**Bohan & Williams and Bithell & Bithell**
Royal Court
19th November, 2014

**JUDGMENT**
**45/2014**

**Appeal from a decision of the Court of Alderney on 28 May 2014, regarding the extent of the Appellants' rights of way across land owned by the Respondents.**

**Approved Text**
**19.11.2014**

**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**ON APPEAL FROM THE COURT OF ALDERNEY**

**Between:** **SIMON BOHAN**

**&**

**COLIN WILLIAMS** **Appellants**

**-and-**

**KENNETH BITHELL**

**&**

**MARGERY BITHELL** **Respondents**

**Hearing dates:** **20th October 2014**

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

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

**Advocate for the Appellants: Advocate J A S White**
**The Respondents were not represented**

**Cases, texts & legislation referred to:**
*Cyma Petroleum (CI) Limited v States of Guernsey* (unreported, 15 September 2014)
*Hawkins v Greenwood* (1985) 2.GLJ.57
*Island Development Committee v Lainé* (unreported, 18 December 2003)
The Human Rights (Bailiwick of Guernsey) Law, 2000
*Henry v Veloso* [2003-04] GLR Note 31
*Law Officers v Gallienne* (unreported, 1 December 2003)
The Alderney Land and Property, etc. Law, 1949
*Singleton v Le Noury* (unreported, 5 June 1990, digested at 9.GLJ.48)
Basnage, *Commentaires sur la Coûtume de Normandie*, 4th ed, 1778, Vol. II

## Introduction

1. The Appellants, Simon Bohan and Colin Williams, are aggrieved at the decision of the Court of Alderney given on 28 May 2014, and in particular its declaration about the extent of their rights of way, which run across land owned by Kenneth and Margery Bithell, the Respondents, and over which it is not disputed that the Appellants have rights of way. After conducting a *vue de justice* and hearing evidence and submissions, the Court of Alderney found that "*the Southern edge of the Track is the Boundary of AY1374 as indicated by the dotted line on the Plan attached to Colin Partridge's statement*" and that "*The Northern edge of the boundary is the base of the lower rubble stone wall, known as the Rockery, as marked by a solid line on the Plan mentioned above.*" The Appellants had sought a declaration that the width of the land over which their rights of way exist is 14 feet and the effect of the declaration made by the Court of Alderney is that the width is approximately 11 feet 6 inches at its narrowest point.

2. Two themes emerge from their Notice of Appeal dated 11 June 2014. The main question in this appeal is whether the finding of the Court of Alderney "*was so contrary to the evidence as to be perverse*". It is suggested that the Court must have misunderstood the evidence or drawn the wrong inferences from it. The other basis of the appeal is that the Court of Alderney failed to given adequate reasoning for its decision. In particular, the Court failed to say why it had ignored evidence that the width of 14 feet exists for the rest of "the Track" over which the rights of way of the First Appellant exists, what basis there is for concluding that the area over which the rights of way can be exercised will narrow as it approaches the public road, why they rejected evidence that "the Rockery" had been built on land previously available for use to exercise the right of way, and why they disregarded the evidence on behalf of the Appellant that a width of 14 feet was the minimum the Appellants needed for the use to which they intended, as permitted, to use the Track.

3. The Appellants seek an order varying the determination of the Court of Alderney so as to substitute the declaration they had originally sought. In the alternative, Advocate White, who has appeared on behalf of the Appellants, suggests that the case could be remitted to the Court of Alderney for it to reach a fresh decision in the light of what this Court rules. She doubted that any further evidence would need to be adduced, but left open that possibility. The Respondents, who were represented by the First Respondent, resist the appeal on the basis that the Court of Alderney reached a decision it was entitled to reach on the evidence given to it, on the basis that there was nothing in writing confirming the width of the right of way at 14 feet and the decision was consistent with the evidence given by the jointly instructed expert, Colin Partridge.

## Procedural matters

4. The Appellants commenced their action by way of a Cause tabled on 5 September 2013. Defences were tabled pursuant to a Consent Order on 26 September 2013. Thereafter, the matter proceeded to a trial heard on 27 May 2014, with judgment being delivered the following day.

5. At the outset, the Court of Alderney agreed to the application made by Advocate White that there be a *vue de justice*. That is one element of the case where the Chairman and Jurats of the Court of Alderney have the advantage over me. As I explained to the parties, from my visits to Alderney in the past, I know where the Second Appellant's house is and have walked

 

past the area of land in question a number of times. For professional reasons, I have also previously been along some of the road reservations further away from Longis Road. However, apart from seeing the photographs in the bundle, I have no recollection of the physical layout of the land and no first-hand experience of the area of land in question. (The parties confirmed that my prior dealings with land issues in Alderney was not something they wished to raise as a reason for recusing me from hearing the appeal.)

6. The remainder of the evidence, however, was largely from the documentation placed before the Court of Alderney, plus the small amount of oral evidence given by the Second Appellant and the First Defendant as set out in the transcript. When the Second Appellant gave evidence, the First Respondent's cross-examination of him was limited to asking whether he agreed that the parties had jointly instructed Colin Partridge to assist them in trying to reach agreement without troubling the Court. The rest of the Second Appellant's evidence went unchallenged.

