

JERSEY / JUDGMENT

Morgan v Heaven

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Property - dispute. [2022]JRC060 Royal Court (Samedi) 4 March 2022 Before : Sir William Bailhache, Commissioner, and Jurats Ramsden and Le Cornu Between Mrs Joy Morgan née Hacquoil Plaintiff And Mrs Caroline Louisa Ann Heaven née Smith First Defendant Mr David Rowland Heaven Second Defendant Advocate L. Calder for the Plaintiff. Advocate H. J. Heath for the Defendants.

judgment

the commissioner:

Introduction

1. In these proceedings the Plaintiff seeks orders from the Court that the construction by the Defendants of a walled patio and laundry drying area on part of their land constitutes an unlawful encroachment of a right of way created in 1974 by the predecessors in title of the Plaintiff and the Defendants; that the Defendants shall remove the walled patio and restore the original condition of the land; that the Defendants' parking of vehicles so as to block or restrict access to and across their land constitutes an unlawful encroachment of the right of way, and that they shall be prohibited from parking their vehicles, or allowing others to park vehicles in any location on their land otherwise than is set out in a draft Contract of Arrangement which the Plaintiff had caused to be prepared. The Defendants deny that the Plaintiff is entitled to any of this relief. To adjudicate on the dispute requires a review of the respective titles to their property, of the difficulties which currently exist and an assessment, informed by the evidence including a site visit, as to the extent to which the Plaintiff is entitled to the orders which she seeks. The Court sat on 27th and 28th January and judgment was reserved. Title 2. The Plaintiff owns La Botellerie Farm with a garage to the north and various pieces of land including a field called Le Clos du Menage to the north of both La Botellerie Farm and the property of the Defendants. The Plaintiff also owns the property White Haven which lies to the east of the Defendant's property. La Botellerie Farm and the Defendant's property borders by the south on the public road La Rue de la Mare des Cauchez ("the public road"). 3. The Defendants own La Botellerie Cottage, which is attached to La Botellerie Farm and lies to the east of it. To the north and east of La Botellerie Cottage lie what is called the avenue and the yard, also belonging to the Defendants and to the east, and in part by the north, of the avenue and yard lies the Plaintiff's property White Haven. 4. The public road lies to the south of the Defendants' property. Other than the public road, the

properties of these parties are surrounded by fields which generally have a current agricultural user. 5. The Plaintiff's properties and the Defendant's property historically all belonged to the Plaintiff's grandfather, Mr John Philip Hacquoil ("the Grandfather") who had acquired all that property from his uncle by Deed of Gift in 1937. By a Deed of Gift in 1962, the Grandfather gifted a piece of land to the Plaintiff's father, Mr Clive Francis Hacquoil ("the Father"): and on this land a house was constructed, and is now known as White Haven. The Grandfather died in 1972 leaving to his wife the use of and life enjoyment of all his real property, and the reversion divided between his son and his daughter, Iris May Sinsbury née Hacquoil (the "Aunt") and the Father. The Grandfather's Will set out a number of terms and conditions but importantly directed the Father and the Aunt to pass a contract of division of real property before the Royal Court. This contract ("the Deed of Division") was duly passed on 22nd March 1974 and settles the respective rights of the owners of La Botellerie Farm and La Botellerie Cottage. We will turn to the detail of the Deed of Division later in this judgment. 6. By contract passed before the Royal Court on 7th July 1995, the Aunt sold La Botellerie Cottage to Mr Jeremy Platt. The Father was not party to that contract and accordingly that Deed of Sale cannot have changed the contractual obligations owed by the purchasers to the Father. The only new provision in this contract is the creation of a right of way in favour of the Aunt as vendor, who had retained agricultural land to the east of White Haven. That is not relevant, however, for the purposes of the present dispute. On 8th August 1997, the First Defendant married Mr Platt and the same year the property La Botellerie Cottage was conveyed into their joint names. Sadly, Mr Platt died in July 1998 and the First Defendant became the sole owner of La Botellerie Cottage. Following her marriage to the Second Defendant, the First Defendant let La Botellerie Cottage to various tenants until May 2018, when following renovation works to the cottage, the Defendants moved back in. The Father died in 2000. By his Will, which was registered on 10 March 2000, he left La Botellerie Farm, the property White Haven and the surrounding land to the Plaintiff. The Deed of Gift – White Haven 7. The Deed of Gift in 1962 by the Grandfather to the Father established a boundary between La Botellerie Farm and Cottage and White Haven, by the planting of two boundary stones, which are still in situ today. The Deed contains a provision by which White Haven could be more fully demarcated from La Botellerie Farm and Cottage by the construction of a wall or other enclosure or hedge. There is provision for the owner of White Haven to have the right to maintain a well which in the future would be situated in the land to the north with all ancillary rights necessary. There are rights for the owner of White Haven to place and maintain electric cables and conduits as considered necessary for the use of the White Haven plot. Notably, however, there is no provision for any right of way over the property of La Botellerie – the assumption is that the owner of White Haven will have access to the public road which lies to the south of that property. The Deed of Division 8. The Deed of Division between the Father and the Aunt contains these provisions relevant to this present dispute. Having first set out the devise of La Botellerie Farm, the garage and lands to the Father, the contract describes then the property of the Aunt as including La Botellerie Cottage and a field to the west of Le Clos du Menage. As regards La Botellerie Cottage, the description is in these terms: "Premièrement certain petite maison ou "cottage"

