

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM COUNTY COURT
His Honour Judge Cockcroft
6NG16064**

Royal Courts of Justice
Strand, London, WC2A 2LL

10/12/2009

B e f o r e :

**SIR MARK POTTER, THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE WILSON
and
LORD JUSTICE RIMER**

Between:

NORMAN DAVILL	Appellant
- and -	
CLIVE PULL	
MARION PEARL SANDERSON	Respondents

**Mr Anthony Elleray QC and Mr Ian Procter (instructed by C. Turner Solicitors) for the Appellant
Ms Joanne Wicks (instructed by Brady Solicitors) for the Respondents
Hearing date: 4 November 2009**

Lord Justice Rimer :

Introduction

1. This appeal raises an issue as to the interpretation of express grants of rights of way created by conveyances executed between 1919 and 1921. The appellant/claimant, Norman Davill, owns three plots of land to which the rights are appurtenant and wishes to use the servient track as a means of access to them for the purposes of their residential development in accordance with a planning permission he has obtained. The respondents/defendants, Clive Pull and Marion Sanderson, own neighbouring plots which enjoy like rights of way over the track. They assert that Mr Davill's proposed use of the track for his intended purposes will involve an excessive, and so unlawful, use of his rights. They object to such use.
2. By his claim issued in Nottingham County Court in December 2006, Mr Davill asserted his right to use the track for his intended purposes and that the defendants had obstructed such use. He sought declaratory relief, damages and an injunction. The defendants defended and counterclaimed. The outcome of the trial before His Honour Judge Cockcroft was that by his order made on 14 November 2008 the judge dismissed Mr Davill's claim for damages and an injunction and declared that his rights were limited to a use of the track for 'all reasonable and usual purposes relating to the [dominant land] *as garden ground*' (my emphasis). He enjoined Mr

Davill from using the track for the purpose of constructing houses on the dominant land or for accessing any houses built upon it.

3. With the permission of Sir John Chadwick, Mr Davill appeals against that order. His case is that the rights are not limited in the way so prescribed and that there is no warrant for such a restrictive interpretation of them. The respondents seek to affirm the judge's order.

The facts

4. Mr Davill is a farmer. He owns Greenhays Farm, which lies to the north of and fronts onto Bunny Lane, Keyworth, Nottinghamshire; and is the tenant of a rectangular field lying to the east of the farm and also fronting onto Bunny Lane. To the east of the field are eight terraced cottages on Bunny Lane, numbered from 50 to 64. Behind them, stretching northwards, is a line of eight rectangular plots parallel to the field. They are numbered 2 to 9 and are served by a track running north from Bunny Lane between them and the field. Mr Davill owns plots 5, 7, 8 and 9, the last three being the northernmost plots; Mr Pull owns plots 3 and 4; Ms Sanderson owns plot 6.
5. In 1919 Bertrand Breakspear acquired the eight cottages (which were tenanted), some land behind them and the rectangular parcel of land comprising the eight plots and the track. By each of various conveyances executed between 1919 and 1921, all in essentially identical form, he then sold (i) each tenanted cottage, (ii) the coalhouse and earth closet used in connection with it, (iii) part of a common 'drying ground' behind the cottages, and (iv) one of the eight plots. Mr Davill's titles to plots 7, 8 and 9 derive respectively from a conveyance on sale dated 17 July 1920 and two conveyances each dated 17 November 1919. The sample conveyance we have seen is that dated 17 July 1920 between Mr Breakspear and Arthur Blatherwick.
6. I must set out the description in that conveyance of the parcels clause and the right of way it granted over the track. It is necessary to quote from the conveyance as fully as I do in order to understand the argument, but my quotation emphasises the description of the plot and of the right of way:

'... the Vendor as Beneficial Owner hereby conveys unto the Purchaser and his heirs ALL THAT piece or parcel of land or ground situate in Bunny Lane in the Parish of Keyworth aforesaid being part of a larger piece of ground containing by estimation one acre two roods and seventeen perches or thereabouts sometime known by the name of the 'Middle Furlong' but afterwards called 'Green Hades' AND ALSO ALL THAT messuage or dwellinghouse erected and now standing thereon and now in the occupation of Mr Tomkinson TOGETHER with the coalhouse and earth closet now used in connection therewith AND ALSO THAT piece or parcel of garden ground situate in the rear thereof being the sixth from the South end of eight pieces of garden land as now set out by the Vendor for the use of the tenant of the before described land and messuage and the tenants of the adjoining seven messuages ALL which said premises are by way of identification merely and not by way of warranty of area or boundary more particularly delineated on the plan drawn hereon the said land with the messuage thereon and the said coalhouse and earth closet being coloured pink and the said piece of garden ground coloured blue TOGETHER with the right for the Purchaser his heirs and assigns to use for all reasonable and usual purposes such part of the cart or roadway on the West side of the said adjoining messuages and such part of the garden path as are necessary to give access to and from the hereditaments hereby conveyed and also the right of access at all times to the said coalhouse and earth closet hereby conveyed and also the right to use for all reasonable and usual purposes the water from the well and the pump situate on the adjoining hereditaments now or late of the Vendor and the drying ground and drains now used and enjoyed in common by the owners and occupiers of the hereditaments hereby conveyed and the owners and occupiers of the said adjoining seven messuages the Purchaser his heirs and assigns contributing along with the owners for the time being of the said adjoining seven messuages a due proportion of the expense of keeping the said well and the pump thereto and the said drains in repair Reserving nevertheless to the Vendor his heirs and assigns or other the owner or owners and occupiers for the time being of the said

adjoining seven messuages the right to use such portion of the said common drying ground as forms part of the hereditaments hereby conveyed such portion of the said common drying ground to be left open unfenced and unbuilt upon and also the right to use such part of the said cart or roadway as is included in this conveyance which cart or roadway leads to the rear of the hereditaments hereby conveyed and also to the rear of the said adjoining hereditaments and gardens and also the right to use the said drains they contributing a due proportion of the expense of keeping the said cart or roadway and drains in repair' (Emphasis supplied)

Mr Breakspear's conveyances of the other seven cottages were (*mutatis mutandis*) in identical terms save for one insignificant minor variation.

7. The scheme of the conveyances was therefore that Mr Breakspear conveyed to each purchaser a cottage, the coal house and earth closet used by it, part of the 'drying ground' and one of the eight plots of 'garden ground'. According to the plan attached to the July 1920 conveyance, the coal houses and earth closets were all erected on the area of 'drying ground' lying between the rear of the cottages and the first plot of garden ground, and were so erected on the land forming part of the curtilage of just four of the cottages, not including the cottage conveyed by the July 1920 conveyance. That explains why that conveyance included a right of way to its coal house and earth closet, although it might be thought that not all the cottages would require a like right of way. The purchaser was also given a 'right to use' the water from the well and the pump, the 'drying ground' (meaning those parts of it conveyed to others) and the drains, subject to contributing (with the other owners) a fair contribution to the cost of maintenance of the well, pump and drains.
8. The plot of 'garden ground' that was also conveyed included the soil of the section of track adjoining it. Each purchaser was given a right of way over the track to enable him to access his plot of garden ground. Each was also given a right of way over 'such part of the garden path' as was necessary for access purposes between the parts of land conveyed. The plan annexed to the July 1920 conveyance shows the path running north through the middle of the plots.
9. There was then a reservation in favour of the Vendor, his heirs and assigns and the owners of the adjoining cottages of the right to use that part of the drying ground conveyed to the purchaser – 'such portion of the said common drying ground to be left open and unfenced and unbuilt upon' – and the right to use the track and drains subject to contributing a due proportion of the expense of the maintenance of the track and drains. Oddly, the reservation did not extend to a right to use the well and pump, subject to an obligation to contribute to their maintenance. Nor, equally oddly, did the grant of the right of way over the track purport to subject the purchaser to a liability to contribute to its maintenance. There are therefore some apparent infelicities in the drafting, although the intention of the scheme was, I would think, that all purchasers were given their various easements subject to an implied common obligation to make a proper contribution to maintenance costs.
10. The reservation also purports to impose a restriction upon the purchaser as to the fencing of, and building upon, his section of the drying ground. That was probably the wrong place and way in which to purport to impose such a restriction, but for present purposes it matters not. It is merely relevant to note that the reservation showed that the purchaser's part of the drying ground was intended to be subject to such a restriction. In any event, so long as the adjoining owners wanted to exercise their 'drying' easement on such land, the purported restriction was probably unnecessary: any fencing of, or building upon, the drying ground would probably have amounted to an unlawful interference with the easement, which they could have restrained.
11. Mr Davill has obtained planning permission to develop plots 7, 8 and 9 by building a house on each. The respondents objected to his right to use the track for the purposes of accessing the plots for the construction work. They also asserted that if any houses were to be built on the plots, the track could not lawfully be used for access by their occupiers and visitors. Mr Davill disagreed and proceeded with his building works to the point at which he has completed the construction of

the house on plot 7. Work was then suspended pending the resolution of the dispute by these proceedings. Their outcome was as I have described.

