Poulding & Poulding and Elliott & Elliott
Royal Court
19th June, 2014

JUDGMENT
35/2014

Dispute between neighbours relating to a ramp placed by the Plaintiffs on the Defendants' land to make better use of a right of passage.

Approved Text
19.06.2014

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **MICHAEL POULDING and SANDRA POULDING** **Plaintiffs**

-and-

PAUL ELLIOTT and PATRICIA ELLIOTT **Defendants**

Hearing date: **28th May 2014**

Judgment handed down: **19th June 2014**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Advocate for the Plaintiffs: **Advocate T.A.T. Crawfourd**
Advocate for the Defendants: **Advocate M.G.A. Dunster**

Cases, texts & legislation referred to:

Russell and Caine v Gillespie and Ford [2003-04] GLR 54
Parsessus, *Traité des Servitudes ou Services Fonciers* 8th ed. (1838)
Berault, *La Coûstumier Reformée du Pays et Duché de Normandie, Anciens Ressorts et Enclaves d'Icelu*, 3rd ed. (1620)
Godefroy, *Commentaires sur la Coûtume Reformée du Pays et Duché de Normandie*, second tome (1626)
Basnage, *Oeuvres de Maitre Contenant ses Commentaires sur la Coûtume de Normandie et son Traité des Hipoteques*, 3rd ed. (1709)
Flaust, *Explication de la Coûtume et de la Jurisprudence de Normandie, dans un Ordre Simple et facile*, second tome (1781)
Pesnelle, *Coûtume de Normandie*, 3rd ed. (1759)

Terrien, *Commentaires du Droict Civil tant public que privé, observé au pays & Duché de Normandie* (1574)
Houard, *Dictionnaire de Droit Normand*, tome 4 (1782)
Domat, *Les Loix Civiles dans leur Ordre Naturel, le Droit Public et Legum Delectus* (1713)
de Ferriere, *Dictionnaire de Droit et de Pratique, contenant L'Explication des Termes de Droit, d'Ordonnances, de Coutumes & de Pratique*, tome 2 (1787)
The *Code Civil*
Halsbury's Laws of England, 5th ed., Vol. 87
Newcomen v Coulson (1877) 5 Ch D 133
Nationwide Building Society v Beauchamp (a firm) [2001] EWCA Civ 275
Colesberg Hotel (1972) Limited v Alton Hotel Limited [2003] JLR 176
Duquemin and Duquemin v Dunstan Investments Limited [2003-04] GLR 537

Introduction

1. The Plaintiffs and the Defendants are neighbours in La Grande Rue, St Saviour. A dispute has arisen between them. It relates to whether the Plaintiffs are legally permitted to place a wooden ramp on part of the Defendants' land to enable them to make better use of the right of passage over a strip of the Defendants' land from which they benefit. The Defendants have objected to the Plaintiffs' actions. The parties have been unable to agree any solution between themselves and appear to be entrenched in their respective positions. The Plaintiffs tabled a Cause pleading nuisance on 15 November 2013 by which they seek injunctive relief and damages. Les Defences were tabled on 13 December 2013. Those Defences denied that the Plaintiffs were entitled to the relief sought and included a Counterclaim for declarations of the extent of the Plaintiffs' rights and injunctive relief to require the Plaintiffs to remove the ramp. The Plaintiffs' Defences to that Counterclaim were tabled on 10 January 2014.

2. At the case management conference, which had been deferred by consent until 25 April 2014, Advocate Dunster, on behalf of the Defendants, applied for a preliminary question of law to be determined. The issue arose from the assertion in paragraph 14 of the Plaintiffs' Cause that:

> "*The Plaintiffs position the Ramp on the Driveway and leave it in situ in accordance with the principle that they as owners of the Right of Way have the right and entitlement to enter upon the Driveway/Strip and do all such works to it as are necessary to use and preserve the Right of Way and make the Right of Way fully effective in accordance with the purpose for which it was granted.*"

At paragraph 8 of Les Defences, the Defendants averred "*that a declaration as to the parties' respective rights will resolve any contention*". I recognised that construing the grant of the servitude from which the Plaintiffs' land benefits and determining whether, and if so what, ancillary rights have been conferred would potentially assist both parties. However, as Advocate Crawfourd submitted, on behalf of the Plaintiffs, the determination of such a preliminary issue may not completely resolve the action and there might still need to be a hearing before the Jurats. I considered that the balance lay in favour of hearing legal arguments on the basis of those facts that are agreed because declaring the legal position would provide the foundation on which any further discussions between the parties would be based or would have the potential to narrow the issues to be aired in front of the Jurats. Moreover, the legal arguments had already been rehearsed in correspondence between the parties' Advocates so an early hearing could be arranged. Accordingly, this neighbour dispute might be capable of being resolved quicker by proceeding to determine the preliminary issue.