et les édifices et garage à l'Est et au Nord de ladite petite maison ou "cottage" et (par un petit bout) au Nord de ladite cheffe maison échus à ladite première partie; lesdits petite maison, garage et édifices avec la cour au Nord et au pourpotant d'iceux, l'avenue à l'Est et au pourportant lesdites petite maison, garage, édifices et cour et une lisière de terre à l'Est de partie de ladite avenue, lesdites prémisses avec le mitoyenneté du pignon de l'Ouest au pourportant de ladite cheffe maison échus à ladite première partie, les côtières ou murs et reliefs sur partie du côte sud et sur le reste dudit côte l'Ouest (au pourportant deadits chemins à piétons échus à ladite première partie), le pignon du Sud vers le chemin public appelé "La Rue des Cauchers" et le mitoyenneté (sans relief) des bornes de l'Est vers ladite propriété déjà appartenant à ladite première partie (au droit susdit); lesdites prémisses se tenant et joignant ensemble et formant un seul et même corps de bien-fonds, bordant par le Sud sur ledit chemin public appelé "La Rue des Cauchers" et joignant par tous les autres côtes aux propriétés de ladite première partie; 9. In translation: "And secondly, the said Iris May Hacquoil, wife of aforesaid, shall have for her part of the property the two corpus fundi as follows: Firstly, a certain small house or cottage and the outbuildings and garage to the east and to the north of the small house or cottage and (by a small section) to the north of the main house devised to the first party, the said small house, garage and outbuildings with [the ownership of] the yard to the north and adjacent thereto, the avenue to the east of and adjacent to the small house, garage, outbuildings and yard and a strip of land to the east of part of the avenue, the said property with the party ownership of the gable to the west adjacent to the main house devised to the first party, the walls and offsets on part of the south and the remainder of the west (adjacent to the footpath devised to the first party), the gable on the south towards the public road "La Rue de Cauchers" and the party ownership (without offset) of the boundary stones on the east towards the property already belonging to the first party (in right as aforesaid); the said property joining together and forming a single and sole corpus fundi, bordering by the south the public road La Rue de Cauchers and joining by all other sides to the properties of the first party."

10. The contract then provides for a number of rights created for the Aunt over the property of the Father in relation to the installation replacement and maintenance of various services, and there are mutually established rights in relation to drainage of foul and rainwater, again with rights of access for the purposes of replacement repair and maintenance. None of these are relevant to the present dispute.
11. The Deed of Division goes on, however, to deal with the right of way in these terms: "QUE ladite première partie aura droit de chemin et passage toutes fois et quantes et à tous usages par sur et à travers lesdites avenue et cour formant partie dudit premier corps de bien-fonds echu à ladite seconde partie et ce afin d'aller et venir dudit chemin public "La Rue des Cauchers" tant audit garage dans la carre Nord-Est de ladite cour qu'audit "Clos du Ménage" formant partie de ladite propriété echu à ladite première partie: à la charge à cette dernière de contribuer sa juste proportion des frais des maintien et entretien desdites avenue et cour."

