



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

CAUSE NO. G 67 OF 2023

BETWEEN

**BOGGY SANDS DEVELOPMENT LTD
THE PROPRIETORS OF STRATA PLAN NO. 823**

PLAINTIFFS

AND

THE PROPRIETORS, STRATA PLAN NO. 70

DEFENDANT

IN OPEN COURT

Appearances:

**Mr. Waide DaCosta of Waide DaCosta Attorney-at-Law for the
Plaintiffs**

Mr. James Kennedy of KSG Attorneys at Law for the Defendant

Before:

The Chief Justice, The Hon. Justice Ramsay-Hale

Heard:

4 and 5 June 2024

Draft Judgment circulated 6 September 2024

Judgment delivered: 11 September 2024

Land Law - Right of way - Extent - Express grant - Whether power in dominant owner to extend grant of right of way to non-dominant land - Rule in Harris v Flower - Whether right of way abandoned by unlawful user - Obstruction by gates

JUDGMENT

INTRODUCTION

1. Boggy Sands Club is a luxury condominium development on the West Bay Road consisting of 18 four-bedroom condos with the last two condominiums in the approved development currently under construction. The condominiums are housed in five building blocks on two separate parcels of land. In these proceedings, the parties have referred to these parcels as the West Lot and the East Lot. The development on the West Lot is registered as Strata Plan No. 823. The Proprietors of Strata Plan No. 823 (“Strata 823”) is the Second Plaintiff. The development on the East Lot is registered as Strata Plan No. 919 (“Strata 919”). It is not a party to these proceedings but the acts of its proprietors and guests are relevant to the issues to be resolved in the present dispute between the Plaintiffs and the Defendant strata, Strata Plan No. 70, which is a four-unit condominium complex known as Windsong on the Boggy Sand Road in West Bay (“Windsong”).
2. The Boggy Sands Club is successfully operated as a condo resort (the “condo resort”). It is heavily marketed on Airbnb and most of the guests are short-term holiday makers. Owners and guests of the condo resort enjoy the use of an amenity parcel on which a pool pavilion has been constructed. This amenity parcel, referred to in these proceedings as the Pool Lot, is owned by the First Plaintiff, Boggy Sands Development Limited (“BSDL”), a company limited by guarantee. Its members are Coen Coleman Limited, which was the developer of the condo resort and is presently the property manager, as well as Strata 823 and Strata 919. The Pool Lot has a right of way over Windsong to the Boggy Sand Road to the south.
3. The dispute between the parties has arisen because the right of way is being used by the owners of the Pool Lot and the owners and guests of the condo resort to access a beach amenity lot on the Boggy Sand Road, which was acquired for the use and enjoyment of guests of the condo resort.
4. The West and East Lots were undeveloped parcels of land until the condo resort was built. The increased foot and vehicular traffic over the right of way since it has been developed has been the source of much consternation to the owners of Windsong, not least because many of the holiday makers veer off the driveway built over the right of way and on to the owners’ private property and otherwise make a nuisance of themselves.
5. In order to preserve their peace of mind, the residents of Windsong erected a gate for the purpose of indicating to the guests of the condo resort that the property they were traversing was in fact private property and not a part of the condo resort.

6. In response to the erection of this gate, the Plaintiffs have instituted these proceedings seeking, *inter alia*, a declaration that the Plaintiffs are entitled to vehicular and pedestrian right of way and uninterrupted passage over Windsong and injunctions to restrain the owners of Windsong from interfering with the Plaintiffs' reasonable enjoyment of such right of way and to compel them to remove the gate.
7. Windsong defends the claim on the grounds, *inter alia*, that the Plaintiffs have wrongly asserted a right to extend the Pool Lot's right of way over Windsong to both the West Lot and East Lot. By Counterclaim, Windsong seeks declarations that BSDL, which owns the Pool Lot, has a vehicular right of way over Windsong for the benefit of the occupiers of the Pool Lot only, that the right of way does not extend to the owners and occupiers of either the West Lot or the East Lot and that the current use of the Pool Lot creates a presumption of abandonment of the legal right of way over Windsong's parcel.
8. The rights of way and the Plaintiffs' beach amenity lot numbered 546 are depicted in the map below.



HISTORY OF THE LANDHOLDING AND THE GRANT OF THE EASEMENT

9. I have used the tables setting out the evolution of the parcels and the rights of way granted over them, as they are set out in the Defence and have related the parcel numbers to the names of the lots which have been adopted in these proceedings.

