Neutral Citation Number: [2024] CA (Bda) 27 Civ

Civil Appeal No. 59 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. JUSTICE LARRY MUSSENDEN
CASE NUMBER 2022: No. 89

Sessions House
Hamilton, Bermuda HM 12

Date: 22/11/2024

Before:

THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, THE HON SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL, THE HON IAN KAWALEY

- -

Between:

REBECCA BRADY

Appellant

- and -

JOHN ZUILL

Respondent

Appearances:
Mr Jeffrey Elkinson of Conyers, Counsel on behalf of the Appellant
Mr Changez Khan of Marshall, Diel & Myers Limited, Counsel on behalf of the Respondent

Hearing date(s):	20 June 2024
Draft Judgment circulated:	20 November 2024
Date of Judgment:	22 November 2024

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JUDGMENT

SMELLIE JA:

1. The Appellant and the Respondent are cousins and members of the Zuill family.

2. This appeal involves a disputed right of way over a small area of land which is part of one of three parcels located in Smith's Parish and which are involved in this dispute. These three parcels share a common boundary defined by an old stone wall and have been held, along with a number of other adjoining or adjacent parcels, within the Zuill family for generations.

3. The three parcels, along with other Zuill family lands, enjoy a legal right of way over Peak Road, a private road which was constructed to provide access in common for the family lands to Middle Road, which is a main public road traversing Bermuda from East to West. Access to Peak Road has thus been indispensable for ensuring access to the rest of Bermuda from all the family lands.

4. As one enters Peak Road from Middle Road going toward the family lands, one arrives at a left turn in the road at an area called 'the Elbow'. There the three parcels in question, along with entrances to other parcels, are located on the right side of the road. Two of the three parcels, that at #12 Peak Road (otherwise called "Somersall") and Parcel B ("Westlands"), have boundaries on Peak Road running along the Elbow but the third, Parcel C (that owned by the Respondent John Zuill), has no boundary on Peak Road. Westlands lies between Peak Road and Parcel C such that access to Peak Road for Parcel C is along a vehicular track through Westlands.

5. There is no dispute that like all other Zuill family lands, Parcel C enjoys a right of way over Peak Road. The contest relates to the aforementioned small area of land (the "Disputed Area") because, as confirmed by surveys conducted in July 2016 and January 2023 by Bermuda Land Surveys (a division of Bermuda Realty Company) Limited, the Disputed Area is not part of Westlands but part of Somersall and located at the Elbow such that it extends from the entrance to the driveway into Somersall, across to and straddles the end of the vehicular track which provides Parcel C's right of way through Westlands, at exactly that location where the track would otherwise intersect with Peak Road. At that point, the Disputed Area, measuring only 12' x 10' or 121 square feet, presents a buffer 10 feet wide between Peak Road and the Westlands boundary. There the track arrives at the Disputed Area but, as shown in photographs presented in evidence, in actuality continues without interruption over the final 10 feet through the Disputed Area to Peak Road.

6. A drawing setting out the survey made by Bermuda Land Surveys[1] is attached to this judgment. A copy was presented in evidence at the trial. It shows the three parcels with Parcel C, 1.777 hectare (approximately 4 acres) in size, shown as a red rectangle, with the thin yellow line depicting the vehicular track right of way[2] through Westlands and the small pink triangular mark depicting the Disputed Area.

7. The Appellant's case is that the final 10 feet of the track where it traverses the Disputed Area to Peak Road is not part of the vehicular track right of way otherwise represented by the thin yellow line. On her case, at that point the right of way across Westlands comes to an end. This is although, as mentioned above, in actuality the track continues across the Disputed Area to Peak Road.

8. The question on this appeal is whether a prescriptive easement by right of way in favour of Parcel C exists over the 10 feet of the track where it crosses the Disputed Area as the Respondent contends and as Mussenden J (as he then was) decided, or not, as the Appellant contends.

9. A further question is whether, even if the right of way exists, a change of user which would involve increased vehicular traffic to result from a residence being built on Lot C, in addition to its use hitherto exclusively for farming, walking or horseback riding, would be an unjustifiable increase in the burden of the easement upon the Disputed Area. On this issue also, the Judge found in favour of the Respondent that there would not be an unjustifiable increase in the burden.

10. The issues at the trial were of course, defined by the pleadings.

11. The Respondent in his writ averred as follows:
    1. *He is a resident of Bermuda and the owner of Lot C*
    2. *The Appellant is also a resident of Bermuda and has confirmed by letter from her attorneys that she is the owner of Somersall.*
    3. *Lot C has been in the ownership of his family since at least 1920 and was conveyed to him as owner by Deed on 2 October 2002.*
    4. *That there is a long established right of way leading from Lot C through Westlands and thereafter onto Peak Road which provides access for multiple properties owned by family members to Middle Road, including Somersall (the "Right of Way").*

[1] Drawing No: LS6929Z1, given as amended by them in January 2023. Bermuda Lands Survey is a division of Bermuda Lands Realty Limited.

[2] Being 3.05 meters wide, while the thicker yellow line showing Peak Road described as being 5.49 meters wide.

5. *Lot C consists of an undeveloped lot of land in excess of four acres which is zoned predominantly open space with areas designated as woodland and arable.*
6. *It is evident from the historical use of Lot C and long-established access thereto that a legal easement over the Peak Road has arisen in favour of the Respondent as the owner of Lot C.*
7. *Neither the Respondent nor the tenants, grantees, family members, visitors, guests or licensees of Lot C have ever paid any fee for access to the Right of Way. All persons have exercised free and unencumbered passage over the Right of Way as a means of access to and from Lot C.*
8. *The nature of the Right of Way has never been altered.*
9. *On 19 July 2021, extended family members of both the Respondent and the Appellant, in their capacity as owners of a small portion of Peak Road, entered into a Deed of Declaration and Confirmation of Easement confirming the Right of Way.*
10. *The Respondent has entered into a sale and purchase agreement for the sale of Lot C.*
11. *On 14 March 2022, the proposed purchaser attempted to access Lot C with their realtor but was blocked by the Appellant who had blocked the Right of Way where it crosses (Somersall) with a chain and metal rod.*
12. *Marshall Diel & Myers Limited, attorneys for the Respondent, issued letters to the Appellant dated 16 March 2022 and 24 March 2022 requesting her acknowledgement of the existence of the Right of Way and that she remove any barriers on it. The Respondent's attorneys also notified the Appellant that if the current sale was lost due to her actions, the Respondent would seek damages from her as a result.*
13. *The Appellant has failed to respond in any substantive manner to the Respondent's requests."*