7. The judgment of the Court of Alderney was delivered on 28 May 2014. Having set out the relief sought by the Appellants, the Court of Alderney first set out the facts that were not in dispute:

> "*1. Simon Bohan owns parcel AY2137 and has a right of way across the Defendants' land, and his plot is zoned for residential development, and has applied for planning permission.*
> *2. Mr Williams owns AY1407 and has a right of way across the Defendants' land.*
> *3. Simon Bohan's Right of way is recorded in the Alderney Land Register (the Track)*
> *4. Mr William's [sic] Right of Way is recorded in an Agreement dated 5 September 2003 between him and the Defendants' predecessor-in-title (the Agreement)*
> *5. At the time Mr William's Right of way was granted, the land he owned to which he gave access was zoned for housing development and the parties to the Agreement would have known the Track could be used in future by vehicles associated with the development and servicing of dwellings built on Mr Williams' land.*
> *6. The history of the various parcels of land is set out in the Cause and has not been disputed.*"

8. The judgment then identified the facts that were in dispute and so required the Court's resolution:

> "*1. The issue in dispute is the location and width of the track over which the Rights of Way run. The width of the track cannot be ascertained by comparing the rough colouring lines on the plans attached to the Plaintiffs' title documents with the features on the ground.*
> *2. The Plaintiffs' case is that The Track was approximately fourteen feet wide all the way along the length, both over the Defendant's [sic] land and that of others. Their case is that the Defendant's predecessor-in-title built the Rockery on top of land that was part of The Track, impeding their rights, and that removing the Rockery would restore The Track to its original width of fourteen feet.*
> *3. The Defendants' case is that there are no measurements on any documents which set out the width of the Right of Way or the Track.*"

9. Following a very brief review of the evidence given, the judgment records the following findings:

> "*1. There appears to be no written or recorded measurements of the width of the track at any point, indicating whether or not it was fourteen feet wide.*
> *2. From the evidence provided by both parties, and the "Vue de Justice" the assumed width of the Track varies on the entire length of the designated Right of Way.*
> *3. In paragraph 8 Colin Partridge's Witness Statement he states "… that no measurement taken from the Plan can be stated as the definitive of the Track at the time of the 1951 survey due to the small scale of the Ordinance [sic] Survey Plan"*
> *4. In paragraph 11 of Colin Partridge's Witness Statement he states "… The small scale of the OS Map prevents accurate measurement and cannot be used in drawing an inference as to the extent of the width of the track."*
> *5. Colin Partridge's letter to Mr Bithell dated 2nd January 2014 indicated that he would be willing to act as an intermediary between the parties if it would be of assistance.*
> *6. The Jurats noted that there appeared to be no indicators of the original intended width of the Track within the original land awards and transfer documents.*
> *7. The Jurats also noted that there were differences between the visual evidence, following the Vue de Justice, and the Ordinance Survey Documents presented.*
> *8. As pointed out to us by Advocate White, we have total discretion in making our decision in this case. In exercising our discretion, we have taken into account all evidence, documents produced, the Le Noury case and the land registry documents for each title. We conclude that:*
> *a. The Right of Way in question is a qualified Right of Way. It is over a Track as outlined in the Plan attached to the Land Awards for the various titles and for persons on foot or with vehicles;*
> *b. No width is mentioned in the original land awards. It is clear that the intention of the Land Commissioner was to make the Track as existing at the time of the awards the Right of Way;*
> *c. For the Vue, it is clear the Track exists in some form.*
> *9. It is clear to us that the Track is as follows: the Southern edge of the Track is the Boundary of AY1374 as indicated by the dotted line on the Plan attached to Colin Partridge's statement. The Northern edge of the boundary is the base of the lower rubble stone wall, known as the Rockery, as marked by a solid line on the Plan mentioned above.*"

10. In the light of those findings, the Court of Alderney made the declaration in terms of its ninth numbered findings and granted the ancillary relief sought in terms that the Respondents "*do all things necessary to restore the Southern edge of the track*" and that they "*continue to permit the [Appellants] to exercise their rights of way over the said track and continue to take such actions necessary to allow them to do so*". There was no order in respect of costs.

**Appellants' contentions**

11. As acknowledged in Advocate White's submissions, the Appellants are not disputing the finding of the Court of Alderney as regards the Southern boundary of the Track. However, they challenge the finding over the Northern edge of the Track, arguing that it runs contrary to the evidence given. In particular, the Court of Alderney did not explain why it ignored the evidence given by the Second Appellant about his conversation with the Respondents'

predecessor-in-title, Mrs Blumberg, from which "*the understanding that I got from it was that the rockery was installed to narrow the track to deter people from using it. No more, no less than that*", adding "*the rockery was in the track*".

12. Advocate White's submissions recognise that the Court of Alderney is a lay tribunal, meaning that this Court should be careful to interpret it fairly. In doing so, she highlighted what had been said by Lieutenant-Bailiff HH Hazel Marshall QC in a recent appeal from Alderney (*Cyma Petroleum (CI) Limited v States of Guernsey* (unreported, 15 September 2014), at para. 47):

> "*I accept the point that I am dealing with a decision of a lay tribunal, and that I should accordingly be careful to interpret it fairly, with that point in mind. However, I am not satisfied that the principle can be stated quite as forcefully as Advocate Hill would have it [ie, that "One should consider whether the ultimate finding is "wrong" in the sense of not being a finding which could reasonably be justified on the basis of all the evidence which was before the court and the submissions made, rather than examining, over-critically, whether the reasons expressed for any such finding were fully sufficient to justify it"]. The danger in that (as Advocate Merrien submits) is that it risks leading the appellate court into the error of substituting its own judgment for that of the lower court.*"

13. I adopt that approach in the present case and can also usefully adopt the reasoning that preceded that passage and its further explanation. Accordingly, the learned Lieutenant-Bailiff referred (in para. 43) to the test to apply on an appeal such as this as follows:

> "*To interfere with the decision of the court below, the appellate court must be satisfied either that the lower court erred in law (ie legal principle), or that there was no sufficient evidence to support a material finding of fact. This is because the question whether or not there is evidence sufficient to support a finding of fact is, itself, a question of law. The application of this latter principle is often described as there being "no evidence" to support a finding of fact. However, to treat that literally is misleading, because the test is not that of "no" evidence but of "no sufficient evidence"*."

The approach to be taken was that spelt out in *Hawkins v Greenwood* (1985) 2.GLJ.57 ("*The court would not interfere with the findings of fact made by the court below unless it was satisfied that there was no evidence before the court upon which it could reasonably have arrived at those findings of fact, or that it was for any other reasons the findings of fact of the court below were perverse*"), adding (at para. 44):

> "*... the issue for the appellate court is whether the findings of fact made by the court below are conclusions to which that tribunal could reasonably have come on the basis of the evidence before it, whether or not the appellate court itself agrees with those conclusions or would have made the same findings*".

