



Neutral Citation Number: [2018] EWCA Civ 555

Case No: B2/2016/0641

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE TUNBRIDGE WELLS COUNTY COURT
HIS HONOUR JUDGE SIMPKISS
3TN00252

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2018

Before :

LADY JUSTICE ARDEN
and
LORD JUSTICE DAVID RICHARDS

Between :

Clare Elizabeth Annetts

**Claimant/
Respondent**

- and -

Nureni Adetunji Adeleye

**Defendant/
Appellant**

Zachary Bredemear (instructed by **DWF LLP**) for the **Appellant**
Justin Althaus (instructed by **Batchelors Solicitors**) for the **Respondent**

Hearing date: 5 December 2017
Further submissions filed 8,12,19 & 21 December 2017

Approved Judgment

LADY JUSTICE ARDEN :

BRIEF SUMMARY OF THIS APPEAL AND MY CONCLUSIONS

1. The appellant seeks to establish that a right of way over an access way to a strip of land in Sevenoaks (“the Strip”) has not been abandoned by entry into a covenant to fence the boundary between the Strip and the access way. Stated very briefly, the right of way was created in 1962 by the owner of a property called Salterns, who owned the access way, in favour of the purchaser of adjoining land (“Summerhill”). At that time Summerhill included the Strip. By a transfer dated 10 October 1988 (“the Transfer”) the Strip was severed from the rest of Summerhill and sold to the owner of the neighbouring property (“Dawning”). Under the Transfer the purchaser undertook to erect, and for ever after maintain, a fence between the Strip and the access way. HHJ Simpkins, sitting in the Tunbridge Wells County Court, held that this meant that this case was:

one of those exceptional cases where it can be said that the right of way (insofar as it previously benefited the strip) has been abandoned or released by implication. Further points which suggest that this is what was intended (although of much lesser relevance) are that no right of way was registered when the new title to the strip was formed. The parties could also have made it expressly clear that the strip had the benefit of the right of way and also have identified or provided for a point of access.

2. The judge went on to hold that the right of way would not revive if the Strip and Summerhill were to be re-united under the name of a single owner. He held:

Summerhill did not reserve the right of way over the strip for the benefit of the land which was retained in 1988. Following the transfer, there was therefore no right of way for the benefit of Summerhill from across the strip. I cannot see a reunification of the 2 plots could re-create a right of way from the access way across the strip for the benefit of Summerhill without there having been at least an express reservation when the land was divided in 1988. This is in any event academic, since I have found that the right of way was abandoned so far as it benefited the strip.

3. The plan scheduled to this judgment shows the location of the properties with which we are primarily concerned.

4. The critical parts of the Transfer read as follows:

1. The Transferees(s) hereby covenant(s) with the Transferor(s) so as to benefit the land owned and retained by the Transferors known as ‘Summerhill’ Seal Hollow Road comprised in the above title number or any part or parts thereof and so as to bind

the land hereby transferred into whosoever's hands the same may come...as follows:

(a) Not to use the land for any purposes other than as a garden in connection with the Transferees' existing property and not to erect any buildings or other structures on the land whether permanent or temporary of any nature whatsoever without the prior written approval of the Transferors such approval not to be unreasonably withheld

(b) Not to carry out on the property anything which will become a nuisance or annoyance to the Transferors or the owner or owners of the retained land

(c) Within 3 months of completion to erect and forever after maintain a good and sufficient fence along the boundary of the land and driveway leading to the Transferors retained land with chestnut paling fence or such similar materials as may be agreed between the parties hereto such fence to be approximately three feet six inches in height.

2. There is excepted and reserved to the Transferors the following:

(a) all ...rights and easements quasi-rights or quasi-easements...(other than rights of way)...

5. The judge heard oral evidence and had the benefit of a site visit.
6. It is common ground that the right of way passed under the Transfer but the respondent argues that the purchaser simultaneously abandoned it by entering into the covenant to fence. The appellant denies this and submits among other matters that the fencing covenant did not exclude the possibility of a gate. Moreover, on the appellant's case, the parties to the Transfer could always have agreed to release the fencing covenant. That would have been the obvious step for the parties to take if the owner of Dawning wished to develop his property.
7. In my judgment, for the reasons given below and after consideration of the parties' detailed submissions, the judge was wrong in law to conclude that the right of way had been abandoned. The covenant to fence did not demonstrate an intention that the right of way over the Strip should be extinguished. Moreover, in my judgment, if Summerhill and the Strip were again to be united under one owner (as is now possible as they are owned by husband and wife), the right of way enjoyed before the Transfer would become exercisable for the same purposes as it could be exercised before the Transfer: the owner of Summerhill could therefore use the Strip to reach the access way.

LEGAL FRAMEWORK

8. It was common ground before the judge and in this Court that on a question as to the abandonment of a right of way, the applicable legal principles are those summarised

by *Gale on Easements* and cited with approval by this Court in *Dwyer v Westminster CC* [2014] 2 P & CR 7. They are as follows:

- a. whether a person intends an abandonment is not a subjective question; it is always a question of fact to be ascertained from the surrounding circumstances whether the act amounts to an abandonment or was intended as such;
 - b. abandonment depends on the intention of the person alleged to be abandoning the right of way as perceived by the reasonable owner of the servient tenement; to establish abandonment of an easement the conduct of the dominant owner must have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement;
 - c. abandonment is not to be lightly inferred; owners of property do not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use for it;
 - d. non-user is not by itself conclusive evidence that a private right is abandoned; the non-user must be considered with and may be explained by the surrounding circumstances.
9. This Court added in *Dwyer* that the lack of any need on the part of the owner of the dominant tenement to use the right of way for a time would reinforce the conclusion that the right of way had not been abandoned. The parties have not relied on that point but it does have some resonance as there is no evidence that the owner of Dawning wished to enter the access way from the Strip prior to the events giving rise to these proceedings.
10. These principles require the court to find the objective intention of the person alleged to have abandoned the right of way as reasonably perceived by the servient owner. It is irrelevant whether the servient owner actually knew about the transaction because the test is one of the reasonable perception of the servient owner and what he would conclude as to the dominant owner's intentions.

FURTHER RELEVANT REASONING IN THE JUDGMENT

11. The judge drew certain inferences from the Transfer:
- a. It was not contemplated that the Strip would be used for anything other than a garden, since there was a covenant to that effect by the purchasers. While it was contemplated that a building might be built on

the land that could only be done with the approval of the owners of Summerhill and the building had to be one which was not inconsistent with the Strip's use as a garden.

- b. As the entrance to Dawning was at the eastern end of that property, it was reasonable to infer access that the Strip would be from that drive, whereas while it was part of the Summerhill title, access was from the Summerhill drive.
 - c. The covenant to erect and thereafter maintain "*forever*" a fence between the Strip and the drive strongly suggested that it was not intended that there should be any access to the Strip from the access way. The Transfer did not permit a gate in the fence between the Strip and the access way.
12. Counsel appearing at trial for the appellant (not Counsel appearing in this Court) conceded that any access for the benefit of the Strip could not be used to access Dawning.

ISSUES TO BE DETERMINED ON THIS APPEAL

13. The parties have helpfully formulated the issues that need to be determined on this appeal as follows:
1. Was the judge wrong to hold that the right of way, so far as it benefited the Strip, was abandoned by the 1988 Transfer?
 2. If the judge was right on abandonment, should he have held that the abandonment was only partial and that the Strip continued to benefit from a right of way over the first 40 feet of the Access Road so that access to the Strip could be obtained via Dawning? (The respondent initially objected to this issue on the grounds that the point had not been pleaded or argued below, but ultimately agreed that it could be raised as it was one of law).
 3. If there was no abandonment, was the judge wrong to decide that the right of way could not be used to provide access to the retained part of Summerhill across the Strip even if the Strip and the retained part of Summerhill came into common ownership?

PARTIES' SUBMISSIONS

Issue 1

14. Mr Zachary Bredemear, for the appellant, submits that it is significant that the servient owner was not a party to the Transfer. The land register would simply show that the Transfer had been executed and the parties had not registered the right of way over the Strip but he would also know that the right of way would pass under Law of

Property Act 1925 (“LPA”), s 62, subject to s 62 (4). The right of way was ultimately registered against the Strip in 2008.

15. LPA, s 62 (1) and (4) provide:

(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all rights, and advantages whatsoever, appertaining or reputed to appertain to the land, ...

(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.

