

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2017

Before :

MRS JUSTICE JEFFORD

Between :

KINGSGATE DEVELOPMENT PROJECTS LIMITED	<u>Claimant</u>
- and -	
MR PETER JAMES JORDAN & MRS JOY MARY JORDAN	<u>Defendants</u>

Mr Andrew Noble (instructed by **Wilson Davies & Co**) for the **Claimant**
Mr Stephen Bishop (instructed by **Horwood & James Solicitors**) for the **Defendants**

Hearing dates: 16th – 19th January 2017

Judgment Approved

Mrs Justice Jefford :

1. The Defendants in this action, Mr and Mrs Jordan, are the freehold owners of a property known as Ferndown at Lee Gate, Great Missenden, Bucks with registered title no. BM192767. They purchased Ferndown as their home in July 2012. Adjacent to Ferndown is Kingsgate Farm which is owned by the Claimant, Kingsgate Development Projects Ltd. (“Kingsgate”), with registered title no. 167271. Kingsgate purchased Kingsgate Farm in 2014. Having registered title in February 2016, Kingsgate is also the registered owner of a strip of land (with registered title no. BM403579) which lies between Ferndown and Kingsgate Farm. I shall refer to this as the strip.
2. There is no dispute between the parties that Kingsgate has a right of way over the Jordans’ land which was granted by a conveyance dated 12 September 1960 but a dispute has arisen about that right of way. Kingsgate commenced these proceedings in April 2016 alleging that the Jordans had reduced the right of way and interfered with its use. Kingsgate claimed to have suffered special damage and claimed damages together with an injunction to restrain interference with the right of way and a declaration as to the extent and ambit of the right of way.

3. In the context of this claim, Kingsgate also set out its case that the boundary of Ferndown and Kingsgate Farm was “at the edge of the Claimant’s parcel of land filed under Title No. BM403579”, that is, at the edge of the strip.
4. The Jordans denied any reduction or interference with the right of way contending that the right of way was the same or substantially the same as granted in 1960. They disputed that the boundary of the properties was where Kingsgate said it was and they said, in the alternative to their case that there had been no interference with the right of way, that any substantial restriction arose from a fence which was positioned within Ferndown and not on the boundary. They counterclaimed a declaration as to the correct boundary. By the conclusion of this trial, it was common ground between the parties that, irrespective of the registration of title to the strip, I had jurisdiction to grant such a declaration.
5. This trial was dealt with under the Shorter and Flexible Trials Scheme of this Court. Under that scheme, disclosure is limited to the documents a party relies on and those that the other party requests; in cross-examination, a party need only put the material parts of its case, rather than challenge all disputed evidence. I have borne these points in mind in this judgment.

The history of the properties

6. Kingsgate Farm is now disused but it was in the past a poultry farm. There was some evidence that cattle may also have been kept there. It was one of 4 plots of land conveyed out of a larger parcel of land by a Mr Brown and a Mr Udale between 1960 and 1961. All the plots appear to have been conveyed to companies operating poultry farms. In the case of Kingsgate Farm, the company was Thomas Poultry (Aylesbury) Limited (“Thomas Poultry”).
7. Each of these properties benefitted from a right of way over what remained, at the time, the land of Messrs Brown and Udale. The terms of the right of way were as follows:

“TOGETHER WITH a right of way in common with the Vendors and their successors in title and all others having the like right to pass and repass at all times and for all purposes with or without vehicles over and along the entrance road and tracks the approximate position of such entrance road and tracks being shown and coloured green on the said plan [showing the freehold land conveyed] (or so much thereof as the Vendors build having regard to planning restrictions on development”

It is apparent from that conveyance that the right of way was to be exercised along an existing entrance road and tracks.

8. By a conveyance dated 22 November 1965, Messrs Brown and Udale conveyed a further parcel of land to Mr Robert James. Mr James worked at what was then Thomas Poultry’s poultry farm. In 1970 he built a bungalow on the land. This is the land now known as Ferndown.
9. The conveyance conveyed:

“ALL THAT plot of land situate at The Lee in the Parish of Wendover in the county of Buckingham containing in area 2.527 acres or thereabouts which said plot of land is for the purposes of identification only and not by way of limitation or enlargement delineated in the plan attached hereto and thereon edged in red TOGETHER WITH a right of way in common with the Vendors their successors in title and all others having a like right to pass and re-pass at all times and for all purposes with or without vehicles over and along that part of the entrance road coloured green on the said plan...”