12. The width of the track, including a ditch, is some 14 feet. Whether or not the original purchasers and their successors were under an obligation to contribute to the costs of its maintenance, there was no evidence that any has ever done so: there has been little or no maintenance of it. Mr Davill, however, filled in the ditch and laid hardcore and gravel on the track as a preliminary to the carrying out of his building works.

The issue before the judge

13. The issue before the judge was the narrow one of whether, upon the true construction of the terms of the grants, the rights appurtenant to Mr Davill's three plots could lawfully be used for residential purposes. It is important to note that it was no part of the respondents' case (i) that the use of the track by such heavy vehicles as would or might be necessary in connection with the building operations would interfere with the use of the track by the other dominant owners; or (ii) that there would be any such interference by the use of the track by the occupiers of the new houses. Ms Joanne Wicks, for the respondents, conceded that Mr Davill is entitled to build a house on each of the three plots. She accepts also that if such houses can be accessed otherwise than via the track, they can lawfully be so accessed and used. Her clients' only point is that as the residential use of the plots is not a use 'as garden ground', the appurtenant rights of way over the track are not exercisable for purposes associated with such residential use. As the other plots are all used for stabling horses, also not a use as 'garden ground', the respondents' attitude might (if I may borrow from Russell LJ, as he then was) perhaps appear to be 'somewhat curmudgeonly' (*Keefe v. Amor* [1965] 1 QB 334, at 343G/344A). But, as in that case, we are here concerned with rights, not attitudes.

The judge's decision

14. With the reminder that each plot was described in the conveyances as 'garden ground', it may be convenient to quote again the words of the grant of the right of way, namely:

'... the right for the Purchaser his heirs and assigns to use for all reasonable and usual purposes such part of the cart or roadway on the West side of the said adjoining messuages and such part of the garden path as are necessary to give access to and from the hereditaments hereby conveyed'
15. The judge directed himself that the resolution of the issue depended upon the words of the grant read in the light of the surrounding circumstances. The extent of the grant was not, for example, limited to a right of access by foot. The only limitation advocated by the defendants was one determined by reference to the purposes for which it was granted. The judge said, by reference to *Finch v. Great Western Railway Company* (1879) 5 Exch. 254 and *McKay Securities Plc v. Surrey County Council*, 9 December 1998 (a decision of Mr Peter G. Whiteman QC, sitting as Deputy High Court Judge in the Chancery Division), that where a grant is 'for all purposes' its use will not be limited by the purposes for which the dominant land was used at the date of the grant.
16. That was not, however, the formula in this case. The judge approached the question of its interpretation by considering the factual circumstances in play when the cottages were sold and the rights granted. Mr Breakspear's scheme was intended to bind all the purchasers of the cottages as a local community, being one in which there was no mains water supply but a well with a pump to which all had access; and the drying ground for laundry was also shared. In addition to the shared facilities enjoyed by the cottagers, each cottager owned his allotted plot of 'garden ground', to which the right was appurtenant. The track was, at the time of the grants, significantly less (although the judge did not find how much less) than 14 feet wide and was unmetalled, although Mr Davill had laid hardcore and gravel on it to facilitate the delivery of

construction materials to his plots. I understand that, in saying what he did, the judge was excluding the width of the ditch, which Mr Davill has filled in.