12. The Appellant filed her Defence on 29 April 2022. Most particularly, in it she averred as follows:

> *"…*
>
> *5. The Appellant denies that there has been a long established access or a legal easement over her property which arises in favour of the Respondent as the owner of Lot C as is alleged or at all.*
>
> *6. Without prejudice to the foregoing, the Defendant says that (at) all material times in respect of the relief sought, access over the Defendant's property has been with the Defendant's permission and that at all material times there was no free and unencumbered passage over her property not least as evidenced by visible obstructions placed on the right-of-way.*
>
> *7. In so far as the Defendant says there never existed a right-of-way, then the nature and extent of it as alleged by the Plaintiff is denied.*

> *8. In respect of paragraph 9 of the matters pleaded in the Statement of Claim, the Defendant says that she was not party to any Deed entered into on 19 July 2021 and denies that anyone had or would have had authorization to execute such a Deed.*
> *9. Without prejudice to the foregoing, the Defendant says that the Deed of 19 July 2021 does not grant a right-of-way over her property…*
> *12. In so far as it is alleged that the Plaintiff's attorneys sought acknowledgement of the existence of the right-of-way and the removal of any barriers protecting Defendant's property, the Defendant says that as no right-of-way exists over her property there could be no acknowledgement of same and in so far as the Plaintiff has lost a purchaser of his property, the Defendant says she is not responsible for same and denies that the Plaintiff has suffered such loss and in any event would put the Plaintiff to proof of same.*
> *13. The Defendant denies that the Plaintiff is entitled to the relief sought or any such relief*."

13. Having found for the Respondent, the Order made by the Judge adopts the wording of the prayer from the Respondent's Specially Endorsed Writ of Summons. It declares the existence of the prescriptive easement, recognizes the potential increase of vehicular use across the Disputed Area and is expressed as follows:

> " *The Court declares that the Plaintiff his successors in title and assigns as owners of Lot C together with their tenants, servants and others authorized by him or them benefit from full and free right and liberty of way and passage to go return pass and repass with or without animals and vehicles of all descriptions over and along the entire Right of Way including where it crosses 12 Peak Road*."

14. While the Order declares the existence of the prescriptive easement in terms wide enough to include use for residential purposes, as will be further explained below, a deeded right of way along the vehicular track over Lot B Westlands (formerly known as "Red Gate Farm"), is revealed by the evidence to have been in existence since March 1936. Then a right of way was granted by Alan James Zuill for Lot C, following the earlier transfer in 1933 of Lot C to the Respondent's grand-father William Zuill from Alan James Zuill. The latter was then the owner of Lot C, Westlands and other adjacent parcels.

15. Despite this history, the Respondent's need to rely upon a prescriptive easement appears to have arisen because the 1936 deeded right of way is described as traversing Westlands without mention of the final 10 feet where it traverses the Disputed Area and that this may have been the result of it not then, in 1936, being recognized that the Disputed Area was part of Somersall. This fact was later reported in July 2016 and

reconfirmed in January 2023, by the Bermuda Lands Survey which resulted in the attached drawing.

16. The Survey drawing No. LS6929Z1, both in its original 2016 form and as amended in January 2023, were adduced in evidence. What the accompanying Survey Report reveals has not been disputed. As the Judge noted at [20] of the Judgment, the amendments are additional markings and comments/descriptions added about boundary lines, walls and right of ways. The Survey Report, dated January 25, 2023, cites among other things, the C.E. Hinson Cooper plan which was attached to the deeded right of way granted by Alan James Zuill in 1936. The Survey Report explains the Disputed Area, concluding as follows:

> "*As per the C.E. Hinson Cooper plan the 10' Right of Way crosses the Eastern Boundary of Lot B [Westlands] to connect with the main estate roadway. This road is now known as the Peak Road being 18' wide. The North Western corner boundary area for No. 12 The Peak Road [Somersall] was reconstructed as per the B&L Plan (ie: the legal plan for No.12 Peak Road prepared by B&L Limited, number SY400, dated September 1995). As shown on the new plan the connection of the 10' Right of Way beyond the Eastern boundary with Lot B passes over a apportion of No. 12 The Peak Road to connect to the Peak Road. This is a longstanding situation. This area is shown coloured pink and comprises of 121 sq ft. The survey report and plan update were prepared with the information available at that time".*

17. Thus, it appears that while those who were parties to the deed granted in 1936 were of the belief that the right of way extended over Westlands to Peak Road, the Bermuda Lands Survey established, by reference to the remains of the old stone wall, that it passes over the Disputed Area.

18. The settled location of the track was accepted by the Judge at [33] of the Judgment and is of course, of evidential significance, going to what would have operated in the minds of all concerned about the existence of the Right of Way until the Disputed Area was shown finally and conclusively in 2023, to be a part of Somersall.

19. The Appellant, having succeeded to title of Somersall in 1999, relies upon the results of the 2016 and 2023 Survey establishing that the Disputed Area is part of Somersall. The Respondent relies upon the uninterrupted use of the track across the Disputed Area since at least 1936. In support of that history and his own evidence, he relied at trial upon the evidence of a farmer, Mr Carlos Amaral, who testified to the open, free and uninterrupted use of the track for access to fields which he (and another before him, Mr Manuel Periera) farmed on Lot C as well as fields on other Zuill lands, including

Somersall, for more than 20 years. On the basis of the doctrine of Lost Modern Grant[3], it is argued on behalf of the Respondent, that Mr Amaral's right of way over the Disputed Area, like that of the Respondent himself, was acquired without force or contention (*nec vi)*, without secrecy but openly (*nec clam)*, and without permission (*nec precario)*.

20. In response to Mr Amaral's evidence, the Appellant asserts that his access for farming across the Disputed Area was only ever by way of her consent as given in an oral lease agreement. Her case at trial, which was not accepted by the Judge, is that Mr Amaral's access for farming not only her fields on Somersall but also the other fields on Zuill lands including Lot C, was permitted by her lease arrangement with him and so not admitting of any prescriptive right of way over the Disputed Area, either in himself as a farmer, or in the Respondent, as owner of Lot C.

The evidence at trial

21. Four witnesses testified at the trial- the Respondent and Mr Amaral in support of the Respondent's case and the Appellant and her husband Mr Lawrence Brady, in support of her case. As stated in the Judge's judgment (the "***Judgment***") at [15], there was some evidence that was not generally in dispute:

- As mentioned above, Lot C and much of the surrounding land had been owned by Alan James Zuill who conveyed Lot C to the Respondent's grandfather William Edward Sears Zuill (Grandfather Zuill) on 28 June 1933.

