

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice Strand  
London WC2A 2LL

Date: Tuesday, 9 September 2003

**BEFORE:**

**MR JUSTICE LEWISON**

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**Between:**

**WESLEYVALE LTD**

**CLAIMANT**

- v -

**HARDING HOMES (EAST ANGLIA) LTD    DEFENDANT**

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(Official Shorthand Writer's to the Court)

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**MR BROCK QC** (instructed by **Holmes & Hill**) appeared on behalf of the **CLAIMANT**  
**MR FANCOURT QC** (instructed by **Bircham Dyson Bell**) appeared on behalf of the **DEFENDANT**

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**J U D G M E N T** (Amended By the Court)

## MR JUSTICE LEWISON:

1. By a conveyance dated 29 May 1979, the claimant, Wesleyvale Ltd, bought property, which included the Old Mill, adjacent to East Street in Colchester. By a further conveyance, dated 6 January 1988, Wesleyvale conveyed away part of the land, defined in clause 1(a) of the 1988 conveyance as the Property, while retaining land described in clause 1(b) of the conveyance as the Blue Land.

2. By clauses 2(a) and (b) of the 1988 conveyance, Wesleyvale reserved to itself rights of way and other rights. The material right for present purposes is the right reserved in clause 2(a) which reads as follows:

“Except in reserve to the vendor and its successors in title in respect of the Blue Land or any part thereof, the following rights over the Green Land for the benefit of the Blue Land and each and every part thereof, for whatever use the same may from time to time be put (a) a right of way with or without vehicles over the Green Land at all times and for all purposes and the right of entry from time to time with workmen and equipment for the purpose of constructing, maintaining, improving and repairing a metalled road thereon with associated footpaths, drainage, lighting and other services as the vendor, or its successors in title in respect of the Blue Land or any part thereof shall think fit, notwithstanding that during the period of any such works rights of passage over the Green Land may be obstructed or prevented, and provided that access to the hotel and the nightclub shall not be prevented or impeded without the consent of the purchaser, such consent not to be unreasonably withheld”.

3. The Green Land was defined in clause 1(d) of the 1988 conveyance as follows:

“The Green Land means that strip of land, 35 feet in width, being part of the property, and in approximately the position shown coloured green under plan numbered 1 attached hereto as the same is more particularly delineated on the plan numbered 2 (annexed hereto) and thereon edged with green”.

4. Plan 1 and plan 2 were annexed to the 1988 conveyance. Plan 1 appears to take the ordinance map as its base map. The Green Land is represented by a single coloured stroke, apparently made with a green felt-tipped pen running more or less north/south in more or less a straight line. The position of the Green Land on the ground is clearly, as the definition says in relation to plan 1, only approximate.

5. Plan 2 takes, as its base map, drawing 25 prepared by Stanley Bragg & Associates. They were architects who obtained planning permission on behalf of the claimant in 1979. That planning permission gave consent to a redevelopment of the claimant’s land, but the development was not fully implemented. The bundle contains a reduced version of the full plan, which is marked “not to scale”. The plan attached to the conveyance is clearly not a photocopy of the reduced plan. First, it is a full-sized plan. Second, heavy lines which appear around some of the buildings on the reduced plan do not appear on plan 2. Mr Brock invited me to infer that since the reduced version of drawing 25 was not marked “not to scale” plan 2 is not to scale either. I do not draw that inference.

6. As Mr Johnson, the architect, said in evidence, the indication “not to scale” is a warning that the reduction in size of drawing 25 may have distorted its scale. A better copy of the reduced plan reveals that the original full-sized plan was in fact drawn to the scale of 1:500. In addition, there is no evidence that the reduced version of drawing 25 was within the knowledge of both parties to the conveyance. In my judgment, the plan was and must be treated as a scaled drawing.

7. Mr Aristotimu senior, one of the directors of the claimant, said that the original purchaser of the land intended to implement the remainder of the planning permission. That would have involved building the conference centre shown on plan 2. The topography of the site at the date of the conveyance was as follows: at the southern end of the Green Land where it debouches onto East Street stands Siege House. That is a medieval building now used as a restaurant. Next to Siege House is a gate pillar. 22 feet to the west is another gate pillar. Both pillars are grade 2 listed. Both pillars are indicated on plan 2. Immediately to the west of the western gatepost is an old tree which is subject to a tree preservation order. Some 60 feet

to the north of East Street is another medieval building called The Miller's Cottage. The eastern flank of The Miller's Cottage has a right angle in it, and the northern half of that wall protrudes by some three or four feet. By 1988 The Miller's Cottage had been incorporated into the hotel referred to in the proviso to clause 2(a) of the conveyance.

