Neutral Citation Number: [2022] EWHC 1491 (QB)

APPEAL REF: BM10118A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ON APPEAL FROM A DECISION
OF HHJ TINDAL MADE AT
WORCESTER COUNTY COURT
ON 4 MAY 2021
CLAIM NO: GOOWR097

Date: 15 June 2022

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

JAMES BANKS (1)
HELEN BANKS (2)

Claimants\Respondents

- and -

GARY BLOUNT

Defendant\Appellant

(Adam Boyle instructed by Harrison Clark Rickerbys Solicitors) for the Claimants
(John Stenhouse instructed direct) for the Defendant

Hearing date: 9 June 2022

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Mr Justice Ritchie:

The Parties

[1] The Claimants own the yard at Bishops Wood Lane, Crossway Green, Stourport-on-Severn (the Yard) which consisted of buildings and land. Included in their property was a right of way (ROW) from the main road across the Defendant's land to the Yard.

[2] The Defendant owns a Nursery and land at the same address (the Nursery) which was subject to the Claimants' ROW.

Bundles

[3] For the appeal I was provided with the Appeal bundles, skeleton arguments from both parties and supplementary skeletons and the whole trial bundle (parts of which I was asked to read as set out in submissions).

Chronology

[4] The ROW is the subject of the appeal. It had been granted by a Mr. Taylor in 1992 to the owners of the Yard back then. It was set out in writing in the contemporaneous documents. Mr. Taylor sold two parcels of land to different individuals. The Yard with the ROW was sold in 1992 and 5 years later, in 1997, the Nursery was sold subject to the ROW.

[5] The Judge found that the plans delineating the ROW in 1992 and 1997 were drawn up by Mr. Taylor but he did not specify the width of the ROW. He coloured in the ROW thickly on the 1992 plan and thinly on the 1997 plan (for illustration purposes only). This width of colouration gave scope for disputes as to the width of the ROW. The Yard owner relies on the thick colouring for his/her ROW but the Nursery owner likes and relies on the thin colouring for the ROW over his land.

[6] For many years before 2018 the Defendant had been in dispute with Mr. and Mrs. Lee who owned the Yard back then. The disputes covered many matters but included allegations of the Defendant obstructing the Lees' ROW into the Yard. A lawyers' letter dated 12.3.2002 contained allegations that the Defendant was obstructing the ROW by putting up fencing across it and disconnecting the water, gas and electricity supplies to the Yard. It also asserted that the Lees had a right to a telephone line to the Yard. In a further letter dated 25 July 2002 the Lees' lawyers asserted that the supply of water, electricity and telephone services to the Yard had not been restored.

[7] The Claimants bought the Yard in early 2018 with the ROW over the road into their Yard. It was Mr. Banks' evidence that Mr. Lee informed Mr. Banks that he had installed a telephone line in around 2004 and that the Defendant had let his trees adjoining the ROW grow such that the line was disconnected by the trees. When Mr. Banks took possession of the Yard he found a coil of telephone wire in one of the buildings. He instructed BT to inspect and they did in April 2019 and reported that

they would not reconnect until the trees along the North service road and outside the Nursery building were cut back. The engineer said the cable was wrapped around the branches which he/they believed had been done deliberately.

[8] The Defendant accepts that there is a telephone line pole along the ROW (the position was not in evidence in the trial).

[9] As to the width of the ROW various experts gave evidence to the Judge. Mr. Banks summarised them in his witness statement. For the layout of the buildings and the road into the Yard the plan at TBp24 is helpful (ignoring the blue colouring). The Judge held that the words of the 1992 grant were wide encompassing and expressly permitting all types of vehicle to use the ROW. He held that the road delineated in the ROW had been used by Mr. Taylor who operated a nursery and garden centre and hence would have received HGVs and other large vehicles into the car park and, before him by Mr Smith who provided a photo from 1977 of the car park area with a large flat bed HGV in it. The Defendant accepted that HGVs were permitted in a letter dated 26.7.2019 but had also asserted to the Land Registry in January 2001 that the maximum ROW width was only 2.5 metres. Mobile homes had been driven on an off the land as well and they are wide.

[10] The issue was whether the whole of the road / track and the grass verges and the bushy and tree lined sides from fence to fence either side of the service road from the North gate to the Yard in the South was covered by the ROW or just a smaller, narrower part consisting of the track or roadway used by the vehicles which passed up and down in 1992 and before then.

