England and Wales High Court (Chancery Division) Decisions

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Case No: 3LV90068

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LIVERPOOL DISTRICT REGISTRY

Liverpool Civil & Family Courts
Vernon Street
Liverpool
09/10/2014

B e f o r e :

MR JUSTICE NORRIS
VICE-CHANCELLOR OF THE COUNTY PALATINE OF LANCASTER

Between:

Martin Harry Bradley **Rosemary Diane Bradley**	**Claimants**
- and -	
Peter Greenwood Heslin **Marianne Heslin**	**Defendants**

Mr. Lawrence McDonald (instructed by Brabners LLP) for the Claimants
Mr. Christopher Jones (instructed by Portland Legal Services) for the Defendants
Hearing dates: 19-22 May 2014

HTML VERSION OF JUDGMENT

Mr Justice Norris :

1. Rather to my surprise I find myself trying a case about a pair of gates in Formby: surprise on at least two counts. First, that anyone should pursue a neighbour dispute to trial, where even the victor is not a winner (given the blight which a contested case casts over the future of neighbourly relations and upon the price achievable in any future sale of the property). Second, that the case should have been pursued in the High Court over 3 days. It is not that such cases are somehow beneath the consideration of the Court. They often raise points of novelty and difficulty and are undoubtedly important to the parties and ultimately legal rights (if insisted upon) must be determined. But at what financial and community cost?

2. In 1977 Mr Ewing owned the entirety of the plot now comprised in Title Number MS67573 and MS54181. The entire plot fronted onto Freshfield Road, Formby to the west and was bounded by a wide public footpath called Long Lane to the north. There was an Edwardian villa on the plot designated "No. 40", with a large garden to the rear incorporating a former paddock. Mr Ewing built a bungalow on the paddock land. The bungalow was designated "No. 40A".

3. Mr Ewing moved into No.40A and in October 1977 sold off No.40 (the original villa) to Mr and Mrs Thompson. No.40 was given the title number MS67573. Mr and Mrs Thompson sold No.40 to Mr and Mrs Field in 1984: and they in turn sold No.40 on the 15 September 1986 to Mr and Mrs Bradley, who are the current registered proprietors and the Claimants in the proceedings. (Each of the Claimants is entitled to be called "Dr Bradley": but I will refer to them as "Mr Bradley" and Mrs Bradley" respectively so as to distinguish between them, but without thereby intending any disrespect).

4. No.40A retained the original title number, MS54181. Mr Ewing sold No.40A to Mr Armstrong in the Autumn of 1986 (so that both No.40 and No.40A changed hands at the same time). Mr Armstrong lived at No.40A until his death in 2005. Mr Armstrong's executors sold No.40A on the 21 December 2006 to Mr and Mrs Heslin, who became its registered proprietors and are the Defendants in the action.

5. The separation of No.40 and No.40A had occurred on the 20 October 1977 when Mr Ewing sold No.40 to the Thompsons and retained No.40A for himself. When separating out No.40 the conveyancer used the hallowed but mutually stultifying formula:-

> "All that messuage or dwelling house and garage known as 40 Freshfield Road Formby… together with the land forming the site thereof… which is for the purpose of identification only more particularly delineated and edged red on the plan annexed hereto being part of the land of which the Vendor is registered proprietor…"

   The plan was to the usual small scale of 1/1250: and the "general boundaries" rule applied. So precise boundaries cannot be measured from the plan, and have to be worked out on the ground.

6. Mr Ewing did not sell the whole of the plot that fronted onto Freshfield Road. He retained for himself as owner of No.40A a driveway running from Freshfield Road alongside and parallel to the northern boundary with Long Lane: and he gave the Thompsons as the owners of No.40 a right of way over that part of the driveway which ran alongside the forecourt to No.40 and alongside the villa and up to the garages built at the rear of No.40. So this right of way was granted over the western half of the (roughly 200ft) length of the driveway. The remaining eastern half of the driveway retained by Mr Ewing to serve No.40A (bounded on the north by Long Lane and on the south by the garden to No.40) was unencumbered by any right of way and was for the exclusive use of No.40A. There is one point of detail to note. On the North West corner of No.40A (where the end of the driveway

met Freshfield Road) the boundary did not form a right angle. The corner was cut off at an angle of roughly 45 degrees. So the driveway actually ended in a point on its southern boundary with No.40. I will call the triangle of land cut off the corner of the north western boundary "the excluded triangle".

7. The right granted was:-

> "A right of way in common with the Vendor and his successors in title… for all purposes with or without vehicles to pass and re-pass over and along that portion of the access road retained by the Vendor which is shown coloured blue on the said plan which said land coloured blue is part of the land registered under the above title number subject to the payment by the purchasers or their successors in title of one half of the cost of the maintenance and repair of that portion of the said access road coloured blue as hearing before mentioned…"

(There is an obvious mistake in that the "said land coloured blue" was not part of the land registered under "the above title" but was registered under the title number of the original plot). I will refer to the whole length of this strip of land running parallel to Long Lane as "the driveway".

8. I visited the site. Standing in Freshfield Road and looking east the frontage onto Freshfield Road appears thus. The boundary between No.40 and Freshfield Road is formed by a wall approximately 3ft in height and built of reconstituted stone. This terminates at the northern end of the frontage wall in a pillar with a capstone approximately 4ft in height. This is matched by an identical pillar (now lacking the capstone) on the northern side of the driveway, bearing the house name and number for No 40A. From this northernmost pillar springs a low stone wall approximately 2ft in height which runs northward for about 2ft before making a right angle turn east and then running for another 2ft to form the start of the boundary between the driveway and Long Lane. (So on the ground the north western corner is a right angle, and the excluded triangle has been incorporated into the driveway and its features). The boundary between the driveway and Long Lane is then formed by a close boarded fence.

9. Between the two pillars is hung a pair of iron gates each about 4ft wide. The gates are hung on gudgeon pins set into the stone pillars, the pins passing through adjustable eye-bolts on the gates. At present the gates are slightly out of adjustment in that the southern gate hangs slightly higher than the northern gate. The gates are opened by swinging inwards onto the plot. The northern gate must be shut first and is held closed by a drop bolt, which simply drops into a hole in the tarmac. The southern gate ought then to shut against the stock on the northern gate: but because the southern gate is out of adjustment the two gates have to be closed together. The Defendants were anxious that I should note that the adjustment on the eye-bolts had been painted over, that the hinges were corroded, and that the gate latch did not work (partly because it had been painted over and partly because the gates were out of alignment): and so I did.