10. Parcel 138 was a lot which ran from the West Bay Road to the sea on the south side of Boggy Sand Road. It was owned by a Mr. and Mrs. Turner who sub-divided it in 1983 to create 3 parcels - 220, 221 and 222, ¹ ultimately creating the lots identified in the depiction above which are now known as Parcels 438 (West Lot), 439 (Pool Lot), 225 (Windsong) and 222 (Beach Lot).
11. At the time of the sub-division, both parcels 220 and 221 were undeveloped land. The Turners expressly created various easements appurtenant to and incumbering the new parcels, reserving a right of way to pass and repass through the newly sub-divided parcels to the West Bay Road for the benefit of the Beach Lot, where they resided, as set out below.

Parcel Name	Appurtenances	Incumbrances
220		A 18 ft. vehicular Right of Way along the eastern boundary in favour of 222 as indicated on the Registry Map.
221		A 18ft vehicular right of way along the eastern boundary in favour of 222 as indicated on the Registry Map.
222	A 18-ft. vehicular Right of Way along the eastern boundaries 220 & 221 as indicated on the Registry Map. (3181/83)	

12. The Turners later built the Windsong complex. On 23 January 1984, parcel 221 was sub-divided into 225a and 225b and Strata Plan 70 was registered on 225 (b).
13. In 1985, further easements appurtenant to and incumbering the new parcels were registered:

Parcel Name	Appurtenances	Incumbrances
220 (West Lot)	A private 3 ft. wide pedestrian Right of Way adjacent to the northwest boundary of 222 as indicated on the Registry Map. (2444/85)	An 18 ft. vehicular Right of Way over the existing private R.O.W. along the eastern boundary in favour of 225(a & b) as indicated on the Registry Map.

¹ All the parcels are part of Block 5C, so I have chosen to identify them by their parcel numbers only

225a (Pool Lot)	<p>A private 3 ft. Pedestrian Right of Way adjacent to the northwest boundary of 222 as indicated on the Registry Map (2445/85).</p> <p>An 18 ft. vehicular Right of Way over the existing private R.O.W. along the eastern boundary of 220 as indicated on the Registry Map.</p>	
225b (Windsong)	<p>A private 3 ft. Pedestrian Right of Way adjacent to the northwest boundary of 222 as indicated on the Registry Map (2445/85).</p> <p>An 18 ft. vehicular Right of Way over the existing private R.O.W. along the eastern boundary of 220 as indicated on the Registry Map (2443/85).</p>	
222 (Beach Lot)		<p>A private 3 ft. wide Pedestrian Right of Way to the beach adjacent to the northwest boundary of this parcel in favour of 220 as indicated on the Registry Map.</p> <p>A private 3 ft. Pedestrian Right of Way adjacent to the northwest boundary of this parcel in favour of 225.</p>

14. The newly registered easements preserved the vehicular right of way over 220 granted to 221 before the sub-division and gave a 3ft pedestrian right of way over the Beach Lot to all lots in the sub-division.
15. On 6 September 1989, 225b became 225 (Windsong). On the same date, Parcel 225a became 248 (the Pool Lot). In the same month, the rights of way over the Pool Lot (later 439²) and Windsong were widened to 22 ft. as required for the grant of certain planning permission.
16. In 2010, the Turners built a paved driveway over the easement from Windsong through the Pool Lot and the West Lot, all the way to West Bay Rd. In 2011, they built a pool on the Pool Lot and sold all four condos in the Windsong development.
17. At the date of trial, all the registered easements appurtenant to the parcels which were part of the original sub-division (excluding the easements relevant to the condo resort³) were as set out below.