10. The right of way runs south from the main road, it turns east at what I will refer to as bend B and then south at bend C, as they were identified on the plan referred to below.
11. Amongst the evidence about the right of way, which I set out in more detail below, there was an aerial photograph of the land taken in about 1961, that is, shortly after the conveyance to Thomas Poultry, and an aerial photograph from 1969 some time after the conveyance of Ferndown to Mr James. Both parties appointed Chartered Land Surveyors to give expert evidence:
 - (i) Mr Carl Calvert was appointed by the Claimant and Mr Michael Rocks by the Defendants.
 - (ii) Mr Rocks produced a plan (plan 8) annexed to his report dated 16 May 2016 on which he plotted the position of the track on the 1961 aerial photograph using cyan coloured lines. He also plotted the track from the 1969 photograph.
 - (iii) Mr Calvert did not initially have available to him the 1961 aerial photographs but the experts met on a without prejudice basis, viewed the photographs together and reached various agreements.
 - (iv) The plan thereafter went through a number of revisions. I express the Court’s appreciation of the professional approach of both experts and their readiness to discuss these revisions over the weekend before trial and to continue their discussions during the trial.
 - (v) By the conclusion of the trial, the experts had produced an agreed and dimensioned plan Rev C which, amongst other things, showed the extent of the right of way on the 1961 aerial photograph shaded in blue.

The boundary

12. It is convenient to deal first with the parties’ cases about the boundary of Ferndown, in part because that has a direct impact on the dispute about the right of way.
13. In accordance with the 1965 conveyance, the land that comprises Ferndown was delineated on the plan forming part of the conveyance for the purposes of identification only. It is not dimensioned. It does, however, appear to show the right of way within the boundary of Ferndown.
14. Mr James who purchased the property in 1965 gave a witness statement. He is now 93 years old and his GP assessed him as unfit to attend Court. Notice was given to adduce his evidence under the Civil Evidence Act 1995. In this witness statement, he gave the following evidence about the right of way and the boundary:

“...The entire track was within Ferndown with Kingsgate Farm having rights of access. At the time of my purchase it was agreed that the boundary between Ferndown and Kingsgate Farm would be a distance of 27 feet from a hedge that was in situ.”

15. The Defendants rely on that evidence and contend that the true boundary is 27 feet from the old hedge line. There is an Ordinance Survey map from 1899 which shows a public footpath running just south of what appears to be an existing hedgeline. The aerial photograph from 1961 appears to show some vegetation north of the track. On the aerial photograph in 1969, the then existing track can be seen as well as an established hedge to the north of the track where it runs roughly west to east. Mr James provided a photograph taken in the early 1970s which he said showed a line of old trees which was where the hedge ran. As I note further below, Mr Rocks has also identified where he thinks the old hedge line probably was.
16. The fact that the Claimant was unable to cross-examine Mr James is a matter which plainly goes to the weight of his evidence and, on behalf of the Claimant, Mr Noble urged me to reject it or give it little weight amongst other things because, at 93, Mr James was unlikely to remember an oral agreement over 50 years ago about the location of the boundary. Kingsgate relies instead on what was agreed by the experts in their joint statement namely that they believed the boundary followed the red line marked Y – Z on the original plan 8. I note, however, that this line crosses the right of way as plotted from the 1961 aerial photograph.
17. I do not agree that I can dismiss Mr James' evidence and, on the contrary, I give it considerable weight for the reasons that I set out below.
18. The boundary shown on the conveyance plan was for identification only, so it is entirely likely that there would have been some other means of defining the boundary and an obvious way would be by reference to an existing physical feature. Mr James was familiar with the land because he worked at Kingsgate Farm. It was a significant purchase of the land on which he and his wife then built their home. There is every reason why he would remember the detail of what was agreed about the boundary by reference to features of the land that were familiar to him, even many years after the event. The nature of the detail – that is that the boundary was 27 feet from the hedge – also adds to the credibility of his recollection because it would be a curious detail to have made up or misremembered.
19. The way in which Mr James came to give evidence is also relevant. When Mrs Jordan gave her evidence, she explained how this had come about. After the dispute had arisen, she had been out walking her dog and had met a lady from another farm with whom she got talking. This lady told her that she knew who used to live at Ferndown and she later provided contact details. Mrs Jordan arranged to visit Mr James and met him and his daughter. She told Mr James that they were not sure where the boundary was. He immediately said that it had been agreed as being 27 feet from the hedge. She said that after that there had not been that much to talk about because he had told her the thing she wanted to know. Mrs Jordan was a wholly credible witness and I accept her evidence about this. It means that Mr James provided this information without any prompting and, in any case, he had nothing to gain from it.
20. Lastly, if the boundary was 27 feet from the line of the old hedge, then the right of way as plotted by the experts from 1961 aerial photograph would, subject to any argument as to the hedge line, fall entirely within the boundary of Ferndown which is consistent with the plan with the 1965 conveyance.