14. In *Cyma* (*supra*), the way to proceed having conducted this exercise was explained as follows (para. 48):

> "*With regard to any complaint that the lower court failed to take any matter of evidence into account, the first question must, in my judgment, be whether, in all the circumstances that seems to have been the case. However, I accept that Advocate Hill is correct in that such a finding alone is not sufficient for success in the appeal, and the appellant must then go further and show that the decision of the lower court was thereby affected, and was flawed as a result. What course the appellate court will then take must depend on the particular circumstances, and also, in a case such as this in particular, its recognition that decisions of fact are matters for the lower*

 

> *court. If, therefore, the appellate court is able to conclude confidently that the matter allegedly not taken into account either would not have affected the lower court's actual decision, or was bound to have affected it in a particular way, it can give effect to that conclusion. If it is unable to say whether and if so how, consideration of the matter not taken into account would have affected the findings of fact in the case, then the position is more difficult, and the court might have to remit the case back to the court below for further consideration.*"

15. Turning to the issue of the alleged inadequacy of the reasoning of the Court of Alderney, Advocate White referred me to the comment made by Southwell JA in *Island Development Committee v Lainé* (unreported, 18 December 2003) doubting whether a regime "*which leaves the litigant and any Appellate Court with no knowledge of the reasons for the decisions reached by the Jurats, is appropriate today in Guernsey*". Southwell JA had commented just before that passage that the Human Rights (Bailiwick of Guernsey) Law, 2000 seemed likely to impact on the need for adequate reasoning to accord the litigant his Article 6 right to a fair trial. She also referred to the view offered by Lieutenant-Bailiff Hancox in *Henry v Veloso* [2003-04] GLR Note 31:

> "*There is a general duty on judges and magistrates, particularly in the light of art. 6 of the European Convention on Human Rights, to give reasons for their decisions. … The extent of reasoning required will depend on the circumstances of the case (R. v. Harrow Crown Court, ex p. Dave, [1994] 1 W.L.R. 98, followed; Law Officers v. Gallienne, Royal Ct., December 1st, 2003, unreported, dicta of Day, Lieut. Bailiff followed); in a simple case, it may suffice to state which evidence is preferred, giving brief reasons why that is the case (Flannery v. Halifax Estate Agencies Ltd., [2000] 1 W.L.R., followed). Reasons do not have to be greatly elaborated (Norton Tool Co. Ltd. v. Tewson, [1973] 1 All E.R. 183, dicta of Donaldson, P. applied), nor need they mention every piece of evidence or argument raised by counsel – it is sufficient that the parties (and, if necessary, the appellate court) can see the basis upon which a judge has acted (Eagil Trust v. Pigott-Brown & Taylor, [1985] 3 All E.R. 119, dicta of Griffiths, L.J. applied).*"

16. The passage quoted in that case from Lieutenant-Bailiff's Day's judgment in *Gallienne* (unreported, 1 December 2003) also provides a succinct summary of the importance of the reasons being adequate and what the parties to the case are entitled to understand:

> "*I conclude that it is incumbent on the Magistrate to give adequate reasons for his decisions, adequacy in the circumstances of any particular case being the crux. Those circumstances will vary widely, from those in which reasons for a decision will be implicit in the decision itself (probably so, for example in the vast majority of simple road traffic offences) to those in which, as in Diment, the evidence and legal argument is lengthy. A defendant is entitled to know why he has been found guilty, in no more than simple, but clear, terms appropriate to his case.*"

In the context of a civil case, similar reasoning can, in my view, be applied. The parties are entitled to know the reasons for a Court's decision. In particular, the party who has not succeeded needs to know why he has lost the case. If he does not understand the reasons for the Court's decision, he is unable to consider properly whether to exercise any right of appeal.

**Discussion**

17. Because of the principal ground of appeal, this is a case in which the decision of the Court of Alderney was fact-sensitive. Moreover, because of the nature of the dispute, much can be gleaned from the documents submitted to the Court of Alderney rather than the impression the Chairman and Jurats formed of the two witnesses from whom they heard.

 

18. Alderney operates a system of land registration. Following the post-War Homecoming, because so many records of ownership had been lost, the States of Alderney enacted the Alderney Land and Property, etc. Law, 1949. Provision was made for the appointment of a Land Commissioner who would take evidence of claims in respect of land and make awards identifying the owner and the boundaries. The Land Commissioner was required by section 7(1) of the Law to "*annex to the award a plan delimiting the land to which the award relates*". Subsection (3) provides that "*A plan annexed to an award in pursuance of sub-section (1) of this section shall be deemed to be … part of the award for the purposes of so much of this law as requires registration of awards*". In subsection (4), there is provision about *inter alia* "*an easement over land*", which was not "*impliedly extinguished by an award made under this Law but unless expressly extinguished by an award as a consequence of other provisions thereof shall continue to apply to the same land*".

19. The awards made by the Land Commissioner were entered into the Alderney Land Register as they were lodged with the Court (section 13). Section 14(1) provides that:

> "*An interest or charge awarded to a person other than the States in pursuance of this law shall vest in that person as soon as the award is registered, without the necessity of a conveyance.*"

The status of the Register is dealt with in section 17:

> "*After the date upon which an award is in pursuance of section 10 of this law lodged with the Clerk of the Court no evidence of ownership or of boundaries other than the Register shall be of any legal effect in relation to the interest to which the award relates*".

