CHANCERY BAR

Harris v Flower

Rule or misrule?

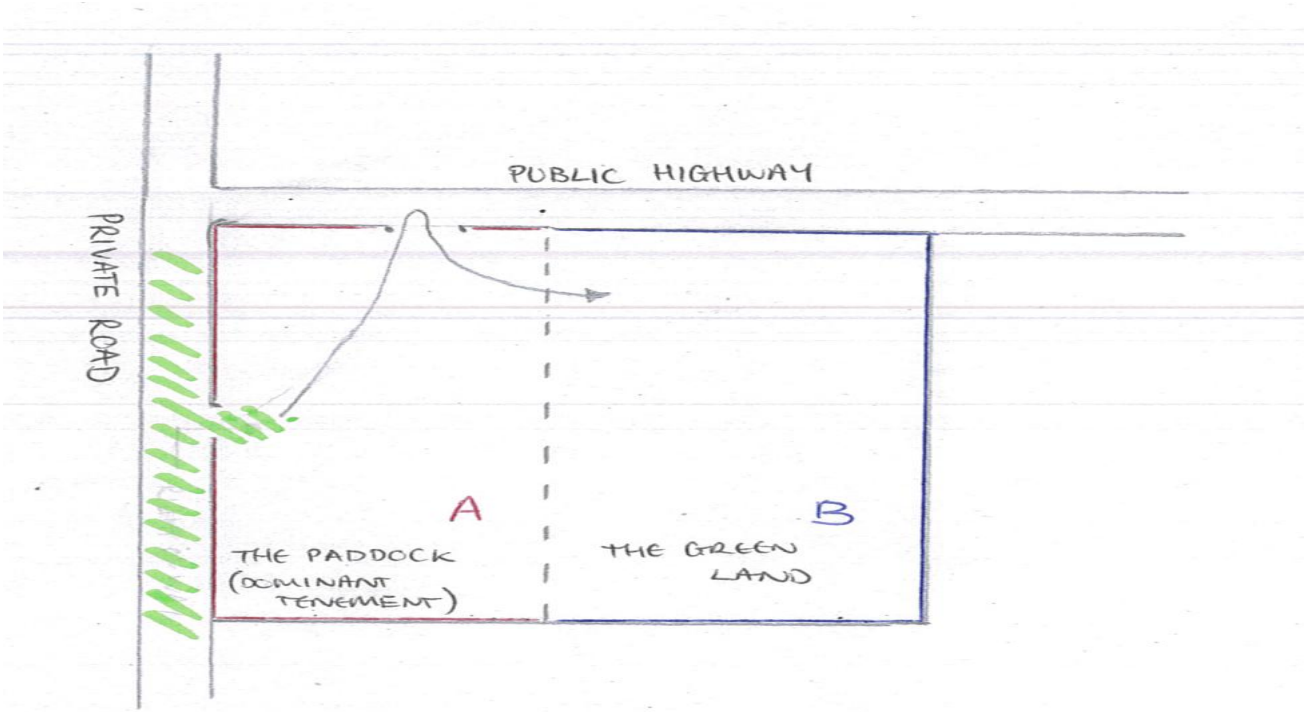
Stephen Jourdan QC

The “rule”

“If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B.”

Romer LJ in *Harris v Flower* (1904) 74 LJ Ch 127

Giles v Tarry [2012] EWCA Civ 837



.. for the benefit only of that part of the vendors' neighbouring land edged red on the said plan … a right of way at all times and for all purposes over the land coloured brown on the said plan …

Norris J:

> The language in which the relevant question to be asked is expressed varies from case to case: use “in substance”, “colourable use”, “bona fide use”, the “essential purpose” of the use, the “reality of the case” amongst others. It would not assist this area of the law to analyse the words as if they were in statute or put a gloss upon them. I regard the formulation in the classic statement of the rule in *Harris v Flower* to be entirely sufficient: what was in substance and intention the user claimed by the defendant?

The judge "… did not ask himself that question, but instead focussed on "actual movement, not the ultimate intention of the user". In my judgment that was an error of law. Once he had identified that the objective of Mr Tarry was to graze his sheep both on the Paddock and on the adjacent Green Land; and once he had identified what Mr Tarry's family actually did (by which conduct that objective was manifest); and once he had correctly characterised those pointless and self-cancelling manoeuvres as a "somewhat artificial device or expedient" then he was bound to conclude that Mr Tarry was in substance and intention using the driveway for the purpose of gaining access to the Paddock and the Green Land as a single agricultural unit."