8. The Green Land shown on plan 2 then passes to the east of the original mill buildings. They stand opposite the car park of Siege House. At the northern end of the Green Land, it narrows to a width of 13 feet. This width is similar to the width of the road leading to and then over the sluice gates in the River Con. That road and the road over the sluice gates constitute the only means of vehicular access into the claimant's retained Blue Land. If plan 2, attached to the conveyance, is treated as a scale plan, the Green Land is 22 feet wide at its southern end, which is the width between the gate pillars, and 13 feet wide at its northern end, which is the width of the road over the sluice gates. This is consistent with the topography on the ground.
9. It is clear from the lines, which the party's architects had plotted on a scale plan, that at no point is the Green Land, as shown on plan 2, 35 feet wide. How I should give effect to the apparently contradictory descriptions of the Green Land is the major issue between the parties.
10. The majority of the property is now vested in the first defendant and registered under title number EX372670. Part of the title to the property is registered in favour of the second defendant under title number EX696410. It is not necessary to distinguish between the defendants and I shall not do so. A further part of the property is now vested in an unconnected third party, registered under title number EX467475.
11. On 4 December 2001, the defendants applied for planning permission to carry out a development of the property. The applications, having come to the attention of the claimant, Mr Johnson, the architect, wrote to the planning department of the Colchester Borough Council on the claimant's behalf on 13 February 2002, asserting the claimant's right to a right of way 35 feet wide in accordance with the 1988 conveyance.
12. The defendant's architect said that the proposed development would not infringe the right of way and also objected this was not a valid planning objection, but a civil dispute between the parties.
13. Mr Burton, the planning officer, reported to the planning committee that the nature and extent of the right of way was a civil matter to be determined by the court in default of agreement between the parties and not a planning matter. At the meeting of the planning committee, the claimant withdrew its planning objection.
14. By a decision notice, dated 2 August 2002, the defendants were granted planning permission for a development on the property. The principal plan, relevant to that development, was drawing number H150/01 revision K. That equates to the plan marked D and referred to in paragraph 10 of the amended particulars of the claim. It shows the defendant's development proposals which are residential.
15. Plan K shows, by means of dotted lines, the extent of the Green Land as taken from plan 2. The road that the defendants intend to construct follow those dotted lines, subject to a minor realignment towards the southern end of the site. Indeed, in many places, it is wider than the space between the dotted lines. All the areas between the dotted lines consist of carriage way, curves, or footpath.
16. The planning authority has said the proposed road is of an adequate size to service not only development on the defendant's land, but also development on the claimant's retained land. The plan has since been revised again and the latest revision is revision N.
17. On 11 December 2002, the claimant's solicitors wrote to the defendants reasserting the claimant's rights. On 3 April 2003, representatives of the parties met on site. This meeting was originally relied on as having given rise to an estoppel. However, like many estoppels, it vanished in the cold light of day and Mr Fancourt no longer presses it.
18. The claimant has negotiated an agreement in principle for the sale of the Blue Land to Knight

Developments Ltd. Knight is represented by solicitors and Knight have not yet exchanged contracts and are becoming impatient at the delay. Indeed, they may well have withdrawn from the transaction.

19. It is, however, right to say that Knight were content with the width and reach of the road as the defendants proposed to construct it. What was of concern to them were rights to connect into such services as the defendants might lay under the road. The defendants are content for them or for the claimant, for that matter, to have such rights, but at a price. The claimant also points out that if, for whatever reason, the sale to Knight goes off, the subsequent buyer might insist on a full width of 35 feet.
20. By June 2003, the defendants had begun with a substantial development of the property. The claimant's representatives claimed that the proposed development would impinge on the right of way reserved by the 1988 conveyance. On 27 June 2003, Holmes & Hill, the solicitors for the claimant, gave notice of objection to Bircham, Dyson Bell, the defendant's solicitors, to works which they said would encroach on the right of way. The parties were unable to resolve their differences and these proceedings were issued on 25 July 2003.
21. The particulars of claim assert a claim to a right of way over a strip of land delineated by red lines on a plan attached to those particulars. That plan takes, as its base map, drawing K. It shows, by green lines, the extent of the Green Land as taken from plan 2. Those green lines do not coincide with the dotted lines on the base map, which as I have said were intended to show the extent of the Green Land as taken from plan 2. The median point between the green lines is shown by a broken red line. Two unbroken red lines are then drawn at a scaled distance of 17 feet six inches from the broken red line. This was claimed as the full extent of the 35 foot strip over which the rights exist. However, as Mr Fancourt was making his closing submissions, Mr Brock abandoned this construction.
22. The matter came before Neuberger J on an interlocutory application on 28 July 2003, resulting in an order of that date. The adjourned trial was listed for hearing on 8 September 2003 and came before me on that date, pursuant to Neuberger J's order. Since that order, the parties' architects have met to narrow issues. They have agreed that the lines plotted on the plan attached to the particulars of the claim are inaccurately plotted and they have now produced an agreed plan showing the green lines correctly plotted.
23. In my judgment, there is no interpretation of the conveyance that can give full effect to every part of it. One would naturally expect that the plan described as more particularly delineating a piece of land to take preference over a general verbal description in the parcels clause. Mr Fancourt relied heavily on this principle of construction. He referred me to the decision of the House of Lords in *Eastwood v Ashton*, [1915] AC 900. In the course of his speech, at page 915, Lord Sumner said:

“The deed purports to convey parcels describing four different ways: one by the name which the premises bear, two by their acreage, three by the names of those who respectively occupy part thereof and the remainder thereof, and four by delineation and tint on a plan to scale endorsed on the deed. I say describe in four way advisedly. I recognise the difference made by saying ‘all which said premises are more particularly described in the plan’ instead of ‘and all more particularly described in the plan’. The latter simply continues the series of descriptions by another mode of description. The former is a relative sentence to which the said premises are the antecedent. It qualifies, but does not enlarge them. It furnishes details within the extent of the antecedent; it does not make additions to it. Still the word ‘describe’ is there. When, as I think is the case, the description of the antecedent previously given is inconclusive and contradictory. The relative clause elucidates and completes the description of the antecedent just because it supplies particulars of the content to a fullness and indeterminate outline”.

24. Lord Wrenbury said, at page 920:

“My Lords, I find that the description by plan couched in the words ‘all which premises are more particularly described’ the words ‘more particularly’ exclude, I can see, that they have already been exhaustively described. These words seem to me that the previous description may be insufficient for exact limitation and that the plan is to cover all deficiencies, if any”.

25. He continued at page 921:

“My Lords, to my mind, the description of the parcels in this conveyance is equivalent to a description of parcels expressed as being Farm A containing blank acres in the occupation of B, more particularly described in a plan. In that description, I find no accurate and exhaustive description before reaching the plan. B may have adjoining lands in his occupation which are not part of Farm A. The acreage may be more or less than that stated. The name may convey such and such plots or may not. The earlier part is but a description by reference to certain characteristics of premises whose position and abutments are to be found on the plan”.

26. This approach was followed by Morton J in Wallington v Townsend, [1939] 2 All ER, 225. Having set out the word of the contract in that case, he continued:

“It [that is the contract] then proceeds with the words ‘as the same is more precisely delineated on the plan annexed hereto and thereon coloured pink’ there, for the first time in the schedule, one gets what appears to be a clear and definite description of a land which is being sold. I think this is a case in which the only definite description of what is being sold is contained in the plan”.

27. The decision in the latter case is a remarkable one on its facts, and one might respectfully question whether that decision would be reached today. In my judgment, the rationale underlying this principle of construction is that in the conveyances considered in those cases, there is an inadequate description in words and therefore the plan is the only place where the requisite certainty can be found. But in the present case, as I have mentioned, 35 feet is not a general description; it is a precise dimension which is in stark conflict with the measurements scaled on plan 2.

28. Mr Fancourt also relied on two principal matters as part of the factual matrix, or as we have now been taught to call it, the background. First, he pointed to the topography of the site. Second, he relied on the evidence that the original purchaser intended to build out the development for which planning permission had been obtained. In addition to these two factual points, he also said correctly that the green lines on plan 2 had been carefully drawn so as to avoid the elements of a description shown on that plan. Lastly, Mr Fancourt relied on the rule of construction I have mentioned above.

29. I do not consider that a modern judge would apply so-called rules of construction slavishly. One of the important factors in construing a conveyance is to relate the description in the instrument to the topography of what is conveyed. In Jackson v Bishop, [1979] 48 Property and Compensation Reports, page 57, the Court of Appeal held:

“Where there are inconsistencies between a verbal description and a plan, the competing interpretations must be applied to the physical features on the ground to see which of them produces the most sensible result”.

30. As Bridge LJ observed:

“It seems to me that the decision is one which must depend on the application of the plan to the physical features on the ground, to see which, out of two possible conclusions, seems to give the more sensible result”.

This is the approach I will adopt in the present case.

