

Judgment 17/2003

**Russell and Caine v
Gillespie and Ford
Royal Court
(Civil Action File 631)
2nd April, 2003**

Land law – Grant by will of right of way – Subsequent conveyance – Servitude réelle – Whether the servitude ran with the land

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 2nd day of April, 2003 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; sitting alone.

FRANCES RUSSELL

Plaintiffs

and

SUSAN CAINE

v

JAMES HILLIS GILLESPIE

Defendants

and

NORMA MARTIN FORD

WHEREAS on the 10th, 11th and 12th of February, 2003 the Deputy Bailiff heard Advocate N.J. Barnes and F.J. Haskins, Counsel for the Plaintiffs and Defendants, respectively with regard to the legal issues relating to the Cause of Action between the Plaintiffs and Defendants (attached hereto) such cause concerning a disputed right of way;

The Deputy Bailiff this day gave judgment in the terms attached hereto and found the Plaintiffs, as successors in title to have a right of way on the Defendant's property in the terms provided in the Will of Realty of Martin Slater dated 7th July, 1972 and provided guidance as to the law in relation to the exercise of the right of way. The matter of costs was adjourned for further argument.

S. M. D. ROSS
Her Majesty's Deputy Greffier

R&L

(NJB)

Rôle des Causes en Preuve

FRANCIS RUSSELL and SUSAN CAINE both of La Petite Concordia, La Gouffre, Forest whose address for service is at 6 Court Row, St Peter Port

ACTIONS

JAMES HILLIS GILLESPIE and NORMA MARTIN FORD both of Le Gouffre Lodge, Le Gouffre, Forest whose address for service is at 3-4 St James Street, St Peter Port to see the Court grant the Plaintiffs the following relief in the following circumstances:

1. The Plaintiffs are the owners of a dwelling house “La Petite Concordia” outbuilding covered yard and garden at Le Gouffre, Forest as purchasers thereof from Susan Anne Russell by a conveyance registered on 10th September 1998.
2. The Defendants are the owners of a dwelling house “Le Gouffre Lodge” (formerly “Le Bosquet” formerly “La Concordia”) barn, garage, two outbuildings and land at Le Gouffre, Forest as purchasers thereof from Jeremy John Stevens and wife by a conveyance registered in 1st July 1999.
3. Le Gouffre Lodge adjoins La Petite Concordia.
4. La Petite Concordia enjoys a right of way on foot and with all vehicles over the drive and yard forming part of Le Gouffre Lodge to go between La Petite Concordia and the public road. There is no other means of access to the public road from La Petite Concordia.
5. On 16th March 2002 the 1st Defendant, James Hillis Gillespie, informed the 1st Plaintiff that the Plaintiffs had no right of way over the yard and driveway because the right originally granted in the will of Martin Slater dated 7th July 1972 did not grant the right for successors in title and that as from Monday 18th March 2002 the Plaintiffs would have no right of way either on foot or with vehicles.
6. During the week commencing Monday 18th March 2002 contractors employed by the Defendants erected posts and a gate which impede the free exercise of the right referred to above.

7. The will of Martin Slater provides that “I GIVE AND BEQUEATH for an estate of inheritance to Zelia May Russell (née Goubert) my cottage called “La Petite Concordia” together with the small area of garden lying to the east thereof and the concrete block asbestos sheet roofed outbuilding and the small garden adjacent to and at the rear of the said outbuilding the whole adjoining and lying to the south of the dwellinghouse called “La Concordia”, Le Gouffre aforesaid together with the right in perpetuity to maintain a water pipe in connection with the spring situate on the adjoining land and an electric cable under the surface of the said adjoining land in connection with the main electricity cable situate in the public road with right of access thereto at all times to inspect, repair and replace the said water pipe and electric cable together also with a right on foot and with all vehicles over and by way of the drive and yard owned with the property known as “La Concordia”, Le Gouffre aforesaid to pass and repass at all times between the premises devised to the said Zelia May Russell and the public road”.

8. By a conveyance registered on 9th September 1975 George Harold Purkis and others conveyed to Roy Anthony Smith and wife the Gouffre Lodge (then called La Concordia). Mr & Mrs Smith are predecessors in title to the Defendants. Zelia May Russell was a party to that conveyance which provided inter alia that “the said Zelia May Russell for herself and successors in title appearing to confirm and ratify a) the rights and servitudes hereinbefore mentioned in respect of her said premises [La Petite Concordia] and the premises hereby conveyed and b) the boundaries between her said premises and the premises hereby conveyed”.

