

JERSEY / JUDGMENT

Haas v Duquemin [2002]

JCA 15 (17 January 2002)

[2002] JCA 15

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COURT OF APPEAL 17 January 2002 Before: D. A. J. Vaughan, Esq., President; M. G. Tugendhat, Esq., Q. C., and; P. S. Hodge, Esq., Q. C. Between Elizabeth Anne Haas (née Daniel) Plaintiff/APPELLANT And Frederick Lenfesty Duquemin Joan Betty Duquemin Née O'Toole Defendants/RESPONDENTS Appeal by the Plaintiff/APPELLANT from the Judgment of the Royal Court of 8th August, 2000, whereby it was adjudged that the Defendants/RESPONDENTS together with the Plaintiff/APPELLANT have the right to use the remainder of the yard owned in common by them - and over which the Plaintiff/APPELLANT does not exercise the parking rights granted her under her deed of purchase - for the purpose of parking. Respondent's Notice by the Defendants/RESPONDENTS, under Rule 5(1) of the Court of Appeal (Civil)(Jersey) Rules, 1964, contending that the decision of the Royal Court of 8th August, 2000, be varied and that the Court of Appeal direct that the Defendants/RESPONDENTS have right to the exclusive use of the eastern half of the yard, without thereby impeding the Plaintiff/APPELLANT. Advocate D. J. Benest for the Plaintiff/APPELLANT; The first Defendant/RESPONDENT on his own behalf, and on behalf of the second Defendant/RESPONDENT.

judgment

HODGE JA:

Background

1. The Appellant, Mrs Haas, is the owner of a house known as "Mont au Roux Cottage" in the parish of St Brelade. Mrs Haas' property forms part of the same complex of properties, known as "Mont au Roux", as the house owned by the Respondents, Mr and Mrs Duquemin. The Respondents' house is known as "the Dower House". The complex of properties was developed by Mr and Mrs Robin Pallot, who sold off different parts of the complex at different times. The Appellant has leased her property to tenants. The Respondents occupy their house.
2. Within the complex of properties there is a yard which is rhomboid in shape and which lies between the properties of the Appellant and the Respondents. On the Eastern side of the yard is a house formerly known as "Le Pigeon Volant" and now as "Laverock" which extends into the Southern side of the yard along which it extends for over one-quarter of that side. On the rest of the Southern side is the Appellant's house. On the Western side of

the yard is the house, "Mont au Roux Farm". To the North of the yard is an access drive in the ownership of the Respondents over which other owners in the complex have certain rights of access. We were informed that the Southern side of the yard measured about 10 metres and the Western side measured about 7.3 metres. This yard is used as a parking area. The Appellant and the Respondents each own an undivided one-half share in the yard. 3. A dispute has arisen between the Appellant and the Respondents as to their respective rights and duties in relation to the yard. In particular the dispute is focussed on the issue whether the Appellant has an exclusive right to park three cars in the yard or the Respondents may also use the yard to park one or more cars. 4. The parties have not been able to resolve their differences in this unfortunate dispute between neighbours. The litigation 5. On 25 June 1999 the Deputy Bailiff granted the Appellant an interim injunction restraining the Respondents from parking any motor vehicle in the yard. The Appellant sought and obtained the interim injunction on a complaint that the deed of purchase to her house (which she quoted in her application) contained provisions which constituted a servitude réelle in favour of her house giving her the sole right to park three cars on the yard. 6. The Respondents answered the complaint, seeking the lifting of the injunction. They argued that on a proper interpretation the deed of purchase gave the Appellant the right to park a maximum of three cars in the yard and that the Respondents could also park a car in the yard, so long as they respected the Appellant's servitude right. 7. On 28 March 2000, the Deputy Judicial Greffier ordered, pursuant to Rule 7/8(1) of the Royal Court Rules 1992 that the proper construction of certain clauses in the deeds of purchase of the Appellant's property and the Respondents' property should be determined as preliminary issues of law. The Bailiff's judgment 8. On 8 August 2000 the Bailiff sitting as a Single Judge of the Samedi Division of the Royal Court held that as the Appellant and the Respondents own the yard en indivis they are both entitled to the full use and enjoyment of it to the extent that they are not legally inhibited from so doing. He held that the legal inhibitions were contained in the deeds of purchase. 9. In summary the legal restrictions were (1) that the co-owners of the yard could not erect or place on the yard any building or construction, (2) that they were entitled to use the yard only as a parking area and (3) that the Appellant had the right, and the Respondents had the duty to permit the Appellant, to park three private motor cars immediately to the East of the Western-most wall of the yard. 10. He held that subject to those inhibitions both of the parties were entitled to use the yard as a parking area. He also observed in passing that the rights of way over the yard conferred on the Appellant and the Respondents as owners of the two houses were otiose. 11. He recognised that his judgment did not bring the dispute between the parties to an end and expressed the hope that they could negotiate some mutually acceptable *modus vivendi*. This hope has not been realised. The Appeal 12. The Appellant now asks this court to set aside the Bailiff's judgment and to order that there exists in her favour a servitude réelle giving her the sole right to park three vehicles in the yard and that the Respondents have no right to park any vehicles in the yard. 13. The Respondents also appeal against the Bailiff's judgment, arguing that they have an exclusive right to park cars on the area of the yard which is not required for the operation of the Appellant's servitude right to park three motor cars. 14. Before considering this appeal it