17. The rival submissions before the judge were, from Ms Wicks for the respondents, that the plots were described as 'garden ground', which she invited the judge to regard as meaning a place of recreation in the nature of a garden or allotment which the plot owner could use for the wide range of activities for which such land might ordinarily be used, whereas on the parts of the overall area where their rights were shared (including the track), the owners' rights were limited for the protection of others. The grant of the right to use the track was not expressed as a right exercisable 'at all times and for all purposes' but as a right for the purchaser to use it 'for all reasonable and usual purposes'. That must mean 'reasonable and usual' for a country track leading to an allotment. It could not, Ms Wicks submitted, embrace a use for the delivery by heavy lorries of building materials to the plots, nor the use for access purposes by the occupiers of any house that might be built upon them. Her submission was that the use was circumscribed by the fact that the dominant land was 'garden land' at the date of the grant.
18. For Mr Davill, counsel (not Mr Elleray QC, who appeared before us with Mr Procter) submitted that the description in the conveyance of the dominant land being 'garden ground' was there solely for the purpose of identifying the dominant land; it did not limit the purposes for which the grant could be used. Were the force of the phrase 'garden ground' to limit the use of the track to a use in connection with garden or allotment use, it could not be used by children intent on engaging in a football match on the plot. The only effect of the phrase 'reasonable and usual' was to exclude offensive or obnoxious purposes. All other purposes were permitted. Moreover, if all gardening activities on the plot were to come to an end, there would on the respondents' case logically be no continuing right to access it. It could not sensibly have been the intention of the parties to the conveyances to tie the use of the track to the purpose of 'garden ground' for all time.
19. Judge Cockcroft's decision was that the grant was not expressed to be 'for all purposes' but 'for all reasonable and usual purposes'. That formula did not merely exclude offensive or obnoxious purposes, because use for such latter purposes would already be outlawed by the general law. The words were intended to convey a restriction over and above that which was so outlawed; otherwise they would be otiose. Context, said the judge, was everything. Here the context linked the permitted use with pieces of 'garden land' off a country track. The right therefore permitted use 'for reasonable and usual purposes associated with gardening in the wider sense explained', a reference to Ms Wicks' submission that the use could include a wide range of essentially agricultural uses. That, said the judge, was what the words said and it was likely to have been what the parties intended. Had Mr Breakspear been asked whether the track could be used as a driveway to a house built on a plot, he would have replied 'Of course not'.

The appeal

20. For Mr Davill, Mr Elleray submitted that the task for the court is to interpret the words of grant in the light of the background knowledge which would reasonably have been available to the original parties to the conveyances in the situation they were in at the time of the grant (Lord Hoffmann's first principle of the interpretation of contractual documents in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, at 912H, which applies also to the interpretation of express grants of an easement by deed: *Partridge v. Lawrence* [2004] 1 PP & CR 176, at [28], per Peter Gibson LJ).
21. Mr Elleray noted that the dominant land was described as a 'piece or parcel of garden ground' but also pointed out that no covenant was extracted from the purchaser restricting its use as such, any more than a covenant was extracted that restricted the use of the coal house or earth closet for such purposes, being parts of the land conveyed to the purchaser for which he was also given rights of access. He said that it was well known by the time of the original conveyances that the way to freeze land from future development, including a change of use, was by the imposition of

restrictive covenants. No such restriction was imposed upon the garden plots. By contrast, Mr Breakspear *did* purport, if only in the reservation, to impose a restriction on what the purchaser could do with his part of the common drying ground. He prevented it being fenced or built upon. If at the time of the original conveyances anybody had considered whether the garden plots – each being about one sixth of an acre – could be developed by building on them, the answer must be ‘yes’.

