

**IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARDIFF CIVIL JUSTICE CENTRE
HHJ MILWYN JARMAN QC
9CF02774**

Royal Courts of Justice
Strand, London, WC2A 2LL

09/12/2010

B e f o r e :

**LORD JUSTICE CARNWATH
LORD JUSTICE ELIAS
and
LORD JUSTICE PITCHFORD**

Between:

**DEWAN & OTHERS
- and -
LEWIS**

Appellants

Respondent

**Matthew Wales (instructed by R. George Davies & Co) for the Appellants
Graham Walters (instructed by Keppe Rofer, Solicitors) for the Respondent
Hearing date : Tuesday 23rd November, 2010**

LORD JUSTICE CARNWATH :

Introduction

1. This is an appeal against one aspect of the order made by HH Judge Jarman QC in the Cardiff County Court. The case was concerned with the existence and extent of the rights attached to the land of the respondents (Mr and Mrs Lewis) (“the dominant tenement”), over a private road known as Old Station Road, Talyllyn. The private road links at its west end to the public Talyllyn Road, and provides access to a group of six cottages known as Cobbstown, some 200 yards east. The dominant tenement is an area of agricultural land to the south and east of Cobbstown, some of it until the 1960s enclosed by a triangular railway junction (“the triangular area”). The lines have since been removed. The private road provides access, through a gate near Cobbstown, to the triangular area, and through it to the rest of the dominant tenement to the east.
2. The old station building (“Old Station”), which has been converted to residential use, also has access by the private road, as do some additional houses built since the mid 1980s along the north side of the private road. The private road is mainly unfenced. The frontages of the houses to the private road have been laid out with lawns and ornamental trees. Although their owners now accept the existence of a right of way to the agricultural land to the east, they are understandably anxious to limit the scope for potential disturbance by unrestricted use for driven animals.

Although, as I understand it, the respondents have no present intention of using the way for this purpose, they maintain their right to do so.

3. The proceedings began when the appellants (who live at 4 Old Station) and other neighbours sought an injunction prohibiting any use of the private road by the respondents. They counterclaimed for a right of way, either by implied grant by virtue of a conveyance in 1970; or by prescription or lost modern grant, arising from use between 1986 and 2006. The judge rejected the first ground, but upheld the second. He made a declaration that

“... the Defendant is entitled by way of prescription to a right of way at all times for agricultural purposes with or without animals and with or without vehicles...”

4. The existence of that right is not now in dispute on this appeal. The sole issue concerns the extent of the right. The appellant submits that the right should be limited by the insertion of the words “(except for the purpose of driving stock)”.

5. It is fair to observe that the issue of driving stock did not loom large for most of the hearing before the judge. It was not flagged up as a distinct issue in the pleadings, even in the further particulars of the defendant’s case on prescription, which made no mention of animals other than horses. Nor was it dealt with as a separate issue in the judgement. However, as we were told by Mr Wales for the claimant, he indicated during the hearing that he would be seeking a specific exclusion of the driving of stock from any declaration. There is a transcript of the post-judgement argument, in which he raised the issue again. After a short discussion, with some limited reference to authority, the judge declined to make such an exclusion. He said:

“...the most I can do is indicate the view that it should include stock, but there will have to be a very clear understanding that it must be related to the use that has been made in the past, and one must be very wary of the excessive user...”