3. Both Advocates submitted helpful Skeleton Arguments, upon which they elaborated succinctly at the hearing on 28 May 2014, for which I am grateful. At the conclusion of that

hearing, I reserved judgment. My conclusions on the preliminary issue are set out in this judgment.

Facts

4. The Defendants purchased Fleur de Lys by conveyance registered on 6 September 2001. The Plaintiffs purchased Le Figuier by conveyance registered on 25 October 2007. Both conveyances referred to a right of way on foot and with vehicles for the benefit of the owners of Le Figuier over part of Fleur de Lys.

5. That right of way was created by a clause in a conveyance registered on 22 December 1964 by which Barry John Edward Paint, acting through his mother as tutrice, and Noella Doris Heaume sold the plot on which the Plaintiffs' dwelling-house has since been constructed to Grosnez Management Company (Alderney) Limited. The vendors had inherited the land on which the Plaintiffs' and the Defendants' properties are situated from their late father. The clause in question provides:

> "*ET SOUFFRIRONT la dite Société Preneure et ayants cause aux dits Bailleurs leurs hoirs respectifs et ayants cause pour une distance de cinquante pieds ou environ droit de passage de pied et de véhicules (y compris automobiles) par dessus une lisière de terre de douze pieds de laize dans le coin nord ouest des prémisses de ce bail pour aller et venir toutes fois et quantes entre les dites prémisses des bits Bailleurs et la Grande Rue susdite en payant une proportion équitable des frais de maintien et entretien de la dite lisière de terre en passage*".

6. Clause 5 of the 2007 conveyance by which the Plaintiffs purchased Le Figuier provides:

> "*The Purchasers shall as reserved in the Conveyance by Barry John Edward Paint and Noella Doris Heaume, née Paint, to Grosnez Management Company (Alderney) Limited registered on 22nd December, 1964, have a right of way on foot and with vehicles over the Driveway in order to come and go at all times between the Property and La Grande Rue, on paying a fair share of the costs of maintenance and upkeep of the Driveway.*"

Clause 1.5 of that conveyance defines "*the Property*" as "*a **HOUSE** known as "**LE FIGUIER**", **GARAGE** and **LAND**, situate at La Grande Rue, St Saviour on Fief Saint Michel*" and clause 1.4 defines "*the Driveway*" as "*a strip of land measuring fifty feet long and twelve feet wide (which serves the Property) belonging to Mr and Mrs Elliott*", which forms the boundary to the East of the Property, with the granite wall and the gate therein belonging with the Property.

7. At some time following the grant of this servitude in 1964, the strip of land in question was covered in tarmac. This occurred before the Defendants purchased Fleur de Lys in 2001. This means the parties have always known the strip of land as "the Driveway" in that state. The Plaintiffs paid for the bottom 16 feet of the Driveway to be resurfaced in tarmac on 21 April 2008 with the Defendants' consent.

8. The bottom of the Driveway adjoins a shallow gully in La Grande Rue. La Grande Rue and the shallow gully are owned by the States of Guernsey. The profile of the bottom of the Driveway as it joins that gully is at an angle which makes for a relatively steep approach on to the Driveway from La Grande Rue and vice versa. The Driveway, and in particular its profile, has not been altered at any time during the parties' ownership of their respective properties other than the resurfacing of the Driveway.

9. The Second Plaintiff purchased a Peugeot 207 in May 2011.

10. Although the exact nature of the difficulties facing the Plaintiffs is not fully agreed between the parties, in broad terms, because of the profile of the Driveway as it joins the gully in La Grande Rue, various vehicles driving on to and off the Driveway scrape along the ground and some become immobilised through grounding on the road surface or the surface of the Driveway. Although not conceded by the Defendants, the Plaintiffs assert that the vehicles affected include the Second Plaintiff's Peugeot 207.

11. The Plaintiffs have sought to resolve the problem encountered by the Second Plaintiff's Peugeot (and other vehicles) by requesting that the Defendants consent to the re-profiling of the Driveway, at the Plaintiffs' cost, but such consent has not been forthcoming. Instead, the Plaintiffs have placed a bisectional ramp made of plywood partly on the Defendant's land and partly over the gully in La Grande Rue. This wooden ramp serves to reduce the angle when the Driveway joins the gully, with the result that vehicles, including the Second Plaintiff's Peugeot, can be used over the right of way without the difficulties experienced without the ramp being in place. This ramp is left permanently in place, and photographs of it show it with a metal chain attached fixed to the wall of the Plaintiffs' land, to avoid the First Plaintiff being required to manoeuvre the ramp on each occasion its use is needed. The ramp has only been used since the Second Plaintiff purchased her Peugeot, and so has been in place now for some three years. The Defendants object to the ramp being placed in this location on their land.

