Neutral Citation Number: [2023] EWHC 343 (Ch)

Case No: CH-2021-000244

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS LIST
ON APPEAL FROM THE COUNTY COURT AT NORWICH
DECISION OF HHJ WALDEN-SMITH OF 30.9.2021

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

Date: 21/02/2023

Before :

SIR ANTHONY MANN

- -

Between :

(1) GARY DAVID HARRY HAMBLING **(2) KERRY ANNE HAMBLING**	**Claimant**
- and -	
(1) GARRY LAWRENCE WAKERLY **(2) JENNY WAKERLY**	**Defendant**

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- -

Dermot Woolgar (instructed by **Holmes & Hills LLP**) for the **Appellant**
Charles Irvine (instructed by **DAS Law**) for the **Respondent**

Hearing date: 23rd January 2023

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Approved Judgment

Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. A copy of the judgment in final form as handed down should be available on The National Archives website shortly thereafter. The deemed time and date of hand down is 10am on Tuesday 21st February 2023.

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SIR ANTHONY MANN

Sir Anthony Mann :

The background to this appeal

1. This is an appeal from a decision and order of HH Judge Walden-Smith, sitting in the County Court at Norwich, the judgment having been handed down on 30 September 2021. Permission to appeal was given by Edwin Johnson J on 2 February 2022. Mr Dermot Woolgar appeared for the appellants (the claimants below) and Mr Charles Irvine appeared for the respondents (the defendants below). Although more issues arose at the trial, the only issue which arises on this appeal is the true construction of an easement contained in a Land Registry Transfer dated 30 March 2001.

2. The issue between the parties can most conveniently be illustrated by the plan which I have annexed to this judgement. That is a copy of the land registry plan annexed to the transfer, and by reference to which the property was conveyed and the easement granted.

3. The issue which arises can be expressed very shortly. The appellants, Mr and Mrs Hambling, own the two areas outlined in red on the plan. The one to the left is their residential property (a cottage called Garden Cottage, gardens and (constructed after the transfer) a stable block), and the one on the right is a field. Between them is a track which is coloured yellow. As will appear, the transfer granted an easement over that yellow track which, it is common ground, is for the benefit of at least the field. It is common ground that the track can be used to pass between the field and the highway; it is also common ground that it cannot be used to pass between the cottage and the highway. The question which arises in this appeal is whether or not the easement permits the Hamblings to pass directly between their cottage to the left and the field to the right, which is their case. The owners of the yellow land are the respondents, Mr and Mrs Wakerly, who also own the land at the end of the yellow land itself. The judge below held that the Hamblings were not so entitled, on the true construction of the easement or on the basis of "ancillary use" and they appeal from that determination. She also decided against them on claims based on proprietary estoppel and rights to light (the latter being based on the erection by the Wakerleys of a high close-boarded fence along the entirety of the cottage/track border), but those issues are not revived in this appeal.

4. For the sake of completeness it should be noted that there is also another small triangular piece of land coloured yellow at the south-western corner of the cottage property. It is covered by the same easement as the track, and it gives access to the highway from the cottage. There is no dispute about that piece of land. It is apparently known in the case as "The Maltings" or "The Maltings entrance". The parties to both sides of the transfer were predecessors in title of the Hamblings and the Wakerlys.

The easement

5. The wording of the grant of the easement has been taken from the transfer of 30th March 2001. Its benefit is recorded (by cross-reference to the transfer) on the Hamblings' land, but for some reason it is not recorded on the Wakerlys' title, though nothing seems to have turned on that. The easement appears in the property transferred section of the transfer in the following terms:

> "All that Cottage known as Garden Cottage 1 Tills Farm Cottages Hadleigh Road Boxford comprising 0.26 acres or thereabouts together with the field formerly part of Tills Farm Boxford comprising 2.05 acres or thereabouts all of which property is for the purpose of identification only shown edged red on the plan annexed hereto **together with the right of way for all purposes with or without vehicles at all times of the day and night over and along the access road has coloured yellow on the plan annexed hereto but subject to access over the road marked "Drive" only being used for access to the field not to Garden Cottage**." (emphasis provided – that is the wording of the easement)

