Case No: B2/2013/1361

Neutral Citation Number: [2014] EWCA Civ 64

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HEREFORD COUNTY COURT
HHJ PEARCE-HIGGINS QC
2HR00001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 3rd February 2014

Before :

SIR BRIAN LEVESON,
PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE AIKENS
and
LADY JUSTICE MACUR

- -

Between :

	Emmett	**Appellant**
	- and -	
	Sisson	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Malcolm Warner (instructed by **Gabbs LLP**) for the **Appellant**
Nicholas Isaac (instructed by **Beaumonts Solicitors**) for the **Respondent**

- -

Judgment**Lord Justice Aikens :**

1. This is an appeal about a right of way along a private driveway which, geographically speaking, runs along the boundary between two properties at Dinedor, Herefordshire. The parties to the proceedings are the owners of the two properties; in each case they are husband and wife. The dispute arises out of the wish of the appellants, Mr and Mrs Emmett, to build a high brick wall along the actual boundary between the two properties. The two issues are: (1)

whether the respondents have a right to gain access to their land all along the length of the right of way, or only at certain points; and (2) even if their right of way extends to every point along the right of way, would the erection of the wall, with one suitable vehicular entrance for the respondents to gain access to their property, constitute an actionable interference with their rights of way? I annexe to my judgment a plan of the two properties and the driveway between them.

2.The appeal is from a judgment and order of HHJ Pearce-Higgins QC dated 1 May 2013. He had to determine two issues. First, what was the physical extent of the respondents' right of way; in particular, did it extend right up to the actual boundary of the appellant's property on the north side of the driveway? In doing that he also had to consider the actual boundaries of the two properties. Secondly, if the right of way extended as far as the property boundary, would the proposed wall be an "actionable interference" with the respondents' right of way? The judge decided both questions in favour of the respondents.

The background facts.

3. All the land in this dispute was once combined in a single parcel owned by Mr Andrew A Price and Nancy Price ("Price"). Out of this parcel, three properties were created as follows: first, on 11 June 1993, Mr Price conveyed to the appellants a property, known as "Nellie's Oak" (HW134765), which comprises the south-westernmost portion of the land. That has a yellow period house standing on it.

4. Secondly, on 20 December 1996, Price conveyed to the respondents a property known as "River View Barn" (HW175610), which comprises the north-easternmost portion of the original parcel of land. A barn stood on that land and that has now been refurbished in red brick. It is this conveyance ("the Conveyance") that contains the right of way that gives rise to the dispute. The right of way is over what was then a track which had run along the middle of the original parcel of land.

5. The critical words of the grant of the right of way are in paragraph 1 of Schedule 2 of the Conveyance. This provides that there will be conveyed to the purchasers (the respondents):

> "…a right of way for the owner of owners for the time being of the Property with or without vehicles and for all reasonable purposes in connection with the proper use of the Property as a dwelling house over and along the access way the approximate position of which is shown by a red and black dotted line on plan number 2 subject to the payment by such owner or owners as aforesaid of the property hereby conveyed of the following

> namely (1) one eighth of the cost of maintaining the said access way from the County maintained road at the point A to point B on plan number 2…"

Schedule 5 imposed an obligation on the purchasers (the respondents):

> "…within three months from the date hereof to erect and at all times thereafter keep in good and substantial repair stock proof fences of a type and height and consisting of materials previously approved in writing by the Vendors to the whole length of all external boundaries between the points marked A B C and D on the said plan number 1 annexed hereto".

6. The points A to D go around the perimeter of the River Barn View property from its western edge in a northwards, eastwards and then southwards direction, as can be seen in the annexed plan. The section D to A goes along the northern edge of what became the Driveway land.