[11] Experts measured the land. The evidence of the Claimants' expert Mr. Prosser was excluded for late service (it also had no statement of truth). Mr. Clifford Taylor in 2008 estimated the ROW width from the Land Registry plan at 3.7 m and asserted that anything less would not permit emergency vehicles down into the Yard. Mr. Atkinson wrote a report in 2009 asserting that the Northern entrance width was 4.18m due to the brick gate posts. His scale plans at 1553-1556 are helpful. Mr. Carey reported on the Defendant's instruction in July 2020. The Judge relied on his evidence for many of his findings on the width of the ROW. His topographic survey was similar to that of Mr. Atkinson made 11 years earlier. He measured the North gate at 4.15 m. He noted the North service road as bounded by leylandii trees and laurel bushes. He noted the middle gate as 4.5m wide with brick pillars. The car park after the middle gate was much wider. He concluded that the road in the ROW had not changed significantly since 1992 and the Judge accepted that. He noted from Google overhead maps that the trees adjoining the ROW had closed in between 2013 and 2018. He concluded the Northern service road from the North gate was around 3m wide. The ROW in front of the nursery building was 2.5m wide. He left the rest of the definition of width to the Judge.

[12] In April 2019 the Claimants sent a lawyer's letter before action to the Defendant setting out their complaints of obstruction of the ROW and other matters.

[13] The Claimants issued proceedings in February 2020. They claimed various declarations and injunctions. They asserted the width of the ROW was as per the 1992 conveyance plan (thick blue line). Many other matters were pleaded which are not relevant to the appeal. In the defence the Defendant pleaded that the wider ROW plan was in some way falsified. He asserted a Land Registry revised plan was more accurate. He denied obstruction by the Rebar fence. He asserted he regularly maintained and cut back the trees adjoining the ROW. He counterclaimed asserting that the Claimants (1) misused the ROW with large lorries and drove off the ROW to damage his pallets and (2) placed a sign unlawfully on his land. Many other matters were pleaded.

[14] The trial was heard by HHJ Tindal (the Judge) on 24/5/6 March 2021 and 4 May 2021. Judgment was given on 29 March 2021 but costs and the details of the order to be made were left over and decided after submissions on 4th May 2021.

Findings on the width of the ROW

[15] The Judge found for the Claimants on the main issues but not on all issues. He did not find the ROW was as wide throughout its length as the Claimants asserted. He defined the ROW by width running from the main road to the North, through the North entrance gate, down the North service road, through a middle gate into a car park area and then through there, through a chicane, into the South service road and then the Yard. He defined the width:

(1) at the North entrance gate as 4 metres;
(2) down the North service road as 3 metres;
(3) from the middle gate across the car park to and including the chicane as 4.5 metres, and
(4) down the South service road as 2.5 metres.

Findings on obstruction

[16] The Judge found that the Defendant had substantially interfered with the Claimants' right of way in two ways:

(1) he had failed to maintain the trees and bushes adjoining the ROW allowing them to impinge over the ROW and obstruct vehicles and to impinge on a telephone line attached to a pole along the ROW running to the Yard such that it was broken by the trees. He also failed to maintain the road surface which caused the Claimants to repair the surface themselves.
(2) He had installed a moveable Rebar fence with concrete footings across the chicane leaving on many occasions a gap so small that it obstructed vehicular

access to the Yard and caused the Claimants and their invitees to have to stop, get out, move the fence post which had a concrete base and then drive through.

Damages

[17] The Judge awarded the Claimants £2,000 in damages, £1,000 was for the failure to maintain the road surface and £1,000 for the rest of the obstructions.

[18] The Judge also found for the Defendant on part of the counterclaim and awarded £5 in damages.

Injunctions ordered

[19] Finally the Judge granted 3 injunctions each lasting 10 years:

(1) a prohibitory order preventing the Defendant from obstructing the ROW;
(2) another prohibitory order preventing the Defendant from obstructing the telephone services to the Yard running over the ROW;
(3) a mandatory injunction requiring the Defendant to maintain the trees adjoining the ROW.

The Appeal

[20] The notice of appeal was dated 22 May 2021 and the grounds were undated. The Appellant's skeleton was dated July 2021. It was 29 pages long. After the permission hearing it was reduced to 11 pages.

The Issues

[21] Permission was granted by Cotter J. on 27th January 2022 to the Appellant to appeal the decisions made by HHJ Tindal on some, but not all, of the original grounds.

[22] In summary the issues at the appeal hearing were:

(1) was there a substantial interference with the Claimants' right of way (ROW) by the Defendant:
- by putting a Rebar fence with a gap across the ROW at a point referred to by the Judge as the chicane?
- by allowing trees to impinge on the ROW in the air above it which restricted it and restricted the telephone services to the Yard running above the surface by disconnecting them and making it impractical for BT to reconnect them?