6. The land marked red is that appearing on the plan annexed to this judgment (the cottage and the field). The land coloured yellow is the track between the cottage and the field, and also the small triangle at the south-west corner of the cottage property which gives access to the highway. The road marked "Drive" would seem to be within the surface area of the passable track, shown by the dotted line on the plan. The other half of the track (abutting the field) is in the nature of a verge between the field and the passable area. Predecessors in title of the Hamblings acquired title to that "verge" and incorporated it into the field. Because of a conveyancing accident that "verge" got left behind in a subsequent transfer of the cottage and field, but it has now caught up and is vested in the Hamblings along with the field. Nothing turns on that conveyancing accident or its correction. It is not clear whether the use of the word "Drive" is intended to connote just the passable surface, or is used to distinguish the track from the small yellow triangle, but nothing seems to turn on that either.

7. One other provision in the transfer seems to me to be potentially relevant, though it does not seem to have been referred to below. The transferees covenanted:

> "To maintain in good state of repair and condition those boundaries marked with the inward facing 'T' marks on the plan and any boundary features erected within the perpetuity

> period and to bear half the cost with the adjoining owner of the cost of repairing maintaining and renewing any boundary marked with a 'T' on both sides this being a shared boundary."

As will appear, there is one relevant boundary for present purposes, namely the boundary between the cottage and the track, running up from the road. A hedge is shown there with internal "T" marks.

The judge's determination

8. At paragraph 28 of her judgment the judge considered the correct approach to the construction of the grant of the easement. What she said there was in my view correct, and it was not disputed by the parties:

> "28. As is set out in Gale on Easements (21 st Ed) paragraph 3.14 "the extent of the right granted depends on the express terms of the grant. Those terms must be construed in accordance with the general rules as to the interpretation of legal documents." Consequently, the construction of the express grant of a right of way over the Track, as set out in the Transfer of 30 March 2001, requires the meaning of the words to be assessed in light of their natural and ordinary meaning; any other relevant provisions in the Transfer of the overall provisions; the facts and circumstances known or assumed by the parties at the time that the Transfer was executed in March 2001; and commercial common sense. In taking into account the context of the words of the Transfer themselves, it is important that the process of construction is objective and does not take into account subjective intentions, albeit that all facts and circumstances can be taken into account as an aid to interpretation. See Gale on Easements (21 st Ed.) paragraphs 3-14 and 9-18 and 9-26."

9. She then made her determination:

> "29. The natural and ordinary meaning of the words of the express grant is that the Drive (ie the Track) is only to be used for access and egress to the Field and not to Garden Cottage. There is nothing complex in the construction of the wording of the express grant and there is no need to go any further. The straightforward, objective, construction of the Transfer is supported by the surrounding evidence."

10. She then went on to refer to evidence that the grantor of the easement did not want the track blocked by domestic and delivery vehicles as being a reason why the easement was framed so as to exclude the possibility of the right of way being used for access to the cottage at all.

11. Having thus concluded she then went on to deal with a further argument of the Hamblings, which was that if they were wrong on the main construction point, nonetheless, their use of the track to pass and repass from the cottage to the field was a legitimate ancillary use of the easement in accordance with *National Trust v White* [1987] 1 WLR 907. She dismissed that claim too on the footing that such ancillary use would be contrary to the express words of the grant forbidding access to the cottage, and also on the footing that the use of the cottage was not ancillary to the use of the field. Her judgment in this context further expressed her view of the true construction of the provision in the transfer:

> "36. The express right of way in this matter is clear. Not only is it for the benefit of the Field but it is expressly said not to be for the benefit of Garden Cottage. Garden Cottage is not part of the dominant tenement and while, for the historic reasons already set out, it was transferred with the Field, the Field and Garden Cottage did not take the benefit of the same rights of way.
>
> 37. While I was initially attracted to the argument that the right of way for the benefit of the Field has worded included with it a right to pass over the Track to and from Garden Cottage, on reflection I do not consider that to be the correct interpretation of the express right of way. Both the Track and the triangular access to the west of Garden Cottage are described as 'access road'. That is access from the highway (the A1071 – Hadleigh Road) and not from and to other buildings along the Track. The express right of way further expressly excluded the right to use the Track (marked Drive) as access to Garden Cottage and consequently it would be contrary to the words of the grant to interpret the express right of way to include a right to pass over and across the Track to and from Garden Cottage and the Field."