16. As to s 62 (4), Mr Bredemear submits that there is nothing in the Transfer to rebut the implication of the right of way. The servient owner would see a reference to buildings in the Transfer but this was not particularly significant because this appears to be a reference to buildings for the purposes of gardening, such as a garden shed.

17. Mr Bredemear submits that a strong factor against abandonment was the fact that, if the judge was right, the Strip was landlocked. He contends that it would have been an excessive user of Dawning’s right of way to use the access way to reach the Strip: *Harris v Flower* (1904) 74 LJ Ch. 127. It is inherently unlikely that the parties to the transfer intended that the Strip would be landlocked.

18. Mr Bredemear submits that the transferor had a clear incentive to retain the right to authorise use of the Strip other than as a garden in the future because he might obtain a payment out of that.

19. In any event, Mr Bredemear submits, it seems odd to say that a covenant to fence excludes a right of way. A fence is simply there to screen a property and to ensure that boundaries are observed and to ensure that stray animals do not get on to the access way. It is not obviously a condition intended to exclude a right of way.

20. Mr Bredemear further submits that the covenant to fence was a positive covenant which did not run with the land so that the servient owner would not have drawn the conclusion that the covenant would be enforceable by injunction beyond the ownership of the current owner. The respondent accepts that as a matter of law the covenant to fence did not run with the land, but submits that the servient owner would nonetheless not automatically have jumped to the conclusion that the parties had reserved the right to alter the covenant in the future because the covenants were expressed to bind successors in title.

21. Mr Bredemear contends that the judge was wrong to say that the fence could not include a gate. On that basis there was obviously no abandonment. He further submits that a fence is not sufficient to constitute abandonment. There has to be a significant blockage of the access point (see *Gale* paragraph 12-90 to 12-92 and *Snell & Prideaux v Dutton Mirrors Ltd* [1995] 1 EGLR 259). He submits that a covenant

to erect and maintain a fence is not enough to constitute evidence of an intention to abandon a right of way. In any event, the covenant to fence could be released or varied and so it did not demonstrate an intention to abandon.

22. By virtue of clause 2 (b) of the Transfer the vendor reserved the right to use the existing gas pipe under the Strip, together with the right of entry to maintain it. Mr Bredemear submits that it was most likely that the parties intended that there would have to be access to the Strip from the access way for this purpose. Accordingly, he submits that this reservation was indicating that access might still be required.
23. Mr Justin Althaus, for the respondent, submits that certain arguments now advanced were not raised before the judge e.g. (a) application of *Harris v Flower* (b) right to use the gas pipe (c) partial abandonment and (d) that the covenant to fence constitutes a positive covenant, but, as he recognised, (with the possible exception of (b)) these were all points of law. The usual course in those circumstances is for this Court to allow them to be argued.
24. Mr Althaus submits that the *Dwyer* principle (c) (paragraph 8 above) reflects common sense. Parties may wish to abandon a right of way where they acquire a piece of land. Mr Althaus submits that that is what happened in this case. The purchaser's covenant to fence is a condition that did not disadvantage him even if he abandoned the right of way because he did not need it.
25. Mr Althaus submits ordinary residential use of the dominant tenement, as part of the garden of Dawning, is an ancillary use and therefore the Strip is not land-locked: see *Gore v Naheed* [2017] EWCA Civ 369. So, on his submission, that is not a reason for saying that the right of way was not abandoned.
26. As to the question whether the covenant to fence would have implicitly permitted a gate to be inserted in the fence, Mr Althaus points out that in *Wheeler v JJ Saunders Limited* [1996] Ch 19, Peter Gibson LJ held that the function of the gate was different from that of a fence. He held at 31G to 32B as follows:

I part company from 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. A gate is intended to prevent ingress and egress only when it is shut. It is of the essence of a gate that it can be opened whereas a fence cannot be opened and, as Ferris J. pointed out, the covenant to fence does not refer to a gate. What was plainly contemplated as the purpose of the covenant was that between the plaintiffs' property and the vendors' property there should be a stockproof barrier so that no stock from one property could pass to the other property. 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. Accordingly I would allow this part of the appeal and discharge both the mandatory injunction to remove the wall and the order that the first and second defendants pay £500 by way of general damages for the obstruction of the right of way.

27. Sir John May (at 36G to 37A) held that a gate may be opened or left open by design or mistake and in such condition would not satisfy the requirement of a covenant, but did not reach a final conclusion. Staughton LJ, giving the first judgment, considered that there was much to be said for the argument that a gate could if sufficiently solid count as part of the fence for the purposes of a covenant to fence in that case but he did not express a concluded view (page 26 C).
28. In *Hillman v Rogers*, (unreported, 19 December 1997, [1997] Lexis Citation 5033), Robert Walker LJ, with whom Butler-Sloss J agreed, held “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 specific materials in a position meticulously defined on an accurate large scale plan.”
29. Mr Althaus submits that these observations reinforce the argument that the judge with the benefit of a site visit was in the best position to consider whether a gate was permitted by the covenant. On that basis the judge’s decision should not be disturbed.

Issue 2

30. Mr Bredemear’s alternative submission is that the right of way should be treated as partially abandoned so that it retained a right of way until the point where Dawning was first reached. He submits that this is more logical than total abandonment. There would then be no need to break into the fence and the owner of the Strip could use the easterly boundary right of way. Unless the abandonment is partial, the Strip is land-locked for the reason already given.
31. Mr Althaus submits that partial abandonment is possible in law but an easement must be appurtenant to land. The first forty feet of the access way lies between the parcels belonging to Dawning and to the respondent. The access way did not belong to the purchaser of Summerhill and it could not therefore pass to the owner of the Strip. Moreover, if the judge was entitled to find abandonment, the purchaser of Summerhill could not use the first forty feet of the access way to access the Strip. On that basis it was no longer part of the dominant tenement and there would be excessive user.

Issue 3

32. The judge concluded that, even if Summerhill and the Strip were reunited, the common owner could not access Summerhill via the Strip. Mr Bredemear submits that this conclusion was wrong and that those properties together had a bundle of rights, and that, unless something is done to take away those rights, none of those rights should be abstracted when they come to be unified. Otherwise the consequence is that the servient owner is enabled to derogate from his grant by transfer and re-transfer. He submits that, in the absence of direct authority, the matter has to be decided as a matter of common sense.
33. Mr Bredemear relies on *Wall v Collins* [2007] Ch 390 as authority for the proposition that, if a lessee acquires the freehold, rights of way conferred by the leasehold interest are not affected by the fact that the lease merges into the freehold. Carnwath LJ, with whom Hooper and Mummery LJ agreed, held that, as a matter of common sense the rights attached to the leasehold interest should not be affected by merger of the leasehold interest into the freehold. He held (at [18]) that:

The owner of a servient tenement should not be able to escape the burden of an easement by dealings to which those interested in the dominant tenement are not parties. Equally, as a matter of common sense, it is difficult to see why a lessee should be worse off, so far as concerns an easement annexed to the land, merely because he has acquired a larger interest in the dominant tenement.

34. Mr Bredemear submits that *Ward* shows that rights can survive dealings in the dominant tenement and that transactions in the dominant tenement do not affect the right of way. The scope of the right of way before division and after reunification is one and the same, so that there is no question of the burden on the servient tenement being increased or reduced.
35. Mr Althaus also submits that there is no authority directly in point. He seeks to uphold the judge's conclusion that there needed to be an express reservation by Summerhill in the Transfer of rights of access via the Strip in order for a later common owner of Summerhill and the Strip to be so restored to their pre-Transfer entitlements.
36. Mr Althaus submits that the appellant has not demonstrated that those conclusions were wrong. The transferors could have reserved in the Transfer a right to pass along the access way to access the Strip. If they had done so, and there was no abandonment, they would still have enjoyed the right of way to themselves but not through the Strip. In addition, the Strip would have enjoyed the right of way along the access way to enter the Strip, but not Summerhill. Each of the two parts of what was then a single dominant tenement still enjoyed a right of way. Neither part enjoyed access to the other as an incident of the division. The judge's conclusion (at paragraphs 67 to 68 of his judgment) was that accordingly, if and when the two parts were reunited the common ownership, user of the right of way over the Strip for the benefit of Summerhill would be excessive user of the rights in question.