10. It is now necessary to set out the internal arrangements that would be apparent on passing through the gates between the pillars and proceeding up the driveway towards No.40A.

11. On the right hand side (which is the forecourt to the villa at No.40) a low edging wall made out of the same reconstituted stone and about two courses high runs from the back of the southern pillar through several curves towards the front door of No.40. The forecourt to the villa between that low wall and the northern boundary onto Long Lane is covered in tarmac. It is not possible on the ground to see the boundary line between the driveway and the path to the front door of No.40 for there is simply a single sweep of tarmac.

12. On the left hand side, the northern boundary of the driveway does not abut directly onto Long Lane. That is because there is an identical low stone wall running the length of the driveway behind which is a space of about 18 inches in which is planted a leylandii hedge which abuts directly onto the back of the close boarded fence that runs along Long Lane, and has obviously been allowed to grow to a considerable height. The space between this low stone wall and the gable end of the villa on No.40 is entirely tarmaced.

13. The villa on No.40 is set out at a slight angle on the plot (with a greater distance between the front corner of the villa and the boundary with Long Lane than between the rear corner of the house and that boundary). It is plain from the filed plan that the driveway has straight sides and those sides are parallel to Long Lane. Since the driveway is parallel to the boundary with Long Lane but the gable end of the villa on No.40 is not, it follows that a triangular sliver of land forming part of No.40 has been incorporated into the surface of the driveway: but it is not possible to identify on the ground where the true boundary of the driveway should be alongside the gable end of the villa.

14. There was no tape measure at the site view. But I did some rudimentary pacing and took some sight lines. Whether one includes or excludes one or both of the pillars at the entrance to the driveway, the driveway where it abuts Freshfield Road is wider than the driveway width at the "pinch point" between the gable end of the villa and the Long Lane boundary. The northernmost pillar, the northward run of the low stone wall and its return to form the start of the boundary with Long Lane were (to my eye) probably built on the excluded triangle.

15. Freshfield Road itself is a quiet residential road. There is some through traffic. During my site visit it was sometimes possible to cross immediately: but sometimes it was necessary to wait whilst a car passed. The cars which conveyed people to the view were easily parked on Freshfield Road and caused no obstruction to passing traffic. At the end of Long Lane (which is a wide footpath alongside which runs a ditch to the north) was a dropped kerb and a splay onto Freshfield Road about 15ft or so in length. In daylight I do not think it would be difficult to see that the gates were closed whether approaching the driveway from the north or the south, though one would have to be appreciably closer if approaching from the north because of the reduced sight line (though one could draw onto the splay if it was necessary to stop and ascertain the position). It was difficult to assess what would be the position at night, although I noted a street lamp opposite the end of Long Lane on the other side of the road and so no real distance from the gates.

16. How did these features come into being? There is no direct witness evidence: nor does the story emerge from any documents. Mr Thompson (to whom Mr Ewings had first sold No.40) was a builder. He came to repair the Bradleys' swimming pool in about 1990 and told Mr Bradley something of the history. When the dispute between the Bradleys and the Heslins blew up he gave some further information to Mr Bradley. Mr Bradley's witness statement contained hearsay evidence about what he had been told by Mr Thompson. Mr Thompson himself is now elderly and the Bradleys did not wish to compel him to come to Court.

17. The Heslins' solicitors also interviewed Mr Thompson: but they did not put in any hearsay statement which contradicted Mr Bradley's account of what he had been told. I have reminded myself about the caution that should be exercised when assessing the weight to be attached to hearsay evidence: in the instant case it (and what I saw) is all I have to go on. I find the following facts.

18. Mr Thompson was a builder. He bought No.40 with the intention of renovating it. He built outhouses and garages at the back of No.40 and built the swimming pool. He laid out and remodelled the gardens to a unified design incorporating the low reconstituted stone walls to which I have referred, and he told Mr Bradley that he considered it to be an integral part of his redevelopment of No.40. The current frontage onto Freshfield Road was created by him. He personally paid for all of the materials, and his business undertook the work. He paid for the leylandii hedge and for the tarmacing of the driveway. At exactly what point in his period of ownership (from 1977 to 1984) this work was undertaken it is not possible on the evidence to say. But the earliest photograph which I have (dated from May 1987) shows the leylandii hedge to be about 9ft tall and fairly thick, so that it seems unlikely that the work was done at the very end of that period: and that would accord with common sense, in that a builder "doing up" a house would not want to leave the improvement of its presentation and immediate impact longer than was necessitated by other works. Equally it seems likely that the extensive work to the outhouses and garages at No.40 would mean that "prettifying" the driveway and front garden would not be top of the agenda. So one can perhaps date the works to about 1979.

19. What is important to note is that Mr Thompson's unified design and complete work was not confined to his own land. He tarmaced and edged the whole driveway, not simply the part over which he had a right of way: so he tarmaced the eastern end which belonged to and was exclusively used by Mr Ewing and the subsequent owners of No.40A. He planted a hedge along the Long Lane boundary, and indeed along its whole length not simply that part which lay adjacent to (though separated by the driveway from) the buildings on No.40. He built a low stone edging wall on the northern side along the entire length of the driveway, not simply along that part over which he had a right of way. He incorporated into the surface of the driveway some land which quite plainly belonged to No.40. To my eye, by building the northern entrance pillar and the low two foot wall that joined the frontage to the boundary with Long Lane he had shifted the entrance of the driveway onto Freshfield Road slightly to the south i.e. into land that strictly formed part of No.40.

20. But the consensual, co-operative and neighbourly approach of Mr Ewing and Mr Thompson has not survived the changes of ownership, and the Bradleys and the Heslins now resort to their legal rights. The Bradleys close the gates between the entrance pillars. This renders No.40 secure: but it blocks the driveway that affords access to No.40A. This is an inconvenience to the Heslins when leaving No.40A, for they have to stop their car on the driveway and open the gates in order to drive down Freshfield Road. It is more of an obstruction to the Heslins when gaining access to No.40A, for they have to stop their car on Freshfield Road and then open the gates in order to use the driveway to reach No.40A.