12. In translation: “That the first party shall have right of way and passage at all times and for all purposes by, on and across the said avenue and yard forming part of the first corpus fundi devised the second party and this in order to go to and come from the public road La Rue des Cauchers both to the said garage in the north east corner of the yard and to the said Clos du Ménage forming part of the said property devised to the first party; obliging the latter to contribute his fair proportion of the costs of maintenance and upkeep of the avenue and yard.” The present difficulties
13. It appears from the evidence that we have heard that the right of way caused no problems for some years following its creation in 1974. As far as the Plaintiff is concerned, the difficulties really arose following the submission of a planning application in December 2015 for the extension of an existing unit at La Botellerie Cottage, although the former tenant of Le Clos du Ménage, Mr Richard Lee, had complained of difficulties of access from the public road to his field in or about 2000/2001. When the planning application was submitted in late 2015, the Plaintiff took legal advice on the terms of the contracts, and in particular the Deed of Division. The 2015 application was withdrawn but a further application was submitted by the Defendants in July 2016 to carry out some renovation works to the cottage – this involved the demolition of a garage immediately north of the cottage and attached to it, the conversion of a barn to habitable space, various window alterations to the north and east elevations, and the demolition of a bank and the construction of a retaining wall to the north east with the removal of a low level wall to the south east of the site. The latter was a reference to the wall surrounding a patio which had been constructed in or about 1997, the First Defendant says with the approval of the Father, who was then living at White Haven. The Plaintiff asserts that the application was approved in September 2016, the officer assessment being that the removal of the patio area, currently surrounded by the patio wall, would improve the width of the access and provide a third parking space.
14. The renovation works were commenced in April
2017. It is clear there was some inconvenience to the Plaintiff during the continuation of those works. The Plaintiff asserts that the patio wall, which was removed in accordance with the application was subsequently rebuilt in July 2019 and that 'constitutes a permanent obstruction to the right of way. It is said that this is exacerbated by the parking of vehicles by the Defendants and their invitees on both the avenue and the yard. The particular difficulties are that the Plaintiff has been unable to driver her motor home from the public road to Le Clos du Ménage because the patio wall seriously impacts the width of the avenue close to the entrance with the public road. In particular, access is only possible from the east and not from the west. Furthermore, a whirligig washing line severely restricts the room for turning out of and into the avenue due to the space that is taken up with clothes hanging on it.
15. Mr Lee, the Plaintiff’s tenant of Clos du Ménage is said regularly to need access to the field, often with large tractors, trailers and other equipment to tend to his cows and to transport these animals to pasture elsewhere in a trailer. He too has the same difficulty that he cannot

manoeuvre his tractor and trailer up the avenue unless he gains access from or exits towards the east. It is not just a problem for him; it is said that all large vehicles have no option other than to enter and exit the avenue from and to the east. This has an impact also on the delivery of oil to the oil tank serving White Haven which is in the northern part of that property. Finally, the Plaintiff asserts that the construction of the floor and walls of the patio abutted the wall of White Haven, and as a consequence did not take into account her offset and encroached on that area. As a result, her lawyers wrote to the Defendants who acknowledged that encroachment and undertook works to remove the patio flooring and parts of the wall from the area of the offset.