- Grandfather Zuill died in 1989 when Lot C became vested in the Respondent's father James Zuill (Father Zuill). Father Zuill died in 2000 when the Respondent and his brothers inherited Lot C and Westlands. An agreement was reached between them whereby the Respondent would retain Lot C and his brother David Zuill would retain Westlands. In this regard the Judge noted that the Respondent states that this was subject to him being granted full, free and unrestricted access through Westlands by way of the vehicular track over what is now the Disputed Area, and thereafter over Peak Road to get to and from Middle Road. This agreement is said to have been framed within a Vesting Deed dated 21 October 2022.

[3] A legal fiction based on the notion that once a prescriptive easement has been established as of right (ie: without force, without secrecy but openly and without permission), the law presumes that it was established and expressed in a deed which has been lost: see **Dalton v Angus** [1881] UKHL , 6 App Cas 740; ***Gleeson and Gleeson v Bell and King*** , Civ App Bda,1994: No. 2, Judgment dated 12 May 1994 and ***Bean and Smith v Frost*** [2006] Bda LR 87 (per Kawaley J.)

- Mr Amaral had been farming various lots of land on Peak Road, including some lots on Lot C and some on Somersall for well over 20 years. He continued farming some of those lots up to the date of trial. Lot C had previously been farmed by Manuel Pereira, now deceased. Mr Amaral knew Manuel Periera very well and as a young man helped him with farming from time to time. When Manuel retired, Mr Amaral agreed with Father Zuill to lease Lot C which he has been farming on the basis of a continued tenancy arrangement with the Respondent since 2000. He had also entered into an oral tenancy arrangement with the Appellant to continue farming on Somersall where he had also been farming for well over 20 years.

- For the purposes of farming these and other fields, Mr Amaral moved his vehicles and equipment over Peak Road, the Disputed Area and the vehicular track Right of Way, the same route which Manuel Pereira had used to farm on Lot C. Although now disputed by the Appellant, that access which they both enjoyed, Mr Armaral attested had always been free, unrestricted and unencumbered.

- It was not in dispute that members of the public would sometimes access Peak Road for various purposes. Sometimes, as she attested, the Appellant would give permission to various groups to access Somersall. These included equestrians, boy scouts, painting groups and mountain bikers. However, some people accessed the family lands without permission for other purposes, including "night farming", a euphemism for nocturnal praedial larceny. Consequently, signage was erected informing people that the lands were private property and that trespassing was not allowed and access was to be by permission only. There came a time when a barrier in the form of a rebar and chain was placed across the entrance to the vehicular track.

22. Three factual issues of contention arose at the trial: (i) whether the signage was directed, not only at the public at large but also at Mr Amaral and the Respondent as well, (ii) whether the barrier was erected by Mr Amaral as he attested, or by the Appellant and another cousin David, as both herself and her husband attested and (iii) whether the rental fee paid to the Appellant by Mr Amaral was supplemented by farm produce, as claimed by the Appellant, for the purpose of allowing him to access Lot C by way of the Disputed Area. I will return below to note the Judge's findings on each of these issues, and especially on the third, which was pivotal to the outcome before him.

23. The Respondent wished to sell Lot C to a buyer who intended to build a house there and had obtained planning permission for those purposes. The Appellant, wishing to keep Zuill lands as open space and within the family, made him an offer which fell far below the price he could obtain and so was refused. On 14 March 2022, the proposed purchaser attempted to access Lot C with his realtor but was denied access by the Appellant who had blocked the track where it crosses the Disputed Area with the aforementioned chain and metal rod. The Respondent's lawyers wrote to the Appellant requesting her acknowledgement of the right of way and that she removed any barriers to it. She was also notified that if the current sale was lost due to her actions, the Respondent would seek to recover from her the consequential damages; as his writ of summons now claims. Also as already noted, at the time of the issuance of the Respondent's writ, the Appellant had failed to respond to the request.

24. The Judge dealt with the three factual issues in dispute at [24] to [30] of the Judgment.

25. The signage was shown by photographs to have been erected along Peak Road in the area of the Elbow. There are two signs of longstanding, one at the junction on Peak Road to Orange Grove and one at the junction to the Malplaquet property near to the Disputed Area. Above these signs are written on individual pointers the names of the properties to which they are meant to relate, indicating the direction for access to each, for instance: "Sandbox, Malplaquet, Somersall, Peak Farm 22, Westlands and Orange Grove"; with the following wording below: *"Notice. Access with permission only. Private Property no trespassing. Area partrolled (sic) by dogs. Failure to comply with notice will result in legal action*."

26. At [25] of the Judgment, the Judge noted as follows: *"On cross-examination about the Signs, Mrs Brady stated that the Signs were put in place to stop the public going onto her property as well as on to other properties including Westlands, Sandbox, Orange Grove and Peak Farm. When challenged that the Signs were never intended for Mr Zuill (the Respondent) because twenty years ago when the signs were erected she did not know she owned the Disputed (Area), she maintained that she wanted to protect her property. She conceded that the Signs were erected to stop people from stealing the cedar and produce but also to stop people from wandering through the properties. She maintained that the Signs were very clear*."

27. A third sign was erected by the Appellant at the entrance to the Disputed Area but only after this dispute arose. It reads "*Private Property No Trespassing"*. The Appellant testified that she was annoyed with the allegations concerning a right of way over her property and wanted to make it clear that no trespassing had been or would be allowed. This sign could obviously not affect pre-existing rights and was indeed so regarded by the Judge at [50] of the Judgment in his seventh finding of fact:

" *Seventh, I have considered that in 2020 Mrs Brady instructed Mr Amaral not to use the Disputed (Area). Thereafter she erected the Third Sign. In my view, by the time that Mrs Brady had the conversation with Mr Amaral and later when she erected the Third Sign, Mr Zuill had already obtained the right to use the Disputed Area as set out above. Thus her actions in 2020 could not remove or otherwise extinguish that right*."

28. As regards the other signs, by a number of statements at [46], [47], [48] and [51] of the Judgment, the judge explains his reasons for having concluded at [30] that

> "*having considered the evidence, I find that the Signs were posted to deter unauthorized people from coming onto the properties to steal cedar or to steal produce or do any other unauthorized activity*." Most pertinently at [46], he stated: " *In my view, it follows that the Signs were not for the purpose of informing Mr Zuill or Mr Amaral that they could not access the Disputed (Area). Further, twenty years ago, Mrs Brady did not know she owned the Disputed Area and thus, when the Signs were posted, she was hardly informing anyone to stay off the Disputed (Area) in particular*."

