CA Before Peter Gibson LJ, Chadwick LJ, Lady Justice Hale : 4th July 2003.

Lord Justice Chadwick : Case No: 2002/1278 2002/1912 4 July 2003 C.A

1. These are appeals from an order made on 8 May 2002 by His Honour Judge Inglis, sitting in the Lincoln County Court, in proceedings brought by Mr Alan Valentine to restrain alleged trespass by his neighbours over land at Home Farm, North End Lane, Fulbeck, Lincolnshire, of which he is registered as proprietor at HM Land Registry. The disputes which have given rise to these proceedings are directly attributable to a lack of attention to detail on the part of the solicitor whose responsibility it was to carry through conveyancing transactions in connection with a small residential development, of which the properties now owned by Mr Valentine and his neighbours form part. The costs which the parties to these proceedings will have to bear – following a fourteen day trial in the County Court and this appeal – will prove a heavy price for that incompetence.

The development land

2. The development land at Home Farm comprised some two acres, more or less, within the village of Fulbeck. The land was bounded on the south by woodland; the southern boundary being marked by a wall and fence. The land extended to the north of that boundary, roughly in the form of a semi-circle, and was contained within (but not bounded by, save on the west) a loop of public roadway known as North End Lane. The eastern half of the land was occupied by the farmhouse – situate in the south-eastern corner - the farmyard and agricultural buildings, including two good stone-built barns along the northern boundary. The western half of the land was rough and uncultivated. Access to the farmyard and buildings, and to the rough land beyond the farmyard, was from the east – by a made-up driveway which lay immediately to the north of the farmhouse.

3. Outline planning consent for residential development of the land at Home Farm was obtained in September 1989. In 1990 the land was acquired, as a site for development, by A H Turner Property Developments Limited. That company was registered as proprietor at HM Land Registry under Title No LL55951. Shortly thereafter the company went into receivership. The receivers entered into an agreement to sell the whole site to Mr Philip Rann.

4. The proposed development was for the erection of three new houses on the western half of the land, the conversion of the two barns on the northern boundary into separate dwellings and the renovation of the farmhouse. So, after development, there would be six dwellings on the Home Farm land. The whole is shown on a site plan prepared on behalf of Mr Rann. As appears from an early version of that site plan (annexed to the judgment below as plan 2), the three new houses were to have access to North End Lane by a new entrance on the western boundary. If access were available from the west, the new houses would not need access (and associated rights) across the former farmyard to the existing entrance on the eastern boundary.

The western plots

5. By early 1991 Mr Rann had found sub-purchasers for the three western plots – then still undeveloped. They were sold, as building plots, to Mr Philip Beverley (Plot 1), Mr Paul Merritt (Plot 2) and Mr Graham Bailey (Plot 3). Their respective plots were transferred to the sub-purchasers by the receivers of the Turner company at the direction of Mr Rann. Those transfers are dated 28 February 1991, although (as the judge thought) they may have been executed rather later than that. Be that as it may, the transfers had been executed by the beginning of April 1991, when application was made to HM Land Registry for registration. Those transfers were made by reference to the early version of Mr Rann's site plan (plan 2). The transfers included an easement across the farmyard for drainage and other service media, and a right to cross the farmyard for a limited period of six months to enable building materials to be brought onto the plots: but they did not include any permanent easement of way across the farmyard. As I have said, permanent access from the east was not then in contemplation. The three purchasers agreed, between themselves, for the provision of access from the west.

6. By May 1991, however, it had become apparent that the local planning authority (or, perhaps, the highway authority) did not favour the creation of a new access from North End Lane on the western

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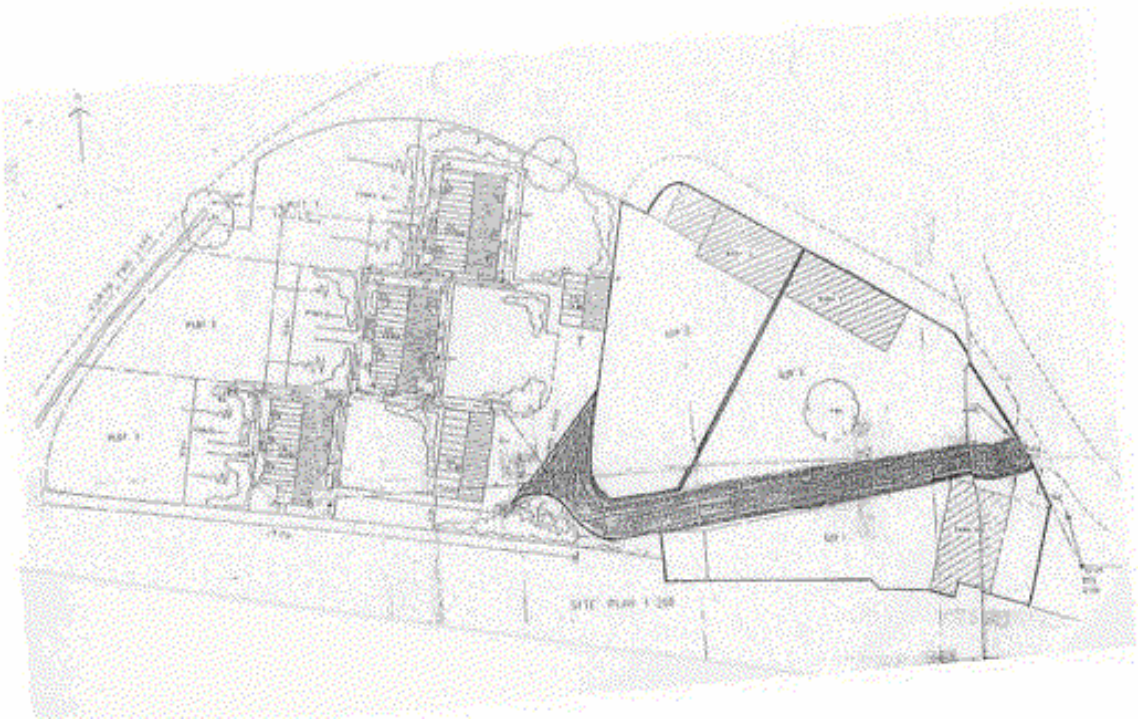
boundary of the Home Farm development. The authority preferred a single access to all six dwellings from the east; so that the only access to the public road would be through the existing entrance on the eastern boundary. With that limitation in mind, the three sub-purchasers instructed Newton Design, a firm of architects and surveyors, to prepare a proposed layout for the development of the three western plots with access across the former farmyard to the existing entrance.

The Newton plan

7. Newton Design prepared a detailed layout plan:



That plan was subsequently revised in minor respects, but nothing turns on that. By the end of June 1991 it was in a form acceptable to the sub-purchasers. The Newton plan provided a practical solution to the problem of access to the three western plots; but it took little or no account of the ownership of the land over which that access was to be provided. There is no reason to think that that was a matter which Newton Design had been asked to take into account. It must have been obvious that, whatever the solution to the problem of access to the western plots, some further acquisition from Mr Rann, as the owner of the remaining (or eastern) half of the Home Farm land would be required.

8. Two features of the Newton plan (in its revised form) require mention. First, there is what may be called "*the 69 metre line*". That is a line from a point on the northern boundary, then marked by the western post of a gate which itself lay to the west of the stone barns, to a point on the southern boundary of the Home Farm land which is 69 metres from the western corner. The line marks the western extremity of the building works which were to be carried out on the eastern half of the Home Farm land; in particular, it was to be the building line for the barn conversion which was to become known as Jacob's Place. Land immediately to the west of the 69 metre line was to be used for access to (and turning space in connection with) garages which were to be built to the east of the three new houses on the western plots. It is convenient to refer to that land by the description which it was given on the Newton plan – that is to say, as the "shared access" land. Importantly, in the present context, the 69 metre line took in, for the benefit of the western plots and as part of the shared access land, a significant triangle of land to the east of the two southern plots (plots 2 and 3). That part of the shared access land had not been included in the transfers dated 28 February 1991.

9. Second, the Newton plan provided for access to the shared access land – and so to the garages serving the three western plots – from the existing eastern entrance to be over a roadway the southern edge of which was a straight line from the southern end of the 69 metre line to the north western corner of the

