Case No: B2/2016/1052
B2/2016/1051

Neutral Citation Number: [2017] EWCA Civ 369

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM OXFORD COMBINED COURT CENTRE
His Honour Judge Harris QC
3RG51989

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2017

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE UNDERHILL

- -

Between :

GRAHAM GORE	**Claimant/ Respondent**
- and -	
(1) KISHWAR NAHEED and (2) ASIM SUHAIL AHMED	**Defendants/ Appellants**

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- -

Jonathan McNae (instructed by **Louise Greer Solicitors**) for the **Appellants**
Henry Webb (instructed by **Richard Wilson Long Solicitors**) for the **Respondent**

Hearing date : 3 May 2017

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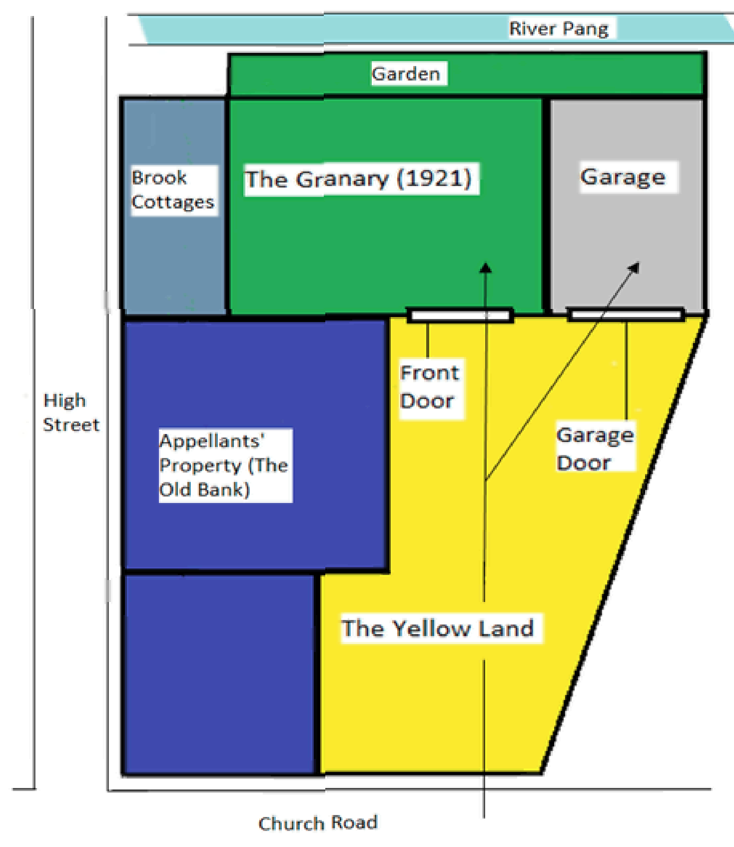
Judgment

Lord Justice Patten :

1. This is an appeal by the defendants, Mrs Naheed and Mr Ahmed, against an order made by HH Judge Harris QC on 22 September 2015 following judgment for the claimant, Mr Gore, in his action against them for damages and an injunction in respect of the alleged obstruction of a right of way. Permission to appeal has also been granted in respect of the costs order which the judge made on 15 January 2016 after the receipt of further written submissions.

2. The dispute between the parties centres on the use of a driveway which connects Mr Gore's property known as the Granary to Church Street in Pangbourne, Berkshire. The area in question is shown on the simplified plan below.



3. Access to Church Street is obtained through a brick archway from the driveway which is referred to on the plan as the Yellow land. The defendants' premises at 4-8 High Street are shown marked on the left hand side of the plan and were formerly a branch of the Nat West Bank. The defendants acquired the premises in September 2012 and they are now used to run a family wine merchants' business. The Granary is the building shown on the plan between the defendants' premises and the River Pang.

4. The Granary enjoys a right of way to Church Street over the driveway by virtue of a conveyance dated 11 November 1921 under which the then National Provincial and Union Bank conveyed to the purchasers the Granary and some adjoining cottages and land:

> "TOGETHER with the right for the Purchasers their respective heirs and assigns and others the owners and occupiers of the said granary in common with other persons having similar or greater rights with or without horses or other animals carts or wagons laden or unladen to go and return along and over the private entrance road or way coloured yellow on the said plan for all purposes connected with the use and occupation of the said granary but not further or otherwise."

5. The area coloured yellow on the conveyance plan included the entirety of the driveway shown on the plan as the Yellow land including the area marked "Garage" to which I shall refer in that way. The ownership of the driveway is now divided between the Post Office (who own the section closest to Church Street); the defendants (who have the next section adjacent to their premises); and the claimant who when he purchased the Granary in March 2007 also purchased the Garage land which had been acquired by the vendor or her predecessor in title by adverse possession. In 1994 a garage with some bedrooms above had been constructed on the Garage land so that since then the position on the ground has been that the driveway effectively ends with the Garage.