29. Further at [47] and [48], the Judge, in the fourth and fifth of eight findings upon which he based his conclusions, found as follows:

> "*Fourth, in my view, the location of the Signs were not placed to prevent Mr Zuill or Mr Armaral from using the Disputed (Area)… Fifth, I have considered the case of* ***Winterburn v Bennett ([2017] 1 WLR 647)*** *and the various authorities referred to therein. In my view, the Plaintiff has proved that Mrs Brady has acquiesced to the use of the Disputed (Area) before she met Mr Armaral in 2020 to tell him to stop using the Disputed (Area). Additionally to my mind, the continuous presence of the Signs was for the unauthorized persons coming to steal, to night-farm or to do other activities not approved by Mrs Brady. Further, the wording of the Signs are far too vague to drive attention to Mr Zuill and Mr Amaral that they were barred from using the Disputed (Area), already having had the right to use Peak Road and the main part of the Track across Westlands. Thus, in my view, the Signs were not sufficient to render usage of the Disputed (Area) by Mr Zuill and Mr Armaral contentious*."

30. At [37] of the Judgment the Judge had already quoted extensively from ***Winterburn v Bennett***. In that case, the effects of a clearly worded sign to prevent the acquisition of a prescriptive right of way were explained by Richards LJ on behalf of the English Court of Appeal, concluding as follows:

> "*The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land*".

31. In light of his findings that the Signs did not operate to render contentious the access of either the Respondent or Mr Amaral to the Disputed Area, it seems that the Judge, in his fifth point cited above, regarded the dictum from ***Winterburn v Bennett*** as being simply in counterpoise to the factual position as he found it to be in this case.

32. The second issue in dispute was as to the erection of the barrier across the entrance which prevented access across the Disputed Area. At [24] of the Judgment, the Judge records that the Appellant "*asserts that, more than twenty years ago, David (another cousin) had placed a chain across the Track, between two trees which cuts off access to the Disputed (Area) from Lot C and anyone who wished to access it would have to remove the chain. Her concern was that people would use Peak Road to access her property without her permission*". At [28] the Judge continued his enquiry on this issue by noting that: "*Mr Amaral stated that he put the chain in place across the Track because people were night-farming and stealing his produce. He rejected the suggestion that David erected the chain. Instead he did it himself, looping the chain around the trees and hitching it to itself unlocked… He would unloop the chain to have continued access across Lot C over the Track. He stated that he had maintained the Track between Lot C and Peak Road without objection from anyone"*. And continuing at [29]: "*Mr Armaral stated that he had a lease with Father Zuill and it was renewed [with the Respondent] without being put in writing. When Mrs Brady told him to use another route to access Lot C, he took the position that he had a lease to use Peak Road and he needed to use the Track also. Thus he maintained that he continued to use the Track, pointing out in one of the pictures the tyre marks of his tractor on the asphalt aligning with the start of the Track on the grass area. In any event, he maintained that he was relying on his lease which gave him a right to use the Track. He declined to cut another route over someone else's property*."

33. At [30], the Judge expressed his findings on this issue:

> "*In respect of the erection of the chain, I prefer the evidence of Mr Amaral that he installed the chain in the way that he did to prevent people from accessing his fields to steal his produce. I am not satisfied with the evidence of Mrs Brady that David had put the chain up. Mr Amaral had taken some care and interest in the properties to that extent that he had 15 lots of land that he was farming in the area, as split between five property owners. It follows that he would take some care of the farmland such as doing maintenance on the Track and areas he used, for example clearing paths after a hurricane. Further, Mr Amaral had 'skin in the game' in that in the land beyond the chain, he had a financial investment in fields that he farmed.*

Thus, he had reason to put the chain up to deter people from stealing, especially night-farmers who probably would not have realized that the chain was not locked but instead looped around the tree. Thus, I find as a fact that Mr Amaral installed the chain."

34. That finding negated the Appellant's suggestion that the barrier was erected by her to operate as an obstruction to either Mr Amaral's or the Respondent's free, open and unencumbered access across the Disputed Area.

35. The third issue – whether a supplemental rental in the form of vegetables was paid to the Appellant by Mr Amaral for use of the Track to access Lot C – was addressed by the Judge in this way:

" 26. *Mrs Brady stated that she knows Mr Amaral as he is a tenant farmer for her as well as Lot C and other fields in the area. She gave Mr Amaral access to Somersall to access her fields and the other fields including Lot C. Mr Amaral had been paying $1000 a year in rent for her fields. Also, he had been providing her with vegetables from her fields and the other fields which she considered as supplemental payment for renting her fields and for using the Disputed (Area) to access Lot C*".

36. The implication of this account of the Appellant's was that a prescriptive easement by right of way could not have been acquired in favour of Lot C by virtue of Mr Amaral's use of the Track because that use was only ever also by means of her permission, given in consideration for the supplemental "*payment*". This account was however, also firmly rejected by the Judge at [30]:

"… *In respect of whether the rent paid to Mrs Brady by Mr Amaral was supplemented by produce from the farmlands, I reject Mrs Brady's position that it was so, as it is vague and unsupported in any form. Thus, I prefer Mr Amaral's evidence which had a solid ring of truth to it that there had never been any express agreement or even implied undertaking that providing Mrs Brady with vegetables had any bearing on his access or was in exchange for any continued use of the Peak Road, the Track and the Disputed (Area).*"

And at [45]: ".. *I refer to Mr Amaral's evidence that he had a lease to use the lands and the Disputed (Area). The Defence rely on this evidence to say that it supports the argument that he had permission to use the Disputed (Area) thus it negates the continued use by Mr Zuill. In my view, I reject that argument. Mr Amaral was renting farmland from Mrs Brady. That poses no real issue in this case. Also, he was renting farmland from Mr Zuill. Mr Amaral states that he had a lease with Mr Zuill and father Zuill, renewed verbally. Thus it is clear that by his lease with Mr Zuill, as his tenant, Mr Amaral exercised the same rights and privileges as Mr Zuill, including in respect to the Disputed*

> *(Area). Thus, the lease between Mr Amaral and Mr Zuill had no negative impact in respect of the element of permission"*
> [By this last sentence, I understand the judge to mean that no permission was sought or required of the Appellant Mrs Brady, in respect of this tenancy between Mr Amaral with Mr Zuill].
>
> And still further at [51]: " ... *I refer to my finding of fact that Mr Amaral's supply of produce to Mrs Brady was not part of his rent to Mrs Brady and was not for permission to use the Disputed (Area). I rely on this finding to reject Mrs Brady's contention that Mr Amaral was using the Disputed (Area) with her permission because he had paid for such use. As stated above, Mr Amaral was using the Disputed (Area) as a result of being the tenant of Mr Zuill and before him Father Zuill*."