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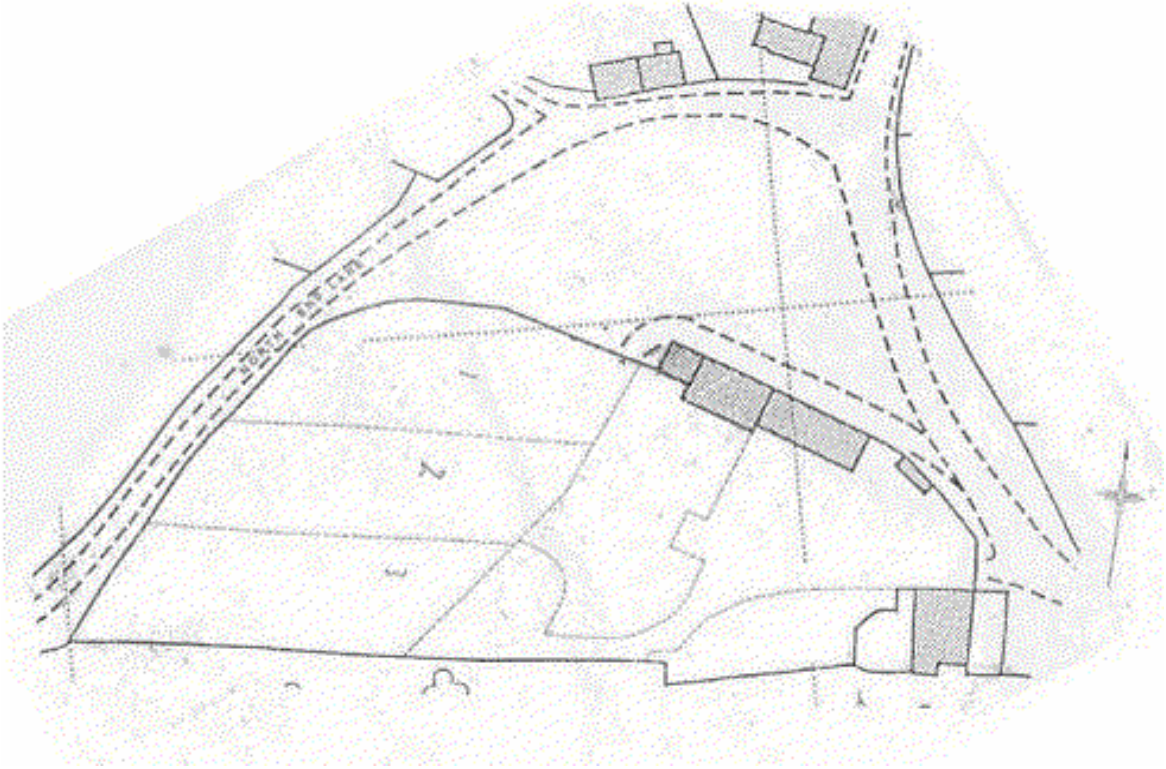
existing farmhouse. The effect was that the proposed roadway passed just to the north of a garage which was to be built at the western end of the land which was to comprise the curtilage of the renovated farmhouse. It could be deduced from the Newton plan – which was drawn to scale - that the width of the proposed roadway (throughout its length) was to be 4.2 metres.

The eastern lots

10. By the beginning of July 1991, Mr Rann had decided upon the boundaries of the three lots into which the eastern half of the Home Farm land was to be divided; and had agreed the sale on or transfer of those lots. The lots were shown on the site plan to which I have already referred - that is to say, the site plan by reference to which the western plots had been transferred – as revised to accommodate the need to provide access to the western plots from the existing entrance on the eastern boundary.



11. The farmhouse itself, with a garden and curtilage extending to the west along the southern boundary of the Home Farm land, (eastern lot 1) was to be transferred to Mr Rann and Miss Alexa Valentine. Miss Alexa Valentine is the daughter of Mr Alan Valentine. The judge held as a fact (as to which there is no challenge on this appeal) that she was to take the transfer of that lot as nominee for her father. The easterly of the two stone-built barns, together with land to the south abutting both lot 1 and the southern boundary and extending as far west as the boundary with the western plots, (eastern lot 2) was to be transferred to Mr Clarence Hunton and his wife, Mrs Lillian Hunton. Mr and Mrs Hunton were Mr Rann's parents-in-law. The remaining lot (eastern lot 3) – which comprised the westerly of the two stone built barns and which abutted (at its western boundary) Mr Beverley's plot (western plot 1) and Mr Merritt's Plot (western plot 2) – was to be transferred to Mr Rann and his wife, Mrs Lesley Rann. Lot 3 did not extend to the southern boundary of the Home Farm land. It abutted (at its southern boundary) land comprised in eastern lot 2.

12. The configuration of the boundary between lot 3 and lot 2 (in so far as that boundary lay to the south of lot 3) was plainly dictated by the need to provide access to the three western plots and a decision to meet that need by rights confined to rights over one only of the three lots into which the eastern land was to be divided. That lot was to be lot 2 - the land to be transferred to Mr and Mrs Hunton. The effect of that decision was that part of lot 2 extended along the southern boundary of Home Farm, beyond lot 1; first as a continuation of a roadway and then widening to form a space for access and turning. In the result so much of lot 2 as lay to the south of lot 3 was in the form of a ploughshare; the

blade facing to the west. The handle of the plough was formed by the roadway along the north boundary of lot 1. The corollary was that the space between the blade and the handle – which was included within lot 3 – extended southwards in the form of an inverted shark's fin. That part of lot 3 became known in the proceedings as "the shark's fin".

13. There was a potential problem – which does not appear to have been recognised at the time – in that the revised site plan and the Newton plan were not congruous. In particular: (i) the revised site plan gave no recognition to the position of the 69 metre line, (ii) part of the shared access land (for which the Newton plan provided) was included within lot 3, and (iii) the shark's fin extended over the line of the roadway as shown on the Newton plan.

The July 1991 meeting

14. As I have said, it must have been obvious to the owners of the three western plots, by the end of June 1991, that a solution to the problem of access to those plots required some further negotiation with Mr Rann, while he remained the owner of the remaining (or eastern) half of the Home Farm land, or with his sub-purchasers or transferees if he sold on. That negotiation took place. In particular, as the judge found, it took place at a site meeting during the second week of July 1991. The judge found (and his finding is not challenged) that those present included Mr Rann, Mr Bailey and Mr Merritt (acting on their own behalf and on behalf of Mr Beverley) and – importantly, in this context - Mr Valentine. The judge found, also, that agreement was reached on the basis of the Newton plan. Indeed, it does not seem to have been suggested that any consideration was given at that meeting to what I have described as Mr Rann's revised site plan. There was no evidence that Mr Bailey or Mr Merritt had seen the revised site plan at that stage (if, indeed, it had come into existence by that date). Mr Rann did not give evidence; and Mr Valentine could not recall having been at the meeting. The judge's findings are expressed in two passages, at paragraph 39 of his judgment:
"I do not take the agreement to have been an agreement about the legal boundaries of the various pieces of land. It was an agreement about the layout of the development. It was also, and crucially, an agreement about the land which would be dedicated to accessway for each of the plots, by reference to the layout on the plan . . .
I therefore find that there was an oral agreement to which Rann and Mr Valentine were parties that the roadway and areas described as shared access on the plan would be dedicated as means of access to the Plots, including Beverley Merritt and Bailey's plots; and that in return for the legal entitlement to use such areas for access, Beverley Merritt and Bailey would perform certain works."

It is clear from context that the plan to which the judge refers in those passages is the Newton plan.

15. The works to be performed by the owners of the three western plots in return for access over the eastern land included making up the roadway itself with hardcore and a gravelled surface, the construction of stone walls between the roadway and the lots to either side – that is to say, between the roadway and eastern lot 1 (to the south) and between the roadway and eastern lot 2 (to the north) – and the construction of a stone wall at the south of eastern lot 3. Stone for the walls was to be provided by Mr Valentine's company, ATV Reclamation Limited – as appears from a letter dated 15 July 1991 from Mr Merritt.

The deeds of grant

16. By transfers dated 12 July 1991 two of the three eastern lots were transferred by the Turner company at the direction of Mr Rann; in particular, lot 2 was transferred to Mr and Mrs Hunton and lot 3 was transferred to Mr and Mrs Rann. By a transfer dated 9 August 1991 lot 1 was transferred by the Turner company, at the direction of Mr Rann, to Mr Rann and Miss Alexa Valentine. The transfers were effected by reference to Mr Rann's revised site plan.

17. Mr and Mrs Hunton, as proprietors of eastern lot 2, executed two deeds of grant. The deeds are dated 12 July 1991; but they may well have been executed at the same time as (or after) the transfer dated 9 August 1991. By one of those deeds Mr and Mrs Hunton purported to grant to Mr Beverley, Mr Merritt and Mr Bailey respectively rights of way over "all that freehold accessway situate and forming part of Lot 2 Home Farm, . . . , shown edged red and coloured brown [on] the plan attached hereto" for the benefit of each of the three western plots. By the other they purported to grant rights of way over the same land to Mr Rann and Miss Alexa Valentine (for the benefit of eastern lot 1 – the farmhouse)

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and to Mr and Mrs Rann (for the benefit of eastern lot 3 – Jacob's Place). The grant to the owners of the western plots reflected the agreement made at the site meeting that they would carry out the works contained in the covenants by the grantees to construct "the accessway shown coloured brown on the plan annexed hereto with hardcore and with a gravelled surface" and to construct "a continuous stone wall to a height of 1.8m along the edge[d] of the said accessway".

18. The plan attached (or annexed) to the deeds of grant was the Newton plan. The "accessway shown coloured brown" on that plan accords with the roadway shown on the plan which had been the subject of discussion and agreement at the site meeting. It extends over part of the shared access land which had not been included in the transfers of the western plots – that is to say, in the transfers of plots 2 and 3 dated 28 February 1991.

19. The remainder of the shared access land – that is to say, (i) so much of the shared access land as had been included in the transfers of the western plots and (ii) so much of that land as had neither been included in those transfers nor in the grant by Mr and Mrs Hunton – is the subject of a third deed of grant, made between Mr Bailey, Mr Merritt and Mr Beverley. That deed contains the recital that the parties "have agreed to appropriate the pieces of land coloured brown on [their] respective properties for the purposes of a private road for their common benefit . . ." and to grant to each other rights of way thereover. The plan annexed to that deed was the Newton plan – that is to say, it was the same plan as that which had been annexed to the deeds of grant executed by Mr and Mrs Hunton, and the same plan as that which had been the subject of discussion and agreement at the site meeting. The necessary inference – as the judge found – is that the third deed of grant, although dated 28 February 1991, must have been executed at or about the same time as the other two deeds of grant. The Newton plan (in its revised form) was not in existence until June 1991.