6. Although the defendants' premises front on to the High Street, they use the driveway for deliveries. The area occupied by the driveway is quite confined and the effect of parking or delivering when outside the rear of the defendants' premises is that it will almost inevitably obstruct vehicular access to the Granary or the Garage. It is common ground that the easement granted by the 1921 conveyance entitles Mr Gore to drive a car or other vehicle to the front door of the Granary (as shown on the plan) and to park the car there for the purposes of loading and unloading. Mr McNae (for the defendants) also accepts that it would have been permissible for the owner of the Granary prior to 1994 to have parked for that purpose on the area of the driveway now occupied by the Garage and that Mr Gore may legitimately access the Garage via the driveway and park there temporarily for loading and unloading just as he might have done had it remained part of the driveway. What is in dispute is the right of Mr Gore (or a tenant of the property) to use the driveway to obtain direct access to the Garage for the purposes of leaving a car parked there for an indefinite period of time. Parking in such circumstances would not, of course, amount to a trespass because Mr Gore now has title to the land on which the Garage has been built. But it is said that to use the driveway for the purpose of parking in the Garage lies outside the scope of the easement granted under the 1921 conveyance on a correct application of the decision of this Court in *Harris v Flower* (1904) 74 LJ Ch 127.

7. The practical significance of this argument, if correct, is that it was not unlawful for the defendants to have obstructed access to the Garage by parking on the driveway outside the rear of their premises. The judge found that on various occasions between 2012 and 2014 a van had been parked in front of the Garage. Although therefore there may have been occasions when the position of the defendants' van was such as to obstruct vehicular access even to the claimant's front door, most of the use of the driveway by the claimant and his tenant over the relevant period was with a view to parking in the Garage. If that is not permissible under the terms of the 1921 grant then the award of damages and the injunction granted by the judge will have to be re-considered.

8. Access to the Garage is the major issue on this appeal but the defendants also challenge the order made by the judge even if the claimant does have the right claimed. Judge Harris made a declaration that the rights granted by the 1921 conveyance include the right for the claimant to pass over the driveway for the purpose of parking in the Garage and granted an injunction in terms which prevent obstruction of vehicular access to the Garage but provide that parking of a vehicle by the defendants on their part of the driveway for up to 20 minutes for the purpose of loading and unloading shall not amount to an obstruction. In the case of a shared driveway, there obviously needs to be some give and take and some certainty as to what will and will not amount to an obstruction. The defendants accept this but say that the specified time limit should have been two hours.

9. The judge also awarded general damages of £2,500 in addition to special damages of £4,584.54 in respect of lost rent caused by the early termination of a tenancy due to the obstruction. The defendants contend that no claim for general damages was ever made and that the judge's award is both unreasonable and arguably inconsistent with the award of special damages.

10. The judge ordered the defendants to pay the claimant's costs to be assessed on the standard basis and made an order for an interim payment of £17,500. The defendants say that because of the claimant's failure to engage with their invitations to submit the dispute to mediation, the judge was wrong not to have made some deduction or allowance against the claimant's costs in accordance with the guidance contained in the decision of this Court in *PGF II SA v OMES Company I Limited* [2013] EWCA Civ 1288. His order that the claimant should have interest on costs is also said to be wrong in this case.

Access to the Garage

11. The first two of the essential characteristics of an easement referred to by Sir Raymond Evershed MR in *Re Ellenborough Park* [1956] Ch 131 are that there must be a dominant and a servient tenement and that the easement must accommodate the dominant tenement. This was explained as meaning that the easement should operate for the better enjoyment of the dominant tenement which was satisfied in that case even though the right to use the park was shared with a number of other houses in the same development. It is also well established that a right of way granted over the servient tenement can accommodate the dominant tenement even though the dominant and servient tenements are not physically contiguous: see *Pugh v Savage* [1970] 2 QB 373 where the owner of the dominant tenement had the third party owner's consent to cross the intervening land between the dominant and the servient tenement. The fact that the right of way over the servient tenement provided access to the intervening land rather than to the dominant tenement was held not to be fatal to the validity of the grant.

12. The issue in the present case is whether the 1921 conveyance gives the claimant as the owner of the Granary the right to use the driveway to obtain direct access to the Garage for the purpose of parking. The appeal has been argued in terms of whether such a right was included in the grant. If it does, as a matter of construction, create such a right, it has not been suggested by Mr McNae that this could not form the subject matter of the grant of an easement provided that it operates for the better enjoyment of the Granary. Although title to the Garage was acquired comparatively

recently and it does not form part of the dominant tenement for the purposes of the 1921 conveyance, it is no different from the intervening land in *Pugh v Savage* over which the dominant owner had permission to pass or which in the earlier case of *Todrick v Western National Omnibus Co Ltd* [1934] Ch 561 also belonged to the dominant owner although not part of the dominant tenement. In his judgment, Lord Hanworth MR said that there was no authority for the proposition that the dominant and the servient tenements must be contiguous and that the true test (as stated in *Gale on Easements*) was that an easement "must be connected with the enjoyment of the dominant tenement and must be for its benefit". Consistently with those decisions, the claimant would still be exercising the right of a dominant owner under an easement if, for example, he obtained access to the Granary via the internal door in the Garage even though the last section of his journey to the Granary would be through property which he owned. Access to the Garage by car is different in that the car will physically remain in the Garage rather than travelling on to the dominant tenement. The claimant, once in the Garage, is entitled to park his car there for an indefinite period by virtue of his ownership of that land. But the right of way up to the Garage is nonetheless a valid easement provided that it can be said that it enures for the better enjoyment of the Granary.