DISCUSSION

37. On the principles summarised by *Gale* and accepted by this Court in *Dwyer*, the issue the judge had to decide was whether the hypothetical servient owner would have considered that the right of way from the Strip to the access way had been abandoned. A suitable starting point is to determine the circumstances as they existed at the time of the Transfer as those circumstances would inform the perception of the servient owner as to the effect of the fencing covenant in the Transfer.
38. The first point a servient owner would note is that the Transfer was only an agreement between the owners of Summerhill and Dawning, the dominant owners. It is unlikely, therefore, that he would have considered that this document had any effect on his obligations as servient owner.
39. The servient owner would have been very familiar with the site. Although the judge had a site visit, he does not record that there was any particular feature of the Strip or the adjoining properties which led him to his conclusion that the covenant to fence excluded the possibility of a gate. We do have some clue, however, from the fact that the fence was to be a chestnut paling fence three foot six inches in height. This of

course is consistent with the restriction to garden use in conjunction with Dawning, as such a fence is suitable for preventing children and others going on to the access way: it was certainly not a stock-proof fence, where a gate might give rise to the risk of animals escaping on the access way. It would also be apparent to him that the new fence on the western boundary of the Strip was intended to mark the boundary between the Strip and Summerhill. Even that part of the boundary did not altogether exclude the possibility of the gate, for example, if there was some common service on the Strip which the owners of Summerhill might need to access. The fact that there might be a gap or gate in that part of the boundary might perhaps make it less likely that the part of the same fence along the access way also excluded the possibility of a gate.

40. So far as the boundary with the access way is concerned, the most likely purpose of a fence in this location was to mark the boundary with the access way so that people using the access way did not use the garden, or damage it with their vehicles, and so that people using the garden or their pets or balls did not go on to the access way. This is consistent with the judge's finding that what happened after the Transfer was that the picket fence around the Strip was moved to mark the new boundary of Dawning. There was also evidence that there was some dispute with the servient owner as to the boundary of the access way.
41. The fence would then be performing the same function as the northern boundary of the Strip before the Transfer, that is, the function of marking a boundary, which is consistent with the owner of Dawning moving that fence to put it along the access way after the Transfer.
42. There is, moreover, authority in this Court that even the obligation to erect a stock-proof fence may not preclude a gate: see *Alford v Hannaford* [2011] EWCA Civ 1099, [40]. In determining the extent of a fencing covenant, all the relevant circumstances must be considered.
43. In addition a chestnut paling fence, as stipulated in the Transfer, would possibly not in any event preclude a stile, which would provide a limited form of access on to the access way.
44. Furthermore, at the time of the Transfer there was no plan to change the use of the access way or the surrounding properties (if there had been, one would have expected the servient owner to be a party to the Transfer). Therefore no reason suggests itself as to why the owner of Summerhill should want to stop his neighbour putting a gate into the fence if he (the neighbour) should wish to do so. Suppose, for example, that the owner of Dawning had wished to put up automatic gates across his driveway to control the entry of vehicles. If he had wished to insert a wicket gate into the fence of the Strip bordering the access way and next to his new automatic gates for visitors on foot, it is difficult to see that it could have been said that the covenant to fence precluded this reasonable use of his property. It seems to me that the hypothetical servient owner, if asked about this possibility at the time of the transfer, would have concluded that the gate would in those circumstances be treated as part of the fence, and as being in compliance with the fencing covenant. It cannot be the case that, simply because the fence was to cover a comparatively short length along the boundary with the access way, therefore the fencing covenant could in no circumstances have permitted a gate. Nor would there be any reason for Summerhill

to prevent this when there was no similar restriction on that property. As I see it, the servient owner would perceive no change in this.

45. The judge considered it significant that the parties did not register the existence of the right of way when they registered the Transfer but the right of way was ultimately registered against the Strip. I would not give this point the same significance for the reason that Mr Bredemear gave, namely that it could still pass under LPA, s.62.
46. On the subject of s 62, we invited further submissions on the effect of s 62 (4), and I am most grateful for the submissions we received. However, I am satisfied as a result of those submissions that the right of way could still be abandoned even if s 62 (4) did not operate to exclude it from the Transfer, so that s 62 (4) does not have any role to play on this appeal. We also asked for further submissions on *Midland Railway Company v Gribble* [1895] 2 Ch D 129, approved (within, I note, a period of three months) by this Court: [1895] 2 Ch D 827. Lord Justice Richards found the authority in *Gale* (paragraph 12-86) and it appeared relevant at one point to Issue 3, but on analysis does not assist. In that case, this Court appears to have rejected the argument that a right of way could be suspended when property was divided but returned to common ownership. This case turns on the rights which the original holder of the right of way obtained from the railway company under the Railways Clauses Consolidation Act 1845, and no greater right than was conferred by that legislation could revive, and so the Conveyancing and Property Act 1881, s 6 (1) and (4), which was in the same form as LPA, s 62(1) and (4) was not in point, and indeed no reference is made to those provisions. As *Gale* states (paragraph 12-79), this case is to be contrasted with

the doctrine that a mere intermittence of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the right, does not amount to an abandonment.
47. In the present case, there is an intermittence, that is, a discontinuance of any exercise of the right of way from the Strip to the access way for the duration of the fencing covenant in the Transfer, but that covenant could be released by the parties to it at any time. Having reached that conclusion, it is unnecessary to consider the point about the gas pipe, which was not raised at trial.
48. I do not accept that it has to be assumed that the hypothetical servient owner has no knowledge of the law. That would be contrary to principle and indeed it is difficult to see how the *Dwyer* principles work unless the hypothetical servient owner is deemed to have some knowledge of the law. In my judgment, a servient owner should generally be taken to know that the obligation to fence would not run with the land and bind any successor of the transferee. In this particular case, that is reinforced by the fact that the servient owner would appreciate that, as he was not a party to the Transfer, he could not enforce any contractual obligation to which it gave rise. Mr Althaus submits that he would be influenced to the contrary conclusion in this case because the parties expressed the covenant to bind successors in title of Dawning. I think that in the circumstances I have mentioned a servient owner would attach little weight to this.

49. The *Dwyer* principles make it clear that abandonment is not to be lightly inferred. Here we have a chestnut paling fence which is hardly a major obstruction to anyone seeking to use the access way from the Strip. Even a major obstruction does not necessarily result in abandonment of a right of way. In *Jones v Cleanthi* [2007] 1 WLR 1604 (which is mentioned in *Gale* at paragraph 12-12), this Court held that the erection by a landlord of a wall across a tenant's right of access to communal bins pursuant to fire safety legislation did not extinguish the tenant's right of way: it was enough that there was a possibility that the wall would be removed in the future so that the rights would once again become exercisable. Jonathan Parker LJ, with whom Pill LJ and Sir Peter Gibson agreed, held:

85. In the circumstances of the instant case, therefore, I am not prepared to hold that the erection of the wall pursuant to the section 352 notice had the effect of extinguishing the claimant's rights once and for all. In my judgment the court should recognise the possibility (albeit it may be a remote possibility) that at some time during the remainder of the term granted by the lease, whether as a result of a change of use or of a change in the relevant legislation or for some other reason, there may no longer be any statutory impediment to the exercise of the claimant's rights and that they may once again become exercisable.

50. If that is so in relation to an obstruction in the form of a wall, a much more permanent structure than a fence and also one required to be built by statute, it is difficult to see how there could be an extinction of the right of way if there is a mere contractual right to fence the boundary which adjoins the access way by a non-permanent form of fencing.
51. Moreover, the servient tenement, who would be a person most keenly interested if there was to be an abandonment of the right of way, was not even a party to the contractual arrangement in question. If the abandonment was effective, it might well lead to the result that the owner of the Strip was not liable to contribute to the maintenance of the access way.
52. Likewise, when giving permission to appeal, Patten LJ cited *Carder v Davies* (1998) 76 P & C R 33. In that case, the question was whether the owner of land had abandoned a right of way even though she had built a wall across the way on her land. Peter Gibson LJ rejected that argument. The easement owner had a completely unfettered right to enter on the roadway and could not be confined to a particular access point merely because of the existence of a wall over or through which where it stood she could not conveniently gain access.
53. Mr Bredemear submits that any contrary conclusion would mean that the Strip was landlocked. I do not accept that submission. The Strip is a comparatively minor part of the property in which Dawning stands and in my judgment it could properly be regarded as ancillary to Dawning so that, if the Strip no longer enjoys any right of way on to the access way, the right of way to Dawning could be used for the purpose of the Strip also. Moreover, the use of the Strip was restricted to use as a garden with the existing house on Dawning. That is clearly what the parties to the Transfer intended since there is no obligation to fence that part of the Strip which was

contiguous to the driveway leading up to the house on Dawning. Mr Bredemear referred us to cases in *Gale* at paragraph 9-49 to 9-50 which suggest that there can be a fine line between cases where use of a right of way to benefit additional land is permitted and cases where it is held to be excessive user of the right of way: see, for example, *National Trust v White* [1987] 1 WLR 907 and *Das v Linden Mews Ltd* [2003] 2 P C & R 58. This Court considered these cases in its recent judgment in *Gore v Naheed*. There is nothing in the 1962 Conveyance to exclude ancillary use.

