In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No. 11

BETWEEN:-

LESLIE LEON RICHARD STEEDE JR

Plaintiff

-and-

(1) JIBRI LEWIS
(2) SHANELLE LEWIS

Defendants

JUDGMENT

(In Court)

Whether right of way – express grant – easement of necessity – lost modern grant

Date of hearing: 2nd May 2017, 26th June 2017
Date of judgment: 1st August 2017

Ms Sara-Ann Tucker, Trott & Duncan, for the Plaintiff
Ms Simone Smith Bean, Smith Bean & Co, for the Defendants

Introduction

1. The Plaintiff, Mr Steede Jr, owns the property known as 5 Boundary Lane in St George's Parish. It is bounded on the west by a 16 foot wide roadway running north/south known as Talavera Lane and on the north, south and east by parcels of land. The parcel to the east is known as 3 Boundary Lane and is owned by the Defendants, Mr and Mrs Lewis. The Plaintiff and Mrs Lewis are cousins. Access to 3 Boundary Lane is by an eight foot wide roadway which runs from its eastern boundary in an easterly direction to form a "T" junction with a 16 foot wide roadway running north/south known as Boundary Lane.

2. The Plaintiff claims a 10 foot wide right of way ("the disputed right of way") over 3 Boundary Lane. This would in effect extend the 8 foot wide roadway so that it runs to the eastern boundary of 5 Boundary Lane. The Defendants dispute the existence of the said or any right of way over their property. The Plaintiff has produced a plan which was exhibited to his first affidavit. It is annexed as a schedule to this judgment and shows the disputed right of way very clearly.

3. The Plaintiff claims that his grandfather, the late Joseph Henry Weller ("Mr Weller"), made an express grant of the right of way. Mr Weller was also the great grandfather of Mrs Lewis. Alternatively, the Plaintiff relies upon the principle of lost modern grant to claim a right of way through long usage. In addition, I have invited submissions from the parties as to whether, if the grant is somehow defective, there is a right of way as an easement of necessity.

Conveyancing history

4. What are now 5 Boundary Lane and 3 Boundary Lane were once wholly owned by Mr Weller. By clause 4 of his last will and testament executed on 2nd October 1965, he devised his real estate as follows:

"*I DEVISE all my real estate to my wife the said Agnes Louise Weller during her life without impeachment of waste and from and after her decease I DEVISE the same in manner following (that is to say);*

(a) I DEVISE my lot of land situate at North Wellington in St. George's parish aforesaid [ie what is now 5 Boundary Lane] together with my dwelling-house thereon (where I now reside) and all rights of way (including a right of way over the lot of land next hereinafter described [ie what is now 3 Boundary Lane] and over a strip of land belonging to the heirs or devisees of Salisbury Stanley Spurling or his or their assigns [ie the 8 foot wide roadway]) and appurtenances whatsoever to my daughter Janet Beatrice Steede her heirs and assigns forever

(b) I DEVISE my lot of land also situate at North Wellington aforesaid [ie what is now 3 Boundary Lane] ... together with the building thereon used as a shop ... unto my son Joseph Horace Weller during his life without impeachment of waste and from and after his decease I devise the same to such of his children as shall be living at the time of my death and if more than one in equal shares as tenants in common."

5. Mr Weller died on 15th October 1966. His wife, Agnes Louise Weller ("Mrs Weller"), died on 21st March 1994. She was predeceased by Mr Weller's daughter, Janet Beatrice Steede ("Mrs Steede"), who died on 22nd February 1988. Letters of administration were granted to Mrs Steede's husband, Leslie Leon Steede ("Mr Steede"), on 21st April 1989.

