Neutral Citation Number: [2018] EWHC 1206 (Ch)

Claim No. HC- 2017-002491

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

BETWEEN

JAMIE TREVOR ROBERTS **Claimant**

- and -

(1) ANDREW MARK METSON PARKER

(2) EVE MARY PARKER

Defendants

Before Mr. R. Hollington QC sitting as a Deputy Judge of the High Court

Judgment Date: 21 May 2018

Hearing Dates: 18-20th April 2018

Representation:

Mr. John Antell, of Counsel (Direct Access), for the Claimant

Mr. Adam Rosenthal, of Counsel, instructed by Sydney Mitchell LLP, solicitors, for the Defendants

JUDGMENT

The issues

1. This case has come on for trial expeditiously pursuant to the order of Mr Justice Marcus Smith dated 12th October 2017.
2. That order contemplated that the principal issue to be determined was whether the Claimant had a right of way from a private road belonging to the Defendants to the whole of his back garden or only to part of it excluding the part the Claimant

wants to build a new house on. A further major issue between the parties falls, however, to be determined at this trial, namely whether the Claimant is bound by a restrictive covenant not to build on the land in question: it is the Claimant's case that the covenant is unenforceable for want of registration. There are other issues of lesser importance to be determined, including whether the Claimant is liable to the Defendant in damages for having cut down a yew tree, which turns on the position of the tree in relation to the boundary between the two properties.

The Site

3. The plan below is taken from the registered title to the Claimant's property, No. 40 Fairmile Lane, Cobham, Surrey (SY737999) ("No. 40"). This Judgment is best read printed in colour, because it is otherwise almost impossible to follow what parcels of land are being referred to. The Defendants' property is No. 38. Fairmile Lane is the public highway to which the private road, coloured brown in the plan, connects. The main drive of No 40 gives directly on to the public highway, so the side access into its garden from the private road is only needed for access to the back of No. 40. A house and detached garage were built on No 40 in 1972, in such a way that the back garden is accessed through a relatively narrow side archway.

4. The Claimant's title to No. 40 is shown edged in red. The brown strip, immediately below (and to the south of) the red line is the private road which continues, as shown by the dotted line, into No. 38, running alongside the garden of No. 38 to a forecourt at the front of the house. The private road also affords

access to No. 36, owned by Mr and Mrs Farrer, on the right at the end of the private road – the number 36 appears in tiny print on their house.

5. The private road is within the title to No. 38, owned by the Defendants.

6. The roughly rectangular parcel of land coloured yellow in the above plan bounded by the letters A to D (the "yellow land"), which forms part of the registered title to No 40, is the land on which the Claimant now wishes to build a new house with a frontage on to the private road. As will appear below, the "yellow land" and the rest of what now forms part of the registered title to No. 40 came into common ownership, of a "wheeler and dealer" John Leslie Smith, by a Transfer dated 15 May 1968 ("the 1968 Transfer"). I was not told the date of first registration of that title but Mr. Monks bought the land comprised in the title in 1990. I will come in due course to what the registered title shows as to the covenants and rights affecting the property. The Defendants dispute that the Claimant has a right of way which enables a house to be built on it and sold off as a separate parcel with access from the private road, and they further rely upon a restrictive covenant which they say prohibits him from building on it.

