

JERSEY / JUDGMENT

Colesberg Hotel v Alton Hotel

[2003] JCA 083 (16 May 2003)

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court OF APPEAL th May, 2003 Before: R. C . Southwell, Esq., Q. C., President; Sir John Nutting, Q. C., and P. D. Smith, Esq., Q. C.. Between The Colesberg Hotel (1972) Limited Plaintiff/APPELLANT And Alton Hotel Limited Defendant/RESPONDENT Appeal by the Plaintiff/APPELLANT from the Judgment of the Royal Court of 6th February, 2003, whereby it was adjudged that the proposed use of a right of way by the Defendant was not an aggravation of that servitude. Respondent's Notice by the Defendant/RESPONDENT, under Rule 5(2) of the Court of Appeal (Civil)(Jersey) Rules, 1964, contending that the said Judgment of the Royal Court of 6th February, 2003, should be affirmed on grounds other than those relied on by that court. Advocate J. C. Martin for the Plaintiff/APPELLANT; Advocate D. J. Benest for the Defendant/RESPONDENT.

judgment

the president: 1. This appeal is concerned with servitudes which are part of Jersey land law. A servitude is a right in favour of a "dominant" piece of land or building (usually referred to as a "tenement") over the land of an adjacent "servient tenement". The servitudes which have most frequently led to disputes in the past include rights of way and rights to take or to discharge water. When considering a particular problem concerning a particular servitude it is of some importance to keep in mind that a decision about, for example, a right of way must be consistent with the legal requirements relating to all servitudes under Jersey law. It is also important that a servitude is only in favour of the relevant dominant tenement, and of no other tenement. 2. In view of the citation to the Royal Court and to this Court of authorities from other jurisdictions, it is necessary to emphasise that Jersey land law has only distant connection with Roman law, is different in many respects from French law before the Revolution and from present-day French law based on the Napoleonic codes, and has entirely different origins from English land law and remains different in many material respects from English land law of today. This has been emphasised on numerous occasions by the Privy Council: see for example *Godfray v Godfray*

(1865) 3 More PC 316; *Le Cloche v Le Cloche*

(1870) LR 3 PC 125; *De Carteret v Baudains*

(1886) 9 AC 214, and *Snell v Beadle*

- [2001] JLR 118 . I have tried in the past, both judicially and extra-judicially, to draw attention to the dangers involved in trying to transpose from Roman law (see Houard: Dictionnaire de Droit Normandie 196), from French law - especially after its codification, and from English law, legal principles which are not consistent with principles of Jersey land law. This point is of particular importance in the case of servitudes because the material cited to us shows that Jersey law concerning servitudes differs materially from Roman law, from the law of the Coutume d'Orléans of which Pothier wrote before the Revolution, from current French law, and from English law. 3. One main feature of the Jersey law of servitudes is that there is a presumption in favour of the freedom of land from excessive burdens of servitudes. Where servitudes derive their "titre" from a contract or deed, the effect of this presumption is that in interpreting the words of the contract or deed, in so far as there is any ambiguity, the ambiguous words are to be interpreted in favour of the freedom of the servient tenement. This presumption for freedom in relation to servitudes has recently been applied by this Court in *Haas v Duquemin*
- [2002] JLR 27 . 4. This appeal is concerned with properties in St Helier lying within a rectangular area bounded to the east by Rouge Bouillon, to the south by Roussel Street, to the west by a number of different properties, and to the north by (inter alia) the Hotel Savoy. This entire area is relatively small, and the buildings are crowded close to each other within this area. I take first the eastern part of this area. The northern section of this was occupied by 35 Rouge Bouillon, once known as Alton House, which became in 1968 the Alton Hotel. The Alton Hotel fronted onto Rouge Bouillon. From the main part of the Alton Hotel there stretched back along the northern boundary of the area a further extension of this hotel, leaving a courtyard to the south of this extension bounded by the wall adjoining the Colesberg Hotel. The only entry to this courtyard was by means of the private roadway belonging to the Plaintiff company which owns the Colesberg Hotel. It is this roadway which is the subject of the appeal. 5. To the south of 35 Rouge Bouillon is the Colesberg Hotel (31 and 33 Rouge Bouillon) with a frontage on both Rouge Bouillon to the east and Roussel Street to the south. At the western end of the Colesberg Hotel there is the roadway belonging to the Plaintiff company ("Colesberg"), which ran from Roussel Street past the west end of the Colesberg Hotel to join the courtyard of the Alton Hotel. 6. I turn to the western part of the area. On the southern side of this there is a piece of land on which at some date not known to this Court there was built a house called Melbourne Lodge. To the north of Melbourne Lodge was a garden which was separated from the roadway by a wall in which there was a door. 7. So within the overall area I have described there have been four properties: first, the Alton Hotel; second, the Colesberg Hotel; third, Melbourne Lodge; and fourth, the garden lying to the north of and behind Melbourne Lodge. 8. I turn next to the history of the four properties. On 28 October 1871 the land which subsequently became Melbourne Lodge and the garden, and which was in 1871 an entire walled garden, was sold by deed by Jacques Gautier to Elie Rive. On the same day, 28 October 1871, the wife of Jacques Gautier, Elizabeth Gautier née Roussel , granted a right of way over the roadway by deed to Elie Rive in favour of the walled garden bought