Lewison LJ:

> Short of legislation or the Supreme Court we must accept the principle for what it is; but I do not consider that we should be keen to extend it…

I agree with Norris J that although the language in which the critical question is posed varies from case to case, the underlying thrust of the question is the same: what in substance and intention is the dominant owner's use? Since “intention” or “essential purpose” is one of the components of the question, I agree with Norris J that the judge fell into error in excluding Mr Tarry's “ultimate intention” from consideration…

There are of course other ways by which Mr Tarry can achieve his objective. One is to … ensure that the sheep are turned onto the paddock to graze it first before proceeding on to the green land. That might necessitate the erection of some gated barrier between the paddock and the green land … But the fact that there may exist legitimate ways in which Mr Tarry can achieve his objective does not make an illegitimate one lawful.

Law Commission: Easements Covenants and Profits à Prendre (Consultation Paper No 186 § 5.70-71).

5.70 We consider that there are significant areas of concern with the rule in *Harris v Flower* and the way in which it has been applied. It is a doctrinal rule which takes insufficient account of the practical effects on the servient land caused by the extended user of the easement. At the heart of the rule should be the effect on the servient land. If the rule is recognised, as we would suggest, as a subcategory of excessive user, then the solution is to apply the *McAdams Homes* test in cases where the dominant land is extended.

5.71 We provisionally propose that, where land which originally comprised the dominant land is added to in such a way that the easement affecting the servient land may also serve the additional land, the question of whether use may be made for the benefit of the additional land should depend upon whether the use to be made of the easement is excessive as defined above.

Law Commission: Easements, Covenants and Profits à Prendre Consultation Analysis [5.42]-[5.51]

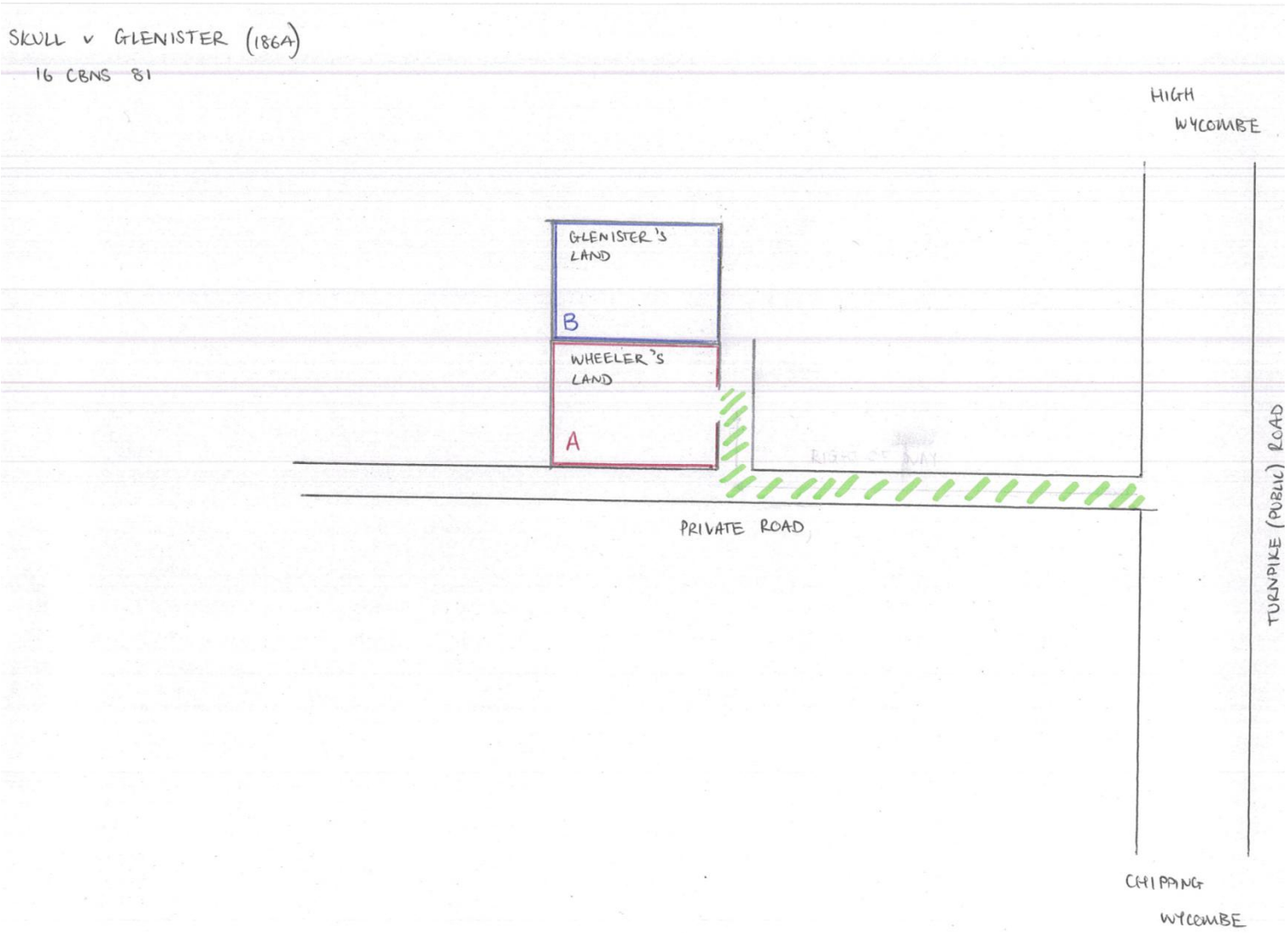
31 consultees responded, and most expressed opposition. A few consultees agreed, including the Chancery Bar Association, but the others said:

- It would interfere with freedom of contract
- If the parties have agreed that the way shall be used to get to property A it is unfair to allow it to be used more widely
- Servient owners make a lot of money out of charging dominant owners for the extension of the land which the way can be used to reach. Changing the law would deprive owners of a property right contrary to the ECHR
- A change would produce uncertainty because it would be hard to say if use was excessive

Two problems:

- Can B be used with A if there is a pause before B is used?
- When will use of property B be permissible as “ancillary” to property A?

SKULL v GLENISTER (1864)
16 CBNS 81



“Q: Did the defendants really use the way with carts and wagons as a way to Wheelers' land, or did they really use it as a way to the houses they were building? And was the going first to Wheelers' a mere colourable use.

A: It was a mere colourable use.”

Erle CJ :

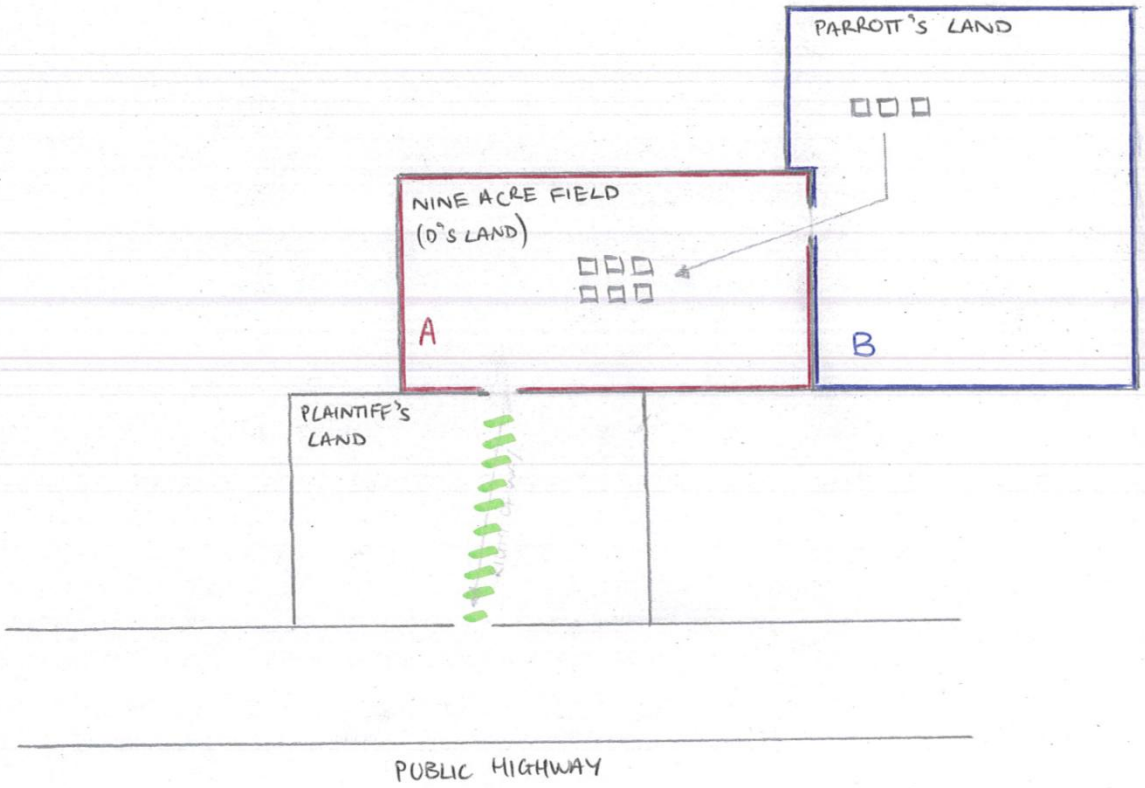
“The question which the learned judge left was, whether the defendants used the way as a way to Wheelers' land, or was it a mere colourable use of it for the purpose of getting at their own land. That seems to me to be in substance what the summing-up amounts to. Did the defendants use the way merely for the purpose of carrying the building-materials through Wheelers' close to their own land? I think that was the correct way to leave the question …”.