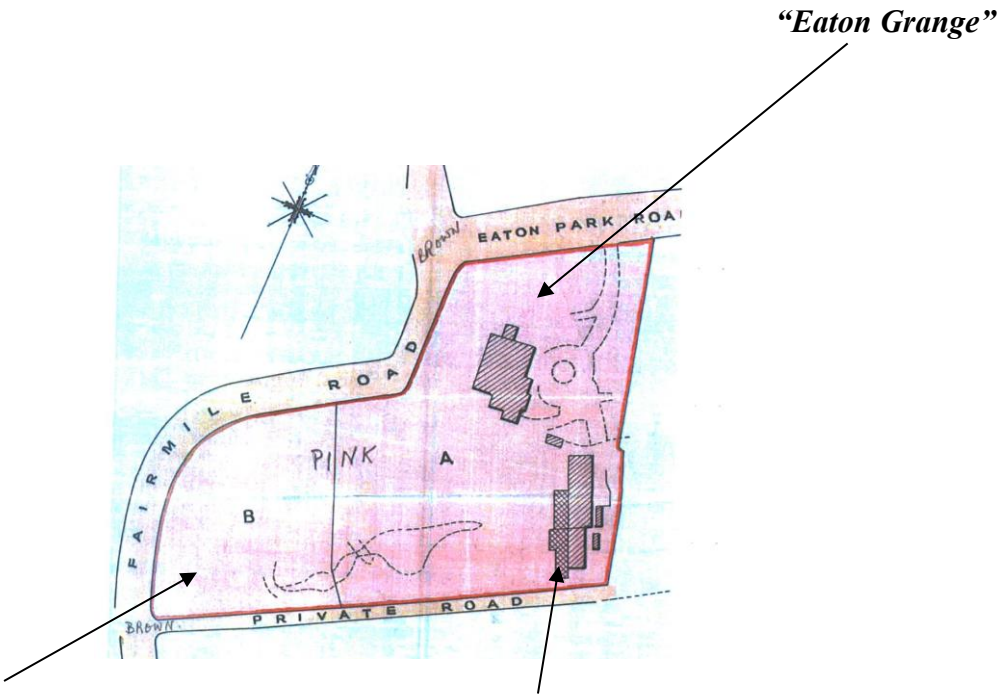
The conveyancing history

7. It is important to know the conveyancing history in order to understand the right of way issue. I take this largely from the submissions of Mr. Rosenthal, counsel for the Defendants, which Mr. Antell, counsel for the Claimant, accepted as accurate. I pay tribute to Mr. Rosenthal for his mastery of this history, as well as of the authorities he took me through with such care. I interpolate some comments on the respective cases of the Claimant and Defendants.

17 February 1923

Julius Frederick Gems owned all of the land in the vicinity and the private road.

He conveyed land which included what is now the Claimant's Property and the Defendants' Property (except the private road which he retained) to Gladys Muriel Hird:



In this 1923 Conveyance, Julius Frederick Gemms granted a right of way over the private road, which he retained, in common with others. The Claimant relies upon this right of way.

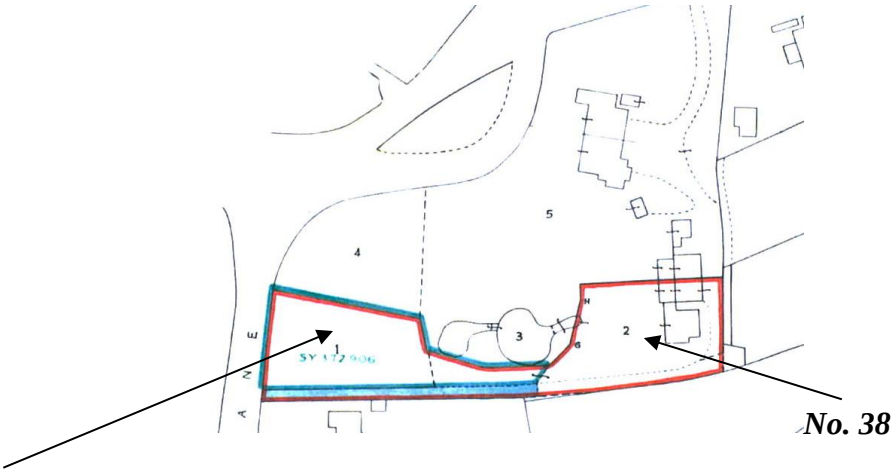
The Defendants' case is that this right of way was extinguished by the subsequent conveyances of 14 August 1950 and 21 February 1951 (see below), as a result of which (so it is claimed) the dominant tenement, i.e. the "yellow land", ceased to be accommodated by, i.e. to benefit from, the right of way. The Defendants argue that it was for this very reason that the 1968 Transfer (see below) contained a grant of a right of way over the private road for the benefit of that part of No. 40 which did not include the "yellow land".

14th August 1950

By 1950, some or all of land conveyed to Gladys Muriel Hird in 1923 had come into the hands of John Leslie Smith, who appears to have been a "wheeler and dealer", who set about selling it off piecemeal.

By this 1950 Conveyance, he conveyed part of the land to Caroline Mildred Anne Bruce.

The parcels clause in the 1950 Conveyance records that the land conveyed formed part of a larger property known as Eaton Grange. The plan to the conveyance is not available, but it is possible to piece together the land which was conveyed in 1950 by considering the registered title plans and later conveyances. It is reasonably clear, and is common ground, that the 1950 Conveyance was of the whole of the land edged in red (numbered 1 and 2) in the title plan for No. 38 dated 11 December 1956, but excluding the private road:



Part of No. 40

I would note the following parts of the 1950 Conveyance:

- The recital: the Vendor (Smith) was seised of the property contained in the 1923 Conveyance – which contained the right of way over the private road
- The land sold to Caroline Bruce was conveyed together with the right of way over the private road
- Clause 2- it was "hereby agreed and declared":
    - (i) The Purchaser was not entitled to any right of access to or use of the ponds, i.e. in effect, the "yellow land" – i.e. excluding any Wheeldon v Burrows easements in that respect
    - (iii) "The Vendor or other owners from time to time of the adjoining property [i.e. including the "yellow land" and the rest of Eaton grange retained by Smith] shall not be entitled to use the said private road."