21. I note that when Ferndown was purchased by the Jordans in June 2012, the registered plan appeared to show the boundary passing through the track. The plan, however, expressly shows the general position and not the exact line for the boundary.
22. I find, therefore, that the boundary runs 27 feet from the line of the old hedge.
23. That leaves two issues, namely what is the line of the hedge and where does the boundary run if it cannot be fixed by reference to the hedge line.
24. Mr Rocks identified a number of stumps which he thought likely to be the remnants of the old hedge. He drew a line along the stumps, shown on Rev B, and extended eastwards, and a boundary line accordingly. Mr Calvert agreed that the three stumps were part of the original hedge and that it was eminently reasonable that what was shown as the extension of the hedge represented the old hedge line. Mr Rocks also projected the boundary line westwards and this is shown on the agreed Rev C. In my judgment, on the evidence, this boundary line represents the best representation of the true boundary.
25. I therefore find that the true boundary between the properties is at the line shown on Rev C as 27 feet from the stumps with the projections I have referred to. That will clearly have an impact on ownership of the strip but that is not a matter I have to deal with as such in this judgment.

The right of way

26. Before I turn to the issues that arise, it will, in my view, be helpful to set out some of the evidence about the right of way.
27. The earliest piece of evidence is the Ordinance Survey map from 1899, which I have referred to above and which shows a public footpath running from “Emanuel Hall” south of an old hedge line to a public house to the west of what is now Ferndown.
28. Next in time is the 1960 conveyance which shows the right of way in green. There is then, as I have said, the aerial photograph from 1961 on the basis of which the experts have agreed both the route and the extent of the track at a time very shortly after the right of way was granted.
29. Next in time is the conveyance of Ferndown in 1965 and the aerial photograph taken in 1969.
30. Mr James’ evidence, which I accept, was that, at the time of the conveyance of Ferndown, the track was entirely within the boundary of Ferndown. He said further that he put up a barbed wire fence along the boundary and beyond the public footpath. In other words, the public footpath also passed over Ferndown land. No distinct public footpath can be seen on either of the aerial photographs or on Mr James’ photograph.
31. There is next an Ordinance Survey map from 1973-1975. It shows the right of way and the public footpath.

32. From these sources I am satisfied that the public footpath at some time and certainly up until the 1970s passed over the right of way but the experts are agreed that it then migrated southwards until it followed a path to the south of the right of way.
33. By the time the Jordans purchased Ferndown in 2012, there was (and still is) fencing separating the track from the public footpath. Their vendor, Mr Phelps, told them that this had been erected by his predecessor in title, Mr Grima.
34. Mr Bishop, who appeared on behalf of the Defendants, submitted that the issue of the route and extent of the right of way could be dealt with shortly. The best evidence of the route and extent of the right of way was the 1961 aerial photograph and what the experts had plotted on Rev C and shown shaded in blue. The Claimant, in response, took two points.
35. Firstly, both the experts accepted that there was a “margin of error” in plotting from the photographs and in transposing to a plan. Mr Calvert and Mr Rocks agreed that in viewing the photographs in stereo the margin of error could be plus or minus 0.25m. Mr Rocks did not agree with Mr Calvert that transposing to a plan might introduce an additional margin of error of plus or minus 0.5m but he agreed that figure as the total margin of error. Mr Rocks said the agreed plots were the experts’ “best fit”.
36. The Claimant’s argument, in effect, was that it should be given the benefit of these margins of error. That argument seems to me to be fallacious for the simple reason that it is as likely that the Defendants should have the benefit of these margins as the Claimant.
37. Secondly, Mr Noble relied on the fact that at the time of the grant of the right of way, Kingsgate Farm had been in operation as a poultry farm (and raised other livestock) so that the right of way must have been sufficient to allow the passing and repassing of the type and size of vehicles one might expect to have access to a farm of this nature. In principle that must be right and, if there were evidence that vehicles of the type or size that were able to pass in 1960 could not pass if the route and extent of the right of way was as plotted on Rev C, then that would provide support to Mr Noble’s argument that the right of way should be adjusted, so to speak, in his clients’ favour. But, as I consider further below, there is no such evidence.
38. In my view, and as submitted by the Defendants, the best evidence of the route and extent of the right of way is as plotted by the experts on Rev C, shown shaded in blue and agreed, and I find that, that is the route and extent of the right of way granted.