21. Sensible neighbours would have sat round a table and worked out either a regime for closing the gates at agreed hours (the one party suffering a diminution in security and the other an increase in inconvenience) or the installation of remotely operated electric gates (which might have cost £5000). There were some desultory attempts at exploring the possibility of electric gates, but (when they came to nothing) in August 2012 Mr Heslin simply padlocked the northern gate open and refused to allow the Bradleys to shut it: and in July 2013 the Bradleys commenced proceedings for declarations as to their right to use the gates and for an injunction requiring the Heslins to remove the padlock and restraining them from interfering with it. The Bradleys say that the southern pillar at the driveway entrance is built on land forming part of No.40, and they base their claimed legal rights to ownership of the northernmost pillar and gates and to close the gates upon proprietary estoppel (or alternatively upon adverse possession as to the pillar and upon prescription or "lost modern grant" as to the right to close the gates). In their Defence the Heslins deny that the Bradleys have any right to close the gates at all (asserting that the gates are purely ornamental), assert

that the gates have never been closed on any regular basis and were never closed until July 2012, and claim that both of the pillars that flank the driveway belong to No.40A (as does the gate itself), though there is no counterclaim for relief.

22. This entrenchment of positions is a regrettable characteristic of neighbour disputes. I add my voice to that of many other judges who urge that, even when proceedings have been issued to preserve the position, the engagement of a trained mediator is more likely to lead to an outcome satisfactory to both parties (in terms of speed, cost, resolution and future relationships) than the pursuit of litigation to trial. In Oliver v Symons [2012] EWCA Civ 267 (a disputed easement case) Ward LJ said at [53]:-

> "I wish particularly to associate myself with Elias LJ's pointing out that this is a case crying out for mediation. All disputes between neighbours arouse deep passions and entrenched positions are taken as the parties stand upon their rights seemingly blissfully unaware or unconcerned that that they are committing themselves to unremitting litigation which will leave them bruised by the experience and very much the poorer, win or lose. It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced mediator, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come."

23. Perhaps in times of scarce resources and limited (and in any event expensive) representation it is time to give those who know the worth of mediation in this context (both to the parties and to all Court users) some help. If in any boundary dispute or dispute over a right of way, where the dispute could not be disposed of by some more obvious form of ADR (such as negotiation or expert determination) and where the costs of the exercise would not be disproportionate having regard to the budgeted costs of the litigation, any District Judge (a) imposed a 2 month stay for mediation and directed that the parties must take all reasonable steps to conduct that mediation (whatever the parties might say about their willingness to engage in the process) (b) directed that the fees and costs of any successful mediation should be borne equally (c) directed that the fees and costs of any unsuccessful mediation should form part of the costs of the action (and gave that content by making an "Ungley Order") and (d) gave directions for the speedy further conduct of the case only from the expiration of that period, for my own part (recognising that certainly others may differ) I think that such a case management decision would be difficult to challenge on appeal.

24. I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.

25. But mediation is not always successful: and this case has gone to trial. I do not by so stating intend any criticism of the case managing judges or the legal representatives. The confidentiality attending the mediation process means the trial judge can know nothing of what has gone on.

26. Both an understanding of the nature of the arrangement between Mr Thompson and Mr Ewing and an assessment of the arguments about the acquisition of rights over time requires

an examination of events subsequent to the creation of the present layout. The evidence on these matters was given (for the most part) by family, friends or employees or each of the contending parties. I had no doubt that each of these witnesses intended their evidence to be honest, and none came consciously to lie or to deceive. But from the judge's point of view, all such evidence runs the risk (a) that considerations of loyalty lead to selective recollection and emphasis and (b) that the close connections between the witnesses means that matters are inevitably the subject of discussion in which a "collective memory" unconsciously emerges and truly independent properly nuanced evidence becomes difficult to discern. Some of the evidence (particularly that of Mrs Rosemary Bradley and of Dr Laura Bradley) had obviously been the subject of extensive consideration, self-review and analysis with a view to enhancing its credibility: but the resulting apparent precision was no more persuasive than the more raw-edged and generalised recollection of others who gave evidence about the state of a pair of gates over a 30 year period as remembered by busy people to whom they were of no immediate significance.

27. By some way the most impressive witness was Margaret Cairney, who lives at 42 Freshfield Road and is the local "Homewatch" co-ordinator. She gave careful evidence supported by records as to her visits to and observations of No.40 and No.40A as a result of her being asked to keep an eye on the properties when the Bradleys and the Heslins were away. I accept her evidence.

28. I approach the subsequent events by reference to the ownership of No.40A and No.40.

29. From 1977 until 1984 the properties were in the respective ownerships of Mr Ewing and Mr Thompson. I have described what work was done. I make two points. First, the work undertaken goes far beyond what could be categorised as maintenance of the shared portion of the driveway. Second, it is extremely improbable that Mr Thompson would have done work on Mr Ewing's land (such as building boundary walls to the driveway, laying out and edging the driveway, planting the hedge and tarmacing the end of the driveway nearest No.40A) without any discussion with Mr Ewing, or that Mr Ewing would simply stand by and allow it all to happen. The compelling inference is that all this work (including the building of the northern and southern pillars flanking the driveway and the installation of working gates) must have been done with the positive agreement of Mr Ewing and that each of Mr Thompson and Mr Ewing got something of benefit out of the arrangement. But there is no direct evidence of any express formal agreement or of any specific terms. The closest the evidence came was Mr Bradley's oral evidence that Mr Thompson said that he had agreed with Mr Ewing to build the gateposts, but had given the impression that it was a tacit agreement. I find that the gates were not erected with the intention that they be purely ornamental and would never be shut. Mr Thompson had an aggressive dog, and one of the functions of the gates was to prevent it straying onto Freshfield Road. It may be inferred that the gates were regularly shut for that purpose. But it cannot be inferred that the default position was that the gates were shut: for the dog would probably have been restrained or in the house for significant periods. When shut, the gates must have interfered to some degree with Mr Ewing's freedom of access and egress: but the absence of any evidence of contention founds the inference that such impediment was consensual and reasonable.