20. On 31 December 1963, the Land Commissioner made an award in respect of Parcel No. F59. The full award was not provided to the Court of Alderney, but an extract of it, as it relates to Title No. AY2137 (which has been formed from part of Parcels F59 and F60 and has been created out of part of AY271), now owned by the First Appellant, shows in Part IV (*Notes as to Minor Interests*) that "*Access to Parcel No.59 is by right of way over Parcels Nos.76A and 56A to Longis Road the said right of way being shown in full on the Record Plans Nos.5707 and 5807 lodged with the Registrar of Lands Alderney*".

21. The Land Commissioner's Award No. 13 dated 4 February dealt with Parcel No. F56A. At that time, the award recorded that the plot of land comprised a dwelling house, known as "Glenhurst", and land. The site was two vergees and ten perches. This plot had been acquired by Frederick Odoire from Brigadier French CBE by a contract dated and registered 5 May 1961. The boundaries were set out as follows:

> "*North-East: Parcel No.76A (Gauvain Trust) and Parcel No 55 (Mr. and Mrs. G.E.G. Jackson)*
> *South- East: Parcel No.54 (Mrs. C.A.P. Bickerton) and Longis Road*
> *South-West: Parcel No.56 (Mr. F.C. Odoire "Balmoral House") the garden wall between and the gable end of the outbuilding of "Balmoral House" belonging to Parcel No. 56, but the south west wall of "Glenhurst" belongs to Parcel No.56A.*
> *North-West: Parcel No.58 (Mr. F.C. Odoire) the wall between belonging to Parcel 56A*".

 

22. In Part III of the award (*Particulars of Charges and other Adverse Interests*), two rights of way over Parcel No. F56A were set out:

> "*A Right of Way in favour of the owners of Parcels 47, 52 and 55 their heirs successors and assigns exists over Parcel No.56A where shown coloured red on the plan affixed hereto to enable the owners of the said Parcels Nos.47, 52 and 55 their heirs successors and assigns to proceed on foot or with vehicles, but on foot and with animals and a cart so far as Parcel No.47 is concerned, over the said Parcel No.56A to go and come between Longis Road and Valongis Road and the said Parcels Nos.47, 52 and 55.*
>
> *A Right of Way in favour of Parcels Nos.76A (Gauvain Trust) 59 (W.F. Sebire) 76 (Gauvain Trust) 64 (Heirs P. Bott) 66 (Mrs. M.E. Brymer) 72 (J.W. Pezet) 84 (F.C. Odoire) and 85 (Mrs. A.J. Mignot) their heirs successors and assigns exists over Parcel No.56A where shown coloured red on the plan affixed hereto to enable to owners of the said Parcels Nos.76A, 59, 76, 64, 66, 72, 84 and 85 their heirs successors and assigns to proceed on foot or with vehicles over the said Parcel No.56A to go and come between Longis Road and their properties the said Parcels Nos.76A, 59, 76, 64, 66, 72, 84 and 85.*"

23. In Part IV of the award (*Notes as to Minor Interests*), it is recorded that "*The said Right of Way in Parts III and IV hereof shall follow the alignment shown coloured green on the 1/2500 Scale Record Plans Nos.WA 5707 and WA 5807 lodged with the Registrar of Lands Alderney*". The plan attached, although a little unclear, appears to show the colouring following the alignment of the track marked on the plan.

24. Parcel No. F56A was, along with other parcels, transferred on a number of occasions between 1964 and 1974. It was then subdivided, so that Parcel No. F56A comprised land only (of one verge and 38 perches) and a new parcel (Parcel No. F56B) was created comprising the dwelling "Glenhurst" and the remaining land of original Parcel No. F56A as its curtilage. The boundaries described show that to the North and to the East, Parcel No. F56B was bounded by Parcel No. F56A and to the West was bounded (as was the case with Parcel No. F56A) by Parcel No. F56. To the South it was said to be bounded by the Longis Road entrance. Although the exact details of those former boundaries were not transposed completely when Parcel No. 56B was created out of Parcel No. 56A, it appears that the terms of the West and South boundaries were those previously attaching to that part of the land when it was part of Parcel No. 56A. Parts III and IV of the Register entry for Parcel No. 56A were carried forward so as to apply to the owners of new Parcel No. 56B.

25. The other relevant award of the Land Commissioner at that time is Award No. F58 dated 5 February 1964. At that time, the award was in respect of a house known as "Les Jumelles" and land. The boundaries were described as follows:

> "*North-West: Parcel No.56A (Mr. F.C. Odoire) and Parcel No.55 (Mr. G.E.G. Jackson) a wall between Parcels Nos. 54 and 55 for part of the said wall belonging to Parcel No.54. The remainder of the boundary between Parcel No.54 and 55, and also 56A is the southern side of the access track to Parcels Nos.47, 52 55 and 56A.*
> *East: Parcel No.53 (Mr. T.H. Shade) the wall between belonging to Parcel No.54.*
> *South: Longis Road.*"

26. Plan WA5807 was exhibited to Colin Partridge's jointly agreed Witness Statement dated 25 April 2014, at para. 5 of which Mr Partridge explained that this Ordnance Survey map was "*originally surveyed at 1:2500 in 1951, (published in 1961) and overprinted in orange*

*following the supplementary survey in January 1964 to show the extent of the Land Commissioner's awards at the time of the reconstitution of the Alderney Land Register*". To the northern side of Longis Road, it shows (from the West) Balmoral (Parcel No. F56), Glenhurst (Parcel No. F56B) and Les Jumelles (Parcel No. F54). It also slows the markings of the Track running just above the line marking its southern boundary, as described in the Land Commissioner's award in respect of Parcel No. F54. The alignment of the Track runs along the edges of Parcel No. F56A until it joins with the Track in Parcel No. F76A, from which point it runs along the inside of that parcel of land (rather than continuing inside Parcel No. F56A), including along the boundary where Parcel No. F76A is contiguous with Parcel No. F59, before running along the inside of Parcel No. F76 where it bounds Parcel F59 (although the right of way enjoyed by its owner to Parcel No. F59 meant that entry to that parcel needed to be gained before the Track reached Parcel No. F76).