9. One of the rights referred in the 1975 conveyance provided “that the Purchasers as heretofore granted or reserved shall allow the said Russell and her successors in title as owners for the time being of the said premises known as La Petite Concordia

.....(2) Right of way on foot and with all vehicles over and by way of the driveway

and yard of the premises hereby conveyed in order to come and go at all times between the said premises known as La Petite Concordia and La Rue du Gouffre aforesaid”.

10. By letter dated 21st March 2002, the Defendants’ advocates wrote to the Plaintiffs’ advocates stating that in their view the Plaintiffs did not have any right of way over the Defendants’ property.

11. The erection of the gate and posts is causing the Plaintiffs considerable inconvenience by making access to their property with vehicles more difficult.

12. Whether or not the words in the will of Martin Slater and the conveyance of 1975 were sufficient to grant the right contended for by the Plaintiffs the Defendants are estopped by deed, namely the conveyance of 1975, from denying the Plaintiffs and their successors in title the right as expressed in the 1975 conveyance.

13. The Plaintiffs therefore claim

- i) an order, upon such penalty and within such time as may be just, requiring the Defendants to remove the gate and posts and not to replace them,
- ii) an order restraining the Defendants from otherwise preventing the Plaintiffs from exercising the right as expressed in the 1975 conveyance,
- iii) a declaration that the Plaintiffs have a right of way over the Defendants' property in the terms expressed in the 1975 conveyance, and
- iv) costs.

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
ORDINARY DIVISION**

FRANCES RUSSELL

Between

and

Plaintiffs

SUSAN CAINE

v.

JAMES HILLIS GILLESPIE

and

Defendants

NORMA MARTIN FORD

Judgment of Rowland D.B.

Advocate N. J. Barnes for the Plaintiffs.

Advocate F. J. Haskins for the Defendants.

Hearing dates: 10th, 11th February, 2003
Judgment handed down: 2nd April 2003

A dispute has arisen between the owners of adjoining properties concerning the existence of a right of way and a gate erected across the route by which the right of way may be exercised.

It is appropriate to briefly outline some of the material facts of the case before referring to the arguments of Counsel on the legal points in issue.

1. Background

In 1952 Martin Slater acquired a parcel of land situate at Le Gouffre in the Forest parish. Constructed on it in 1972 was a dwelling-house known as La Concordia (now known as Le Bosquet) in which he lived and a cottage known as La Petite Concordia in which it is believed Zelia Russell lived. It is understood that she was his housekeeper.

On the 7th July, 1972, he executed a will of his Guernsey realty. A will of Guernsey realty if executed in Guernsey must be witnessed by two Jurats of the Royal Court. The Will appears to have been drafted by Advocate P. Ogier, one of the more senior Advocates at that time. He endorsed the Will of Realty before it was executed in the presence of two Jurats.

Martin Slater died on 22nd June, 1974, and on the 4th July 1974 the Will of Guernsey realty was registered in the normal way following application to the Royal Court. The two material paragraphs of the Will in this case read as follows:-

“2. I GIVE, DEVISE AND BEQUEATH for an estate of inheritance to Zelia May Russell (née Goubert) my cottage called “La Petite Concordia” together with the small area of garden lying to the east thereof and the concrete block asbestos sheet roofed outbuilding and the small garden adjacent to and at the rear of the said outbuilding the whole adjoining and lying to the south of the dwellinghouse called “La Concordia”, Le Gouffre aforesaid together with the right in perpetuity to maintain a water pipe in connection with the spring situate on the adjoining land and an electric cable under the surface of the said adjoining land in connection with the main electricity cable situate in the public road with right of access thereto at all times to inspect, repair and replace the said water pipe and electric cable together also with a right on foot and with all vehicles over and by way of the drive and yard owned with the property known as “La Concordia”, Le Gouffre aforesaid to pass and repass at all times between the premises devised to the said Zelia May Russell and the public road.

3. I GIVE, DEVISE AND BEQUEATH all the rest, residue and remainder of the real property which shall be in my ownership at the date of my death to my nephews and niece George Harold Purkis Slater, Gerard Bruce Slater and Hildetta Wanda Slater in equal undivided shares and I DECLARE that if any one or more of my nephews and niece, the said George Harold Purkis Slater, Gerard Bruce Slater and Hildetta Wanda Slater shall predecease me leaving issue them surviving, such issue and if more than one in equal shares shall take by representation the share of my said Real Estate to which their parent would have been entitled under the terms of this my Will had he or she survived me.”.

Le Bosquet was part of the rest residue and remainder of the real estate of the deceased. I shall hereafter refer to G.H. Slater, G.B. Slater and H.W. Slater as “the devisees Slater”.

Whilst the Will was drafted with some particularity it did not cover all points which would require to be clarified and dealt with. As is often the case such matters are not clarified in a registered document until the first of two adjoining properties is sold.