that day by Elie Rive. The right of way was described in French in this passage: "droit de chemin et passage toutes fois et quantes et à tous usages par dans ledit chemin qui est établi à l'Est dudit mur qui sépare la propriété desdites parties, lequel chemin mesure en longueur cinquante -deux pieds quatre pouces et en laize neuf pieds , ledit Sieur Rive contribuant sa proportion des frais des maintien et entretien dudit chemin , ainsi que des grandes portes qui le sépare du chemin public. Que ledit Sieur Rive aura droit d'avoir soit portes soit fenêtres dans ledit mur et ce seulement au pourportant dudit chemin ." 9. The right of way granted to Elie Rive remains in favour of the land on which subsequently Melbourne Lodge was built, and in favour of the garden which has subsequently changed as I will describe. 10. Until 1899 31, 33 and 35 Rouge Bouillon (the houses which later became the Colesberg Hotel and the Alton Hotel) were in the same ownership of Elizabeth Gautier. On 28 January 1899 the heirs of Elizabeth Gautier sold 35 Rouge Bouillon (then Alton House) to Pierre Philippe Guiton by deed. The purchaser was granted a right of way over the roadway in terms similar but not identical to the 1871 grant to Elie Rive. 11. Naturally over the intervening years each of the properties was transferred to numerous other owners by sale or by inheritance. 12. On 29 November 1968 Alton House was sold to the Defendant company, Alton Hotel Limited ("Alton"), by deed in which it was recorded that Alton House had the benefit of the right of way over the roadway now owned by Colesberg. 13. On 28 April 1972 the Colesberg Hotel was sold to the Plaintiff company, Colesberg Hotel (1972) Limited, by deed in which it was recorded that both Alton and Melbourne Investments Limited, the owners of Melbourne Lodge with its garden, had the benefit of rights of way over the roadway in favour of the land of each of them. 14. On 18 January 1985 Alton bought from Melbourne Investments Limited Melbourne Lodge and its garden by deed in which it was recorded that there was in favour of the purchased house and garden the right of way over the roadway owned by the Plaintiff company which had been granted in 1871. 15. On 19 July 1985 Alton sold Melbourne Lodge to Hotel Savoy Limited on terms that a fence and subsequently a wall was to be built by Hotel Savoy Limited to separate off the house it was purchasing from the garden which Alton was retaining. In the deed it was recorded that Hotel Savoy Limited would have the benefit of the right of way over the roadway. 16. Subsequently Alton knocked down part of the wall separating the Melbourne Lodge garden from the roadway, enabling vehicles to enter the garden area and to be parked there. There is a dispute on the affidavit evidence as to how much use was actually made of the garden site for car parking, which was not resolved by cross-examination of the deponents enabling the Royal Court to make any finding in that regard. 17. On 21 December 2001 Beck Limited acquired control of Alton. Beck made this acquisition in order to carry through the demolition of the Alton Hotel, and the construction of two blocks of flats (Block A with 16 flats which will be on the Alton Hotel site, and Block B with 8 flats of which it seems 4 flats will be on the Alton Hotel site and 4 flats on the garden site) and a covered car parking area with 24 spaces (of which 16 will be on the garden site, and 8 on the Alton Hotel site). 18. It is a remarkable feature of this case that complete demolition on the Alton Hotel and the garden sites has proceeded, and construction of the covered parking and the two blocks of flats has reached an advanced

stage without the position regarding the roadway having been resolved, though the design and construction of the new complex has been on the footing that the only possible means of access to the covered parking would be over Colesberg's land by means of the roadway.

19. The members of this Court saw the relevant properties. At the point at which the roadway meets the pavement of Roussel Street, the roadway is nine feet wide. There are traces of the large gates referred to in the 1871 deed which could easily be re-erected: if they were, that would reduce the width of the roadway somewhat, but probably not to a material degree. There is no space for vehicles to pass one another in the roadway. At the northern end of the roadway the entrance to the covered parking is canted to one side (this is not as shown on the plans placed before the Royal Court) so that there may be some difficulty for the driver of a car entering the roadway at either end in seeing whether another car is about to enter the roadway at the other end.