is necessary to record a separate matter. The Application to enlarge the time for service of the Contentions 15. The Appellant's advocate applied to this Court to exercise its power under Rule 16 of the Court of Appeal (Civil)(Jersey) Rules, 1964 to extend the time in which the Appellant might file her contentions in this appeal out of time. The reason for the delay in pursuing the appeal, we were told, was that the parties attempted unsuccessfully to negotiate a workable solution to the use of the yard following the Bailiff's decision. The Respondents did not contest the application and the Court granted leave. The Deeds of Purchase 16. As the Bailiff records in his judgment, the yard came into existence as a separately identified area of land following the sale by Mr and Mrs Pallot of "Mont au Roux Cottage" (formerly unit 3A) and the Barn (formerly unit 3B and now "Laverock") to Mr Leonard True on 14 December 1990. In addition to those properties Mr and Mrs Pallot conveyed to Mr True the undivided half share in the yard, while retaining ownership of "the Dower House", the access road and the other undivided half share in the yard. The Appellant purchased "Mont au Roux Cottage" (and the half share in the yard) from Mr True and obtained ownership when the deed of purchase passed before the Royal Court on 11 December 1992. In 1998 the Respondents purchased "the Dower House" and the other undivided half share in the yard which Mr and Mrs Pallot had retained until then. They obtained ownership when the deed of purchase passed before the Royal Court on 28 August 1998. 17. For the sake of completeness I record that in 1989 Mr Christopher Scholefield acquired unit 2 of the complex, now known as "Mont au Roux Farm". It appears from the deed of purchase in favour of the Appellant (clause 12) that the owner of "Mont au Roux Farm" also has a right of access over the yard. 18. There appear from the deeds which were before us to be some inconsistencies (which are not material) between the deed of purchase in favour of Mr True and that which he granted in favour of the Appellant. I therefore refer to the former as the original title. It contained the following clauses relating to the use of the yard and responsibility for its upkeep: "12. QUE nul édifice, bâtiment ou construction quelconque ne sera érigé, placé ou planté sur aucune partie dudit bel ou terrain dont une moitié indivise est présentement vendue, lequel sera utilisé comme un parc de stationnement seulement. 13. QUE ledit Acquéreur aura le droit de stationner, mais pour l'usage seulement d'une unité d'accommodation dite "one unit of dwelling accommodation" formant partie de ladite propriété présentement vendue, trois voitures privées (anglicisé "private motor cars") maxima sur ledit bel ou terrain dont une moitié indivise est présentement vendue et ce immédiatement à l'Est de la façade Est dudit édifice (as Sud desdits passage couvert et aile) dépendant de ladite maison formant partie de ladite propriété désignée "Unit One" "Mont au Roux" que se réservent lesdits Vendeurs. Pour éviter aucun doute entre lesdites parties à ces présentes, l'expression "private motor car" contenue dans cette présente clause n'inclus pas aucune voiture du genre dit "dormobile", "van" ou aucune voiture employée dans les buts commerciaux. 14. QUE tant à piétons que pour les besoins des susdites trois voitures privées (anglicisé "private motor cars") seulement, ledit Acquéreur aura droit de chemin et passage toutes fois et quantes par sur et à travers ledit bel ou terrain dont une moitié indivise est présentement vendue et ce pour aller et venir de ladite seule unité d'accommodation dite "one unit of dwelling accommodation" formant