30. From 1984 to the autumn of 1986 the properties were in the respective ownerships of Mr Ewing and Mr and Mrs Field. There is no direct evidence about the use of the driveway in this period. At the end of it the Bradleys visited No.40 with a view to its purchase. When they did so the gates were shut, and were opened to admit them. That was because the Fields had three children, including a lively toddler who needed to be kept off Freshfield Road. It may be inferred that the gates were regularly shut for that purpose. Mrs Bradley's

evidence was that in the time of the Fields the default position was that the gates were shut. There is again no evidence of contention.

31. From 1986 to December 2006 the properties were in the respective ownerships of Mr Armstrong and the Bradleys. They each bought their respective properties at more or less the same time. Mr Ewing had built No.40A as a bungalow: but Mr Armstrong intended to add a storey and convert it into a house. On the day when the Bradleys moved in Mr Armstrong telephoned and asked if he could demolish the southern pillar at the entrance to the driveway (i.e. that closest to No.40) in order that his contractors could gain access for a mobile crane to lift the new roof trusses into place. This demolition was in the event unnecessary. There is no evidence about what Mr Armstrong intended to do in relation to the northern pillar – whether he intended to demolish it without asking the Bradleys, or whether he intended to leave it standing. It is not possible to draw any reliable inference from the silence on the topic, since the demolition of the southern pillar could have been as much to do with "swing space" at the entrance as with absolute width (having regard to the existence of the "pinch point" formed by the rear corner of the gable end of the villa).

32. During this period the gates were regularly closed by the Bradleys on a "need to" basis, and without discussion with or the agreement of Mr Armstrong. Thus, when Adrian Bradley was small (he was 4 when the Bradleys bought No.40) they were shut when he played outside. Later, this meant that in general (though not invariably) the gates were shut at about 9pm or 10pm and opened at about 7.30am on weekdays (though later at weekends), being otherwise left open. When he needed access or egress Mr Armstrong would open the gates, and then close them behind him. Mrs Bradley said that Mr Armstrong "welcomed" the closure of the gates: whilst this risks being the sort of reinforcement that derives from extensive consideration of selected events, Mr Bradley also recounted how Mr Armstrong had accosted some youths venturing down the driveway claiming to have "lost their ball" and had thereafter recognised that his own secluded property benefitted from the increased security (a matter of some importance because Mr Armstrong was often away at his second home). I find also that, when requested by Mr Bradley sometime in 1990 or earlier, Mr Armstrong agreed that he and his visitors would close the gates behind them if they needed to pass through closed gates. As Mr Bradley put it, "routines became established".

33. From 2000 onwards the gates were more frequently left permanently open, being shut for particular reasons such as when rowdy behaviour on Freshfield Road connected with an event at a local school or a party season was anticipated, or when a new car was parked outside the house.

34. From some time in 2002 Mr Armstrong became increasingly unwell. One visiting doctor or ambulance crew complained that the gates to the driveway were shut. Thereafter they were left more or less permanently open because (as Mrs Bradley put it) the Bradleys felt they ought to be good neighbours and did not want any delay in treatment of Mr Armstrong upon their consciences. Nonetheless they were still occasionally shut, especially when disturbance was foreseen: as Mrs Bradley put it "if there was reason to do so".

35. When Mr Armstrong died in 2005 the Bradleys resumed closing the gates at night on a more frequent basis, to provide security for themselves and for No.40a (which was empty for two years). They did not close them during the day: so Mr Airey, who had worked for Mr Armstrong and continued to work for Mr Armstrong's personal representatives in looking after the empty property, never had to open the gates.

36. At the front the Bradleys maintained the pillars and painted the gates, first in 1992 and then again in 1998 and in 2004. Some time after he moved in (it is not possible to establish even

an approximate date) Mr Armstrong put a slate bearing the house name and number of No.40A on the northern pillar to the driveway. The circumstances in which he did so were not explored in evidence, Mrs Bradley's evidence being that Mr Armstrong had "discussed" it with her husband, and Mr Bradley's evidence being that Mr Armstrong had "[informed] us of his intention before doing so". But they agreed with the proposal anyway.

37. From December 2006 to date the properties have been in the respective ownerships of the Heslins and the Bradleys.

38. According to the evidence of the Bradleys they maintained the practice of shutting the gates at night, but on a less frequent basis (perhaps two nights per week). They appear to have taken some account of the fact that the Heslins came and went at a late hour (in connection with their participation in amateur dramatics) and in an endeavour to be neighbourly did not close the gates if they knew the Heslins had not returned. But the strongest impression I gained was the gates were shut most often when anti-social behaviour in Freshfield Road was anticipated (for example at November 5th, Christmas and New Year) or when No.40 or No.40A was unoccupied for any extended period

39. On 14 December 2010 a burglar broke into the rear outhouse at No.40. The gates were on that occasion open: and the crime was an opportunistic one. Mrs Bradley says that the police advised her to ensure that the gates were shut at night and she began closing them much more frequently, leaving them open if the Heslins asked.

40. The evidence of Mr Heslin was (a) that until 2011 the gates were never closed at night, that there would have been a riot if they had ever been shut, and that he had never had to get out of his car and nor had his wife; and (b) that on 3 or 4 nights a week they have visitors who leave between 11.00pm and 1.00am and on no occasion before 2011 had any visitor found the gates closed on leaving.

41. The Heslins also called as a witness Mr Arslanian, a friend of Mrs Heslin's son, who said he had visited the property 10 to 20 times in the period from 2006 until July 2009, and then 15 to 20 times in between July and November 2009 at varying times during the day and evening (but sometimes as late as 4.00am) and had never seen the gates shut. His written evidence was in essence consistent with the account given by the Bradleys. His oral evidence elaborated his written evidence so as to add a degree of detail which contradicted the Bradleys' account. I was unimpressed with this embroidery.