7. Thirdly, as a result of the Conveyance to the respondents, there remained the strip of land which I will call "the Driveway Land" (HE36323). This strip ran between the two properties as they had been conveyed to the parties by Price. The Driveway Land was tarmacadamed around April 1997. Then, in about July 1997, the respondents constructed a low stone wall (between 40-70cm high) along the southern boundary of their land (ie. running along the northern boundary of the Driveway Land), with a pedestrian gate where the Driveway Land reached the red-brick building. By a deed of release dated 21 May 1999, the respondents (at the appellants' request) released part of their right of way at the south-easternmost section of the Driveway Land, from where it passed between the buildings. Lastly, on 19 November 2007 the Driveway Land was transferred from the ownership of Matthew and Rebecca Parkin to that of the appellants, subject to the Respondents' remaining easement.

8. There is also an access way ("the Northern Road") to the north of River View Barn, which runs east-north-east from west of the property's western edge. At its westernmost point the Northern Road merges with the Driveway Land. This is the current vehicular access used by the respondents. However, the respondents do not have a legal right to this access, because the appellants own a non-contiguous triangular parcel of land which bisects the Northern Road. This small area of land has been referred to as the "Ransom Strip" because its ownership by the appellants does enable them to prevent anyone going over that land onto the rest of the Northern Road if they do not wish them to do so.

Events leading up to the current proceedings.

9.It seems that relations between the two parties soured sometime after 2000, when the respondents wished to develop buildings on their property. There were some proceedings between the parties in 2008 which are not now relevant. Then on 11 September 2009, the appellants dug a 75 cm wide trench along the northern boundary of the Driveway Land, which is about 30 metres long. This trench was literally a few centimetres from the low stone wall that the respondents had constructed. The trench was filled with concrete which could provide a foundation for a 2 metre high brick wall.

10.On 12 October 2009 the appellants notified the respondents that they intended to build this wall. The respondents objected by a letter dated 15 October 2009 and threatened to seek an injunction to prevent them doing so. Nothing happened thereafter for 2 years. Then on 22 November 2011 the appellants sent the respondents another letter announcing a renewed intention to build the brick wall. The respondents started the current proceedings in the Hereford County Court, seeking a permanent injunction to prevent the appellants from doing this.

The current proceedings

11. Many of the issues that the judge had to consider are no longer pursued. These included the appellants' counterclaim for a declaration as to the true position of the boundary between the two properties. At the end of the trial the appellants conceded that the boundary of the respondents' property, River View Barn, was the exterior face of the low stone wall. That is still accepted by the appellants.

12. The judge had to determine two issues on the respondents' right of way.

(1) Whether the northernmost boundary of the **e**asement over the Driveway Land is: (a) entirely coterminous with the southernmost boundary of River View Barn; or (b) largely just to the south of the common boundary between the Driveway Land and River View Barn, leaving an interstitial space of land along the northernmost boundary of the Driveway Land which belongs to the Appellants, and over which the respondents do not have a right of way.

(2) If the easement is entirely coterminous with River View Barn, whether: (a) the respondents were entitled to gain access to their property from any and all points along that coterminous boundary, so that a brick wall such as the appellants proposed to build would be an actionable interference in their right of way; or (b) whether, if the appellants offered to allow a single, gated point of access through the brick wall, were carried out, that would mean that the brick wall would not amount to an actionable interference with the respondents' right of way.

13. The Judge decided, as a matter of construction of the Conveyance in light of the facts on the ground at the time, that:

a) the fencing obligation in Schedule 5 of the Conveyance did not include the stretch of the boundary D-A (§7);

b) the dotted lines on the plan attached to the conveyance (being of poor quality and not to scale) were not contractually representative of the easement (§§14-15);

c) the clear intention of the parties in the Conveyance was to provide for maximum flexibility of entrance and egress prior to renovation works, and that the boundary of the easement ran coterminous with the boundary of River View Barn (§17);

d) the Respondents' had the right to access their land from any point along the Driveway Land (§24); and

e) what the Appellants proposed by way of a brick wall was an unreasonable interference with such right (§24).