² As of 28 October 2016

³ See para 22 below

Parcel Name	Appurtenances	Incumbrances
220 (now 438, "West Lot")	A private 3 ft. wide pedestrian Right of Way adjacent to the northwest boundary of 222 as indicated on the Registry Map. (2444/85)	An 18 ft. vehicular Right of Way along the eastern boundary in favour of 222 as indicated on the Registry Map. An 18 ft. vehicular Right of Way over the existing private R.O.W. along the eastern boundary in favour of 225(a & b) as indicated on the Registry Map.
225a (then 248, now 439 "Pool Lot")	A private 3 ft. Pedestrian Right of Way adjacent to the northwest boundary of 222 as indicated on the Registry Map (2445/85). An 18 ft. vehicular Right of Way over the existing private R.O.W. along the eastern boundary of 220 as indicated on the Registry Map.	An 18ft vehicular right of way along the eastern boundary in favour of 222 as indicated on the Registry Map.
225b (now 225, "Windsong")	A private 3 ft. Pedestrian Right of Way adjacent to the northwest boundary of 222 as indicated on the Registry Map (2445/85). An 18 ft. vehicular Right of Way over the existing private R.O.W. along the eastern boundary of 220 as indicated on the Registry Map (2443/85).	An 18ft vehicular right of way along the eastern boundary in favour of 222 as indicated on the Registry Map.
222 ("Beach Lot")	An 18-ft. vehicular Right of Way along the eastern boundaries 220 & 221 as indicated on the Registry Map. (3181/83)	A private 3 ft. wide Pedestrian Right of Way to the beach adjacent to the northwest boundary of this parcel in favour of 220 as indicated on the Registry Map. A private 3 ft. Pedestrian Right of Way adjacent to the northwest boundary of this parcel in favour of 225.

18. What the Register entries show is that the Pool Lot and Windsong both enjoy a vehicular right of way over the West Lot to the West Bay Road. The rights of way are recorded on the respective titles as property rights belonging to those two Lots - appurtenances - and as incumbrances on the title to the West Lot.
19. The Pool Lot has a right of way over Windsong and Windsong has a reciprocal right of way over the Pool Lot.
20. The only appurtenance - property right - registered on the title to the West Lot is the private 3 ft. wide pedestrian right of way giving it access to the beach over the Beach Lot. This easement is registered as an incumbrance on the title to the Beach Lot.

THE EVIDENCE RELATING TO THE CURRENT USE OF THE EASEMENT

21. I have considered the evidence in full but will not rehearse it in detail as the issues I have to decide are essentially issues of law. Relevantly, one of the purchasers of a condo in Windsong was Mr. Morne Botes, a property developer, who became accustomed to traversing the Windsong driveway south to the Boggy Sand Road and north to the West Bay Rd. The Pool Lot at the time was an amenity lot utilized by the occupants and guests of Windsong and as a right of way in favour of Windsong. The Pool Lot was unoccupied, so there was no occupant who used the Windsong right of way to access the Boggy Sand Road.
22. In 2012, Mr. Botes purchased the parcels now known as the West Lot, the Pool Lot and the East Lot.
23. In 2017, he commenced construction of the condo resort through his development company, Coen Coleman. A total of five buildings were built across both lots, comprised of twenty (20) 3-bedroom 4-bathroom condominiums, with den, each capable of sleeping 10 guests if the units were fully rented out.
24. The Pool Lot was redeveloped into a pool pavilion featuring a pool, pool deck and some parking spaces. Mutual easements were granted to allow guests and owners of West Lot, East Lot and the Pool Lot to enjoy the development as a condo resort with a shared pool amenity.
25. Mr. Botes' evidence was that the most important of the rights of way was the right of way in favour of the West Lot and Pool Lot over the Beach Lot giving them access to the beach. It emerged from his evidence that the incorporation of a company - BDSL - controlled by the two Stratas and Coen Coleman as property managers for the condo resort, to own the Pool Lot, was part of a strategy to extend the Pool Lot's right of way over Windsong to the West and East Lots so owners and guests could access the Boggy Sand Road and the beach.
26. Mr. Botes' evidence was that they made a decision to keep the development as two separate Stratas which share the Pool Lot, choosing this layout to protect the beach access of guests and owners over the Beach Lot. At para 12 of his December 2023 affidavit, he said this:

“Due to this case and other factors, we took legal advice from 5 different firms to decide on our strata laws and layout of our parcels. From these consultations we decided on our final layout which we feel is best and have been checked by multiple lawyers since we sold 18 condos originally and resold 4 in the last 3 years.”

