Appeal from a decision of the Court of Alderney to amend the Alderney Land Register regarding a right of way granted to Land Parcel AY34 over Parcel AY35. The issue is whether the Court of Alderney had jurisdiction to hear the Second Application or whether the Court had no jurisdiction on the ground that the cause of action was res judicata. Appeal allowed and second judgment of the Alderney Court set aside.

[2022]GRC048

IN THE ROYAL COURT OF GUERNSEY
ON APPEAL FROM THE COURT OF ALDERNEY

DEBORAH ANNE LEWIS

Appellant

-AND-

EMMA SMART ODOLI

-and-

LOUIS WILLIAM SMART ODOLI

Respondents

Before Sir Richard John Collas, Lieutenant Bailiff

Hearing Date: 23 May 2022

Judgment Handed Down: 14 July 2022

Counsel for the Appellant: Advocate N J Barnes

Counsel for the Respondents: Advocate J Schaefer

Cases and Legislation referred to:

The Alderney Land & Property Law, 1949
Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd [2014] A.C. 160 (2013)
Henderson v Henderson (1843) 3 Hare 100
Arnold v National Westminster Bank plc [1991] 2 AC 93

Introduction

1. In a Judgment dated 10th March 2022, the Court of Alderney (Jurat N L Hunter, Chairman, and Jurats P Durston and L Sanders) allowed an application to amend an entry in the Alderney Land Register regarding a right of way granted to Land Parcel AY34 over Parcel AY35. The same right of way had been the subject of an earlier Application and Judgment of the Court of Alderney (Jurat N L Hunter, Chairman, and Jurats I Murdoch and A Finding) dated 16th March 2016 in which the Court had

amended the entry relating to Land Parcel AY35 by noting the right of way in favour of parcel AY34 as a Minor Interest. I refer to them as "the First Application" and "the Second Application". The issue in this appeal to the Royal Court is whether the Court of Alderney had jurisdiction to hear the Second Application or whether the Court had no jurisdiction on the ground that the cause of action was *res judicata*.

The Land Parcels, AY 34 and 35

2. The two Parcels were a single Parcel, F263A, until 19th June 1986 when the then owners, Ron Smart and his wife, transferred half each to their two sons. One of whom, Ron Smart Junior (also known as John) and his wife received Parcel F263A(2) which, after digitisation of the Land Register, was redesignated as Parcel AY35 and later, on 1st September 2015, was transferred to Deborah Anne Lewis ("the Appellant" and "Ms Lewis") and her father, Richard Donald Lewis for themselves and for the survivor of them absolutely.

3. The other half of Parcel F263A, designated as F263A(3), was transferred to their other son, Alan Smart and his wife who later gifted part of it to their son, Tim Smart, designated as F263A(4) on 25th October 1990 before the two parts of that sub-plot were consolidated under the sole ownership of Tim Smart on 20th August 1993 as Parcel F263A(4). On digitisation, it was redesignated as Parcel AY34. On 9th February 2006, it was transferred to Emma Smart (now Odoli) as guardian of Louis William Smart (now Odoli) with life interest reserved to Emma ("the Respondents" and "Ms Odoli").

The First Application and the Judgment of 16th March 2016

4. Prior to the First Application to the Court of Alderney in 2016, the right of way was recorded as a Minor Interest in the Land Register entry relating to Parcel AY34: *"This parcel has a right of access to Route de Picaterre over the land coloured brown on the said plan [dated 25 October 1990]"*. However, there was no corresponding Minor Interest in the entry relating to parcel AY35. On 30th October 2015, the Appellant and her father as owners of Parcel AY35, the servient property, applied to the Court of Alderney, under Section 22 of the Alderney Land & Property Law, 1949, ("the 1949 Law") to rectify the Land Register by striking out the right of way recorded in favour of Parcel AY34, on the ground that *"an Agreement to grant such right of access was never made, consented to, documented nor registered by the owners of Title at the time of AY35 or its predecessor in Title number"*. They exhibited to the First Application a number of documents, including correspondence exchanged between the parties in which Ms Lewis had contended there was no right of way and Ms Odoli had asserted the opposite.

5. On 30th November 2015, Crown Advocate J Hill, instructed by the Land Registrar, filed a written submission stating that the Land Registrar had no interest in whose favour the right of way issue was resolved. He also recommended that Ms Odoli be made a party to the First Application.