The grounds of appeal

12. Before advancing his actual grounds of appeal, Mr Woolgar relied in his skeleton argument on what he said was the judge's misplaced reliance on the subjective intentions of the parties to the transfer as an aid to construction. It is true that a significant part of the judgment deals with what happened after the original sale of the cottage and field and the grant of the easement, and also the subjective views of the original parties and their successors. In part that was because she had to deal with the manner in which the dispute arose and because she was faced with a proprietary estoppel argument to which those facts were relevant. However, save in one respect, it is not apparent that she took those matters into account in her decision on construction. Paragraph 28 of her judgment correctly sets out the proper basis on which questions of construction should be approached, and her conclusion in

paragraph 29, set out above, is one based on the natural and ordinary meaning of the words. The only qualification is the reference to "surrounding evidence". The evidence that she is referring to is apparently that set out in the rest of paragraph 29, in which she describes the motivation for the restriction on access to Garden Cottage as being to make sure the track was not blocked by domestic and delivery vehicles, which would also spoil the rural nature of the area, which was a reason given by Mrs Wade, of the original vendor, in her evidence for prohibiting vehicular access to the cottage.

13. I would agree that that evidence would probably not be admissible as a guide to construction, save to rebut the suggestion made for the Hamblings that the Wakerlys' construction is absurd, but it is referred to only as supporting evidence for a construction which the judge found to be obvious on the wording alone. It is clear that she was alive to the need to exclude subjective evidence of intention from the process, because in paragraph 31 she said of such evidence:

> "That [subjective] intention does not, however, undermine the proper construction of the right of way granted in the Transfer which is expressly limited to the use of the Track for access to and from the Field and not for the benefit of Garden Cottage. If the right of way was also for the benefit of Garden Cottage to access the Field then the Transfer could easily have provided for that."

I therefore do not consider that this criticism of the judgment is justified.

14. Turning to the actual grounds of appeal, they were as follows.

15. First, that the judge failed to have regard to the "practical and geographical realities". Mr Woolgar said, correctly, that it was necessary to consider those matters as the judge herself effectively acknowledged in her paragraph 28, and she failed to do so. I would agree that an easement such as this has to be viewed in the light of the facts on the ground at the time of the grant, and that the judge did not expressly consider those facts in that context. It is true that at various points of the judgment, in various contexts, she sets out some of the background topographical facts, but not at the point at which she considers the construction. Nonetheless, her slightly scattered references to the locus in quo shows that she was aware of it. For reasons that appear below (where I consider the state of the land at the time), if and insofar as she held that the locus in quo does not affect the force to be given to the natural meaning of the words, she was right to do so.

16. Second, it is said that the judge failed to take into account "the absence of any express terminus a quo" (the beginning point of the right of way). This is an argument about the general construction of the right of way. So far as relevant I consider it below when I make observations on the correctness of the judge's conclusion.

17. Third, it is said that there was "inapt reliance on the fact that the Transfer conveyed two separate parcels". In paragraph 12 of her judgment the judge observed that "the fact that the Field and Garden Cottage were not sold as one parcel, but as two separate parcels, explains the background to the wording in the transfer …", and in paragraph 29 she said that "It makes entire sense that in selling off the Field and Garden Cottage as separate parcels, the Track was only for the use of the Field while Garden Cottage had its own access at The Maltings on the western boundary."

18. The reference to the cottage's own access is a reference to the Maltings entrance, which gives vehicular access from the highway via from entrance (constructed after the transfer) which is oblique to the highway, and over which the transfer also grants a right of way.

19. I do not consider that the judgment does contain a reliance on the conveyance in two parcels in some culpable way. All the judge was saying was that giving the Field a right of way over the Drive (and therefore the track) but not the cottage was rational.

20. Ground 4 is that there was "Incorrect reliance on subjective intentions". This is a reference to that part of paragraph 29 where she refers to the desire to prevent access and preserve the rural appearance of the land. I do not consider that she was really taking this subjective intention into account, as opposed to making remarks about possible rationales.

21. Ground 5 is a detailed complaint about the accuracy of certain findings about the background to the transfer. Since any inaccuracy did not affect the final decision on construction I do not need to consider it.