42. The evidence of Mrs Cairney was that she had paid little attention to the gates until 2009. In that year she began to look after No.40 whilst the Bradleys were away, doing so twice in 2009, five times in 2010, twice in 2011 and twice in 2013; she has lost her 2012 diary. She did the same for the Heslins from about December 2010. Once she did start to take notice she observed that the gates were frequently shut. They were generally shut when she had to pay her visits to the properties (which was when the Bradleys were away), and since she found the gates "baffling" (I have explained how their lack of alignment required them to be manoeuvred in a particular way) she called upon her husband to help her. Although she was a little uncertain about the status of the gates in 2009 itself, she was clear about the pattern from 2010 onwards, and strongly disputed Mr Heslin's evidence that the gates only began to be closed in 2011. She connected the frequent closing of the gates at No.40 with an incident of vandalism. No.38 Freshfield Road became empty in July 2008; and in October 2009 some youths smashed in the doors and set a fire in the garage which shared a party wall. She thinks that it was from that time that the Bradleys began closing the gates more frequently. There was a second "break-in" at No.38 in July/August 2011: but Mrs Cairney was clear

that the practice of closing the gates had begun before then. I accept this evidence in preference to the accounts of both the Bradleys and the Heslins where they differ.

43. On 8 December 2011 the Heslins arranged for the front gates to be measured in connection with a quotation for electric gates. The appointment had been arranged late and the Bradleys had not been forewarned. There was an altercation between Mrs Bradley and Mrs Heslin. Within about a week there was another attempted break-in at No.40: and this reinforced Mrs Bradley's determination to see that the gates were shut and (over the ensuing months) Mrs Heslin's determination to complain at any inconvenience. On 17 August 2012 Mr Heslin padlocked the northern gate of the pair permanently open (save for a period in October and November 2012). Although the Bradleys could have closed the remaining gate (causing just as much inconvenience to the Heslins but without achieving security) they did not do so. The Bradleys issued the proceedings in July 2013 so as not to run the risk that any prescriptive right to open and close the gates should be interrupted for a year.

44. For the Bradleys Mr McDonald argued (a) that the Bradleys owned the southern pillar because it was built by Mr Thompson on land within the title to No.40, and (b) that the Heslins were estopped from denying the Bradleys' ownership of the northern pillar (or alternatively title to it had been acquired by adverse possession). He submitted that an easement to close the gates had been acquired by prescription or by lost modern grant: or alternatively that the Heslins were estopped from denying the existence of such an easement.

45. For the Heslins, Mr Jones argued that (irrespective of who paid for them) both gate pillars were built on land belonging to No.40A and formed part of that land; that the gudgeon pins were chattels which (when driven into the pillars) became fixtures; and that the gates were also chattels which, when hung on the gudgeon pins, were so placed not for their better enjoyment as panels of ironwork, but as part of a design to make the driveway look pretty, so themselves becoming fixtures. At law the pillars and gates therefore belonged to the Heslins and they (and they alone) had the right at law to open and close the gates.

46. He argued that unless it was established by evidence that Mr Thompson had intended to retain ownership of the bricks, the gudgeon pins and the gates and had intended to retain possession of those driveway features (by treating them as his own and by excluding Mr Ewing therefrom so far as reasonably practicable and so far as the processes of the law would allow) there could be no question of acquiring title by adverse possession. He submitted that there was no such evidence.

47. Mr Jones further argued that if ownership of the pillars was disregarded and attention focussed upon the claimed "right" to close the gates, then no such right could be claimed as an easement: he submitted that the right to close gates is only meaningful if it imposes on the servient owner the obligation to close the gates behind him if he opens them, because a right that can be undone immediately is not "a right". Moreover, if such an easement could exist, then no such consistent use was established by the evidence as could found an easement of the type claimed. The usage was simply too variable and was in essence permissive.

48. In the course of argument I put to the parties that the dealings between Mr Ewing and Mr Thompson bore the hallmarks of an informal boundary agreement of the type considered in Neilsen v Poole (1969) 20 P & CR 909 whereby parties agree that in return for a concession by A in one place B will make a concession in another place, thereby effecting trivial transfers of land in order to demarcate what might otherwise be in doubt. As Joyce v Rigolli [2004] EWCA Civ 79 demonstrates, such a principle can apply in relation to trivial bits of

land whether the transfers are conscious or unconscious. Neither party was minded to take up the suggestion (possibly because no agreement between Mr Ewing and Mr Thompson could deal with the ownership of the northern pillar to the driveway if it was built on the excluded triangle). But I remain of the view that the approach has some value.

49. In analysing the position I make four preliminary observations. First, the language of the parcels clause in the transfer that created No.40, the scale of the attached plan, the existence of the general boundaries rule and the absence of any evidence as to what was the physical state of the area at the date of the 1977 transfer make it impossible simply to construe the 1977 transfer in such a way as to establish the present line of the boundaries to within inches: and yet the law has to provide an answer.

50. Second, insofar as that answer might derive from agreement or understanding, as Megarry J pointed out in Neilson v Poole (supra at p.919) such agreements and understandings are by their nature acts of peace, quieting strife and avoiding litigation, and are to be favoured in the law, however informal they might be. But when the Court looks at agreements or understandings it is in essence looking at agreements or understandings between those who create or modify the boundary (in the instant case, Mr Ewing and Mr Thompson) or those who compromise disputes over the boundary, of which there is direct evidence or which might properly be inferred from proved facts. One is otherwise in the realm of adverse possession or prescription.

51. Third, although properly proved agreements or understandings are favoured by the law some caution must be exercised. Simple acts of neighbourliness should not ripen into legal rights vested in the beneficiary of the actor's kindness, or amount to an abandonment of some legal right already vested in the actor.

52. Fourth, when looking at usage over a period of time one has to be clear whether that usage is being used as evidence of what must have been agreed or understood (where the acts of Mr Ewing and Mr Thompson might have relevance: see Maggs v Marsh [2006] EWCA Civ 1058 or Ali v Lane [2007] EWCA Civ 1532), or as evidence of a modification of some established right, or as by itself establishing a right (by adverse possession or prescription or under a lost modern grant).