16. Whether it is as a result of the difficulties over the planning application, or during the renovation works or the arguments which have occurred subsequently, the relationships between those living at La Botellerie Farm and La Botellerie Cottage have regrettably deteriorated considerably. In their witness statements, both sides make a number of allegations about the conduct of the others, or, about the conduct of the Plaintiff's partner. We make no finding at all in relation to those complaints. We note that they have been made, and it is extremely unfortunate that the relationships have deteriorated as they have, but these matters fall outside the scope of what is being litigated here. Both sides say that they recognise the obligation to live in reasonable harmony with their neighbours, and we can only say that it is a pity that although they say this, it is apparent that it is not happening in practice. Inevitably in a case such as this, there will be a winner and a loser. Despite the fact that this is so, we hope that both parties will treat the resolution of the matters raised by the litigation as wiping the slate clean so they can start again for the future.
17. We also take the opportunity of saying that we do not regard the various planning issues which have been raised in evidence as being material to what we have to decide. We have not been invited to apply planning law; the Planning Department has not provided evidence; the Minister for Planning and Environment is not a party to the proceedings; there is no enforcement action taken before us, if indeed any such action might be justified. It follows that the complaints about the dealings with Planning over the 2016 application, or whether the area of hard standing in Le Clos du Ménage where the Plaintiff's motor home and other vehicles are parked has been created with the necessary planning permission are all beside the point. The Defendants' answer to the difficulties which the Plaintiff has in accessing Le Clos du Ménage with her motor home was in part that she should not be parking the motor home there in any event; we have no conclusive information on that point, and whilst we can well see that a right of way cannot be exercised for an illegal purpose, we are in no position to make a finding as to whether it is or is not illegal for the motor home to be parked there. In those circumstances we have assumed that it is a legal use, and we do not address that further. Rules relating to servitudes
18. Although this case involves property which originally was in the hands of one land owner and has subsequently been split up, we are not concerned here with the doctrine of destination de père de famille because there is no doubt that both under the Grandfather's

Will and under the Deed of Division, express provision was made for the matters which are now in dispute. We do not think there is any material difference between the terms of the Will and the Deed of Division in so far as the right of way serving Clos du Ménagement is concerned but it is noteworthy that the Will does not mention at all the Plaintiff's garage which is mentioned in the Deed of Division. Perhaps the reason for that is that that garage was constructed between the date of the Will and the Deed of Division; at all events we proceed on the basis of the Deed of Division as that carries the later date and reflects the agreement between the Father and the Aunt as owners of the neighbouring properties, expressed to be in perpetuity.

19. The principles of construction in relation to documents have been set out on a number of occasions in our jurisprudence. A recent exposition is in the *Parish of St Helier v Minister for Infrastructure* [2017] JCA 027 where the Court of Appeal laid down these principles: “12. The Royal Court set out extensively the principles applicable to the construction of documents, primarily by reference to the decisions of this Court in *Trilogy Management v YT Charitable Foundation (International) Ltd* [2012] JCA 152 and *La Petite Croatie Ltd v Ledo* [2009] JCA 221. Those principles, which are well-known, may be stated as follows:
 - (1) the aim is to establish the presumed intention of the makers of the document from the words used;
 - (2) the words must be construed against the background of the surrounding circumstances or matrix of facts existing at the time of execution of the document; (3) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the makers of all parties to the document at the time, and include anything which would have affected the way in which the language of the document would have been understood by a reasonable man; (4) evidence of subjective intention, drafts, negotiations and other matters extrinsic to the document in question is inadmissible as an aid to construction, but may be admitted to resolve a latent ambiguity (that is to say, an ambiguity that only becomes apparent when otherwise clear words are related to the surrounding circumstances); (5) evidence of events subsequent to the making of the document is inadmissible as an aid to construing the original meaning of the document;
 - (6) words must be read in the context of the document as a whole;
 - (7) words should so far as possible be given their ordinary meaning; and if the language is unambiguous the Court must apply it unless the result is commercially absurd;
 - (8) if the words used are ambiguous, in the sense of being capable of more than one construction, the court should adopt the construction that appears most likely to give effect to the commercial purpose of the agreement and to be consistent with business common sense; but there is a correlation between the degree of ambiguity and the persuasiveness of a common sense construction, so that the greater the ambiguity the more likely it is that the court will adopt a construction based on business common sense, and vice versa.”