12. It is the lawfulness of the Plaintiffs' actions of placing and keeping the ramp at the bottom of the Driveway next to the gully that is the issue in this case.

The parties' contentions

13. On behalf of the Plaintiffs, Advocate Crawfourd submits that the right of way from which they benefit includes the ancillary right to enter upon the Defendants' land and "*do all such works to it as are necessary to use and preserve the Right of Way and make it fully effective in accordance with the purpose for which it was granted*". If that ancillary right exists, he further submits that it is a question of fact as to whether the work undertaken by the Plaintiffs in positioning and keeping the part of the ramp which is on the part of the Driveway nearest La Grande Rue is permitted to make the Right of Way fully effective.

14. On behalf of the Defendants, Advocate Dunster submits that the Plaintiffs must take the land over which the servitude exists as they find it, ie, with the attendant potential problems caused by the steepness of the Driveway and opposes the Plaintiffs' suggestion that the servitude granted encompasses the right to place the ramp where it has been placed. However, he accepted that the express grant of the servitude in 1964 carried with it the right for the Plaintiffs to enter the Defendants' servient land for the purpose of carrying out works necessary in order to use and conserve that servitude. In his submission, what the Plaintiffs have done goes beyond what is permitted.

15. Advocate Crawfourd has carried out an extensive review of the authorities and other materials which might assist me in determining the issues raised. Advocate Dunster opted for a more direct approach, relying heavily on the principle that there is a presumption in favour of freedom of land from the excessive burden of servitudes. Whilst recognising that Advocate Crawfourd's analysis was at times more academic than it perhaps needed to be, as shown in the two judgments of Deputy Bailiff Rowland to which I will turn, disputes about servitudes are comparatively infrequent and it is inevitable that the customary law position will be articulated in full. That is why I will set out more completely than might be strictly necessary the results of Advocate Crawfourd's researches before commenting on them.

The law

16. Counsel accepted that the principle relied on by the Plaintiffs has not been expounded in any previous decision of the Courts in Guernsey. There are, however, two comparatively recent cases offering guidance to the approach that the Court should adopt where there is no judicial pronouncement on a topic relating to servitudes.

17. In *Russell and Caine v Gillespie and Ford* [2003-04] GLR 54, the Court was concerned *inter alia* with construing "*a right on foot and with all vehicles over and by way of the drive and yard*" owned by the servient land. After commenting that "*There are dangers in the multiplication of burdensome servitudes on ownership*" (para. 45), Deputy Bailiff Rowland stated (at para. 49):

> "*If a right of way were to benefit successors in title, it would be 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 servitude prédiale in the Coûtume de Normandie.*"

This passage serves as an important reminder that, in construing the rights encompassed in the grant, they are property rights attaching to the land rather than personal rights attaching to the owners for the time being of the land. Any declaration of those rights will be enforceable not just between the parties but by any successors in title.

18. That case also assists in identifying some of the sources to which reference can sensibly be made, including Parsessus, *Traité des Servitudes ou Services Fonciers* 8th ed. (1838), about which the Deputy Bailiff stated that it "*is also treated as an authority in Guernsey on matters concerning servitudes*" (para. 53), and to which I will return in due course. As a result of the guidance given, in Advocate Crawfourd's written submissions, he indicated that he had looked at, but derived no assistance from, Berault's *La Coûstumier Reformée du Pays et Duché de Normandie, Anciens Ressorts et Enclaves d'Icelu*, 3rd ed. (1620), Godefroy's *Commentaires sur la Coûtume Reformée du Pays et Duché de Normandie*, second tome (1626), Basnage's *Oeuvres de Maitre Contenant ses Commentaires sur la Coûtume de Normandie et son Traité des Hipoteques*, 3rd ed. (1709), Flaust's *Explication de la Coûtume et de la Jurisprudence de Normandie, dans un Ordre Simple et facile*, second tome (1781) and Pesnelle's *Coûtume de Normandie*, 3rd ed. (1759). Advocate Dunster did not suggest any differently, accepting Advocate Crawfourd's suggestion that the customary law sources indicated that the focus should be on *La Coûtume Reformée* rather than *Le Grand Coutumier de Normandie*, which is very largely silent on matters relating to servitudes (see, eg, Terrien, *Commentaires du Droict Civil tant public que privé, observé au pays & Duché de Normandie* (1574)).