6. Upon Mrs Weller's death, and as Mrs Steede had already died, 5 Boundary Lane was inherited by Mrs Steede's heirs and assigns, namely Mr Steede and Mr and Mrs Steede's two children, the Plaintiff and Ann Barbara Atiba ("Ms Atiba"). By a vesting deed dated 25th August 2009, Mr Steede, as administrator of his late wife's estate, conveyed 5 Boundary Lane to the said heirs and assigns. He conveyed one half share to himself absolutely and the other half share jointly to the two children in equal shares as tenants in common. The property was stated as being conveyed:

"*ESPECIALLY TOGETHER WITH full free and unrestricted right and liberty of way and passage for the owners for the time being of the said lot of land hereinbefore particularly described [ie 5 Boundary Lane] and their tenants servants and agents and all other persons lawfully going to or from with or without animals and vehicles of all descriptions OVER AND ALONG the said Right of Way Three decimal point nought five metres*

(3.05m) [ie 10 feet] wide delineated and coloured Yellow on the said plan leading to Boundary Lane ..."

7. The plan annexed to the vesting deed, which exists in two slightly different versions, was dated May 2009 and showed the disputed right of way. It was the first plan to do so.

8. By a conveyance dated 22nd September 2009, Ms Atiba conveyed her interest in 5 Boundary Lane to the Plaintiff. The Plaintiff gave unchallenged evidence, although the conveyance appears to have been lost, that at around the same time he bought out his father's interest in the property. Mr Steede died on 1st October 2013. It is not disputed that the Plaintiff now holds sole legal title to 5 Boundary Lane.

9. Turning to 3 Boundary Lane, upon Mrs Weller's death Joseph Horace Weller inherited a life interest in the property, with the remainder interest going to his children Carlton Weller, Joseph Horace Weller Jr, Deborah-Lee Page, Donna-Rea Palanyandi, and Nelody Janice Lee ("Ms Lee").

10. 3 Boundary Lane became the subject of a partition action. On 12th December 2008, Bell J (as he then was) ordered that the property be sold with vacant possession to Ms Lee, with the net proceeds of sale to be divided between her father and the other four children. 3 Boundary Lane was duly conveyed to Ms Lee by a conveyance dated 1st July 2009. This stated that the property was:

    "*ALSO SUBJECT NEVERTHELESS to a right of way in favour of the lot of land shown as No. 5 on the said plan expressed (although not specifically described) in Clause 4(a) of the will of Joseph Henry Weller so far as the same is existing and capable of being enforced*".

11. There is a plan annexed to the conveyance but it does not show the disputed right of way.

12. Ms Lee was Mrs Lewis' mother. Mrs Lewis gave evidence that Ms Lee purchased the property for her and her fiancée, Mr Lewis. The property was purchased in Ms Lee's name on legal advice. But Mrs Lewis explained that it was purchased with monies borrowed by way of mortgage in the joint

names of her and her mother and that she, ie Mrs Lewis, had made the mortgage payments.

The Plaintiff's evidence

13. The Plaintiff gave evidence that he lived at 5 Boundary Lane from 1962 – 1974, from the ages of 16 – 28. He lived there with his grandmother, Mrs Weller, and his parents. He lived at other properties in the area for maybe another 16 years until 1990. While living in the area he used to attend 5 Boundary Lane every day, and once he left the area he used to visit the property two or three times a week to visit his father and grandmother, ie Mr Steede and Mrs Weller. His father lived there until early 2013, when he went to live with the Plaintiff at St David's Road in St George's Parish due to ill health. Thereafter, the Plaintiff used to visit the property once every two weeks or so to check on it. Mr Steede died in October 2013 aged 92. So far as the Plaintiff was aware his father always used the disputed right of way to access the property. The property remains unoccupied.

14. The Plaintiff used to use the disputed right of way to access 5 Boundary Lane until 15th December 2015 when the Defendants put up a fence along the boundary between number 3 and number 5 Boundary Lane. The fence is made of green mesh copper wire and has an opening which is wide enough to allow a pedestrian or a motor cycle to pass through but not a car or van. The Plaintiff stated that so far as he was aware it was not until a few days before the fence was put up that the right of way was ever disputed.