22. Accordingly, the detailed grounds of appeal do not amount to a successful attack on the decision on construction of the wording of the easement. However, underpinning all this was Mr Woolgar's fundamental case that she got the construction wrong. That is the real question on this part of the appeal, and I shall deal with it now.

The true construction of the easement

23. Like the judge, I prefer to start with the natural and ordinary meaning of the words in the context of the transfer and the locus in quo appearing on the face of the transfer. I agree with the judge that the natural meaning of the words is as she said. The wording of the right of way has two elements – the apparently general grant of the right, and then a qualification about access to Garden Cottage ("but subject to the access …"). The wording of the qualification is apparently absolute. The Drive is to be used only for access to the field and not to the cottage. It is difficult if not impossible to see how the words can have any meaning other than those contended for by the Wakerlys. The first part gives "a right of way"; then that "access" is qualified in apparently absolute terms. Mr Woolgar accepted that the qualification prevented access between the cottage and the highway, but maintained that that did not exclude passing between the cottage and the field.

24. Mr Woolgar's main argument turned on the word "access" (to the field) without any reference to the starting point for the access (the terminus a quo). That suggested, he said, that what was ostensibly forbidden was only access <u>to</u> and not <u>from</u> the cottage. That would give rise to a unidirectional right of way which was, although legally possible, unlikely as an intended result. Accordingly there ought to be bidirectional access, and the "access" that was prohibited was access to and from the highway. I have to say that I struggle with the logic of this approach, because it involves doing considerable violence to the apparent clear wording of the prohibitory element as well as giving rise to unacceptable linguistic struggles. The otherwise clear words of the provision clearly trump an interpretation which has such problems.

25. However, if one does concentrate on the word "access" one finds that further analysis does not support Mr Woolgar's case. Access was a central concept in the mind of the draftsman. The Drive (and the yellow triangle, it must not be forgotten) is described as an "access road". It is a means of giving access. As Mr Woolgar pointed out, the other end of the "access" is not defined. The first part of the grant (before the qualification introduced by the word "but") is capable of allowing passage over the yellow land between the dominant tenement (cottage and field) at one end and anywhere lying along it at the other. Doubtless passing to and from the highway was primarily in mind but that does not expressly appear in the grant and it is not an inherent limitation.

26. The word then appears in the qualification. It first appears as a noun in "the access", which should be taken to be a reference back to "the access" afforded by the "access road". Next there is the limitation in which that "access" is to be used only "for access to the field". That concept must be taken to be a two-way access. It cannot sensibly be taken to be a one way access (there is a presumption against that in the absence of clear wording – *Giles v Tarry* [2012] EWCA Civ 837 at para 41), and it

would be a nonsense to suppose otherwise on the facts of this case. It is a bi-directional concept. It therefore needs to be read as "access to and from" the field. The "from" is necessarily implicit in the limitation. It is then appropriate to read the same implication into the end of the proviso – "not for access to and from Garden Cottage". Reading the grant in that way is not altering the grant by reading into it material which is not there; it is making clear how the grant operates by making explicit what, in my view, is otherwise implicit in the wording.

27. When that is done the effect of the wording becomes clearer. The Drive can be used to go to and from the Field to the highway and any property which is contiguous with the track, but that does not include the cottage because there is to be no access "to or from" the cottage along the track. At one point I had wondered whether there could be at least some access to the field from the cottage on the footing that in substance what was being had was, in substance, access to the field – for example, if the Hamblings left the cottage to carry out activities purely on and in relation to the field (for example cutting the grass, or trimming hedges, or merely going for a walk there). I considered whether that could have been justified, notwithstanding that the Hamblings started from the cottage and returned to the cottage, because what they were doing was in substance using the field's right of way and that was not within the apparent bar in the grant. However, on reflection I consider that that argument would not be correct, because the closing words of the grant as I construe them to be make it clear that notwithstanding that the main words of the grant apparently make the cottage part of the dominant tenement so far as the Drive is concerned, the effect of the closing words is to take that right away. The words forbidding access qualify not only the right which would otherwise be given to the cottage; they also qualify the rights given to the field.