54. I observe that under clause 3 of the 1962 Conveyance, the vendor, the owner of Salterns, covenanted to maintain the access road in good repair. The purchaser of Summerhill and its successors in title were obliged to contribute. However, the parties made no reference to this in the Transfer. In his further submissions, Mr Althaus submits that this is relevant to the judge's conclusion that the right of way had been abandoned. Moreover the evidence at trial showed that there had been a recent repair of the road in 2008 and the appellant's contribution was calculated by reference only to the original length of the property of Dawning which was appurtenant to the access way and not the Strip. As I have held that the hypothetical servient owner would not have concluded that the right of way had been abandoned, I do not consider that this evidence is of any assistance on Issue 1. The issue had to be determined at the date of the Transfer.
55. Issue 2 does not on this basis arise, and so I need not deal with it.
56. That leaves Issue 3, and the question whether, if Summerhill and the Strip were now united in a single title, the right of access from the Strip to the access way would enure for the benefit also of Summerhill. Clearly this is not a situation in which that user of the right of way would be ancillary to that conferred for the Strip.
57. In my judgment, the effect of reunification is that the same rights must revive as existed prior to the splitting of the Strip for the reasons given by Carnwath LJ in *Wall v Collins* (paragraph 33 above). On this issue, therefore, I also respectfully disagree with the judge.
58. On severance of the Strip from Summerhill, the right of way which Summerhill had to the access way through the Strip was not extinguished by the sale of the Strip but went into abeyance, and was not terminated. The position is the same as would be the case if the dominant owner acquires the servient tenement. When he sells the servient tenement, the right revives: *Simper v Foley* (1862) 2 J & H 555, 70 ER 1179.
59. This is perfectly consistent with my answer to Issue 1. So long as there is a possibility that Summerhill and the Strip would be re-united, there is no basis for saying that the vendor (owner of Summerhill) had abandoned the easement across the Strip to the access way should the titles be reunited in the future.
60. It is also perfectly consistent with what I take to be the reason for that principle, namely that rights over land should not be lost, so that the land becomes less economically useful, unless the court is driven to the conclusion that that was a decision for all time. It makes precious little sense for the properties to be restored to common ownership and yet not to have the rights which attached to them as a single unit before, unless that result was clearly the parties' intention. I do not consider that that can be inferred from clause 2(a) which reserved rights other than rights of way

because that sub-clause was not dealing with the situation of re-unification but of division.

61. The judge may have had in mind that where unity of ownership occurs between dominant and servient tenement, restrictive covenants are extinguished (*Re Victoria Recreation Ground, Portslade's Application* (1979) 41 P. & C.R. 119), but that is a different situation.
62. For the reasons given above, I would allow this appeal.

LORD JUSTICE DAVID RICHARDS:

63. I agree that this appeal should be allowed. As regards Issue 3, I agree with the reasons given by Arden LJ and I have nothing to add.
64. As regards Issue 1, Arden LJ would allow the appeal on two grounds. First, the covenant to fence did not preclude the transferee of the Strip from including a gate in the fence and thereby gaining access to and using the access way. Second, even if the covenant did preclude the transferee from including a gate in the fence, the covenant did not have the effect of an abandonment of the right of way, for the reasons given by Arden LJ in her judgment at [47] – [54]. I agree that the appeal on Issue 1 should be allowed on the second ground, for the reasons given by Arden LJ.
65. However, I take a different view on the effect of the covenant to fence. In my judgment, in the particular circumstances of the relevant properties and the terms of the Transfer, the covenant did preclude the transferee from gaining access to the access way through a gate or gates in the fence.
66. It is apparent from the authorities cited by Arden LJ that there is no hard and fast rule that a covenant to fence either does or does not preclude the inclusion of a gate or gates. It is a question of construction of the covenant in accordance with the usual principles. In the particular circumstances existing in *Wheeler v JJ Saunders Ltd* [1996] Ch 19, Peter Gibson LJ (with whom Sir John May was inclined to agree) considered that the covenant to fence precluded the inclusion of any gate. By contrast, in the very different circumstances existing in *Hillman v Rogers* (unreported, 19 December 1997, [1997] Lexis Citation 5033) and *Shrewsbury v Adam* [2005] EWCA Civ 1006; [2006] 1 P&CR 27, this court held that the covenants to fence did not preclude a gate or gates.
67. I consider the relevant circumstances in this case to be as follows. First, neither the covenant nor the other provisions of the Transfer contain any reason for thinking that the parties intended that a gate might be included, unlike in *Shrewsbury v Adams*. Second, the Strip was to be used only as a garden in connection with Dawning (covenant (a)). Dawning already had a garden round the house and the Strip would form part of it. Third, there was no need for the transferee to have access to the Strip from the access way. The access way was relatively short and there would be the same access to the Strip as to the rest of the garden of Dawning. Moreover, if the transferee wanted direct access to it, this could be achieved without difficulty from Dawning's own driveway just feet from the access way. Fourth, viewed objectively, the owners of Summerhill had good reason for not wishing the transferee to use the access way running beside the Strip. Prior to the Transfer only the proprietors of

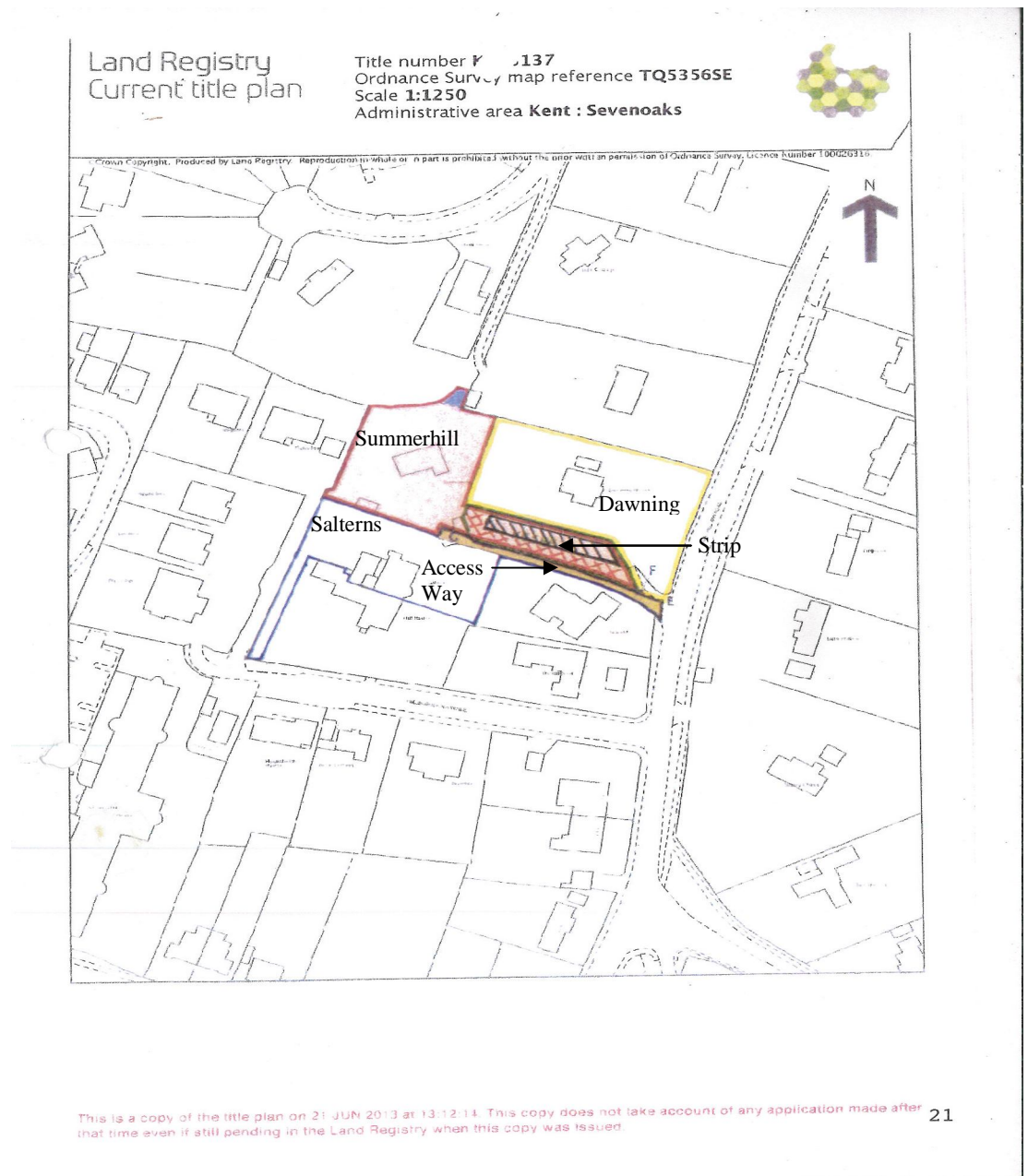
Salterns and Summerhill, and their licensees, were entitled to use the access way. The transferee could have good reason for not wanting that use to be extended to the proprietors of Dawning. Fifth, the covenant to fence was an obligation imposed on the transferee by the vendor; it was for the benefit of the vendor, not the transferee. The benefit to the vendor would include the exclusion of the transferee from use of the access way beyond the existing express right of way enjoyed over the first 40 feet of the access way, giving access to Dawning.