20. The Court of Appeal accepted those principles for the purposes of its decision.
21. The construction of documents must of course also be conducted against the background of the general law, in the present case, the law of servitudes in Jersey. In that connection, it is relevant to refer to the Court of Appeal decision in *Colesberg Hotel (1972) Limited v Alton Hotel Limited* [2003 JLR 176] where Southwell J A said this: “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. 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 (née Daniel) v. Duquemin* [2002] JLR 27.”
22. In that case, a contract passed before the Royal Court in 1899 had included a right of way “toutes fois et quantes et à tous usages” along a private road. Subsequently the defendant proposed to develop its property by the construction of 24 flats with associated parking space on its land and the argument concerned whether, first of all, the right of way “toutes fois et quantes et à tous usages” had been extinguished because it had originally been granted with a different purpose in mind, and secondly, whether the right of way had been lost, or would be lost, by aggravation as a result of the development.
23. It is to be noted that the right of way was created in these terms: “Il a été convenu et stipulé entre lesdites parties ... que ledit Monsr. Elie Rive, Jr. et ses hoirs ou ayant droit auront droit de chemin et passage toutes fois et quantes et à tous usages par dans le chemin qui est établi à Est dudit mur qui sépare la propriété desdites parties, lequel chemin mesure en longueur 52 pieds 4 pouces et en laize 9 pieds, ledit Sieur. Rive contribuant sa proportion des frais du maintien et entretien dudit chemin, ainsi que des grandes portes qui le sépare du chemin public.”
24. In translation: “It has been agreed and stipulated between the parties that the said Mr Elie Rive, JR. and his heirs or those having right from him shall have right of way in passage at all times and for all purposes by and in the private road which is established to the east of the said wall which separates the property of the said parties, which private roadway

measures in length 52ft 4in and in width 9ft, the said Mr Rive contributing his proportion of the costs of maintenance and upkeep of the said private roadway, as well as, of the large gates which separate it from the public road.”

25. In the Royal Court, it was noted that an amount of evidence demonstrated that until 1985 the private road was used for vehicular access to what was then a walled garden. After 1985, however, the private road was used during the tourist season with some regularity for access on foot and by vehicle from the public road to what had become a building site by the date of that litigation.
26. The competing arguments before the Royal Court over the construction of the right of way were these. The Defendant submitted that the right of way existed at all times and for all purposes, which carried its natural and ordinary meaning. The plaintiff submitted that the phrase did not relate to the purpose for which the right of way existed but rather to the method or manner by which the right of way might be exercised. Sometimes one saw in a conveyance a reference to a right of way by foot only, or by horseback. In this case, the plaintiff’s submission was that the expression “à tous usages” indicated that the right of way could be exercised in any manner, which is to say on foot, on horseback or with a vehicle of any kind, but not for any purpose.
27. In the Royal Court, Bailhache, B, said: “13. We cannot accept [the plaintiff’s] submission. “Usage” has, in our judgment, no such restricted or special meaning. It is to be translated in this context as “use” or “purpose”. The manner in which the right of way may be exercised is certainly embraced by the phrase “à tous usages” so that the beneficiary of the right may use it on foot or by vehicle as he sees fit. But it means more than that; it means that he may use it for transporting persons, materials or supplies or, generally, for any purpose reasonably incidental to the enjoyment of his land”.
28. Later in his judgment, at paragraph 20, the Bailiff said this: “What does the titre, or title, in the relevant deed provide in this case? It creates a right of way along a specific private road, accurately measured, “toutes fois et quantes et à tous usages”. In conveyancing practice, there is no more general nor wider terminology that can be employed. One may include words of limitation. Counsel cited a number of examples None of these phrases of limitation exists here.”
29. In the Court of Appeal, the various submissions as to the construction of this language were advanced again. The Court of Appeal specifically declined to endorse the Royal Court’s approach, noting at paragraph 29, that whichever interpretation were to be adopted, the consequences could be somewhat revolutionary for those having the benefit or burden of servitudes in Jersey. If the Plaintiff/Appellant was right, use of the words “à tous usages” would of itself give the owner of the dominant tenement no permission to use the servitude except for such limited purpose or purposes as could be derived from the context of the contract and of the relationship between the dominant and servient tenements. On the other hand, if the Defendant/Respondent was right, then potentially servitudes could be used for

purposes which could not possibly have been contemplated at the time when the servitude was granted. Southwell JA concluded: “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.”