It can therefore be seen that, as a result of the 1950 Conveyance, the "yellow land" and the rest of Eaton Grange not purchased by Caroline Bruce in 1950, became physically separated from the private road. Clause 2(iii) could not have operated as a

release of the right of way over the private road contained in the 1923 Conveyance because neither the vendor nor the purchaser was the owner of that road at the time of the 1950 Conveyance. It must have been inserted, as Mr. Antell submitted and I accept, because the parties to that Conveyance were aware of the right of way contained in the 1923 Conveyance and wanted to exclude any suggestion or implication that the vendor had any sort of right of way over the land purchased to access the private road given the physical separation effected by the 1950 Conveyance. Mr. Antell also submitted that Clause 2(iii) operated as a personal restrictive covenant not to use the private road, but I am not persuaded that is the best way to characterise it for present purposes.

21st February 1951

Having taken a transfer under the 1950 Conveyance of part of the land which comprised Eaton Grange from John Leslie Smith, with the benefit of a right of way over the private road, the same Caroline Mildred Ann Bruce acquired the road itself, from a descendant of Julius Frederick Gemms, by **a conveyance of 21 February 1951** (which is not available).

The title plan to No. 38 (copied above) is likely to be the plan filed on the first registration of the title following the 1956 Conveyance (see below). This application was made on 29 November 1956. The title plan was subsequently altered (see entry no. 2) when the land edged and numbered in green (but which has turned blue in photocopying, above) was removed from the title plan. That is likely to have been when this land (part of what is now the Claimant's Property, No. 40) was transferred on 15 May 1968 (see below).

It is common ground that the whole of the land edged red on the title plan is likely to be that which was held by Caroline Mildred Ann Bruce after the conveyances of 1950 and 1951.

It can therefore be seen that, as a result of the 1951 Conveyance, the land purchased by Caroline Bruce under the 1950 Conveyance, which was adjacent to the private road, and the private road came into common ownership. Mr. Rosenthal's principal submission was that, by the combined effect of the 1950 and 1951 Conveyances, the right of way granted by the

1923 Conveyance had permanently ceased to benefit the land for whose benefit it had been created and therefore was extinguished.

Mr. Rosenthal also submitted that the 1923 right of way must have been extinguished by unity of ownership.

He further submitted (although this is not distinctly pleaded in the Defence, Mr. Antell sensibly took no pleading point) that, by the combined effect of the 1951 Conveyance (whereby Caroline Bruce became the owner of the private road) and clause 2(iii) of the 1950 Conveyance (by which Smith acknowledged no right of way over the private road), the right of way was released.

31 October 1956

The same Caroline Ann Bruce conveyed the whole of this land to Richard Maxwell Milne.

6 May 1968

John Leslie Smith transferred more of the land he retained to Enso Marketing Company Limited, as shown edged in red on the plan below:

Original part of no. 40:

John Leslie Smith retained the land edged in green, the previously mentioned "yellow land", and covenanted, in clause 4 of the transfer, not to build on it. Presumably because the benefit

of this covenant was annexed to land not forming part of their land, the Defendants do not rely upon this restrictive covenant, which is noted as affecting the title to No 40 under entry C6. He also retained the land edged in blue (which appears as turquoise). The "yellow land" was not land-locked: access to the public highway, Fairmile Lane, was afforded by the land edged in blue.

The land edged in blue, save for a parcel carved out of the corner of the land edged in blue so as to incorporate the "yellow land" more into No 40, which must have been effected subsequently (nobody suggested anything turns on this), is now No. 42 Fairmile Lane.

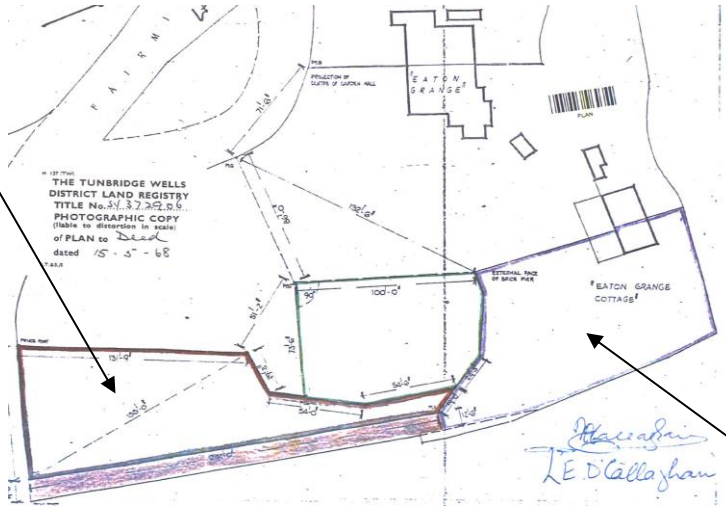
What is now no. 38 is shown edged purple and was referred to in the transfer for the purpose of John Leslie Smith passing the benefit of covenants given by Caroline Mildred Ann Bruce in the 1950 Conveyance so far as they relate to the purple land (by para. (d) of the parcels clause).

15 May 1968

I refer to this as the 1968 Transfer.