15. The Plaintiff complains that, by obstructing access from 3 Boundary Lane, the fence has hindered certain renovation works which he is undertaking at 5 Boundary Lane. To undertake the works he has had to gain vehicular access to the property via Talavera Lane. This is most likely a private roadway and none of the conveyancing documents which I have seen grant an easement over it in favour of 5 Boundary Lane. Thus it is not at all clear that he has any right to use the roadway. In order to access 5 Boundary Lane from Talavera Lane, the Plaintiff had to clear and level the land on 5 Boundary

Lane around the house there. He stated that Talavera Lane did not become a roadway until after he moved to St David's Road in 1990.

16. The cleared area around the house is large enough to form a driveway. But underneath the cleared area is a cesspit. The Plaintiff is concerned that the ground over the cesspit would be at risk of collapsing under the weight of a motor vehicle. Although I have not heard expert evidence on the issue, he did produce a one page opinion dated 2nd May 2017 from SAL Trading Limited, Comprehensive Building Supplies, which explains the basis for his concerns.

17. I also heard evidence from the Plaintiff's wife, Rhonda Steede, and grown-up daughter, Meka Steede. They both confirmed that prior to December 2015 they always used to access 5 Boundary Lane via the disputed right of way. Rhonda Steede corroborated her husband's evidence that the fence put up by the Defendants had caused significant delay and expense to the renovation of the property.

The Defendants' evidence

18. Mrs Lewis gave evidence that when she purchased 3 Boundary Lane it was in a derelict state. She stated that there was no pathway or driveway through the property at the time. She and her husband moved into the shop on the property in 2009 and cleared the area. They lived there while building their current house, which lies between the shop, which is now a rental property, and the disputed right of way. They started a family. They looked on the area traversed by the disputed right of way as their backyard and as a play area. They now had two small children and the disputed right of way posed a danger to them, besides imposing on the family's privacy.

19. Mrs Lewis said that their conveyancing attorney advised them that the right of way mentioned in the conveyance of 3 Boundary Lane lacked detail and that they should approach Mr Steede, who was living by himself at 5 Boundary Lane, to make sure that the issue was sorted. Their attorney advised them that Mr Steede clearly had a right of way over Talavera Lane,

although I have not been told on what basis she reached this conclusion, and that they should find out why he wasn't using it.

20. Mrs Lewis and her father therefore approached Mr Steede. He agreed that it would make sense for him to use Talavera Lane but said that it was easier for him to use Boundary Lane (ie via the disputed right of way). He asked if they would mind if he continued to do so and requested that they leave a path so that he could use it. Mrs Lewis interpreted this as him asking for her permission to use 3 Boundary Lane. She wanted to convey to him, without expressly saying so, was: "*Go the other way*". So far as she was concerned he did not have a right of way over her property. This belief was based on the plan annexed to her conveyance and on Mr Weller's will. However I draw the reasonable inference that, whatever Mrs Lewis' intentions, Mr Steede understood that he had her permission to continue crossing 3 Boundary Lane. Thus he used to traverse the property maybe twice a week until sometime in 2013, when he stopped. Mrs Lewis hadn't seen him since.

21. Mrs Lewis stated that she had put up the boundary fence in December 2015 following an increase in the use of the right of way. People accessing 5 Boundary Lane – I surmise for purposes of construction work – started parking on 3 Boundary Lane and using it as a turning space for their vehicles. One visitor to 5 Boundary Lane stepped in dog faeces on that property but wiped them off his shoe on the grass at 3 Boundary Lane. That provocation was the event that triggered the erection of the fence. The opening left in the fence was a temporary goodwill gesture until the Plaintiff could get the part of 5 Boundary Lane that bordered Talavera Lane cleared of trees.

22. The Plaintiff took to parking his truck on 3 Boundary Lane after the fence was put up as it would not fit through the opening. This led to a heated conversation between him and Mrs Lewis in December 2015. He said the Defendants should open up the fence so that he could get his vehicle through. They said that they had no intention of doing so and that he should use Talavera Lane. Mrs Lewis said she had reconnoitred Talavera Lane and found that 5 Boundary Lane was readily accessible via that route.