30. We mention this in some detail because, not unnaturally, Advocate Calder relied heavily upon the views expressed by the learned Bailiff at first instance in *Colesberg Hotel*. For reasons at which we will arrive shortly in our construction of the particular contract in question here, it is not necessary for us to resolve which of the two competing submissions in that case is appropriate.
31. Before leaving the case however, we do refer to paragraph 25 of the Judgment at first instance where the then Bailiff said this: “We would add only one cautionary note and one consequential note. The cautionary note is that the right of way is a right, like all servitudes, which must be exercised civiliter, i.e. in a way which minimises inconvenience to the servient land.”
32. In the Court of Appeal, the argument was taken that the use of the right of way over the servient tenement could not lawfully be greater than that contemplated by the parties at the time it was created. At paragraph 39, Southwell JA commented in this way: “In my judgment, this is not the correct test. I prefer the test adumbrated by Basnage (2 *Commentaires sur la Coutume de Normandie*, 4th ed., at 562 (1778)) 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 “the right of way is a right, like all servitudes, which must be exercised civiliter, i.e. in a way which minimizes inconvenience to the servient land.”
33. It is perhaps to be noted that Le Geyt, writing towards the end of the 17th Century in his *Privilèges Loix & Coustumes de L’Isle de Jersey* said this at p.66, Article 9: “La Servitude de chemin et passage peut ester fournie sur la fonds servant par la lieu la moins prejudiciable, s’il n’est pas limité, et l’on ne doit user d’avenue servitude à heure induë.
34. In translation: “The servitude of a right of way and passage must be exercised over the servient tenement by the least prejudicial means, if it is not limited, and one must not use it at any undue hour”. The construction of this right
35. We turn next therefore to the construction of this particular right contained in the Deed of Division. It is appropriate first of all to look at the matrix of the fact against which it should be construed, which involved: (i) The two properties in question had hitherto been in one ownership devolving on two owners. (ii) The Deed of Division created defined boundaries

and rights in perpetuity. (iii) The right of access was expressed to be created over the servient tenement to provide the dominant tenement (La Botellerie Farm) with a right of access to a garage and to a field. It follows that, whatever else it may mean, the expression “à tous usages” must be considered as including vehicular access to the garage and access to a field for agricultural purposes i.e. with tractors and if necessary trailers.

36. It is also appropriate to note at this point in the construction of this clause that the subjective intentions of the parties, even if they could be established, are inadmissible. We say this because, entirely naturally, the Plaintiff had regard to the fact that her Father was an Arpenteur Public of the Royal Court, who therefore could be assumed to have known something about conveyancing and land law, and indeed in her view would never have agreed to the construction of the patio which the Defendants disputed – they claim that he had expressly agreed it and encouraged them in its construction. We do not have regard to this evidence any more than we have regard to the evidence that from 1997 until 2015 the existence of the patio has caused little difficulty in practice, albeit the farmer Mr Lee did complain on one occasion and enquire whether a different right of access to Le Clos du Ménage might be obtained. None of these pieces of evidence are in our judgment relevant to the construction of the Deed.
37. Unlike the Deed that came to be considered in the Colesberg Hotel, this particular provision in the Deed of Division does have an express purpose. The right of way was created “in order to go to and come from the public road La Rue de Cauchez both to the said garage in the north-east corner of the yard and to the said Clos du Ménage forming part of the said property devised to the first party ...” (see paragraphs 10 – 11 above).
38. In the present case a substantial part of the evidence was directed to the difficulty of making the turning into the avenue over which the right of way was created from a westerly direction – likewise making an exit from the avenue by turning right in a westerly direction. In our judgment, that mis-construes the purpose of the Deed, which is to enable access to the public road. That access, turning left on entrance or right on exit, is possible with a vehicle of ordinary length despite the creation of the patio and the building of the wall enclosing it. It is a tight turn, but members of the Court made that turn and it is achievable. We think it would be achievable with a tractor, but we accept that with a tractor and trailer, or with a motor home, access from the west into the avenue is not possible, or certainly, is not easily possible. It is, however, possible to exercise that access from the east. It follows in our judgment that it is impossible to say that the patio and wall prevents access from the public road to the garage or to Clos du Ménage. It is possible and it follows that these complaints of the Plaintiff do not establish any breach of the covenant by the Defendants.
39. In our judgment there is no ambiguity in the terms of the Deed; but to the extent that it might be said there is such an ambiguity, we think that it should be resolved in favour of the Defendants, applying the usual contra proferentem rule, namely that ambiguities are resolved in favour of the servient tenement.