68. For these reasons, I have reached a different conclusion on the effect of the covenant to fence, but, as I have explained, I nonetheless agree that the appeal should be allowed.

Schedule

Plan of Summerhill, Dawning, Salterns, the Strip and the access way

Summerhill (with its boundary marked in a heavy line) is situate to the west of Dawning and the north of Salterns. The Strip is the combination of the two cross-hatched areas.





Neutral Citation Number: [2018] EWCA Civ 555

Case No: B2/2016/0641

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE TUNBRIDGE WELLS COUNTY COURT
HIS HONOUR JUDGE SIMPKISS
3TN00252

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2018

Before :

LADY JUSTICE ARDEN
and
LORD JUSTICE DAVID RICHARDS

Between :

Clare Elizabeth Annetts

**Claimant/
Respondent**

- and -

Nureni Adetunji Adeleye

**Defendant/
Appellant**

Zachary Bredemear (instructed by **DWF LLP**) for the **Appellant**
Justin Althaus (instructed by **Batchelors Solicitors**) for the **Respondent**

Hearing date: 5 December 2017
Further submissions filed 8,12,19 & 21 December 2017

Approved Judgment

LADY JUSTICE ARDEN :

BRIEF SUMMARY OF THIS APPEAL AND MY CONCLUSIONS

1. The appellant seeks to establish that a right of way over an access way to a strip of land in Sevenoaks (“the Strip”) has not been abandoned by entry into a covenant to fence the boundary between the Strip and the access way. Stated very briefly, the right of way was created in 1962 by the owner of a property called Salterns, who owned the access way, in favour of the purchaser of adjoining land (“Summerhill”). At that time Summerhill included the Strip. By a transfer dated 10 October 1988 (“the Transfer”) the Strip was severed from the rest of Summerhill and sold to the owner of the neighbouring property (“Dawning”). Under the Transfer the purchaser undertook to erect, and for ever after maintain, a fence between the Strip and the access way. HHJ Simpkins, sitting in the Tunbridge Wells County Court, held that this meant that this case was:

one of those exceptional cases where it can be said that the right of way (insofar as it previously benefited the strip) has been abandoned or released by implication. Further points which suggest that this is what was intended (although of much lesser relevance) are that no right of way was registered when the new title to the strip was formed. The parties could also have made it expressly clear that the strip had the benefit of the right of way and also have identified or provided for a point of access.

2. The judge went on to hold that the right of way would not revive if the Strip and Summerhill were to be re-united under the name of a single owner. He held:

Summerhill did not reserve the right of way over the strip for the benefit of the land which was retained in 1988. Following the transfer, there was therefore no right of way for the benefit of Summerhill from across the strip. I cannot see a reunification of the 2 plots could re-create a right of way from the access way across the strip for the benefit of Summerhill without there having been at least an express reservation when the land was divided in 1988. This is in any event academic, since I have found that the right of way was abandoned so far as it benefited the strip.

3. The plan scheduled to this judgment shows the location of the properties with which we are primarily concerned.

4. The critical parts of the Transfer read as follows:

1. The Transferees(s) hereby covenant(s) with the Transferor(s) so as to benefit the land owned and retained by the Transferors known as ‘Summerhill’ Seal Hollow Road comprised in the above title number or any part or parts thereof and so as to bind

the land hereby transferred into whosoever's hands the same may come...as follows:

(a) Not to use the land for any purposes other than as a garden in connection with the Transferees' existing property and not to erect any buildings or other structures on the land whether permanent or temporary of any nature whatsoever without the prior written approval of the Transferors such approval not to be unreasonably withheld

(b) Not to carry out on the property anything which will become a nuisance or annoyance to the Transferors or the owner or owners of the retained land

(c) Within 3 months of completion to erect and forever after maintain a good and sufficient fence along the boundary of the land and driveway leading to the Transferors retained land with chestnut paling fence or such similar materials as may be agreed between the parties hereto such fence to be approximately three feet six inches in height.

2. There is excepted and reserved to the Transferors the following:

(a) all ...rights and easements quasi-rights or quasi-easements...(other than rights of way)...

5. The judge heard oral evidence and had the benefit of a site visit.
6. It is common ground that the right of way passed under the Transfer but the respondent argues that the purchaser simultaneously abandoned it by entering into the covenant to fence. The appellant denies this and submits among other matters that the fencing covenant did not exclude the possibility of a gate. Moreover, on the appellant's case, the parties to the Transfer could always have agreed to release the fencing covenant. That would have been the obvious step for the parties to take if the owner of Dawning wished to develop his property.
7. In my judgment, for the reasons given below and after consideration of the parties' detailed submissions, the judge was wrong in law to conclude that the right of way had been abandoned. The covenant to fence did not demonstrate an intention that the right of way over the Strip should be extinguished. Moreover, in my judgment, if Summerhill and the Strip were again to be united under one owner (as is now possible as they are owned by husband and wife), the right of way enjoyed before the Transfer would become exercisable for the same purposes as it could be exercised before the Transfer: the owner of Summerhill could therefore use the Strip to reach the access way.

LEGAL FRAMEWORK

8. It was common ground before the judge and in this Court that on a question as to the abandonment of a right of way, the applicable legal principles are those summarised

by *Gale on Easements* and cited with approval by this Court in *Dwyer v Westminster CC* [2014] 2 P & CR 7. They are as follows:

- a. whether a person intends an abandonment is not a subjective question; it is always a question of fact to be ascertained from the surrounding circumstances whether the act amounts to an abandonment or was intended as such;
 - b. abandonment depends on the intention of the person alleged to be abandoning the right of way as perceived by the reasonable owner of the servient tenement; to establish abandonment of an easement the conduct of the dominant owner must have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement;
 - c. abandonment is not to be lightly inferred; owners of property do not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use for it;
 - d. non-user is not by itself conclusive evidence that a private right is abandoned; the non-user must be considered with and may be explained by the surrounding circumstances.
9. This Court added in *Dwyer* that the lack of any need on the part of the owner of the dominant tenement to use the right of way for a time would reinforce the conclusion that the right of way had not been abandoned. The parties have not relied on that point but it does have some resonance as there is no evidence that the owner of Dawning wished to enter the access way from the Strip prior to the events giving rise to these proceedings.
10. These principles require the court to find the objective intention of the person alleged to have abandoned the right of way as reasonably perceived by the servient owner. It is irrelevant whether the servient owner actually knew about the transaction because the test is one of the reasonable perception of the servient owner and what he would conclude as to the dominant owner's intentions.

FURTHER RELEVANT REASONING IN THE JUDGMENT

11. The judge drew certain inferences from the Transfer:
- a. It was not contemplated that the Strip would be used for anything other than a garden, since there was a covenant to that effect by the purchasers. While it was contemplated that a building might be built on

the land that could only be done with the approval of the owners of Summerhill and the building had to be one which was not inconsistent with the Strip's use as a garden.