partie de ladite propriété présentement vendue qui fera utiliser le susdit droit de stationner ledites trois voitures privées à ladite chasse ou avenue formant partie de ladite propriété désignée "Unit One" "Mont au Roux" que se réservent lesdites Vendeurs. 15. QUE sujet au droit de stationnement ci-dessus décrit lesdits Vendeurs auront droit de chemin et passage toutes fois et quantes et à tous usages à travers ledit bel ou terrain dont une moitié indivise est présentement vendue et ce afin d'aller et venir d'aucune partie de ladite propriété désignée "Unit One" "Mont au Roux" qu'ils se réservent lesdits Vendeurs. 16. QUE les frais des réparation, maintien et entretien dudit terrain ou bel dont une moitié indivise est présentement vendue seront payés, à savoir:- une cinquième part d'iceux par lesdits Vendeurs comme propriétaires de ladite propriété désignée "Unit One" "Mont au Roux" et l'autre quatre-cinquièmes part d'iceux par ledit Acquéreur comme propriétaire de ladite seule unité d'accommodation dite "one unit of dwelling accommodation" formant partie de ladite propriété présentement vendue qui fera utiliser le susdit droit de stationner lesdites trois voitures privées." 19. The Appellant's title (clauses 9 to 13) contains substantially the same provisions except that clause 12 of her title provides that the owner of "Mont au Roux Farm", who then was Mr Scholefield, has a right of access to his property over the yard in substantially the same terms as that reserved to the owners of the Dower House in the 1990 sale to Mr True. Subject to a minor error which is not material, the Respondents' title (clauses 13 to 17) contains similar provisions to those in the deed in favour of Mr True. The parties' submissions 20. Advocate Benest, for the Appellant, argued that the issue was one of the interpretation of the parties' contracts and not about underlying rights of property law. He analysed the provisions of the Respondents' deed of purchase. He suggested that the servitudes set out in the deed were a complete code which regulated the use of the yard and left no room for the application of other rules which property law would otherwise imply. In addition to the servitudes which I have quoted, he referred to the prohibition against enclosing the yard at its northern boundary with the access road and the right of access over the yard for the maintenance of the buildings (respectively clauses 8 and 9 of the original deed in favour of Mr True and clauses 9 and 10 in the Respondents' deed). 21. He emphasised that if the clauses were not a complete code there would be great uncertainty as to the parties' rights. The co-owners could keep cars, vans, commercial vehicles or boats on the residual area while restricting the Appellant to three private cars. He suggested that the maximum of three private cars and the requirement to park immediately to the East of "Mont au Roux Farm" could be explained by a desire to preserve the amenity of "Laverock" on the East side of the yard, although he recognised that no rights to enforce the servitude had been conferred on the owner of "Laverock". His case is that there should be no further parking in the yard once the maximum of three cars has been reached. He did not claim that the Appellant had the right to park cars in excess of that number. 22. He argued that as the deeds showed an intention to produce a complete scheme and to avoid the confusion which would arise if the parties had to share the residue, as the Bailiff suggests, the court should give effect to the parties' intentions and hold that the only right to park on the yard was vested in the Appellant through her servitude right to park the three private cars. 23. In support of his contentions he referred the court to the familiar rules for the interpretation

of contracts in the " Oeuvres de Pothier " Tome 2 (2 nd ed 1861) pp.48-52. He referred in particular to the rule that one is to look for the common intention of the parties and the rule that one is to construe a contractual provision in the context of the contract as a whole (the first and sixth rules). He also referred to the court to the well-known maxim "la convention fait la loi des parties" (Wallis v Taylor