27. The beach access was closed by the new owners of the Beach Lot and a beach amenity lot was acquired for the use of the owners and guests of the condo resort. Promotional material developed to market the property advertises its direct access to the beach across the Windsong right of way. Since the completion of the development, owners and guests of the condo resort and other persons associated with BDSL have been walking or being driven over the Windsong driveway from the West and East Lots in order to access the beach amenity lot, and back again.
28. Mr. Botes expressed his understanding that all the parcels in the original sub-division enjoyed reciprocal rights of way over each other. He lamented what he said was the intention of the Windsong proprietors *“to drive through our [property] but not allow us to drive over theirs.”* He accepted that the East Lot has no right of way over Windsong and stated that the proprietors of the East Lot were not seeking any declarations of right to use the easement over Windsong, pointing out that the East Lot has its own access to the Boggy Sand Road along a right of way that runs along its eastern boundary. That may be so, but it was not in dispute that owners and guests of the condos on the East Lot have been traversing the Windsong driveway to go to the beach and back.
29. Mr. Crockett, in his evidence on behalf of Windsong, described the dramatic increase in the number of persons passing over the Windsong driveway following the development of the Club and the nuisance caused by the holidaymakers some of whom would trespass on to the owners’ private property or return from the beach, drunk and noisy, much to the dismay of the owners to whom they would respond belligerently if spoken to. He noted that, before the Club was developed, the use of the easement to access the Pool Lot was negligible, as it was only ever used as a pool and as a right of way for Windsong and the Beach Lot.
30. Mr. Crockett explained that, in a bid to secure for themselves some privacy and security, the owners ultimately decided to install fence posts and a rolling gate to establish a boundary - line of demarcation - to bring attention to the fact that Windsong was not part of the condo resort but private property. Mr. Crockett explained that the gate is not locked but rolls open and shut on wheels. He denied the allegation made that there was vegetation or other barriers restricting the use of the driveway.

THE ISSUES

31. The primary issues for resolution are:
 - (i) whether the West Lot has a right of way over Windsong;

(ii) if no, then whether the Pool Lot's right of way over Windsong can be extended to the West Lot and, indeed, the East Lot which is held in common ownership by one of the members of BDSL;

(iii) whether, on the facts, the Pool Lot's right of way over Windsong has been presumptively abandoned and the right of way extinguished.

THE LAW

32. An easement is a proprietary right benefiting a piece of land that is enjoyed over land owned by a third party.

33. In *Re Ellenborough Park* [1955] 3 All ER 667, Evershaw MR set out the four requirements of an easement as follows:

(i) There must be a dominant tenement, that is to say, the land which benefits from the easement, and a servient tenement, which is the land over which the easement is exercised;

(ii) The easement must accommodate the dominant tenement;

(iii) The owners of the dominant and servient land must be different people;

(iv) The right over the land must be capable of forming the subject matter of the grant of an easement.

34. The question raised here is whether the right of way enjoyed by the dominant tenement can be extended to accommodate non-dominant land. The answer is governed by the application of the rule in *Harris v Flower* 1904, 74 L. J. Ch. 130 which states that a right of way granted for the benefit of a defined area of land may not be used in substance for accommodating another area of land. Put another way, although a landowner may have a right of way over someone else's land to part of his land (Plot A), he cannot use the same right of way to get to another part of his land (Plot B).

35. The rule was articulated by Romer LJ in this way:

"If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B."

36. The rule is based on the principle that you cannot increase the burden of user over a right of way beyond that which was originally contemplated when the right was granted. Extending the land area to an additional plot would be an increased use of the right of way - an additional burden - which would not have been in the original contemplation of the parties. Notwithstanding the formulation of the rule by Romer J, The House of Lords

decision in *Alvis v Harrison* was that the principle is not restricted to situations where the dominant owner owns or acquires Close B.

37. In *Flower*, the servient landowner - the owner of the land burdened with the right of way - alleged that Flower was seeking to impose an additional burden on the servient land by using the right of way to gain access to a factory which was constructed partly on the ("pink") land which had the benefit of the right of way - the dominant land - and partly on contiguous ("white") land owned by Flower, which did not.

38. Vaughan-Williams LJ who gave the leading judgment in the English Court of Appeal said with respect to the user of the additional land:

'This particular burthen could not have arisen without the user of the white land as well as of the pink. It is not a mere case of user of the pink land, with some usual offices on the white land connected with the buildings on the pink land. The whole of the object of this scheme is to include the profitable user of the white land as well as the pink, and I think access is to be used for the very purpose of enabling the white land to be used profitably as well as the pink, and I think we ought under these circumstances to restrain this user.'

39. In his judgment, Vaughan-Williams LJ cited with approval the earlier case of *Skull v Glenister* (1864) 16 C. B. (N. S.) 81 where the defendant leased land from a man named Wheeler which had the benefit of a right of way and was adjacent to land on which they intended to build houses for the alleged purpose of making it a place of deposit for building materials for the purpose of using them on his own land. Erle CJ identified the issue for resolution as

".. whether the defendants used the way as a way to [the leased land] or was it a mere colourable use of it for the purpose of getting at their own land. ... Did the defendants use the way merely for the purpose of carrying the building-materials through Wheelers' close to their own land? ..."