(2) Was the finding by the Judge about the width of the ROW in the car park wrong in relation to the use of the word "verge" in his order date 4.5.2021?

(3) Were the assessments of the damages awarded for (a) substantial interference with the ROW, and (b) failure to maintain the ROW, illogical and\or founded on an inappropriate basis?

(4) Was the mandatory injunction to cut back trees and bushes too vague and was the duration of all 3 injunctions (the other 2 being prohibitory) too long?

The law on appeals

[23] CPR part 52 sets out the powers of this Court and the process for review of the decision of the Court below in this appeal. I can overturn the decisions if any of them was or were wrong or procedurally or otherwise unjust. This is not a rehearing.

[24] The Practice Direction to CPR 52 directs that "only" the relevant documents required for the appeal are to be put in the appeal bundle. The appeal bundle must be lodged and must contain all relevant documents relied upon. The Appellant lodged an appeal bundle and served it. It had 508 pages. It included transcripts of some of the evidence. It did NOT include the trial bundle.

[25] By PD 52B para 6.6 late documents shall be added into the appeal bundle at the latest by 7 days before the appeal hearing. In contravention of the PD the Appellant tried to file the whole trial bundle but did not add it to the appeal bundle. The trial bundle was in fact put before Cotter J. on the permission to appeal hearing. It was sent to me 1 day before the hearing. It contained 1950 pages of documents most of which were irrelevant to the appeal.

[26] At the start of the appeal I invited both counsel to list those pages of the trial bundle which were relevant to the appeal and they did so. They are: 106-107, 171-172, 187, 200, 218-220, 271, 298, 299, 319, 322, 331, 362-386, 388, 1553, the Carey report, the Atkinson report, the Clifford Taylor report. All of those and nothing more should have been in the appeal bundle.

[27] When considering findings of fact on the evidence which the Judge heard the powers of this Court are limited to overturning decisions made (1) where there was no evidence to support them or (2) which no reasonable judge would make: see *Perry v Raleys* [2019] UKSC 5 at paras. 49-52.

[28] I did not see the witnesses, the Judge did. I have not had 3 days of evidence which the Judge had the benefit of. Instead, as on all such appeals, I have "island hopped" through the trial bundle and the evidence, led ably by counsel.

[29] I shall deal with each ground in turn. I shall fold into the ground: (1) the Judge's findings, (2) the appeal grounds and (3) the decisions I make on each ground.

Ground 2: the verge and the definition of the width of the ROW

[30] The logical place to start in this appeal is the findings on the width of the ROW. None of the findings are appealed save for the width in the car park. Paras. 17-19 and 38-47 of the Appellant's skeleton contain the submissions. The words "inclusive of verge space" in the order at para 1c are criticised.

[31] Counsel used the words "no evidential basis" as his starting point. He went on to assert that the finding was "completely contradicted" by the expert evidence of Mr. Carey. He submitted there was no verge in the car park and that in law verge space could not be included as part of a ROW unless expressly so stated or implied in the grant. Further it was asserted that this was really disguised swing space which the Judge had already held was not permitted in law. Finally it was asserted that the use of the words "verge space" in the order contradicted the Judge's rulings on the law made in March 2021.

[32] In my judgment none of these grounds was made out. The first point to note is that the Judge, in his well reasoned judgment delivered in March 2021, set out the law on rights of way and no criticism is made of his summary of the law and rulings therein. He ruled that verges may be included in a ROW if the factual matrix at the time of the grant so established but he found as a fact that there was no such evidence before him so verges were not included in the ROW and no claim was made for specific verges by the Claimants (see paras. 69, 70, 76, 92.3).

[33] In the May hearing the Judge dictated the order relating to the width of the ROW and the Appellant's counsel specifically asked for the word "verges" to be included in para 1c (see internal page 56 of the transcript of the May hearing – note there are two such transcripts and this one was not in the appeal bundle). Mr. Stenhouse now appeals on the Defendant's behalf and complains about the inclusion of the very words he asked to be included.

[34] The root of the Judge's finding on the width of the ROW was at paras. 70 and 86. The beaten track caused by HGVs' and other vehicles' tyres before and as at the date of grant in 1992 was the evidential limit of the ROW in the Judge's conclusion. The Judge considered that in the car park HGVs would take various slightly different tracks to get from the middle gate to the chicane so the ROW would be wider than the North service road. He decided it was 4.5m. I consider that to be unassailable.