Expert evidence on location of disputed right of way

23. Mr Weller's will does not describe the precise location of the disputed right of way. As noted above, the first plan on which it appeared was dated May 2009. This was prepared by Q-Ship Enterprises Ltd ("Q-Ship") following what they describe as an extensive boundary survey. I heard expert evidence from Quinton Stovell ("Mr Stovell"), a registered professional land surveyor who is the principal of Q-Ship. He prepared a report which stated:

> "*The ten foot right of way (10.00 R.O.W.) for #5 Boundary Lane was confirmed along the driven track that continues from the eight foot (8.00') R.O.W. between #7 and #9 Boundary Lane, proceeding over #3 Boundary Lane ... to 5 Boundary Lane. This track had been well established over decades of continuous use at the time of the survey in 2009.*"

24. Mr Stovell carried out a subsequent survey of the area in January 2017 for the purposes of this action and produced a further plan. The location of the track had not changed. However, given that the right of way does not appear on any plans prior to 2009 and that its precise location is not described in any conveyance, the basis for the assertion that the track has been well established over decades of continuous use was not clear.

25. I also heard expert evidence from Shawn McKee, a registered professional Bermuda surveyor who works for Bermuda Caribbean Engineering Consultants Ltd. He suggested that any right of way ran along the northern boundary of 3 Boundary Lane. However his evidence was based on the contention, advanced for the first time in his oral evidence, that the parcel of land which was devised by clause 4(a) of Mr Weller's will was not the land that is now 5 Boundary Lane but an adjacent parcel of land to the north.

26. This contention, which was based on his reading of a 1950 plan, formed no part of the Defendant's pleaded case or indeed Mr McKee's short written report. It was not put to any of the Plaintiff's witnesses. It is not consistent with the conveyancing history of 5 Boundary Lane after Mr Weller's death. Moreover, the Plaintiff gave unchallenged evidence that after his grandfather, ie Mr Weller, died his grandmother, mother and father inhabited

the property. They would have had no right to do so if Mr Weller had not devised 5 Boundary Lane in his will but another property to the north.

27. It would appear to follow from Mr McKee's evidence that 5 Boundary Lane was owned not by Mr Weller but by someone else – otherwise Mr Weller would have dealt with it in his will (it being Mr McKee's assumption that he did not). But there is no evidence that anyone has ever claimed that 5 Boundary Lane was not Mr Weller's to dispose of. That is no doubt because it was.

28. In the premises I am satisfied beyond peradventure that the parcel of land devised by clause 4(a) of Mr Weller's will was 5 Boundary Lane. Mr McKee's assumption to the contrary was in error. Insofar as his evidence of the location of the disputed right of way was based on that error it was of little assistance to the Court.

29. Mr McKee also referred to a 2012 aerial photograph provided by the Government of Bermuda from which he said he could discern no evidence of a travelled right of way crossing 3 Boundary Lane. However I can see a trackway on that photograph, even though it is partially overgrown. Its location is consistent with the right of way shown in the May 2009 and January 2017 plans.

The law

30. A right of way is a type of easement. An easement is a right over the land of another. It must satisfy the four requirements stated in Cheshire's Modern Real Property, 7th Edition at 456 ff and accepted by Lord Evershed in In Re Ellenborough Park [1956] Ch 131 EWCA at 163:

> "*They are (1) there must be a dominant and a servient tenement [ie one piece of land that benefits from the easement and another piece of land that provides that benefit]: (2) an easement must 'accommodate' the dominant tenement [ie benefit the land and not merely the user]: (3) dominant and servient tenement owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.*" [Explanatory text in square brackets added.]

31. The case concerned the right of adjoining owners to use a park as a garden. Considering the fourth requirement in this context, Lord Evershed stated at 175 – 176:

"*satisfaction of the condition in the present case depends on a consideration of the questions whether the right conferred is too wide and vague, whether it is inconsistent with the proprietorship or possession of the alleged servient owners, and whether it is a mere right of recreation without utility or benefit.*"

32. Gale on Easements, Seventeenth Edition[1] noted at para 1-42 that (as of 1st August 2002) there appeared to be no reported cases in which an express grant of a supposed easement had been held to create no easement because the wording of the grant was too vague.