40. The issue arose for resolution again in *Bracewell v Appleby* [1975] Ch 408 where the Court considered whether a right of way could be extended to a house which had been partially built on land which had the benefit of an access over a private road. The defendant had purchased one of six houses in a cul-de-sac, No 3 Hill Road, with a right of way over a private road giving the only means of access to the houses. He later bought a plot of land referred to in the proceedings as the blue land, which adjoined the grounds of No 3. The only means of access to the blue land was over the grounds of No 3. He decided to build a house partly on the blue land and on part of the original grounds of No 3. He subsequently sold No 3 and moved into his new house. The dispute before the Court was

whether the right of way which he acquired when he bought No 3 also gave him a right of way to his new house.

41. Graham J framed the issue for decision in this way:

“[D]oes the law permit the creation of a right of way appurtenant to a particular close for purposes of access not only to that close but also to any adjoining land which is not part of such close at the date of the grant, but which may, at some future time, come into the ownership of the owner of such close?”

42. The learned Judge held that the defendant had no legal right, as the owner of the dominant tenement, to extend the grant of an easement to land adjoining the dominant tenement and accordingly, there was no right of way over the private road to the blue land.
43. That the rule is flexible as can be gleaned from the judgment of Vaughan-Williams LJ in *Flower* who considered that “*a mere case of user*,” that is to say, a use of the way to accommodate access to the adjoining land for a use that was ancillary to that of the dominant tenement, would not be unlawful.
44. In *Macepark (Whittlebury) Limited v Sargeant and another* [2003] EWHC 427 (Ch.) on which Mr. Kennedy relied to counter any suggestion that might be made that the use of the way to accommodate the West Lot was ancillary to the use of the Pool Lot by the Plaintiffs, Mr. Gabriel Moss QC, sitting as a Deputy Judge of the Chancery Division reviewed a number of decisions of the English Court of Appeal including *Peacock v Custins* [2001] 2 All ER 827, *Das and others v Linden Mews Limited* [2002] EG 130 and *Massey and another v Boulden and another* [2022] EWCA Civ 1634 which considered whether the use of a way could be said to be ancillary to the use for the benefit of the dominant land.
45. The Deputy High Court Judge’s summary of the law with which I agree is set out at para 50 of the judgment. Relevantly, with respect to the issues before me for resolution, Moss KC concluded *inter alia* that there was a doctrine of ancillary use which would apply where (i) the use of access to reach the dominant land and then go on to non-dominant land did not benefit the non-dominant land, and (ii) where the extent of the use for the benefit of the non-dominant land is insubstantial.

Discussion and Decision

46. Although it was submitted by Mr. DaCosta, in the course of his closing argument, that the right of way had been used by various parties over the years, including non-parties to the suit, no prescriptive easements are pleaded or claimed. In seeking to resolve the issues before the court, the Court is, therefore, confined to a consideration of whether the rights of way have been registered on the Plaintiffs’ title as an appurtenance. Once

the rights of way are identified, the Court must then determine which is the dominant and which is the servient tenement: see *Re Ellenborough Park*. The authorities make plain that the use of the right of way must be for the benefit of the dominant land. As it is alleged by Windsong that the right of way over is being used by BDSL not for the benefit of the Pool Lot but to access non-dominant land, the question the Court must ask is whether the use being made of the way falls outside the scope of the grant or is merely ancillary to the use of the dominant land. The resolution of the question is a question of fact: what is in substance and intention the user claimed by the Plaintiffs?