(1965) JJ 455 , 457). 24. While I recognise that Pothier's rules on the construction of contracts may be useful in some circumstances as an assistance in the interpretation of deeds which confer real rights of property (viz. Pennec v Romeril, (9 March 1995) Jersey Unreported. I think that care is required in their application. Pothier in setting out those rules was addressing the law of obligations where the intentions of the contracting parties are the prime consideration. In the law of property however a deed sets out real rights which affect others than the initial parties to the deed and there are special rules, such as the presumption for freedom in relation to servitudes, which I will mention shortly. 25. It is difficult also to accept the submission as it is not clear why the owners of "the Dower House" would have wished to retain an interest in the yard if the only person allowed to make any significant use of the yard were the Appellant. It is not clear why the parties should provide that the Eastern part of the yard should be sterilised. It is not clear why the owners of "the Dower House" should have imposed on their title an obligation to pay 20% of the maintenance costs of the yard when, on Advocate Benest's interpretation of their right of access, they received no benefit from the yard. 26. I am not persuaded that the servitudes, read as a whole, provide a scheme giving the Appellant an exclusive right to park in the yard. The requirement in the servitude in favour of the owner of "the Dower House" which imposed a maximum of three cars and required that they be parked as close to the East façade of "Mont au Roux Farm" as is reasonably practicable suggests that the possibility of beneficial use of the residue of the yard was recognised at the time when the yard came into existence as a separate property. 27. Mr Duquemin , who appeared on his behalf and his wife's, also challenged the Bailiff's judgment. He argued that he was entitled to the exclusive use of that part of the yard that does not impede the Appellant's right to park a maximum of three private motor cars. He emphasised that the deeds imposed a maximum number of cars on the Appellant. He argued that his right of access (clause 16 of his deed and the clause 15 which I have quoted) gave him a right of access over the yard for all purposes - "à tous usages

- and that the final words of that clause did not restrict the general right. I cannot accept that. The concluding words of clause 15 in the initial grant make it clear that the right of access was in order to come and go from one part of the property known as "the Dower House" to another part of the same. They are a limitation on the right of access. 28. He also argued that he was entitled to a precise one -half of the yard, une moitié , and as the Appellant had a right to park three cars in a specified area on the Western side of the yard he was entitled to the same right on the Eastern side of the yard. For the reasons which follow I am not persuaded by this argument. 29. Finally he argued that it was inconceivable that the Respondents' predecessors in title when selling off the properties in the complex would have