20. On 5 June 2002 an order of justice was served on behalf of Colesberg, in which two main issues were raised. One, concerning the height and position of the wall to be built adjacent to the Colesberg Hotel, was decided against Colesberg by the Royal Court and has not been pursued on this appeal. The other main issue concerned the prospective user of the roadway by the inhabitants of the new blocks of flats and their visitors, whether social or commercial. The essence of Colesberg's case as pleaded was that: (i) the proposed development and use of what had been the Melbourne Lodge garden would lead to an "aggravation" of the servitude constituted by the right of way to that part of Alton's property; (ii) the burden of upkeep of the roadway would be materially increased as a direct result of the redevelopment of that part of Alton's property; (iii) accordingly the right of way was or should be extinguished in so far as it would otherwise benefit that part of Alton's property.

21. The trial before the Royal Court (Sir Philip Bailhache, Bailiff, and Jurats E J M Potter ISO and J L Le Breton) was on 15 and 16 January 2003. Judgment was delivered on 6 February 2003. The Royal Court held that there would be no relevant aggravation of the servitude, and accordingly that Colesberg's claim failed.

22. All the evidence at trial was by affidavit, and there was no oral evidence. Little turns on the evidence, since the servitude is a consensual one, created in 1871, and the answer to the dispute about the servitude is to be derived from the interpretation of the 1871 grant, set in the relevant factual matrix in 1871. As I have already indicated, one difference between the parties on the affidavits was as to the extent to which the Melbourne Lodge garden area had been used for car parking. Another difference related to the extent of the actual user of the roadway for the purposes of the Alton Hotel. In the absence of oral evidence, neither difference could be resolved by the Royal Court or by this Court.

23. Colesberg's case, as put by Advocate Jane Martin, is directed only to the servitude in favour of that part of Alton's property which was once the Melbourne Lodge garden, a consensual servitude created by the deed of 1871. It appears from paragraph 9 of the Royal Court judgment that it was not fully explained to that Court why Colesberg's case was directed only to that servitude, and not also to the servitude in favour of the Alton Hotel property created by the deed of 28 January 1899. This has been made clear to this Court. Colesberg's complaint in relation to the 1871 servitude involves (amongst others) these issues: (i) whether the 1871 servitude entitles Alton as successor in

title to the Melbourne garden land to use the right of way for the purposes of entry and exit of cars to and from 16 car parking spaces on that land; (ii) whether the 1871 servitude entitles Alton as such successor in title to use the right of way (created in 1871 for the benefit of the Melbourne Lodge garden land) for the benefit of residents of flats built, not on that land, but on the Alton Hotel land which has the benefit of a different servitude created under the 1899 deed. Though issue (i) was considered by the Royal Court, it does not appear that the Royal Court was asked to deal with issue (ii). 24. The issues between the parties turn on the interpretation of the wording of the 1871 deed. The main difference between the parties is as to the meaning of the words "à tous usages" in the phrase "toutes fois et quantes et à tous usages". Miss Martin submitted that its meaning is "by all methods" (or "means"), thereby making it clear that Mr Rive in 1871 could use the roadway by foot, with a wheelbarrow or in a cart or some form of carriage. On the other hand Mr Benest submitted, as the Royal Court held, that its meaning was "for all purposes". Mr Benest submitted that "purposes" in the context included "purposes" for which access to the Melbourne garden site was required, as well as the "means" used to gain such access. 25. On this difference in the rival interpretations of this phrase depended a large difference in the Advocates' submissions as to the use of the roadway. 26. Miss Martin submitted that the purposes for which the right of way could be used were not defined in the 1871 deed. They must be arrived at by use of the presumption of freedom of the servient tenement. She did not go so far as to say that the purposes were limited to that of a garden. For her case it was only necessary to submit that whatever the limit of the purposes for which the access could be used, use for the purposes of the new development was outside that limit. Her submission was that use for the new development amounted to an illegitimate aggravation of the use of the servitude, either because such use was not covered by the 1871 deed at all, or if it was so covered, it would be an excessive use of the roadway to the detriment of the servient tenement owned by Colesberg. 27. Mr Benest on the other hand submitted that the purposes for which the Melbourne garden site, and therefore the purposes for which the owner of that site, could use the roadway, were infinite. He accepted without demur the potential use of the site for a skyscraper, a multi-storey car park, an army barracks using tanks, and many other extreme examples. His submission, based on the interpretation of "à tous usages", was that there is no limit on the use of the site and therefore the use of the roadway, except that for whatever purpose it is used the user must not be uncivil, and must be neighbourly user. He submitted that any other interpretation of the 1871 deed (i) would drive a coach and horses through the conveyancing practice on the Island, the phrase "à tous usages" having always been assumed to bear the meaning for which he argued and which it appears the Royal Court accepted, and (ii) would stultify development on the Island leaving much property in effect "pickled in aspic". 28. The difficulty which this Court faces in resolving this dispute as to the meaning of "à tous usages" is that it is without evidence as to conveyancing practice in the Island. Miss Martin sought to place a brief affidavit as to this practice before the Royal Court, but on the application of Mr Benest the Royal Court declined to admit such evidence. 29. It has to be appreciated that whichever interpretation