By September, 1975, the devisees Slater who had become owners of Le Bosquet and who were resident in England had contracted to sell the premises to Mr. and Mrs. R. Smith. It would appear that as vendors they had also instructed Advocate P. Ogier.

On 9th September, 1975, a conveyance document was consented before the Royal Court and registered that day. There were three parties, namely the vendors of Le Bosquet (the devisees Slater), the

purchasers (Mr. and Mrs. R. Smith) and Zelia Russell who still owned La Petite Concordia. The vendors and the purchasers as is standard in a Guernsey conveyance conveyed and acquired the property in terms which would “where the context so permits” include their respective heirs in the case of the vendors and their successors in title in the case of the purchasers. In the witness clause in respect of Zelia Russell it is stated as follows:

“The said Zelia May Russell for herself and her successors in title appearing to confirm and ratify (a) the rights and servitudes hereinbefore mentioned in respect of her said premises and the premises hereby conveyed, and (b) the boundaries between her said premises and the premises hereby conveyed.”.

The conveyance document included the following provisions:

“THAT the Purchasers as heretofore granted or reserved shall allow the said Russell and her successors in title as owners for the time being of the said premises known as La Petite Concordia:-

(1) The right in perpetuity to maintain (a) a water-pipe in the premises hereby conveyed in connection with the spring situate thereon and (b) an electricity cable under the surface of the premises hereby conveyed in connection with the main electricity cable situate in the said Rue de Gouffre;

(2) right of access at all reasonable times upon the premises hereby conveyed with or without workmen, materials and equipment in order to inspect, repair and replace the said water- pipes and electricity cable whenever necessary PROVIDED ALWAYS that such works are carried out promptly and efficiently and in causing the least possible inconvenience to the Purchasers and that any part of the surface of the land belonging to the premises hereby conveyed disturbed as a result of such works shall be promptly and satisfactorily reinstated;

(3) right of way on foot and with all vehicles over and by way of the driveway and yard of the premises hereby conveyed in order to come and go at all times between the said premises known as “La Petite Concordia” and La Rue de Gouffre aforesaid;”

As the reference to La Petite Concordia in paragraph 2 of the Will had been brief the conveyance referred to detailed boundary features and also dealt with a number of other rights and servitudes which might not have been known or apparent to the draftsmen of the Will of Realty. By way of example Zelia Russell granted to the purchasers for the benefit of Le Bosquet a right to discharge foul water into the cesspit located on her property and a right of way over her yard neither of which were dealt with in the Will of Realty. The purchasers granted to Zelia Russell rights for the benefit of La

Petite Concordia over a flight of steps on their land. Rights were also granted reciprocally to cover any other existing amenity or facility existing between the two properties. There was also a catch-all provision in respect of any other rights and servitudes heretofore granted or reserved. This would apply to the relationship between La Petite Concordia and Le Bosquet and also any subsisting rights and servitudes benefiting other adjoining properties. In the conveyance Advocate P. Ogier appeared on behalf of the vendors as their duly constituted attorney.

On 29th November, 1979, Zelia Russell conveyed La Petite Concordia to Susan Russell. On 10th September, 1998, Susan Russell conveyed it to the Plaintiffs.

In the 1998 conveyance to the Plaintiffs the right of way expressed to be for the benefit of the La Petite Concordia over Le Bosquet is dealt with as follows:

“THAT as heretofore granted or reserved the Purchasers shall have:

(3) right of way on foot and with all vehicles over the driveway and yard owned by the said Stephens and Wife in order to come and go at all times between the premises hereby conveyed and Rue de Gouffre aforesaid:”

On 9th October, 1997, Margaret Smith (who had survived her husband) conveyed Le Bosquet to Mr. and Mrs. J. Stephens and they conveyed the property on 1st July, 1999, to the Defendants.

The 1999 conveyance of Le Bosquet to the Defendants included the following provisions:

“3. THAT as heretofore granted or reserved, the purchasers shall have the benefit of the rights and shall be subject to servitudes contained or referred to in (1) the conveyance by George Harold Purkis Slater, Gerard Bruce Slater and Hildetta Wanda Slater to Margaret Lindsay Smith and Roy Anthony Smith (her husband, who died on the 10th day of January 1990) predecessors in title to the Vendors registered on the 9th day of September 1975; (2) the Agreement between the Constables of the Forest Parish and the said Margaret Lindsay Smith registered on the 25th day of September 1997; and (3) the conveyance by way of exchange between R.W. Randall Ltd. and the Vendors registered on 10th December 1998.

4. THAT the Purchasers shall have all such other rights and shall be subject to all such other servitudes in respect of the premises hereby conveyed as heretofore granted or reserved insofar as such rights and servitudes may subsist.”.