Has the right of way been reduced or interfered with?

39. It was common ground, I believe, that an actionable interference with a private right of way must be substantial. Mr Bishop also submitted that the question here was whether the right of way could be used substantially as conveniently as when it was granted. Both these propositions are taken from Gale on Easements, 20th ed. paras. 13-06 and 13-07. Whilst these are the questions I should ask myself, there are within them two potentially distinct issues. The first is whether the right of way has been reduced in the sense that the track has been narrowed or its route moved so as to affect its use and the

second is whether it can be used substantially as conveniently as when it was originally granted, particularly if physical obstructions have been placed along its route.

The history

1960s

40. The experts have agreed where the track was from the aerial photographs taken in 1961. By the time the aerial photographs were taken in 1969, the track had moved and it has moved further over time as shown by the magenta lines on the original plan 8.
41. It is also clear from the photographs that when the right of way was granted, the track crossed open farmland and was entirely open with no fences along its length and no gates across it.

2012

42. By the time, the Jordans purchased Ferndown in June 2012, there were a number of features (both permanent and temporary) that had come into existence. They took photographs of the rear of the property including the track which now provide evidence of what was there at the time.
43. At the entrance to the track off the main road, there was and still is a gate that is operated electrically. I refer to this as Gate no.1.
44. On the northern side of the track, heading east, there was some fencing on the bend (Bend B), then considerable foliage, then one or two sheds and then a laurel hedge.
45. To the south of the track near bend B, there was a wooden gate (“the wooden gate”) which Mrs Jordan believed had been installed by Mr Grima. I was told during the Claimant’s opening that this gate was irrelevant. It is in the sense that no complaint is made about it and it is not in issue that there is no right of access through this gate to Kingsgate’s land. Nonetheless, it still features in this dispute.
46. On the southern side of the track, after the wooden gate, there was a substantial fence and then a low level post and rail fence up to a gate (Gate no. 3). On the photographs taken in 2012, there were also some items (a fridge and a small chest of drawers) alongside the post and rail fence. The public footpath is to the south of these fences and there is a chicken wire fence beyond.

Since 2012

47. Since they have owned Ferndown, the Jordans have made the following changes:
 - (i) they have installed a gate (Gate no. 2) at the location of Bend B. The gate is unlocked.
 - (ii) In March 2016, they removed the fencing on the northern side of the track and erected a post and rail fence further back which widened the track by approximately 0.6m.
 - (iii) In March 2016, they also removed the sheds.
 - (iv) They have cut back the laurel hedge on the northern side of the track.
 - (v) They have removed the substantial fence on the southern side of the track and replaced it with a post and rail fence and hedge.
 - (vi) They have removed the items left at the side of the track in the 2012 photographs.
 - (vii) They have removed old conifer trees near Bend B.

- (viii) They appear to have built up a pile of wood near Bend B and allowed foliage to grow. This was removed in April 2016 although Mrs Jordan's evidence, in any event, was that it was in front of the wooden gate and not on the track.
- (ix) At one point, Gate no. 3 was removed by Mr Katz of the Claimant. After that, the Jordans re-installed a gate but changed it so that it opened on to their property.