33. The Plaintiff's primary case is that the right of way is an easement by way of express grant. A land owner can subject his land to an easement for any estate or interest for which he could alienate it. See Gale on Easements, Seventeenth Edition at para 3-05. The extent of the dominant owner's right depends upon the words of the relevant deed construed in the light of the surrounding circumstances at the time of the grant. See the leading judgment of da Costa JA in Fisher v Cox [1988] Bda LR 2 CA at page 3, citing Gale on Easements Fourteenth Edition at 139; Kain v Norfolk [1949] Ch 163 at 165 *per* Jenkins J; and Jelbert v Davis [1968] 1 WLR 589 at 595 *per* Lord Denning MR.

34. Da Costa JA amplified this statement of principle in Young v Gray [1992] Bda LR 1 CA at 8:

"*In the case of an express grant it is for the court to construe the 'language in the light of the circumstances, and, in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against a grantor must be applied. In particular in construing a grant the court will consider (1) the locus in quo over which the way is granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used.' (Gale on Easements, 15th edn. p.292).*"

[1] Gale is now in its Twentieth Edition. The Court library, sadly, has yet to catch up.

35. As Lord Denning explained in the latter case at 595 E – F, the grant must be construed as a grant for all purposes within the reasonable contemplation of the parties at the time of the grant. The other side of the coin is that no-one entitled to use the right of way may use it to an extent which is beyond anything contemplated at the time of the grant. The time of the grant is the date of the relevant instrument, which need not be the date on which the grant takes effect. See Roe v Siddons (1888) 22 QBD 224 EWCA *per* Lord Esher MR at 233 and Lopes LJ at 237.

36. During the hearing I invited written submissions as to whether the disputed right of way could be justified as an easement of necessity. I am grateful for counsel's assistance on this point. As explained in Gale on Easements, Seventeenth Edition, at paras 3-109 and 3-111:

> "*A way of necessity, strictly so called, arises where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained is left without any legally enforceable means of access. In such a case the part so left inaccessible is entitled, as of necessity, to a way over the other part. The principle no doubt applies where both parts are disposed of simultaneously, either by grant inter vivos or by will.*
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> . . . . .
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> *Where a way of necessity arises, whether in favour of the grantee of the enclosed land, or the grantor retaining the enclosed land, its line is to be chosen by the grantor, but it is for the person entitled to it to make it up. It has been said that the line, once established, cannot be altered by the servient owner.*"

37. In Bermuda, at any rate, an easement of necessity ceases to exist once it is no longer necessary. See Gleeson v Bell [1994] Bda LR 8 *per* Costa JA, giving the judgment of the Court, at 92.

38. An easement of necessity is one example of an easement arising by implication. There are others. Eg the rule in Wheeldon v Burrows (1879) 12 Ch D 31.[2] However I was not addressed on them and in my judgment they were not engaged by the particular facts of the case. If the express grant of a right of way was too wide and vague, or inconsistent with the

[2] The rule was stated by Thesiger LJ at 59: "… *that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, ...*"

proprietorship or possession of the alleged servient owners, it is difficult to see how this could be cured by an implied grant of much the same thing. Conversely, if the express grant was not defective then the possibility of an implied grant did not arise.

39. It has been suggested in the context of an implied grant that if the start point and the end point of the alleged right of way raise the obvious inference that a way between them was intended to be included, the way itself need not be marked out at all. See Gale on Easements, Seventeenth Edition at 3-62, citing Donnelly v Adams [1905] 1 IR 154, a decision of the Irish Court of Appeal. This sensible approach is in my judgment also helpful when considering whether words purporting to grant an express right of way are sufficiently precise.