13. The defendants' challenge to the claimant's right to drive to and park in the Garage is based on a different line of authorities beginning with *Harris v Flower* which deal with whether the grant of a right of way across plot A (the servient tenement) to plot B (the dominant tenement) also includes the right to use the way to access land outside the dominant tenement (plot C) either by going via plot B or (as in the present case) by going directly to plot C from the servient tenement. Mr McNae submits that these cases are no more than specific applications of a general principle that the dominant owner can only use the way for the purposes of the dominant tenement and not for the benefit of other land. For this he relies on the decision of the House of Lords in the Scottish Appeal of *Alvis v Harrison* (1991) 62 P & CR 10 (HL) where Lord Jauncey of Tullichettle says (at pages 15-16):

> "A servitude right of access enures to the benefit of the dominant tenement and no other. Thus it cannot be communicated for the benefit of other tenements contiguous thereto….What they may not do….. is to use the way, or permit its use by others, to obtain access to subjects other than the dominant tenement, whether or not they happen to be heritable proprietors of those other subjects."

14. *Alvis v Harrison* was a case concerning the right of the dominant owner to construct a new point of entry from his property on to the servient tenement. The statement of principle I have quoted, which is equally applicable under English law, goes no further than to state the obvious that a right of way granted over plot A to plot B cannot, without more, be used by the owner of plot B to access other land in his or another's ownership. But it is important to be clear why this is so and in what context it holds good.

15. The grant of a right of way across plot A to plot B and nowhere else necessarily limits the scope of the grant to direct access to plot B. The use of plot A to obtain direct access to plot C in such a case is simply not within the grant so that any use of plot A for that purpose would amount to a trespass. But, for the reasons already explained,

the grant of a right of way over plot A to plot C may be capable of taking effect as an easement which accommodates plot B if that is reasonably necessary for the proper enjoyment of plot B. That test is likely to be satisfied where plot C intervenes physically between plot A and plot B but the principle can operate more widely. Such cases differ from the circumstances contemplated in *Alvis v Harrison* because the right of way does enure for the benefit of the dominant tenement by providing an indirect right of access to plot B. This merely serves to emphasise the importance of identifying the scope of the rights granted (which is a matter of construing the grant) in advance of any determination of whether the use of the servient tenement is excessive. The general principle set out in the quotation from Lord Jauncey's speech in *Alvis v Harrison* depends for its context on the nature and scope of the rights granted.

16. In *Harris v Flower* the defendant owned two adjoining parcels of land (referred to as the white and the pink land) on which he built a factory. This was a single building with no internal divisions. Most of the building was erected on the pink land but part of it extended on to the white land. An earlier conveyance of the pink land included "the full and free right and liberty of ingress, egress and regress, passage and way into and upon the pink land" from an adjoining street over land belonging to the plaintiff. He sought an injunction to restrain the use of the right of way as a means of access to the part of the factory built on the white land. Swinfen Eady J dismissed the claim on the ground that the right of way was being used to access the dominant tenement in the form of the pink land even though that also enabled the defendant to access the part of the factory built on the white land. The Court of Appeal allowed the appeal.

17. Having reviewed some of the earlier authorities, Vaughan Williams LJ said (at page 130):

> "Now if *Williams v James* is looked at, it is a decision to the same effect. Chief Justice Bovill says: "It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a *bona fide* or a mere colourable use of the right of way".
>
> …..
>
> That being so, we have to consider here what was in substance and intention the user claimed by the defendant in the present case. There has been very little actual user, and we have to deal rather with what the user threatened is. The question of the user is a question of fact; but if we come to a conclusion different from that at which Mr Justice Swinfen Eady arrived, it will not be on a question of fact such as those questions of fact on which the Court of Appeal very unwillingly and reluctantly comes to a different conclusion from that taken in the Court below; because here the question of fact does not depend on any conflict of evidence, but is a question of the proper inference to be drawn from the facts, which are not in dispute."

18. Having reviewed the facts Vaughan Williams LJ concluded that the proper inference was that the defendant did intend to use the right of way to obtain access to the white land. For the purposes of this appeal, what matters is not the correctness of these findings of fact but the reasons why the Court considered that such intended user was impermissible. It is clear that Vaughan Williams LJ (at page 132) thought that this turned on the terms of the grant:

> "The reason of it is that a right of way of this sort restricts the owner of the dominant tenement to the legitimate user of his right; and the Court will not allow that which is in its nature a burthen on the owner of the servient tenement to be increased without his consent and beyond the terms of the grant. I do not know that it makes any difference whether the right of way arises by prescription or grant. The burthen imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the way in excess of the grant. There can be no doubt in the present case that, if this building is used as a factory, a heavy and frequent traffic will arise which has not arisen before. 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 object of this scheme is to include the profitable user of the white land as well as of the pink, and I think the 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."