22. Mr Elleray recognised that that did not take him all the way home. That was because he recognised that if the terms of the grant *did* clearly confine its use to purposes associated with some limited use of the plots (not including a use for residential purposes), then even if the plots might lawfully be developed for residential purposes, the track could not lawfully be used to access them for such purposes: alternative access would have to be found. The question, therefore, was whether the language of the grant, construed against the background circumstances known to the original parties, imported some such limitation.
23. As to that there was, said Mr Elleray, no background justifying any conclusion that the grant was limited to any particular use of the plots. Each of plots 7, 8 and 9 was described as ‘garden land’ but that was the extent of the background information which, according to the evidence, was known to the parties. Those two words were doing no more than at most describing its then use. They carried no implication that the parties had in mind that the plots could not and would not lawfully be used for other purposes, any more than the conveyances carried the implication that the coal houses and earth closets could not and might not in the future lawfully be used for other purposes. Had there been an unqualified express grant of a right of way appurtenant to the plot, the authorities showed that, even though the dominant land was used as garden land at the time of the grant, the right would be exercisable for all lawful purposes for which the land could be used from time to time, including the devotion of formerly agricultural land to its development by building houses on it: see *Finch and Another v. The Great Western Railway Company* (1879) 5 Ex D. 254, at 261 to 263, per Stephen J delivering the judgment of the court.
24. In this case, however, there was a qualification of the nature of the right granted, namely that it was ‘for all reasonable and usual purposes ...’. Mr Elleray emphasised the ‘all’; and there was no dispute between counsel that an express grant of a right of way ‘for all purposes’ will not be limited to a use for the purposes to which the dominant tenement was put at the time of the grant (Ms Wicks conceded that if the grant in this case had been so expressed, the respondents would not be challenging Mr Davill’s claim to use the track as he wants to). This is not of course to say that there can be no question of an excessive, and so unlawful, use of an ‘all purposes’ right of way. For example, a purported exercise of it by using vehicles that are too wide or heavy for it will be unauthorised (see, for example, *Todrick v. Western National Omnibus Co Ltd* [1934] Ch 190), as will a use of it by authorised vehicles in such numbers that they will interfere unreasonably with the use of it by its other users (see, for example, *Jelbert v. Davis* [1968] 1 WLR 589). This, however, was not suggested to be such a case.
25. The critical question that the case raised was, therefore, whether the phrase ‘for all *reasonable and usual* purposes’ imported a material qualification on the reach of the grant which would not be there if the grant were simply one ‘for all purposes’. Mr Elleray’s submission was that, whilst the extra words had a qualifying effect, it was not a material one. The permitted purposes were so qualified simply to contrast them with ‘unreasonable and unusual purposes’. The purposes that had to be considered in connection with any claimed use of the grant were those of the dominant tenement. The devotion of the plots to their residential development could not be characterised as ‘unreasonable or unusual’. It was, said Mr Elleray, a perfectly reasonable and usual purpose. As no case was made at the trial that the use of the track for such purposes would impose an unreasonable burden on the track or unreasonably interfere with the respondents’ use of it, it could not be said that Mr Davill’s intended use of it was either unreasonable or unusual.
26. Ms Wicks, in her succinct and able responsive argument, submitted that the judge was right for the reasons he gave. The phrase ‘for all reasonable and usual purposes’ had to be given a

meaning derived from the context in which the conveyances were made. It was, she said, wrong to start from the premise that a grant of right of way will be assumed to be (or to be equivalent to) one 'for all purposes' and then to see whether anything in its language or context limited that meaning. The correct approach to the interpretation of the grant was by what Ms Wicks called a global or holistic approach.

27. She accepted that the only evidence as to the background to the conveyances was that which can be derived from the conveyances. She said that the plots as they were at the time were best described as smallholdings, the track was a country track serving them and the cottages were modest ones. Each cottage purchaser was buying into a local community scheme. Whilst Ms Wicks accepted that an express grant of a right of way 'for all purposes' will permit a use for changed purposes, the interpretation of a grant is always dependent on its terms construed against the background circumstances. An apparently unlimited grant may be limited by such circumstances, and in this case the qualification that the purposes must be 'reasonable and usual' ones required the court to ask what those words meant in the context of the conveyances at the time of their execution. She submitted that the ambulatory meaning for which Mr Elleray contended, namely that the permitted purposes are any such as are 'reasonable and usual' from time to time, is an unlikely one since there would be no control over it. She disclaimed any reliance on the fact that the dominant land was described as 'garden land' in her suggested interpretation of the grant. Her submission was that it was the words 'reasonable and usual' that carried the relevant limitation and, interpreted against the background context that she had described, they justified the limited interpretation that the judge put upon them.

Discussion

28. The question of interpretation raised by the appeal is ultimately a short one. The task of interpretation with which the court is faced requires the intention of the parties to the original conveyances to be ascertained from the words of the grants read in the light of the background circumstances which would have been known to the parties. As I observed in *Young and Another v. Brooks and Another* [2008] EWCA Civ 816, at [12], Lord Hoffmann's five principles of interpretation in the *Investors Compensation Scheme* case, *supra*, apply as much to the interpretation of an express grant of an easement as to that of a contract. Context, as the judge rightly said, is all; and Ms Wicks was correct to emphasise the background scheme against which the grants came to be made. If the language of the grant, construed against the context and background in which it was made, is such as to indicate a clear intention that the parties intended that the grants could only be exercised for the purpose of the use of the plots as garden ground (or for like uses), it would probably avail Mr Elleray little to point to decided cases showing that an unqualified grant, or a grant 'for all purposes', ordinarily enables a use of the grant for the purpose of the different uses from time to time of the dominant tenement. The modern approach to the interpretation of documents such as the grants here in question is to deduce the parties' intentions from all admissible available indicia.
29. The difficulty, however, that I have both with the judge's approach and with Ms Wicks' argument is that I am unable to detect anything in such context and background to justify the inference that the original parties intended that the easement over the track could only ever be used in connection with the use of the dominant plot as garden land. The conveyances nowhere say that. Nor does the fact that the parties to them may have contemplated that the plots would be used as garden land indicate an intention that the track could only be used to access them so long as they continued so to be used. That factual circumstance will arise in virtually every case of an express grant of a right of way appurtenant to a particular piece of land that is being used for a particular purpose at the time of the grant, but the cases show that the purpose for which the right may be used will not be limited by the original use of the dominant land. I add that I derive in this respect no assistance from Mr Elleray's contrast with express restriction in the conveyances preventing any fencing of, or building upon, the drying ground. The reason for that restriction was the need to keep open for common use land that was intended to be commonly enjoyed. That consideration did not, however, apply to the garden plots, which could in principle be put to any