20. The three deeds of grant are mutually consistent; and are consistent with a scheme for access to the three western plots, and to the eastern lots (in particular, to lots 1 and 3), based on the Newton plan and the agreement at the July site meeting. They are consistent, also, with an intent that access to the shared access land (for the benefit of the three western plots) should be over eastern lot 2 – and not over lots 1 and 3. But they are not consistent with the transfers of lots 1, 2 and 3 as effected by the transfer deeds dated 12 July and 9 August 1991. The reason is obvious. The transfers were effected by reference to Mr Rann's revised site plan; the access was granted by reference to the Newton plan; the two plans were not congruous. The incongruity led to the purported grant by Mr and Mrs Hunton of a right of way over land which had not been transferred to them – that is to say, over part of the shark's fin (which was transferred with lot 3) – and to the purported appropriation as part of the land subject to the deed of mutual grant by the owners of the western plots of land which they did not own. That, in turn, led the owners of the three western plots to think that the land over which they had a right of way to the shared access land was wholly within lot 2; and that the shared access land itself (so far as not within the western plots) was wholly within lot 2. It was not appreciated – and not intended – that part of the land over which the right of way was thought to exist – and part of the shared access land – was comprised within eastern lot 3.

Subsequent dealings with the eastern lots

21. By April 1992 the farmhouse on eastern lot 1 had been renovated, and a garage had been built at the western end of that lot. The judge found that Mr Valentine had supervised those works. As I have said, the judge was satisfied that his daughter held her interest in lot 1 as his nominee. On 30 April 1992 Mr Rann and Miss Alexa Valentine transferred lot 1 to Mr Francis Murphy and his wife, Mrs Maureen Murphy. By a transfer of the same date Mr and Mrs Hunton transferred to Mr and Mrs Murphy, out of lot 2, a small piece of land abutting the western end of lot 1 – thereby extending the curtilage of the farmhouse to the west by a few metres. The combined parcel – that is to say, the former lot 1 and the small addition from lot 2 – was allocated a new title number at HM Land Registry. Since April 1992 the farmhouse and curtilage has been held under title LL82154.

22. On 17 July 1992 eastern lot 3, which had been registered under title number LL78144, was transferred by Mr and Mrs Rann to Mr Valentine. The barn conversion had not, then, been carried out. The land registry plan shows the land within that title as including the shark's fin. The judge found that Mr

Valentine was surprised to find that lot 3 extended as far to the south as it did (with the shark's fin); but that he did discover that at the time of the transfer because the land registry plan was sent to him. The judge found, also, that there was bound into the land certificate a copy of the deed of grant, dated 12 July 1991, by which Mr and Mrs Hunton had granted a right of way over part of eastern lot 2 (and had purported to grant a right of way over part of the shark's fin) for the benefit of lot 3. Lot 3 has remained in the ownership of Mr Valentine. He has carried out the barn conversion and the property is now known as "Jacob's Place" .

23. By early 1993 (in connection with a proposed sale of Mr Bailey's plot) the discrepancy between the land which had been transferred in 1991 and the land over which rights of way had been granted – reflecting the fact that the Newton plan and Mr Rann's site plans were incongruous – was appreciated not only by Mr Valentine but also by Mr Merritt and Mr Bailey. Mr Beverley had, by then, dropped out; in that he had found it impossible to keep up the payments due under his mortgage with the consequence that his plot (western plot 1) had been repossessed by his mortgagees. In what may be seen as an attempt to resolve the problem, Mr and Mrs Hunton transferred to Mr Bailey and Mr Merritt, for nominal consideration, the roadway to the north of lot 1 – which was, by then, at least partly bounded by the stone walls built pursuant to the July 1991 agreement and the covenants in the deed of grant – and the land to the south of lot 3 (which I have described as being in the form of a ploughshare). The transfer is dated 21 May 1993 and the land transferred is described by reference to the land registry plan. The land transferred out of lot 2 was allocated a new title number – LL94279. In effect, therefore, Mr Bailey and Mr Merritt acquired the land over which, at the time of Mr Rann's decision to divide the eastern land in accordance with his site plan, it had been contemplated that access would be afforded to the western lots; but they did not acquire the whole of the land over which access was to be provided under the July 1991 agreement and the deeds of grant. In particular, they did not acquire any part of the shark's fin or so much of the shared access land as had been transferred with lot 3. That land remained in title number LL78144, of which Mr Valentine was registered as proprietor.

The September 1993 agreement

24. The acquisition by Mr Bailey and Mr Merritt of the land in title LL94279 did not resolve the problem caused by the discrepancy between the land transferred in 1991 and the land over which rights of way had been granted by the deeds of grant. It could not do so for at least two reasons. The first was that the garage which had been built at the western end of lot 1 (title number LL82154) extended onto what had been the intended roadway as defined by Mr Rann's site plan; thereby creating a constriction so that, in practice, it was necessary for a vehicle to encroach onto the shark's fin if it were to pass the north western corner of that garage. Further, it was impossible to gain access to that garage without encroaching onto the shark's fin. The judge found that those were problems created by Mr Valentine himself, in that he had supervised the construction of the garage on lot 1. The second reason was that Mr Bailey had erected a garage at the eastern edge of his plot (western plot 3) which – although in the position shown on the Newton plan – extended over what I have described as the blade of the ploughshare at the western end of the former lot 2 (title LL94279). Although the acquisition of title LL94279 gave Mr Bailey joint ownership (with Mr Merritt) of the land on which part of his garage had been built, access to that garage by vehicle – and access to the shared access land to the north and east of that garage – could not be obtained without encroachment upon the shark's fin.

25. The solicitor then acting for Mr Bailey and Mr Merritt – Mr Michael Adie of Messrs Russell Adie and Pickwell – had, it seems, acted for Mr Rann and for each of the transferees in 1991, both in connection with the various transfers and in connection with the deeds of grant. Negotiations between Mr Adie and new solicitors instructed by Mr Valentine – Messrs Langleys – continued over the summer of 1993. It is curious – given the previous involvement of Mr Adie as the conveyancer – that he made no attempt to address, in correspondence with Langleys, the underlying problem – that is to say, the lack of congruence between the transfer plans and the plans annexed to the deeds of grant. The negotiations proceeded on the basis of a further plan – put forward by Mr Valentine – which provided for the redefinition of the boundaries to the land which he had purchased (eastern lot 3 – Jacob's Place). Those negotiations led to agreement on terms set out in a letter from Langleys, dated 3

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September 1993, and accepted by Mr Adie on behalf of his clients on 10 September 1993. Put broadly, Mr Valentine agreed that the boundaries of Jacob's Place be redefined so as to exclude most (if not all) of the shark's fin – which was to be treated as part of "the accessway"; Mr Bailey agreed to make payment to Mr Valentine of £8,000 out of the proceeds of sale of his plot (western plot 3) then in contemplation; and "the ownership of the accessway" was to be transferred to Mr Valentine free of charge. The agreement, contained as it was in an exchange of letters, was not in a form capable of satisfying the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989; and so was not, of itself, of any legal effect.

26. It was envisaged that the agreement reached in September 1993 would be carried into effect by the rectification of the title plans at HM Land Registry. To that end Mr Bailey and Mr Merritt instructed a surveyor, Mr Togher, to prepare a plan showing the proposed new boundaries. Mr Adie sent a copy of that plan ("the Togher plan") to Langleys on 9 December 1993 with the comment: "If the plans are agreed, would you please let us know and we will prepare the endorsement that the Land Registry require". But the matter did not proceed. Mr Bailey's proposed purchasers had withdrawn. That had the consequence that – as Mr Adie informed Langleys on 15 November 1993 – Mr Bailey "does not presently have funds to make any payment to your Client". Although Mr Valentine was prepared to agree the Togher plan, no application for rectification of the title plans appears to have been made to HM Land Registry before April 1994 (or at all). By April 1994 mortgagees had repossessed both Mr Bailey's plot (western plot 3) and Mr Merritt's plot (western plot 2).

The subsequent ownership of the western plots

27. As I have said, by April 1994 all three of the western plots were in the possession of mortgagees. No building work had commenced on plot 1 (Mr Beverley's plot); some work had been done on plots 2 and 3, but the houses were not complete.

28. On 9 August 1995 western plot 1 was transferred to Mr Valentine by Mr Beverley's mortgagee for a consideration of £5,000. As the judge put it, at paragraph 15 of his judgment:

> "The Claimant Mr Valentine successfully asserted to Beverley's mortgagee, the National and Provincial Building Society, that Plot 1 was landlocked as a result of the events that had happened, and so he was able to persuade them to sell it to him for what he described in evidence as the "lovely price" of £5000. . . . He has in recent times built a substantial house on the site."

Plot 1 is registered under title LL67120.

29. By October 1997 a purchaser – the first named defendant, Mr Kevin Allen – had been found for western plots 2 and 3. Mr Allen approached Midland Bank Plc for mortgage finance, The bank obtained a valuation report from a chartered surveyor. The surveyor wrote (in his report on plot 2):
"We are advised that the property enjoys a right of way to a private entrance driveway off North End Lane enabling vehicular access to the shared garage block and to the property. However while on site we were challenged by a neighbouring owner who claimed the property to be landlocked which would in our opinion have a serious effect on the values reported above (in excess of 50%) and we would recommend detailed investigation and confirmation of all rights of access and maintenance liabilities by the completing solicitor in this respect."

> The "completing solicitor" was Mr Adie. On 29 October 1997 he wrote to the manager of the bank:
> ". . . to confirm that plots 2 and 3 Home Farm have a defined right of access way to connect with the public highway. I enclose a photocopy of the land certificate relating to the driveway from which you will see that the whole of the access way is comprised within the registered title and is subject to rights of way in favour of the other properties on this development."
>
> The copy land certificate enclosed with that letter is in respect of title LL94279 – that is to say, it is the land certificate in respect of the land transferred to Mr Bailey and Mr Merritt by Mr and Mrs Hunton on 21 May 1993.