53. In my judgment the southern pillar at the driveway entrance belongs to No.40. First, to my eye it is built upon land forming part of No.40, even making every allowance for the small scale of the registered plan and the applicability of the general boundaries rule. I do not have the benefit of a survey plan and must make the most of what evidence I have (in the form of (i) small scale plans identifying features and (ii) photographs) and the results of the site visit. The driveway runs parallel to the Long Lane boundary, the sides of the driveway are themselves parallel, and the narrowest point of the driveway is the "pinch point" of the eastern end of the gable wall. If this data is a "given" then it seems to me that the southern pillar belongs to No.40. Second, the southern pillar is an integral part of the frontage wall and forms part of a coherent design of the front garden of and forecourt to the villa on No.40. It simply appears to be part of the front wall to No.40. It so appeared to Mr Armstrong when he asked to demolish it (an act which does not amount to some acknowledgement of title, but simply evidences a natural reaction to the layout). I consider it extremely improbable that when the southern pillar was built by Mr Thompson he and Mr Ewing thought or agreed or operated on the footing that it belonged to No.40A which lay at the far end of the drive. As an alternative to construing the transfer plan, I find and hold that there was an informal boundary demarcation agreement under which the southern pillar was accepted as belonging to No.40: or in the further alternative that that was clearly the understanding upon which the southern pillar was constructed.

54. It is not really possible to look at the northern pillar in isolation from the gates which hang from it. In my judgment the northern pillar belongs to No.40. First, it is to my eye built on land that was in third party ownership i.e. on the excluded triangle. What the natural features were before the work was undertaken I do not know: but it may be inferred that the Land Registry plan showing the excluded triangle reflected something on the ground (even if it did not precisely delineate it). On that footing the question is: who (if anyone) has acquired title by dispossessing the paper owner? Mr Thompson built and paid for the pillar. Mr Thompson's stonework physically occupies the space. Of itself that is not enough because he also built and paid for the "L" shaped low stone wall that forms the new boundary on the north western corner to the site. No sensible consideration of the limited facts would lead one to conclude that Mr Thompson intended to exclude the whole world from the excluded triangle which he incorporated into Mr Ewing's northern boundary either as regards the low stone boundary and edging walls or as regards the leylandii hedge which he planted for Mr Ewing. It seems so obvious that they simply form part of the new boundary to No.40A, and if anyone intended to possess or exercise rights of ownership over them then it was Mr Ewing and his successors. But the pillar is different. Although related to the boundary and edging walls its principal function is not to tie together the edging wall and the boundary wall: its principal function is to form the northern element of a pair of pillars from which gates are to be suspended. There is no direct evidence as to Mr Thompson's state of mind. But it is in my judgment proper to infer that he must have intended (in creating, paying for and building a coherent and integrated frontage design) to possess and exercise control over the northern pillar: and there is no doubt that he in fact did so by hanging a gate from it. I find and hold that Mr Thompson actually possessed the northern pillar (by doing all that an occupying owner might be expected to do) and that he intended to exclude all the world (including the owner of the paper title to the excluded triangle).

55. There is no evidence that Mr Ewing ever took physical possession of the northern pillar by doing such acts as might be expected of an owner of such a pillar. Mr Thompson was not therefore dispossessed.

56. When Mr Thompson sold No.40 to Mr and Mrs Field it seems to me plain that Mr Thompson's possession of and his maturing possessory right to the pillar was transferred to them as an incident of his registered title under the Land Registration Act 1925 and was not excluded from the transfer of No.40. I find and hold that the Fields immediately followed Mr Thompson into possession of the northern pillar acting in relation to it as he had done, by hanging a gate from it, and using that gate. There is no evidence that Mr Ewing dispossessed them.

57. When the Fields sold to the Bradleys in my judgment the analysis is the same. Physical possession of the northern pillar passed together with the maturing possessory right, and the Bradleys followed the Fields into possession of the northern pillar, acting as they had acted. When Mr Ewing sold to Mr Armstrong the maturing rights of the Fields (or the Bradleys, as the case may be) were overriding interests that bound Mr Armstrong, under either s.70(1)(f) or s.70(1)(g) of the Land Registration Act 1925. Mr Armstrong did not dispossess the Bradleys. They continued to hang and to use the gate on the northern pillar (which is all that could really be done with it). Putting up a nameplate with the agreement of the Bradleys did not amount to an act of dispossession (so as to bring to an end the Bradleys' maturing right and commence a fresh period running in favour of Mr Armstrong against the owner of the paper title to the excluded triangle).

58. In my judgment the Bradleys acquired title to the northern pillar by adverse possession against the true owner of the excluded triangle by the beginning of 1992.

59. Second, if I am wrong about the extent of the registered title at the north western corner of No.40A and the northern pillar is built on the driveway (and so on land originally within the ownership of Mr Ewing), then I would declare that the Bradleys own the northern pillar as the result of the operation of a proprietary estoppel.

60. Mr Jones submitted that there was no direct evidence of any specific agreement or understanding as to the ownership of the northern pillar and the gate hung from it. This is true: but it is not an answer to the case based on proprietary estoppel, because an estoppel can be founded upon a representation that is never expressly made but is a matter of implication and inference from indirect statements and conduct: see Thorner v Major [2009] UKHL 18 at para.2.

61. There is no doubt that Mr Thompson paid for the construction of the northern pillar; that it forms part of a coherent and unified frontage design incorporating a pair of gates; that the effect of that design is to make the entire frontage appear to be part of No.40; that as part and parcel of the implementation of that design Mr Ewing acquired extensive and enduring benefits going far beyond any thing that could be regarded as the discharge of an obligation to share the cost of maintaining a jointly used driveway; that all relevant works were undertaken by agreement (even if that agreement is described as "tacit"); and that from the time of its construction Mr Thompson acted as an owner of the northern pillar and gates would be expected to act and that Mr Ewing did not so act. Mr Jones warned me about making an evidential leap from these limited facts to finding that there was some implied agreement about legal rights in relation to the works so constructed. I heed that warning. But it seems to me plain that in acting as owner of the northern pillar (constructing it at his expense to his design in his chosen location, and hanging from it gates which he operated according to his need) Mr Thompson was doing so because he understood (and reasonably understood) that he would be entitled to do so: that it would have been obvious to Mr Ewing that that was the case: and that Mr Ewing must have intended that to be the case (as a return for all the work that Mr Thompson did at his own expense on property that belonged to and was used exclusively by Mr Ewing). As Mr McDonald rhetorically asked: if in 1979 Mr Ewing had demolished the northern pillar or painted it pink would that have been regarded as conscionable? Or would equity have said to Mr Ewing "You are estopped from exercising your rights as registered proprietor of the ground on which the pillar has been built by Mr Thompson"?