limited their rights in the yard to a meaningless right of access while burdening themselves with a share of the maintenance of the yard. It would he said have been simpler to sell the yard. Issues of property law 30. I am not persuaded that the issue can be determined as if it were simply a matter of contract law by construing the clauses of the rights over the yard granted to the Appellant and Respondents as owners of their respective houses and the restrictions placed on their use of the yard in their capacity as such owners. In my opinion the issue is one of property law and turns on the nature of the residual rights of the parties as co-owners of the yard. 31. It is necessary to analyse the rights of property which each of the parties obtained once their respective deeds of purchase passed before the Royal Court and their personal rights as against the vendor in each case were converted into real rights. I am grateful to Advocate Benest who assisted the Court in the debate with his analysis of the structure of the relevant deeds of purchase. 32. First, the Appellant obtained sole ownership of her house, "Mont au Roux Cottage" and the Respondents obtained joint ownership of "the Dower House". 33. Secondly, the Appellant in her capacity as owner of "Mont au Roux Cottage" and the Respondents in their capacity as owners of "the Dower House" obtained co-ownership of the yard. They are owners in common, the Appellant and the Respondents each holding "une moitié indivise" in the yard. 34. The yard in which they have rights as co-owners however was subjected to praedial servitudes in favour of, among others, the owners of "Mont aux Roux Cottage" and "the Dower House". Those servitudes which are relevant to the parties' properties included the negative servitude prohibiting building on the yard and restricting use of the yard to use as a car park (clause 12 above). They included the right of the owner of "Mont au Roux Cottage" to park three private motor cars immediately to the East of the East façade of "Mont aux Roux Farm" (i.e. the wall on the West side of the yard), such cars being used solely in relation to "Mont au Roux Cottage" (clause 13). The servitudes included the right of access in favour of the owner of "Mont au Roux Cottage" (clause 14). They also included the right of access in favour of the owner of "the Dower House" which is subject to rights of parking in clause 13 (clause 15 above). 35. Finally, the obligation to maintain the yard was divided between the owners of "Mont au Roux Cottage" and "The Dower House" in the proportions of 80:20 (clause 16 above). 36. In my opinion the Bailiff was correct when he stated in paragraph 11 of his judgment that the parties as co-owners were both entitled to use the yard subject to the restrictions imposed by the servitudes. He referred to De Ferrière's Dictionnaire de Droit et de Pratique, (Paris 1740), Tome 2, p.584 which defines "propriété" as "le droit de jouir et de disposer à notre volonté ce qui nous appartient, en tant que la loi n'y met point d'obstacle". De Ferrière (op. cit. at p.27) also gives the following definition of "indivis" : "Jouir par indivis n'est autre chose que jouir d'une même chose, non séparée entre les copropriétaires, qui la possèdent en commun, chacun pour leur part et portion". 37. This is where the problem arises for the parties. Co-proprietors are each entitled to the full use and enjoyment of property owned en indivis. If, as appears to be the case, the yard is large enough to accommodate at least one private motor car (and with some difficulty two) in addition to the three which the owner of "Mont au Roux Cottage" is allowed to park, each of the Appellant and the Respondents is entitled to use the yard for that purpose. The maximum laid down in the servitude in favour of the

owner of "Mont au Roux Cottage" does not prevent the Appellant as a co-owner of the yard from sharing the residual space in the yard with the Respondents for either or both to park cars. 38. It is a principle of the civil law of co-ownership that management requires the consent of all co-owners and that one co-owner may prevent a decision with which he does not agree. This principle is expressed in the Latin maxim *in re communis melior est conditio prohibentis* : in common property the objector is in the better position. Although the courts have not developed the rules of common ownership in Jersey in detail, it appears that Jersey, like other jurisdictions whose property law is based on the civil law, does not apply the veto of the co-owner to all decisions and acts. Jersey law restricts the co-owner's right of veto to actions which alter the property or which alter proprietary rights. See *H A Gaudin & Co Ltd v Bennett*

(1976) 266 Ex 448, *Wade v Weston & Trigg*

(1979) 266 Ex 461 and *In re L F Morgan Ltd* (1987-88) JLR 336, 342. 39. Use of the yard for parking by a co-proprietor would, in my opinion, amount to ordinary use of the yard which would not be subject to the veto. I bear in mind that in ascertaining the customary law of Jersey French law as it exists today is unlikely to be of direct benefit. See *Snell v Beadle*

[2001] 2 WLR 1180, Lord Hope of Craighead at pp.1187-1188. But where modern French law is consistent with Jersey case law and with the property law of other jurisdictions which have their origins in Roman law, some help may be obtained. Article 815-3 of the French Code Civil provides: "Les actes d'administration et de disposition relatifs aux biens indivis requièrent le consentement de tous les indivisaires. Ceux-ci peuvent donner à l'un ou à plusieurs d'entre eux un mandat général d'administration. Un mandat spécial est nécessaire pour tout acte qui ne ressortit pas à l'exploitation normale des biens indivis, ainsi que pour la conclusion et le renouvellement des baux." 40. There are similar rules in Scots Law which derives the basic structure of its property law from Roman law. See Professor Kenneth Reid: *The Law of Property in Scotland*

(1996) paragraphs 23 -25 and the decision of the Second Division of the Court of Session in *Rafique v Amin* 1997 SLT 1385. South African property law is to similar effect. See Silberberg and Schoeman's *The Law of Property* (3rd ed) (1992) pp.310-311, van der Merwe and de Waal, *The Law of Things and Servitudes*