19. From other commentators, it is clear that the express grant of a servitude can also confer ancillary rights to which no reference is explicitly made. By way of example, in Houard's *Dictionnaire de Droit Normand*, tome 4 (1782), it is stated (at page 202) that:

> "*Dans nos anciennes Coutumes, il est traité de ces divers droits sur les fonds d'autrui, & à l'égard, tant de chaque droit en lui-même que de ses accessoires, celui auquel il appartenoit avoit l'action en nouvelle dessaisine pour le conserver or s'y maintenir, si on essayoit de l'en dépouiller.*"

In similar terms, Domat's *Les Loix Civiles dans leur Ordre Naturel, le Droit Public et Legum Delectus* (1713) explains (at page 114):

> "*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 reparer l'ouvrage necessaire pour s'en server: & si le travail ne peut se faire dans l'endroit où la servitude est fixée, on pourra travailler dans les environs, selon que la necessité peut y obliger; mais en reparant, on ne peut rien innover à l'ancien état.*"

20. By reference to Roman law origins, such ancillary rights are then arguably set out in slightly more detail in de Ferriere's *Dictionnaire de Droit et de Pratique, contenant L'Explication des Termes de Droit, d'Ordonnances, de Coutumes & de Pratique*, tome 2 (1787) (at page 750):

> "*Les servitudes des heritages des champs, sont les servitudes que l'on nomme rustiques. Les principales sont, suivant le Droit Romain, iter, actus & via.*
> *ITER, est un droit de passage, c'est-à-dire, la liberté d'aller & de se promener sur l'héritage d'autrui, à pied ou à cheval, ou en litiere, avec pouvoir de remuer la terre, de l'applanir, & de faire toutes choses necessaries pour l'usage & l'exécution de ce droit, qui est appellé en Latin iter, qui vient du mot ire. …*
> *ACTUS, qui vient d'agere, conduire, est le droit de faire passer des bêtes de charge, ou de conduire une charrette ou un chariot sur l'héritage d'autrui. Celui qui a ce droit n'a pas le droit se sentier ou le droit de passage, comme une servitude distinct & séparée …, mais il en a la commodité & l'usage, & il s'en peut servir même sans bête de charge & sans voiture. …*
> *VIA, est une servitude qui contient directement, & le droit d'aller & de se promener sur le fonds d'autrui, & celui d'y faire passer des bêtes de charge ou de voiture; …*
> *Enfin, celui qui n'a que la servitude d'actus, ne peut pas conduire un chariot chargé à la hauteur d'une pique, ni trainer par l'héritage servant des poutres & de grosses pierres; mais celui qui a la servitude de via, est en droit de faire tout cela. …*
> *Nous ne distinguons point en France ces trois sortes de servitudes rustiques, de la même maniere qu'elles étoient en usage chez les Romains: nous reconnoissons seulement la servitude des chemins pour les gens de pied, la servitude pour les bêtes de charge, & la servitude pour les chariots & autres voitures; & ce ne sont que les clauses particulieres que l'on y infere, qui les rendent plus ou moins étendues.*"

21. In France, the position has been codified so that Article 696 of the *Code Civil* provides:

> "*Quand on établit une servitude, on est censé accorder tout ce qui est nécessaire pour en user*"

and Article 697 adds:

> "*Celui auqel est due une servitude a droit de faire tous les ouvrages nécessaires pour en user et pour la conserver.*"

22. In commenting on these provisions, Pardessus offers further explanation about how they operate. Accordingly, at page 131, he wrote:

> "*Le droit que donne une servitude s'étend nécessairement à tous les accessoires sans lesquels il ne seroit pas possible d'en user. Ainsi, le puisage, l'abreuvage dans un puits, une fontaine, donne le droit de passer sur la partie de l'héritage dans laquelle ces objets sont situés. Mais l'usage de ces accessoires doit être limité que de la manière la moins incommode au fonds grevé.*"

Referring to Article 697, and using a similar example to de Ferriere, Pardessus explained (at page 131):

> "*Par exemple, il est permis d'aplanir le terrain d'un passage, de le paver, d'y faire même un escalier, si la servitude ne peut être utile que de cette manière. Ce droit fait*