14. The order of 1 May 2013 (in addition to dealing with costs and refusal of permission to appeal) made two declarations:

(1) The northern boundary of the accessway [Driveway Land] (over the full-width of which the Claimants have an express right of way with our [sic: or] without vehicles and for all reasonable purposes…) is coterminous with the southern boundary of … River View Barn;

(2) The Claimants have a right to access River View Barn from the said access way at any point along it.

The appeal and the arguments of the parties

15. The appellants seek to replace the declarations made by the judge with two new declarations. These are:

(1) To entitle them to create the wall or fence along the common boundary of the Driveway Land and River View Barn;

(2) To entitle the respondents to require (on reasonable notice) a single vehicular access (which may be gated) to be made in the wall or fence.

16. **The arguments of the parties: the appellants:** Mr Malcolm Warner for the appellants said that the appellants now accepted the judge's conclusion on the physical extent of the right of way in the Driveway Land, viz, that it runs up to the boundary of the appellants' land. The appellants also accepted the judge's conclusion that the respondents' obligation to fence did not extend along the southern boundary of their land along the line D to A on the plan. So the only points that remain in issue are: first, whether the judge was correct to conclude that the respondents had what was called in the appeal hearing "a linear right of way" to gain access to their land from the Driveway Land – ie. the right to gain access to it at any point along the length of the right of way; and, secondly, if the respondents have such a right, whether the appellants would be committing an "actionable interference" with this right of way if they built the proposed wall, if there was an undertaking by the appellants to provide vehicular access to the respondents' property through the wall at a point of the respondent's choosing.

17. On the first remaining issue Mr Warner attacked the judge's conclusion, at paragraph 24 of the judgment, that the respondents have a right to have access to their land from the Driveway Land "from any point along this right of way". Mr Warner submitted that this is wrong as a matter of law and in this regard he relied on the decision in this court of ***Pettey v Parsons [1914] Ch 653*** and also: ***Well Barn Shoot Limited, Well Barn Farming Limited and Gerald Henry Shackleton and another [2003] EWCA Civ 02 ("the Well Barn Shoot case").*** Mr Warner submitted that the judge should have applied the principles set out in these cases to the facts of the present one and if he had done so he would have concluded that the respondents were not entitled to access along the whole length of the Driveway Land the subject of the right of way, but only at one or more access points. However, he accepted that the respondents could (within reason) choose and change the access points upon reasonable notice.

18. Mr Warner submitted that even if he were wrong on that issue, the judge applied the wrong test on the second issue, ie. whether the proposed wall would constitute an actionable interference with the right of way of the respondents, assuming for this purpose that they had a right of way to access their property along the whole 30 metres of the Driveway Land. Instead of asking, as the judge did at paragraph 24 of his judgment, whether it was reasonable for the appellants to build the proposed wall, the judge should have asked whether the insistence of the respondents in exercising the right of way over the whole 30 metres was reasonable. Mr Warner relied on ***Pettey v Parsons*** on this point again and submitted that it was clear, from the principles stated in that case, that the respondents' insistence was not reasonable. It must follow, he said, that there was no actionable interference with the right of way by the appellants' proposal to build the 2 metre wall, provided that they abided by an undertaking to permit there to be a vehicular access in the wall at a point of the choosing of

the respondents, which even could, upon reasonable notice, be altered.

19. For the respondents Mr Nicholas Isaac submitted, in relation to the first point, that the question of whether there is a right of way to enter onto the respondents' land along the whole of the boundary from the servient tenement is a question of construction of the deed granting the right of way, taken in its context. For this he relies on ***Megarry and Wade's Law of Real Property, 8th Ed (2012) at para 30 – 005 and*** statements by Lord Cozens-Hardy MR and Swinfen-Eady LJ in ***Pettey v Parsons at 663 and 667.*** He submitted that upon the correct construction of the Conveyance, the judge was correct to conclude that in this case the right of access was not limited to defined gates or passages but extended over the whole length of the boundary.