28. Thus the clear wording of the transfer works against the Hamblings' case. Nor is there anything in the surrounding topography which in any way supports that case, and if anything it points the other way. As I have observed, the circumstances as they existed at the time of the grant (which are always capable of being relevant to construction argument if known to both parties) are in part scattered throughout the judge's judgment, and not all of them are apparent there, but the parties assisted me in understanding what was on the ground at the time, based on the uncontested evidence from the trial.

29. The present access between highway and cottage is via the obliquely orientated gates at the south-western corner. At the time of the transfer access to the highway with vehicles was through a narrow gap in the hedge which runs along the highway. A car would then drive over the lawn up to the house. The new entrance (the Maltings) was constructed subsequently in order to take advantage of the easement granted over the yellow triangle. To the east of the cottage property, abutting the lane, there was a continuous hedge running along the track from the highway up to almost the corner of the cottage (shown on the plan). It stopped just short of the corner of the cottage, and a path ran round the south-east wall of the cottage and turned left round to the track

side of the cottage where there was a door which has apparently been considered to be the "front door". There seems to have been a gate between the end of the hedge and the corner of the cottage, across the path. There is and was another door in the south-eastern wall of the cottage. Between the "front" door and the surface of the track was a rising bank which one would have to go up to get to the track. It was about 3 feet high or so – not so high as to be unsurmountable, but high enough to require effort to climb it, making it far from obvious that access to the track from the "front door" was natural, and to justify the addition of some steps which were put in subsequently.

30. My conclusion on the wording is also, to a degree, supported by the additional provision in the covenant which I have identified above, although it was not referred to by the judge or, apparently, by Mr Irvine below (or before me). That covenant would apply to the hedge along the track boundary. It is marked by "T" marks, and is within the wording of the covenant. Mr Woolgar sought valiantly to say that the "T" mark referred to the boundary itself, and not to the hedge which he said was within the boundary, but that is in my view an erroneous construction of the provision and the plan. The "T" marks plainly refer to the hedge. There was therefore a covenant to maintain the hedge, which impliedly prevents its removal. That hedge would be a barrier to access to the lane for much of the boundary with the cottage (and therefore to the field by crossing the lane), which tends to support the Wakerlys' case on construction of the easement. It is true that there is no boundary feature to remove from where the hedge stops to the corner of the property – there is merely the smallish bank – so the existence of this covenant is not as powerful as it might otherwise have been had there been a continuous and obvious boundary feature capable of removal and maintenance, but it is nonetheless a pointer, and it certainly tends to point away from the attempts by the Hamblings to force a very unnatural construction on the words of the grant of the easement.

31. For the sake of completeness I record that at one stage I was attracted by an argument that turned on the expression "the access over the Drive", with the concept of an apparently singular access demonstrating that what was in mind was one type of access only, namely access to and from the highway. I put that point to counsel after the hearing and received submissions on it. However, on maturer reflection I do not favour that point and favour my reasoning expressed above.

32. I therefore find that the express terms of the grant of the easement actually prohibit the use of the track as a means of access between the cottage and the field. The words of prohibition mean what they say and it is not possible to force another interpretation on them.

33. That means that the Hamblings fall back on their ancillary use argument. The Hamblings' argument is that use of the right of way over the track to the field is, in the words of the judge below:

> "ancillary to, or part and parcel of, the use of the way for the purpose of the original grant".

She referred to Gale on Easements:

> "It is now firmly established that a grant of a right of way may authorise access to premises whose use is genuinely ancillary to the identified dominant tenement but does not extend the dominant tenement … "