The dispute

- 48. Before the Kingsgate Farm land was sold to the Claimant, it was owned by a company called Comtek UK Ltd. Both Mr Katz and Mr Dilloway, who gave evidence for Kingsgate, were involved with this company as well. Mr Katz said that he had a gentleman's agreement with Mr Phelps to use the wooden gate for access to Kingsgate Farm. Mr Dilloway said that after the Jordans purchased Ferndown, they locked the gate. Nonetheless, on a number of occasions, which Mrs Jordan gave evidence about and which the Claimant did not appear to dispute, the Jordans permitted persons visiting Kingsgate Farm to have access via the wooden gate.
- 49. After this had happened on a number of occasions in 2013, the Jordans suggested that they might agree to giving a right of way through the wooden gate in return for the surrender of the existing right of way. That resulted in a letter from Comtek's solicitors (now Kingsgate's solicitors) to the Jordans dated 30 October 2013 which proceeded on the basis that the Jordans had already agreed to grant a right of way through the wooden gate (which was not, in fact, the case) but said nothing about surrendering the existing right of way.
- 50. Up until this point, there had been no complaints about interference with the right of way. The condition of the right of way as I have described it in 2012 had not given rise to any complaint.
- 51. Some negotiations followed but they were unsuccessful and seem instead to have led to the present dispute.
- 52. I have formed the clear view that the genesis of the current dispute is the dissatisfaction of Mr Katz and Mr Dilloway in not being able to get access directly through the wooden gate. Whilst I do not suggest that they had any intention to mislead the Court, that has, in my view, led them to exaggerate their evidence. For example, in Mr Dilloway's witness statement he said that the Jordans had installed two further sets of gates. That was simply wrong, as he accepted in cross-examination. He also said that the Jordans had not maintained the shrubbery and the trees so that they had encroached on the right of way. I have no hesitation in accepting Mrs Jordan's evidence to the contrary. Mr Katz also complained that every time he visited the site a new obstacle seemed to have been put up. But other than the installation of Gate no. 2, there were no such obstacles.

The pleaded case

- 53. In terms of the complaints that Kingsgate now make about the present condition of the right of way, the pleaded case was that the right of way had been substantially reduced, rendering it unsuitable for the use for which the Claimant believes it was intended. The particulars of this allegation were that the Defendants had done the following:

- (i) Operated and continue to operate electric gates between the main road and the right of way that are too narrow, and do not comply with and encroach upon the right of way.
This is Gate no. 1 and the allegation made was that the gate was narrower than the right of way. This complaint was repeated in the Claimant's particulars of nuisance. The complaint was not that the presence of a gate itself interfered with the use of the right of way.
- (ii) Reduced the right of way where it makes an approximate 90 degree turn before proceeding in a South Easterly direction.
This appears to relate to Bend B.
- (iii) Reduced the width of the right of way where it proceeds in a South Easterly direction.
This appears to relate to the width of the track to the south of Ferndown. In its particulars of nuisance, the Claimant said that the Defendants had caused or permitted or continued to narrow the right of way by extending their garden into the right of way (or part of the right of way) and/or allowed that extension to continue to interfere with the right of way. The complaint therefore clearly relates to the northern side of the track adjacent to the garden and not the southern side where there is fencing.
- (iv) Positioned a gate at the entrance to the Claimant's land that restricts certain vehicular access to the Farm.
This is Gate no. 3.

54. In addition, in its particulars of nuisance, the Claimant alleged that the Defendants had attempted to deny access to third parties delivering services to the Claimant's land including verbally challenging a delivery driver delivering fuel required to operate machinery on its land in the week ending 17 April 2016 (which was 3 days before the claim was issued on 20 April 2016).

The evidence

55. In support of these allegations, the Claimant adduced the evidence of Messrs Katz and Dilloway which I have referred to above. Oral evidence was given by Mr Peter Meadows and Mr Clayton Vermaak and written statements were adduced under Civil Evidence Act Notices from Vaughan Davies and Daniel Keneally. The Defendants' evidence was given by Mrs Jordan.

Conclusions on the evidence

56. I take first the evidence as to each of the pleaded allegations.

Gate no. 1

57. It is accepted that this gate does narrow the original right of way to 4.5m. However, the Defendants argue that the narrowest point on the right of way as shown shaded blue on Rev C is between Bends B and C and is 2.67m. It is this dimension, and the bends, that determine the size of vehicle that could use the right of way. Any vehicle that could pass through the narrowest point on the right of way could necessarily pass through Gate no. 1.

58. That seems to me to be clearly right. The width of Gate no. 1, whilst it reduces the width of the right of way at one point, does not cause any substantial interference with the use of the right of way.