19. Mr McNae relies on a passage in the judgment of Romer LJ (at page 132) where he says:

> "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."

20. This is similar in terms to what was said in *Alvis v Harrison* but, as Romer LJ explains a little later, this principle is based on the assumption that the right contained in the grant operates to create a right of way over the servient tenement to the dominant tenement and no further:

> "It is impossible to say that by reason of one building being on both lands the defendant has made the right of way which was granted for the enjoyment of the one a right of way for the enjoyment of both, and that is what the defendant is really doing. That would substantially enlarge the grant of the right of way. The servient tenement is not obliged to submit to the carrying of building materials for the purpose I have indicated; and other instances might easily be given which would result in using the right of way for purposes of the land coloured white,

> and not for the true and proper enjoyment of the land to which the way was appurtenant".

21. It is also important to observe that although the Court of Appeal considered that the grant did not extend to permitting the servient tenement to be used in order to obtain substantial and unlimited access to the white land, they were of the view that the grant would have been sufficient to accommodate access to that land for a use that was purely subsidiary or ancillary to that of the pink land. One sees that in the reference by Vaughan Williams LJ in the passage quoted at [18] above to the white land containing "some usual offices … connected with the buildings on the pink land" and in an earlier passage to uses of the white land in ways which are "mere adjuncts to the honest user of the right of way for the purposes of the pink land". I read these passages as indicating that had access to the white land been obtained via the servient tenement solely for such limited purposes, they would have been treated as part of the use of the way to obtain access to the pink land and therefore as within the grant.

22. In *National Trust v White* [1987] 1 WLR 907 Warner J had to decide whether visitors to the National Trust site at Figsbury Ring near Salisbury were entitled as the Trust's licensees to use a right of way along a farm track linking the site to the main road in order to access a car park situated approximately half way along the track. This had been constructed on land adjoining the track between the main road and the site but was not part of the dominant tenement. It had been acquired on a lease by Wiltshire County Council to avoid the problem of visitors parking along the track. Visitors to the site could obtain access to the car park from the track and after parking were then required to return to the track to continue to the site on foot. There was no direct access from the car park to the site.

23. The right of way granted to the National Trust by a 1921 conveyance was in these terms:

> "Together with a right of way for the purchaser his heirs and assigns owners for the time being of the land coloured pink on the said plan and all other persons authorised by him or them from time to time (but in common with all other persons having a like right) to pass and repass over the road or track leading out of the Salisbury to London Road on the west of the pond on the London Road of a width of 20 feet as shown on the said plan and thereon coloured brown at all times and for all purposes the purchaser making good any extraordinary damage he may cause to be done to the same."

24. This is similar to the terms of the grant in *Harris v Flower* and the owners of the track objected to its use in order to obtain access to the car park. Warner J referred to the passages in the judgment of Vaughan Williams LJ I have just mentioned and held that the use of the track to obtain access to the car park fell within the grant. At page 913C he said:

> "So, applying in the present case the distinction drawn by the Court of Appeal in *Harris v. Flower*, 74 L.J.(Ch.) 127, it seems to me that, since the right claimed by the National Trust is no more than a right to authorise people to use the track for access

> to the car park for the purpose of visiting Figsbury Ring, it is properly to be regarded as ancillary to the enjoyment of Figsbury Ring. It is not as if the National Trust claimed a right to authorise people to use the track for access to the car park for the purpose of enjoying the car park itself, e.g. by picnicking there. Indeed, one way of describing the right claimed by the National Trust is as a right to authorise people to use the track to get to Figsbury Ring, in their vehicles as far as the car park and on their feet from there on."

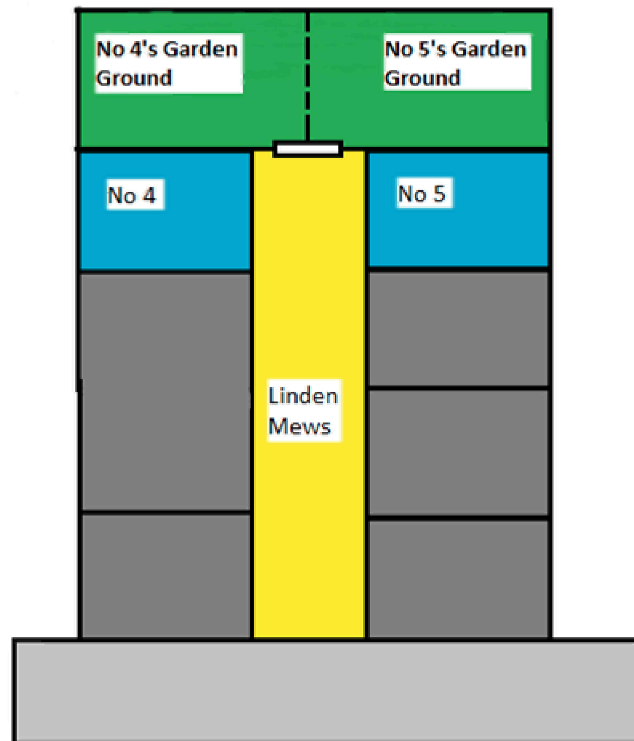
25. Mr McNae has to accept that *National Trust v White* is a case in which the grant included the right of the dominant owner to obtain direct access to land not forming part of the dominant tenement. But he says that it differs from the present case in that the use of the Garage for permanent parking is (to use Warner J's formulation) equivalent to the enjoyment of the car park in its own right. The car remains parked there indefinitely. It is not ancillary to or part of the use of the servient tenement to obtain access to the Granary.