- b. As the entrance to Dawning was at the eastern end of that property, it was reasonable to infer access that the Strip would be from that drive, whereas while it was part of the Summerhill title, access was from the Summerhill drive.
 - c. The covenant to erect and thereafter maintain "*forever*" a fence between the Strip and the drive strongly suggested that it was not intended that there should be any access to the Strip from the access way. The Transfer did not permit a gate in the fence between the Strip and the access way.
12. Counsel appearing at trial for the appellant (not Counsel appearing in this Court) conceded that any access for the benefit of the Strip could not be used to access Dawning.

ISSUES TO BE DETERMINED ON THIS APPEAL

13. The parties have helpfully formulated the issues that need to be determined on this appeal as follows:
1. Was the judge wrong to hold that the right of way, so far as it benefited the Strip, was abandoned by the 1988 Transfer?
 2. If the judge was right on abandonment, should he have held that the abandonment was only partial and that the Strip continued to benefit from a right of way over the first 40 feet of the Access Road so that access to the Strip could be obtained via Dawning? (The respondent initially objected to this issue on the grounds that the point had not been pleaded or argued below, but ultimately agreed that it could be raised as it was one of law).
 3. If there was no abandonment, was the judge wrong to decide that the right of way could not be used to provide access to the retained part of Summerhill across the Strip even if the Strip and the retained part of Summerhill came into common ownership?

PARTIES' SUBMISSIONS

Issue 1

14. Mr Zachary Bredemear, for the appellant, submits that it is significant that the servient owner was not a party to the Transfer. The land register would simply show that the Transfer had been executed and the parties had not registered the right of way over the Strip but he would also know that the right of way would pass under Law of

Property Act 1925 (“LPA”), s 62, subject to s 62 (4). The right of way was ultimately registered against the Strip in 2008.

15. LPA, s 62 (1) and (4) provide:
 - (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all rights, and advantages whatsoever, appertaining or reputed to appertain to the land, ...
 - (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.
16. As to s 62 (4), Mr Bredemear submits that there is nothing in the Transfer to rebut the implication of the right of way. The servient owner would see a reference to buildings in the Transfer but this was not particularly significant because this appears to be a reference to buildings for the purposes of gardening, such as a garden shed.
17. Mr Bredemear submits that a strong factor against abandonment was the fact that, if the judge was right, the Strip was landlocked. He contends that it would have been an excessive user of Dawning’s right of way to use the access way to reach the Strip: *Harris v Flower* (1904) 74 LJ Ch. 127. It is inherently unlikely that the parties to the transfer intended that the Strip would be landlocked.
18. Mr Bredemear submits that the transferor had a clear incentive to retain the right to authorise use of the Strip other than as a garden in the future because he might obtain a payment out of that.
19. In any event, Mr Bredemear submits, it seems odd to say that a covenant to fence excludes a right of way. A fence is simply there to screen a property and to ensure that boundaries are observed and to ensure that stray animals do not get on to the access way. It is not obviously a condition intended to exclude a right of way.
20. Mr Bredemear further submits that the covenant to fence was a positive covenant which did not run with the land so that the servient owner would not have drawn the conclusion that the covenant would be enforceable by injunction beyond the ownership of the current owner. The respondent accepts that as a matter of law the covenant to fence did not run with the land, but submits that the servient owner would nonetheless not automatically have jumped to the conclusion that the parties had reserved the right to alter the covenant in the future because the covenants were expressed to bind successors in title.
21. Mr Bredemear contends that the judge was wrong to say that the fence could not include a gate. On that basis there was obviously no abandonment. He further submits that a fence is not sufficient to constitute abandonment. There has to be a significant blockage of the access point (see *Gale* paragraph 12-90 to 12-92 and *Snell & Prideaux v Dutton Mirrors Ltd* [1995] 1 EGLR 259). He submits that a covenant

to erect and maintain a fence is not enough to constitute evidence of an intention to abandon a right of way. In any event, the covenant to fence could be released or varied and so it did not demonstrate an intention to abandon.

22. By virtue of clause 2 (b) of the Transfer the vendor reserved the right to use the existing gas pipe under the Strip, together with the right of entry to maintain it. Mr Bredemear submits that it was most likely that the parties intended that there would have to be access to the Strip from the access way for this purpose. Accordingly, he submits that this reservation was indicating that access might still be required.
23. Mr Justin Althaus, for the respondent, submits that certain arguments now advanced were not raised before the judge e.g. (a) application of *Harris v Flower* (b) right to use the gas pipe (c) partial abandonment and (d) that the covenant to fence constitutes a positive covenant, but, as he recognised, (with the possible exception of (b)) these were all points of law. The usual course in those circumstances is for this Court to allow them to be argued.
24. Mr Althaus submits that the *Dwyer* principle (c) (paragraph 8 above) reflects common sense. Parties may wish to abandon a right of way where they acquire a piece of land. Mr Althaus submits that that is what happened in this case. The purchaser's covenant to fence is a condition that did not disadvantage him even if he abandoned the right of way because he did not need it.
25. Mr Althaus submits ordinary residential use of the dominant tenement, as part of the garden of Dawning, is an ancillary use and therefore the Strip is not land-locked: see *Gore v Naheed* [2017] EWCA Civ 369. So, on his submission, that is not a reason for saying that the right of way was not abandoned.
26. As to the question whether the covenant to fence would have implicitly permitted a gate to be inserted in the fence, Mr Althaus points out that in *Wheeler v JJ Saunders Limited* [1996] Ch 19, Peter Gibson LJ held that the function of the gate was different from that of a fence. He held at 31G to 32B as follows:

I part company from 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. A gate is intended to prevent ingress and egress only when it is shut. It is of the essence of a gate that it can be opened whereas a fence cannot be opened and, as Ferris J. pointed out, the covenant to fence does not refer to a gate. What was plainly contemplated as the purpose of the covenant was that between the plaintiffs' property and the vendors' property there should be a stockproof barrier so that no stock from one property could pass to the other property. 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. Accordingly I would allow this part of the appeal and discharge both the mandatory injunction to remove the wall and the order that the first and second defendants pay £500 by way of general damages for the obstruction of the right of way.

27. Sir John May (at 36G to 37A) held that a gate may be opened or left open by design or mistake and in such condition would not satisfy the requirement of a covenant, but did not reach a final conclusion. Staughton LJ, giving the first judgment, considered that there was much to be said for the argument that a gate could if sufficiently solid count as part of the fence for the purposes of a covenant to fence in that case but he did not express a concluded view (page 26 C).
28. In *Hillman v Rogers*, (unreported, 19 December 1997, [1997] Lexis Citation 5033), Robert Walker LJ, with whom Butler-Sloss J agreed, held “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 specific materials in a position meticulously defined on an accurate large scale plan.”
29. Mr Althaus submits that these observations reinforce the argument that the judge with the benefit of a site visit was in the best position to consider whether a gate was permitted by the covenant. On that basis the judge’s decision should not be disturbed.

Issue 2

30. Mr Bredemear’s alternative submission is that the right of way should be treated as partially abandoned so that it retained a right of way until the point where Dawning was first reached. He submits that this is more logical than total abandonment. There would then be no need to break into the fence and the owner of the Strip could use the easterly boundary right of way. Unless the abandonment is partial, the Strip is land-locked for the reason already given.
31. Mr Althaus submits that partial abandonment is possible in law but an easement must be appurtenant to land. The first forty feet of the access way lies between the parcels belonging to Dawning and to the respondent. The access way did not belong to the purchaser of Summerhill and it could not therefore pass to the owner of the Strip. Moreover, if the judge was entitled to find abandonment, the purchaser of Summerhill could not use the first forty feet of the access way to access the Strip. On that basis it was no longer part of the dominant tenement and there would be excessive user.

Issue 3

32. The judge concluded that, even if Summerhill and the Strip were reunited, the common owner could not access Summerhill via the Strip. Mr Bredemear submits that this conclusion was wrong and that those properties together had a bundle of rights, and that, unless something is done to take away those rights, none of those rights should be abstracted when they come to be unified. Otherwise the consequence is that the servient owner is enabled to derogate from his grant by transfer and re-transfer. He submits that, in the absence of direct authority, the matter has to be decided as a matter of common sense.
33. Mr Bredemear relies on *Wall v Collins* [2007] Ch 390 as authority for the proposition that, if a lessee acquires the freehold, rights of way conferred by the leasehold interest are not affected by the fact that the lease merges into the freehold. Carnwath LJ, with whom Hooper and Mummery LJ agreed, held that, as a matter of common sense the rights attached to the leasehold interest should not be affected by merger of the leasehold interest into the freehold. He held (at [18]) that:

The owner of a servient tenement should not be able to escape the burden of an easement by dealings to which those interested in the dominant tenement are not parties. Equally, as a matter of common sense, it is difficult to see why a lessee should be worse off, so far as concerns an easement annexed to the land, merely because he has acquired a larger interest in the dominant tenement.