(1993) para 211. 41. But each co-owner has the right to make use of the whole of the property (unless otherwise restricted by servitudes as in this case). Thus no co-owner can take exclusive possession of all or any part of the property owned *en indivis*. As Marcel Planiol stated (*Treatise on the Civil Law* Vol 1 part 2, 12th ed 1939 para 2497): "A thing belonging to several co-owners is in indivision when the right of each owner bears upon the whole (and not upon a given part) of the thing held in common. The share of each is therefore not a tangible share but a portion expressed as a fraction: a third, a fourth, a tenth. It is the right of ownership that is divided among them. The thing is not. The right of each co-owner must be pictured as striking every molecule of the thing and as there encountering

the right of the other co-owners for the portions belonging to them." 42. See also *In re L. F. Morgan Ltd* (1987-88) JLR 336, 340 where the Bailiff refers to the right of an owner in common as an interest in the whole of the property. 43. As a result, subject to the servitude rights of the neighbouring houses, including those of the parties, the co-owners of the yard have identical rights to use the yard. In the absence of agreement between the co-owners there could be an unregulated competition on a daily basis for use of the residual space to park a car. This would not be a satisfactory state of affairs. The parties or their successors as neighbours, if unable to reach a sensible accommodation, would face a competition akin to the competition between holidaymakers who rise at dawn to place their towels on sun- loungers in sunny climates. Unregulated competition between co-owners is unsustainable in the long term. 44. Where co-owners cannot agree on the administration or use of their property, the normal solution is to end the co-ownership by raising an " action en licitation ". The court may order the sale of the property by auction at which anyone, including a co-owner, can bid. See *Ritson v Slous*

(1973) 1 J. J. 2341, 2342. I do not think that this is a satisfactory expedient in this case. The yard is intimately connected with the surrounding properties and is burdened by servitudes in favour of such properties. It is unlikely to be of any real value to persons other than the owners of the properties. The drafters of the deeds in this case used co-ownership and servitudes in an attempt to achieve the sensible regulation of the use of the yard which serves the neighbouring properties. It may not have been envisaged that the yard would be separated from the ownership of the parties' houses. Hence the owners of those houses are burdened with the upkeep of the yard. That said, the owners of "Mont au Roux Farm" on the West of the yard and "Laverock" on the East have no proprietary rights in the yard and only limited servitude rights. Co-ownership of the yard may not be indispensable to the ability of the owners of the neighbouring houses to enjoy their properties, as they have praedial servitudes. Thus a sale of the yard by means of an "action en licitation " may be competent as the test of necessity may not be met. See *In re L. F. Morgan Ltd* 1987-88 JLR 336, 341. A sale by licitation would however be a very unfortunate expedient. It would be likely to result in a bidding contest between neighbours and cause further and unnecessary aggravation. 45. In my opinion an appropriate remedy, if the parties cannot achieve a *modus vivendi* without the intervention of the court, is to use a power of judicial regulation. Such a power exists in some jurisdictions with civilian traditions in their property law. In France, the courts have power to regulate on an interim basis the use by co-owners of property held in common. Article 815-9 of the "Code Civil" provides: "Chaque indivisaire peut user et jouir des biens indivis conformément à leur destination, dans la mesure compatible avec le droit des autres indivisaires et avec l'effet des actes régulièrement passés au cours de l'indivision. A défaut d'accord entre les intéressés, l'exercice de ce droit est réglé, à titre provisoire, par le président du tribunal." 46. In Scotland, where we have drunk from the same fountain, judges have suggested that judicial regulation is available to resolve managerial deadlock. I refer again, in this regard, to Professor Reid (*op.cit*) at paragraph 30, to the cases which he cites and in particular to

Fearnan Partnership v Grindlay 1992 SC (HL) 38, Lord Jauncey of Tullichettle at p.62. 47. It seems to me that judicial regulation is available in the civilian tradition and that in principle it is available in Jersey. Judicial regulation existed in Roman law in the context of the termination of ownership in common through the action *communi dividundo* : Buckland , A Textbook of Roman Law nd ed (1932), pp.252, 540-1, Thomas, Textbook of Roman Law