use that the owner might choose; and – subject to the ‘reasonable and usual’ qualification – there is nothing in the grants that purports to prevent the use of the track in connection with any such use.

30. In my judgment, therefore, the context of and background to these grants do not import the limitation which the judge found and for which Ms Wicks contends. Indeed, Ms Wicks’ submission to us was ultimately not solely dependent upon any inference to be drawn from the ‘community scheme’ that the conveyances established. Her point was that it was the limitation by the grant to a use ‘for all reasonable and usual purposes’, interpreted against the background of such scheme, that justified the judge’s interpretation.
31. The question is therefore ultimately whether the phrase ‘for all reasonable and usual purposes’, interpreted against the background in which the conveyances were executed, imports the limitation on the grants that the judge derived from them. In my judgment, they do not. Moreover, and with respect, I regard the judge’s interpretation of that phrase as an unnatural one. It is, it seems to me, obvious that no draftsman intent upon limiting the use of the track to a use for the purposes of the garden (or like) use of the plot would have limited its use to ‘all reasonable and usual purposes’. A use ‘for all purposes’ means, on the face of it, what it says and would in principle permit the use of the track for any purpose (or at any rate any lawful purpose) to which the dominant tenement might from time to time be put. A use ‘for all reasonable and usual purposes’ obviously imposes a qualification on an ‘all purposes’ use. It would, however, be an odd phrase to use if the intention were to limit the use to the type of use to which the dominant plot was currently being put. Had that been the intention, the drafting of the limitation would not have been difficult. The grant could, for example, have been limited to the use of the track in connection with the use of the dominant plot as garden land or for like uses; or, if at the time of the conveyance, the track was already being used in connection with the plot as garden land, the grant could have been limited to a use for such purposes for which it was currently used, or words to the like effect. The second type of formula is one that is sometimes to be found in conveyances, but is obviously a less satisfactory one as it has the potential to give rise to dispute in the future as to what the original use was.
32. These conveyances, however, did neither of these things. They conveyed (inter alia) the garden plots with no limitation on their future use; and they granted rights of access to them over the track ‘for all reasonable and usual purposes’. Those words were not linked to, or limited by, the then use of the plots as gardens. They were, on the face of it, words indicating an expanded rather than a limited range of uses. They did and do not permit a use of the track for *all* purposes. But they did and do permit a use for all purposes that are from time to time reasonable and usual; and I consider that Mr Elleray was right to submit that the intended contrast is with purposes that are unreasonable and unusual. There might well be occasion for dispute as to whether any particular use is ‘reasonable or usual’. But there can in my judgment be no question that the use of each of the plots for the building and occupation of a dwelling house on it in accordance with a planning permission is a ‘reasonable and usual’ use. In my judgment, the easements over the track can lawfully be used for the purposes of building such houses and their occupation when built.

Disposition

33. I would accordingly allow the appeal, set aside paragraphs 1 to 5 of the Judge’s order and substitute a declaration as to the nature of the rights granted over the track that reflects my conclusion. It has been agreed by counsel that, if the appeal were to be allowed, Mr Davill’s claim must be remitted to the county court for the determination of the outstanding issues that remain to be decided. If my Lords agree, I would invite counsel to endeavour to agree the form of declaration and the other provisions of the order that the court should make.

Lord Justice Wilson :

34. I agree.

Sir Mark Potter P:

35. I also agree.