Charles Terrence O'Callaghan and Louise Eugenie O'Callaghan had acquired the land conveyed by Caroline Mildred Ann Bruce to Richard Maxwell Milne in 1956 (see above). By this transfer, they transferred the part, which is not coloured on the above plan (from 1956) which is now part of No. 40, *back* to John Leslie Smith, who had earlier in the 1950 Conveyance sold it to Caroline Bruce. This is shown edged in red on the transfer plan, below:

No. 40



No. 38

As a result of this transfer, John Leslie Smith, who as already seen and independent of this transfer owned the "yellow land" which was the land edged in green on the above plan, became again the owner of the land edged in red. By this transfer, a right of way was granted over the private road (which was owned and retained by the O'Callaghans, now No. 38) for the benefit of the land transferred (edged in red), i.e. what is now No. 40. The terms of this Deed are important:

- The land was transferred together with a right of way over the private road "for all purposes connected with the present and every future use of the land hereby transferred", i.e. not including the "yellow land", the purchaser (Smith) already owning this.
- By Clause 2, the purchaser (Smith) on behalf of himself and his successors in title as owner of the "yellow land", "to the intent that the burden of this covenant may run with and bind [the "yellow land"] and every part thereof and for the benefit of the land retained by the vendors [i.e. now No. 38]" covenanted
    - (a) not to build on the "yellow land"
    - (b) to pay one half of the cost of maintaining the private road.

It is significant that clause 2 was drafted specifically so as to bind the "yellow land", i.e. the land already belonging to Smith which was not the "land transferred". Clause 2(b) was said to bind the "yellow land", even though it was the "land transferred" which abutted the private

road and one could only get from the "yellow land" to the private road by crossing the "land transferred".

The Claimant relies in the alternative on this right of way. He says that it is clear from clause 2(b) that the "yellow land" was entitled, with the "land transferred", to the benefit of the right of way because the burden of duty of contribution to the maintenance of the private road was imposed on the "yellow land" by clause 2(b). The Defendants' case is that this right of way cannot be used for the benefit of the "yellow land" independently of "the land transferred". The parties to this Deed obviously thought that the right of way over the private road created by the 1923 Conveyance had lapsed, because otherwise they would not have made express provision for a right of the way in the Deed.

By clause 2(a) John Leslie Smith covenanted, for the benefit of the land edged in purple (No. 38), retained by the O'Callaghans, not to build on the "yellow land". It is this covenant which the Defendants seek to enforce against the Claimant.

The right of way issue

The 1923 Conveyance

8. The Claimants puts his case first on the grant contained in the 1923 Conveyance. In answer to the Defendants' case that this grant was extinguished by the 1950 and 1951 Conveyances, the Claimant in his Skeleton Argument submits:

"12. It is true that the 14 August 1950 conveyance (A35 - under which it appears the yellow land was retained, though the conveyance plan is missing) contains a restrictive covenant at clause 2 (iii) by which the vendor agrees not to use the private road, but that is not a release of the right of way benefitting the retained land (it cannot be because the then owner of the private road was not a party) but simply a covenant with the purchaser not to use a right which the vendor retains over third party land (the private road – brown land). There is a real distinction between release of an easement and a restrictive covenant promising, for the time being, not to exercise a subsisting easement – see *CGIS City Plaza v Britel* [2012] EWHC 1594 (Ch) at [53] – as a

restrictive covenant has to be registered to be binding on successors in title. Also a restrictive covenant is subject to the Upper Tribunal jurisdiction under s.84 LPA 1925.

13. The restrictive covenant at clause 2 (iii) is void for non-registration under s.29 of the Land Registration Act 2002. Therefore the yellow land retains the right of way and there is no enforceable covenant restricting its use.

14. D argues (para. 4.2 of Defence – A58) that the right benefitting the yellow land has been extinguished because, as a result of the change in ownership of land lying between the yellow land and the private road, the private road "ceased to accommodate" the yellow land. C denies this.

- In *Huckvale v Aegean Hotels Ltd* (1989) 58 P & CR 163 the CofA doubted (without deciding) whether the idea that an easement which accommodates land at the time of grant could be lost if is subsequently ceased to do so, was good law. If there was such a principle it could only apply where there was no longer any practical possibility of the easement *ever again benefitting the dominant tenement* and "The lack of a current practical use of the easement... is... a far cry from extinguishing the right".

- The conveyancing history shows John Smith buying, selling, and repurchasing land in the grounds of Eaton Grange over the years with a view to development so the "no longer any practical possibility of the easement ever again benefitting the dominant tenement" test would not be satisfied.

- The very fact that in 1968 the yellow land came into common ownership with the other land which now makes up C's property, and that in 1972 a house was built thereon, demonstrates that the "no longer any practical possibility of the easement ever again benefitting the dominant tenement" would not have been satisfied in 1950.

- Part of D's argument at para 4.2 is that the separation of dominant land from servient land, by land owned by a third party means that, as a matter of law, no

right of way can exist. It is submitted that this is incorrect - *Pugh v Savage* [1970] 2 Q.B.373."