27. From all of these documents, which formed the main evidence in the case, I consider that it was open for the Court of Alderney to conclude that the line of the Right of Way across Parcel No. F56B was prescribed by reference to the description given in the Land Commissioner's award of Parcels Nos. 56A and 59 and the plans affixed to (and so part of) those awards. Indeed, the certainty provided pursuant to section 17 of the 1949 Law by the Alderney Land Register means that it was not open to the Court to conclude that the right of way from which Parcel No. F59 has benefited (and from which Title No. AY2137 now benefits) has ever taken any route other than along the edge of Parcel No. F56B (and round the edge of Parcel No. 56A on onwards as shown on the plan).

28. The ambiguity, if there was any, arose when Parcel No. F56B was created out of Parcel No. F56A in 1974. That possible ambiguity arises from the rather sketchy description of the boundaries of Parcel No. 56B and, in particular, the reference to the southern boundary being "*Longis Road entrance*". That wording could mean that the southern boundary of Parcel No. F56B was the same southern boundary as previously existed for Parcel No. F56A or it could mean that the access Track over which other landowners in the vicinity had rights of way had been retained as part of Parcel No. F56A. If the latter were the case, there would have been no need for Parts III and IV relating to Parcel No. F56A to have been carried forward into Parcel No. F56B. That said, one factor pointing in favour of the latter construction is that there had been no reservation of a right of way for the owners of Parcel No. F56A to reach that parcel of land over the Track if it formed part of Parcel No. F56B at the time. Equally, however, because of the common ownership of Parcels Nos. F56 and F56A, there was no necessity for them to gain access to Parcel No. F56A over Parcel No.F56B. However, these difficulties were resolved by way of an agreement dated 5 September 2003.

29. At that time, Parcels Nos. F56 and F56A (and also Parcel No. F58) were owned by the Second Appellant and his late wife. They had purchased their property, now known as "The Vines", on 5 October 1995 from the estate of the late John Arlott. The Title No. became AY1407. Parcel No. 56B was owned at that time by Carole Blumberg. The Title No. became AY1408. As the Second Appellant stated in his evidence, he and his wife believed they owned the Track and their neighbours, Mrs Blumberg and her husband, believed that they did. As the Second Appellant also explained, the previous owner of Glenhurst, Mr Waterfall, had built a garage in or around 1978 in the north-eastern corner of what was Parcel No. F56B. The Blumbergs used that garage and, as the Second Appellant commented, "*the only way he could get out of his garage, when we moved into the property, was to come across our land*". This is a reference to leaving Parcel No. F56B across its eastern boundary into Parcel No. F56A before reaching the Track.

 

30. Against that background of how matters stood in 2003, the Second Appellant and his late wife agreed with Mrs Blumberg (who called her house "L'Eventail") that they would sell "*all such right, title and interest as Mr and Mrs Williams shall have in that area of land shown edged red on the plan attached hereto ("the Plan") as shall form part of AY1407 and being part of a track at Longis Road in the Island of Alderney such that the area of land shown edged red on the Plan shall henceforth be the property of Mrs Blumberg*". The purchase price was £5. I will refer to this document as "the 2003 Agreement".

31. The wording used in this agreement appears to have been carefully chosen so as not to make an absolute assertion that the Second Appellant and his late wife did own the area of land in question. Indeed, the reduced area of land recorded in the Land Register in relation to Parcel No. 56A might have been used as a means of ascertaining whether the area of the Track had been conveyed on not in the 1970s. However, the 2003 Agreement's terms removed any remaining question as to who owned that land.

32. In addition, the Second Appellant and his late wife retained, and Mrs Blumberg granted "*a right of way for themselves and their successors in title to come and go at all times and for all purposes with or without vehicles of any kind over the area of land shown edged red on the Plan*" and also "*the right for themselves and their successors in title to lay public utility services in the area of land shown edged red on the plan and the right to break open the said land in order to maintain, repair and relay the public utility services*". Because of the positioning of the garage on Mrs Blumberg's land, the parties also agreed to formalise the right of way that existed over the land of the Second Appellant and his late wife with the grant to Mrs Blumberg and her successors in title of "*a right of way over the areas shown coloured blue on the Plan to come and go at all times and for all purposes with or without vehicles of any kind between AY1408 and Longis Road*" and "*the right for themselves and their successors in title to lay public utility services in the area of land shown coloured blue on the plan and the right to break open the said land in order to maintain, repair and relay the public utility services*". The parties further agreed that "*The rights reserved and granted in paragraphs 3 and 4 above shall continue in perpetuity and notwithstanding the respective uses to which AY1407 and AY1408 shall be put and notwithstanding their sub-division*".

33. As a result of the 2003 Agreement, any doubt that existed as to who owned the land over which the right of way given to *inter alia* the owner of Parcel No. F59 was removed. The land over which the Track shown on Plan WA5807 ran formed part of Title No. AY1408. Further, the owners of Title No. AY1407 had obtained the express right to pass over an area of land marked on the Plan forming part of the 2003 Agreement.

34. The Plan itself has some measurements on it, but does not contain measurements relating to the hatched area edged red. The hatched area edged blue is shown in greater detail with a series of measurements on it, showing where wooden fence posts had been put into land forming part of Title No. AY1407. The gateway alongside the front of the garage on Title No. AY1408 is 15 feet wide. The hatched area at its southernmost point is 27 feet wide. The blue edging does not appear to extend as far as the continuous line that appears to correspond to the line on Plan WA5807. Similarly, the hatched area edged red also does not appear to extend as far as that continuous line. There is also a line of long dashes marking the northern (or north-western) edge of the red-edged hatched area. The dimensions given for the garage show its width as 17 feet and 1 inch and its length as 20 feet and 8 inches. The distance from the front of the garage to the line of long dashes is shown as 17 feet. Accordingly, it was

 

open to the Court of Alderney to conclude that the area edged in red corresponded, at its northern (or north-western) extreme, with that line of long dashes. Indeed, given the measurements on this plan, it would have been possible for the location of part of the red edged area to be ascertained by reference to the edging linked to the line of long dashes at a distance of 17 feet from the front of the garage.