20. On the second point, Mr Isaac accepted that the judge was wrong to couch the issue in terms of whether or not the actions of the appellants were or were not reasonable. But he submitted that, in practice, the judge had adopted the correct test at the end of paragraph 24 when he held that the action of building the proposed wall would be a "wholly unreasonable obstruction and interference with the right that the claimants have to access their land from any point along this right of way and there is no legitimate reason really put forward for that proposed obstruction". Therefore the judge was correct to conclude that there was an actionable interference with the respondents' right of way.

21. **Analysis and conclusion on the first issue: what is the extent of the respondents' right of way?**

This is a case a right of way that has been created by an express grant in the Conveyance. Mummery LJ, an acknowledged master of the law in this area, stated the principles by which the nature of the extent of such an express grant will be determined in a decision of this court in: ***West v Sharp [2000] 79 P & C Reports 327 at page 327 at 332.*** He said:

> "The nature and extent of a right of way created by an express grant depends on the language of the deed of grant, construed in the context of the circumstances surrounding its execution, including the nature of the place over which the right was granted….".

22. In my view the construction of the second schedule of the Conveyance is clear. The right of way granted is "over and along the access way". The extent of the right is not limited by the wording "with or without vehicles". Nor, contrary to the argument of Mr Warner, is it limited by the words "for all reasonable purposes in connection with the proper use of the property as a dwelling house".

These words may limit the purpose for which the grant is made but they do not limit its physical extent. On their true construction the words plainly grant a linear access along the whole of the boundary and there are no words that either expressly or impliedly limit the access to any one point or a number of points. This construction of the second schedule is supported, in my view, by the terms of Schedule Five, which imposes an obligation on the respondents to fence around their property on all sides except along the boundary next to the Driveway Land. That implies a right to have free access to their land along the whole length of it.

23. This conclusion on the face of the words of paragraph 1 of Schedule 2 is supported by the circumstances surrounding the execution of the conveyance, which Mr Isaac pointed out. First, there was an open boundary there beforehand. Secondly, there is no other lawful right of access to the property save over that boundary, as the appellants have been at pains to point out by emphasising that the "ransom strip" is their land and it would be unlawful for the respondents to cross it without approval by the appellants. Thirdly, the purpose of the grant was to enable the respondents to be able to have access to all the land that they had purchased to the north of the Driveway Land. Lastly, although this is really a construction point, I think, Mr Isaac noted that this was a grant, not a reservation, so that there should be no derogation from it unless there was an express derogation or one must necessarily be implied. There is no express reservation and, in my view, in view of the express wording of the grant there is no basis for any necessary implication here.

24. Mr Warner's reliance on the ***Well Barn Shoot Ltd v Shackleton [2003] EWCA Civ 02*** case is misplaced. It concerned the question of whether there was an implied right of way from a track where there was an express right of way to a field owned by the owner of the right of way along the track. At [22] Carnwath LJ records that it was conceded that there must be an implied right of way into the field. Counsel for the owner of the right of way conceded that the extent of the implied right of way into the field was limited to a particular point A and "such other times as shall from time to time be a reasonable exercise of the right of way". Carnwath LJ said expressly, at [28], that there was no necessity to imply more than one access. So this is a case of an implied right of way and it provides no assistance on the construction of the express grant of a right of way in this case.