Bend B

59. There was a body of evidence at trial from both sides of difficulties encountered by large vehicles in using the track.
60. Mrs Jordan gave evidence in her witness statement about two fuel deliveries. One was on 5 April 2016 when she accepted that an 8m long tanker could not negotiate Bend B. On 13 April 2016, a fuel lorry parked by the wooden gate and filled up the oil tank on Kingsgate's land over the wooden gate. This latter occasion would appear to be the incident alleged in the Particulars of Claim as particulars of nuisance in terms that the Defendants attempted to deny access to third parties delivering services to the Claimant's land. It does not amount to evidence of anything of the sort. On the contrary, the Jordans' son reported to them that it was the driver who was abusive to him when he told the driver that he could not park there.
61. Mrs Jordan also recorded that on 12 April 2016, a delivery of wood was made by the wood being lifted over the hedge with no attempt to use the right of way to reach Kingsgate Farm.
62. Earlier, on 21 March 2016, a low loader with a digger/ earth mover, dumper truck and oil tanker had arrived. All these items, but not the low loader, were either driven or taken along the right of way. On a subsequent occasion on 14 April 2016, a 7 axle low loader was unable to get down the right of way but the items on it were driven or transported along the track.
63. Mr Vermaak's evidence was that he and his father were carrying out a fencing job at Kingsgate Farm in May 2016. During this time, he said there had been a problem with a fuel delivery, a delivery of wood and a low loader collecting machinery. The fuel driver could not get his lorry "along the track"; the wood supplier "could not turn his truck on to the farm on the end gate"; and the low loader "could not get on to the farm".
64. It is not at all clear whether Mr Vermaak's evidence relates to the same occasions that Mrs Jordan recalled, in particular because he said that he was present in May not April. I have confidence in Mrs Jordan's dates and the accuracy of her recollection because she had kept a diary. She recorded no such incidents in May 2016 and, indeed, on a number of occasions in May, the Jordans again allowed access through the wooden gate. Since June 2016, and after this flurry of activity in April and/or May, she said that there had been very few visits to Kingsgate Farm.
65. None of this evidence itself established that the width of the right of way had been restricted either at Bend B or further along the track. Only one piece of evidence, namely Mrs Jordan's evidence about the fuel delivery, expressly related to Bend B. At its highest the evidence showed that on a number of occasions very large vehicles could not negotiate possibly Bend B or the track. The evidence did not demonstrate that the right of way at Bend B had been reduced or that vehicles that could have been expected

to pass to the poultry farm in 1960 could no longer do so (from which it might have been inferred that the right of way had been restricted).

The straight part of the track

66. There was similarly, in my view, no evidence that the garden had encroached on the right of way as pleaded. I have already said that I regard the evidence of Mr Dilloway to that effect as exaggerated. If anything, the contrary was the case and the steps taken by the Jordans enlarged the right of way that had been granted.
67. The Defendants do, however, accept that at Bend C, the right of way has been restricted. It now makes a sharp turn south and the gate is not perpendicular to the right of way. If, however, the boundary is moved, then it will be possible to change the route of the right of way and there will no longer be any interference.

Gate no. 3

68. The pleaded complaint is about the presence of this gate across the right of way and that brings me to the issue of whether the presence of a gate in itself is a substantial interference with the right of way. In one sense the presence of a gate is always an interference with a right of way since a person using the right of way has to open and close the gate but, as set out in *Gale on Easements*, 20th ed., para. 13-14 to which I was referred:

“It has been held in the Court of Appeal in England that a gate is not necessarily an interference with a private right of way. To be actionable the interference must be substantial.”

69. Gate no. 3 separates what was and is farmland from domestic property. It is not locked. It does not seem to me that in itself it substantially interferes with the right of way and/or means that it cannot be as conveniently used as when granted. I take into account in this respect that it had not been the source of any complaint either before or after the Jordans bought Ferndown until this dispute arose, and, as I set out below, that Mr Katz appeared to think that it was Kingsgate’s gate.
70. Mr Noble also urged me to remember the footpath. The thrust of his point seemed to be that it was relevant to the usage and congestion of the right of way when Kingsgate Farm was in operation as a poultry farm. But the submission also brings into play the contention that any appreciable interference with a public right of way is wrong. There is, however, no evidence that Gate no. 3 has in any appreciable way interfered with the use of the public footpath.