9. The Defendants in their Skeleton Argument submit:

"32. C has argued, relying on a judgment of the CA in Huckvale v Aegen Hotels Ltd (1989) 58 P & CR 163, that there is no principle whereby an easement is extinguished if it ceases to accommodate the dominant tenement after it has been granted. That decision is not authority for that proposition because it was an interlocutory appeal on whether there was a "serious issue to be tried". No subsequent (or prior) case has decided the point. Accordingly, it is necessary to rely on general principle.

33. First, an easement cannot be created if the right does not accommodate the dominant tenement: see Gale on Easements (20th Edition) at 1-24ff. A grant will fail to create an easement if it does not accommodate the dominant tenement: see Kennerley v Beech [2012] EWCA Civ 158.

34. Secondly, if the easement ceases to accommodate the dominant tenement, it is logical that the right should cease to exist (given that this is a necessary requirement for the easement to exist in the first place). It is necessary to consider whether, on the facts, the cessation is merely temporary: that is why, in considering whether there was a "serious issue to be tried" in Huckvale, the CA declined to hold that there was no prospect of the claimant establishing that the easement continued to exist. The terms of the transactions in 1950 and 1951 referred to above, in contrast with the circumstances in Huckvale, are clearly intended to be permanent. Indeed, that is why John Leslie Smith was granted a right of way over the private road by the 15 May 1968 transfer.

35. Thirdly, a right of way must have a beginning and an end (described as a *"terminus a quo"* and *"terminus ad quem"*): see Kennerley. For this reason, it was held, in the County Court in Kennerley, that the parties having failed to ensure that a right of way extended over all of the land required to access the dominant land, the right which was granted ceased to rank as an easement when the owner of the servient land revoked permission to pass over the link between the end of the right of way and the dominant land. The CA decided the case on a different basis (i.e. that the facts were such that no easement was created in the first place), but the County Court Judge's reasoning is endorsed by the authors of Gale at para. 1-52.

36. Moreover, Ds do not rely solely on the fact that the easement ceased to accommodate the remainder of the dominant tenement. The agreement at clause 2(iii) of the 1968 Transfer (referred to above) is akin to an express release of the right of way: see Robinson Webster (Holdings) Ltd v Agombar [2002] 1 P & CR 243.

37. Accordingly, immediately prior to the 1968 Transfer, no part of what is now No. 40 benefitted from a right of way over the private road."

10. These submissions were developed in oral argument. Mr. Rosenthal dealt very thoroughly with Kennerley and I am grateful to him for the plan which he prepared as to the facts of that case. In the end, however, I do not derive much assistance from that case. Mr. Rosenthal also took me to Chapter 12 of Gale, particularly paras. 12-01 (extinguishment by operation of law) and 12-104 (summary of extinguishment by abandonment).
11. As I have said, Mr. Rosenthal's primary submission was that the right of way granted in 1923 was granted so as to accommodate the whole of the old Eaton Grange plot, that it had to accommodate that plot in order to rank as a right of way, and that it was extinguished in 1950/1951 when it ceased to accommodate that plot. There is no authority for the proposition that a right of way is extinguished in such circumstances. And what authority does show, by analogy with the law relating to extinguishment by abandonment, is that the law will not infer an extinguishment unless it is clear that the beneficiary of the right of way has permanently given away the right of way.
12. In my judgment, the right of way granted by the 1923 Conveyance was extinguished by operation of law by the 1950 Conveyance, if necessary in conjunction with the 1951 Conveyance. Clause 2(iii) of the 1950 Conveyance made it clear, to my mind, that the parties contemplated that the right of way granted by the 1923 Conveyance, which was recited in the 1950 Conveyance, should no longer be available to the owner of the dominant land which had become physically separated and no longer could benefit from access from the private road. In my judgment, that was tantamount to a permanent abandonment of the right of way by the owner of the dominant land. I do not accept Mr. Antell's submission that no permanent renunciation of the right of way can be inferred from the 1950 Conveyance: in my judgment, it can. It was always open

to Mr Smith or his successor to bargain subsequently for a right of way, but that did not displace the permanence of the renunciation. I do not think that I have to recognise, as urged upon me by Mr Rosenthal, a new means of extinguishment of a right of way to reach this conclusion: it seems to me to be covered by the existing law of abandonment, for the act of abandonment does not need to be lack of user.

The 1968 Transfer

13. The Claimant relies in the alternative upon the right of way granted by the 1968 Transfer, in the terms I have set out above.

14. The essential context to this issue is the so-called Harris v Flower doctrine, as recently elucidated in Gore v. Naheed [2018] 1 P&CR 1, in which another recent decision of the Court of Appeal (Das v. Linden Mews [2003] 2 P&CR 4) was reviewed. It is a well-established feature of English land law, obvious to an English lawyer versed in land law but not perhaps to someone not versed in that law, that a right of way to Point A does not enable the right of way to be used to get to Point B, even via Point A and if the land between the two points is within the ownership of the same person: see the judgment of Patten LJ in the Gore case at para. 14. However, as Patten LJ observed in that case, the ultimate question is always what is the scope of the grant on the true construction of the instrument which creates it, having regard to its terms and the material factual matrix. And, it is possible that, on the true construction of the instrument, the scope of a grant could be found to extend to uses which were purely ancillary to the primary use for which the right was granted. So, on the facts in the Gore case, it was held that a right of way to a house allowed the owner access to the adjacent garage which had been acquired by the house-owner after the right of way had been granted.