25. The case of ***Pettey v Parsons [1914] 2 Ch 653,*** as I read it, was rather more concerned with the issue of whether what was being done was an actionable interference with the right of way, rather than with the construction of the terms of the conveyance granting it. But, as this case was central to Mr Warner's argument on both issues, I will consider it now. Mr Warner very helpfully supplied us with a coloured diagram to illustrate the layout and ownership of the land and the right of way in that case. Mr Parsons (the defendant) owned a parcel of land on the junction of two roads in Bournemouth, called Charminster

Road and Alma Road. In the middle of the parcel there was a footpath which ran from Charminster Road westwards to a private road which ran roughly north-south. This parcel of land was then subdivided and within it and next to the footpath on its southern side was No 93 which fronted onto Charminster Road. The land of No 93 ran back to the private road. Mr Parsons sold No 93 to Mrs Pettey (the plaintiff). It was agreed between them that the footpath to the north of No 93 should be widened, so the existing fence on the north side of the footpath was set back a further 6 feet. That footpath/road was also conveyed to Mrs Pettey in the same conveyance. But Mr Parsons reserved to himself as vendor, and as owner of the land lying to the north of the footpath/road, a right of way to himself, his tenants, servants and all others authorised by him or them "to pass and repass…with or without animals, carts and carriages" over and along the pathway/road, but no vehicle was to remain stationary on it. As Swinfen Eady LJ pointed out at 665 of his judgment, this was therefore a right that Mr Parsons had in common with all other persons entitled to use that way and it was not an exclusive right. The conveyance also gave Mr Parsons the right to build on the land to the north of the footpath/road. In the same conveyance Mrs Pettey undertook to make up the footpath/road and maintain it. She also covenanted to pay for half of the cost of the upkeep of the private road to the western end of the footpath/road and a gate at the eastern end of the private road.

26. Mr Parsons then built new shops on the land which he had reserved to himself to the north of the footpath/road. The shops nearest the footpath/road were not built right up to it but set back a little and the fronts of them were in an arc, leaving a roughly triangular space between the shops and the footpath/road which, at this point, had no fence on it. This triangular-like open space between the footpath/road down to Charminster Road was about 16 feet 2 inches (or very nearly 5 metres) long on the footpath/road side of it. Mrs Pettey then put up a fence along this 16 feet 2 inch stretch ie. on her land but at the boundary of her land and that of Mr Parsons. She also put up a gate at the eastern end of the footpath/road which could be fastened back to the wall of No 93. Both were removed (one way or another) by Mr Parsons.

27. Mrs Pettey began her action for declarations that she was entitled to erect the gate and the fence, but she said that she was prepared to put a gate in the fence so that Mr Parsons could have reasonable access to the footpath/road from his land. That was the basis on which the case proceeded. Mrs Pettey sought an injunction to restrain Mr Parsons from interfering with the proposed gate and fence. Mr Parsons' case was that he was entitled to get onto the footpath/road from any part of his property along the length of the open space in front of the shops. He wanted this access so that customers could thereby have a better view of "the admirable goods he shews in his shop windows" as Lord Cozens-Hardy MR put it. Sargant J found for Mr Parsons. On appeal, the court of Lord Cozens-Hardy MR, Swinfen Eady and Pickford LJJ unanimously reversed this

decision.

28. Only the issue of the fence is relevant to the present appeal. Lord Cozens-Hardy MR said at 663 that the issue of whether there was a right to enter on the footpath/road "merely by defined gates or passages" or whether there was a right to enter "at any other place where it is desired" was a question of the construction of the deed itself. He regarded Mr Parson's case as a "wholly untenable proposition" at least after the construction of the shops. He quoted from a passage of the judgment of Wright J in ***Cooke v Ingram 66 LT 671 at 674,*** in which he had said:

> "There is nothing in the original grant of the way which expressly limits the grantee to one line of access or to access only at the points, if any where his land actually adjoined the new way. And the parties certainly acted from the first upon the construction that the grantee was not limited to the shorter line of access, for the track always in fact used was not the shortest. In the absence of any such express limitation and of anything to shew that the right as claimed is unreasonable or destructive of the object of the grant I am unable to see any ground on which any obligation to elect one particular line of access can be implied".

Mr Warner accepted that as being a correct statement of principle.