30. Mr Adie's letter of 29 October 1997 is – to say the least – both inaccurate and inadequate. The "whole of the access way" from North End Lane to western plots 2 and 3 is not comprised in title LL94279. The access which those plots required lay over the shark's fin (comprised in title LL78144 – Jacob's Place);

and over the shared access land (part of which was comprised in title LL78144). But entries 5 and 6 in the charges register of title LL94279 refer to the two deeds of grant dated 12 July 1991 made by Mr and Mrs Hunton – the one in favour of Mr Beverley, Mr Merritt and Mr Bailey, and the other in favour of (i) Mr Rann and Miss Alexa Valentine and (ii) Mr and Mrs Rann. Those are the two deeds by which (as I have explained) Mr and Mrs Hunton purport to grant rights of way in favour of each of the properties comprised in the Home Farm development (other than eastern lot 2, which they owned themselves) over the land which was subsequently transferred to Mr Bailey and Mr Merritt and allocated title number LL94279. The important feature, in the present context, is that there are notes against entries 5 and 6 in the charges register to the effect that copies of each of the two deeds of grant dated 12 July 1991 are bound into the land certificate. The plans annexed to each of those deeds are, of course, copies of the Newton plan. It would be obvious, therefore, to anyone who took the trouble to compare the LL94279 title plan with the plans by reference to which the rights of way referred to in entries 5 and 6 in the charges register are defined that the position was not as simple as might appear from the unqualified confirmation which Mr Adie felt able to give to the bank.

31. The explanation which Mr Adie gave to his client, Mr Allen, was more explicit. We were shown, without objection, a witness statement signed by Mr Allen on 29 March 2001 which, we were told, stood as his evidence at the trial. At paragraphs 11 and 12 of that statement Mr Allen had said this:

> *"11. When I came to buy [western plots 2 and 3], naturally I sought advice from my solicitor, Mr Adie, as to whether or not there was any legal basis for Mr Valentine's claim that the properties had no access, and my solicitor informed me that the properties had the benefit of deeds granting rights of way over a shared access road in 1991. Referring to plans attached to those deeds (showing the houses and garage on South Plot (plot 3) and Middle Plot (plot 2) more or less in the position they had been built) it was clear that this road was adequate to provide access to both properties and an area at the end for vehicles to turn.*
>
> *12. My solicitor further advised that the plans at the Land Registry showing ownership of the land subject to the rights of way did not correspond with the position of the access road shown on the deed plans. He also advised that the plan followed by the developers (of whom Mr Valentine was one) in laying out the site on the ground, was that used for the deed plans, not the title plans. Therefore, as the access road to the properties had been built in the intended position many years previously, no one was in a position to challenge it, least of all Mr Valentine who had been involved with the development at the outset and was responsible for building the garage belonging to the Farmhouse in a position which would obstruct the access road if it had to take the route indicated by the plan of the relevant title. Also, Mr Valentine could not have the benefit of the right of way as it [is] exists on the ground for access to his properties, the Barn [Jacob's Place] and North Plot [western plot 1], without also accepting the burden of other persons also using the right of way where it crosses any land within his title."*

There was no challenge to that evidence. In particular, Mr Adie did not give evidence to contradict Mr Allen's account of what he had been told as to the position before he purchased western plots 2 and 3. It is a remarkable feature of this litigation that Mr Adie, who might be thought to be the person best able to explain the conveyancing transactions in relation to the Home Farm development site in which he had been engaged, was not called to give evidence at the trial.

32. The significance of the evidence set out in paragraphs 11 and 12 of his witness statement, as it seems to me, is that Mr Allen purchased western plots 2 and 3 in the knowledge that the title plans defining the various properties at HM Land Registry did not correspond with the Newton plan, by reference to which rights of access had been granted; but in the belief that Mr Valentine (as one of those involved in the layout of the development), knowing that at the time, had intended that the Newton plan should be definitive in relation to rights of access. That belief cannot be dismissed as fanciful. It was based on what Mr Allen had been told by Mr Adie – who had acted for Mr Valentine in 1991 (when the deeds of grant were executed) and at the time of the negotiations in 1993. And, as Mr Allen pointed out, at paragraph 12 of his witness statement, it was supported by the obvious need of Mr Valentine – as the owner of Jacob's Place (eastern lot 3) and of western plot 1 – to rely on the 1991 deeds of grant to gain access to his own properties.

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33. Western plots 2 and 3 (then registered under title numbers LL67121 and LL67119 respectively) were transferred to Mr Allen on 21 January 1998. He completed the house on plot 2. On 9 November 1998 he sold on part of that plot 2 (with the house) to Mr Simon Nash and his wife, Mrs Alison Nash. He retained, under the existing title LL67121, a strip of land on the east of plot 2, over which Mr and Mrs Nash obtained access to the land which they had purchased. The land transferred to Mr and Mrs Nash was allocated a new title number – LL166539. Mr and Mrs Nash are the second and third named defendants to these proceedings.

The devolution of the eastern land.

34. Lot 1 (the farmhouse and curtilage, held under title LL82154) was transferred by Mr and Mrs Murphy on 26 June 1998. The transferees, Mr Paul Bridgestock and his wife, Mrs Valerie Bridgestock, have been joined in these proceedings as defendants to a Part 20 claim. Lot 2 is, I think, no longer owned by Mr and Mrs Hunton – but nothing turns on that. The present owners of lot 2 have played no part in these proceedings. The land which was transferred by Mr and Mrs Hunton to Mr Bailey and Mr Merritt on 21 May 1993 – which I have described as taking the form of a ploughshare and which is held under title LL94279 – was transferred by them to Mr Allen on 4 December 2000 (after the commencement of this litigation).

These proceedings

35. These proceedings were commenced in or about April 1999; but the particulars of claim then served were wholly replaced by amended particulars dated October 2000. The claimant, Mr Valentine, claimed in the proceedings as the registered owner of Jacob's Place (eastern lot 3 – registered under title LL78144) and of western lot 1 (under title LL67120).

36. The amended particulars, themselves, fail to recognise the underlying problem caused by the lack of congruence between the transfer plans and the plans annexed to the 1991 deeds of grant. In paragraph 11 of the amended particulars the land over which rights of access were granted to the owners of the western plots by Mr and Mrs Hunton in July 1991 is defined as "the South Access Way". In paragraph 12 it is asserted that "The land subject to the South Access Way" was sold to Messrs Bailey and Merritt by Lillian Hunton in or about May 1993 and the said land is now registered under Title No LL94279". And in paragraph 13 it is said (in effect) that the rights of access granted in July 1991 to the then owners of eastern lots 1 and 3 (the farmhouse and Jacob's Place) were granted over "land now registered under Title No LL94279". The underlying problem, of course, is that the land over which Mr and Mrs Hunton purported to grant rights of access in July 1991 - both to the owners of the western plots and to the owners of eastern lots 1 and 3 – included land which Mr and Mrs Hunton did not then own. The land over which rights of access were granted in 1991 included land not then within title LL78142 - and so not within title LL94279 on the subsequent transfer to Mr Bailey and Mr Merritt. In particular, the land over which rights of access were granted in 1991 included land within title LL78144 (Jacob's Place). The failure to recognise that the land over which Mr and Mrs Hunton purported to grant rights of access in 1991 is not the same land as the land within title LL94279 has the result that the amended particulars of claim tend to obscure rather than to define the issues which the judge needed to address.

37. Examples of this tendency to obscure the issues are found in paragraphs 14 and 22 and 23of the amended particulars of claim:

> *"14. By reason of a building constructed at the western end of Title No LL82154 [the farmhouse] and marked on the Plan, it is not possible for vehicles using the South Access Way to access land registered under Title Nos LL67119, LL166539 and LL67121 [western plots 3 and 2 respectively] without coming onto the Claimant's Property [Jacob's Place] by reason of the obstruction caused by the building to the South Access Way.*
>
> . . .
>
> *22. The First Defendant's garage is built partly on his own land under Title No LL67119 [western plot 3] but substantially and as to the larger part upon land not owned by him being land registered under Title No LL94279, the same being subject to the rights of way granted under the deeds of 12 July 1991 as is hereinbefore pleaded.*

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23 By reason of the matters aforesaid the First Defendant:

23.1 has acquired and continued to maintain a permanent obstruction to, and interference with, the use by the Claimant (and the Second and Third Defendants) of the South Access Way and his enjoyment of rights granted to him

23.1.1. as owner of dominant land [western plot 1 – registered under title LL 67120] under the deed dated 28 February 1991 . . .;

23.1.2. as owner of dominant land [also western plot 1] under the deed dated 12 July 1991 referred to under paragraph 11 above;

23.1.3 as owner of dominant land [Jacob's Place] under the deed dated 12 July 1991 referred to under paragraph 13 herein; . . . "

It is only if the "South Access Way" over which Mr and Mrs Hunton purported to grant rights of access in 1991 is (wrongly) treated as congruous with the land which, in May 1993, they transferred to Mr Bailey and Mr Merritt (now comprised in title LL94279) that sense can be made of those paragraphs. Once it is appreciated that the "South Access Way" – as defined in paragraph 11 of the amended particulars of claim – includes land which is not within title LL94279 paragraphs 14 and 22 cannot mean what they say. The building constructed at the western end of the farmhouse (title LL82154) does not obstruct the rights of access which Mr and Mrs Hunton purported to grant in July 1991 – because those rights of access were granted with that building in mind. Mr Allen's garage (built on land which he now owns) does not obstruct the rights of access granted by either of the deeds of July 1991 – because those deeds were based on the Newton plan which took account of the proposal to build a garage to serve western plot 3.