6. The defendants appeal on this issue alone.

Relevant History

7. The issues before the judge required an examination of the history of the ownership and uses back to 1970 and before. The much more limited issue in this court means that a brief summary is sufficient.
8. In 1940 Brynderwen Farm was conveyed to Mr Thomas Harris. The farm consisted of a substantial holding of land to the west of the Talyllyn Road, the farmhouse and farm buildings to the east of the Talyllyn Road, and a large meadow bounded on the east by the triangular railway junction. The farm also included an island of pasture beyond the junction to the east, which was originally accessed by a track across the junction.
9. Old Station Road was the former access to Talyllyn Station and the dwellings known as Cobbstown, all of which were owned by the British Railways Board, who also owned the triangular area. The railway closed in the 1960s and the rail track was removed.
10. In 1970 Mr Thomas Harris purchased part of BRB’s holding within the triangular area, following which a gate was erected at the north-west corner (point A on the plans), and a fence was erected along the northern boundary. In 1971 the remainder of BRB’s holding at Talyllyn Station and the junction, including the private road, was conveyed to Mr and Mrs Stephens. They converted the former station building into a dwelling house, sold off various plots of land to developers, and sold the cottages at Cobbstown individually. The appellants (Mr and Mrs Dewan) bought the former station building, including a stretch of Old Station Road, in 1985.

11. Brynderwen Farm continued to be farmed by Thomas Harris until his retirement in about 1979. At about this time the land to the west of the Talyllyn Road was let to Mr Philip Williams and his brother; the triangular area and the rest of the dominant tenement to the east, were let to Mr & Mrs Probert.
12. Mr Thomas Harris died in 1982, leaving his widow Jenetta Harris living at Brynderwen Farm. The farm was vested in Jenetta Harris and her children. In about 1991 Richard Harris (son of Thomas Harris) moved to Brynderwen with his wife Adrienne Harris. In 1992 they took formal tenancies or licences of various parts of the farm, including the dominant tenement. They conducted a livery business. In the early to mid 1990s the dominant tenement was let to Mr Philip Williams and this letting continued until around 2004 to 2005.
13. In 2005 the remainder of Brynderwen Farm to the east of the Talyllyn Road was transferred to Richard & Adrienne Harris. Richard died later that year. The respondent purchased his holding in 2006, including the dominant tenement. Jenetta Harris died in 2010 shortly before the commencement of the trial.

Evidence of use

14. In considering the evidence as to the use of the private road to serve the fields making up the dominant tenement, it is important to keep in mind that it was not the only access to those fields, at least for anyone occupying Brynderwen Farm or on reasonable terms with the occupants. The former access across the line of the former junction remained. As the judge said:

“Regard must be had to the fact that this (Station Road) was not the only way to the triangular land or the land beyond. In times when the weather was good, it may have been more convenient to use the meadow and the track across the triangular land. That does not mean to say that it is not also convenient at other times, and in particular wet times, to use the road. I do not accept the submission that this would be confined to the winter months. It may be that was when the user was most pronounced, but wet weather can occur at any time of the year.” (para 46)

15. The only direct evidence of use of the track for driving cattle came from a Mr Lindsell. The judge referred to his evidence when dealing with his first period (relevant to the use at the time of the 1970 conveyance), and before coming on to the 1980s (para 22). He summarised the evidence as follows:

“Mr Lindsell lived in a property backing on to the old station from 1970 to 2007, and he recalls Mr Stephens buying that property. There was a discussion between the two about a stile at the end of Mr Lindsell’s property. He recalls stock being taken down the lane from the farm. He did not accept the recollection of Mrs Rennison that the dairy herd at the farm had been disbanded after about 1970. He said that he recalls standing on Talyllyn Road to make sure the stock coming up the lane would not turn right up towards Llangorse but would turn left down the road to the farm. He said he helped the Harrises frequently on this basis. He could not recall the track towards the southern part of the triangular land being used.”

16. There was evidence that the Proberts had used the dominant tenement for grazing livestock, and that they had used Station Road for access, but no specific evidence that they had driven cattle along it. In the following period, the evidence of Philip Williams, who had the grass keep of the dominant tenement from the mid 1990s until about 2004, was that he would use route through the farmyard at Brynderwen to move stock. Mr Wales relies particularly on the transcript of cross examination of Philip Williams:

“Q The prime route down to that land would be through Brynderwen yard. Would you accept that?

A One of the routes. If we were moving livestock, we would go through Brynderwen yard.

Q There was no question of moving livestock by other routes?

A Unless I was checking stock.

Q There was no question of moving livestock by any other routes? That is the route that you would have used if you were moving stock?

A Yes, unless I was checking the stock. I would take a horse down.

