing covenant can be performed by putting up a gate, and therefore that the covenant to put up a fence or hedge between points E and F could be performed by putting up a gate so that the covenant is consistent with the grant of an easement northwards along the Brown Track. What mattered in this case was having a stock-proof barrier, not having a fence rather than a gate. He cites *Shrewsbury v Adam* [2005] EWCA Civ 1006 where Neuberger LJ said at [22]:

“... it seems to me that it cannot possibly be the law that, in every case where there is a contract to erect a stock proof fence, without any reference to a gate, the covenant cannot include a gate anywhere in the fence.”

25. In *Alford v Hannaford* [2011] EWCA Civ 1099 Patten LJ said, at paragraph 40:

“The erection of a garage wall (or a gate) has been held to satisfy an obligation to erect a stock-proof fence (see *Shrewsbury v Adam* [2005]) and, by the same process of reasoning, the fencing covenant in this case would be satisfied by the erection of gate ‘X’.”

26. Mr Ward points out that in *Alford* the gate in question was not the only way out of the field but was still held to be satisfactory. In *Annetts v Adeley* [2018] EWCA Civ 555 it was said at paragraph 42 that a gate might satisfy a fencing covenant and that “in determining the extent of a fencing covenant all the relevant circumstances must be considered.”
27. Turning, accordingly, to the relevant circumstances, Mr Ward argued that the line E-F has to be looked at as part of the long line of fencing A – G, and that it would be consistent with the authorities for a gate between E and F to be a satisfactory performance of the covenant. The provision for fencing from A to E and from F to G indicates that it was anticipated that the purchaser would have the right to use the Brown Track, and the requirement of a fence from E to F rather than a gate would be inconsistent with that clear intention. He observed that the Vendors reserved a right of access to inspect and maintain their electricity supply, and must have intended to do so via the Brown Track rather than taking a detour of several miles by road, so that a gate must have been intended. And he points out that the parties went to the trouble of excluding section 62, and of including a reverse *Wheeldon v Burrows*

The arguments for the respondents about the 1994 conveyance

28. In response, Mr Antell points to *Wheeler v Saunders* [1996] Ch 19 at 32 where Peter Gibson LJ said at page 25:

“I part company with the judge where he proceeded to say that the notion of a fence did not necessarily exclude a gate, The function of a gate is different from that of a fence ... Only if the gate could never be opened would the gate share the same function as a fence, To my mind the consequence is that the covenant in clause 4 does defeat the implication of the grant of a right of way.”

29. Mr Antell then refers to *Hillman v Rogers* [1997] 12 WLUK 424, a decision of the Court of Appeal. The layout of the land involved was of such complexity that one has to wish their lordships had included a plan in their decision, but fortunately we do not need the detailed facts here. The issue was whether the imposition of a fencing covenant showed an intention to prevent the creation of a right of way by *Wheeldon v Burrows*. Robert Walker LJ referred to *Wheeler v Saunders* and said:

“I do not read Peter Gibson LJ’s judgment as expressing the view that a fencing covenant can never contemplate the inclusion of wooden or metal gates, or moveable wire gates, or moveable hurdles or draw-rails (or, in appropriate circumstances, cattle grids). As Peter Gibson LJ said, the meaning and effect of such a covenant must be determined having regard to the topography of the property in question. A covenant to fence a boundary several miles long, crossing varied terrain, may require a different approach from a covenant to erect a much

shorter fence, with specified materials, in a position meticulously defined on an accurate large-scale plan.”