29. However, Lord Cozens-Hardy MR regarded Mr Parson's contention as being "wholly and absolutely unreasonable" and one that "ought not to be sanctioned". He did not give any explanation for this conclusion. Nor did he did say that, as a matter of construction of the conveyance that had reserved the right of way on the footpath/road to Mr Parsons, he had only a right of way to enter and leave the footpath/road from his land to the north of it by means of the entrance to the footpath/road at the Charminster Road end. Thus, it seems to me, Lord Cozens-Hardy MR dealt with the case more on the footing that there was no actionable interference with Mr Parson's right of way.

30. Swinfen Eady LJ dealt with the issue of whether Mrs Pettey could erect a fence on the boundary of the triangular piece of land at the end of his judgment at 667. He said that it was a question of construction of the deed granting the right of way as to whether what is granted is a right to open gates or means of access to the way at any point on his frontage or whether it is "merely a way between two points, a right to pass over the road, and is limited to the modes of access to the road existing at the date of the grant". He was prepared to accept that Mr Parsons was entitled to open new means of access to this footpath/road, but, he said, Mr Parsons was not entitled to have it unfenced along the whole of the line "…so that at every inch of the way he may pass on to it at any times he pleases".

So he agreed with the Master of the Rolls. It is unclear to me whether Swinfen Eady LJ was deciding the case on the construction point and on the issue of whether there was an actionable interference by Mrs Pettey in what she had done or proposed to do or just on the latter point.

31. Pickford LJ said (at 669) that, assuming that Mr Parsons had the right of access from each part of the land from which access is required to any part of the footpath/road, "such access shall be given as is reasonable". That meant "such access as will give reasonable opportunity for the exercise of the right of way, or, to put it in another way, such access should be given as will not be a derogation from the grant of the right of way". Pickford LJ noted that Mrs Pettey had offered to put a gate in the proposed fence along the 16 feet 2 inch northern border of the footpath/road. He concluded, given that offer, "there was nothing in what [Mrs Pettey] proposes with regard to the fence that is in any way an infringement of [Mr Parson's] rights…".

32. The reasoning in the judgments is not, with respect, entirely easy to follow. There is not much, if any, analysis of the terms of the right of way in the conveyance. Mr Isaac was right to point out that this was a case where Mr Parsons had conveyed away land to Mrs Pettey and had then reserved for himself a right of way over land he had conveyed away. The court appears to have reached two conclusions. First, as Mr Parson's right was only to pass and repass on the footpath/road land, he was only entitled to rights that reasonably enabled him to do that and a fence with a gate in it would not stop him from exercising this right reasonably. Secondly, what Mrs Pettey proposed to do by erecting the fence with the gate in it was not an actionable interference with the right of way that Mr Parsons had reserved to himself. Overall, I maintain my view that this case is more concerned with the issue of whether Mrs Pettey would, by the erection of a fence with the proposed gate in it, thereby commit an actionable interference with Mr Parson's right to pass and re-pass on the footpath/road. That must be a question of fact in each case. Other than stating the general principles about ascertaining the scope of an express right of way and the helpful quotation from the judgment of Wright J in ***Cook v Ingram,*** which is apposite to the present case, the decision is very much one on its facts and does not assist on the first issue.

33. **Analysis and conclusion on the second issue: is the proposed brick wall with a defined vehicular access to respondents' land from the Driveway Land an actionable interference with the respondents' right of way granted by the Conveyance?**

On the basis that the respondents have the right to have linear access to their property from the Driveway Land, the question that remains is whether the proposed 2 metre high wall (even if it provides for one or more points of access to the respondents' land) is an actionable interference with the right of way

granted by the Conveyance? As noted, Mr Warner submitted that the judge approached this question from the wrong angle by asking and finding that the proposed action of the appellants was unreasonable, instead of asking whether the insistence of the appellants, as the owner of the dominant tenement, was unreasonable or perverse: see ***Megarry & Wade The Law of Real Property para 30-004 in 8th Ed (2012).***

34. Once again, Mummery LJ has set out the principles governing infringement of rights of way succinctly in ***West v Sharp,*** at page 332:

> "Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him".