> *en quelque sorte partie de la servitude elle-même; mais rien n'empêcheroit qu'une clause de l'acte n'en interdit ou n'en modifiât l'exercice. Il ne faut point aussi perdre de vue que la loi n'autorise que les ouvrages nécessaires. Ainsi, celui qui jouit d'un passage à travers un parc, un jardin, ne peut faire paver le point par lequel il exerce cette servitude, sous prétexte d'en rendre l'usage plus commode, si le propriétaire du jardin s'y oppose, parce que le passage n'ayant pas été désigné comme un chemin pavé, ce changement peut nuire à l'agrément de sa propriété. Cependant, comme il est juste qu'un tel refus ait moins une cause plausible, si le propriétaire du fonds auquel est due la servitude de passage, vouloit y faire une amelioration évidemment utile ou moins agreeable, par exemple, le faire sabler, l'opposition du propriétaire du fonds grevé seroit malice à laquelle les tribunaux ne devroient pas avoir égard.*"

23. Turning to how any works required can be executed, in a passage not highlighted by Advocate Crawfourd, Pardessus commented further (at page 133):

> "*... en réparant le passage par lequel il exerce son droit de servitude, il doit conserver l'ancien état et les dimensions que determine le titre constitutive, ou qui existent depuis trente ans, sans pouvoir l'élargir, l'alonger, le creuser, ni l'élever d'une manière qui soit nuisible ou seulement plus incommode au propriétaire du fonds grevé. La conséquence de ce principe va jusqu'à lui interdire les changemens qui enlèveroient à ce propriétaire l'utilité qu'il pourroit lui-même tirer de la servitude.*
> *Il faut cependant excepter de cette prohibition, le cas où les changemens arrivés, soit naturellement, soit par cas fortuit, à l'état des lieux ou des choses, nécessiteroient des dispositions nouvelles, dont l'effet indispensable seroit d'aggraver la servitude; et c'est principalement à l'égard de celles qui proviennent de la situation des lieux, que cela peut arriver.*"

Advocate Crawfourd did, however, rely on the following passage (at page 136):

> "*Le propriétaire du fonds grevé ne peut se refuser à laisser executer les travaux nécessaires à l'usage de la servitude, quand même il éprouveroit quelque dommage. Le temps et le mode des ouvrages ou des réparations à faire, doivent être disposés de manière que le fonds assujéti n'éprouve que les incommodités indispensables dans une telle circonstance. En conséquence, il faut notifier au propriétaire grevé, avant l'introduction des ouvriers, l'intention de faire les réparations, de manière qu'il puisse prendre les arrangemens nécessaires pour éviter le préjudice que ce travail pourroit lui occasioner s'il n'étoit pas averti: de son côté ce dernier peut demander qu'on détermine un délai pendant lequel les ouvrages seront achevés, et réclamer des dommages-intérêts pour le tort que lui causeroit un retard dans l'exécution de ces travaux.*"

24. Before leaving the work of Pardessus, I will also refer to a short passage on page 142:

> "*En général le propriétaire du fonds auquel est due la servitude, ne peut, quelqu'indemnité qu'il offre, en étendre l'usage à des objets qui n'en faisoient pas partie lorsque la concession a été faite.*"

I have done so because, given the reliance placed on this work by Advocate Crawfourd on behalf of the Plaintiffs, I have sought to extract all the principles that I consider offer helpful guidance in the present case.

25. Without descending into detail, the position in Jersey law advanced by Advocate Crawfourd appears to follow the Articles of the *Code Civil*.

26. The legal position in England and Wales is, according to extracts from *Halsbury's Laws of England*, 5th ed., once again similar. Paragraph 821 of Vol. 87 states:

> "*The express grant of an easement is also the grant of such ancillary rights as are reasonably necessary for its exercise or enjoyment. The ancillary right thus implied must be necessary for the use and enjoyment, in the way contemplated by the parties, of the right granted; it is not sufficient that such an ancillary right would be convenient, usual, common in the district or reasonable.*"

Paragraph 966 then explains further that:

> "*As a general rule the owner of the servient tenement is under no liability to repair the way over which a right of way has been granted, for such liability is not a condition incident by law to the grant of a right of way; nor is it even a legal obligation incumbent on the grantee. The person entitled to the use of the way must do such repairs as he requires, and has right of entry upon the servient tenement for that purpose. The right of repair is not limited to making good the defects in the original soil by subsidence or other natural causes, but includes the right of making the road reasonably fit for the purpose for which it was granted. He is not, however, entitled to make improvements which would benefit his own land to the detriment of the owner of the land of which the right of way is exercised.*"

27. One of the cases supporting the principle that the grantee of a right of way is permitted to make it effective is *Newcomen v Coulson* (1877) 5 Ch D 133, which was the subject of comment more recently in *Nationwide Building Society v Beauchamp (a firm)* [2001] EWCA Civ 275. In that later case, Peter Gibson LJ stated (at para. 11):