30. In that case there were two parcels of land in issue. One parcel, the “blue land”, was being sold for development. It was held that the fencing covenant was intended to create a “complete barrier of fencing and hedge” along the whole boundary between the retained land and the land sold, and was “unequivocally inconsistent” with the creation of a right of way across that boundary through a gate. So *Wheeldon v Burrows* was excluded. As to the other parcel, a gate was permitted at a point in the relevant boundary where there was in fact no fencing covenant. So, as Mr Antell says, the case is hardly encouraging to the appellants’ argument. He points out the line E to F is only as wide as the track and is meticulously defined, and therefore a requirement for a fence or a hedge means just that, and a gate will not do.
31. Turning to the other authorities, Mr Antell points out that *Annetts v Adeley* is not a decision about either section 62 or *Wheeldon v Burrows*, but about abandonment; but it is notable that Arden LJ at [28] restated the key passage from *Hillman v Rogers* about the difference between a fence several miles long and a shorter fence “meticulously defined”. Generally a fencing covenant will not be satisfied by the erection of a gate; the exception is *Shrewsbury v Adams* where if a gate had not been permitted the purchaser would have had no access from a garage to the road, which cannot have been what the parties intended. Moreover, so far as he is aware, there is no case where a covenant to fence has been interpreted as allowing just a gate to be erected with no fence at all, which is how the appellants say this covenant to fence from E to F is to be interpreted.

Decision on the appeal about the 1994 conveyance

32. Neither party has been able to refer to a case where a covenant to fence has been held to be able to be satisfied by the erection of a gate with no fence at all. Where a gate has been allowed as part of a fence, the circumstances have been very different from those in the present case, and apparently encouraging dicta have to be examined in their context and alongside what a particular case actually decided.
33. So in *Shrewsbury v Adam*, the reason why a gate was allowed in that case was very specific: it was because otherwise there was no way to get from the garage to the road. The appellants, by contrast, have access to the A38 and do not need the Brown Track as their only access to a road.
34. In *Alford v Hannaford* it was not held that the fence that the purchasers covenanted to put up “where such fences do not exist” could include a gate, but rather that the covenant to fence did not oblige the purchaser to put up a fence where there was already a gate. Nevertheless that gate was part of a secured boundary. It is true that, as Mr Ward says, the gate in question was not the only gate leading out of the field, but that does not assist him because there was no right to go through it; it was held that the fencing covenant was inconsistent with the existence of an implied right of way through that gate.
35. *Annetts v Adeley* is not as irrelevant as Mr Antell suggests, because the issue there was whether an easement had been abandoned by the dominant owner entering into a fencing

covenant, and therefore the Court of Appeal had to consider whether it would have been permissible to put a gate in the fence. But the purpose of the fence was to mark a boundary; it did not have to be stock-proof and “would not possibly in any event preclude a stile”(Arden LK at [43]). Crucially it was not a fence that extended only across a track.

36. The passage quoted above from *Hillman v Rogers* is an endeavour to move forward from the isolated dicta in *Wheeler v Saunders* and other cases and to introduce more general and helpful guidance. It points inexorably to the interpretation of the covenant to put up a fence or hedge from E to F as meaning just that. It is a short stretch, deliberately excluded from the general fencing covenant from A to E and from F to G, of which the vendors retained control. The fence or hedge that they were able to require was just the width of the track and the covenant appears to have been deliberately designed to enable access along the track to be cut off.
37. That being the case Mr Ward’s other arguments fall away. The reservation of a right to access the electricity supply does not, I think, assist, because the inspection and maintenance would surely be done by professionals who could approach the land on the A38 and not by the vendors personally from the farmhouse.
38. Accordingly the appeal fails so far as the 1994 conveyance is concerned. There was no easement implied by *Wheeldon v Burrows* for the benefit of the land along the Brown Track.

The 1995 deed and the operation of section 62 in favour of the Cottage

39. After Gerald Pote bought the Land in 1994 the Cottage was transferred to him in 1995 by Deed of Gift. The FTT found, and it seems to me obvious, that the two transactions were linked; Mr Pote put his resources into the purchase of the Land in 1994 because he knew he was going to get the Cottage.
40. The appellants argue that section 62 of the Law of Property Act 1925 had the effect that the 1995 Deed of Gift granted to Mr Pote a right of way for the benefit of the Cottage along the Brown Track from the boundary of the Land at E-F northward to Bethany Road.

Section 62 of the Law of Property Act 1925

41. Section 62 of the Law of Property Act 1915 was designed to be a word-saving provision, ensuring that rights appurtenant to land were conveyed with it without the need for over-cautious verbiage to ensure everything was picked up. The relevant sub-sections are (1) and (4):

“(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.”