40. The Plaintiff's further or alternative case is that he has acquired an easement by way of lost modern grant. The law will adopt the fiction that a grant has been made, even if there is conclusive evidence that it has not, if the following conditions are satisfied: (i) there has been uninterrupted enjoyment of the easement for twenty years or more; (ii) the enjoyment was as of right; and (iii) there are no circumstances, such as the incapacity of the presumed grantor, which would render the grant impossible. See Angus v Dalton (1881) 6 App Cas 740, as summarised by Buckley LJ, giving the judgment of the Court, in Tehidy Minerals Ltd v Norman [1971] 2 QB 528 EWCA at 552 B. The summary was approved by da Costa JA, giving the judgment of the Court in Lathan v Darrell and Hill [1986] Bda LR 30 CA at 8 – 9.

41. In order to be as of right, the enjoyment must be *nec vi*, *nec clam*, *nec precario*, ie it must not be by violence, or by stealth, or permissive. See the judgment of the Court given by da Costa P Ag in Gleeson and Gleeson v Bell [1994] Bda LR 8 CA at 6. Addressing the requirement that the use must not be permissive, the judge stated at 6 – 7:

"*Any acknowledgement that the user is permissive will be fatal to the claim. As Cheshire observed 'to ask permission is to acknowledge that no right exists' (Cheshire and Burn's*

Modern Law of Real Property, 14th Ed. p. 550) Accordingly what a party must show is that he claims the privilege, not as a thing permitted to him from time to time by the servient owner, but as a thing he has a right to do (see *Patel v. W.H. Smith (Esiot) Ltd. 1987 (1) W.L.R. 853).*"

42. However a right of way is acquired, its use by the dominant owner must not be excessive. Excessive use will render the dominant owner liable in trespass and may be restrained by injunction. See Gale on Easements, Seventeenth Edition at para 9-72; Maioriello & Ors v Ashdale Land and Property Company Limited [2011] EWCA Civ 1618 EWCA *per* Etherton LJ (as he then was) at para 61.

Discussion

43. In 1965, when Mr Weller made his will, Talavera Lane did not exist. The only way to access the parcel of land comprising numbers 3 and 5 Boundary Lane was via the 8 foot roadway running east/west between 3 Boundary Lane and Boundary Lane. Under the will, and upon the death of his wife, 3 Boundary Lane and 5 Boundary Lane were devised to different people. So as not to derogate from his grant of 5 Boundary Lane by rendering it inaccessible, Mr Weller granted a right of way in favour of that property over 3 Boundary Lane and over the 8 foot roadway. I draw the reasonable inference that the right of way granted over 3 Boundary Lane was intended to connect 5 Boundary Lane to the 8 foot roadway.

44. The Defendants submit that the grant of the disputed right of way in Mr Weller's will was only purported as it was: (i) too wide and vague; and (ii) inconsistent with the proprietorship or possession of the alleged servient owners. It is submitted that for these reasons it was not capable of forming the subject matter of a grant and therefore failed to satisfy the fourth requirement in In Re Ellenborough Park.

45. As to (i), a right of way is undoubtedly capable of forming the subject matter of a grant. I am satisfied that the wording of the will which created this particular right of way is not too wide and vague for the Court to ascertain

and give effect to the grantor's intention. In construing the will, I bear in mind the approach helpfully suggested by Mr Stovell: "*Ideally, you want to have the most unobtrusive pathway that is practically usable by a vehicle.*" This is in my judgment a good expression of the *contra proferentem* principle applied to this particular grant.

46. I am satisfied that what the grantor intended was that the right of way should follow a direct route from the boundary of 5 Boundary Lane to the intersection of 3 Boundary Lane with the 8 foot roadway. There was no evidence before the Court that, as at the date of the grant, the right of way was marked by an existing track.

47. It was therefore open to the original recipients of the grant, ie Mr Steede, the Plaintiff, and Ms Atiba, to choose a path for the right of way so long as it complied with the terms of the grant. I doubt that they made a conscious decision. Rather, I think it probable that over time they came to use a particular route. That route became the track shown in the May 2009 and January 2017 plans. There is no evidence that they used any other route. Indeed I understood from the Plaintiff's that they had always used that one.

48. I am satisfied that the present location of the disputed right of way, as shown in those plans, does comply with the terms of the grant. That finding is subject to the caveat that, construing the grant *contra proferentem* against the grantor, the width of the right of way was in my judgment most likely intended to be the same as that of the roadway with which it connects, ie 8 foot rather than 10 foot.