> "*As I understand the authorities, the grant of a right of way is to be taken to carry with it such ancillary and incidental rights as are necessary to make the grant fully effective. This is so whether the right of way is obtained by prescription or by express grant. The law presumes this to have been the intention of the parties.*"

His Lordship continued (at para. 20):

> "*The extent of the ancillary right must be determined in the light of the particular circumstances of the right of way. In the present case what seems to me determinative is that the parties themselves have specified to what standard the road should be constructed.*"

28. It is against the background of that material that Advocate Crawfourd has submitted that Guernsey law implies into the express grant of a right of way an ancillary right "*do all such works to it as are necessary to use and preserve the Right of Way and make it fully effective in accordance with the purpose for which it was granted*". In doing so, he appears to be relying on a combination of the French law and English law principles.

29. Advocate Dunster conceded on behalf of the Defendants that the principle derived from customary law codified in Article 697 of the French *Code Civil* forms part of the law of Guernsey. This is consistent with the position in Jersey law. However, he submitted that the right was inevitably limited and that the English law concept of making the right of way "*fully effective*" had to be viewed in the light of the principle that such works as were envisaged were predicated on necessity. Moreover, he drew attention to the need for caution as suggested by Southwell JA in *Colesberg Hotel (1972) Limited v Alton Hotel Limited* [2003] JLR 176 in relying too heavily on principles in this area of the law derived from other jurisdictions:

> "*2. In view of the citation to the Royal Court and to this court of authorities from other jurisdictions, it is necessary to emphasize that Jersey land law (a) has*

> *only a distant connection with Roman law; (b) is different in many respects from French law before the Revolution and from present-day French law based on the Napoleonic codes; and (c) has entirely different origins from English land law, and remains different in many material respects from the English land law of today. This has been emphasized on numerous occasions by the Privy Council, e.g.* Godfray v. Godfray (1865) 3 Moo. P.C.C.N.S. 316, *La Cloche v. La Cloche* (1870) 6 Moo. P.C.C.N.S. 383, *De Carteret v. Baudains (1886) 9 App. Cas. 214 and Snell v. Beadle* [2001] 2 A.C. 304. *I have tried in the past, both judicially and extra-judicially, to draw attention to the dangers involved in trying to transpose from Roman law (see Houard, Dictionnaire analytique, historique, étymologique, critique et interprétant de la coutume de Normandie, 1st ed., at 196 (1782)), from French law (especially after its codification), and from the law, legal principles which are not consistent with principles of Jersey land law. This point is of particular importance in the case of servitudes because the material cited to us shows that Jersey law concerning servitudes differs materially from Roman law, from the Coûtume d'Orléans of which Pothier wrote before the Revolution, from current French law, and from English law.*
>
> *3. One main feature of the Jersey law of servitudes is that there is a presumption in favour of the freedom of land from excessive burdens of servitudes. Where servitudes derive their titre from a contract or deed, the effect of this presumption is that in interpreting the words of the contract or deed, in so far as there is any ambiguity, the ambiguous words are to be interpreted in favour of the freedom of the servient tenement. This presumption for freedom in relation to servitudes has recently been applied by this court in Haas (née Daniel) v. Duquemin [2002] JLR 27.*"

30. That case, and particularly para. 3 of the judgment, was cited with approval by Deputy Bailiff Rowland in *Duquemin and Duquemin v Dunstan Investments Limited* [2003-04] GLR 537. At para. 18 of his judgment, the Deputy Bailiff also quoted a passage from Basnage's 1709 work, which states that:

> "*Si par le titre de la constitution de la servitude l'on n'a point déclaré de quelle maniere l'on pourra passer, ni désigné le lieu par lequel l'on doit soufrir le passage, ni sa largeur, ni si c'est pour y passer à pied, à cheval, ou avec chevaux & charrettes, comment sera-t'il permis d'en user? Il semble que l'on peut passer par tout, parce que l'heritage entier est sujet à cette servitude, & le propriétaire n'y peut rien faire que empêche l'usage: Il n'est pas juste néanmoins de soufrir que celui à qui le passage est dû en puisse abuser, le propriétaire peut lui désigner un chemin, dont il doit se contenter, pourvû qu'il soit accessible, quoique ce ne soit pas l'endroit le plus commode, parce que les servitudes ne s'étendent point, & qu'il doit sufire d'avoir un passage commode, bien qu'il le pût être davantage en un autre lieu: Que s'il n'est point fait mention de la largeur du passage, ni de la maniere que l'on s'en pourra servir, l'on doit examiner quelle a été l'intention vrai-semblable des contractans, & la fin pour laquelle le chemin a été stipulé & promis; que si ces circonstances ne donnent point assés de lumiere, if faut en cette obscurité favoriser le fonds servant, quod minimum sequendum est, & ne donner qu'un simple chemin à pied. Toutes ces difficultés sont décidées en la loi ...*"