34. Mr Bredemear submits that *Ward* shows that rights can survive dealings in the dominant tenement and that transactions in the dominant tenement do not affect the right of way. The scope of the right of way before division and after reunification is one and the same, so that there is no question of the burden on the servient tenement being increased or reduced.
35. Mr Althaus also submits that there is no authority directly in point. He seeks to uphold the judge's conclusion that there needed to be an express reservation by Summerhill in the Transfer of rights of access via the Strip in order for a later common owner of Summerhill and the Strip to be so restored to their pre-Transfer entitlements.
36. Mr Althaus submits that the appellant has not demonstrated that those conclusions were wrong. The transferors could have reserved in the Transfer a right to pass along the access way to access the Strip. If they had done so, and there was no abandonment, they would still have enjoyed the right of way to themselves but not through the Strip. In addition, the Strip would have enjoyed the right of way along the access way to enter the Strip, but not Summerhill. Each of the two parts of what was then a single dominant tenement still enjoyed a right of way. Neither part enjoyed access to the other as an incident of the division. The judge's conclusion (at paragraphs 67 to 68 of his judgment) was that accordingly, if and when the two parts were reunited the common ownership, user of the right of way over the Strip for the benefit of Summerhill would be excessive user of the rights in question.

DISCUSSION

37. On the principles summarised by *Gale* and accepted by this Court in *Dwyer*, the issue the judge had to decide was whether the hypothetical servient owner would have considered that the right of way from the Strip to the access way had been abandoned. A suitable starting point is to determine the circumstances as they existed at the time of the Transfer as those circumstances would inform the perception of the servient owner as to the effect of the fencing covenant in the Transfer.
38. The first point a servient owner would note is that the Transfer was only an agreement between the owners of Summerhill and Dawning, the dominant owners. It is unlikely, therefore, that he would have considered that this document had any effect on his obligations as servient owner.
39. The servient owner would have been very familiar with the site. Although the judge had a site visit, he does not record that there was any particular feature of the Strip or the adjoining properties which led him to his conclusion that the covenant to fence excluded the possibility of a gate. We do have some clue, however, from the fact that the fence was to be a chestnut paling fence three foot six inches in height. This of

course is consistent with the restriction to garden use in conjunction with Dawning, as such a fence is suitable for preventing children and others going on to the access way: it was certainly not a stock-proof fence, where a gate might give rise to the risk of animals escaping on the access way. It would also be apparent to him that the new fence on the western boundary of the Strip was intended to mark the boundary between the Strip and Summerhill. Even that part of the boundary did not altogether exclude the possibility of the gate, for example, if there was some common service on the Strip which the owners of Summerhill might need to access. The fact that there might be a gap or gate in that part of the boundary might perhaps make it less likely that the part of the same fence along the access way also excluded the possibility of a gate.

40. So far as the boundary with the access way is concerned, the most likely purpose of a fence in this location was to mark the boundary with the access way so that people using the access way did not use the garden, or damage it with their vehicles, and so that people using the garden or their pets or balls did not go on to the access way. This is consistent with the judge's finding that what happened after the Transfer was that the picket fence around the Strip was moved to mark the new boundary of Dawning. There was also evidence that there was some dispute with the servient owner as to the boundary of the access way.
41. The fence would then be performing the same function as the northern boundary of the Strip before the Transfer, that is, the function of marking a boundary, which is consistent with the owner of Dawning moving that fence to put it along the access way after the Transfer.
42. There is, moreover, authority in this Court that even the obligation to erect a stock-proof fence may not preclude a gate: see *Alford v Hannaford* [2011] EWCA Civ 1099, [40]. In determining the extent of a fencing covenant, all the relevant circumstances must be considered.
43. In addition a chestnut paling fence, as stipulated in the Transfer, would possibly not in any event preclude a stile, which would provide a limited form of access on to the access way.
44. Furthermore, at the time of the Transfer there was no plan to change the use of the access way or the surrounding properties (if there had been, one would have expected the servient owner to be a party to the Transfer). Therefore no reason suggests itself as to why the owner of Summerhill should want to stop his neighbour putting a gate into the fence if he (the neighbour) should wish to do so. Suppose, for example, that the owner of Dawning had wished to put up automatic gates across his driveway to control the entry of vehicles. If he had wished to insert a wicket gate into the fence of the Strip bordering the access way and next to his new automatic gates for visitors on foot, it is difficult to see that it could have been said that the covenant to fence precluded this reasonable use of his property. It seems to me that the hypothetical servient owner, if asked about this possibility at the time of the transfer, would have concluded that the gate would in those circumstances be treated as part of the fence, and as being in compliance with the fencing covenant. It cannot be the case that, simply because the fence was to cover a comparatively short length along the boundary with the access way, therefore the fencing covenant could in no circumstances have permitted a gate. Nor would there be any reason for Summerhill

to prevent this when there was no similar restriction on that property. As I see it, the servient owner would perceive no change in this.

45. The judge considered it significant that the parties did not register the existence of the right of way when they registered the Transfer but the right of way was ultimately registered against the Strip. I would not give this point the same significance for the reason that Mr Bredemear gave, namely that it could still pass under LPA, s.62.
46. On the subject of s 62, we invited further submissions on the effect of s 62 (4), and I am most grateful for the submissions we received. However, I am satisfied as a result of those submissions that the right of way could still be abandoned even if s 62 (4) did not operate to exclude it from the Transfer, so that s 62 (4) does not have any role to play on this appeal. We also asked for further submissions on *Midland Railway Company v Gribble* [1895] 2 Ch D 129, approved (within, I note, a period of three months) by this Court: [1895] 2 Ch D 827. Lord Justice Richards found the authority in *Gale* (paragraph 12-86) and it appeared relevant at one point to Issue 3, but on analysis does not assist. In that case, this Court appears to have rejected the argument that a right of way could be suspended when property was divided but returned to common ownership. This case turns on the rights which the original holder of the right of way obtained from the railway company under the Railways Clauses Consolidation Act 1845, and no greater right than was conferred by that legislation could revive, and so the Conveyancing and Property Act 1881, s 6 (1) and (4), which was in the same form as LPA, s 62(1) and (4) was not in point, and indeed no reference is made to those provisions. As *Gale* states (paragraph 12-79), this case is to be contrasted with

the doctrine that a mere intermittence of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the right, does not amount to an abandonment.
47. In the present case, there is an intermittence, that is, a discontinuance of any exercise of the right of way from the Strip to the access way for the duration of the fencing covenant in the Transfer, but that covenant could be released by the parties to it at any time. Having reached that conclusion, it is unnecessary to consider the point about the gas pipe, which was not raised at trial.
48. I do not accept that it has to be assumed that the hypothetical servient owner has no knowledge of the law. That would be contrary to principle and indeed it is difficult to see how the *Dwyer* principles work unless the hypothetical servient owner is deemed to have some knowledge of the law. In my judgment, a servient owner should generally be taken to know that the obligation to fence would not run with the land and bind any successor of the transferee. In this particular case, that is reinforced by the fact that the servient owner would appreciate that, as he was not a party to the Transfer, he could not enforce any contractual obligation to which it gave rise. Mr Althaus submits that he would be influenced to the contrary conclusion in this case because the parties expressed the covenant to bind successors in title of Dawning. I think that in the circumstances I have mentioned a servient owner would attach little weight to this.

49. The *Dwyer* principles make it clear that abandonment is not to be lightly inferred. Here we have a chestnut paling fence which is hardly a major obstruction to anyone seeking to use the access way from the Strip. Even a major obstruction does not necessarily result in abandonment of a right of way. In *Jones v Cleanthi* [2007] 1 WLR 1604 (which is mentioned in *Gale* at paragraph 12-12), this Court held that the erection by a landlord of a wall across a tenant's right of access to communal bins pursuant to fire safety legislation did not extinguish the tenant's right of way: it was enough that there was a possibility that the wall would be removed in the future so that the rights would once again become exercisable. Jonathan Parker LJ, with whom Pill LJ and Sir Peter Gibson agreed, held:

85. In the circumstances of the instant case, therefore, I am not prepared to hold that the erection of the wall pursuant to the section 352 notice had the effect of extinguishing the claimant's rights once and for all. In my judgment the court should recognise the possibility (albeit it may be a remote possibility) that at some time during the remainder of the term granted by the lease, whether as a result of a change of use or of a change in the relevant legislation or for some other reason, there may no longer be any statutory impediment to the exercise of the claimant's rights and that they may once again become exercisable.