42. So a conveyance of land includes easements already appurtenant to it. But it is uncontroversial that section 62 also picks up and transforms rights enjoyed with the land by permission, and transforms them into legal easements.
43. Where section 62 is available, the rule in *Wheeldon v Burrows* is not needed because section 62 is of wider effect; everything *Wheeldon v Burrows* does is also done by section 62, and the requirements of the latter are less strict because there is no requirement for an easement created by section 62 to be necessary for the reasonable enjoyment of the land.
44. The issue in this appeal so far as section 62 is concerned is whether the apparently unambiguous subsection (4) means what it apparently says.

Section 62: the arguments before the FTT and the FTT's decision

45. A significant difference between the 1994 and 1995 deeds was that whereas in the 1994 conveyance the operation of section 62 of the Law of Property Act 1925 was expressly excluded, there was no such exclusion in the 1995 Deed of Gift.
46. It followed from the FTT's findings of fact that the conditions required for the operation of section 62 were met; at the time of the Deed of Gift the track was “enjoyed with” the Cottage as section 62(1) requires. The respondents conceded that, absent any contrary intention within section 62(4) section 62 would have created the right of way sought in this case.
47. Moreover, there is no contrary intention expressed in the Deed of Gift, which is entirely silent about the Brown Track.
48. The judge in the FTT also considered whether the fact that the Cottage was not contiguous with the track would present a problem, particularly as the Land (as he had found) did not benefit from an easement over the track. He found, and the respondents conceded, that since the Land was in the same ownership as the Cottage the fact that the owner of the Cottage would have to pass over the Land to access the track did not prevent the Cottage from having and exercising that easement (*Todrick v Western National Omnibus Co. Limited* [1934] Ch 561). Of course, if the Cottage has the easement and the Land does not then the easement could only be used for the benefit of the Cottage and not for the benefit of the Land, following the rule in *Harris v Flower & Sons* (1904) 74 LJ Ch 127.
49. However, the FTT was persuaded by the respondents' argument that there is authority to the effect that regard may also be had to the admissible surrounding circumstances at the date of the deed.
50. The FTT had, of course, already found that the fencing covenant across E-F in the 1994 conveyance precluded an easement along the Brown Track for the Land. It found that that

fencing covenant also showed the requisite contrary intention to preclude the creation of an easement by section 62 in the 1995 Deed. The judge said at paragraph 68:

“I find that the intention manifested in the 1994 conveyance of the Land by the fencing covenant – that points E-F were to be fenced or hedged off, so that there would be no right of way through that point to the Brown Track – effectively continued and ‘carried over’ just three months later when the Cottage was conveyed by Deed of Gift. It would have made little sense to insist on that covenant, and preclude any right of way, in December 1994, only then to grant a right of way through those same points in March 1995. The circumstances of that fencing covenant and obligation was sufficient evidence of a “contrary intention” under section 62(4) to prevent the grant of a right of way for the benefit of the Cottage in the 1995 Deed. It also, as it did in relation to the 1994 conveyance of the Land rebuts any implication of such a grant for the benefit of the Cottage via *Wheeldon v Burrows*.

The arguments for the appellant about the 1995 Deed

51. I shall look at the parties’ arguments in turn, except that I shall save for a separate discussion (paragraph 74 and following) what they both had to say about the apparent disagreement between *Megarry and Wade* and *Gale on Easements*.
52. The appellants argue that the FTT erred in law in finding that there was a contrary intention for the purposes of section 62(4) of the Law of Property Act 1925 on the proper construction of the 1995 Deed. At the heart of their argument is that in the face of the clear words of section 62(4) and its requirement of a contrary intention “expressed in the conveyance” the FTT was not entitled to go outside the Deed of Gift and look at the 1994 conveyance to find a contrary intention.
53. Mr Ward cites *Gregg v Richards* [1926] Ch 521, which was a decision about section 6(4) of the Conveyancing Act 1881, the statutory predecessor to section 62. Pollock MR at 526-7 said:

“the words in sub-s 4 are ‘as far as the contrary is not expressed’. It is not suggested in any of the cases that that must be an expression in absolute terms but it is worth noting that the word used in that sub-section is “expressed” and not, as in some other cases ... “unless the contrary intention appears.”
54. There is no requirement, therefore, that the expression of contrary intention must refer in terms to section 62. But there must be something expressed in the conveyance. An examination of the surrounding circumstances, or of another document, other than as an aid to the construction of wording in the conveyance itself is not permissible.
55. There are indeed cases where reference is made to the surrounding circumstances, but only in order to construe the express words of a conveyance and in particular the grant of an express right of way in order to assess whether an express grant of a right of way through one gate is not inconsistent with the creation by section 62 of a right of way through another.