Gates nos. 1 and 2

71. As I have said above, the pleaded complaint about Gate no. 1 related to the width of the opening, rather than the presence of a gate as such, and there was no pleaded complaint at all about Gate no. 2. This is not simply a pleading point – it indicates the significance that the Claimant attached to these matters and is some indication of whether they were perceived as causing any substantial interference. In any case, the list of issues agreed to be tried included the following:

“Can the express ROW be used as conveniently as before as a consequence of the installation by the Ds or their predecessors in title of three sets of gates:

- (i) The gates, brick pillars and apparatus at the entrance from the main road*
- (ii) The gate on the first bend from that road to Point B*
- (iii) The gate located immediately after the second bend in the track, on the express ROW, near Point C.”*

72. I take Gate no. 1 first and in isolation. It seems to me important that this gate is not locked. It opens electrically at the push of a button and is, therefore, easier to open than a manually operated gate where a handle or latch has to be operated and the gate then moved manually. The gate also closes automatically although it will not do so if obstructed.

73. In this context, Mr Noble also referred me to the following passage in Gale on Easements at paragraph 13-16:

“A recurring question has been whether it is a substantial interference with a right of way if the servient owner, pleading considerations of security, erects an electronically operated gate across the way and provides the person entitled to use the way with a fob and/or a code to open the gate. It appears that this arrangement will almost always fail the “as conveniently as before” test. “Fobs get lost ... codes are forgotten and periodically changed, visitors may not even be given a fob or may not know whether to ask for one”.”

74. The quotation is taken from **Page v Convoy Investments** [2015] EWCA Civ 1061. In that case, Tomlinson LJ said this:

“[46] At the time of the conveyance there were no practicable gates. If the servient owner chose to install or reinstate manually operated gates, the issue would be whether those gates, as constructed and used, would themselves constitute a substantial interference with the exercise of the right of way. It may be that they would not have done.

[47] If, instead, the servient owner chooses to install electronic gates the question should be the same, and should start from the same point: a comparison between the position with the given gates installed and in operation, and the previous position without gates in place.”

The Court accepted that the trial judge had therefore applied the right test and did not interfere with his conclusion that the gates which could only be operated with a fob or a code constituted a substantial interference.

75. The present position is, however, different. It is not the case that gates have been installed that can only be operated with a fob or a code. They require the press of a button only and, to that extent, are more convenient than manual gates.

76. There was evidence from Mr Meadows, a Health and Safety inspector who visited Kingsgate Farm to carry out a health and safety assessment that he was unable to open the gates without Mr Dilloway’s assistance. He seems simply not to have noticed the

button to press for entry even though it is clearly visible alongside the gate. Mr Vermaak on the other hand opened all three gates without difficulty and without thinking about it. Others, including those making deliveries, seem to have driven through the gates without difficulty.

77. Mr Dilloway claimed that on a couple of occasions the gates had failed to open. That did not result in any complaint to the Jordans and I doubt very much whether it happened. Even if it did, Mr Dilloway agreed that it had not happened for over 18 months; there was no such evidence from any other user; and there was certainly no evidence of a persistent problem.
78. The Claimant also relied on the fact that the presence of the gates meant that anyone driving onto the right of way had to stop:
- (i) The distance between the gates and the main road is approximately 6m and clearly large enough for a car.
 - (ii) The Claimant's point is that vehicular access was not limited to cars and that larger vehicles could not stop clear of the road. The Claimant relied on the previous agricultural use of Kingsgate Farm and the other plots of land conveyed by Messrs Brown and Udale in 1960 and submitted that the right of way granted must have been intended for use by farm vehicles, vehicles transporting animals and feed and products, and other vehicles serving the farms. I accept that submission in principle.
 - (iii) The Claimant says again, rightly, that the right of way must be exercisable by similar types or sizes of vehicle.
 - (iv) The point of this is that large vehicles will have to stop and will obstruct the highway, which it is argued is dangerous. There is, in broad terms, some merit in that argument.
 - (v) The difficulty for the Claimant's argument, however, is that there is a dearth of evidence of the gates, in fact, causing any such problem and, in the absence of such evidence, I do not find that the gates substantially interfered with the right of way. I referred above to the flurry of activity in April 2016 and it seems to me that the bringing of so many large vehicles to Kingsgate Farm, whilst unrepresentative of the normal use of the right of way, would have been the opportunity to evidence the obstruction of the highway that the Claimant now expresses concern about. But there is no such evidence.
79. The gates separate Ferndown from the main road. They are there for the safety of those using Ferndown. They probably have the positive effect of slowing vehicles. If they had been manually operated gates, I would not have found them to be a substantial interference with the right of way. In fact, they are more convenient than manually operated gates. I find, therefore, that they are not a substantial interference with the right of way.
80. Gate no. 2 is, however, another matter. In his closing submissions, Mr Bishop realistically accepted that this gate – the only one that the Jordans installed – was difficult to justify. This is not because of the nature of the gate itself but because it means that there are 3 gates over a length of less than 100m. I find that this constitutes a substantial interference with the right of way and I will order this gate to be removed.