37. Having arrived at those conclusions on the disputed issues of fact and at [35] to [36], considered the law as set out in ***Gleeson and Gleeson*** and ***Bean and Smith*** (both above), the Judge concluded as follows:

> " *In light of the reasons set out above, I am satisfied that Mr Zuill has established a right of way over the disputed (Area) on Somersall on the basis that it was nec vi, nec clam, nec precario, that is, not by violence, not by secret, and not by permission and that he is entitled to benefit from the doctrine of lost modern grant.*"

38. In my view, this conclusion was copiously supported by the evidence. As we have seen, this included the evidence of the open use of the Track by Zuill family members as a right of way over Westlands and the Disputed Area, going back to at least 1936 when its existence was sought to be recorded by deed as between Alan Zuill and the Respondent's Grandfather Zuill. This also included the evidence of the Respondent himself that during his teenage years, he and his brothers would access Lot C over the Peak Road and the Track over the Disputed Area and, in latter years, that he frequently visited Lot C with architects and other professional persons with a view to possible development and sale of Lot C. There was also the evidence that there came a time, before the Appellant acquired Somersall in 1999, and so going back more than 20 years, when the Disputed Area was crossed openly and freely by Mr Pereira and later by Mr Amaral, for farming on the many fields on Zuill family lands, including Lot C. All of these activities appeared to have occurred not by permission but as of right, on the assumption by all concerned, that the Track had continued without interruption from Lot C across Westlands to Peak Road. As the Judge accepted, it was only when it was conclusively established by the Bermuda Lands Survey that the Disputed Area was part of Somersall, that the Appellant was in a position to assert her exclusive

control over it[4], but this was long after the prescriptive easement had been established. This reasoning by the Judge finds support in the dicta from ***Gleeson and Gleeson*** *(above)* which he cited in the Judgment and in which this Court stated as follows:

> " *On the issue of lost modern grant the learned judge was bound by authority to conclude that there was no statutory provision in Bermuda for the acquisition of easements by prescription or the applicability of the common law doctrine relating to prescription (see* ***Lathan v Darrell and Hill****, Civil Appeal No. 13 of 1985, at p8). Accordingly, the appellants had to persuade the learned judge that this was a case for the application of the doctrine of lost modern grant. The learned judge implicitly rejected that contention holding that the user relied upon was not user as of right. When Lord Davey asserted in* ***Gardner v Hodgson's Kingston Brewery Company*** *(1903) A.C. 229, 238) that an enjoyment as of right must be nec vi, nec clam, nec precario, he was in fact merely accepting what was law from the time of Bracton as cited by Coke: in short, the enjoyment must not be by violence, it must not be secret and it must not be permissive.*
>
> *The prerequisite for the acquisition of an easement under the doctrine of lost modern grant is that the user must have been as of right. Any acknowledgement that the user is permissive will be fatal to the claim. As Cheshire observed 'to ask permission is to acknowledge that no right exists' (****Cheshire and Burns' Modern Law of Real Property,*** *14th Ed p 550.) Accordingly, what a party must show is that he claims the privilege, not as a thing permitted to him from time to time by the servient owner, but as a thing he has a right to do (see* ***Patel v W.H. Smith (Esiot) Ltd*** *1987 (1) WLR 853*".

The Appeal

39. On the appeal, there does not appear to be any issue taken by the Appellant as to the findings of fact made by the Judge. In particular, it is not said that he was wrong in his rejection of the Appellant's assertion of an implied or expressed permission given by her to Mr Amaral, for an extended use of the Track across the Disputed Area to farm Lot C, in return for a supplemental rent.

40. On behalf of the Appellant, Mr Elkinson now takes a rather different point.

[4] As she herself implicitly acknowledged in her email of 27 January 2020 to Mr Amaral which was tendered in evidence by her: "*Hi Carlos – I hope all is well – a very happy new year to you! As you know we've been taking a close look at our property boundaries and easements. I've become aware that my boundary next to the farm track that leads to lot c impacts the entry into the farm track. Can we meet there to take a look at it? I'd be very grateful if you could make some time to do this. Many thanks, and all the best – Becky*."

41. His primary contention on behalf of the Appellant is at [6] of his submissions: "*The Respondent had never lived in Bermuda for any continuous period of 20 years and was last on the property in or around 2010. He had no claim to an easement based on his personal enjoyment or use of the land. The basis upon which the Learned Judge concluded that the Respondent was entitled to a prescriptive easement was through Mr Amaral's farming of Lot C*."

42. This, in my view, reflects a fundamental misunderstanding of the Respondent's case and the basis of the Judge's acceptance of it. The Respondent's case accepted by the Judge was that the user of the Track is as of right (ie: nec vi, nec clam, nec precario) acquired, not by the Appellant's permission or lease with Mr Amaral, but by the free, open and unencumbered use of the Track for many decades by various Zuill family members and by the two farmers in turn, for access to and egress from Lot C. Thus, the prescriptive easement had arisen in favour of Lot C as the dominant tenement and the Disputed Area of Somersall, as the servient tenement. The right is claimed in respect of Lot C as having accrued before, and continued to exist even after, the Appellant came along as owner of Somersall and extended Mr Amaral's lease to farm on Somersall. The fact of the farmers' access across the Disputed Area to farm Lot C for more than 20 years is simply evidence of the existence of the right of way, not the basis on which it is claimed. And, of course, the claim finds further evidential support in the fact that no objection was ever taken by the Appellant to the user for access to and egress from Lot C, until in 2020 when it seems she had only recently become aware that the Disputed Area formed part of Somersall and when she did become aware of the Respondent's intention to sell Lot C.

43. In sum, the legal basis of the claim is as Lord Neuberger MR explained on behalf of the English Court of Appeal in ***Tara Hotel v Kensington Hotel*** [2012] 2 All ER 554 at [9]:

> " *It is well established that, if the owner of land uses a road as a means of access to, and egress from, his land for more than 20 years 'as of right', then, at least in absence of special circumstances, he will obtain a right of way over the land for the benefit of his land*."

44. Despite the foregoing, Mr Elkinson seeks valiantly on behalf of the Appellant to establish that the user over the Track has not been as of right but has been *precario*, that is, by permission of the Appellant.

45. He puts the argument in this way at [7] to [12] of his written submissions:

> "[7] It was a necessary incident, or implied term, of the Appellant's lease with Mr Amaral that was Mr Amaral was permitted to access his rented field. There was after all no other way he could farm his field. (For implied terms in leases

(and any other contract), see ***Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and Anor***. [2015] UKSC 72.) – an implied term must be necessary to achieve [or give business efficacy to], the parties' express agreement, purposively construed against the admissible background).
[8] The lease accordingly provides a reasonable alternative explanation for Mr Amaral's long use.
[9] The relevant law was recently summarized in ***Poste Hotels Limited v Tracey Anne Cousins*** [2020] EWHC (Ch) by Morgan J at [32] – [35]: "*If there are two explanations, and both are reasonable explanations but only one of them involves the presumed grant of an easement, then enjoyment of an easement as of right is not established*."
[10] The above proposition is supported by the highest authority. In ***Gardner v Hodgson's Kingston Brewery Company Limited*** [1903] AC 229, the House of Lords considered a claim for an easement over a track where the user had (like Mr Amaral) paid a yearly sum to the owner of the servient land. The long use of the land was potentially explicable on the basis that these payments had been for a (now forgotten) licence. Lord Lindley stated the law to be as follows:

" *A title by prescription can be established by long peaceable open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained. This, I think, is the proper inference to be drawn from the authorities discussed in the Court below. If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established; and this, I think, is the real truth in the present case"*. (Lord Lindley page 239, emphasis added)

[11] Here, there was a proper basis for an alternative reasonable inference- namely that Mr Amaral's long use was due to the permission implicit in his lease of the Appellant's fields. Mr Amaral used the Disputed Area pursuant to that permission and also used such access to farm the other fields.