38. Be that as it may, the relief sought in the amended particulars of claim includes: (i) a declaration that the first defendant (Mr Allen) has no right to pass over land owned by the claimant as owner of Jacob's Place (including, in particular, the land known as the shark's fin) for the purpose of obtaining access to that part of western plot 2 which he retained (now held under title LL67121) and an injunction to restrain trespass; (ii) a declaration that the second and third defendants (Mr and Mrs Nash) have no right to pass over the Jacob's Place land for the purpose of obtaining access to that part of western plot 2 which they now own (held under title LL166539) and an injunction to restrain trespass; (iii) an injunction requiring Mr Allen to remove so much of his garage as has been built upon the land transferred by Mr and Mrs Hunton in 1993 (now held by him under title LL94279) "which interferes with and obstructs the Claimant's rights [as owner of Jacob's Place and western plot 1 – see paragraphs 23.1.2 and 23.1.3] over and along the South Access Way"; and (iv) damages in lieu of the injunctions sought.

39. The substantive defence to those claims is found in the re-re-amended defence and counterclaim served on behalf of the first defendant. The second and third defendants adopted that defence. The defence identified and defined the deeds of 12 July 1991 respectively as "Deed E" (the grant of rights of access for the benefit of the owners of the western plots) and "Deed F" (the grant of rights of access for the benefit of eastern lots 1 and 3). It took the point that the transfer plans and the plan (the Newton plan) attached to Deeds E and F are not congruous. Paragraph 10 of the re-re-amended defence contained the following averment:

". . . it was the intention of the parties to the said Deed 'F' and to the transfers referred to in the Amended Particulars of Claim, that the Accessway as shown on the Plan attached to Deeds 'E' and 'F' would be transferred to Messrs Bailey and Merritt and that the Claimant's Property [Jacob's Place] transferred to him in 1992 was intended to be the area of land identified as 'Lot 3' on the Deed 'F'. The First Defendant will contend that the Claimant was aware of, acquiesced in and/or consented to the drawing up of the boundaries of all the Plots at Home Farm and the rights of way thereover in accordance with the layout shown on the said Plan attached to Deeds 'D', 'E' and 'F' [the Newton plan], and that the Claimant is estopped or in equity prevented from asserting that the said layout is wrong or not binding on him."

On the basis of that averment the defendants sought rectification of the Land Registry title plans so as to accord with the boundaries shown on the Newton plan.

40. Paragraph 13 of the re-re-amended defence contained an alternative plea, also based on estoppel:
". . . if contrary to the First Defendant's primary contention, it be found that the Claimant's property [Jacob's Place] covers the area shown on the Land Registry Title plan for LL78144, then the First Defendant will contend that, by reason of the matters set out above and below, the Claimant is now estopped or prevented in equity from alleging that vehicles following the route shown as the Accessway on the plan attached to deeds 'D', 'E' and 'F' [the Newton plan] are trespassing on his property. . . "

That contention is repeated in paragraph 16 of the re-re-amended defence; and repeated again, in relation to the garage serving western plot 3, in paragraph 23. On the basis of that contention the defendants sought by way of counterclaim (in the alternative to rectification of the Land Registry title plans) a declaration as to the existence and extent of rights of way enjoyed in respect of the properties comprised in the Home Farm development.

41. In paragraphs 1.2, 3.1 and 3.2 of the re-re-amended defence, western plots 1, 3 and 2 (respectively LL67210, LL672119 and LL67121 and LL166539) are defined as 'Plot 2', 'Plot 4' and 'Plot 3'. Paragraph 7.3 of the re-re-amended defence contained the allegation that the claimant (Mr Valentine) had built a garage on Jacob's Place in such a position as to obstruct access to 'Plot 2' (western plot 1) over so much of 'Plot 3' (the retained part of western plot 2) as was appropriated for the purposes of a private road under the deed of grant dated 28 February 1991 – see paragraph 19 of this judgment. Accordingly, it was said (at paragraph 7.4 of the re-re-amended defence) that "the Claimant has no right of way over Plot 3 [the retained part of western plot 2] sufficient to enable him to gain access by vehicle or alternatively at all to Plot 2 [western plot1]". It is alleged, at paragraph 7.5 of the re-re-amended defence, that part of a wall and part of a pond which the claimant has constructed (within, I think, what he took to be the curtilage of Jacob's Place) is, in fact, on the retained part of western plot 2. By counterclaim under CPR Part 20 the first defendant (Mr Allen) sought an injunction to restrain the claimant (Mr Valentine) from continuing to trespass on the retained part of western plot 2 (title LL67121); with a claim for damages in the alternative.

The Part 20 proceedings against Mr and Mrs Bridgestock

42. As I have said, eastern lot 1 (the farmhouse and curtilage, held under title LL82154) was transferred to Mr and Mrs Bridgestock in June 1998. Mr Allen has joined them in the proceedings as "the Second Part 20 Defendants". Paragraph 13.1 of the re-re-amended defence was in these terms:
"Alternatively, if, contrary to the First Defendant's primary case, the Title plans for the plots at Home Farm are not altered to accord with the position on the ground as it stands and if it be found that the First Defendant is and has been guilty of any actionable trespass over land owned by the Claimant in order to gain access to his land by vehicles, then the First Defendant will contend that such trespass has been and is made necessary by reason of the positioning of the garage belonging to the Second Part 20 Defendants on land not owned by [them] and not forming part of Title no.LL82154 [the farmhouse], namely on part of Plot LL94279 (as indicated on [the Newton plan]). The said garage (and cars parked by the Second Part 20 Defendants adjacent to it) is (in such circumstances) preventing the First Defendant from gaining access to his garage and amounts to an actionable trespass by the Second Part 20 Defendants over the access-way and an unlawful interference with the First Defendant's right of way thereover."

On the basis of that plea Mr Allen sought a declaration against Mr and Mrs Bridgestock as to the correct and accurate boundaries, an order for rectification of the Land Registry title plans, damages for trespass and indemnity in respect of any sums payable by him to the claimant, Mr Valentine.

43. The amended defence and counterclaim served on behalf of Mr and Mrs Bridgestock in response to the Part 20 claim made against them contains (at paragraph 13B) what is, perhaps, the fullest statement of the estoppel on which they and the defendants now rely:
"Further or alternatively, the Claimant should be estopped from contending as against the Defendants that the right of way is other than along the Brown Roadway north of the Blue Land notwithstanding the fact that part of the Brown Roadway may be within the Claimant's registered title to the Barn: . . ."

In that context "the Barn" is the property (registered under title LL78144) now known as Jacob's Place, "the Blue Land" is the small piece of land at the western end of eastern lot 1 which was transferred to Mr and Mrs Murphy in April 1992 – thereby extending the curtilage of the farmhouse to the west by a

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few metres (see paragraph 21 of this judgment) – and "the Brown Roadway" is the road coloured brown on the plan (the Newton plan) attached to the July 1991 deeds of grant. The plea continues, in paragraph 13B, in these terms (so far as material):

"... (a) the Claimant's predecessors in title of the Barn (Mr G P D Rann and Mrs L E Rann) would have been estopped (by convention or otherwise) from denying that the right of way was along the Brown Roadway, and the Claimant can be in no better position than his predecessors in title:

(i) it was the common intention of all the parties to the Deeds of Easement dated the 12th of July 1991 and the 9th of August 1991 that the right of way would be over the Brown Roadway. That common intention appears from the following:

(1) [T]he owners of all the plots of land on the Site entered into the Deeds of Easement dated the 12th of July 1991 and the 9th of August 1991 showing the right of way over the Brown Roadway. Mr and Mrs Bridgestock note that the witness statement of Mr Bailey served on behalf of the First Defendant refers to specific discussion involving Mr G P D Rann and the Claimant on the Site in June/July 1991 to the effect that access would be over the Brown Roadway. [emphasis added]

(2) The Site was laid out in accordance with the plan [the Newton plan] attached to the Deeds of Easement.

(3) Access to all the properties on the Site has always been in accordance with the Deeds of Easement.

(4) Neither the Claimant nor his predecessors in title of the Barn [Jacob's Place], Mr G P D Rann and Mrs L E Rann, have occupied the Brown Roadway. The boundary wall of the Barn has been erected so that access along the Brown Roadway is not impeded.

(5) The Garage [serving the farmhouse] was constructed by Mr G P D Rann and by the Claimant and no objection was made to the construction of the Garage by any of the proprietors of any of the properties on the Site. . . . [emphasis added]

The only reasonable inference is that Mr G P D Rann and the Claimant did not erect the Garage on the land they believed to be subject to the right of way, and the proprietors of the properties on the Site (including Mrs L E Rann) did not consider that the Garage had been erected on the land subject to the right of way. [emphasis added]

(ii) In any event, by reason of their conduct in erecting the Garage the Claimant and Mr Rann represented to the other proprietors of the Site and/or encouraged them to believe that the right of way ran over the Brown Roadway and not over the land on which the Garage had been built.

(iii) The proprietors of the other properties on the Site relied and acted on the common assumption/representation/belief by making no objection to the building of the Garage and continuing to use the Brown Roadway and all parties to these proceedings acquired their land on the understanding that the right of way was over the Brown Roadway. . . ."

It is pertinent to note the reference, in sub-paragraph (a)(i)(1) of paragraph 13B, to the site meeting in June/July 1991 at which (as the judge found) Mr Valentine was present – see paragraph 39 of the judgment below and paragraph 14 of this judgment.

44. I should add, for completeness, that Mr Valentine was joined, as a Part 20 defendant, to a claim by Mr and Mrs Bridgestock for declarations that 'the Blue Land' is subject to no rights of way; and that they are entitled to a right of way over 'the Brown Roadway'.