35. The Register entry in respect of Title No. AY1407 records that "*The area of this title has been reduced by transfer of part to AY1408 on 3rd October 2003. See Plan filed*". In Part III (*Charges and Adverse Entries Register*), it is confirmed that "*The land is subject to the rights contained in the Land Commissioner's Award dated 4th February 1964*". With the note "*This entry affects the part formerly described as F56A*". Further "*The land in this title is subject to but has the benefit of the rights contained in an Agreement dated 3rd October 2003 made between Colin Williams and Millicent Williams (1) and Carole Kathleen Blumberg (2)*". In Part IV (*Minor Interests Register*), there is reference to the land having the benefit of the rights in the Land Commissioner's award and those set out in the 2003 Agreement.

36. The Register entry in respect of Title No. AY1408 records that "*The extent of this title has been increased by transfer from AY 1407 on 3rd October 2003. See plan filed*". In Part III, there is a similar entry to that detailing the 2003 Agreement. It also states "*The area of land formerly forming part of F56A in Section 5 and transferred on 3rd October 2003 is subject to rights and burdens as set out in the Land Commissioner's Award dated 4 February 1964*". This is repeated in Part IV, where there is also further reference to the 2003 Agreement.

37. The date of registration of the transfer of Title No. AY1408 from Mrs Blumberg to the Respondents was 26 April 2004. The Respondents, therefore, purchased in the full knowledge of the terms of the 2003 Agreement. The Respondents have reverted to using the original name for their house, Glenhurst.

38. The date of registration of the transfer of Title No. AY2137 to the First Appellant was 13 April 2007. Part IV of the entry records that "*Land in this title has the benefit of the rights contained in The Land Commissioner's Award filed in AY0271 dated 31st December 1963*".

39. It is acknowledged by everyone concerned that the First Appellant's land is zoned for residential development and that he has sought planning permission. One of the underlying elements of this case is that the States of Alderney's Building and Development Control Committee is unlikely to grant the permission sought if the First Appellant is unable to satisfy the Committee that there is a means of access of approximately 14 feet wide. It is also acknowledged by everyone concerned that the Second Appellant's land could be used for residential development, subject to the same question of ensuring adequate access. The motivation of the Appellants for seeking the relief they have is clearly to be in a position to satisfy the Committee that the planning options can properly be pursued. There may still be other hurdles for them to surmount in that regard but the first is to ascertain the width of the land over which the rights of way exist.

40. Mr Partridge's evidence explains that he "*carried out a full survey of the features "on the ground" to produce the Plan*" he appended to his covering letters to the parties dated 2 January 2014 and also to his Witness Statement. In his letter, Mr Partridge repeated what he had told the parties orally, namely that "*the drawing shows the line of the original track projected from the O.S. plan to a reasonable accuracy obtainable by grid transfer; I estimate the accuracy to be within ± 150mm which, for this purpose, serves to fix the width and line of*

*the track relative to Longis Road on which my baseline was established*". At that stage, Mr Partridge also comments that "*it is quite evident that the existing track does not follow the alignment of that taken from the O.S. plan, and upon which the original legal titles for the three adjoining properties are based*" and that he made "*no attempt at this time to show where the boundary lines fall in relation to the track. These are issues which ought to be resolved through the goodwill of the parties in light of the survey findings, with the object of reconciling the respective Land Registry entries*".

41. In his Witness Statement, Mr Partridge explained about the lines on the Ordnance Survey plan used (WA5807) that "*These dotted lines represent a track that would have been observed running across the area of land in question*" (para. 5). He further explained about OS maps that (at para. 6):

> "*Generally features such as walls, fences, hedges or buildings are shown by solid black lines. Features such as where two different surfaces meet are shown by dotted black lines. Features such as a track where the land on either side is in the same ownership will not be recorded as an important feature. They are recorded to define the position or extent of any features.*"

Mr Partridge highlighted the fact that any form of mapping is done to certain defined tolerances.

42. Paragraphs 7 to 11 of his Witness Statement then set out his opinion on how to interpret the plans affixed to the awards:

> "*7. The dotted lines should not therefore be taken, by themselves, as evidence that the track ran between those lines. However, a clear distinction should be recognised on the OS Map between the dotted black lines (drawn at the time of the original survey in 1951) and the orange overprint (drawn at the time of the supplementary survey in 1964). The overprint shows a solid orange line on the Southern edge of the track to indicate the division between Parcels 54 and 55, and a dotted orange line on its Northern side to confirm the existence of the track.*
>
> *8. The dotted lines on the OS Map can nevertheless be used, together with other available material, and the evidence on the ground, to help draw an inference of what the intention was regarding the location and purpose of the track over which rights of way were granted. In transferring those lines from the OS Map to the Plan, I should make clear – for the avoidance of doubt or misconstruction of any statement made to the parties in my letter of 2nd January 2014 – that no measurement taken from the Plan can be stated as the definitive width of the track at the time of the 1951 survey due to the small scale of the OS Plan.*
>
> *9. In my opinion, the Southern line of dots drawn on the Plan is likely to be a reasonably accurate indication of the Southern edge of the access track at the time the rights were granted. This opinion is based on the line of the OS Map, the features on the ground on this edge (particularly the trees and gate posts), and the projection of the track to westward from the existing boundary wall to Parcel 54A ("the remainder of the boundary between Parcel No.54 and 55, and also 56A" being described in the relevant title as "the southern side of the access track …").*

> *10. This opinion is borne out by the overprinting with a solid orange line of the Southern edge of the track in 1964, establishing the fact that there was now a boundary between properties along that line. To summarise the English Land Registry guide, a line that appears to define the extent of a boundary is higher up the hierarchy of importance of features to be recorded.*
>
> *11. In my opinion, the black and orange overprinted dotted line on the Northern edge of the access track bears reference to the fact that no defined physical feature existed at the time of the original 1951 survey or the 1961 supplementary survey, and that it did not form a boundary between properties at those times. The small scale of the OS Map prevents accurate measurement and cannot be used in drawing any inference as to the extent of the width of the track.*"