were to be adopted the consequences could be somewhat revolutionary for those having the benefit and those having the burden of servitudes in Jersey. 30. If Miss Martin is right, use of the words "à tous usages" in respect of servitudes by itself gives the owner of the dominant tenement no permission to use the servitude except for such limited purpose or purposes as can be derived from the context of the contract and of the relationship of the dominant and servient tenements. This could affect the use of servitudes for purposes not in contemplation when the servitudes were granted, particularly because no right of servitude can be acquired or enlarged under Jersey law by long use or prescription. 31. On the other hand, if Mr Benest is right, then potentially servitudes can be used for purposes which could not possibly have been contemplated at the time when the servitude was granted. As the Court's questioning of Mr Benest revealed, use of the servitude for such purposes might have a devastating effect on the servient tenement. In the present case Mr Benest claimed that the roadway owned by Colesberg could have been used for the purposes of e.g. a multi-storey car park. It might come as a very unwelcome surprise to the owner of a servient tenement such as Colesberg to find that within the area I have described not only was such a car park built, but the sole means of entry and exit was over the roadway owned by Colesberg. 32. It follows, in my judgment, that resolution of the dispute as to the meaning in this context of "à tous usages" would have potentially such wide effects that this Court ought not to embark on its resolution except in a case in which it is furnished with sufficient evidence. This is not the case in this appeal. Further, in view of what I am about to say, it is not necessary in this appeal to resolve the dispute. This case can be decided on a narrower basis. I would therefore leave to a later opportunity a decision as to which of the somewhat revolutionary alternatives is correct. 33. In this case I believe that we can proceed on the assumption (and I emphasise that it is only an assumption) that Miss Martin is right, and that "à tous usages" means no more than "by all methods (or means)". On this footing there is in the 1871 deed no definition of the purpose or purposes for which the right of way is permitted to be used. The purpose or purposes have to be found by considering what must have been in the contemplation of the parties to the 1871 deed, having regard to the terms of the deed, the relative positions of the properties and the nature of the roadway over which the right of way was granted. Though the garden site was a garden in 1871 and remained a garden for over a century after that, I have no doubt that eventual use of the land for residential purposes would have been in the contemplation of the parties in 1871. This can be seen in the construction of Melbourne Lodge on part of the garden site. Even in 1871 residence in flats rather than in separate houses was entirely normal, and in my view it would have been in the contemplation of the parties that the land might be used for flats or houses when and if St Helier grew in size. That is the purpose for which Alton wish to use the garden site. So even on the basis of giving "à tous usages" the meaning for which Colesberg contends, the purpose of Alton is one which falls within the ambit of the servitude granted by the 1871 deed. Use of the roadway to bring carriages or vehicles to such flats or houses would have been within the contemplation of the parties. 34. This leaves for decision the issue arising from the legal position that the rights under the 1871 deed can be used by Alton only for