26. Another case in which the dominant owner claimed to be able to access not only the dominant tenement but also land beyond it using a right of way to the dominant tenement was *Peacock v Custins* [2002] 1 WLR 1815. The land in question was an adjoining field which was acquired by the dominant owner and then farmed as a single unit with the dominant tenement. This was therefore what has been termed a "passing through" case similar to *Harris v Flower* and the decision that the right of way could not be used to obtain access to the adjoining land as a separately identifiable economic unit is largely based on the judgments in that case. But I refer to it for the confirmation which it provides that we are dealing in all these cases with questions of construction and not with the application of some a *priori* principle operating irrespective of the terms of the grant. At [25] Schiemann LJ said that in these cases the court:

> "is concerned with declaring the scope of the grant, having regard to its purposes and the identity of the dominant tenement. The authorities indicate that the burden on the owner of the servient tenement is not to be increased without his consent. But burden in this context does not refer to the number of journeys or the weight of the vehicles. Any use of the way is, in contemplation of law, a burden and one must ask whether the grantor agreed to the grantee making use of the way for that purpose. Although in *Harris v. Flower* Vaughan-Williams LJ mentioned the "heavy and frequent traffic" arising from the factory which "could not have arisen without the use of the white land as well as of the pink", the view we take of the reasoning in all three judgments in that case, as appears by the passages set out above, is that all three judges were addressing not the question of additional user, but the different question: whether the white land was being used for purposes which were not merely adjuncts to the honest use of the pink land (the dominant tenement); or, re-phrasing the same question, whether

the way was being used for the purposes of the white land as well as the dominant tenement."

27. The sheet anchor for Mr McNae's submissions about the limited nature of the grant is the more recent decision of this Court in *Das v Linden Mews* [2003] 2 P & CR 4 which concerned the right of the dominant owner to obtain direct access via the servient tenement to some garden land adjoining his house in a London mews. The physical layout of the relevant area is illustrated diagrammatically in the figure below:



28. The issue in *Das* was whether the owner of No. 4 could use the right of way which he enjoyed over the mews to the front of that property in order to drive his car on to some garden land at the end of the mews which he wished to use for parking. The garden was at the date of the grant of the easement separated from the end of the mews by a substantial brick wall and was therefore not directly accessible. But the defendant opened up an entrance in the wall so as to be able to obtain direct access to the garden land. This land was not part of the dominant tenement in favour of which the right of way had been granted so that the question for the Court was not (as in *Alvis v Harrison*) whether the defendant as dominant owner was entitled to create a new entrance from the dominant tenement on to the servient tenement but rather whether there was any right at all to obtain direct access from the mews to the proposed parking space.

29. The terms of the grant in favour of the owners of Nos. 4 and 5 were:

> "a right to pass and repass over the [carriageway] to and from the highway to their respective properties by foot and with vehicles and a right to halt a single vehicle immediately

> adjacent to their respective properties for the purposes of loading and unloading the said vehicles."

30. The grant was therefore very similar to that in *Harris v Flower* and in *National Trust v White*: i.e. a right to pass and repass between specified points. It was also common ground that this would have entitled the owner of No. 4 to drive into a garage within the curtilage of No. 4 had one existed. In his judgment Buxton LJ referred to the passages from the judgments in *Harris v Flower* and *Alvis v Harrison* I quoted earlier. Counsel for the defendant (Mr Lewison QC) had not challenged the correctness of those decisions and the propositions of law on which they were based but relied on the Court's acceptance in *Harris v Flower* that the grant in that case would have accommodated the use of the right of way to obtain access to other premises whose use was ancillary to that of the dominant tenement. The use of the garden land for parking was, it was submitted, ancillary to the beneficial use of No. 4.

31. In rejecting that submission, Buxton LJ thought that it was relevant to distinguish between a passing through case such as *Harris v Flower* and a case like the present one and *Das* itself where direct access was sought to the adjacent land. Referring to what Vaughan Williams LJ said in *Harris v Flower* about the adjacent land housing "mere adjuncts" or "usual offices" of the buildings on the dominant tenement, he said at [14]:

> "The latter circumstances, unlike those in *Harris v Flower* itself, would not prevent the use of the way from being, in substance, use to access the dominant tenement. But that was the limit of those observations, and they were strictly related to the factual issue before the court, of what was the true purpose of the use of the way to approach the dominant tenement. The court did not address the issue that arises in this case, of a use of a way to access land that is not the dominant tenement without going through the dominant tenement at all. Hence, the impossibility of applying "the rule in *Harris v Flower*" directly to this case, as pointed out in para [12] above. Nor did Vaughan Williams LJ pose the question that Mr Lewison says that we should answer, of whether access to the white land would be ancillary to the owner's *enjoyment* of the pink land. But, plainly, it would have been, because a building that was on the pink land could not be as effectively used as a building if the owner could not access the part of it that was on the white land.
>
> 15. I do not, therefore, think that the observations of Vaughan Williams LJ assist the owner in our case. It is not merely a pedantic distinction of fact to say that the court there was not concerned with use of the way directly to access land that was not the dominant tenement, because the court's observations about ancillary use are all made in the context of further steps once the agreed purpose of the way, access to the dominant tenement, had been achieved. And if it had been thought that use of the way, in the words of Vaughan Williams LJ, to include profitable user of the white land as well as of the pink, was legitimised because profitable user of the white land was

> ancillary to, and supported, the profitable use of the pink land, as would appear to have been the case, then it is difficult to see how the result of that case could not have been different."

32. Mr McNae relies on this to support his submission that there is a legal distinction to be made between passing through cases and what he refers to as "passing alongside" cases such as *Das*. He says that the construction of the grant to include access to adjacent parcels of land whose use is ancillary to that of the dominant tenement should be confined to passing through cases. The difficulty about this approach is that it runs contrary to the decision of Warner J in *National Trust v White* which was a passing alongside case in which the judge relied on the observations about ancillary use made in *Harris v Flower*. *National Trust v White* was relied on by the defendant in *Das* but Buxton LJ rejected the submission that it provided support for the submission that the use of the garden land for parking was merely ancillary to the use and enjoyment of No. 4:

> "20. There are two reasons why I cannot agree with that contention. First, although I accept that Warner J did speak of use of the car park as ancillary to the "enjoyment of Figsbury Ring", the general structure of his judgment, and not least his references to the analysis of this court in *Harris v Flower*, makes it plain that what he had in mind was use of the car park as ancillary to, or, in Mr Denehan's phrase, part and parcel of, the use of the way for the purpose of the original grant, of getting to and from the Ring. That that is so is strongly supported by Warner J's statement of the practical effect of the provision of the car park that is to be found in the last sentence of the passage cited in para [18] above. Second, although I agree that the mere fact of the location of the parking area cannot be decisive, it is of importance in the present case. Because the car park abutted the way and was used for access to the way, rather than separately for access to the Ring, it was possible for Warner J to analyse the mechanics of its use as he did, and not possible for it to be said, as it can be said in the present case, that the principal or real use of the way that is asserted is a right to use the way to access land that is not part of the dominant tenement.
>
> 21. The distance between the decision in *White* and any principle that easements can be extended to give access to any activity that can be said to be ancillary to the beneficial use of the dominant tenement can be illustrated in a further way. Warner J excluded any use of the way for the purpose of separate activities within the car park, for instance picnicking. He undoubtedly so held because use of the way to accommodate a separate activity on the car park would have extended the dominant tenement, contrary to the principle that Warner J drew from *Harris v Flower* in the passage quoted in para [18] above. But it might well occur to the trust, in line with similar arrangements at other beauty spots, that it would

> be agreeable for their visitors, and convenient for the trust in terms of protecting the Ring while pleasing the customers, to provide a picnic area in the car park. Provision and use of the picnic area would undoubtedly be ancillary to the enjoyment or beneficial use of the Ring. Warner J's judgment is, however, clear that the way could not be used to access the picnic area.
>
> 22. I therefore consider that *White* gives no support to a rule or principle that would justify the use of the way sought to be made in the present case."

33. Applying this analysis to the facts in *Das*, Buxton LJ equated the use of the garden land for parking with Warner J's example of the use of the car park in *National Trust v White* for picnicking:

> "The great benefit of access to the garden ground is not simply to be able to access no 4, because that can already be done by using the easement according to the grant. What the garden ground adds is somewhere where the car can be left: a parking space.
>
> 24. I have no doubt that, for the practical reasons already given, that is a separate use from mere access. It is a use that takes place other than on the dominant tenement, and by using the carriageway to access that parking space the owner extends the dominant tenement. He does exactly what the House of Lords said in *Alvis v Harrison,* quoted in para [9] above; Cozens-Hardy LJ said in this court in *Harris v Flower,* quoted in para [8] above; this court said in *Peacock* v Custins, quoted in para. [16] above; and Warner J said in *White*, quoted in para. [18] above; could not be done.
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> 25. Even, therefore, if application of the verbal terms of the narrower rule in *Harris v Flower* could be made to yield the outcome contended for by the owner, the use of the way to access the parking space on the garden ground would fall before the broader rule forbidding enlargement of the dominant tenement."