15. The contending submissions in the present case are as follows:

The Claimant submits:

"D places emphasis on the fact that the 15 May 1968 Transfer (A53) in clause 1 refers to the granted right of way as being "for all purposes connected with the present and every future use of the *land hereby transferred*" but it is submitted that the correct

interpretation of the Transfer is that the right of way also benefits the yellow land (referred to as the "green land" in the Transfer):

- A written instrument has to be interpreted sensibly and in context - *Arbuthnott v Fagan* [1995] CLC 1396 but the way granted is not limited to the physical characteristics present at the time of grant – *Keefe v Amor* [1965] 1 QB 334.

- Clause 2(b) is a positive covenant, binding on the purchaser and on successors in title of, in terms, the "green land" (yellow land) "to pay and contribute one half of the cost of repairing maintaining and renewing the road coloured brown on the said plan". It would make absolutely no sense for such a covenant to be imposed on the yellow land if the yellow land was not being granted (or did not already have) a right to use the road coloured brown, and the Transfer, properly interpreted, grants a right of way for the benefit of the whole land which, following the transfer, is in the ownership of the purchaser including the yellow land which the purchaser already owned. Alternatively the Transfer impliedly releases the yellow land from the restrictive covenant so that the still subsisting right of way granted in 1923 can be used.

- Alternatively as set out in paras. 3-4 of the Reply (A71), a right of way benefitting the yellow land is to be implied as an easement of intended use – *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 WLR 2620.

- Entry A3 of the Register of Title of C's property (SY737999) – A11 - states that the land (which includes the yellow land) has the benefit of the right of way granted by the 15 May 1968 Transfer and by s.11(3) of the LRA 2002, registration has the effect that "The estate is vested in the proprietor together with all interests subsisting for the benefit of the estate""

The Defendants submit:

"38. In para. 4 of the Reply, C contends that a right of way for the benefit of the whole of the Claimant's Property was *"granted by implication by the 15 May 1968 Conveyance as an easement of intended use"*.

39. It is not altogether clear what principle C relies on.

40. As a matter of construction, the grant in the 1968 Transfer was clear, stating that the right was granted *"for all purposes connected with the present and every future use of the land hereby transferred"*. That did not include what is now the rear part of the garden of No. 40. C seeks to imply a term that contradicts this express statement of the purpose of the grant.

41. Even if one leaves aside the fact that the grant makes clear the extent of the dominant land as intended by the parties, easements will only be implied as a matter of necessity: see Pwllbach Colliery Company Limited v Woodman [1915] AC 634, where Lord Parker set out (at p.646) the two categories of implied easement: first where the easement is necessary for the enjoyment of an expressly granted right and secondly where the easement is necessary to give effect to the common intention of the parties with regard to the purpose for which the dominant land is to be used. On neither basis can an easement be implied in the 1968 Transfer to extend the dominant tenement of the expressly granted easement to what is now the rear part of the garden of No. 40.

42. As noted above, it is not clear whether C maintains that if the only easement he has is a right of way for the benefit of that part of No. 40 which was transferred by the 1968 Transfer, the right of way will nevertheless be exercisable to construct a house on the yellow land and, subsequently, for the benefit such a house.

43. Ds rely on the rule in Harris v Flower which is that if a right of way is granted to get to Blackacre, it cannot be exercised for the purpose of accessing Whiteacre via Blackacre. However, where the use of the non-dominant land (Whiteacre) is ancillary to the use of the dominant land, the right of way continues to be exercisable. The authorities were most recently considered by the CA in Gore v Naheed [2018] 1 P & CR 1.

44. For present purposes, Ds rely on these principles for two reasons. First, because it is Ds' case that C will not be entitled to rely on the existing right of way to access another house, constructed on the plot at the rear of No. 40 because that is not, on any reckoning, ancillary to the use of the dominant tenement within No. 40. Secondly, Ds accept that for so long as the yellow land is used as part and parcel of the garden of the existing house within No. 40, that is "ancillary use" such that it does not fall foul of the Harris v Flower doctrine."