40. We turn next to the question of access being impeded by the Defendants' parking of vehicles. The first point to make in this connection is that the Plaintiff's right of access does not remove all uses of their land by the Defendants. It is, after all, their land, and they are entitled to use it as any landowner can use his land; the limitation is that their use of it must not impede the right of access. It follows that although the Plaintiff has a right of way over the entirety of the avenue and the yard belonging to the Defendants, it is open to the Defendants to designate any part of that land for the purposes of the Plaintiff's right of access, as long as the same be reasonably designated for that purpose. In this connection, we think the right of access to the garage must necessarily include the convenience of a right to manoeuvre – to turn a car within the yard so that if the car is driven into the garage it can be turned on reversing so as to exit onto the public road safely, or by contrast, if reversing into the garage, then exercising the right of access over sufficient of the yard to make that operation possible. This seems to us to follow from the principle that an expressed grant of a servitude must include ancillary rights necessary for its exercise. This is a concept well known to the civil law in France – see Domat on Les Loix Civiles 9th Edition
- [1713] where under the chapter on servitudes, titre XII, section VII, the author says this: “Le droit de servitude comprend les accessoires sans lesquels on ne pourroit en user. Ainsi, la servitude de prendre l'eau d'un puits ou d'une source emporte la servitude du passage pour y aller: Ainsi la servitude d'un passage emporte la liberté d'y faire, ou réparer l'ouvrage nécessaire pour s'en servir: & si le travail ne peut se faire dans l'endroit où la servitude est fixée, on pourra travailler dans les environs, selon que la nécessité peut y obliger; mais en réparant, on ne peut rien innover à l'ancien état.”
41. In translation: “The servitude includes the accessory rights without which one could not use it. Accordingly, a servitude of drawing water from a well or other source carries with it the servitude of a right of passage to go there: thus a servitude of passage brings with it the liberty to make or repair works necessary in order to use the servitude.....”
42. This principle was also adopted on an appeal in the House of Lords from a Scottish case, *Moncrieff v Jamieson* [2007] UK HL42, the House of Lords concluding that the test to be applied in the case of an ancillary right where there was an expressed grant of a servitude is whether the ancillary right is necessary for the comfortable use and enjoyment of the servitude. It is not necessary to establish the ancillary right for it to be shown that all the rights that are later claimed as necessary were actually in use at the date of creation, and it was sufficient that they might be considered to have been in contemplation at the time of the grant having regard to what the dominant proprietor might reasonably be expected to do in the exercise of his right to convenient and comfortable use of the property. That appears to us to be on all fours with the ancillary right of the Plaintiff to manoeuvre in the yard in order to gain access to her garage. We note that no manoeuvring is necessary for the purposes of gaining access to the field because the avenue and yard lead directly into it.