Mummery LJ referred for that proposition to the judgments of Russell LJ in ***Keefe v Amor [1965] 1 QB 334 at 337*** and ***Scott J*** in ***Celsteel Ltd v Alton House Ltd [1985] 1 WLR 204 at 217.***

35. The question of what, in the circumstances of the particular case, constitutes "the reasonable use of the right of way" was the subject of further analysis by Blackburne J in ***B&Q PLC v Liverpool and Lancashire Properties Limted (2001) 81 P&CR 20 at [42] to [48].*** He concluded, after an analysis of the ***Celsteel case*** and thus those cases referred to in it by Scott J that there are three propositions which can be deduced from the authorities. They are: (1) the test of an "actionable interference" is not whether what the grantee is left with is reasonable, but whether his insistence on being able to continue the use of the whole of what is contracted for is reasonable; (2) it is not open to the grantor to deprive the grantee of his preferred *modus operandi* and then argue that someone else would prefer to do things differently, unless the grantee's preference is unreasonable or perverse; (3) if the grantee has contracted for the "relative luxury" of an ample right, he is not to be deprived of that right in the absence of an explicit reservation merely because it is a relative luxury and the reduced, non-ample right would be all that was reasonably required. Blackburne J summarised the third proposition as follows:

> "In short, the test…is one of convenience and not necessity or reasonable necessity. Provided that what the grantee is insisting on is not unreasonable, the question is: can the right of way be substantially and practically exercised as conveniently as before?".

36. Mr Warner did not quarrel with those propositions and I would accept them as correctly stating the law. Nonetheless, he submitted forcefully that the answer to the present case lay in this court's decision in ***Pettey v Parsons [1914] 2 Ch 653*** which I have attempted to analyse above in some detail.

37. As Mr Isaac accepted, the judge was wrong to express "the test of reasonableness" (as he put it at the start of paragraph 24 of the judgment) in framing it in the following way later on in the same paragraph:

> "…in my judgment it is quite clear to me that what the defendants propose is wholly unreasonable….it would be a wholly unreasonable obstruction and interference with the right that the claimants have to access their land from any point along this right of way and there is no legitimate reason really put forward for that proposed obstruction".

38. However, it seems to me that although the emphasis of the judge may have been wrong, he was nevertheless correct in his conclusion. The respondents, as the grantees of the right of way, have a right to gain both vehicular and pedestrian access to their land along the whole 30 metre stretch. That might be called a "relative luxury" but that is what the Conveyance gives them as their right. They have no other legal means of access to their land from the road to the west of their property, because of the appellants' ownership of the "ransom strip". The respondents could obviously gain access to their land through the one suggested vehicular entrance in the proposed wall. But, as the judge pointed out, the proposed brick wall will restrict both pedestrian and vehicular access. At the time any pedestrian could "hop" over the low wall constructed by the respondents on their own land. (See judgment paragraph 23. It is said that the low wall has since been removed). The respondents are entitled to exercise the "relative luxury" of the ample right to gain both vehicular and pedestrian access to their land from the Driveway Land along the whole length of the right of way, unless insistence on this is either unreasonable or perverse. Mr Warner accepts it would not be perverse.

39. Is the respondents' insistence unreasonable? In my view it is not. The proposed wall would severely restrict the respondents' vehicular and pedestrian access to their land. They could not exercise the "relative luxury" of their right to gain vehicular and pedestrian access to their land from any point along the right of

way with the same convenience as they can now. So, in my view the proposed wall, even with a vehicular entrance in it would constitute an actionable interference with the respondents' right of way.

40. I would therefore dismiss this appeal. This makes it unnecessary to consider the respondents' application dated 14 January 2014 to adduce new evidence, which was not pressed.

Lady Justice Macur:

41. I agree.

President of the Queen's Bench Division:

42. I also agree.

Annexe