62. There was no serious argument that if an estoppel originally governed the relationship between Mr Ewing and Mr Thompson then somehow it ceased to bind their successors, so that Mr Armstrong (and after him the Heslins) could assert rights to ownership of the northern pillar as (assumed) registered proprietors. The frontage is a unified whole and it appears to be the frontage to No.40: and the owners of No.40 were in actual occupation of it.

63. Accordingly, on this alternative and secondary basis, I hold that the northern pillar belongs to the Bradleys.

64. This leaves the gates themselves. I find and hold that the gates that hang between the pillars belong to the owners of No.40. Mr Thompson paid for them: and they hang between pillars which belonged to him and have belonged to successive owners of No.40.

65. But ownership of the gates does not determine the real question in controversy between the parties. That question is: when (if ever) may they be closed?

66. I find that it was not intended that the gates should be purely ornamental. They were intended by Mr Ewing and Mr Thompson to be functional. There is no direct evidence of

agreement to that effect: but the fact that they were used as soon as they were erected may be relied on as evidence of the understanding or "tacit" agreement that must have been reached.

67. The construction of gates across a driveway can often be a substantial interference with the rights of those entitled to use it. Where there is a right of way and it is gated by the owner of the servient tenement it will frequently be the case that the application of the principles set out in Pettey v Parsons [1914] 2 Ch 662 and the approach suggested by Blackburne J in B&Q plc v Liverpool and Lancashire Properties (2000) 81 P&CR 246 will lead to an injunction ordering the removal of the gate, unless some means of reducing the inconvenience to something less than substantial can be found (as was done in Siggery v Bell [2007] EWHC 2167 or Wall v Collins [2009] EWHC 2100). That, of course, is the reverse of the case before me, where it is the owner of the dominant tenement who has gated the way and thereby interfered with the servient owners' rights. I make the point only to underline (by reference to a more usual context) just what a serious thing is the erection of gates across a shared way, but that sometimes the law recognises the right.

68. If the gates are closed and the Heslins or their visitors are coming home then the Heslins have to approach the entrance slowly and, if they see the gates shut, either (a) park the car at the kerbside (perhaps turning off the engine and locking up if there is a sole occupant in the car), get out, walk up the pavement or across the road, open the gates, return to the car and then drive through; or (b) park the car nose up to the gates, with the length of the car crossing the pavement and protruding into the road and into the path of the traffic, get out, open the gates, return and drive through. If the Heslins are leaving home then they can simply park on the driveway, leaving the engine running, whilst someone gets out to open the gates, and then drive through. It is one thing to do this on a summer evening: and another to do it in the depths of winter or during a downpour. Whilst the Heslins dramatised the exercise I have no doubt that if the gates were closed whenever they wanted to pass through them, then they would be seriously inconvenienced, as would their predecessors in title have been.

69. In the present case if the Bradleys close the gates over the driveway it will constitute a trespass over the Heslins' land, unless they have a right to do so on the occasion that they do so. The nature of that right would be an easement. I do not accept the argument of Mr Jones that the right to hang and close a gate is not a right capable of being an easement (and so cannot be acquired by grant or prescription or declared to exist by virtue of a proprietary estoppel). If the right to hang a clothes line (Drewett v Towler (1832) 3 B&Ad 735) or the right to overhang a bowsprit (Suffield v Brown (1864) 4 DeGJ&Sm 185) is capable of being an easement I do not see why the right to occupy airspace by hanging a gate over the land forming a driveway is incapable of being an easement that accommodates the dominant tenement. It does not amount to a claim to the whole beneficial use of the driveway, nor does it render the Heslins' ownership of the driveway illusory.

70. Nor do I accept his argument that a right vested in the Bradleys to hang and to close a gate is meaningless unless it is accompanied by an obligation on the part of the Heslins to close the gate behind them after they have passed through it. Mr McDonald did not argue that the nature of the Bradleys' claimed right was such that the Heslins did have to close the gate behind them (though such an obligation is not unknown to the law: see *Gale on Easements* 18th ed. Para 13-14). But even assuming there is no such obligation, the simple right to close the gates (even if they can at law be opened and left open by others) is of benefit to No.40 as the dominant tenement. The servient owner (in the position of the Heslins) might be neighbourly and well mannered (as was Mr Armstrong) rather than boorish: so the closed gates would voluntarily be shut after passing through them. Or the servient owner might be

at home, not going out and not receiving visitors: or away on an extended holiday: so the closed gates would not be opened.

71. What is claimed is a right to maintain gates across the entrance, and a right to open and close those gates at all times and for all purposes connected with the enjoyment of No 40. Has such a right been acquired?

72. In my judgment no such right has been acquired by prescription. The Bradleys must prove a period of user between 1993 and 2013. The user does not have to be continuous i.e. the Bradleys do not have to show that the default position is that the gates were shut any more that someone claiming a right of way has to show that he constantly drove up the lane. Regular intermittent use suffices. But such intermittent user has to have such character, degree and frequency as to indicate the assertion of a continuous right, and of a right of the measure of that claimed: see White v Taylor (No2) [1969] 1 Ch 160 at 192 per Buckley J cited in Polo Woods Foundation v Shelton-Agar [2009] EWHC 1361.

73. In 1993 the gates were regularly closed from 10.00pm until 7.30am. From 2000 they were more frequently left permanently open but were shut when there was a perceived risk of intrusion. From 2002 they were more or less permanently open. From 2005 night time shutting increased. From 2006 it decreased again, this time to about two nights per week (to take account of the Heslins' habits of life) and generally when security considerations indicated that course wise or when the Bradleys were on holiday. Closure for security purposes increased for a time after October 2009 and certainly after December 2010, but again taking account of the any request of the Heslins.

74. In my judgment this does not amount to the assertion of a continuous right of the measure claimed. It has about it a "permissive" quality: that the Bradleys closed the gates whenever the owners of No.40A were not using them or did not object to their closure. Such acts of neighbourliness by the Bradleys would not lead to the abandonment or restriction of an established right: but they do prevent the acquisition of a right to close the gates at all times and for all purposes connected with the enjoyment of No.40, for the right was not asserted when (whatever the needs of No.40) it would seriously inconvenience the owner of No 40A. As Mr Bradley put it "routines became established".