16. I agree with Mr. Antell that, in order to make sense of clause 2(b), it is necessary to construe the 1968 Transfer so that the "yellow land" enjoyed a full right of way to the private road. In my judgment, this result is achieved, applying the usual principles of construction of contracts and deeds, by implying an easement to that effect. As the Defendants effectively accept, it cannot have been in the contemplation of the parties to the 1968 Transfer that the right of way was limited to the "transferred land". Mr. Rosenthal's submission, that sense can be made of it by allowing access to the "yellow land" as ancillary to access as part of No 40's garden including the "transferred land" (as per the Gore case), is attractive but it does not in my judgment acknowledge sufficiently the very specific annexation of the burden of the obligation to pay for repair to the "yellow land". It would be possible to regard that annexation as merely sloppy draftsmanship, but that would be too radical an interpretation in my view. And I note that the positive covenant to pay for the repair of the private road would not have been enforceable against successors in title to the burdened "yellow land" unless it was an adjunct to the enjoyment of a right of way: it would do violence to the language of the Transfer if the right of way to the "land transferred" were conditional upon compliance with the obligation to pay for the repair. A further reason why I do not consider it legitimate to read into any right of way to the "yellow land" the qualification suggested by Mr. Rosenthal, namely that the right of way could only be used so long as the "yellow land" was used as part of the garden, is that there is no covenant against the future sub-division of the plot. Instead, the covenant in clause 2(a) was inserted.
17. So, the real question in my judgment is: has that covenant ceased to be enforceable for non-registration?

Prescription

18. Mr. Antell submitted in the alternative, if he failed on the 1968 Conveyance, that the owners of No. 40 have accessed the back garden from the private road as of right for a period in excess of 20 years. This does not arise but I express my conclusions on it nevertheless. I accept the evidence of the Claimant and his

gardener but that only takes one back to May 2006. The Claimant has not persuaded me on the balance of probabilities that his predecessor in title, Mr. Monks, did so before him. The Claimant produced a witness statement from Mr. Monks dated 22 November 2017 but Mr. Monks, without explanation, did not appear at court. I allowed in his witness statement as evidence but it was not subject to cross-examination. It was apparent from the cross-examination of the Claimant and his gardener, who had a very wide wheelbarrow and used a sit-on mower to cut the grass of an average-sized lawn, that there were serious issues over the need to use the access from the private road for ordinary garden maintenance and I simply do not know what answers Mr. Monks would have given.

19. In any event, I would have accepted Mr. Rosenthal's submissions to the effect that any user would have been consistent with the right of way under the 1968 Conveyance had I accepted his interpretation of it and therefore could not have given rise to a right of way by prescription which was wider than that interpretation allowed.

Was Clause 2(a) of the 1968 Deed adequately registered?

20. This is a short but difficult point of law, upon which I was told no authority exists. I was referred to no authority on it.
21. The Defence and Counterclaim, supported by Mr. Rosenthal's Skeleton Argument, advanced a claim for alteration of any error in the registration of the covenant, but he made it clear in oral submissions that the Defendants accepted that, if the error meant that the Claimant was not bound due to non-registration, alteration could not be retrospective in the sense of depriving the Claimant of the benefits of non-registration under s. 29 of the Land Registration Act 2002. Mr. Rosenthal was only claiming alteration if the Claimant was bound by the covenant, i.e. for the purposes of correcting a misleading Note on the register for the future. On this basis, I stopped Mr. Antell replying on this claim.
22. Mr. Antell's submissions on this issue were short and broadbrush. He submitted that clause 2(a) is unenforceable against his client because it is not properly registered against the title to No. 40. He submitted that the whole purpose of the

system of registration of title depended upon proper registration of adverse interests such as this restrictive covenant so that a purchaser such as his client could trust the register to disclose what adverse interests affected the title.

23. Mr. Rosenthal referred me to the material provisions of the 2002 Act in sections 29 and 32:

"29. Effect of registered dispositions: estates

(1)If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(2)For the purposes of subsection (1), the priority of an interest is protected—

(a)in any case, if the interest—

(i)is a registered charge or the subject of a notice in the register,

…..

32 Nature and effect

(1)A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge.

(2)The entry of a notice is to be made in relation to the registered estate or charge affected by the interest concerned.

(3)The fact that an interest is the subject of a notice does not necessarily mean that the interest is valid, but does mean that the priority of the interest, if valid, is protected for the purposes of sections 29 and 30."

24. I was not referred by either counsel to any of the Land Registration Rules or any guidance notes, but it seems to me that Rule 84 is material:

Entry of a notice in the register

84.—(1) A notice under section 32 of the Act must be entered in the charges register of the registered title affected.

(2) The entry must identify the registered estate or registered charge affected and, where the interest protected by the notice only affects part of the registered estate in a registered title, it must contain sufficient details, by reference to a plan or otherwise, to identify clearly that part.

(3) In the case of a notice (other than a unilateral notice), the entry must give details of the interest protected.

(4) In the case of a notice (other than a unilateral notice) of a variation of an interest protected by a notice, the entry must give details of the variation.

(5) In the case of a unilateral notice, the entry must give such details of the interest protected as the registrar considers appropriate.

25. The title plan to No 40 is reproduced in paragraph 3 above. The registered title contains the following entries. Mr. Antell told me that none of the Conveyances or Transfers referred to are filed, and so the only available information is that stated on the register. Mr. Rosenthal did not challenge this. So the Conveyances and Transfers were obviously produced to and considered by the Land Registry for the purpose of composing the entries on the register but the Land Registry did not see any need to make the documents available for inspection on file.