[35] In so far as verges were relevant they existed at the chicane and were either side of the gap which the Defendant closed partly with a Rebar fence. Those could have been interpreted as part of the ROW granted in 1992 by the use of the term verges in the Order and I see nothing wrong with that decision. It is logical and accords impliedly with his ruling on the law. For Large HGVs turning through the chicane they might often have driven over the verges as they turned (before the Defendant had put in his Rebar fencing). This is a matter of logical inference which the Judge was entitled to

make on the evidence he heard in my judgment. I do not consider that "Swing Space" has any relevance in the appeal.

Ground 1: no evidence of substantial interference

Rebar Fence

[36] The Grounds of appeal at paras. 5-16 set out the following submissions and admissions. Firstly, that after the Claimants sent a lawyers letter in April 2019 the Defendant removed the Rebar fence in July 2019. Secondly, that Mr. Carey asserted that the ROW width was not more than 4m at any point (para. 6 of the skeleton) or 3.3m (para. 13 of the skeleton). Thirdly, that the Claimants' case at trial was that the ROW was 6m wide and they lost on that issue. Fourthly, that the Claimants accepted that a gap was always left, so only the size of the gap was in dispute. Fifthly, that in law opening an unlocked gate is not a substantial interference: authority cited: *Pettey v Parsons* [1914] 2 Ch 653, (no paragraph numbers relied upon) and *Johnstone v Holdway* [1963] 1 All ER 432 (no paragraph numbers relied upon).

[37] The Defendant's evidence was that the gap in the Rebar fence was always 4.57m wide and the ROW was less than that so no obstruction or substantial interference occurred. The Judge rejected that defence on the evidence. In particular the Judge found on the evidence of the 1st Claimant that the gap was too small to allow vehicles to pass and he and his invitees had to get out and laboriously move the pole with concrete on the bottom which was the edge of the Rebar fence. The Lees complained about this too as the Judge so found (contrary to the assertion in the Defendant's skeleton that the Lees made no such complaint). The judge referred expressly to the photo at TBp363 but he saw all the photos and heard all of the evidence and read the letters from Mr. and Mrs. Lees' lawyers and despite having no site visit due to covid he gained a far better understanding of the site than I have. In particular he rejected the Defendant's evidence for the reasons stated in the judgment. It is quite clear from the judgment that the judge found that the gap was not 4.57m at all times, but instead far less and so much less that the Claimants and their invitees had to get out of their vehicles and open the gap wider.

[38] Dealing with the second assertion. The Judge made his findings of mixed fact and law relating to the ROW and those are not challenged save as to the word "verges". I have already dismissed the appeal based on that ground.

[39] Dealing with the third assertion. This is irrelevant. The Judge made his findings on the width of the ROW and they are not challenged save as to the verges point which I have dismissed.

[40] Dealing with the fourth assertion. Restating the issue in dispute does not found a ground of appeal.

[41] Dealing with the fifth assertion. The Judge found that the gap was too small for the Claimants and their invitees to drive through and that was evidentially justified in my judgment. The case law does not undermine that ruling. There was no need for the Defendant to install the Rebar fencing save to annoy the Claimants and the Lees before them. The Judge ruled that the Defendant's behaviour was "downright unreasonable and unneighbourly" (para 94). I agree.

[42] In my judgment there are no proper grounds upon which I can interfere with the Judge's findings in relation to obstruction by the Rebar fence.

The Telephone line and the trees

[43] The Judge found that the Defendant's trees were a substantial interference with the Claimants' right to services namely the existence of and the right to use a telephone line running over the ROW.

[44] In paras. 26-29 of the skeleton the Appellant asserts that there was "no evidential basis whatsoever" (with counsel's underlining for the assistance of the Court). This was repeated in submissions.

[45] I regret to say that this submission was factually incorrect. There was evidence to support this finding and in my judgment perfectly good evidence. There were the two letters from Mr. and Mrs. Lees' lawyers in 2002 set out above. Mr. Banks gave evidence in his witness statement at para. 84. Mr. Banks gave further evidence in cross examination (transcript in Appeal Bundle at page 152). The Judge found the telephone line was put in situ by the Lees and damaged in 2002 and reinstalled in 2004 by Mr. Lee and damaged (para. 59). So the ground which was asserted: "no evidence", is obviously wrong. There was also plentiful evidence that the Defendant did not cut back the trees between 2010 and 2019 including from the Defendant's expert. In reality the Defendant was objecting to the judge's decision on which evidence he preferred. Having read the judgment I can see that he was particularly unimpressed by the Defendant as a witness and preferred the evidence of Mr. Banks.

[46] I dismiss the appeal on this ground as totally without merit.

The damages awarded

[47] I note that the ruling that the Defendant failed to maintain the road surface is not challenged.