43. In the light of that evidence, there can, in my view (although subject to what follows), be no dispute by the Appellants about the finding of the Court of Alderney that the southern boundary of the area of land over which the Appellants can exercise their rights of way runs along the line on Mr Partridge's plan of the land area in question. That finding is consistent with the boundary with Title No. AY1374 and the other awards that define the alignment of the right of way. It is consistent with the evidence, which I can infer the Court of Alderney accepted, of Mr Partridge. The fact that works have been undertaken over that land in such a way that the bank at various times in the past, represented by the loose boards and shown on that Plan as an "*Indeterminate line*", does not affect the finding. Advocate White accepted as much, and this appeal is not about that aspect of the findings of the Court of Alderney.

44. The real question is whether there was evidence adduced to the Court of Alderney that means that its finding about the northern boundary cannot be sustained.

45. Mr Partridge's expert evidence did not result in any firm conclusion. It did leave the possibility that the Court of Alderney could have started from the premise that the plans attached to the original awards of the Land Commissioner showed that the right of way now enjoyed by the First Appellant to his parcel of land ran over the Track as shown from the colouring on the plans. I take the view that there was material from which the Court of Alderney could have drawn the inference that the area of land over which the right of way was granted was as narrow as what would be required to get a vehicle (ie, a single carriageway) along the edge of that parcel of land to the various other parcels to which such access was granted. That was the reason why the track was delineated as running close to the fixed southern boundary. It would then have been a matter for the Court to have decided what width was covered by that permitted use and how, if at all, to accommodate where a vehicle is travelling in each direction at the same time. In the event, having regard to the land as they saw it on the *Vue de Justice*, the Court of Alderney reached a conclusion more generous than the dotted lines shown on Mr Partridge's plan which were taken from that OS Map, and, in doing so, explained that it was accepting the evidence that nothing specified the width and that the Chairman and Jurats were, as Advocate White had invited them to, exercising their discretion.

46. In doing so, they referred to the decision of the Court of Appeal in *Singleton v Le Noury* (unreported, 5 June 1990, digested at 9.GLJ.48). This was a case in which the Royal Court had found that the width of the right of way in question was 15 feet, when the appellants had argued for 10 feet. The Court of Appeal, presided over by the Bailiff, Sir Charles Frossard confirmed that the *Code Civil* had no application because "*The commentators on the coutume set out in detail the law to be applied*". Advocate Le Poidevin had submitted that, by

 

reference to a passage from Basnage, *Commentaires sur la Coûtume de Normandie*, 4th ed, 1778, Vol. II (from page 559 and quoted extensively in the judgment), "*if the words creating the servitude are silent both as to the "assiette" and "modalité", i.e. place and width of the right of way, then firstly the owner of the servient tenement can designate the place over which the servitude is to be exercised and in default the Court can decide the place and width of the servitude*". In the present case, there is no issue about the place, or location of the land, over which the rights of way can be exercised, but rather a question of the width of area covered. The Court of Appeal determined that:

> "*The Court is also satisfied that the Royal Court has jurisdiction in proper cases, after hearing evidence, to determine the width of a right of way.*
>
> *In the case under consideration the Court will not alter the finding of fact of the Jurats who had the benefit of a "vue de justice" (1) that the opening shall be 15' wide and the northern limit of that opening shall be 22' from the Respondents' southern boundary, and (2) that the Respondents' right of way is exercisable over the area marked in red on the plan attached.*"

47. It was on the basis of that decision that the judgment of the Court of Alderney recorded that Advocate White had submitted that the Court had a discretion, after hearing and reading the evidence, to determine the width of the rights of way and, in doing so, whether the Appellants' claim for a declaration that the widths of the rights of way they have over a track on the Respondents' land is fourteen feet should be granted.

48. One thing that everyone accepted was that there was nothing in writing specifying the width of the Track or the area over which the rights of way exist. To that extent, the conclusion reached by the Court of Alderney is clearly not inconsistent with anything in writing.

49. As I have already explained, the material placed before the Court of Alderney left the Chairman and Jurats with a number of possible conclusions. The outcome for which the Appellants argued was effectively for a declaration that the width of the track over which they are permitted to exercise their rights of way to come and go, particularly with vehicles, is fourteen feet. In the absence of any written confirmation of that width, the Court was necessarily left to consider the evidence given and to draw inferences from the documents.

50. There was no direct evidence from anyone about the width of the right of way when it was created. The Second Appellant did not come to the land until 1995. At that time, the area known as the Rockery had already been created and he had some discussions with the Blumbergs which led to his "*understanding ... that the rockery was installed to narrow the track to deter people from using it*". He was clear that "*the rockery was in the track*". However, he also confirmed that, at that time, he could not tell where the edge of the track was if it was not the rockery but rather that he assumed that, "*where the wall behind the rockery was, the original, what I always called the original wall, I don't know whether that's correct or not either. There's a wall with the rockery built in front, and I assumed the track originally had been adjacent to where the wall was*". When asked about the 2003 Agreement, the Second Appellant said "*I don't think I thought about how wide it was*". He added "*I assumed right from day one, when we moved into the property, that the track was that width all the way along, I couldn't see any reason why it wouldn't be, why would you have a track that went fourteen feet, or whatever it is, all the way round, and then all of a sudden became narrower, narrow in part at least because there was a rockery been put on it by Mr Blumberg,*

*which I understood, when I talked to him, was done to restrict the width of the track, to deter access*".