31. Carrying out that process, shows to my mind that the reference to 35 feet cannot be taken literally. The red lines drawn by the claimant on the plan attached to the particulars of claim show the route of the way taking in three or four feet of The Miller’s Cottage and part of the Siege House. Mr Fancourt submitted in his written submissions that the extent of the right claimed by the claimant was represented by three lines, none of which appeared on any of the conveyancing documents. He said it defied rational belief that if the

parties had intended the right to extend to those red lines, that the parties would not have plotted them on the scale plan. I agree with him and to be fair, so in the end did Mr Brock.

32. Mr Brock accepts there is one pinch point along the route. There is a place between The Miller's Cottage and the flank of the Siege House where it would be impossible for the claimant to enjoy rights over a full 35 feet width. Thus, Mr Brock accepts the dimension of 35 feet cannot be taken literally. It is also clear that the principal purpose of the reservation was to secure access of people, vehicles and services into the retained Blue Land. Since the date of the conveyance, that access was by means of the road over the sluice gates, which was only 13 feet wide.
33. Mr Brock submitted the very fact that the road over the sluice gates was so narrow might itself be a reason why the parties stipulated for a width of 35 feet. He gave interesting evidence, which Mr Fancourt did not challenge, about the Great Northern Railway and the A303. There is, I think, force in those points.
34. I turn then to the two alternatives for which the defendant contends. The defendant's preferred alternative is to reject the dimension of 35 feet as being a false description and to let the dimensions on plan 2 prevail. The defendant's alternative construction is that the claimant is entitled to a right of way over a 35-foot strip, the precise location of which would be determined by the defendant so long as it included the Green Land as shown on plan 2. This construction is qualified to the extent that where the physical features of the land do not permit the full width of 35 feet, because of the existence of the listed buildings and gate pillars, the claimant must be content with such lesser width as can practically be given. The latter construction would require a modification of the proposed development which can be done at some expense. As I have said, Mr Brock now supports Mr Fancourt's alternative construction.
35. In support of his preferred construction, Mr Fancourt naturally relies on the apparent precision of the scale plan. He also points out that the base map of plan 2 is a plan accompanying the successful application for planning permission made by the claimant. The development permitted by that permission, and shown on the plan, includes the hotel, the nightclub and a conference centre, together with car parking. The hotel and restaurant had been constructed and converted by the date of the conveyance, but the conference centre remained unbuilt. The green lines on plan 2 had been drawn so as to skirt both the unbuilt conference centre and the car parks.
36. Mr Fancourt says the green lines have been carefully drawn so as to enable the remainder of the permitted development to be carried out. He also relies on the evidence that it was the intention of the original purchaser, communicated to the claimant, to build out the development. He referred me to the decision of the Court of Appeal in Scott v Martin, [1987] 1 WLR, 841 in which the court held:

“One factor to be taken into account in the interpretation of a conveyance was a pre-existing planning permission and the conveyance should be construed on the footing that neither party could have intended that it would involve the vendor in any infringement of ‘the obligations’ which the planning permission had imposed upon him”.
37. In my judgment, the twin objectives are to give effect to as much of the conveyance as possible and to produce a sensible result on the ground. Of the two remaining alternatives, the first gives no effect at all to the dimension of 35 feet. In my judgment, the court should lean against a construction that gives no effect at all to the only dimension mentioned in the conveyance. Although I acknowledge the force of the points on which Mr Fancourt relies, I do not think they justify me in rejecting the reference to 35 feet.
38. I return then to the words of the definition: “The Green Land means that strip of land 35 feet in width being part of the property and in approximately the position shown coloured green on the plan numbered one, attached hereto, as the same is more particularly delineated on the plan number two, annexed hereto, and thereon edged with green.
39. There is to my mind an ambiguity in this definition. It lies in the phrase ‘the same’. The more natural reading of that phrase is that the antecedent reference is the strip of land 35 feet in width. Read in that way, there is a conflict between the verbal description and the plan since the plan does not delineate a 35-foot

strip. But I think that the phrase can be read as referring back to the phrase ‘the approximate position’ and to indicate the approximate position of the 35-foot strip is more particularly delineated on the plan. Read in that way, it seems to me that it supports Mr Fancourt’s alternative construction. Thus, the approximate position of the 35-foot strip is shown on plan 2. In principle, where the exact route of a right of way is uncertain, it is for the servient owner, that is the defendants, to prescribe its exact position.