2. Submissions made by Counsel

Counsel had submitted skeleton arguments, supplementary skeleton arguments and further refined their submissions during the course of the hearing.

3. Submissions made by Mr. Barnes

1. Right of Way

La Petite Concordia had been devised by Martin Slater to Zelia Russell for an estate of inheritance. That was the maximum interest which he could devise. It is often referred to as being equivalent to freehold title in England.

The Will of Realty provided for a right of way on foot and with all vehicles over the drive and yard at the rear of Le Bosquet in order to come and go from the Plaintiff's property La Petite Concordia to the public road. As a matter of law that right runs for the benefit of La Petite Concordia (the dominant land) and as a burden on Le Bosquet (the servient land). It was not solely personal to Zelia Russell. If the owner of dominant land is granted a right of way over servient land then as a matter of law it will endure for the benefit of successors in title. To benefit Zelia Russell alone would have required express words of limitation.

Once created in the Will it had been perpetuated in successive conveyances so as to retain the benefit for the Plaintiffs as current owners of La Petite Concordia. It matters not how it is referred to in the current title conveyed to the Defendants.

Notwithstanding this assertion the expression "together with the right in perpetuity" in paragraph 2 of the Will must on any reasonable construction refer not only to the water pipe and the electricity cable but also the right of way. As La Petite Concordia is landlocked it would not be logical or natural to construe the right of way as ceasing when Zelia Russell ceased to be the owner of that property. The interpretation and construction asserted by the Defendants was wrong in law and on any sensible interpretation and construction of the Will too unlikely to contemplate.

Without some clear intention on the part of the testator, the Court does not attribute to a testator a capricious intention, or a whimsical or harsh result to his dispositions, where the words of the Will can be read otherwise. If the language used in a Will admits of two constructions, according to one of which the property will go in a rational convenient and ordinary succession, and according to another in an irrational and inconvenient course, such that the Court is driven to the conclusion that the testator is acting capriciously, without intelligible motive, and contrary to the ordinary mode in which men act in similar cases, the court leans towards the former as to what was intended, although a meaning is thereby given to the words different from their ordinary meaning – Williams on Wills 8th Edition Vol. 1 at p.557. This would be equally applicable in Guernsey when construing the grant of rights under a Guernsey will of realty.

Guernsey conveyancing practice is variable in regard to the treatment a draftsman would accord to rights of way clauses. Conveyances reflect in some cases confidence as to the legal position and in

other cases belt and braces conservative drafting. There are frequent instances when the draftsman will refer to a right of way without specifying its duration but plainly with the intention that it would run with the land for the benefit of successors in title.

His alternative submission in respect of the Will was that there was nothing defective in the wording of the grant of the right of way and that the contention that it was defective was based on a misunderstanding of the use of the words “in perpetuity” with reference to the water pipe and electricity cable. Those words are and were commonly used in relation to services but not rights of way but for reasons that are not entirely clear. He produced a 1965 conveyance (of an unrelated property) where rights of way and rights for services and drains were granted and where an additional clause provided that the rights for services and for drains were expressed to be granted in perpetuity whereas the conveyancer had not felt it necessary to use those words in relation to the right of way. All rights in that conveyance were expressed to be for successors in title. The evidence of this conveyancing practice goes to demonstrate why one would not expect to find the words “in perpetuity” used with reference to the right of way granted in Martin Slater’s Will.

If the right of way conferred in the Will did not as a matter of law run with the land, then he relied on the 1975 conveyance deed. The words of a deed executed for valuable consideration ought to be construed as far as they properly may in favour of the grantee and against the grantor – Neill and Fenton v. Duke of Devonshire (p. 51) and Williams v. James (p. 101). The parties to that conveyance dealt with a number of matters not covered in the Will. They expressly affirmed a right of way benefiting the dominant property (La Petite Concordia) creating a corresponding burden on the servient property (then La Concordia). It was expressly stated to bind successors in title to both properties and did so. The 1975 conveyance stated that the right of way was "as heretofore granted or reserved" and the parties understood and acknowledged that the benefit and burden ran with the properties by virtue of the Will. If that was not the case then it must be assumed that the parties and their legal advisors knew what they were doing and had intended to reduce into writing and register what constituted the agreement between them on that day.

The proviso in regard to sub-paragraph (2) of the relevant paragraph in the conveyance was not to be found in the Will. This would support a contention that the parties intended where legally necessary to vary or perfect the devise under the Will and not merely to recite its provisions if (which was not admitted) they were legally inadequate. To that extent the words “as heretofore granted or reserved” were otiose and not to be construed as limiting the express provisions recording that the right of way was to benefit successors in title. If there was any doubt as to the duration of the right of way conferred under the Will then the 1975 conveyance resolved any argument beyond doubt.