There is no necessary inconsistency; in *Gregg v Richards* Pollock MR approved the words of Russell LJ in *Hansford v Jago* [1921] 1 Ch 32:

“It is a very strong thing to say that when a section of an Act of Parliament provides that a conveyance of land having houses or other buildings on it is to be deemed to include a large number of different matters unless a contrary intention is expressed in the conveyance, the mere fact that the draftsman has elected to include one or two of these matters in the conveyance should operate as an indication of an intention that the remainder should not be included.

56. Whether such an express grant is inconsistent with the creation of an easement by section 62 is therefore a matter of construction of the express grant and for that purpose, Mr Ward argues, surrounding circumstances may be considered. Thus Patten LJ in *Alford v Hannaford* said at [39]:

“As a matter of authority the express grant of a right of way does not necessarily exclude the possibility of a grant under s. 62 of a similar easement: see *Gregg v Richards*... One needs therefore to identify other factors in the admissible surrounding circumstances or the terms of the grant for it to have that effect.”

57. Mr Ward points out that the context for that statement was the need to decide, in *Alford v Hannaford*, whether the express grant of a right of way through a gate A-B precluded the implication of a grant through an existing gate X. The surrounding circumstances included the fencing covenant and the nature of the boundary, and that covenant was held to indicate an intention for there to be a secure boundary without openings except where expressly provided at A-B (see paragraph 34 above). The surrounding circumstances indicated that the express grant of a right of way precluded an implied one. A similar exercise was carried out in *Wood v Waddington* [2015] EWCA Civ 538, where it was held that the express grant did not preclude the operation of section 62.

58. Mr Ward then turns to *Birmingham, Dudley and District Banking Company v Ross* (1888) 38 Ch D 295. In that case the land conveyed, whose purchaser claimed the benefit of section 62, was part of a slum clearance project. Adjoining land was conveyed to the defendant who built a house 80 feet high, which interfered with the light to the claimant’s building. The claimant sought an injunction, but failed; it was held that the claimant did not have an easement of light over the adjoining land. The claimant did not rely on the statutory predecessor to section 62; Cotton LJ referred to it for completeness, but held that it did not create an easement because this was a newly built property, and the purchaser knew about the plans for redevelopment:

“Therefore, I think it could not be said that the light coming [from the neighbouring land and original low building] to these windows could be considered to be enjoyed with it within the meaning of this section. The light did in fact come over that building; but it came over it under such circumstances as to shew that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period; and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of the section.”

59. Accordingly, says Mr Ward, where the parties know that an arrangement will not continue, section 62 has no effect, and in this narrow case only external circumstances may be referred to without the need for something express in the deed. It could be said that section 62 is inapplicable, or it could be said that where the parties know the right is coming to an end then in such a case only that factor can be said to prevent section 62 operating.
60. However, it is axiomatic that a right that might come to an end, because it is enjoyed only by permission, will be transformed by section 62 into an easement. In the present case, at the point when the 1995 Deed of Gift was executed the Brown Track was in use by the appellants for the benefit of the Cottage, and the obligation in the 1994 conveyance to fence across E-F when required had not been triggered (and might never be). Therefore it was transformed into an easement by section 62, in the absence of any expressed contrary intention in the Deed. It is not legitimate to look to the 1994 conveyance to find a contrary intention. According to Mr Ward the only hope for the respondents would be to claim rectification of the 1995 Deed, which of course is now – absent the parties to the Deed – unlikely to succeed.