Q It is right though that your use of Old Station Road would be relatively occasional?

A It depended if there was some stock down there, or maybe cows down there, in which case you would go down every day. Only while the land was being grazed.

Q You would go down there, what, on horseback or foot?

A Horseback or take a vehicle down."

17. Other evidence as to the nature of the use after 1986 was very limited, but certainly did not support the case for use for driving stock. Adrienne Harris gave evidence that the track was used by vehicle, by horse, and by leading ponies. She and her husband Richard Harris started a livery business at Brynderwen Farm in about 1990. Geraint Williams referred to use on horseback or on a quadbike.
18. In summary, as Mr Wales submits, there was no material evidence of use of Station Road to drive livestock in the relevant period 1986 to 2006. Mr Lindsell's evidence related to the period when Mr Harris was in farming the land, before 1980, and was correctly placed by the judge in his discussion of an earlier period. There was no evidence that the Proberts had used the road for driving cattle, as opposed to access to the fields. During the period of the livery stables and of Mr Philip Williams' occupation, the evidence directly contradicted such use.
19. I agree with Mr Wales' analysis of the evidence. It is true that, in the post-judgement discussion on the scope of the way, the judge mentioned Mr Lindsell's evidence. However, he was not as I understand him intending to suggest that the use described by him extended for the 20 year period, but rather as an illustration of "user of an agricultural nature". Mr Walters appears to have accepted that actual use for driving stock was limited, but relied on the evidence of other use by animals, including "horseback use and leading ponies". Similarly, his case in this court was, not that he could prove regular use for driving stock, but that having established use for agricultural purposes, there was no justification for excluding the driving of stock, which was a normal incident to the use of agricultural land.

The legal submissions

20. Mr Wales relies on *Sara on Boundaries and Easements* 4th Ed 2008 para. 18.1120, to support a distinction between (1) the type (or mode) of use (for example, by foot, with vehicles, with animals, or driving stock) (2) the purpose of the use (for example, domestic, agricultural, commercial) (3) the quantity of use. This appeal, he says, is concerned only with the first, the mode of use.
21. In the case of a right acquired by prescription, the right acquired is measured by the type of the user. As is said in *Gale on Easements* 18th Ed 2008 para. 9-03:

"Applying the general principle that every easement is a restriction on the rights of property of the party over whose land it is exercised, the real question appears to be, on the peculiar facts of each case, whether proof has been given of a right co-extensive with that amount of inconvenience sought to be imposed by the right claimed."

22. A right to drive stock may be productive of greater inconvenience than a right to drive vehicles, or ride horses. For this reason, Mr Wales says, the cases recognise that the latter does not necessarily include the former. He referred us to:
- i) *Ballard v Dyson* (1808) 1 Taunt. 279 at 28422, in which it was held that the jury had been entitled to find that a right of way for carts did not include a right to drive cattle.
 - ii) *British Railways Board v Glass* [1965] Ch 538, in which this court, following *Ballard v Dyson*, accepted that a grant of a right of way “with all manner of cattle” enlarged rather than limited the nature of the right granted, a driftway for cattle being a more onerous right than a way with horses and carts (per Denning MR at 553E, Harman LJ at 557G to 558A, Davies LJ at 563G to 564A).
 - iii) *White v Richards* (1993) 68 P&CR105 in which an express grant of a right of way “on foot and with or without vehicles” permitted use by horses whether ridden or led, but not driving of cows or other animals. This court (per Nourse LJ p 115) cited Harman LJ in *BRB v Glass* at p557G, for the proposition that a right to drive cattle was more onerous than a mere right of way with horses and carts.
23. For the respondents, Mr Walters submits that there is no rigid distinction between type or mode of use and its purpose and extent. There is no principle that use for agricultural purposes generally is insufficient to include driving stock. *Sara* itself (para 18.16) refers to the old category of driftways as having been superseded by a way for agricultural purposes. The basic principle is as stated by Bovill CJ in *Williams v James* p 557:

“In all cases of this kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant.”