Even if his other arguments did not dispose of the Defendants' contentions then Mr. Barnes prayed in aid estoppel by deed – Cross on Evidence 7th edition (p. 105 – 114 and particularly p. 122 – 123). He also relied upon estoppel by convention – Chitty on Contracts 28th edition (p. 121 and 122 – 123). He argued that those principles of English law could sensibly be applied to Guernsey real property law.

2. The Gate

The erection and retention in position of a gate by the Plaintiffs, where the yard of Le Bosquet adjoins La Petite Concordia constitutes an unlawful restriction of the right of way to come and go at all times with vehicles as over a public road for the benefit of La Petite Concordia.

In his skeleton argument he had acknowledged that it may be appropriate to put and keep in place a gate across a right of way but had contended that specific provision for this would have to have been made in the original grant. He modified his submission in Court. He accepted that whilst specific provision in a grant might put the issue beyond doubt such a provision was not necessary as a matter of law.

If, as he conceded, a right of way was enforceable in law for the benefit of the Plaintiffs then there would be factual questions for the Jurats to resolve. The Jurats would, after hearing evidence, have to determine whether:

1. It was a legitimate, reasonable and proper exercise of the Defendants' rights to erect a gate on their own property in the position where it had been erected. The Court would have to have regard to the reason or purpose for which a gate had been erected and the precise location of the gate.
2. The requirement to open the gate constituted a material obstruction to the Plaintiffs in the exercise of their right of way.
3. The Plaintiffs ought to be compelled to close the gate after opening it.

4. Submissions made by Mrs. Haskins

The legal dispute necessarily involved the examination of Guernsey legal principles regarding servitudes and such principles can be derived from the commentaries on the Coutume de Normandie and Guernsey case law. However certain English principles could also be sensibly imported into Guernsey real property law.

The Will provided that the water pipe and electricity cable serving La Petite Concordia may be maintained in perpetuity. The right of way was not expressed to be in perpetuity. By inference

the testator had granted a right of way personally to Zelia Russell. It could not benefit successors in title. The Will was clear and unequivocal in its terms. It would be unnatural to construe it in any other way.

Although Zelia Russell had been a third-party to the 1975 conveyance the terms of the conveyance did not vary or enhance the personal duration of the right of way. If the Will did not create a right of way for the benefit of successors in title then any words in the conveyance which purported to benefit successors in title were to be ignored. The conveyance in referring to rights "as heretofore granted or reserved" must have been referring only to the right of way granted or reserved in the Will. The conveyance did not enhance the right of way granted under the Will nor did it create a new right of way for the benefit of successors in title. Successive titles to La Petite Concordia did not extend the duration of the right of way nor create any new right of way.

It is not possible to rely on acquisition by prescription no matter for how long to acquire a right of way. The Coutume does not recognise the creation of a right of way without title. The Coutume de Normandie is emphatic that there can be no right of way without title. (Basnage 4th edition Volume II – Servitudes). The Coutume can develop over the centuries but cannot change the fundamental and substantive common law principle of "nul servitude sans titre". (Singleton v. Le Noury, Guernsey Court of Appeal, 5 June 1990). The Plaintiff was thus driven to rely upon the Will.

If the language of a Will can be read in its ordinary and natural sense so as to make sense with respect to the surrounding circumstances, no rule of construction can be applied to ascertain a testator's intention. (Chitty on Contracts; 28th edition para. 421).

It is only if the language of the Will cannot be read in its ordinary and natural sense so as to make sense that the Plaintiffs could invoke in aid rules of construction. In this case the Will is capable of being read in its ordinary and natural sense.

If Mr Slater had intended that the right of way should benefit successors in title then he should expressly have so specified. The term "estate of inheritance" passes ownership but does not relate to a servitude. There must be an intention for a right of way to run with legal ownership.

Unless it appears from the context of the whole Will that the testator intended a different meaning to be given to the words, ordinary words are to be first read in their grammatical and ordinary sense, and legal and technical words in their legal and technical sense and the usual rules of grammar are to be applied. Whether the Will appears to have been drawn by the testator himself or by a skilled draftsman on his behalf is to be taken into consideration and this may guide the Court as to the force to be given to technical words (Halsbury's Laws of England 4th ed. Pages 49 - 51).

“In perpetuity” is to be given its technical meaning. The Will, drafted by an experienced Advocate, expressly limited the words “in perpetuity” to the electricity cable and the pipe. The right of way was for the personal use of Zelia Russell. It did not benefit her successors in title.

The overriding principle of construction is that the testator’s intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible and the meaning of the will and every part of it is determined according to that intention. (Chitty on Contracts para 408). Mr Slater’s intention was clear and unambiguous.