43. It follows from these comments that the Defendants have the right to park on the avenue and in the yard for as long as their parking does not prevent the right of access which has been created or infringe the ancillary right of manoeuvre in order to gain access to the garage which has been mentioned. In that connection, we have been shown a scaled drawing of the Defendants' property showing three parking spaces. On questioning the Plaintiff in that connection, it seems to have been accepted that if cars were parked on those designated spaces, there would be no impeding of the right of access or ancillary right which have been described. However, the area is extremely tight, and any lack of care in parking on those spaces, particularly the one adjacent to the extension to the cottage, would seem to us to be liable to make the turning area necessary for convenient access to the garage very difficult to manoeuvre. We do not consider that we can come up with any answer to this. It behoves the parties to act in a way which is "civiliter". The Defendants must procure, in so far as lies within their powers, that their parking does not infringe the Plaintiff's rights. If it does, then it will be open to the Plaintiff to take further proceedings either for injunctive relief or damages. Equally, the obligation to act civiliter applies to the Plaintiff as well – and the right course, where the right of access is impeded by such parking, is obviously to make civil contact with the Defendants requesting that the vehicle in question be moved so as to permit the necessary access. "Live and let live" will be particularly difficult given all that has passed so far, but it is essential that the parties make every effort to wipe the slate clean and start afresh with a new relationship; they live too close by each other for anything else.
44. We heard evidence that the oil tank at White Haven could not be easily filled by the delivery lorries. We were surprised by this because it seems to us that there was room in the hard standing within Clos du Menage for a delivery lorry to go into that field and make the necessary turn. However, to the extent that such difficulties continue, it is right to record that the Plaintiff, as owner of White Haven, had no right to use the right of access. The dominant tenement is not White Haven but La Botellerie Farm, which includes of course Le Clos du Ménage. It may well be that common politeness between neighbours might lead the Defendants to permitting such access upon the basis that it is likely to be exercised only a few times a year; but we mention the matter because White Haven has no rights as such in this respect.
45. It is clear from the evidence of Mr Lee that the farmer finds it inconvenient that he can only exercise access by approaching La Botellerie Cottage from the east. We have sympathy with those difficulties which, depending on where he wishes to transport his cattle, may cost him extra time in that exercise. However, notwithstanding that sympathy, the fact is that he cannot have any better right than has the Plaintiff and his difficulties in that respect cannot lead to a construction of the right of way which would give it a meaning which in our judgment it does not have.

46. In summary, having considered all the arguments, we find that neither the walled patio nor the parking of vehicles by the Defendants constitute an unlawful encroachment onto the right of way of the Plaintiff. We urge both parties to make a new start to their relationship, however difficult that may be, and to cooperate with each other to ensure access to the properties and the field is manageable by all.
47. Both the Plaintiff and the Defendants have encouraged us to make an order for the passing of a Deed of Arrangement in a particular form, albeit each seek a different form. We do not consider that is appropriate. The rule that *promiesse à heritage ne vaut* is based on the proposition that, save insofar as there have been some exceptions in particular circumstances, parties cannot be forced to pass contract and take an oath before the Royal Court. That, however, is not to say that it would not be convenient for ongoing relationships for such a contract to be prepared and passed. In that connection, it will be a matter for the lawyers advising the parties to draw the contract appropriately having regard to the conclusions set out in this judgment.
48. Finally, we have considered whether any award of damages ought to be made in favour of the Plaintiff in respect of the admitted breaches of the right of way during the development programme between 2016 and 2018. The Defendants were not living in La Botellerie Cottage at that time, and the Plaintiff was living in her property. Unquestionably there was hardship for the Plaintiff at that time, the Defendants having blocked the right of way from time to time through the work of their contractors. Advocate Heath submitted that there should be no damages; neighbours must accept from time to time that building work might be carried out on the adjacent properties, and, as she put it, “people should muck in and do their best”. Both parties accepted that a rough and ready assessment of any damages we did see fit to award would be acceptable, no consequential losses being identified. Advocate Calder asked us to make an order for damages, and notwithstanding that the same has not been specifically claimed in the amended Order of Justice, Advocate Heath accepted that we could if appropriate make such an order. Having given that question careful consideration, taking into account the submissions of both parties, we think it is appropriate to make an order for that rough and ready compensation. We have taken into account the evidence of Mr Philpott that although there was difficulty at the outset, by liaison with the builders most of those difficulties were resolved. In the circumstances we consider an appropriate award of damages for the interference with the right of way during the building works is in the sum £1,000 and we order the Defendants to pay the Plaintiff those damages.
49. Judgment is entered accordingly. If the parties do not agree on the question of the costs of the action, we will hear argument. *Authorities St Helier v Minister for Infrastructure* [2017] JCA 027. *Colesberg Hotel (1972) Limited v Alton Hotel Limited* [2003] JLR 176. *Privilèges Loix & Coustumes de L’Isle de Jersey* p.66, Article 9. *Domat on Les Loi Civiles* 9th Edition [1713] *servitudes, titre XII, section VII. Moncrieff v Jamieson* [2007] UK HL42.

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