Cattle-grazing was an “ordinary and reasonable use” of the fields making up dominant tenement. There is no reason why use of a way for agricultural purposes should exclude the right to drive cattle to and from those fields. There is a separate principle that the use must not be “excessive”, as explained in *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214. It would require proof of “a radical change in the character” of the dominant tenement, and a “substantial increase in the burden” on the way (*ibid* para 51). There is, and could be, no such allegation in this case.

Discussion

24. Again, in my view, Mr Wales’ analysis is substantially correct. The starting point is the “general rule”, as stated in *Gale* para 9-03, that –

“where a right is acquired by user, the extent of the right must be measured by the extent of the user.”

Such a right is a restriction on the rights of the owner of the servient tenement. The justification is that by acquiescence over a long period, he has lost the right to object to it. By the same token, he should not be taken to have lost the right to object to a user more onerous than that which has in fact taken place. In this case, the user over the relevant period, 1986 to 2006, included access by foot, by vehicles and on horse-back. I have accepted Mr Wales’ submission that there was no material evidence of use for driving cattle during this period.

25. That is not necessarily the end of the matter. If one applies the statement of Bovill CJ in *Williams v James* literally, it would suggest that, the way having been established, it could be used for any purpose fairly related to the reasonable use of the dominant tenement. It is difficult to argue that

driving cattle to and from pasture is not fairly related to the use of grazing land such as this. However, the issue in that case was not the nature of the use of the servient tenement, which was simply for carting hay, but whether it mattered that the hay had not all come from the dominant tenement itself. Where, as here, it is the nature of the use of the way which is in issue, different considerations may arise.

26. For the same reason, I do not find help in cases on excessive user, such as *McAdams Homes Ltd v Robinson*. There the use of the easement (drainage of foul and surface water) remained the same, and the issue was the effect of a substantial change in the character of the dominant tenement. As Neuberger LJ said:

“In most cases where the extent, and even the nature, of the grant are in dispute, the question of excessive use will be unhelpful, because one can determine whether the use is excessive only once one has decided the extent of the grant.” (para 28)

27. Of direct relevance are the cases relied on by Mr Wales, which show that, in considering the acceptable use of a way, a distinction is drawn between a right of way for vehicles or horses, and for driving cattle, the latter being regarded as more onerous.

28. The facts of *Ballard v Dyson* itself were somewhat extreme. The dominant tenement had been used as a barn, but had then begun to be used as a slaughter-house, and it was sought to use it to drive first “fat hogs” and then “fat oxen”. The yard over which the way was claimed was –

“a narrow passage, bounded by a row of houses on each side, the doors of which opened into it; when a cart and horse was driven through it, the foot-passengers could not pass the carriage, but were compelled on account of the narrowness, to retreat into the houses; and they would be exposed to considerable danger if they were to meet horned cattle drive through it.”

In this context, it is perhaps not surprising that the jury found that the use for driving cattle was not covered by the established use as a cartway.

29. It might be open to question whether, taken on its own, this case could be treated as establishing a general proposition going beyond its own facts. In this respect the judgements differ in emphasis. Mansfield CJ said simply that it was “a matter of evidence, and a proper question for a jury” to find whether a right of way for cattle was to be presumed from usage as a cart-way. Heath J (p 285) stated more absolutely that “a carriageway will comprehend a horse-way, but not a drift-way”. The third member of the majority, Lawrence J said (p 286):

“...A grant of a carriage-way has not always been taken to include a drift-way...If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle...”

30. In any event, the other citations noted by Mr Wales show that the case has been accepted in the Court of Appeal, most recently in *White v Richards*, as authority for the proposition that a right of way for vehicles or riding horses is not to be taken, without more, as including a right to drive cattle. Although *White v Richards* concerned an express grant, in my view the logic extends also in determining the scope of a deemed grant arising by prescription. The owner of the servient tenement should not be burdened with a use more onerous in nature than that which he and his predecessors have accepted in fact. In this case, the use shown over the relevant twenty year period does not include use for driving cattle. The servient owners are therefore entitled to exclude it from the right as declared.