There is a limited power of inference. A general intention not carried out by some appropriate words in the Will itself cannot give the Court the right to place the words there for the testator. The Court is not at liberty to conjecture what the testator would have said if a particular state of things had been presented to his mind. In order to deprive words of their appropriate and usual sense there must be sufficient to satisfy a judicial mind that they were meant to be used by the testator in some other sense, and to show what that sense is (Chitty on Contracts para 427).

A testator has the right to be capricious. His bounty is absolute and without control as to motive. If the words used by a testator are unambiguous in their context, the sense given to the words by the context cannot be departed from, nor is the Court induced to put a meaning on them different from that which it judicially determines to be their meaning, on account of any difficulty or inconvenience in carrying out the intention, or because they lead to consequences which are generally considered capricious, unusual, just, harsh, unreasonable or even absurd. Halsbury’s Laws of England, 4th Edition pp 54-55.

It is therefore not open to the court to extend the duration of the right of way granted in the Will personally to Zelia Russell.

Estoppel by Deed may not be prayed in aid by the Plaintiff. The 1975 Conveyance did not extend the duration of the right of way granted to Zelia Russell. The Plaintiffs can rely on the Will but no more than that. If estoppel by Convention was of any benefit the Plaintiffs could not avail themselves of it because it had not been pleaded in the Plaintiffs’ cause of action.

5. The Gate

If the Court determines that the right of way may be lawfully exercised by successors in title to Zelia Russell then the right of way must be construed restrictively. The Plaintiffs must prove that there is an actionable interference with the exercise of the right of way. Not every interference constitutes an actionable wrong. In the case of a right of way there is no disturbance if according to its nature, the way can be practically and substantially exercised as conveniently as before the obstruction occurred.

No action will lie unless there is a substantial interference. The question whether any particular interference amounts to an unlawful interference depends on the nature of the right of way and of the place, and upon the general circumstances of the case (Halsbury's Laws of England 4th ed. vol.14 paras 132,133 and 165) and *Petty v Parsons* 1914 Ch. 653 (p. 70-86).

6. Conclusions

The right of way

The dispute between the parties over the right of way created under the Will of Martin Slater is whether it was constituted to benefit successors in title to Zelia Russell who had acquired La Petite Concordia for an estate of inheritance. The area devised to Zelia Russell under para. 2 of the Will was stated with adequate but not detailed precision and a right of way was created in the following terms:

“a right on foot and with all vehicles over and by way of the drive and yard owned with the property known as La Petite Concordia, Le Gouffre aforesaid to pass and repass at all times between the premises devised to the said Zelia May Russell and the public road.”.

The right of way was created over La Concordia (now Le Bosquet – the servient land) for the benefit of the adjoining property, La Petite Concordia (the dominant land). A drive served both properties. Unsurprisingly the right of way was constituted over the yard next to La Petite Concordia and then over the drive to the public road. La Petite Concordia is landlocked (enclavé). It has no frontage onto a public road. If a right of way was not validly created by the Will or the 1995 conveyance then the Plaintiffs would have to rely upon an implied servitude applying the principle “*destination du père de famille*”. That principle is based on the position which arises when dominant and servient properties, formerly in the same ownership, simultaneously devolve upon different persons, whether by Will or by partage. If the Plaintiffs were driven to rely upon that principle in order to exercise their right of way then they would have to make a bargain with their neighbours, the Defendants, who would be able to dictate the route of the right of way and other consequences would follow. The consequences might include an obligation upon the Plaintiffs to compensate the Defendants. No doubt this is not an attractive course and so the Plaintiffs have not seen fit to pursue it.

There are dangers in the multiplication of burdensome servitudes on ownership. There is a danger that the purchaser of a servient property may be unaware of the burdens attaching to it hence the need to ensure publicity for the creation and transfer of *réelle servitudes*. It is common ground that under the Coutume de Normandie and Guernsey law a right of way cannot be acquired by prescription. This substantive common law principle is long established. It has been interpreted and reaffirmed in a succession of Guernsey cases in the Royal Court and in the Guernsey Court of Appeal. The Defendants produced a number of authorities on this subject to assert that the Plaintiffs could not rely

upon rights acquired by long use. I do not comment further on them simply because the Plaintiffs do not rely on acquisition of a right of way by prescription. They assert that the right of way is a réelle servitude constituted under the Will of Martin Slater, that it was enforceable by Zelia Russell from the date of his death and benefited successors in title.