[12]. In light of this potential alternative explanation, the Respondent cannot invoke the legal fiction of a lost modern grant as the only available inference".

46. I have already explained why, in my view, it is a misconception to describe the Respondent's prescriptive claim as confined to Mr Amaral's use of the Track, longstanding though it has been shown to be. But there are also other reasons, clearly articulated by Mr Khan, why this alternative argument of Mr Elkinson's must fail.

47. As discussed above, at the trial the Appellant did not argue that she had given Mr

Amaral any express permission to use the Track for access to Lot C (or any other parcel). Instead, she argued that the permission was implied. Her case rested heavily on two bases: the presence of signs and further, her allegation that Mr Amaral had paid her a supplemental charge "*in vegetables*" for using the Disputed Area to cross to the Track. She claimed that the vegetables were "*a supplement to the rent he paid for the fields and for using my property to access Lot C and other fields owned by my brother and my cousin David…*"[5] .

48. As we have seen, both of those bases were rejected by the Judge. A third basis of her case was raised somewhat in passing at trial, viz: that Mr Amaral's extended use of the Track should be attributed to the permission that he would have had to use the Disputed Area pursuant to his tenancy with her in respect of Somersall. While this point was not developed at the trial, it was nonetheless also rejected by the Judge at [45] of the Judgment as quoted above at [33] of this Judgment. It is nonetheless the argument now sought to be re-developed on appeal to the effect that the permission took the form of an "implied licence" and is to be so regarded although there was no evidence of such a licence or permission being communicated by the Appellant to Mr Amaral.

49. As Mr Khan submits, the policy of the courts is that they will not readily infer implied licences simply based on one party's assertion. There must be evidence of some clear, positive act communicating permission. This has been settled by the House of Lords since at latest 2004 in ***R(Beresford) v Sunderland City Council*** [2004] 1 All ER 160 and reaffirmed more recently by the English Court of Appeal in ***London Tara Hotel v Kensington Close Hotel*** [2011] EWCA Civ 1356.49. According to the House of Lords per Lord Walker at [75] in ***Beresford***, while consent could be given by "*non-verbal means*" what is required is :

> "*.. a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass*."

50. And, as explained by Lord Neuberger MR in ***London Tara Hotel*** at [27], ***Beresford*** also stands for the proposition that "*toleration on the part of the owner of the putative servient land, in the sense of knowing about the use and bearing it in silence, would not be sufficient to found an argument that the use was precario: to found such an argument the toleration would have to amount to a communicated permission."*

51. Moreover, as Lord Walker himself explained in ***Beresford*** at [79]:

[5] Per her witness statement at [22].

> "79… *In this area of the law it would be quite wrong, in my opinion, to treat a landowner's silent passive acquiescence in persons using his land as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct) to those persons. To do so would be to reward inactivity; despite his failing to act, and indeed simply by his failure to act, the landowner would change the quality of the use being made of his land from use as of right to use which is (in the sense of the Latin maxim) precarious*".

52. It was common ground at trial that the Respondent had established long and open use of the Track over the Disputed Area and so the issue became whether the use was by permission, or *precario*. There is persuasive authority that in circumstances where a claimant of a prescriptive easement on behalf of a putative dominant tenement, can discharge the burden of proof of an uncontentious and open use, the evidential burden moves to the owner of the putative servient tenement to show that the use was with permission: see ***Welford and Others v Graham and anor***. [2017 UKUT 297 at [46] – [47], per Morgan J, (one of the authors of the authoritative work, *Gale on Easements).* See also ***Stanning v Baldwin*** [2019] EWHC (Ch) 1350 at [130] and ***South Tees Development Corp and Anor. v. P D Teesport*** Ltd 2024 EWHC (Ch) 214 at [163].

53. Taking that approach to the Appellant's argument here is, in my view, preclusive of any notion of an implied licence in the absence of any evidence from her to support it.

54. There is moreover, a clearly logical reason why the argument for an implied licence must fail. As Mr Khan submits, the logic for implying a licence as part of the lease with the Appellant would have been to enable Mr Amaral to enjoy his rights under that same lease. It would thus have permitted him to cross the Disputed Area for access to and egress from the particular fields he was renting from the Appellant on her property, Somersall. It would not have gone any further and bestowed upon Mr Amaral complete and unfettered freedom to cross the Disputed Area at all times and for any purpose, however unconnected to the lease. It would not have permitted him to use the Disputed Area in order to access and farm other, non-Brady fields, such as Lot C. Such extended use would have been for purposes entirely separate and different from that contemplated by the lease.

55. There is therefore no logic in implying the wider licence and so, applying the well-known tests from ***Marks and Spencer*** (above) it was "*not necessary to achieve" or "give business efficacy to*" the lease. On the contrary, the lease with Mr Amaral would have been quite effective without the implication of the wider licence and there was no commercial justification for implying it. In light of the Judge's firm rejection of the notion of a supplement to the rent, Mr Amaral's passage to and from non-Brady fields procured no benefit whatsoever to the Appellant.

56. The Appellant's case at trial was that access to Lot C by the Track over the Disputed Area had been the subject of a separate bargain and for a "supplemental" charge (ie. paid by vegetables). Whether she should have been allowed to present such a different argument on appeal is debatable but it is clearly without merit. By way of emphasis, Mr Khan's rhetorical question is worth noting here: *if- as she now argues on appeal – that use was already covered by a prior implied licence, then why would a separate bargain and a supplemental charge have been necessary at all*?

57. In conclusion on the issue of permission, the Judge was in my view, clearly correct in his rejection of the Appellant's case. The evidence clearly supports his conclusion that her lease with Mr Amaral in no way affected or infringed or was intended to infringe upon the Respondent's established right of way over the Disputed Area. Indeed, there was every good reason to think that the lease contemplated only Mr Amaral's farming on the Appellant's fields at Somersall, without a moment's thought given to the subject of permission for access over the Disputed Area, so well and long established had that access been in common for the farming of all Zuill lands located around the vicinity of the Elbow.