Conclusion

31. I conclude that the appeal should succeed. The declaration should be amended as Mr Wales proposes, by the addition of the italicised words so as to read:

“Judgement to be given for the Defendant on the counterclaim herein, and it is declared that the Defendant is entitled by way of prescription to a right of way at all times for agricultural purposes with or without animals (*except for the purpose of driving stock*) and with or without vehicles...”

LORD JUSTICE ELIAS :

32. I gratefully adopt the facts set out by Carnwath LJ. The judge rejected a submission that the right to drive cattle had been acquired by implied grant under the rule in *Wheeldon v Burrows*. He found that an easement had been established by presumed grant or prescription. The question is whether it extends to the right to drive cattle.

33. As Lord Hoffmann observed in the House of Lords in *R v Oxfordshire CC ex p Sunningwell PC* [2000] 1 A.C. 335, 349 D, the purpose of rules of prescription is to “prevent the disturbance of long established de facto enjoyment.” In English law, the fiction is that at some point a right was conferred on the owner of the dominant tenement. The right must relate to what has in fact been enjoyed. As Bovill CJ noted in *Williams v James* (1867) L.R. 2 C.P. 577, 580:

“In all cases of this kind which depend upon user, the right acquired must be measured by the extent of the enjoyment which is proved.”

34. That is not to say that the right is limited to the precise ways in which it was used over the relevant twenty year period. It may be used for rights analogous to them (such as for motor cars where the usage was horse and carriage: see *Lock v Abercester Ltd* [1939] Ch. 861) or for other purposes which impose no greater burden on the servient tenement (on the principle that the greater includes the lesser). Here, there was no evidence of any driving of cattle over the requisite twenty year period, let alone such continuity of use sufficient to confer a right.

35. Nor can it be said that the right to drive cattle is either analogous to any use which was enjoyed, or that it should be permitted under the principle that it imposes a lesser burden on the servient tenement. If authority were needed for the latter proposition, it is found in the judgement of Nourse LJ in *White v Richards* [1998] P. and C.R. 105, where he held that an express grant of a right of way for vehicles or riding horses did not extend to driving cattle. There are observations to similar effect by Harman LJ in *British Railways Board v Glass* [1965] 1 Ch. 538, 557G and *Ballard v Dyson* (1808) 1 Taunt. 279.

36. The argument of Mr Walters, counsel for the respondent, was that since the dominant tenement was used for agricultural – and more specifically grazing – purposes, once there had been sufficient user to establish a right of way, it could be used for any purpose which was reasonably incidental to its agricultural use. On this analysis, the scope of the easement is defined largely by reference to the use to which the land in the dominant tenement is put, not the use to which the right of way itself has been put.

37. In my judgement, that is not in accordance with principle. The use of the dominant tenement may be an important consideration where the easement arises by implied grant because the assumption is that the easements extend to such rights as are necessary for the reasonable enjoyment of the land granted. But rights acquired by prescription have a different focus. They depend not on permitting such use as is necessary to facilitate the activity carried on at the dominant land but rather on acquiescence in what has in fact been happening. That is not to say that the use of the dominant land is always immaterial; if there is a sufficiently significant change in the purpose for which the land is used, that may result in an increase in, or alteration of the burden on, the servient land such that the use of the right of way for that purpose will be unlawful: see the judgement of Neuberger LJ, as he was, in *McAdams Homes Limited v Robinson* [2004] EWCA Civ 214; 3 EGLR 57. But that is not this case, and in any event this principle does not augment the rights of the dominant owner.

38. Here, no driving of cattle or anything analogous to it has occurred at all in the relevant period; accordingly, there could be no acquiescence in such use, and hence no right to drive cattle could be acquired.
39. For these reasons, and those given by Carnwath LJ, with whose judgement I agree, I would uphold the appeal and amend the declaration given below in the manner suggested by my Lord.

LORD JUSTICE PITCHFORD :

40. I agree.