The judgment below

45. After setting out the history the judge began his consideration of the issues in dispute by addressing the claims made by and against Mr and Mrs Bridgestock in relation to the garage serving the farmhouse. Construing the relevant transfers in the light of the circumstances known to the parties at the time, he held: (i) that the transfer of 9 August 1991 to Mr Rann and Miss Alexa Valentine did include the land at the western end of what is now title LL82154, on which the garage has been built; (ii) that no part of the land in that title is subject to a right of way under the July 1991 grants; and (iii) that the southern boundary of title LL78144 (Jacob's Place) is at no point closer than 4.2 metres to any part of the garage. Those findings are incorporated as declarations in paragraphs 1, 2 and 3 of the order which he made on 8 May 2002.

46. The judge rejected the claim for rectification of the Land Registry title plans. There is no challenge to his decision on that point; and, for my part, I have no doubt that he was correct to take the view, as he did, that there was no basis upon which the various transfers could be impugned or upon which the titles, based on those transfers, could be disturbed. As the judge put it (at paragraph 51 of his judgment): "Truly considered . . . the problem lies not with the transfers, but with the terms of the deeds of grant."

47. The judge went on to consider the claims based on estoppel. He accepted the criticism that the factual basis of the estoppels relied upon was not adequately set out in the defendants' pleadings – which he described as "convoluted to the point of being unhelpful"- but he recognised that the matter was pleaded more fully on behalf of Mr and Mrs Bridgestock. He rejected – again, in my view, correctly – the submission that the underlying factual basis as pleaded provided any grounds for redrawing the boundaries of the various plots. He directed himself (at paragraph 55 of his judgment) that: "The only relevant area to be decided upon is about access."

48. The judge rejected the contention that the July 1991 deeds of grant had the effect, in law, of creating an easement (or easements) over land which, at the time, the grantors (Mr and Mrs Hunton) did not own. He recognised that the defendants had to rely on an equitable easement arising by estoppel. He identified the nature of the estoppels on which they sought to rely in these terms (also at paragraph 55 of his judgment):

"As put forward at the trial, estoppel is analysed under different heads, namely proprietary estoppel, estoppel by representation, and estoppel by convention. Estoppel by convention may require a separate mention, but I take the first two as the same for the purposes of this case, the essence being a representation by the true owner of the land that the representee has or will have an interest in the true owner's land; that the representee has acted in reliance on the representation to his detriment; in circumstances where it would be unconscionable for the owner later to deny the truth of what he had represented. Whether estoppel actually confers proprietary rights, or can be used only as a defence, depends on the action taken by the court to give effect to the equity which has arisen, and does not require different ingredients."

Although it is submitted on this appeal that the judge was wrong to address the issues on the basis that there had been representations capable of giving rise to an estoppel, it has not been suggested that his summary of the elements required to found an estoppel by representation, or a proprietary estoppel, was wrong in principle. The judge rejected the submission that this was a case in which an estoppel by convention could arise.

49. The judge set out (at paragraph 58 of his judgment) the two ways in which, as he understood the submissions made to him, the defendants had put their case:

"(a) Rann as beneficial owner of Jacob's Place encouraged Bailey and Merritt (and perhaps Beverley) to believe that the land laid out and shown as shared access on the Newton June plan would be land over which they had a right of way to go to and from their Plots from the gateway at Home Farm. They did believe that, and in reliance upon what they had been led to believe acted to their detriment, by building the walls, working on the roadway; and developing their end of the site in accordance with the plan, in particular Bailey built his garage in accordance with it. The Court should give effect to that reliance and detriment by refusing relief to the Claimant, as Rann's successor in title, when he claims of trespass, and by declaring that they enjoy equitable easements over the shark's fin.

(b) The Claimant also personally encouraged Bailey and Merritt in the relevant belief. It cannot on the finding that I have made be asserted that he, Mr Valentine, was originally a beneficial owner of Jacob's Place, but he became the owner on 17 July 1992, and inasfar as activities amounting to detriment continued after that, he himself is directly subject to the estoppel."

50. The judge held (at paragraph 59 of his judgment) that there had been a clear and unequivocal representation by Mr Rann and Mr Valentine in July 1991 – in particular, at the site meeting to which he had referred at paragraph 39 of his judgment – as to the rights of way to be enjoyed by the western plots; that Mr Bailey and Mr Merritt had been intended to act, and had in fact acted, in reliance on that representation – in that walls were built, hardcore was laid on the accessway across the shark's fin and building was carried out (in particular, the building of Mr Bailey's garage) substantially in accordance

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with the Newton plan; and that work was carried out "both before and after July 1992" – the date upon which Mr Valentine became owner of Jacob's Place. He held (at paragraph 60 of his judgment) that "the equity which Bailey and Merritt had in support of their access to their plots at the time that Rann sold Jacob's Place to Mr Valentine was an overriding interest [within section 70 of the Land Registration Act 1925] and binding on Mr Valentine as the title holder after July 1992". He held, also, (at paragraph 61) that both Mr Rann and Mr Valentine knew the true position – that is to say, knew that the rights of access shown on the Newton plan included rights over land which was to be, or had been, included in the registered title in respect of Jacob's Place – at the material times. He expressed his conclusion (at paragraph 62) in these terms:

"I have no doubt that in the circumstances that had arisen, Bailey and Merritt in the Spring of 1993 could successfully have asserted against Mr Valentine easements over the land registered as LL78144 [Jacob's Place] to the extent that shared access is depicted on the June Newton plan."

51. The judge then considered whether "effect should be given to that equity in favour of Mr Allen and the Nash's, as successors in title to Bailey and Merritt" in the circumstances that (as he put it at paragraph 62 of his judgment): "They have no call on equity arising out of any personal transactions between themselves and Mr Valentine". He addressed three questions: (i) whether it was fatal to the equity which he had identified that Mr Bailey and Mr Merritt did not do all the work to the roadway and to the wall bounding Jacob's Place that they had agreed to do; (ii) whether it was fatal to the equity that, instead of asserting their equitable easement against Mr Valentine in 1993, they negotiated a settlement (in September 1993) under which they were to make a payment of £8,000; (iii) whether there was anything in the circumstances in which Mr Allen, and Mr and Mrs Nash, had acquired their ownership of western plots 2 and 3 which should lead to the conclusion that they could not come to equity for relief. He determined each of those questions in favour of the defendants. But he accepted that it would have been appropriate to put Mr Bailey and Mr Merritt on terms as to payment of the amount which Mr Valentine had laid out in completing the work which they had agreed to do; and as to payment of his wasted costs in connection with the negotiations in 1993. He assessed those amounts at £3,500 and £750 respectively – a total of £4,250 – and added to that sum interest at the rate of 7% per annum over the 8 years to the date of his order. On that basis he made a declaration – incorporated as paragraph 5 of his order of 8 May 2002 – that the lands registered under titles LL67119 (western plot 3) and LL67121 and LL166539 (together western plot 2) enjoy equitable easements of way across that part of title LL78144 (the shark's fin and the shared access land) shown shaded red on the plan attached to that order upon payment within twelve months of the sum of £6,630. The effect of that declaration was to give to the defendants the rights of access over the shark's fin and the shared access land which they had been intended to have under the relevant July 1991 deed of grant.

52. The judge then turned to what he described as *"the other major question in the case"* – the position of the owners of LL67120 (western plot 1, now owned by Mr Valentine), LL67121 (strictly, that part of western plot 2 retained by Mr Allen, but intended to include, I think, the other part of western plot 2 transferred to Mr and Mrs Nash and now registered under title 166539) and LL67119 (western plot 3, owned by Mr Allen) as regards access for the three plots over so much of the shared access land as is not within Mr Valentine's title as owner of Jacob's Place. The judge described the rival contentions of the parties at paragraph 69 of his judgment:

"The Claimant's case is that the First Defendant's garage, built by Bailey partly on LL67119 and partly on land conveyed to Bailey and Merritt, and later to Mr Allen, by the Huntons [LL94279] obstructs the right of access to LL67121 and 67120. This is an important issue in the case, since the Claimant seeks an order that the garage be demolished. The First Defendant . . . on the basis of the facts which I have found, namely that the Land Registry plans accurately show the boundaries of the titles mentioned above, says that given the position in which the Claimant has constructed his garage [serving Jacob's Place] he only enjoys a narrow footway access to his newly built house on LL67120."

53. The judge rejected the claimant's contention that the first defendant's garage, built by Mr Bailey to serve western plot 3, obstructed the rights of access to plots 1 and 2. His reasoning (set out at paragraphs 70 and 71 of his judgment) may, I think, be summarised as follows: (i) the only rights of access over the shared access land which were granted, or purportedly granted, to the owner of

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western plot 1 (LL67120) were those granted by the deed of grant, dated 28 February 1991 but executed in or about July 1991, to which I have referred in paragraph 19 of this judgment as "the third deed of grant" – that is to say, the deed made between Mr Bailey, Mr Merritt and Mr Beverley in order to give effect to their agreement "to appropriate the pieces of land coloured brown on [their] respective properties for the purposes of a private road for their common benefit."; (ii) that deed contemplates that the garage serving western plot 3 will be built on land which is not shown coloured brown on the plan attached to the deed (the Newton plan) – that is to say, on land which is not within the shared access land; (iii) the garage was built in the position shown on the Newton plan – the judge holding that the fact that the garage was somewhat larger than had been contemplated when the plan was prepared was not material in that respect; and (iv) whether or not the deed of grant was effective, in law, to grant rights of access over land which (at the time) none of the parties owned was immaterial – the claimant had to rely upon it (as owner of western plot 1) and it was impossible for him to contend (in reliance upon that deed) that the right of access which it purported to grant was obstructed by a garage which had been built in the position shown on the Newton plan.