Terms of the declaratory relief- impermissibly wide?

58. The Appellant opposes the idea of a house being built on Lot C and so her alternative argument on appeal is that the terms of the declaratory relief granted by the Judge are too wide. On her behalf, Mr Elkinson argues that the right declared to have "*full and free right and liberty of way passage to go return pass and repass with or without animals and vehicles of all descriptions*", was entirely unsupported by the actual past usage- which was by a single farmer with his tractor.

59. As Mr Elkinson correctly submits, the general rule is that where a right of way is acquired by user, the extent of the right must be measured by the extent of the user: ***Gale on Easements*** (21st Ed.) at 9-03. And in ***United Land Company v Great Eastern Railway Company*** [1875] 10 Ch App Cas 586, Sir G Mellish LJ, in words of respectable antiquity, expressed the principle in this way, at p590:

> "*Where a right of way is claimed by user, then, no doubt, according to the authorities, the purpose for which the way may be used is limited by the user; for we must judge from the way in which it has been used what the purposes were for which the party claiming has gained the right*."

60. Thus, as Mr Elkinson puts it, the law is clear that a prescriptive easement is a right to use the servient tenement according to the kind of use made of the servient tenement in the period during which the prescriptive easement accrued.

61. It follows that the scope of a prescriptive easement is not altered merely by later changes to the use of the dominant tenement. This is as classically illustrated by ***Wimbledon and Putney Commons Conservators v Dixon*** (1875) 1 Ch D 362. There the defendant had established the user of a track over the servient tenement for farming and other agricultural purposes. The defendant planned to build houses on the hitherto undeveloped dominant tenement. The question was whether the right of way could be used (i) to bring building supplies onto the dominant tenement and (ii) for all purposes connected to the houses there once they were built. The Court of Appeal answered in the negative, per James LJ, at 368:

> " *I am satisfied that the true principle is the principle laid down in these cases [cited in his judgment, op cit, ibid.], that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, qua field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built*."

62. Mr Elkinson also cites and relies upon the more modern application of this principle found in the judgment of Harman J in ***R.P.C. Holdings Ltd v Rodgers*** [1953] 1 All E. R. 1029. The case concerned a prescriptive right to cross part of a golf course to get to a field for agricultural purposes. The defendant owner of the field had recently established on it and was about to expand a camping site for caravans. The question arose whether the right was to use the track for agricultural purposes only, or a right to use it for all purposes, including the purposes of the camping site. After reviewing the authorities, including ***Wimbledon v Putney*** (above) Harman J held at 1035-36, as reported in the headnote that: " *the extent of the right of way was one of fact, but it could not be concluded from the mere fact that while the field was purely agricultural the way was used for all purposes connected therewith that the right was general and exercisable for purposes connected with the use of the field as a camping ground; the way was limited to agricultural purposes; and, therefore, its use in the manner proposed would constitute an unjustifiable increase in the burden of the easement*."

63. Relying on this dictum, Mr Elkinson argues that the evidence in this case shows that the user is limited to user attendant on a very modest farming operation. The Judge was therefore wrong to grant a right which extended "far beyond such usage".

64. That notion is, of course, inviting of an assessment of what might or might not be a permissible change of user. In ***McAdams Homes Ltd v Robinson and anor.*** [2004] EWCA Civ 214, Gibson LJ, in his concurring judgment, noted at [91] that:

" *...In each case it is for the trial judge to make the required comparison in order to assess whether the user, actual or threatened, is excessive and cannot be abated by the owner of the servient tenement. That, as Sir Martin Nourse has pointed out [in his concurring judgment], is a question of fact and degree, and the trial judge's conclusion on that question is one with which the court will only interfere if he did not have the material on which to arrive at that conclusion or was plainly wrong*".

65. The question in ***McAdams Homes*** was whether an easement of drainage in favour of a bakery as the dominant tenement, through a pipe across an adjoining cottage as the servient tenement, to the public sewer, could continue to be relied upon for drainage from houses which had been constructed upon the site of the bakery after it had been demolished. Neuberger LJ (as he then was) in his lead judgment on behalf of the Court of Appeal, conducted a detailed survey of many of the leading cases, including ***Wimbledon v Putney*** and ***R.P.C Holdings*** (both above). At [24], [27] and [29], he extracted the following three principles:

"[24] *First, where the dominant land (ie, the property benefitting from the easement) is used for a particular purpose at the time the easement is created, an increase, even if substantial, in the intensity of that use, resulting in a concomitant increase in the use of the easement, cannot of itself be objected to by the servient owner (ie, the owner of the property subject to the easement)…*

[27] Secondly, excessive use of an easement by the dominant land will render the dominant owner liable in nuisance. The law is stated thus, in the present, 17th, edition of Gale on Easements at para 6-90:

" If the dominant owner makes excessive use of the right of drainage by discharging more matter than the system is designed to cope with, thus causing flooding of the servient land, he will be liable in nuisance. What amounts to excessive use depends on the grant construed in light of the circumstances surrounding its creation which may include the capacity of an existing system or the size of the buildings on the dominant land at the date of grant"….

[29] Thirdly, where there is a change in the use of, or the erection of new buildings on, the dominant land, without having any effect on the nature or extent of the use of the easement, the change, however radical, will not affect the right of the dominant owner to use the easement. In ***Lutrell's case*** *(1601) 4 Co Rep 86a, a prescriptive right to a watercourse was not lost by the dominant owner demolishing two ancient fulling mills and erecting in their place two new corn grinding mills. The Exchequer Chamber held at 87a that the dominant owner "might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water, as it was before…"*

66. From his examination of the case law and by application of his three principles, Neuberger LJ came at [50] to propose the following two-pronged legal test:

> "[50] *The authorities discussed above appear to me to indicate that the issue (for resolution in the case) should have been determined by answering two questions. Those questions are:*
>
> *i) Whether the development of the dominant land, ie the site, represented a "radical change in the character" or a " change in the identity" of the site (as in **Wimbledon**, and indeed as in **Milner's** [[1907] 1 Ch 208] and **RPC Holdings**) as opposed to a mere change of the intensification in the use of the site (as in **Glass** [[1965] Ch 538] and **Cargill** [[1981] 1 All E.R 682] , and indeed in **Giles** [(1971) 22 P&CR 978];*
>
> ii) *Whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land, ie the cottage (this test being that laid down in **Harvey** [(1873) LR 8 CP 162] and **Wimbledon** and applied in **Milner's** and **RPC Holdings**)*".