75. Nor is it possible to identify any continuous 20-year period of user of the requisite quality for the purposes of the fiction of "lost modern grant". The evidence of user by Mr Thompson is scant. I find that he did close the gate on a regular basis for the purpose of keeping his dog in; but I cannot find that he did so as the assertion of a right to close it at all times and for all purposes connected with the enjoyment of No.40 rather than pursuant to an understanding with Mr Ewing that since he had paid for the gates, the frontage, the driveway and the edging and hedging he could close the gates, provided that that the closure did not constitute a substantial interference with Mr Ewing's right of access.

76. The same is in my view true of the Fields. The evidence is scant. I find that they closed the gates regularly to keep in their young children. But I cannot find that they did so as the assertion of a right to close it at all times and for all purposes, rather than as a continuation of some arrangement that had come into being in the time of Mr Thompson.

77. That brings one to 1986 when the Bradleys and Mr Armstrong, both coming to their respective properties at the same time, establish their mode of living together as neighbours, with the pattern of opening and closing the gates varying between September 1986 and September 2006, but including an indeterminate period during which the Bradleys closed the gates when it suited them and asked Mr Armstrong to ensure that he and his visitors left

them as they found them (which I think is the only period where the user is of the requisite quality to support the right claimed).

78. I therefore hold that a legal easement to close the gates at all times and for all purposes connected with the enjoyment of No.40 is not established by prescription or under the doctrine of lost modern grant.

79. But that does not mean that any closing of the gates lacks legal foundation: nor does it mean that usage which is insufficient to establish a right might not evidence a right having some other origin.

80. The pillars and the gates belong to No.40. At the time the gates were erected they were intended to be used. They were in fact used: both by Mr Thompson and by the Fields in the time of Mr Ewing. If in 1980 Mr Ewing had said to Mr Thompson

> "Thank you for designing and constructing the frontage and the driveway and undertaking the edging and the hedging: but the gates must now be left open. If you want to keep your dog in you must redesign the front and back of No.40 so that you erect new walls and gates dividing No.40 from the driveway"

then I have no doubt that Mr Thompson's response would have been

> "But our clear understanding was that I could close the gates: that is why the design is the way it is and it is on that basis I spent the money on my land and on yours"

and the Court would have declared Mr Thompson entitled to the minimum right to do equity. Since closing the gates whenever Mr Thompson wanted would have amounted to a substantial interference with Mr Ewing's right to use the drive, and since there is no clear evidence of user that did substantially interfere with Mr Ewing's use of the driveway, the minimum right to do justice would have been a right to close and open the gates for all purposes connected with the reasonable enjoyment of No. 40 provided such use did not substantially interfere with the reasonable enjoyment of No.40A (the qualification arising either from the Court's interpretation of the likely understanding or from a restriction upon the relief the Court was willing to grant).

81. Mr Jones argued that it was not possible to have an equitable easement subject to the qualification that it cannot be used in such manner as to occasion substantial interference with the servient owner's use of his land. I do not agree. Easements (whether deriving from express or implied grant or from usage) frequently embody some natural limit so that the Court can say that a particular usage is excessive because it increases the burden on the servient tenement (though difficult questions can arise as to whether the excessive use arises from an increase in intensity of use or from a change in the nature of use). Equally, if the owner of the servient tenement is free to exercise his ownership rights to such an extent as does not substantially interfere with the easement he has granted, I do not in principle see why a grant cannot be made in terms that allows the owner of the dominant tenement freely to exercise his easement to such an extent as does not substantially interfere with the servient owner's residual rights. In each case, of course, the line will have to be drawn by reference to the needs of reasonable owners of the respective rights at the time of their creation, not by reference to the particular personal characteristics of the respective owners at the time the dispute arises.

82. Since there is no serious argument that estoppels binding between Mr Ewing and Mr Thompson are not binding between their successors I hold that the owners of No.40 have a

right to close and open the gates for all purposes connected with the reasonable enjoyment of No. 40 provided such use does not substantially interfere with the reasonable enjoyment of No.40A. It happens that this is the way the Bradleys and Mr Armstrong used the driveway and (for a time) the Bradleys and the Heslins used the driveway: but whilst that may be evidence of the reasonableness of the arrangement (which illustrates how likely it is that Mr Ewing and Mr Thompson reached such an understanding) it does not on this analysis otherwise affect the creation or transmission of the legal rights. (If there had been argument about the continued effectiveness of estoppels, then in my view the original user by Mr Thompson would have amounted to user "as of right", and user of the same nature by subsequent owners could have founded a claim for a usage-based right of the qualified sort I have described: see R (Beresford) v Sunderland City Council [2003] UKHL 60 at [37]).

83. Mr Heslin was accordingly not entitled to padlock the northern gate open. But the Bradleys are not entitled to a declaration that they are entitled to an easement permitting the opening and closing of the gates at all times and for all purposes; but only a declaration of the right indicated.

84. The law expects neighbours to behave reasonably toward one another and that the rights they have over each other's lands will be reasonably exercised and reasonably allowed. The Court cannot write a rulebook for what may or may not be done in every eventuality. What is substantial interference with the user of the driveway has to be determined by what may be inferred about the mutual understanding of Mr Thompson and Mr Ewing at the time the arrangement was made (as to which subsequent user during the time of the Thompson and Field ownerships may throw some light). It cannot be determined by the personal need of the Bradleys for security or the personal need of the Heslins to use the driveway at 1.00am.

85. But it would be unhelpful simply to leave the parties with their rights declared without indicating how they might be applied on the ground in daily life. If it helps, it is my view that until such time as adequate opening arrangements are put in place it would not be a substantial interference with the rights of the owners of No.40A if the gates were closed from 11.00pm until 7.30am, were closed whilst they were staying away from No.40A, were closed on a few additional days when there was a heightened risk of intrusion from revellers, and were closed when there was a particular need to keep someone or something within No. 40 and away from Freshfield Road. By "adequate opening arrangements" I mean an electric system that can be operated from within the car or from within No.40A such that the gate can be opened as a car approaches it and without the driver having to get out.

86. I do not expect attendance when this judgment is handed down. I invite Counsel to endeavour to agree the terms of an order and (in consultation with the appropriate listing office) a date this term when any other applications may be addressed. I will extend the time for filing any appellant's notice until 21 days after the date of that further hearing.

15 September 2014