6. Ms Odoli lodged with the Court of Alderney a response to the First Application in which she wrote: *"I am happy to let the Court of Alderney confirm that my access and my Land Registry documents are correct."* Also, *"I have signed plans and documentation from all parties, clearly showing joint access as being correct (dated*

1990)" and, *"The configuration of the plots may have changed, but the joint access road has always remained the same."*

7. The Respondents' contentions were clearly set out in some of the correspondence exhibited to the First Application. They included *"a Document entitled "Registration of Title F.263(A(4)""* to which was attached a copy of a plan dated 25 October 1990 and *"THE ALDERNEY LAND REGISTER TITLE NUMBER AY34"*. In a letter dated 2nd October 2015, Ms Odoli had written that:

> *"The first document clearly records, under "PART IV NOTES as to Minor Interests", that my property has a right of access to the public road over your property, in accordance with the Plan. Similarly, you will observe that the second document, a copy of the Land Registry for my property as of 10 September 2015, records precisely the same right of access in favour of my property. Accordingly, the assertion in your letter of 3 September 2015 that "…there is no right of access to [my] property recorded on the Land Registry" is incorrect.*
>
> *The Plan plainly shows, marked in brown, the extent of my right of access over your property to the public road. In fact you will note, according to the Plan, the marked access route is jointly owned by us."*

There was also a letter from Advocates Carey Olsen dated 16 October 2015, written on the instructions of Ms Odoli, which referred to her letter of 2 October and repeated the statement that *"our client's property has a right of access to the public road over your property, in accordance with the route marked out in brown in the Plan dated 25 October 2015"* (which is presumed to be a reference to the plan of 1990).

8. With the agreement of the parties, the Court of Alderney heard the matter "on the papers", without a Vue de Justice and without hearing oral submissions. Having reviewed all the documents and the submissions, the Court ordered that:

> *"1. The Land Registrar is directed that Parcel AY35 should have the Minor Interest referred to on Parcel AY34, which grants a right of way to AY34 across the Parcel AY35, added to the Charges and Adverse entries of that Parcel AY34.*
>
> *2. The right of way so mentioned will be as indicated as the area marked in brown on the land registry file for the parcels and the maps contained therein.*
>
> *3. The right of way will remain at its current width, being not less than 10ft to enable single vehicle access to Parcel AY34.*
>
> *4. The right of way will remain part of the title of Parcel AY35, and the owners of said parcel shall take all necessary steps to allow free usage of the Right of Way.*
>
> *5. The Court makes no order as to costs."*

The Second Application and the Judgment of 10th March 2022

9. After five years of uninterrupted access, Ms Lewis issued a new challenge on the basis that the access road on site was not in the position marked on the plan. She also wrote to the Respondents' estate agents who had been instructed to offer the property for sale putting them on notice of the dispute, with the consequence that the Odoli property became unsaleable. On 28th January 2022, Advocate Schaefer, instructed by the Respondents, issued a summons against Ms Lewis, pursuant to section 22 of the 1949 Law seeking a declaration that the right of way should be in the location where it existed on 16th March 2016 and not as represented on the plan at the Land Registry.

10. Advocate Barnes, instructed by Ms Lewis, responded on the ground that the Judgment of 16th March 2016 constituted the final adjudication of the Court and could not now be challenged so the Court had no jurisdiction to hear the matter.

11. The Court of Alderney dismissed Advocate Barnes' submission, holding that neither side was *"having a second bite of the cherry"* because, in the Court's earlier decision *"they were not asked to determine the location of the Right of Way, and the current "on the ground" location was not questioned by either party".* In the Judgment of 10th March 2022, the Court said that when the First Application was decided, the Court was led to believe that the plan at the Land Registry *"had some degree of accuracy"* but having conducted a Vue De Justice, the Court held that the plan was inaccurate and that the topography of the properties favoured a right of way where it was rather than as shown on the plan. The Court ordered that the plan at the Land Registry dated 15th October 1990 be replaced by a plan that had been drawn by Mr Pimm-Smith in connection with the Second Application showing the access road in the position where it was on site, which is where it had been for a number of years.

The Parties' Submissions on Appeal

12. Advocate Barnes relied on the principles of res judicata set out by Lord Sumption delivering the judgment of the Supreme Court in Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd [2014] A.C. 160 (2013), submitting that this is a clear example of cause of action estoppel.

13. Responding on behalf of the Respondents, Advocate Schaefer focussed on three issues in her oral submissions. First, she said that the factual matrix was such that res judicata did not apply. Second, she relied on the Court of Alderney's responsibilities, together with the Land Registrar, under the provisions of the 1949 Law to maintain and, on occasion, rectify the Land Register. Third, she submitted that res judicata could, if required, be disapplied, given the existence of special circumstances.

14. She said that as Jurat Hunter had chaired the Court of Alderney on both occasions, the Jurats were well placed on the Second Application to hold that the Court had not been in possession of the full, correct, facts when it had determined the First Application. The only issue at that time had been the question of whether a right of way existed, Ms Lewis had not raised its location, so the site of the access was not brought to the Court's attention with the result that the Court had assumed it was in the correct position. On the Second Application, the Jurats found that the Court's assumption had been wrong which, being a factual finding of the Jurats, could not be reversed on appeal.