the purposes of the garden site, and that the rights under the 1899 deed can be used only for the purposes of the Alton Hotel site. 35. Miss Martin for Colesberg submitted that, since Alton proposed to allocate all but four of the sixteen parking spaces in the area of the garden site to residents of flats on the Alton Hotel site, the use of those twelve spaces amounted to user for the benefit of a tenement other than the dominant tenement entitled under the 1871 deed to the servitude, and that therefore this proposed user would fall outside the scope of the "titre" of the dominant tenement, and be an "aggravation". 36. Mr Benest sought to persuade the Court that this issue could be resolved on the basis that, once two pieces of land adjoining each other, each of which enjoys a similar right of way over a single servient tenement, come together in the same ownership, the rights attributable to each dominant tenement may be used interchangeably by either dominant tenement. In my judgment this is not and cannot be right. Acceptance of this proposition would inevitably involve permitting one or other or both of the dominant tenements to go beyond the bounds of their "titres" in terms of the burden imposed on the servient tenement, and would therefore amount to "aggravation" of the servitude. We observe that, though invited to do so, Mr Benest did not produce any authority in support of this argument. 37. Having said this, I nevertheless reject Miss Martin's submission, but for different reasons. As I have said, it would have been within the contemplation of the parties to the 1871 deed that the land might be used for flats or houses. It must also have been in their contemplation at that time that the owners or occupiers might park vehicles - at that time carriages (or traps) - on the land. In my judgment, once it can be said that the parking of vehicles by the owners or occupiers of the dominant land was a contemplated use, it follows that the passing and re-passing of such vehicles was a permitted user of the right of way. The spaces on the garden site are to be allocated to residents who will to that extent be occupiers of the garden site: no one else will have the right to park in their spaces. So such occupiers will have exclusive rights over parts of the dominant tenement and will be able to use the right of way by virtue of those rights. In so concluding, I wish to make it clear that I am not deciding whether, if the spaces were allocated to third parties, inconsistently with the scheme promoted by Alton, the use of the right of way by any such third parties would be a permitted user. 38. Miss Martin argued that the use of, or burden on, the right of way over the servient tenement could not lawfully be greater than that contemplated by the parties to the 1871 deed. In my judgment this is not the correct test. I prefer the test adumbrated by Basnage (*Oeuvres*, Tome Second, Rouen 1778 at page 562) to the effect that the user must not be such as to render the burden on the servient tenement more inconvenient and more onerous ("*plus incommode et plus onereuse*"). This obligation was accepted by Mr Benest, and seems to me to be indistinguishable from the Bailiff's statement in the judgment of the Royal Court that "a right of way is a right, like all servitudes, which must be exercised civiliter, that is in a way which minimises inconvenience to the servient land." 39. Miss Martin argued that, though the use of the right of way by four vehicles might not add significantly to the burden on the servient tenement, the passing and re-passing of sixteen vehicles inevitably would. I do not agree that this is so. It cannot be anticipated, as a matter of certainty, how many of the residents

of the flats will use their allocated parking spaces, or, if they all do, how many journeys will be made up and down the right of way on an average day. Clearly it would take only a few seconds for a vehicle to drive along the roadway in either direction. Even if it is assumed that sixteen vehicles would, on average, make the journey a few times a day, this would add up to a total of only a few minutes of user. This cannot be said to amount, inevitably, to an "aggravation" of the servitude. 40. However, nothing I have said excludes the possibility that, when actual user takes place, there may be some "aggravation". It must be borne in mind that the test of "aggravation" or no will not depend only on the number of journeys. Other matters such as use of the horns of vehicles, excessive speed, or interference with Colesberg's use of the roadway, may be equally relevant. I mention the use of horns because, as I have observed, Alton have canted the entrance to and exit from the covered parking to the side, so that there is not a direct view out of or into the parking from the roadway. 41. In view of all the matters I have mentioned, I would uphold the judgment of the Royal Court and dismiss the appeal. 42. I would like to end with a tribute to the excellent advocacy of Advocates Martin and Benest which has greatly assisted us. Authorities. *Godfray v Godfray* (1865) 3 More PC 316. *Le Cloche v Le Cloche* (1870) LR 3 PC 125. *De Carteret v Baudains* (1886) 9 AC 214. *Snell v Beadle*

[2001] JLR 118 . Houard: Dictionnaire de Droit Norman: (1 st Ed'n): p.196: Servitudes. Haas v Duquemin

[2002] JLR 27 . Basnage: Oeuvres de Basnage (4 th Ed'n: 1778): Tome 2: de Servitudes. Pothier: Traité des Obligations (1821 Ed'n): Règles pour l'interprétation des conventions. Poingdestre: Lois et Coutûmes de l'Ile de Jersey (1928): pp.196-8. Le Gros: Traité du Droit Coutûmier de l'Ile de Jersey (1943): de la Servitude: pp.17-22. Dalloz: Nouveau Répertoire de Droit (1950 Ed'n): Tome 4: Servitudes paras 475-6. *Le Feuvre-v-Mathew* (1971) JJ 2461. *Le Feuvre-v-Mathew*

(1974) JJ 49 . Public Services Committee-v-Maynard

(1996) JLR 343 . Haas-v-Duquemin

[2002] JLR 27 . *Jelbert -v-Davis & Anor* (1968) 1 All ER 1182. Page Last Updated: 03 Mar 2016
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