31. The *Colesberg Hotel* case (*supra*) also helpfully identifies that the task of construing the grant of a servitude is to determine "*what must have been in the contemplation of the parties ... having regard to the terms [of the grant], the relative positions of the properties and the nature of the roadway over which the right of way was granted*" (para. 33). Further, by reference to the test adumbrated by Basnage "*to the effect that the user must not be such as to render the burden on the servient tenement more inconvenient and more onerous*", or as the Royal Court in that case had put it "*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" (see para. 39), the Jersey Court of Appeal explained the need for the owner of the dominant land to exercise restraint in how he enjoys the servitude obtained over the servient land.

Discussion

32. In the light of the material to which I have referred, my task is to construe the grant of the servitude and to decide whether the ancillary rights associated with it are as extensive as the Plaintiffs contend or, as the Defendants suggest, are more limited and so do not cover what has been done in placing the ramp on the strip of land owned by the Defendants. Whilst I have some sympathy for the predicament in which the Plaintiffs find themselves, I have reached the conclusion that they do not enjoy the right they have asserted and that their action in placing the ramp on the Defendant's land is a breach of the servitude from which their land benefits. Good neighbourliness may mean that some mutually acceptable accommodation can be reached, but there is, in my view, nothing that the Plaintiffs can do if the Defendants wish to assert their property rights without further negotiation. Indeed, the remedy lies in the hands of the Plaintiffs to acquire a different vehicle for the Second Plaintiff to use and to advise their visitors of the physical limitations of the right of way from the road to their house.

33. I have reached that conclusion because the whole tenor of the authority researched by Advocate Crawfourd points towards works being permitted to be carried out from necessity rather than personal convenience. For example, the passage from page 131 in the work of Pardessus commenting on Article 697 of the *Code Civil* clarifies what can be done if the servitude can only be used by carrying out the works in question. Necessity is also the hallmark of Domat's explanation and consistent with the English law principles.

34. The starting point for the determination of the extent of the ancillary rights associated with a grant of passage is always going to be the express words of the grant itself. The true intention of the parties contracting at the time needs to be identified (see, eg, what Basnage wrote in 1709). In the present case, the right of way accorded to the owners from time to time of the dominant land is to pass over the strip of land, now constituted by the Driveway, on foot and with vehicles. Although there was no evidence about the types of vehicles that could utilise the right of way in 1964, I take the view that I can properly conclude that there were inevitably some vehicles at that time that would have found it physically impossible to drive over the right of way because of the gradient of the slope from La Grande Rue over the servient land before reaching the dominant land. Accordingly, from the outset there were limitations placed on the usability of the servitude and the parties to the original grant did not intend to extend the grant to encompass every possible vehicle that might be used.

35. The owner of the dominant land has throughout had the right to enter upon the strip of land, or even in the vicinity of the strip of land, to carry out works that are necessary to make the use of the servitude possible and to maintain it as a right of way capable of being used. Such works may extend to carrying out repairs, although in the context of the grant affecting the present case, the parties have agreed that the owners of the dominant land will make a fair contribution to the costs of maintenance and upkeep of the Driveway. This is an agreed extension of the principle that the owner of the servient land is not customarily required to do anything to make the servitude effective, whilst at the same time being prevented to doing anything to render it ineffective, and could leave such maintenance and upkeep to the owner of the dominant land. Instead, there has been ongoing agreement here that if the owner of the servient land performs these tasks there is an entitlement to require a financial contribution from the owner of the dominant land. If, for example, the owner of the dominant land wished to flatten the surface over which the right of way had been granted because otherwise it would be unusable then such a step could be taken. Similarly, if some works need to be carried out to make the right of way reasonably fit for the purpose for which it was granted, such works by the owner of the dominant land are implicitly authorised, subject always to the requirement that what is done is no more than is strictly necessary to make the right of way usable.

36. There is, in my judgment, a difference between carrying out repairs to bring the right of way back into its former state, or other necessary works to make it reasonably fit for the purpose for which it was granted, and works to make it more convenient to use. From the agreed evidence, it is clear that the right of way over the Defendants' land continues to be capable of being used by vehicles, albeit not every vehicle. The fact that there are some vehicles which have difficulties driving over the strip of land from La Grande Rue is something that has always existed. Whilst I cannot discount that there might come a time when the usability of the servitude is so affected by changes in vehicle design that there has to be some re-profiling of the servient land, I am satisfied that that position has not yet been reached. There has been no suggestion that only specially adapted vehicles are capable of being used. Indeed, when the Plaintiffs first came to the land the problems of using the Driveway to reach their house were not raised and the section of the Driveway was re-surfaced at their expense without changing its profile. The problems they have since identified only came into sharp focus upon the Second Plaintiff purchasing her Peugeot 207. Having acquired such a vehicle, the Plaintiffs cannot now assert that there is some necessity to authorise them to carry out any works to the Driveway just because it is more convenient to do that than to consider replacing the vehicle associated with the problems they have encountered.