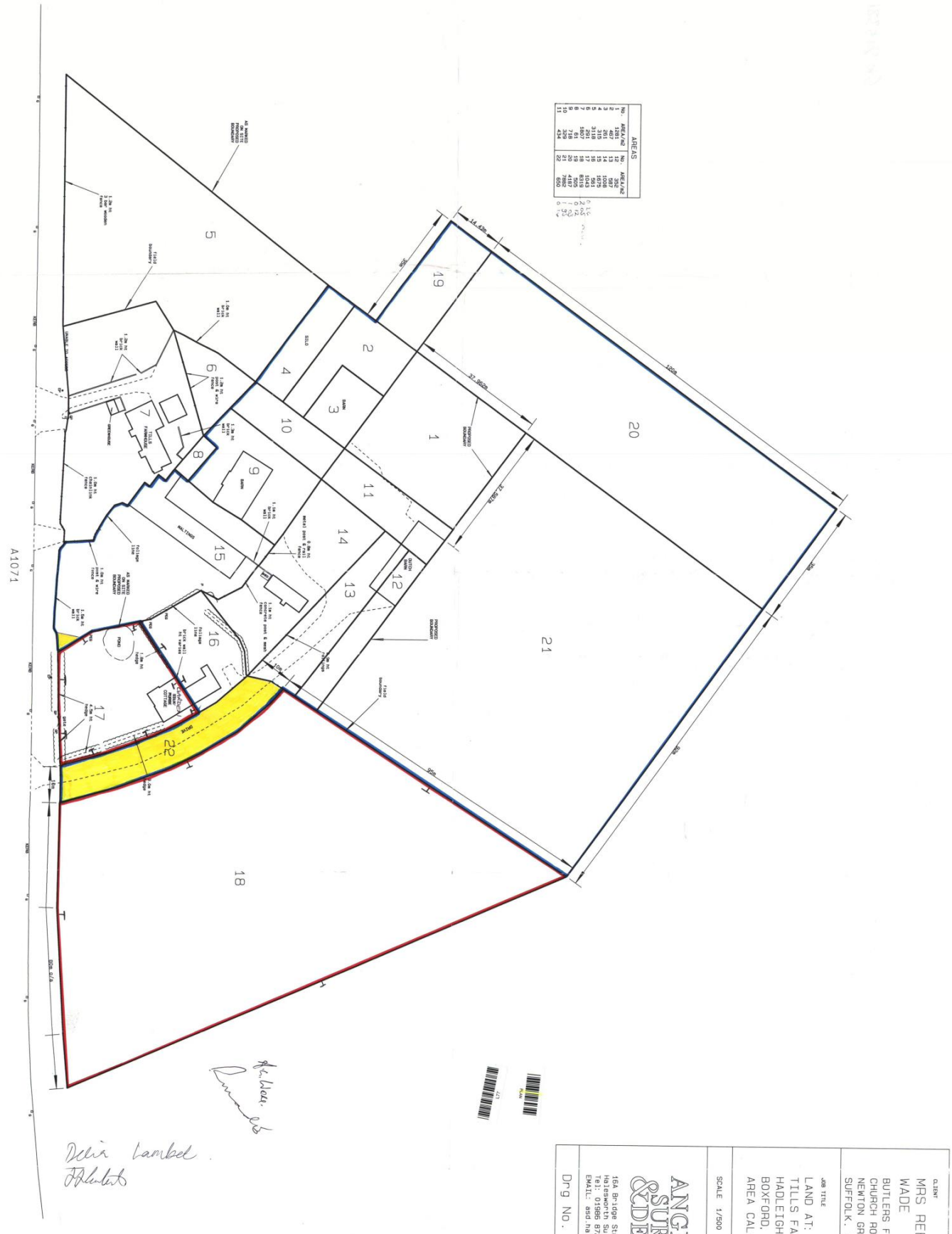
34. Having considered authority she concluded that the use of the cottage was not ancillary to the field (the dominant tenement). Garden Cottage was not purchased subsequent to the purchase of the Field and was not purchased for the purpose of making use of the Field. She held that, if anything, the field is ancillary to the cottage, but more accurately both the field and the cottage have their own independent purpose. She also held that the proposed ancillary use would be contrary to the clear wording of the grant, and dismissed this aspect of the claim.

35. Mr Woolgar revived this argument on this appeal. He submitted that access between the cottage and the field, over the track, was indeed ancillary to the use of the field. He instanced the taking of horses from the field to the stables constructed on the cottage land – that involved accessing the cottage for purposes which were ancillary to the use of the field. He also instanced the taking of a bucket of feed, or saddles, to the field.

36. In my view the judge was right in her conclusions. The main reason is that such a construction would be contrary to the plain words of the grant as I have construed it above. The grant actually forbids access to and from the cottage, and that must mean wherever one is coming from. There is no scope for arguing for "ancillary" use in those circumstances. That makes it unnecessary to consider questions of what was ancillary to what, but if it mattered I would have agreed with the judge below. However, since the wording makes it unnecessary to consider that point I say no more about it.

Conclusion

It follows that this appeal is dismissed.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