40. This construction leads to the conclusion the defendant may prescribe the exact route of a 35-foot strip, provided that it includes the land edged green on plan 2. This construction makes sense on the ground and gives the maximum possible effect to all parts of the description of the Green Land. Mr Brock accepts that where it is not practicable to give the claimant the full width of 35 feet, because of the listed buildings and structures on the ground, the claimant must make do with a narrower route. It is clear from the proviso to clause 2(a) of the conveyance that the parties contemplated that The Miller’s Cottage, at least, would remain in existence. In my judgment, this is a term to be properly implied using the well-known officious bystander test. I hold this is the correct construction.
41. There is one further point arising on the question of construction. As I have said, the defendant says it can accommodate a 35-foot strip over phase 2 by redesigning the development. Mr Grimwade, the defendant’s architect says that this revision will leave a gap of at least 35 feet between the walls of the intended buildings throughout phase 2. At three points, the eaves and footings of the intended buildings would intrude into the 35-foot gap by about six inches.
42. Mr Brock argues that even this intrusion would amount to an interference with the rights reserved to the claimant. He points out that the rights reserved are not merely rights of way, but also rights to lay services and to carry out works. However, in my judgment, even a grant of rights more extensive than a right of way do not entitle the grantee to exercise those rights over every square inch of the ground. There can be no doubt that the servient owner is entitled to build up to the very limits of the land over which an easement is granted ( *VT Engineering Ltd v Richard Barland & Co Ltd*, [1968] 19 Property and Compensation Reports, 890). The mere fact that the walls of the intended buildings butt up against the 35-foot strip is no interference with the claimant’s rights.
43. In *B&Q plc v Liverpool and Lancashire Properties Ltd* [2001] 1 Estates Gazette Law Reports, 92 the owners of a retail park granted B&Q the lease of a retail warehouse with the right to pass and re-pass over a service yard at the rear of one of the other units. The landlords proposed to construct an extension which reduces the area of the yard and turning circle available to B&Q’s vehicles, albeit the turning facilities were available to B&Q within their own demise. Blackburn J adopted the following propositions of law:

“(1) The test of an action of interference is not whether what the grantee is left with is reasonable, but whether his insistence on being able to continue the use of the whole of what he contracted for is reasonable (2) It is not open to the grantor to deprive the grantee of his preferred modus operandi and then argue that someone else would prefer to do things differently, unless the grantee’s preference is unreasonable or perverse (3) If the grantee has contracted for the relevant luxury of an ample right, he is not to be deprived of that right in the absence of an express reservation of a right to build upon it, merely because it is a relative luxury and the reduced non-ample right would be all that was reasonably required (4) The test is one of convenience and not of necessity or of reasonable necessity, provided that that which the grantee is insisting upon is not unreasonable. The question is, can the right of way be substantially and practically exercised as conveniently as before (5) The fact that an interference of an easement is infrequent and when it occurs, is relatively fleeting, does not mean that the interference cannot be actionable”.
44. It must be said that the formulation of the first of those five propositions seem to me to alter somewhat the test laid down in earlier cases, particularly *Clifford v Hall*, [1875] LR 9 Common Pleas 362, where the test does seem to have been expressed by the Court of Common Pleas, as whether what is left still enables the grantee of the right with a reasonable use. Nonetheless, I propose to adopt the formulate of Blackburn J.
45. Any construction traffic using the way to access the Blue Land would have to be sufficiently narrow to get

over the sluice gates. It does not, therefore, seem to me that the projection of the eaves by some six inches would, in any sense, represent an actionable interference with the reserved rights of the claimants; nor do I think it would be reasonable for an owner of the Blue Land to insist on having access to every square inch of the Blue Land to lay services, especially when so far as the evidence goes, the only required service would be electricity. In my judgment, these trivial incursions at three points along the way will not amount to an actionable interference of the claimant's rights.

46. The immediate trigger to the application of the interim injunction was the building of a wall and gatehouses near the old mill building. The building of those structures was permitted by Neuberger J's order. Mr Brock says they have not been built in accordance with the terms of the order. Mr Grimwade accepts the gatehouse has been built approximately one metre to the north of its position, as shown on the plan attached to the order. If this were all, it would be of no significance. Mr Brock says it has also been built further to the east of its position as shown on that plan, with the result that it encroaches on the Green Land. It is common ground that I cannot deal with that question today.
47. I conclude, therefore, for the reasons I have given that the claimant is entitled to a right of way and rights of entry to carry out work, as described in clause 2 of the conveyance, over a strip of land 35 feet wide, whose approximate position is as indicated on plan 2, the precise boundaries of which are to be reasonably determined by the defendant so long as the Green Land shown on plan 2 is included within the strip. I am also of the view that the projection of eaves and footings, to the extent indicated by Mr Grimwade on the plan forming page 90 of bundle A, would not amount to an actionable interference with the claimant's rights.

**SMITH BERNAL WORDWAVE**