34. *Das* is, of course, binding on us for what it decides about the scope of the grant in that case. But I venture one or two observations about the reasoning of Buxton LJ in order not to misunderstand what was decided. The first is that there is nothing in his judgment to suggest that the ultimate question for decision was other than what did the grant permit. For the reasons already explained, it is clear from *Harris v Flower* itself that the issue is one of the construction and not validity. It was not therefore open to this Court in *Das* to approach the matter in any other way. The second point, which follows from the first, is that, in terms of the validity of the grant, there is no distinction to be made between passing through and passing alongside cases. The alleged right of way in both cases is capable of supporting the dominant tenement if access to the adjacent land operates for the benefit of the dominant tenement. For that reason alone, any distinction between the two types of case has to be found in the

construction of the grant. My third observation is that, as Buxton LJ himself recognised, Warner J did not exclude as relevant to construction in a passing alongside case what was said in *Harris v Flower* about ancillary use. It is also clear that he regarded the use of the car park for parking (as opposed to other activities) as ancillary to the enjoyment of Figsbury Ring. It is correct that he characterised this as part and parcel of the use of the way for the purposes of visiting the Ring. But the same analysis might be applied to the use of the Garage in the present case which facilitates the use and enjoyment of the Granary by means of the access provided by the driveway. My own reading of the passage I have quoted from [23] to [24] of Buxton LJ's judgment is that he was very much influenced by the very specific terms of the grant which limited access to No. 4 rather than to any adjoining land. By contrast in the present case, the grant enables Mr Gore to go and return along and over the driveway for all purposes connected with the use and occupation of the Granary.

35. *Das* has been considered in two subsequent decisions of this Court. In *Massey v Boulden* [2003] 1 WLR 1792, another passing through case, the issue was whether the right of way could be used to access two additional rooms added when the dominant tenement was enlarged by the incorporation of part of an adjoining property. The opposing submissions of counsel were as follows:

> "37. As already indicated, Mr Chapman's core submission is that a right of way established for the benefit of Whiteacre cannot be used for the benefit of both Whiteacre and Blackacre, irrespective of whether such extension of the dominant tenement involves any increase in the overall use of the easement. (Whiteacre, of course, is here School Cottage East and its garden, Blackacre the added parish rooms). This, he submits, is the effect of the governing authorities, most notably *Harris v Flower* (1904) 74 LJ Ch 127, *Graham v Philcox* [1984] QB 747, *Peacock v Custins* [2002] 1 WLR 1815 and *Das v Linden Mews Ltd* [2002] 2 EGLR 76.
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> 38. Mr Harrison argues the contrary. His wider submission is that there is no absolute rule of the sort contended for by the defendants and that the critical question is rather whether the use made of Blackacre is more than merely ancillary to that made of Whiteacre. His narrower submission is that any such rule prevents only the use of Whiteacre for direct access to Blackacre and that there has been no breach of that rule here given that the vehicles using the track are not, of course, driven through Whiteacre onto Blackacre, but remain parked at the bottom of Whiteacre's garden."

36. Simon Brown LJ said:

> "45. Having regard to those authorities, I for my part would reject Mr Harrison's narrower submission outlined in paragraph 38 above: the mere fact that this is a vehicular right of way and that the vehicles themselves do not pass through Whiteacre into Blackacre cannot in my judgment operate to distinguish this case from *Harris v Flower* and *Peacock v Custins*. I would,

> however, accept his wider submission and, on the facts found here, hold that in so far as the use of the way serves Blackacre that can only sensibly be described as ancillary to its use for the purposes of Whiteacre. This ground of appeal accordingly fails."

37. The other relevant case is *Wall v Collins* [2007] Ch 390. As in the present case, one of the issues was whether a right of way could be used to access some adjoining land which had been acquired by the dominant owner by adverse possession and then developed as a double garage. It was therefore a passing alongside case involving access to a garage. Having referred to what was said in *Massey v Boulden* about the decision in *Harris v Flower*, Carnwath LJ at [54] concluded that he could see no reason for holding that the use of the garage on the other land was "other than ancillary to (or an adjunct to) the ordinary residential use" of the dominant tenement.

38. From these decisions I think we are bound to conclude that Judge Harris was entitled to find that the use of the Garage was ancillary to the use and enjoyment of the Granary. I do not accept that parking within the Garage by a resident of the Granary should be treated as the use of the Garage in its own right for a purpose independent of the use of the dominant tenement. It would, of course, be different if the garage were let to or used by a third party separately from the occupation of the Granary. In my judgment, the judge was also correct to hold that this ancillary use fell within the scope of the grant in the present case. The terms of the grant are, as I have indicated, arguably wider than those in *Harris v Flower* but they are certainly no narrower. In my view they are wide enough to include direct access to the Garage for parking in connection with the residential use of the Granary. For the reasons given earlier, I reject the submission (if that is what is being suggested) that in passing alongside cases, the use of adjacent land for parking is subject to a different approach in terms of the construction of the grant. In all cases the Court is required to construe the language of the grant having regard to the layout of the *locus in quo* to which it relates and all other material facts and circumstances. There is no room in this process for any legal distinction to be drawn between passing through and passing alongside cases. The physical differences between the two situations are simply facts to be taken into account in determining whether the alleged right of access can be said to have been consented to by the original servient owner as part of the grant.