Issue 1: Does the West Lot have a right of way over Windsong

47. At the time parcel 138 was sub-divided, and parcels 220, 221 and 222 created, a right of way over 221 and 222 for the benefit of the Beach Lot was expressly granted and registered on the titles of 221 and 222 preserving for the owners of the Beach Lot the right to travel to the West Bay Road through the newly created parcels.
48. An express grant of a vehicular right of way over Windsong to the Boggy Sand Road was made in favour of 225 (a) - the Pool Lot - and a right of way over the Pool Lot in favour of parcel 225 (b) - Windsong - when parcel 221 was sub-divided. The right of way in favour of the Pool Lot over Windsong was registered on Windsong's title when it was renumbered 225 and Windsong's right of way over the Pool Lot also recorded on the Pool Lot when it was renumbered as parcel 439. The Pool Lot was not sub-divided.
49. It is not in dispute that Windsong was also granted a vehicular right of way to pass and repass over the Pool Lot and West Lot to access the West Bay Road.
50. A perusal of the registered incumbrances and appurtenances make it clear that a vehicular right of way either over the Pool Lot or Windsong to get to Boggy Sand Road was never granted to the West Lot. Had one been granted, it would have been noted on the title to the West Lot as an appurtenance and recorded on the titles to both the Pool Lot and Windsong as an incumbrance in favour of the West Lot.
51. It follows that, contrary to Mr. Botes' suggestion, the West Lot does not enjoy a reciprocal right of way over Windsong, nor did it enjoy a right of way over the Pool Lot until one was expressly granted to it by Mr. Botes through Coen Coleman in 2016 to facilitate the enjoyment of the owners and guests of the Club.
52. I have considered Mr. DaCosta's submissions, made in closing, that allude to the historical use of the right of way over Windsong by non-dominant land, including use by parcel 288 to the south and east of Windsong, but such user - which is neither pleaded or proved - bears no relevance to the right of way claimed by the West Lot.

53. The answer to the first question, which is whether the West Lot has a right of way over Windsong, is no.

Issue 2: Can the owner of the Pool Lot extend the use of the right of way to the West Lot

54. The Pool Lot is the dominant tenement, that is to say, the land for whose benefit the right of way was granted. Windsong is the servient tenement.
55. Given that no easements over Windsong are registered in favour of West Lot (or East Lot for that matter) the right of the members of BDSL - the strata manager and the proprietors of Strata 823 (and 919) - and their agents, guests and licensees to pass over Windsong from the Pool Lot to access the beach amenity lot and return to the Club, would depend on whether the right of way granted for the benefit of the Pool Lot as the dominant tenement over Windsong could lawfully be extended to the West Lot.
56. The short answer must be no. The right of way is not a personal right belonging to the BDSL but a right appurtenant to the land. Pursuant to the rule in *Harris v Flower*, it cannot be used for the benefit of a non-dominant property. As the Court there observed, use of the right of way to access non-dominant land that would be an increased use - an additional burden - not in the original contemplation of the parties.
57. It was, and is, plainly the Plaintiffs' intention that the right of way should be used for the benefit of the West Lot and East Lot, allowing the owners and guests, licensees of the condo resort built on those parcels, as well as the employees and agents of the property manager, Coen Coleman, to pass over Windsong to access the beach amenity lot and back again.
58. There can be little doubt that by going first to the Pool Lot from the West and East Lots to access the beach amenity lot owned by the Club and back to the Pool Lot to access the condo resort, the use of the right of way by the members of BDSL and their guests, agents and others has, in the language of Erle CJ, simply been a colourable mode of getting to the non-dominant land owned by the Plaintiffs.
59. This use of the way cannot be described as ancillary so as to fall within the exception to the rule as the intended and actual use of the right of way is primarily for the benefit of the non-dominant land on which the condo resort is built, as the owners and guests traverse the Windsong driveway to travel to the beach amenity lot and back - benefiting both non-dominant parcels and enabling the West and East Lots and its beach amenity lot to be used profitably.
60. It follows that only the owner of the Pool Lot and its agents have the right to use the right of way over Windsong. I would add that the right of way is a property right which belongs

to BDSL and not to its members - the management company, Coen Coleman, and Stratas 843 and 919 - as an incident of the company's separate legal personality.

61. To be clear, notwithstanding the right of way granted to the Pool Lot, any entry by BDSL and/or its agents *from* the West Lot for the purpose of passing over the right of way to access the Boggy Sand Road would be unlawful and a trespass, as the right of way cannot be extended to non-dominant land. Equally, access to the Pool Lot over the right of way from Boggy Sand Road for the purpose of accessing the West Lot would also fall outside the terms of the grant.

Issue 3: Has the right of way been extinguished?