Counsel referred in argument to Basnage Commentaires sur la Coutume de Normandie 4th edition 1778. Basnage categorised servitudes into three types or sorts – personnelles, réelles and mixtes. Réelles servitudes (known also as prediale servitudes) could be created by a person who possessed land for the benefit of an adjoining property. Basnage at p. 558 in his treatment of servitudes referred to réelles servitudes:

“Les servitudes réelles peuvent avoir eu quelquefois un principe plus raisonnable, parce qu’elles ont été établies en divisant les terres, ou pour le bien commun de la société civile, ou bien les particuliers les ont consenties volontairement pour les commodités réciproques; mais il y en a plusieurs qui n’ont d’autre origine que la violence & l’autorité des personnes puissantes.”

Laurent Carey (a Jurat of the Royal Court 1765-1769) in his Essai sur les Institutions, Lois et Coutumes de Guernsey (published by order of the Royal Court in 1889) adopted these categorisations and in relation to a number of servitudes including rights of way referred his readers to the Nouvelle Coutume de Normandie.

I am satisfied that Mr. Slater in his Will of Realty with effect from his death divided a single property by devising it as separate properties, each for an estate of inheritance, to separate owners and created a right of way which was a servitude réelle.

If a right of way is to benefit successors in title then it is important not only that a servitude réelle should be enforceable against any subsequent owner of the servient land but also that it should be enforceable by any subsequent owner of the dominant land. Not only must the burden “run with” the servient land but also the benefit must “run with” the dominant land. This was the essence of a praedial (or “real”) servitude in Roman Law, a real right in English law and a servitude réelle or prediale servitude in the Coutume de Normandie.

If the Defendants’ argument is good then Zelia Russell would have been driven to negotiate the duration and other terms of a right of way for the benefit of successors in title in order to render La Petite Concordia saleable relying not on the terms of the Will but on the principle “destination du pere de famille”; this course of action would have placed her in a disadvantageous position in negotiations with whomsoever might be the owners of the servient property at the material time. If Zelia Russell were to retain the property until her death without securing a right of way for the benefit of her

devises or heirs at law then her successors in title would have been placed in an equally difficult position.

I construe the authorities as evidence that if a servitude, such as a right of way, is classified as a servitude réelle it is by its very nature to be regarded as enduring for the benefit of successors in title unless expressly restricted in the title creating it or by subsequent agreement of the owners for the time being of the dominant and servient properties.

I draw some comfort from a case in the Cour de Cassation in 1825 (cited in Fournel Traité du Voisinage volume II at p. 504) which I drew to the attention of Counsel. I am mindful that Fournel was commenting principally on the Code Civile and was not commenting on the Coutume de Normandie. Nevertheless Fournel is treated as an authority in Guernsey on matters concerning servitudes and the case which he cites is of no less, and probably more, relevance in Guernsey than English land law authorities and principles of interpretation and construction (emphasis provided).

“Nous avons, dans le cours de cet ouvrage et sous des mots séparés, fait les additions qui nous ont paru nécessaires sur la matière des servitudes; nous nous contenterons de faire connaître un arrêt que vient de rendre la cour de cassation, relatif à l’étendue et à l’existence de servitudes réelles.

Cette cour a décidé que les servitudes réelles créées sur un fonds pour l’usage et l’utilité d’autres fonds, suivaient ceux-ci en cas de vente dans les mains des nouveaux propriétaires; qu’elles étaient perpétuelles, si l’usage ou l’étendue n’en étaient pas modifiés ou limités, soit par le titre, soit par des preuves légales qui pourraient suppléer au titre. Lorsque la prohibition de bâtir sur un terrain a été pure et simple, sans limitation, sans condition, la circonstance que depuis le propriétaire du fonds dominant l’a vendu, sans aucune réserve ni mention de cette servitude active (mais avec tous les droits, noms raison et actions qu’il avait, comme propriétaire), ne peut autoriser à considérer l’immeuble servant, comme affranchi de cette servitude. Cet arrêt est du 7 février 1825; il est rapporté dans le Bulletin civil de cette année, n° 22.”

I also draw equal limited comfort on a similar basis from a passage in Pardessus Traité des Servitudes 8th edition Vol. I. which I also drew to the attention of Counsel. The first edition of his work had been published in 1806. Pardessus is also treated as an authority in Guernsey on matters concerning servitudes. After dealing with other essential characteristics of servitudes Pardessus at pages 10 and 11 turns to the duration of servitudes (emphasis supplied):

“Nous n’avons pas considéré la perpétuité de la cause et de la durée comme un caractère essentiel aux servitudes. La nature des choses ne permet guère que la durée des servitudes

dérivant de la situation des lieux, ou imposées par la loi soit limitée; quant aux conventionnelles, le droit d'en établir, soit à perpétuité, soit pour un temps, soit pendant la vie de celui qui en jouit ou pendant la vie d'un tiers, soit avec un condition résolutoire, résulte de l'article 688 du code, sous les seules restrictions qu'il prononce. Il suffit de dire que toute servitude, dont le titre n'indique point le terme, doit subsister jusqu'à ce que l'extinction en soit arrivée par l'une des causes dont nous parlerons dans la troisième partie."