37. I take the view that Advocate Crawfourd's attempt to construe "*fully effective*" as extending to the Plaintiffs' use of any road legal everyday car they might choose to acquire, which he suggested clearly covered the Peugeot 207, misunderstands the principles derived from the customary law and seeks more on behalf of the Plaintiffs, or their successors in title, than that law provides. During the course of argument, Advocate Crawfourd sought to distinguish the position of someone owning a car such as a Peugeot 207 and someone else owning a larger car with a lower ride height, eg, some of the so-called "supercars" featured on television programmes such as *Top Gear*. In my opinion he could not properly pursue that distinction because, whatever the ancillary rights, the same principles must apply to everyone because it must apply equally to any successors in title whatever vehicles they may own or acquire. It would simply be unworkable to have one rule in respect of a car in more common usage in Guernsey than those cars we see less often but which are still permitted to be circulated in public. Accordingly, the effectiveness to which reference is made must correspond to the usability of the right of way for the various purposes for which it has been granted. Provided that no steps are taken by the owner of the servient land to prevent the owner of the dominant land enjoying the servitude by exercising all the rights granted, ie, "*fully*", the manner of how that right of way is exercised must be the least burdensome so as to minimise the inconvenience to the servient land. It is important to recognise that the dominant land owner enjoys merely a right over the servient land which is inferior to the ownership enjoyed by the servient land owner. Therefore, the owner of the dominant land is unable to insist on carrying out works on the servient land to achieve what it wishes unless it genuinely is necessary to be able to enjoy each aspect of the right conferred. As soon as it is conceded that the right to come and go over the Driveway with vehicles is capable of being exercised and so the right of way granted enjoyed, necessity has been displaced. Personal preference as to the vehicle of choice for the Plaintiffs, and for their successors in title, or their visitors does not equate to necessity.

38. I also took into account that the solution devised by the Plaintiffs to enable the Second Plaintiff's Peugeot 207 (and other vehicles) to use the Driveway falls into two parts. The section of the ramp they have placed on the Defendants' land only assists because they have also placed the other section of the ramp across the gully in La Grande Rue. Strictly speaking, it is only the placing of the part of the ramp on the Driveway with which this case is concerned. When viewed in isolation, I was satisfied that the section of ramp placed on the servient land against the wishes of the Defendants detracts from the usability of the land for the Defendants and so offends the legal principle that the dominant land owners will exercise the servitude in a way which minimises the inconvenience to the Defendants. In other words there is an inter-dependence between what the Plaintiffs have done on the Defendants' land

and what they have done on land owned by the States of Guernsey. In effect, even if there were an argument in the Plaintiffs' favour of necessity to place and maintain the section of the ramp they have put on the Defendants' land, the reason for it being needed would be as a consequence of their acts in respect of the gully and their remedy would, in my view, lie in their own hands through restoring the gully area to its original state.

39. It might be different if the work on the servient land was needed because of changes to land in a third party's ownership. For example, if the level of the road where the gully is were to be raised or lowered significantly, the owners of Le Figuier might be justified in undertaking appropriate works on the strip of land over which the Driveway has been constructed to ensure that vehicles are generally capable of driving to and from La Grande Rue when using the right of way. However, in my judgment, that is not the position at present because the changes to the gully area have been brought about by the Plaintiffs and not as a result of nature or something done by a third party.

40. During the course of the hearing there was some discussion about negotiations that have taken place with the States of Guernsey about how a more permanent solution to the problems experienced by the Plaintiffs might entail indemnities against possible future claims being given, but that is not something I need to address to resolve the current issue between the parties before the Court.

Conclusion

41. For the reasons given, I reject the formulation of the ancillary right asserted on behalf of the Plaintiffs at paragraph 14 of their Cause. Placing the ramp on the Driveway and leaving it there does not fall within the works they are permitted to perform on the Defendants' land because the servitude from which they benefit is capable of being used as fully as the law requires without carrying out those works to which the Defendants object.

42. I will hear Counsel further on the precise form of the Order to be made to give effect to the legal position as I have determined it to be, as well as any other applications that may follow from this ruling.