62. This brings me to the more difficult question raised in the Counterclaim, which is whether the right of way has been extinguished because the nature of the condo development creates a presumption of abandonment of the legal right of way over Windsong.
63. There was not much argument on this issue, but I understand Mr. Kennedy's position to be that the right of way should be presumed abandoned in the circumstances where:
- (i) it is not being used for its original purpose but as a bridge between the West Lot (and East Lot) and the beach amenity lot for the benefit of the West Lot (and East Lot) and
 - (ii) the excessive and unlawful user is such that it is impossible to sever the lawful use from the unlawful use.
64. Mr. DaCosta's brief submission in response was that the right of way is a property right which is not lightly to be interfered with by the Court.
65. The effect of excessive user is set out in Gale on Easements at 12-77 et seq. They cite the decision of May LJ *Graham v Philcox* [1984] 1 QB 747 (himself relying on Gale on Easements in the passage cited) who stated at 756 E,

"... I doubt whether any excessive user, at least of a discontinuous easement, in whatever respect the user may be excessive, will ever of itself bring to an end or indeed suspend such an easement. The owner of the servient tenement on which, ex hypothesi, the excessive burden is placed is entitled to have that excessive user restrained. The fact that a court may grant an appropriate injunction or make a declaration to this end does not in my judgment either extinguish or suspend the easement. Provided that the owner of the dominant tenement subsequently reverts to lawful use of the easement, his prior excessive use of it is then irrelevant."

66. The claim that the right of way had been abandoned was also advanced in *Harris v Flower* on the ground that, as it was practically impossible to separate the lawful from the excessive user, the right of way could not be used at all. The Court rejected the argument and held that there had been no abandonment.
67. In *Hamble Parish Council v Haggard* on the same issue Millett J said at 158,
- “...where it is possible, however difficult, to make lawful use of a right of way..., the servient owner is entitled to an injunction to restrain excessive user and throw the burden of disentangling the two users and stopping the excessive user upon the dominant owner, but not to obstruct the user altogether.*
68. The authorities establish that excessive user does not give rise to the presumption that the right of way has been abandoned where the dominant owner is able to prevent or avoid its unlawful user. Accordingly, I find that Windsong is not entitled to the declaration it seeks in terms.
69. Windsong is, however, entitled to injunctive relief to restrain not only the owners and guests of the West Lot from entering the Windsong but also to restrain BDSL and its servants, agents and guests from accessing the right of way over Windsong *from* West Lot and also from accessing the right of way over Windsong from the Boggy Sand Road as a means of getting to the West Lot as both would be a mere colourable use of the way to access non-dominant land and unlawful.
70. The question of whether an injunction would be an effective remedy arises, however, from the difficulty in policing any such order.
71. Mr. Kennedy relied on the decision of the English Court of Appeal in *Maiorello & Ors v Ashdale Land and Property Company Limited* [2011] EWCA Civ 1618, in support of the submission that the Court could grant a declaration that Windsong was entitled to obstruct all access across the right of way and put the onus on BDSL to establish on any occasion that it needed to access the right of way for the benefit of the Pool Lot.
72. The facts of *Maiorello* are unusual. The access road ran to a large parcel of land which was originally one site later divided into different lots. Access to the lots were through an access road with a right of way to use the dominant land for agricultural purposes only. The lots were thereafter used by a number of travelers as caravan sites and not for agricultural purposes. The servient owner issued a claim for an injunction restraining the defendants from passing along the access road for any purpose other than agricultural purposes and obtained an injunction restraining the defendants from passing along the road in anything but motorcars. The unlawful user of the right of way continued, and an injunction was issued in wider terms, restraining all travel across of the right of way. This

too was ignored and the servient owner resorted to self-help and erected large concrete blocks in the access road to prevent vehicular access.

73. The issue before the Court was whether, and in what circumstances, the owner of land subject to a right of way is entitled to block the way in a manner to prevent the excessive and unlawful use of the way by one dominant owner, if that was the only way to prevent the unlawful use by one or more other dominant owners of a similar easement.
74. The Court reviewed the relevant principles at para 60:

“Where the owner of land grants an easement, excessive and so unlawful use of the easement does not destroy that property interest: comp. Graham v Philcox [1984] 1 QB 747, 756 (May LJ). Even in cases like Cawkwell v Russell, where complete obstruction of the easement is permitted because it is being used for both lawful and unlawful purposes in an indivisible manner, the easement itself is not brought to an end. In accordance with usual practice and principle, excessive user by the dominant owner is restrained by an injunction prohibiting any use other than in accordance with the terms of the grant of the easement. Such an injunction is enforceable by proceedings for contempt. In addition, the servient owner may take practical steps to prevent the unlawful exercise of the easement. In some rare situations, like that in Cawkwell v Russell, that may involve a complete obstruction of a pipe or passage, but those are cases where the manner in which the easement is being exercised means that it is impossible to separate out lawful from unlawful use. In such cases, so long as that indivisible use is continuing, or so long as purely unlawful use is continuing, and the dominant owner shows no genuine need or intention to use the easement for purely lawful purposes, the Court will refuse the dominant owner an order for removal of the obstruction and may grant a declaration expressly authorising its retention.”