54. The judge accepted that the third deed of grant purported to grant to the owner of western plot 1 (LL67120) a right of access to that plot over the shared access land of sufficient width to allow access with vehicles. The effect, as he held, was that "Mr Allen as the owner of LL67121 cannot complain of encroachment at the North Eastern corner of LL67121". But the judge went on to say this (at paragraph 72 of his judgment):

"That means that Mr Valentine as owner of LL67120 has access to his own land at LL78144 *(sic)* of sufficient width for vehicular access. In fact he has chosen to build a wall at the Eastern end of LL67120 and his garage on LL78144 in such a place as to obstruct that access. He has done so in circumstances where his only rights as owner of LL67120 over LL67121 are those in this [third] deed. There are no others. . . . [U]nless he carries out demolition Mr Valentine will find it necessary to cross LL67121. It is in respect of that apprehended trespass that Mr Allen claims compensation, and in my judgment he is entitled to it."

That conclusion led the judge to order that Mr Valentine pay to Mr Allen (as owner of the land within title LL67121) damages for past trespass in the amount of £200 (see paragraph 6 of the order of 8 May 2002) and an amount of £3,500 in lieu of an injunction in respect of future trespass (paragraph 7 of that order).

55. As I have said, the judge rejected submissions based on estoppel by convention. After setting out (at paragraph 74 of his judgment) the familiar passage in the judgment of Lord Denning, Master of the Rolls, in ***Amalgamated Investment and Property Co. Ltd v Texas Commerce International Bank Ltd*** [1982] 1 QB 85, 122C-D:

"When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

the judge went on to say this:

"I do not think that this species of estoppel applies to this case. As regards Bailey, Merritt and Beverley, they had acquired their plots in February 1991, and any right of way depended upon the efficacy of the express grant to them by the Huntons, or other events giving rise to an equitable right. I have found such rights on the basis of proprietary estoppel arising out of representations by Rann and Valentine. There was no formal transaction between Rann or Valentine and Bailey and Merritt with respect to a right of way over the shark's fin. Those parties were not all parties to one transaction that was based on an underlying assumption. The fact that the Huntons, by separate instruments, purported to grant rights of way over land not belonging to them cannot, it seems to me, bind the true owners, even if by one such instrument they were the supposed beneficiaries of a right of way over what was in fact their land."

The judge's decision as to costs

56. The judge heard submissions as to costs on 2 May 2002, after he had handed down his written judgment in draft. As he said, in the first paragraph of the further judgment which he gave in the light of those submissions: *"This is a case in which the costs became wholly disproportionate to the remedies sought in the case from the very outset. . . . [I]t is a fact that the case long ago became one largely about costs."*

He noted that the court's attempt to persuade the parties that their interests would be best served if the disputes between them were resolved by mediation had come to nothing.

57. At paragraph 13 of his further judgment the judge reminded himself of the principles, set out in CPR 44.3, which should guide a judge when deciding how to exercise his discretion in relation to costs. In particular, he reminded himself that the conduct of the parties in relation to the litigation was a factor which could and should be taken into account. He said this: *"In this case conduct is important. It is a case where at every stage openness to settlement, the need to avoid costs, and the avoidance of fruitless issues was very important. The duty of the parties under Part 1.3 to help the court deal with the case justly seems to me to be something that must always be in the mind of the parties. . . . [T]he fact is that an open offer to settle marked without prejudice save as to costs is a vital tool for a party who wishes to safeguard his position in this kind of case, and reveal to the court at the end of the case the extent of his efforts to settle. It is lacking here. Also lacking was compromise on any issue, great or small."*

58. The judge took the view that "of all the follies in this case, having the Bridgestocks as parties was the greatest." He gave effect to that view by directing that the Bridgestocks should be paid their costs on the indemnity basis. He apportioned liability for those costs between the claimant (as to 75%) and the defendants (as to 25% - to be divided equally between Mr Allen on the one hand and Mr and Mrs Nash on the other hand). He held that the greater burden should fall upon the claimant because "he made and pursued a claim about the Bridgestocks' garage on which he has lost." He took the view that, in joining Mr and Mrs Bridgestock as Part 20 defendants, Mr Allen and Mr and Mrs Nash "were passing on to the Bridgestocks the effect of the claim being made against them." It is clear that he intended that his order (in this respect) should reflect what he regarded as the claimant's unjustified assertion that the reason why the owners of the western plots needed to cross the shark's fin was that the Bridgestocks' garage had been built in the wrong place. In the circumstances that, as he found, the claimant had been involved in the construction of that garage, I do not find his approach surprising.

59. The judge recognised that, as between the claimant and the first defendant, each had won on some issues and failed on others. In particular, the first defendant had been successful in resisting an order, sought by the claimant, that he demolish his garage. But, as the judge found, "a significant part of the costs of the case was caused by the unsuccessful pursuit by the First Defendant of the matter of legal boundaries" – an issue on which "the First Defendant's case [always] seemed to me weak" and which was "expensive to pursue, as well as distracting attention from more meritorious issues." The judge gave effect to those views by directing that the claimant pay two thirds of the first defendant's costs on the standard basis. He made no order for costs as between the claimant and Mr and Mrs Nash; expressing the view that the participation of Mr and Mrs Nash as defendants had not increased significantly the costs that the claimant had incurred in pursuing his claim against Mr Allen.

The issues on this appeal

60. The judge gave the claimant permission to appeal limited to the issue of estoppel. The permission was extended by this Court (Lord Justice Tuckey) on 31 August 2002 to enable the claimant/appellant to argue that the way in which the issue of estoppel came to be decided by the judge was unfair. But in granting that further permission Lord Justice Tuckey observed that the point "can and should be made broadly and not via a trawl of the pleadings and statements made by opposing counsel". Permission was also extended, on 31 August 2002, to enable the appellant to challenge the judge's conclusion that the 1991 deeds of grant had been substantially ineffective in law – in that they purported to grant rights of way over land not owned by the grantors – (ground 5 in the appellant's notice) on the basis (as Lord Justice Tuckey put it) that that issue appeared to be connected to the estoppel issue. Permission to appeal on the remaining grounds in the appellant's notice was refused on 31 August 2002 and at a renewed hearing before this Court (Lord Justice Laws and Lady Justice Arden) on 9

October 1992. In particular, permission to appeal the judge's order as to costs (if the appeal does not succeed on other grounds) has not been obtained. Mr Allen and Mr and Mrs Nash, who (in the light of the limited permission to appeal which has been granted) are the only respondents to the appeal, seek to uphold the judge's order on the additional ground that this was a case in which the judge ought to have held that an estoppel by convention had arisen – upon the principles identified by Lord Denning, Master of the Rolls, in the ***Texas Bank*** case.

Procedural unfairness

61. Counsel for the appellant sought to persuade us that the way in which the judge had determined the issue of estoppel against his client was procedurally unfair. Indeed, it may be said that counsel put that submission at the forefront of his argument in this Court. It was said, correctly, that the crucial finding made by the judge in relation to his determination that this was a case in which the defendants, as successors in title to Mr Bailey and Mr Merritt, could rely on an estoppel by representation – or could set up a proprietary estoppel – was that in paragraph 39 of his judgment. The judge's finding was that, at the site meeting in July 1991, there was an agreement - to which Mr Rann, Mr Valentine, Mr Bailey and Mr Merritt were parties – *"about the land that would be dedicated to accessway for each of the plots"*. Counsel submitted that an agreement to that effect had never been pleaded; that, if such an agreement had been raised on the pleadings, Mr Valentine might have chosen to call Mr Rann to give evidence on the point; and that, in those circumstances, it was not open to the judge (on grounds of fairness) to make the finding which he did. The unfairness is compounded, it is said, by the fact that, at a pre-trial review on 12 December 2001, the judge had directed that there were to be no further amendments to the pleadings.

62. In my view there is no substance in the complaint of procedural unfairness. It is true that the defendants' primary case on the pleadings was that the Land Registry title plans were inaccurate; in the alternative that the claimant was estopped from contending that the boundaries were not as shown on the Newton plan – see paragraph 11 of the first defendant's re-re-amended defence and counterclaim, to which I have already referred. But paragraph 13 of that pleading raises, squarely, the defence that, if contrary to that primary contention, *"it be found that the Claimant's property covers the area shown on the Land Registry Title plan for LL78144"*, the defendants will contend that "by reason of the matters set out above and below" the claimant is estopped "from alleging that vehicles following the route shown as the Accessway on [the Newton plan] are trespassing on his property". In context that can only be read as a plea that the matters alleged in the pleadings give rise to an estoppel which prevents the claimant from asserting that there is no right of access over the roadway shown on the Newton plan. The matters alleged in the pleadings include the allegation, in paragraph 10 of the re-re-amended defence, that *"the Claimant was aware of, acquiesced in and/or consented to the drawing up of all the Plots at Home Farm* ***and the rights of way thereover*** *in accordance with the layout shown on the [Newton plan]"*. The pleading is open to the criticism that it gives no particulars of the allegation that the claimant consented to the rights of way over the plots being in accordance with the Newton plan, and there is force in the judge's observation that the pleadings were unhelpful, but the judge was plainly satisfied that the point had been raised with sufficient particularity to bring it to the notice of the claimant's advisers - see his observations at paragraphs 53 and 54 of his judgment. The point was raised by Mr Bailey in his witness statement of 26 March 2001 (see paragraphs 10 to 13 of that statement); it was raised by Mr Allen in his witness statement of 29 March 2001 (see paragraph 12, to which I have already referred at paragraph 31 of this judgment); and it was raised by Mr and Mrs Bridgestock in their amended defence and counterclaim to the Part 20 proceedings (see paragraph 13B, to which I have referred at paragraph 43 of this judgment and which contains an express reference to the site meeting in July 1991 and Mr Bailey's account of the agreement reached at that meeting). Those advising the claimant could not have been unaware that among the matters likely to be investigated at a trial were the circumstances in which the Newton plan came to be incorporated in the July 1991 deeds of grant; and could not have been unaware that the defendants would be relying on Mr Bailey's account (confirmed by Mr Merritt in his witness statement of 28 March 2001) of the site meeting at which rights of access were discussed and (as he said) agreed. The claimant did not call Mr Rann to give evidence as to the site meeting; nor did he call Mr Adie as to the circumstances in which the

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Newton plan was incorporated in the deeds of grant. It may be that he did not think that they would contradict the evidence of Mr Bailey and Mr Allen. It is pertinent to have in mind that he, Mr Valentine, had no recollection of being at the site meeting. Be that as it may, I am not persuaded that the claimant was led to believe that the point was not a live one, on which the judge would be asked to make a finding.