39. For these reasons I would dismiss the defendants' appeal on the first issue.

40. On the basis that Mr Gore was entitled to the right of access to the Garage which he claimed, it becomes necessary to consider the subsidiary issues of the terms of the injunction and the costs order. As I indicated earlier, the appeal in relation to the order for an injunction is limited to paragraph 4 of the order which states that it will not be an obstruction for the defendants to park a vehicle on the driveway for the purpose of loading and unloading if the vehicle is not parked there for more than 20 minutes. The defendants say that the period is too short and should be 2 hours.

41. It is important to emphasise that the order contains a general injunction against the defendants requiring them not to obstruct vehicular access to the Garage. The order does not specify what will amount to an obstruction but only what will not. The result is that on some occasions it will doubtless be possible for a delivery van to be parked in front of the garage for up to 2 hours or even longer without obstructing access to

the Garage simply because Mr Gore or a tenant of the Granary has no need to use the driveway at that particular time.

42. But, assuming that there are competing needs for the use of the driveway between the claimant and the defendants, the judge obviously decided what in his view was the maximum period of untolerated parking that could be imposed on Mr Gore consistently with the reasonable use of the driveway. Neither side has suggested that the inclusion of paragraph 4 of the order was wrong in principle nor has there been any argument about the evidence on which the judge's order was based. In these circumstances, I do not see any grounds upon which this Court would be justified in interfering with the judge's assessment of this issue. There has been no application to adduce any new evidence to show that the judge's order is unworkable or to support a minimum period of 2 hours. Nor, as I have said, have we been directed to evidence at the trial which should have caused the judge to opt for a longer period. I would therefore dismiss this ground of appeal.

43. The judge's order does, however, require to be amended so as to make it clear that the right to obtain direct access to the Garage for parking is limited to its ancillary use in connection with the occupation of the Granary and would not extend to a tenant of the Garage alone. This is not a matter of dispute between the parties and it is agreed that paragraph 1 of the judge's order should be varied by adding at the end the words "in the garage in connection with the use and occupation of the Granary but not further or otherwise".

44. That leaves the question of damages and costs. The defendants challenge the judge's award of general damages in the sum of £2,500. The judge deals with damages in [29]-[33] of his judgment but most of this, quite understandably, contains his findings on the claim for special damages based on the alleged premature termination of a tenancy of the Granary due to the obstruction of the driveway by the defendants and the problems subsequently encountered by Mr Gore in trying to sell the property.

45. The judge found that the claimant did suffer loss due to the defendants' obstruction of the driveway in the form of loss of rent but was not persuaded that the claimant had suffered any recoverable loss in respect of the subsequent periods of time. He did, however, make an award of general damages based on the inconvenience and difficulty caused by the obstructions between December 2012 and February 2014.

46. As Mr McNae points out, this was a time during which the Granary was let and during which Mr Gore suffered no personal inconvenience or distress due to the obstructions of the driveway. On the judge's finding, these did cause the tenant to leave early but that was after February 2014 and Mr Gore has been compensated for the loss of rent by the award of special damages.

47. In these circumstances and given that no claim for general damages was either pleaded or advanced at the trial, I think that the award of £2,500 cannot stand. I would therefore allow the defendants' appeal in respect of this part of the judge's order.

48. The judge made a separate order that the claimant should have his costs of the claim on the standard basis after considering written submissions. It is clear that Mr Gore was the overall winner so as to bring into operation the general rule that he should

have his costs. But the defendants submitted and now submit on this appeal that the judge should have made some allowance in their favour for the fact that Mr Gore refused to or failed to engage with their proposal that the dispute should be referred to mediation.

49. Mr McNae referred us to the decision of this Court in *PGF II SA v OMFS Company 1 Ltd* in which Briggs LJ emphasised the need, as he saw it, for the courts to encourage parties to embark on ADR in appropriate cases and said that silence in the face of an invitation to participate in ADR should, as a general rule, be treated as unreasonable regardless of whether a refusal to mediate might in the circumstances have been justified. Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.

50. In this case the judge did take it into account but concluded that it was not unreasonable for Mr Gore to have declined to mediate. His solicitor considered that mediation had no realistic prospect of succeeding and would only add to the costs. The judge said that he considered that the case raised quite complex questions of law which made it unsuitable for mediation. His refusal to make an allowance on these grounds cannot in my view be said to be wrong in principle.

51. The other aspect of the costs appeal concerns the judge’s order that the defendants should pay interest under what was CPR 36.17(4) on the costs Mr Gore has paid to his solicitors. Mr McNae says that this power was only exercisable when the claimant has obtained a result at least as advantageous as the terms of his Part 36 offer but that in this case there was no such offer. The written submissions which were provided to the judge by Mr Webb for the claimant make it clear that interest on costs was in fact sought under s.74 of the County Courts Act 1984 which does not depend on a Part 36 offer having been made. It seems to me that the judge was exercising the jurisdiction contained in what was then CPR 44.2(6)(g) and that the reference in paragraph 9 of his order to CPR 36.17(4) is simply an error. I would therefore dismiss this ground of appeal.

52. In summary, therefore, I would allow the defendants’ appeal against the judge’s award of general damages but otherwise dismiss these appeals.

Lord Justice Lewison :

53. I agree.

Lord Justice Underhill :

54. I also agree.

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