The arguments for the respondents about the 1995 Deed

61. Mr Antell argues that it is permissible to look for a contrary intention, sufficient to exclude section 62, in the surrounding circumstances without the need for anything express in the conveyance itself as a “peg”, as he puts it, on which to hang the consideration of the surrounding circumstances.
62. He cites Robert Walker LJ in *Hillman v Rogers*, who said this:

“It has been said that s 62 operates by way of express grant: see for instance what Sargant LJ said in *Gregg v Richards* at p 535. That is perfectly correct in the sense that the section operates by inserting words into a grant, and thus abbreviating conveyancing language. But the statutory formula is to be inserted only if there is no contrary intention evinced in the conveyance or transfer, and takes effect subject to its terms...

Mr Laurence subjected the authorities to close analysis and submitted that neither *Gregg v Richards* nor any other case established a binding general rule. His analysis was an effective and salutary reminder that any statement of general principle may have to be related to the facts of the case. *Hansford v Jago* turned largely on what was meant by appurtenances. *Gregg v Richards* was concerned with an express grant (over a defined part of a wider L-shaped passageway and roadway) in terms which all the members of the Court of Appeal found difficult to construe. Nevertheless the case clearly establishes that the express grant of one easement does not necessarily prevent another easement being created by the operation of s 62, even if that other easement is of a similar character.

Whether an intention is evinced to exclude or vary the operation of s 62 depends on looking at the instrument in the light of such relevant surrounding circumstances as are admissible as an aid to construction. **Indeed there may be little to guide the court but the surrounding circumstances...**

...the question of construction must always be approached by reading the text of the grant in a practical way, looking at the geographical and commercial realities. Maxims such as *expressio unius exclusio alterius* may occasionally give assistance but by themselves will rarely be particularly helpful, and never decisive.

63. The emphasis there is mine; Mr Antell argues that those words indicate that surrounding circumstances by themselves may be taken into account, and that the effect of the passage as a whole is that the express grant of an easement should be ignored.
64. He draws the same conclusion from *Alford v Hannaford*, where it was said at [38] that:

“One needs therefore to identify other factors in the admissible surrounding circumstances or terms of the grant for it to have that effect.”
65. Mr Antell draws a comparison with boundary disputes, where an ambiguity or imprecision in the line drawn on a conveyance plan has to be resolved by looking at the land itself.
66. Mr Antell argues in the alternative that the present case was on all fours with *Birmingham v Ross*, because the parties knew that the ability to use the Brown Track was precarious; it could at any stage be closed off by the owners of Higher Clennick Farm, as the vendors in the 1994 conveyance, requiring the line E-F to be fenced. Therefore there could be no expectation of the continuance of the right and section 62 could not operate.

Decision on the appeal about the 1995 Deed of Gift

67. To my mind the authorities are as clear as are the words of section 62(4) itself; for the operation of section 62 to be defeated by evidence of a contrary intention, that contrary intention must be expressed in the conveyance itself. It cannot be derived solely from the surrounding circumstances. Mr Antell has produced dicta that appear to say otherwise, but those dicta are taken out of context; he has not referred to any case where the contrary intention was derived from the surrounding circumstances alone.
68. The emphasised words in the extract from *Hillman v Rogers*, paragraph 62 above, cannot assist the respondents. It is not permissible to read them in isolation both from the words that precede them (“the statutory formula is to be inserted only if there is no contrary intention evinced in the conveyance or transfer, and takes effect subject to its terms...”) and from their context, which was the question whether the express grant of a right of way precluded the creation of another by section 62 or by *Wheeldon v Burrows*. The case cannot be read as authority for the use of surrounding circumstances when there is nothing express in the deed itself. As Walker LJ went on to say:

“the question of construction must always be approached by **reading the text of the grant** in a practical way, looking at the geographical and commercial realities.”