Damages

81. So far as Kingsgate is concerned, there is a pleaded claim for special damage. These claims included:
- (i) Transportation return costs of £2,700.
 - (ii) Cancellation fees due to lack of access in the sum of £8,400.
 - (iii) Contractual losses of £5,000 per week commencing on 1 April 2016 and continuing weekly as a result of a stand down clause with Leewood Construction.
 - (iv) Further losses commencing 1 July 2016 in the event that the Claimant was unable to complete an agreement to let the farm to a major poultry producer, those losses being anticipated as exceeding £100,000.
82. Although I have found in Kingsgate's favour in respect of Gate no. 2 and the obstruction of the right of way at Bend C, it is impossible to relate any of these claims to these issues and the claims fail on this basis alone.
83. In any event, there was no evidence at all in support of claims (i), (ii) and (iv).
84. In relation to claim (iii), the Claimant adduced the evidence of Mr Keneally, presumably on the basis, albeit his statement did not say so, that he was "Leewood Construction". Mr Keneally said that he had entered into a works contract for restoration and repair of farm buildings and that:
- "Part of the contract allowed for a stand down fee. I can confirm that I excised (sic) this as I have been prevented from gaining the correct access required to do the works, I agreed a reduction to what I was entitled to in the clause so as to avoid a court action on the 11th November when I agreed a settlement of £22,500 plus £200 admin in full and final settlement of the stand down and to void the contract. I can confirm that I have been paid this sum by bank transfer."*
85. Mr Katz, exhibited but gave no evidence in his statement about, a Barclays Bank document showing a payment of £22,700 to Leewood Construction from an account that did not appear to bear the Claimant's name.
86. That was the sum total of the evidence. There was no copy of the contract and the terms of the so-called stand down clause; no evidence as to who the parties were; no evidence of the stand down clause and the circumstances in which the stand down clause had been operated; and nothing to relate this to anything alleged against the Defendants. The claim was doomed to failure.
87. By the end of the trial, the Claimant also asked me to make an award of general damages for loss of amenity in the sum of £5,000.
88. Although I have found some interference with Kingsgate's right of way, there was no pleaded claim for general damages or loss of amenity. In the circumstances, I award nominal damages only in the sum of £1.
89. The Defendants also bring a small counterclaim for damages. It is not in dispute that Mr Katz removed Gate no. 3. He said that he did so believing the gate was Kingsgate's because it opened on to Kingsgate's land, a belief that does not sit easily with Kingsgate's claim that the gate is a substantial interference with its right of way. In any

event, I accept that the gate, in fact, belonged to the Jordans and that its removal and/or destruction was a tortious interference for which they are entitled to damages. That is put at £300 based on the evidence as to the cost of a new gate and I award that sum.

Conclusions

90. It follows that:

- (i) There will be a declaration that the boundary of Ferndown is the line marked on Rev C as 27 feet from the old hedge line.
- (ii) There will be a declaration that the right of way is as shown on Rev C shaded blue.
- (iii) There will be an injunction requiring the right of way to be restored at Bend C and requiring Gate no. 2 to be removed.
- (iv) Kingsgate will pay to the Defendants, after set-off of the nominal damages, the net sum of £299, plus interest to be assessed.

91. I invite the parties to draw up the precise terms of the declarations and injunction, to agree the calculation of interest, and endeavour to agree costs. If the parties are unable to agree these matters, I will hear further submissions in due course or, with the consent of the parties, deal with these matters in writing