Estoppel

63. In my view the judge was plainly correct to hold that the circumstances in which the Newton plan came to be incorporated in the July 1991 deeds of grant did raise estoppels which prevented the owners of any of the six plots comprising the Home Farm development from asserting that rights of access were not to be enjoyed in accordance with the layout on that plan. But, for my part, I would prefer to uphold his decision on the basis that this is a case which falls within the principle identified by Lord Denning, Master of the Rolls, in the *Texas Bank* case.

64. The position, as it seems to me, can be analysed as follows. By July 1991 it was recognised by all those concerned in the development at Home Farm – Mr Rann, Mr and Mrs Hunton, Mr Valentine (who, as the judge found, was beneficially interested in the farmhouse), Mr Bailey, Mr Merritt and Mr Beverley - that rights of access to North End Lane at the east of the site would be required by each of the three western plots, by eastern lot 3 (Jacob's Place) and by eastern lot 1 (the farmhouse – at least in respect of its garage). It must have been obvious: (1) that the rights of access to the three western plots would have to be provided (i) in part by the appropriation of some of the land already transferred to them and the grant of mutual rights over the land so appropriated and (ii) by the grant of rights over some part of the eastern land; and (2) that the division of the eastern land into three lots would have to provide (i) for the grant of rights of access over part of that land for the benefit of the three western plots, and (ii) for the grant of rights of access for the benefit of eastern lot 3 (Jacob's Place) and eastern lot 1 (the farmhouse - at least in respect of its garage). It is plain that all those concerned – Mr Rann (as the then purchaser from the Turner company of the eastern half of the site, as one of the proposed sub-purchasers of eastern lot 1 and, with his wife, as a proposed sub-purchaser of eastern lot 3), Mr and Mrs Hunton (as the proposed sub-purchasers of eastern lot 2), Mr Valentine (as the other proposed sub-purchaser, in the name of his daughter, of eastern lot 1) and Mr Bailey, Mr Merritt and Mr Beverley (as the owners of the three western plots) – intended that the need for access would be met; and that access would be provided in accordance with the scheme shown on the Newton plan. That conclusion does not depend on the agreement reached at the site meeting in July 1991 – although it is consistent with that agreement. The conclusion follows, necessarily as it seems to me, from the terms of the two deeds of grant executed by Mr and Mrs Hunton at or about the time of that site meeting, from what I have described as the third deed of grant (which must have been executed at or about the same time) and from the incorporation of the Newton plan in each of those deeds of grant. It is, I think, beyond argument that those interested in the development each intended that effect would be given to the scheme shown on the Newton plan by the deeds of grant; and that, in 1991, following the execution of the deeds of grant, they each assumed that that had been the effect of those deeds. It is important to keep in mind (i) that the sub-purchasers of the three eastern lots had an interest in the obligations undertaken by the owners of the three western plots in consideration of the grant to them of rights over the eastern land – that is to say, the obligations to construct boundary walls and to make up the roadway – and (ii) that the sub-purchasers of eastern lots 1 and 3 needed the easements granted to them by the second of the July 1991 deeds executed by Mr and Mrs Hunton and must have intended that the roadway over which they were to have rights of access would be the roadway which was to be made up by the owners of the western plots and defined by the boundary walls which the owners of the western plots were to construct. The common assumption shared by all those interested in the development of the Home Farm site in July 1991 was that the development would be carried out in accordance with the scheme shown on the Newton plan and that the necessary rights of access had been granted in respect of each of the properties to be comprised in that development.

65. The judge thought that Mr Rann, Mr Valentine, Mr Bailey and Mr Merritt "were not all parties to one transaction that was based on an underlying assumption". In my view that approach fails properly to identify the transaction in which they were all engaged in early July 1991. The proper analysis, as it

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seems to me, is that the transaction in which they were all engaged was the layout of a development scheme at the Home Farm site which would provide rights of access to each of the properties in which they were interested. The underlying assumption, as I have said, was that the deeds of grant executed in July 1991 enabled the development to be carried out in accordance with the scheme shown on the Newton plan. The parties having embarked on the development of their respective properties on the basis of that common assumption, they (and their successors in title) cannot be allowed to assert rights inconsistent with it in circumstances in which it would be unfair or unjust to do so. In particular, in the circumstances that the owners of the western plots made up the roadway and constructed the boundary walls – and, in the case of Mr Bailey, constructed a garage to serve plot 3 - and the owner of the farmhouse constructed a garage to serve that property on the basis of that assumption, Mr Valentine, as the owner of Jacob's Place and (now) the owner of western plot 1, cannot be allowed to assert rights which are inconsistent with the scheme shown on the Newton plan.

Access to western plot 1 – LL67120

66. As I have said, the judge held that, by his own acts, Mr Valentine had obstructed the access to western plot 1 (LL67120), over the shared access land within title LL67121, which he would otherwise have enjoyed in accordance with the scheme shown on the Newton plan. It followed that, in order to gain access to western plot 1, Mr Valentine had to pass over land within title LL67121 over which he had no claim to a right of way. The judge ordered that Mr Valentine should pay to Mr Allen £200 by way of damages in respect of past trespass (paragraph 6 of the order of 8 May 2002) and £3,500 by way of damages in lieu of an injunction in respect of future trespass (paragraph 7 of that order). It is, perhaps, open to question whether the permission to appeal which Mr Valentine has obtained allows him to challenge paragraphs 6 and 7 of the judge's order; But, for completeness, I should add that – if such a challenge is made on this appeal – I have no doubt that it must fail. The judge's reasoning and conclusion on this point was plainly correct. It is no answer to assert that Mr Valentine constructed his garage in reliance on the Togher plan (sent by Mr Adie to Langleys on 9 December 1993 – see paragraph 26 of this judgment). Matters did not proceed on the basis of agreement that the titles would be rectified in accordance with that plan.

Conclusion

67. I would dismiss this appeal.

Lady Justice Hale:

68. I agree that this appeal should be dismissed. The extraordinary feature of this case is the extent of the claimant's involvement in the whole project, both before and after he became owner of the land over which the disputed access is required, the extent to which he benefited from the agreed arrangements, and the extent to which he allowed others to act to their detriment in reliance upon those arrangements.

69. Thus there was a contractual relationship between him and Mr Rann from a very early stage. This contemplated that they would acquire eastern lot 1, the farmhouse (with the claimant acting through his daughter as nominee), would do it up for sale, and invest the proceeds in the development of eastern lot 3, which became Jacob's Place. The development included building a garage which extended over the roadway contemplated in Mr Rann's conveyancing plan and required the access contemplated in the Newton plan and the second deed of grant. This was all done and the farmhouse was sold.

70. The claimant was present at the meeting in July 1991 where the revised access arrangements to the western plots and Jacob's Place were agreed. He supplied the stone to build the walls and not only allowed them to be built but pressed for his own wall to be completed. He could not have gained access to Jacob's Place without the rights contemplated in the second deed of grant.

71. He stood back while the Bailey garage was built in a place which was totally compatible with the Newton plan and the deeds of grant but totally incompatible with the conveyancing plan. The judge found that the works to the access way and the western plots were still going on after he acquired the title to Jacob's Place in July 1992. His first reaction was not to object to them but to object to the fact that they had not been completed and that he had not been paid for all the stone he had supplied.

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72. No just and sensible system of law would allow the claimant to deny that the rights of access over his land were those agreed by all parties to the development project, including himself, reflected in the deeds of grant, and acted upon by all parties until he started to raise objections in 1993. The case could be put in three ways:
    (i) that Mr Rann as original owner of Jacob's Place was estopped from denying the existence of the right of way and the resulting equitable easement was an overriding interest binding upon the claimant as his successor in title;
    (ii) that the claimant was personally estopped because he was himself involved in the representation and allowed work to be done in reliance upon it after he had become owner of Jacob's Place; or
    (iii) that all parties to the arrangements made in 1991 and acted upon thereafter were estopped from denying them.

73. The judge favoured (i) and (ii). Even if there were difficulties about regarding this equitable easement as an overriding interest, there is little that can be said against (ii). It would be extraordinary if the claimant were in a better position because the representation and reliance had happened both before and after he became owner of the relevant land than he would be if it had only happened before. The judge rejected (iii), because they were not all parties to the same transaction at the same time. But in reality they were all participants in the same project, from which they all benefited, and which they all put into effect for nearly two years. Hence I agree with Chadwick LJ that this is the most elegant solution, but would not thereby wish to suggest that the solutions preferred by the judge were not also available to him. If ever there were a case where the landowner should not be able to claim that others have trespassed on his land, it is this.

Lord Justice Peter Gibson:

74. I agree with both judgments.

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