51. As such, because the Second Appellant's evidence was based on his assumptions and what he had been told, which may or may not be consistent with what is shown in the Land Commissioner's awards, it was, in my judgment, permissible for the Court of Alderney to decline to give the relief sought by the Appellants relating to a width of fourteen feet. It would have assisted the parties to have had a little more detail explaining why the Court rejected the Second Appellant's view that the width of the area over which the First Appellant's right of way across his (the Second Appellant's) land was uniformly fourteen feet and so it must have been fourteen feet over the land that became Parcel No. F56B (now Title No. AY1408), whether because the Track was part of the original grant or by virtue of the 2003 Agreement. However, I take the view that it is sufficiently clear from the findings made by the Court of Alderney that it is implicit that they took more account of the physical layout of the land as they found it at the *Vue de Justice*, all in the light of Mr Partridge's drawings, which suggested that the extent of the Track taken from the 1964 OS Map was not, at the relevant point, as wide as the fourteen feet claimed.

52. In particular, the findings of the Court of Alderney show that the Chairman and Jurats determined that the width of the Track varies, which is tantamount to rejecting the evidence of the Second Appellant that he assumed the width would be uniform along the entire length of the Track. In relation to what the Second Appellant said he had been told about the construction of the Rockery, it is also implicit that the Court chose not to rely on the implication that the width of the Track had been believed by the Blumbergs to extend to the area of land on which the Rockery had been constructed. Again, although it would have been more helpful for the Court to have stated this expressly, I take the view that the inferences to which I have referred are sufficiently obvious that the Court's reasoning about what it has accepted and what it has rejected is adequate.

53. As regards the submission that the Court failed to take into account the need of the Appellants for the minimum width of access for which they had argued so as to facilitate residential development, I regard that as not being a factor material to the decision the Court was obliged to reach, so any omission to address that contention does not render the decision flawed. The task of the Court of Alderney was to fill in the missing gap, namely the width, in respect of the express grant of the Appellants' rights of way. In doing so, the Court was looking at the situation throughout the time that the rights of way have existed and not just looking ahead to consider what rights of way can be exercised for whatever purposes in the future.

54. In those circumstances, the decision of the Court of Alderney to refuse to make the declaration sought by the Appellants must, in my judgment, be upheld and the relief for which they have argued on this appeal cannot be granted. The primary decision of the Court of Alderney on the Appellants' case as pleaded before them must, therefore, follow. The secondary question for me is whether, in the light of the analysis I have undertaken, I should also uphold the decision of the Court of Alderney to make the declaration it did and to grant the relief ancillary to it that forms part of their judgment.

55. From the description of the grants of the rights of way, it strikes me that the Appellants' case may well have proceeded on an incorrect basis. The area of land over which the First Appellant has a right of way may well be different from that over which the Second Appellant

 

has a right of way. This distinction potentially arises because of the different terms of the two express grants.

56. In the First Appellant's case, the grant is that set out in the Land Commissioner's award. The terms of the grant refer to the right of way over the Track as shown coloured red on the attached plan. On the basis that the central question for determination in his case has always been the width of the Track, the declaration made is not, in my judgment, inconsistent with the evidence given, nor does the Court's judgment lack reason. As I have noted, the Court acknowledged that it was being invited to determine the width because the terms of the grant had not settled its precise width. By reference to Mr Partridge's drawing, it was open to the Court of Alderney to conclude that the strip of land running along the edge of the Respondents' land over which the First Appellant can exercise his right of way is narrower than the area they decided should form the basis of their decision. As an exercise of the discretion vested in the Court of Alderney, I cannot find fault with its conclusion that it should not be as prescriptive as that because Mr Partridge himself had drawn attention to the dangers of simply scaling off the 1964 OS map. The decision of the Court of Alderney to have regard to the features on the ground today and the general "usability" of the Track, widened a little as the Court found, being consistent with the evidence adduced, is, in my view, the type of decision with which an appellate court should not interfere.

57. However, the position of the Second Appellant is, I think, potentially different because the right of way recorded in the Land Register is that reserved and granted by the 2003 Agreement and not the original grant of the Land Commissioner in his awards. The right of way enjoyed by the Second Appellant and his successors in title extends only over the piece of land identified by the plan associated with the 2003 Agreement. If the area of land in question is co-extensive with the land over which the First Appellant may exercise his right of way, then there is no difficulty with the same reasoning applying in his case. Because both Appellants argued their cases from the same premise, that is, of course, sufficient for the conclusion of this Court to be the same in respect of both of them. However, from my consideration of the material for the Land Registry, I am not convinced that the Court of Alderney, if it had been invited to do so, would have reached that conclusion because of the measurements on the plan forming part of the 2003 Agreement not having been transposed into Mr Partridge's drawing. If that exercise showed that the area of land conveyed, and over which rights of way were reserved, is different from the width of the Track measured from the settled Southern boundary with Title No. AY1374, I do not believe the Court could have made a decision that the rights of way are over exactly the same area.

58. In this respect, I have reminded myself that my task is not to substitute the decision I would reach on the basis of the material placed before me, but rather to consider whether the findings of the Court of Alderney are those which the Court could reasonably have come to on the basis of the evidence before it. Moreover, I am conscious that the Respondents have not sought to challenge the judgment of the Court of Alderney, albeit that the consequences of the relief ancillary to the main declaration about width will require them to undertake works along the Southern boundary to enable the Appellants to exercise their rights of way over the full width of the land available to them. Accordingly, whilst the justice of the matter might best be served by substituting for the decision of the Court of Alderney that the Appellants' case stand dismissed, thereby leaving the parties to engage in further discussions with a view to resolving any remaining differences, I have decided that the only outcome that I can properly reach is to leave in place the order of the Court of Alderney.

 

## Conclusion

59. For the reasons given, the Appellants' appeal is dismissed. The terms of the order of the Court of Alderney are, therefore, upheld.

60. As regards the costs of this appeal, I would expect costs to follow the event and for the Respondents to have their costs, if any, on the standard basis. If either party wishes to suggest a different costs order, an application in writing should be lodged within 14 days following the handing down of this judgment.