75. The Court went on to note that each case will turn on its specific facts and held that in the instant case, that having regard to all the circumstances which included the persistent disregard of earlier injunctions by the other dominant owners who were using the right of way unlawfully, the servient owner was entitled to maintain that obstruction only until lawful use of the access was intended and required by the plaintiff owner of the right of way or any licensee or tenant of his or any purchaser from him, when the servient owner would be required to remove the obstruction to the extent necessary to permit such lawful use. In the event of a dispute about whether such lawful use was intended and required, or as to the extent to which the removal of the obstruction is necessary, the parties were given liberty to return to the Court.
76. The facts of this case are far removed from *Maiorello*, not least because no injunctions have yet been granted against the Plaintiffs and ignored. That said, in the circumstances

where there are no occupants of the Pool Lot who would need to access the Windsong right of way or be otherwise landlocked and where the owner and its agents or guests can enter the Pool Lot from the West Lot for any purpose associated with the use of the Pool Lot, I consider that Windsong is entitled to fence their entire boundary with the Pool Lot to guard against any continuing trespass by persons entering the Pool Lot from the condo resort. Such an obstruction would not impinge upon BDSL's legal right to access the right of way from the Boggy Sand Road where it can establish a need to do so.

Substantial Interference

77. Although it is no longer strictly necessary, given my findings above, to decide the issue raised by the Plaintiffs as to whether Windsong unlawfully interfered with their right of access, I make the following observations for completion.
78. As no-one occupies the Pool Lot, it is common sense that all persons who have been entering Windsong from the Pool Lot from the north travelled from either the West Lot or the East Lot. Their entry upon the Windsong driveway to get to the Boggy Sand Road was a trespass. The use of the Windsong driveway to access the West and East Lots after a day at the beach was equally unlawful. It follows then that Windsong was entitled to erect the gate to ameliorate the trespass over the right of way by the Plaintiffs and everyone claiming through them to be entitled to use the right of way.
79. Even if it were otherwise, the Plaintiffs would not be entitled to the relief sought. The authorities provide that not every interference with a right of way will amount to an actionable wrong. What is required is "*substantial interference*" with the right. The test to be applied when asking whether there had been a substantial interference in the exercise of easement was set out by Mummery LJ in *West and another v Sharp* [1999] Lexis Citation 2117 as follows:
- "There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him."*
80. It is well-established that a gate can be erected across a right of way: see *Petty v Parsons* [1914] 2 Ch. 408. It can even be locked: see *Johnstone v Holdway* [1963] 1 All ER 432.

81. In resolving the issue of whether there has been an actionable interference with a right of way, the question for the Court is whether, despite the obstruction, the right of way can be used as conveniently as before. The photograph which Mr. Botes exhibited to support his evidence that there had been an unlawful interference with the right of way shows a converted school bus carrying guests along the Windsong driveway - unlawfully, I might add - despite the presence of an SUV parked along the driveway and despite all the foliage which the Plaintiffs assert is obstructing the way. The photograph fatally undermines the Plaintiffs' claim and shows only that there was and is no interference with the right of way, substantial or otherwise.

82. The Plaintiffs' claim for relief was bound to fail from the outset.

CONCLUSION:

83. The Plaintiffs claim is dismissed and judgment is entered for the Windsong on the Counterclaim.

84. For the reasons set out above, Windsong is entitled to the declarations it seeks at paragraphs 50(a)(b) and (c) of the Counterclaim.

85. No evidence was led in support of Windsong's claim for claim for injunctive relief against the Plaintiffs for interference with their right of way over the West Lot. At para 38 of the Counterclaim it was alleged that at various times in 2021, when condo resort was under construction, the way was blocked. There was no suggestion at trial that there was any ongoing obstruction driveway from which needed to be remedied. Accordingly, Windsong's claim for a declaration in terms of paragraph 50 (d) is dismissed.

86. Windsong is entitled to declaratory relief in terms at paragraph of the judgment of the Court 76 *supra*. I will hear the parties on the form of the Order and on costs.

DATED THE 11TH DAY OF SEPTEMBER 2024



Hon. Justice Margaret Ramsay-Hale
CHIEF JUSTICE OF THE GRAND COURT