Did the terms of the grant of the right of way indicate an intention on the part of the testator to limit the duration of the right of way? The Defendants argued that by virtue of the fact that the draftsman stipulated that the rights in respect of the electricity cable and the pipe were to be "in perpetuity" by inference that was not the case in respect of the right of way. The Defendant argued that as a consequence its term could not extend beyond the lifetime of Zelia Russell. I do not accept that the failure to state that the right of way was to be "in perpetuity" limited the duration of the right of way to the lifetime of Zelia Russell. If anything the words "in perpetuity" in relation to the cable and pipe may have been superfluous. I cannot construe the words "in perpetuity" with reference to the cable and pipe as indicative that the right of way was to be limited in the duration. More than that would have been required. To hold otherwise would also attribute to the testator an intention which was harsh and even capricious rather than rational and convenient. The right of way created under the Will was to continue unless and until it was extinguished by agreement or by operation of law.

In 1975 the owners of the dominant and servient properties were parties to a conveyance of the servient property to Mr. & Mrs. Smith. Mr. and Mrs. Smith, when acquiring La Concordia (as it was still named), consented to the conveyance in terms which meant that the right of way which was a burden on La Concordia would be binding on them and their successors in title. Zelia Russell unsurprisingly appeared as a party on the basis that the right of way for the benefit of La Petite Concordia would benefit her and her successors in title. The parties referred to the right of way as being "as heretofore granted or reserved". They were right to do so because the right of way conferred under the Will did run with the land but the conveyance has the virtue of confirming the boundaries of the dominant and servient properties with appropriate precision.

I therefore reject the submission of the Defendants. The Plaintiffs as successors in title to Zelia Russell have a right of way over the Defendants' property in the terms expressed in the Will as confirmed in the 1975 conveyance.

In light of my decision I do not deal with some of the other arguments advanced as alternative propositions.

7. The posts and gate

The Plaintiffs also seek from the Court an order, upon such penalty and within such time as may be just, requiring the Defendants to remove the posts and gate and not to replace them. They also seek an order restraining the Defendants from otherwise preventing the Plaintiffs from exercising the right as expressed in the 1975 conveyance.

The posts and gate were first erected by the immediate predecessors in title to the Defendants. The gates were taken down by them but subsequently re-hung by the Defendants.

Mr. Barnes drew my attention to *Denziloe v. Warren* (Royal Court 1st March 1952), *Celsteel Ltd and Others v. Alton House Holdings Ltd. and Another* (1985) 1 WLR 204 and *National Trust for Places of Historic Interest or Natural Beauty and Another v. White and Another* (1987) 1 WLR 907. Mrs. Haskins drew my attention to *Petty v. Parsons* (1914) 2 Ch 653 CA. *Geoghegan v. Henry* (1922) Appeal 21R1, CA and Halsbury's Laws of England 4th edition Vol. 14 paras. 159 and 165. Unfortunately Coutume de Normandie authorities on this subject were not drawn to my attention by Counsel. I referred Counsel to another section in Pardessus *Traité des Servitudes*. At page 155 of Tome 1 Pardessus is dealing with the manner in which the owner of a servient tenement must tolerate a servitude réelle:

“Le propriétaire du fonds assujéti est obligé de souffrir l’usage de la servitude et de ne rien entreprendre qui puisse en diminuer les avantages et la rendre incommode ou illusoire. Il ne peut, en consequence, rien change a l’ancien état des lieux, ni modifier ce qui est nécessaire pour l’exercice de la change don’t il est grevé.”

This principle would apply equally to a servitude whether granted in a Will or an agreement. The question whether or not it is reasonable for the Plaintiffs to maintain the posts and gate in their present position is a question of fact to be determined by the Jurats.

If the issue were to be determined under English law it is clear that there are no hard and fast rules which can be applied mechanically to determine this issue. The Plaintiffs would have to satisfy the Court that the posts and gate would constitute a substantial interference with the reasonable use of their right of way. It may well be that the relevant criteria under Guernsey law will be similar.

It is hoped in light of my ruling that La Petite Concordia has the benefit of a right of way which runs for the benefit of the Plaintiffs as successors in title that the dispute over the posts and gate can be resolved by pragmatic and realistic negotiation or by mediation. If it cannot be so resolved then I will hear argument on the relevant principles and criteria when the case is heard by the Jurats and would expect that Counsel will have researched thoroughly Norman law or other French authorities which may be considered to be of some relevance.