- (1976) p.325. Where division or sale is not possible or is highly inexpedient it is not a significant development of custom based on Roman law to recognise a power of judicial regulation.
48. The precise scope of that regulation would require to be worked out in practice. In this case if there is in fact room only for one further car, it may be sensible that the parties should share the residual space by allocating periods during the year when that space may be used by one or the other for parking. In so far as the Respondents are concerned to have an opportunity to park in the yard at times when the lime trees in front of their house drop deposits on their car, a temporal apportionment of the right to use the residue of the yard may be suitable. Another option could be that one party would grant the other an exclusive right to use the residual space in return for monetary compensation. If there be room for two cars, the parties could regulate the use of the space so that each would have one parking space. 49. It is important that the parties should remember that the Appellant's right of parking is a servitude which is a restriction on the co-owners' freedom to enjoy their property. The servitude right must be exercised civiliter , in a way which minimises inconvenience to the owners of the servient tenement. I refer in this regard to Domat's discussion de Servitudes in *Les Loix Civiles* , Tome 1 (1745), Book I, title 12, section 1 paragraph IX, where under the title " S'interpretent favourablement pour la liberté " he states: "Comme les servitudes dérogent à la liberté naturelle à chacun d'user de son bien, elles sont restreinte à ce qui se trouve précisément nécessaire pour l'usage de ceux à qui elles sont dûes, et on en diminue, autant qu'il peut, l'incommodité. Ainsi celui qui a un droit de passage dans les fonds d'un autre, sans que le titre marque le lieu où il pourra passer, n'aura pas la liberté de choisir son passage où il lui plaira; mais il lui sera donné par l'endroit le moins incommode au propriétaire du fonds asservi..." 50. The Appellant and her tenants who have no better right than she must therefore exercise their servitude rights to park their three cars in a way which minimises the inconvenience to the co-owners. This obligation applies both to the right to park and to the right of access to and from the parking places. It requires to be borne in mind in addition to the obligation to park as closely as is reasonably practicable to the wall forming the Western boundary of the yard. 51. In respect of the further rights which the Appellant has as a co-owner and which we are informed she has made available to her tenants through her lease, the options appear to be the negotiation of an agreement or judicial regulation. It is important that all persons with an interest in the yard, including the tenants, are made aware of the extent of and limitations on their rights. 52. In the absence of agreement to resolve the impasse, the parties may require to debate the power of the court to grant, and the appropriateness of, any such solutions in further proceedings. I, for one, hope that will not

be necessary and that parties can now solve their differences by negotiating the sensible use of the residual area. 53. I would refuse the appeals of both parties. 54. The President: I agree. 55. Tugendhat JA.: I also agree. Authorities In re L. F. Morgan, Ltd. (1987-88) JLR 336. " Oeuvres de Pothier " Tome 2 (2 nd ed'n :

1861) pp.48-52. Wallis v Taylor

(1965) JJ 455 , 457. Pennec v Romeril, (9 March 1995) Jersey Unreported. Ferrière : Dictionnaire de Droit et de Pratique , (Paris 1740), Tome 2, p.584. H A Gaudin & Co Ltd v Bennett

(1976) 266 Ex 448. Wade v Weston & Trigg

(1979) 266 Ex 461. In re L F Morgan Ltd (1987-88) JLR 336, 342. Snell v Beadle

[2001] 2 WLR 1180 . Code Civil: Article 815-3,9. Professor Kenneth Reid: The Law of Property in Scotland (1996) paragraphs 23 -25. Rafique v Amin (1997) SLT 1385. Silberberg and Schoeman: The Law of Property (3 rd ed'n) (1992) pp.310-311. van der Merwe and de Waal: The Law of Things and Servitudes

(1993) para 211. Marcel Planiol: Treatise on the Civil Law (Vol 1 part 2) (12 th ed'n) 1939: para 2497. Domat: Les Loix Civiles: de Servitudes. Tome 1 (1745), Book I, title 12, section 1 paragraph IX. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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