69. The emphasis is mine, and the words demonstrate the focus on the text of the grant, using other matters to set it in context and understand the parties' intentions.
70. Again, the words in *Alford v Hannaford* cannot be wrenched from their context, which was the consideration of the significance of an express grant through one gate and whether it precluded a right of way through another gate. It was not a case in which surrounding circumstances alone, absent something express in the deed itself, showed a contrary intention within section 62(4).
71. Mr Antell's analogy with boundary disputes does not assist, first because even in that context a boundary is derived primarily from the conveyance that created it and the lie of the land is used to assist the construction of that conveyance (whether its words or its plan), but second and more importantly because here we are faced with the precise requirements of the statute.
72. I do not regard this case as on all fours with *Birmingham v Ross*. It is not in dispute that quasi-easements which may come to an end, because they can be brought to an end by the dominant owner, are transformed into easements by section 62. The fact that one of the ways in which the access over the Brown Track could be terminated was set out in the 1994 conveyance does not, in my judgment, make any difference to the normal operation of the statute on precarious arrangements. The circumstances in *Birmingham v Ross* were very different; the context of the purchase and the imminent development of the adjoining land meant that there was no such arrangement in existence for the section to bite on. The reasoning of the court quoted at paragraph 58 above appears to me to be that there simply was no quasi-easement, in contrast with the paradigm case of the farm track enjoyed with the land for decades which is what we have here.
73. Obviously the creation of an easement in 1995 through the opening at E-F, for the benefit of the Cottage, had an effect on the ability of the owners of Higher Clennick Farm to require that opening to be fenced. By failing to exclude section 62 they brought to an end their ability to require the opening to be permanently closed. But that does not seem to have mattered to them at the time; they never asked for the opening to be fenced before Mr Pote sold (at which point their right would have come to an end in any event because the positive covenant to fence cannot be enforced against future owners).

The relevant passages in Megarry and Wade and in Gale on Easements

74. So far as the authorities are concerned, then, everything points firmly in the appellants' favour.
75. We now have to examine an apparent contradiction between two textbooks, one of which appears to assist the appellants and the other the respondents.
76. Paragraph 27-036 in the ninth edition of *Megarry and Wade, The Law of Real Property* reads as follows (emphasis added)::

“An express grant of a more limited right of way than s.62 would carry does not by itself amount to a contrary intention for this purpose. **But s.62 is also subject to any contrary intention which may be implied from those circumstances existing at the time of the grant (fn Alford at 38).** If, for example, the plot sold and the plot retained are both subject to a building scheme, the purchaser of a house standing on the plot sold will not be able to prevent the plot retained from being built upon so as to diminish his light; for the light was enjoyed “under such circumstances as to show that there could be no expectation of its continuance” (fn *Birmingham v Ross* at 307). But the mere fact that the parties to the conveyance may have believed that the right being previously enjoyed was precarious in the sense of being revocable at the will of the servient owner is not enough to preclude the operation of s.62. It must have been within the parties’ common knowledge that the right must come to an end at some future date [...]”.

77. The equivalent passage in the eighth edition said the same.
78. Paragraph 3-162 in the 19th edition of *Gale on Easements* comments on that passage as follows, again with emphasis added:

“It has been said in one textbook that even in a case where there is no contrary intention expressed in the conveyance:

“... the section is also subject to any contrary intention which might be implied from circumstances existing at the time of the grant.”

The textbook then goes on to illustrate this proposition by reference to the cases which show that s.62 does not apply to a case where the right which is claimed under s.62 is based upon previous enjoyment of something which was temporary in the sense that it was only capable of being enjoyed for a limited period because of the nature of the property over which it was enjoyed... **The passage in the textbook should not be read as meaning that the operation of s.62 can be ousted by an alleged contrary intention to be derived from the background circumstances of the case.**

79. The 20th and 21st editions say the same. The respondents, of course, rely upon the highlighted passage from *Megarry and Wade*. Mr Antell notes that the sentence highlighted in the extract above is generally expressed; Mr Ward of course relies upon the footnoted reference to *Alford v Hannaford* and points to what the case decided, but Mr Antell does not agree that the highlighted words refer only to the use of surrounding circumstances to construe express words in the conveyance. He sees no conflict between *Megarry and Wade* and *Gale* because the passage in *Gale* is focussed on *Birmingham v Ross* and other cases where section 62 is not engaged; but that if that is not right then that the approach in *Megarry and Wade* is to be preferred..
80. Mr Antell relies upon the approval of the passage from *Megarry and Wade* in *P&S Platt Limited v Crouch* [2003] EWCA Civ 1110 (Peter Gibson LJ at 37). The approval is expressed in the context of a discussion of *Birmingham v Ross*; it does not shed any light on the question in issue here.