49. I am therefore satisfied that the devise of the disputed right of way was not too wide and vague to be capable of forming the subject matter of a grant.

50. As to (ii), the Defendants submit that having a driveway leading to 5 Boundary Lane running through the back yard of their house is inconsistent with their proprietorship or possession of 3 Boundary Lane. I understand and sympathise with their position. However the question of inconsistency falls to be resolved as at the date of the grant. There was at that date no

dwelling house on 3 Boundary Lane and the Defendants' house on the property had not yet been built. Even if there had been, that would not in my judgment have negatived the grant of an easement which was necessary in order to permit the owner of 5 Boundary Lane to have pedestrian or vehicular access to her property. Once the grant had taken effect, the subsequent history of the servient tenement was not relevant to its validity.

51. In the premises, I find that the express grant of a right of way in favour of the owner of 5 Boundary Lane over 3 Boundary Lane was effective. The location of the right of way is coextensive with the location of the present track over 3 Boundary Lane, as shown in the May 2009 and January 2017 plans, save that I find that, as the grantor most probably intended, its width is 8 feet, to correspond with the width of the 8 foot roadway which it joins, rather than 10 feet. I find for the Plaintiff accordingly.

52. Had I not found that there was a right of way over 3 Boundary Lane by reason of express grant, I should have had to consider whether there was a right of way by reason of necessity. There would have been such a necessity (assuming that the direct grant was ineffective) when 3 Boundary Lane and 5 Boundary Lane passed into separate ownership as otherwise there would have been no vehicular – or indeed pedestrian – access to 5 Boundary Lane. The live question would have been whether there was any longer an easement of necessity over 3 Boundary Lane now that 5 Boundary Lane could in practice be accessed, whether on foot or by vehicle, via Talavera Lane. My provisional view is that there would still have been an easement of necessity as no evidence was adduced that Talavera Lane was a public road or that there was a right of way over Talavera Lane in favour of 5 Boundary Lane. In those circumstances, there is a real risk that if the Plaintiff used Talavera Lane to access his property he would do so as a trespasser. But I make no findings on the question as it is purely hypothetical and as no-one claiming ownership or a right of access over Talavera Lane was party to these proceedings.

53. The Plaintiff's case that his property has acquired a right of way over 3 Boundary Lane pursuant to a lost modern grant is both an alternative to his

claim of an express grant and an extension of it: I have found that there was an express grant of an 8 foot right of way; the Plaintiff relies on a lost modern grant to claim an additional 2 feet of width as shown in the May 2009 and January 2017 plans.

54. The evidence before the Court is that 5 Boundary Lane was in continual occupation from before the death of Mrs Weller in March 1994, upon which 3 Boundary Lane and 5 Boundary Lane passed into separate ownership, until Mr Steede moved out from 5 Boundary Lane in early 2013. The Plaintiff gave evidence, which I accept, that thereafter he continued to use the disputed right of way to access the property until December 2015 when Mrs Lewis put up the boundary fence.

55. I am therefore satisfied that there was an uninterrupted exercise of the right of way for more than 20 years. However I am not satisfied that such exercise was as of right as I accept Mrs Lewis' evidence that Mr Steede sought her permission to continue to use the right of way. This was fatal to the claim for lost modern grant.

Conclusion

56. The Plaintiff's claim to an easement succeeds in part. The easement is limited to an 8 foot right of way over 3 Boundary Lane for the purpose of entering and exiting 5 Boundary Lane. Save for the width, the right of way follows the course of the right of way shown in the May 2009 and January 2017 plans. It does not include a turning space or right to park a vehicle. The use must not be excessive.

57. I realise that this result will be desperately disappointing for the Defendants. I would hope that going forward the parties will act with a tact and consideration for each other which has not always been present in the fraught history of this dispute.

58. I shall hear the parties as to costs and any consequential directions which are necessary for the implementation of this judgment.

Dated this 1st day of August, 2017

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Hellman J