50. If that is so in relation to an obstruction in the form of a wall, a much more permanent structure than a fence and also one required to be built by statute, it is difficult to see how there could be an extinction of the right of way if there is a mere contractual right to fence the boundary which adjoins the access way by a non-permanent form of fencing.
51. Moreover, the servient tenement, who would be a person most keenly interested if there was to be an abandonment of the right of way, was not even a party to the contractual arrangement in question. If the abandonment was effective, it might well lead to the result that the owner of the Strip was not liable to contribute to the maintenance of the access way.
52. Likewise, when giving permission to appeal, Patten LJ cited *Carder v Davies* (1998) 76 P & C R 33. In that case, the question was whether the owner of land had abandoned a right of way even though she had built a wall across the way on her land. Peter Gibson LJ rejected that argument. The easement owner had a completely unfettered right to enter on the roadway and could not be confined to a particular access point merely because of the existence of a wall over or through which where it stood she could not conveniently gain access.
53. Mr Bredemear submits that any contrary conclusion would mean that the Strip was landlocked. I do not accept that submission. The Strip is a comparatively minor part of the property in which Dawning stands and in my judgment it could properly be regarded as ancillary to Dawning so that, if the Strip no longer enjoys any right of way on to the access way, the right of way to Dawning could be used for the purpose of the Strip also. Moreover, the use of the Strip was restricted to use as a garden with the existing house on Dawning. That is clearly what the parties to the Transfer intended since there is no obligation to fence that part of the Strip which was

contiguous to the driveway leading up to the house on Dawning. Mr Bredemear referred us to cases in *Gale* at paragraph 9-49 to 9-50 which suggest that there can be a fine line between cases where use of a right of way to benefit additional land is permitted and cases where it is held to be excessive user of the right of way: see, for example, *National Trust v White* [1987] 1 WLR 907 and *Das v Linden Mews Ltd* [2003] 2 P C & R 58. This Court considered these cases in its recent judgment in *Gore v Naheed*. There is nothing in the 1962 Conveyance to exclude ancillary use.

54. I observe that under clause 3 of the 1962 Conveyance, the vendor, the owner of Salterns, covenanted to maintain the access road in good repair. The purchaser of Summerhill and its successors in title were obliged to contribute. However, the parties made no reference to this in the Transfer. In his further submissions, Mr Althaus submits that this is relevant to the judge's conclusion that the right of way had been abandoned. Moreover the evidence at trial showed that there had been a recent repair of the road in 2008 and the appellant's contribution was calculated by reference only to the original length of the property of Dawning which was appurtenant to the access way and not the Strip. As I have held that the hypothetical servient owner would not have concluded that the right of way had been abandoned, I do not consider that this evidence is of any assistance on Issue 1. The issue had to be determined at the date of the Transfer.
55. Issue 2 does not on this basis arise, and so I need not deal with it.
56. That leaves Issue 3, and the question whether, if Summerhill and the Strip were now united in a single title, the right of access from the Strip to the access way would enure for the benefit also of Summerhill. Clearly this is not a situation in which that user of the right of way would be ancillary to that conferred for the Strip.
57. In my judgment, the effect of reunification is that the same rights must revive as existed prior to the splitting of the Strip for the reasons given by Carnwath LJ in *Wall v Collins* (paragraph 33 above). On this issue, therefore, I also respectfully disagree with the judge.
58. On severance of the Strip from Summerhill, the right of way which Summerhill had to the access way through the Strip was not extinguished by the sale of the Strip but went into abeyance, and was not terminated. The position is the same as would be the case if the dominant owner acquires the servient tenement. When he sells the servient tenement, the right revives: *Simper v Foley* (1862) 2 J & H 555, 70 ER 1179.
59. This is perfectly consistent with my answer to Issue 1. So long as there is a possibility that Summerhill and the Strip would be re-united, there is no basis for saying that the vendor (owner of Summerhill) had abandoned the easement across the Strip to the access way should the titles be reunited in the future.
60. It is also perfectly consistent with what I take to be the reason for that principle, namely that rights over land should not be lost, so that the land becomes less economically useful, unless the court is driven to the conclusion that that was a decision for all time. It makes precious little sense for the properties to be restored to common ownership and yet not to have the rights which attached to them as a single unit before, unless that result was clearly the parties' intention. I do not consider that that can be inferred from clause 2(a) which reserved rights other than rights of way

because that sub-clause was not dealing with the situation of re-unification but of division.

61. The judge may have had in mind that where unity of ownership occurs between dominant and servient tenement, restrictive covenants are extinguished (*Re Victoria Recreation Ground, Portslade's Application* (1979) 41 P. & C.R. 119), but that is a different situation.
62. For the reasons given above, I would allow this appeal.

LORD JUSTICE DAVID RICHARDS:

63. I agree that this appeal should be allowed. As regards Issue 3, I agree with the reasons given by Arden LJ and I have nothing to add.
64. As regards Issue 1, Arden LJ would allow the appeal on two grounds. First, the covenant to fence did not preclude the transferee of the Strip from including a gate in the fence and thereby gaining access to and using the access way. Second, even if the covenant did preclude the transferee from including a gate in the fence, the covenant did not have the effect of an abandonment of the right of way, for the reasons given by Arden LJ in her judgment at [47] – [54]. I agree that the appeal on Issue 1 should be allowed on the second ground, for the reasons given by Arden LJ.
65. However, I take a different view on the effect of the covenant to fence. In my judgment, in the particular circumstances of the relevant properties and the terms of the Transfer, the covenant did preclude the transferee from gaining access to the access way through a gate or gates in the fence.
66. It is apparent from the authorities cited by Arden LJ that there is no hard and fast rule that a covenant to fence either does or does not preclude the inclusion of a gate or gates. It is a question of construction of the covenant in accordance with the usual principles. In the particular circumstances existing in *Wheeler v JJ Saunders Ltd* [1996] Ch 19, Peter Gibson LJ (with whom Sir John May was inclined to agree) considered that the covenant to fence precluded the inclusion of any gate. By contrast, in the very different circumstances existing in *Hillman v Rogers* (unreported, 19 December 1997, [1997] Lexis Citation 5033) and *Shrewsbury v Adam* [2005] EWCA Civ 1006; [2006] 1 P&CR 27, this court held that the covenants to fence did not preclude a gate or gates.
67. I consider the relevant circumstances in this case to be as follows. First, neither the covenant nor the other provisions of the Transfer contain any reason for thinking that the parties intended that a gate might be included, unlike in *Shrewsbury v Adams*. Second, the Strip was to be used only as a garden in connection with Dawning (covenant (a)). Dawning already had a garden round the house and the Strip would form part of it. Third, there was no need for the transferee to have access to the Strip from the access way. The access way was relatively short and there would be the same access to the Strip as to the rest of the garden of Dawning. Moreover, if the transferee wanted direct access to it, this could be achieved without difficulty from Dawning's own driveway just feet from the access way. Fourth, viewed objectively, the owners of Summerhill had good reason for not wishing the transferee to use the access way running beside the Strip. Prior to the Transfer only the proprietors of

Salterns and Summerhill, and their licensees, were entitled to use the access way. The transferee could have good reason for not wanting that use to be extended to the proprietors of Dawning. Fifth, the covenant to fence was an obligation imposed on the transferee by the vendor; it was for the benefit of the vendor, not the transferee. The benefit to the vendor would include the exclusion of the transferee from use of the access way beyond the existing express right of way enjoyed over the first 40 feet of the access way, giving access to Dawning.

68. For these reasons, I have reached a different conclusion on the effect of the covenant to fence, but, as I have explained, I nonetheless agree that the appeal should be allowed.

Schedule

Plan of Summerhill, Dawning, Salterns, the Strip and the access way

Summerhill (with its boundary marked in a heavy line) is situate to the west of Dawning and the north of Salterns. The Strip is the combination of the two cross-hatched areas.