81. Mr Antell refers also to the cases cited by *Gale*, namely *Commission for New Towns v JJ Gallagher* [2002] EWHC 2668 (Ch) and *Wood v Waddington* [2015] EWCA Civ 538. In *Commission for New Towns* Neuberger J, as the then was, said:

“It seems to me ,, that s.62(4) requires an express rebuttal of the s.62 presumption, although there is no reason to think that the express words need refer to s.62.”

82. Despite the clarity with which those words appear to support the position in *Gale*, Mr Antell says they do not, because Neuberger J went on to cite *Gregg v Richards* which, he says, “has not previously been interpreted as excluding consideration of surrounding circumstances.” But all that *Gregg v Richards* established is that the express grant of a right of way does not necessarily exclude the creation of another by section 62. Neuberger J’s words mean what they, and the statute, say: an express contrary intention is needed.

83. As to *Wood v Waddington*, Mr Antell argues that dicta in that case to the effect that express words are required to satisfy section 62(4) are not significant because the parties were not in dispute about it. At paragraph 60 Lewison LJ said

“It was common ground that clear words are needed to exclude s.62.”

84. No doubt it was common ground because that is the law. If the highlighted words in the passage in *Megarry and Wade* were intended to endorse reliance upon surrounding circumstances to show a contrary intention within section 62(4) without anything express in the deed itself then they would be inconsistent with the cases. There can be no doubt that the highlighted words in *Gale* are correct and it would be helpful if a future edition of *Megarry and Wade* could make it clear that section 62 is subject to contrary intention expressed in the relevant deed (section 62(4)), but that surrounding circumstances may be used to construe what is expressed in the deed so as to understand whether it indicates a contrary intention, as in *Alford v Hannaford* and *Hillman v Rogers*. The sentence that follows the footnoted reference to *Alford v Hannaford* could also usefully be reconsidered because what is then said, correctly, about *Birmingham v Ross* is not an example of the principle in *Alford v Hannaford* but is a separate principle.

Conclusion on the appeal on section 62

85. There is, at best, an ambiguity in the relevant passage in *Megarry and Wade* and Mr Antell seeks to rely on it. But insofar as it is not consistent with the authorities *Megarry and Wade* does not assist him. Section 62(4) means what it says; a contrary intention must be expressed in the conveyance; surrounding circumstances may be used to construe express provisions in the conveyance but cannot by themselves show an intention to exclude the operation of section 62.
86. The FTT’s decision that section 62 was excluded from the 1995 Deed was drawn solely from what was said in the 1994 conveyance. It was common ground between the parties that section 62 would have taken effect in the absence of a contrary intention; there was nothing whatsoever in the 1995 Deed that could be regarded as an expression of intention to exclude section 62, and accordingly section 62 took effect and the quasi-easement northwards along the Brown Track was transformed into an easement by section 62. There

is nothing odd about the easement benefiting the Cottage and not the Land; what the arrangement achieves is that the owners of the Cottage will always be able to use the track, but that if they sell part of the Land separately the new owners of the Land will not be able to do so. On such a sale the owners of the Cottage will of course be free to choose to retain part of the Land, or to reserve an easement, in order to preserve their own access to the opening at E-F.

Conclusion

87. The appeal fails so far as the 1994 conveyance is concerned; the Land does not benefit from a right of way along the Brown Track, and the decision of the First-tier Tribunal stands.
88. I have concluded that the First-tier Tribunal's decision about the 1995 Deed of Gift was made as a result of an error of law, and therefore I set it aside and substitute the Tribunal's own decision that the Cottage does benefit from an easement along the Brown Track. The Tribunal will direct to the Chief Land Registrar to give effect to the appellants' application for the registration of that easement as if the respondents' objection had not been made.

Upper Tribunal Judge Elizabeth Cooke

10 December 2021

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.