67. Both questions raise matters of fact and degree and, as we have seen, are matters for the assessment of the trial judge. Observing at [52], that the cases cited by him deal in the main with rights of way, Neuberger LJ nonetheless regarded the principles as applicable to the case then before him, which concerned the right of drainage involving the passage of water and sewage. The two tests being thus regarded as having general applicability in the field of easements, he then went on to state that:

> "*The satisfaction of only one of the two requirements will not, at least on its own, be sufficient to deprive the dominant owner of the right to enjoy the easement, in light of the first and third principles which I have suggested can be extracted from the cases. However, where both requirements are satisfied, the dominant owner's right to enjoy the easement will be ended, or at least suspended so long as the radical change of character and substantial increase of burden are maintained*."

68. In the present case, as Mr Khan submits, the Judge correctly identified the ***McAdams Homes*** test (at [38] of the Judgment) and sought at [57] – [59], to apply it to the facts. His reasoning on each question, is in my view, unexceptionable:

- On the first question (whether there would be a "radical change in character"), he noted at [57] that the addition of a single dwelling on Lot C would be a change, but not a radical one. He also noted at [57] that, even with the building of a house, some arable land on Lot C would be preserved. At [59] he took a holistic view of the facts: "*Zuill properties historically have been used for*

agricultural purposes but there have been residential premises built there also". Indeed, it was revealed in the evidence that the Appellant herself occupies a residence built on Somersall.

- On the second question from **McAdams Homes**, (whether there will be or has been a "substantial increase in burden"), the Judge found at [58] –[59] that there would not be a substantial increase or alteration in the burden on the Disputed Area. This too I accept was justified on the facts of the case. The momentary and fleeting presence of a household vehicle from time to time over the mere 10 foot span of the right of way, can hardly be described as a "substantial increase" in the traffic generated by Mr Amaral's farming or the going and coming of the Respondent and other Zuill family members accessing the adjacent parcels through Westlands. Nor would traffic generated temporarily by the construction of a house add substantially to the burden on the Disputed Area in the sense, as the Appellant complains, that a noise nuisance would result, any more so than the noise from a tractor. In any event, as noted by the Judge at [55], the Appellant's evidence was that the traffic crossing the Track was out of earshot from her home and she would not be able to see any building on Lot C from her home. In this respect, it is as Mr Khan submits, ironic that at trial, as the Judge noted at [56], the Appellant's complaint was that the new use for residential purposes might be even *too quiet*, if electric cars were used.

69. The Judge declined, at [57] and [60], to restrict the easement to what the Appellant says is the current use, namely by farmers and their vehicles and equipment. This was the correct approach also in light of the principle, as settled in ***Wheeldon v Burrows*** (1879) 6 Ch App 166, that a conveyance of a dominant tenement will take with it the benefit of any existing easement. However, as the second of the principles from ***McAdams*** shows (see above at [65]), excessive use of an easement by the dominant land will render the dominant owner liable in nuisance.

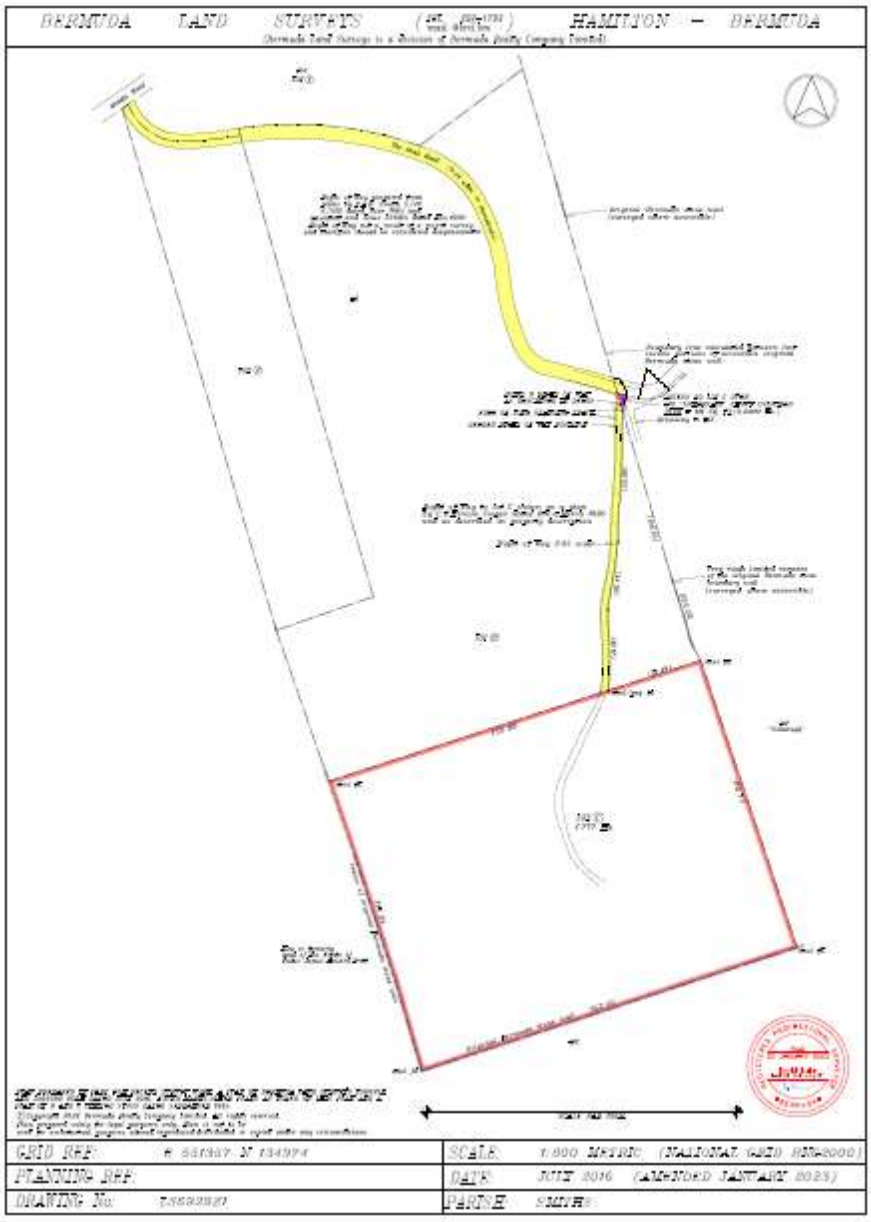
70. On the basis of all the foregoing, I would dismiss the appeal. I would also grant the Respondent his costs of the appeal, to be taxed on the standard basis, if not agreed.

KAWALEY JA:

71. I agree.

CLARKE P:

72. I, also, agree. Accordingly, the Appeal is dismissed. The Appellant shall pay the Respondent his costs of the Appeal, to be taxed on the standard basis, if not agreed.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