[48] The grounds of appeal at paras. 72-76 are as follows. The Judge did not make a "genuine attempt" to assess damages for substantial interference and failure to maintain. That is a rather serious allegation. It was submitted that he relied on the costs to the Claimants' of laying hardstanding to repair the road surface and that the Judge internally contradicted himself in relation to the Rebar gap and fencing being

moved, calling it at one point an irritation and annoyance and then later a substantial interference.

[49] At paras. 81 et seq the Judge considered the law on substantial interference. He focussed on the correct test set out therein. He noted at para.83 how Aikens LJ in *Emmett v Sisson* [2014] EWCA Civ 64 analysed *Petty v Parsons* [1914] 2 CH 653 noting that the gate laid across the ROW in that case was open all day during business hours and unlocked at night.

[50] The Judge reached the conclusion that causing the Claimants and their invitees to have to get out of their vehicles/vehicle (come rain or shine) because the Rebar fence was making the gap too small for safety and then to have to lift a pole with a heavy concrete base on the bottom to the side (perhaps standing in a muddy puddle as this was done) was a breach of the ROW. At para.94 the Judge found that having to move the Rebar fence was an obstruction and an obvious and actionable interference with the Claimants' right of way. I agree.

[51] Considering that the Rebar interference lasted between February 2018 and July 2019 £1,000 seems low to me. I would have awarded a sum closer to £1,200 for the 3 months post complaint and another sum for the year before the April 2019 complaint of around £5,200.

[52] I do not read the judgment for damages as being based on the cost of a sign (the placing and removal of which was an issue in part of the hearing but is not relevant to the appeal).

[53] I do not consider that there are any proper grounds for complaint about the Judge's findings related to the damages for substantial interference caused by the Rebar fence obstruction.

[54] As for the interference by failure to maintain, in my judgment the Judge would have been entitled to assess damages for (1) the Claimants' suffering the lumpy journey every day over the potholed road which was puddled in bad weather as shown on the photos and (2) the costs of relaying the road because the Defendant failed to maintain it. In the event he chose only to award the costs of repairing the road.

[55] I consider that the award was modest. The Defendant did not properly maintain the road for a long period.

[56] In addition I completely reject the appeal based on the ground that the Judge did not make a genuine attempt as totally without merit.

Injunctions

[57] The Appellant alleges that the injunctions granted were "wholly excessive" and go well beyond what it reasonably necessary and are oppressive.

[58] In support a reference by way of authority was made in the skeleton to the whole of Section 15 of volume 2 of "White Book" by Mr Stenhouse. This is a remarkable breach of CPR PD 52 which states at para. 5.1(4) that a skeleton argument must, when referring to authority, state the proposition of law and identify the parts of the authority that support the proposition. The costs of preparing a skeleton argument which does not comply will not be allowed on assessment. At the appeal hearing no further clarity was provided on the authority stated.

[59] The Appellant also added a later amendment to assert that the Judge should have set out in the order the frequency of cutting of trees and the type and level of cutting needed.

[60] This Defendant, as the Judge found, was a long term nuisance and obstructer of the Claimants' ROW. He was completely unrepentant in the trial and his evidence was rejected as lacking credibility. His appeal shows the same approach. The ROW was granted for 80 years. This Defendant may also have obstructed Mr. and Mr. Lees' rights of way, although no findings about their many complaints were specifically made. With that history I consider that a 10 year injunction in the context of his long history of unneighbourly behaviour was justifiable. Had the Defendant admitted his default and promised to do better at the May 2021 hearing the term might have been shorter, we do not know.

[61] As for the assertion that the tree maintenance injunction needed to be more specific, as to frequency and type and level of cutting back, there was a lack of evidence put before the Judge about how often leylandii need cutting back or the other trees adjoining the route. The time when trees need pruning is a matter for common sense in my judgment. The injunction matches the Claimants' rights in the ROW. I see no justification for allowing the appeal on these late added grounds which are unsupported by evidence and against common sense.

Conclusions

[62] The appeal is dismissed on all of the grounds put forwards.

[63] On two grounds I have found the appeal to be totally without merit. Pursuant to CPR r.52.20(5) and (6) I have considered making but have chosen not to make a civil restraint order against the Defendant/Appellant. However this is a yellow card warning.

[64] I do urge the Appellant and all parties who appeal a judgment after a trial to comply with the practice direction in CPR part 52 concerning the appeal bundles. It is not appropriate to rely on the whole trial bundle in an appeal. It took the parties 20 minutes to identify the documents in the trial bundle they wished to rely on. Those

should have been in the appeal bundle. I also urge appellant lawyers to read and comply with the practice direction about skeleton arguments and citing authorities.

Ritchie J.
END