15. The power to rectify the Land Register is set out in section 25 of the 1949 Law including in circumstances where *"(a)…the Court is of the opinion that rectification is required, and makes an order to that effect"* and *"(g) in any other case, by reason of an error or omission in the Register, or by reason of an entry made under a mistake, it is deemed by the Court to be just to rectify the Register."* Advocate Schaefer submitted that having found that the topography of the site was unsuitable for a right of way in the position indicated on the plan at the Registry, the Court was right to hold that a mistake had been made which the Land Register could be ordered to rectify in pursuance of the provisions of that section of the1949 Law.

16. Alternatively, the special circumstances that exist in the present case which enable res judicata to be disapplied arise from the concession that Advocate Schaefer said Ms Lewis made in response to the First Application when she declined to challenge the location of the access road. Furthermore, in its Judgment of 10th March 2022, the Court of Alderney was merely making orders to give effect to what the Court thought it had ordered in its Judgment of 16th March 2016.

Decision

17. The Respondents contend that the Second Application involved a fresh cause of action because the First Application was only concerned with the existence of the right of access, not its location. Cause of action estoppel was explained by Lord Sumption in Virgin Atlantic as the first principle of res judicata *"precluding a party from challenging the same cause of action in subsequent proceedings"* (para 17 of the judgment). At para 18, Lord Sumption cited with approval Wigram V-C's statement of the law in Henderson v Henderson (1843) 3 Hare 100 which he described as the starting point of the statement of principle:

> *"…where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicate applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".*

18. Lord Sumption reviewed the House of Lord's decision in Arnold v National Westminster Bank plc [1991] 2 AC 93 in which Henderson v Henderson had been more fully examined. He cited, with approval, Lord Keith of Kinkel's definition of cause of action estoppel, when distinguishing it from issue estoppel:

> *"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject*

matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permits the latter to be reopened…"

He said, at para 22, that Arnold was authority for the following propositions:

"(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

Lord Sumption concluded, at para 26:

"Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against re-litigation of identical claims."

19. Applying those principles to the present appeal, I have to consider whether the dispute as to the location of the access road could with reasonable diligence and should in all the circumstances have been raised in the First Application. In its Judgment of 20th March 2016, the Court did not limit itself to deciding whether a right of way existed but it went on to direct the Land Register to record the right of way as a Minor Interest on the Title to land parcel AY35 *"as the area marked in brown on the land registry file"*. From the documents attached to the First Application, it is not surprising that the Court came to such a decision. There was no onus on Ms Lewis to raise the location of the access road, her case was that there had been no agreement to grant a right of way and the substantive issue before the Court was that the right of way was recorded as a Minor Interest recorded in AY34's Title but not replicated in AY35's Title. Ms Odoli's response to the First Application invited the Court to find that her *"access and [her] Land Registry documents are correct"* and in correspondence written before the Application was issued, both Ms Odoli and her Advocate had asserted that the right of access was in the position marked in brown on the plan. A reasonable interpretation of her response is that although she had not filed a cross-application, Ms Odoli was asking the Court to order that the right of way be recorded on AY35's title in the same terms as the Minor Interest on her title.

20. The documents in the First Application to which I have referred to do not support the submission made on behalf of the Respondents in this appeal that it was a concession

on Ms Odoli's part not to challenge the location of the access road in the First Application. The Court of Alderney observed that the access road on site is not in the position marked in brown on the plan but it cannot be criticised for having failed to know that when it was asked to decide the First Application "on the papers" and without a Vue de Justice. The error is obvious on site and with reasonable diligence, either of the parties could have informed the Court of the discrepancy but they failed to do so.

21. Arnold is authority for the proposition that res judicate may be disapplied but only in special circumstances, such as fraud and collusion, which do not exist in this case.

22. In its Judgment of 10th March 2022, the Court sought to discharge its responsibilities towards the maintenance of the Land Registrar by ordering that the Land Registry particulars of both properties accord with the position on the ground. The Respondents contend that the 1949 Law imposed a duty to do so on the Court but the principle of res judicata is a fundamental legal principle, precluding parties from challenging the same cause of action in subsequent proceedings and it has not been revoked or varied by the 1949 Law. The salutary lesson for any litigants contemplating any application to the Court of Alderney, whether under the 1949 Law or otherwise, is to ensure that they diligently bring forward their whole case with all the matters that properly belong to the litigation.

Decision

23. For the reasons I have given, I allow the appeal, setting aside the Judgment of the Court of Alderney of 10th March 2022. I will hear any application for costs that is tabled within fourteen days of the handing down of this judgment but costs normally follow the event so I will require persuasion before making any order other than that the Appellant's costs of the appeal and the costs of the hearing before the Court of Alderney be paid on the recoverable basis by the Respondents.