A: Property Register

2. Reference was made to the Transfer dated 6 May 1968 referred to in para. 7 above.

3. Reference was made to the 1968 Transfer and the right of way over the private road granted under it.

C: Charges Register

5. Further reference was made to the Transfer dated 6 May 1968, which provided that parts including the "yellow land" as shown on the title plan were subject to drains etc easements.

6. Further reference was made to the Transfer dated 6 May 1968 in respect of the vendor's covenant in clause 4 not to build on the land "edged with green". The following words appear in the entry:

"NOTE: the land edged with green referred to is tinted yellow on the filed plan"

In other words, the note stated that the land covered by this restrictive covenant was the "yellow land" as shown on the title plan and comprised in the title.

7. Clause 2 of the 1968 Transfer was set out. So far, so good. Clause 2 referred to the land "edged in green", i.e. the "yellow land", and the land "edged with purple", i.e. the retained No. 38. But then the following words appear in the entry:

> "NOTE: **The land edged green and the land edged purple referred to do not affect the land in this title.** The road coloured brown referred to is tinted brown on the filed plan." [emphasis in bold added]

The first sentence of this note is curiously worded: it does not state that the "land edged green" does not form part of the land comprised in the title, nor does it state that the covenant does not affect the land comprised in the title, but it would clearly be understood in both senses. As such, it was clearly wrong: the covenant did affect part of the land comprised in the title.

26. The issue, as I see it, is whether entry C7 is an entry within the meaning of sections 29 and 32 of the 2002 Act – if it is not, then a purchaser is not bound by it. In my judgment, it is not. Rule 84(2) requires the entry in question to identify the part of the title affected, and the note to entry C7, in seeking to fulfil this obligation, states in terms that none of the land comprised in the title is affected by the covenant in clause 2(a). It follows, in my judgment, that C7, although entered on the register, was not "an entry in the register in respect of the burden of an interest affecting a registered estate" within the meaning of s. 32(1) of the 2002 Act. It therefore did not bind the Claimant: s. 29(1).
27. I can see an argument, although this was not how Mr. Rosenthal put his case, that the entries on the register, taken as a whole, would have led a prudent solicitor to have questioned what the note to C7 meant and its accuracy. In particular, a prudent solicitor would have asked why land "edged with green" in a transfer dated 6 May 1968, as noted under C6, <u>was</u> part of the land in the title whereas the land "edged with green" in a transfer dated 15 May 1968, as noted under C7, <u>was not</u> comprised in the title. But I do not see how any such considerations can affect the conclusion I have reached as to the application of the provisions of the 2002 Act and Rule 84. This is not an issue which turns on the merits.
28. I would add that Mr. Antell drew my attention to a letter dated 16 August 2013 from solicitors acting for the Claimant, which suggests that the Claimant's

indemnity policy did not refer to the 1968 Transfer and advises that the covenant in that Transfer did not affect the property. This advice cannot, in my judgment, be of any relevance to the issue with which I am concerned.

29. I therefore reach the conclusion that the restrictive covenant in clause 2(a) of the 1968 Transfer is not binding on the Claimant.

The Yew Tree

30. The final substantive issue between the parties is whether the yew tree which the Claimant cut down in May was on the Defendants' property and, if so, whether the Claimant is liable to the Defendants in damages for having wrongfully damaged it.
31. I do not accept the Claimant's evidence that the First Defendant gave his consent to the removal of the tree. Even on the Claimant's evidence, this was after he had started cutting it down. I accept the First Defendant's evidence that the consent he gave was conditional upon Mr. Farrer's concurrence, which was not given. I also would be inclined to find that the yew tree was on the Defendants' land, although it is difficult for me to tell the boundary on the evidence before me and this issue was not raised for the purpose of, and my finding should not be understood as, determining the exact line of the boundary. I note that the Claimant's arboriculturalist advised him that it was not on his land. But I was not satisfied on the evidence before me that the Defendants had suffered anything more than nominal damages and had any intention of replacing the tree. On the First Defendant's own evidence, he did not personally object to its removal by the Claimant.

Conclusion

32. I invite the parties to agree a minute of order to reflect what I have decided. I would need considerable persuasion to impose any injunction as to future behaviour. The parties seemed to me to be perfectly reasonable people who are not going to come to blows in the future. They have just been divided by the no doubt large amounts of money at stake given the legal uncertainties arising out of

the complicated conveyancing history in this case. I understand that the Claimant has said that he does not object to the gate which the Defendants have installed on the basis of what the Defendants have said about it, and that the Defendants have said that they do not object to the gate that the Claimant has installed into his back garden giving access to the private road.

33. In case there has to be argument over costs, I suggest subject to availability that any argument over costs be determined at the same time as the hand-down of this judgment, with the parties lodging skeleton arguments on that issue by 4pm on the day before.

34. I would conclude by expressing my gratitude to both Counsel for their assistance.