Williams J

These authorities appear to establish the principle that, if the defendants here had directly used the road in question as a way over the grantor's land through Wheelers' close to Glenister's, that would have been an excess of the right. The question was whether they had not substantially done so. The jury must be taken to have found that they had.

WILLIAMS v JAMES (1866 - 67)

L. R 2 C. P 577



There was from time immemorial a right of way on foot, and for wagons, carts, and horses, from the Nine acre field over the plaintiff's land to a public highway.

The jury held that the stacking of the hay was done honestly, and not to get the way further.

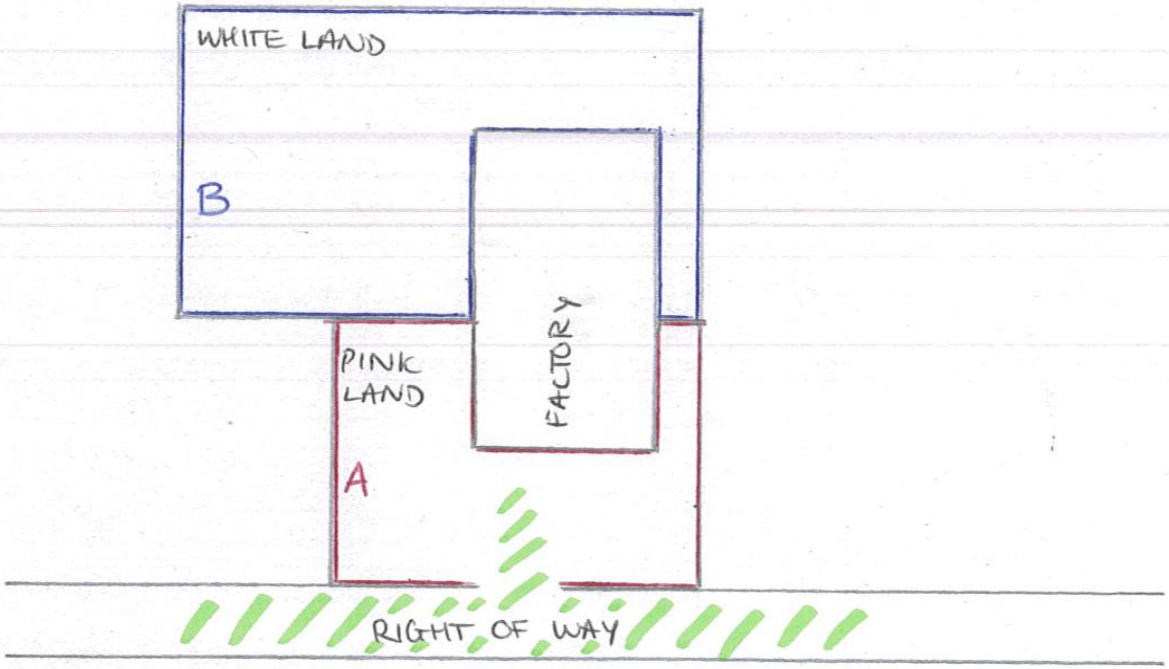
Bovill CJ:

It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a bonâ fide or a mere colourable use of the right of way. That was the question in *Skull v. Glenister*, and on which the case was ultimately decided. This question is excluded here by the finding of the jury.

Montague Smith J:

The way here is claimed for the more convenient use of the Nine acre field. The circumstances under which the hay was stacked, and the purpose and object of the defendant in carrying it away, are questions for the jury. As I read the finding of the jury, the stacking and the subsequent dealing with the hay were in the honest and reasonable use of the Nine acre field.

HARRIS v FLOWER (1904)
74 LJ Ch 127



Vaughan Williams LJ:

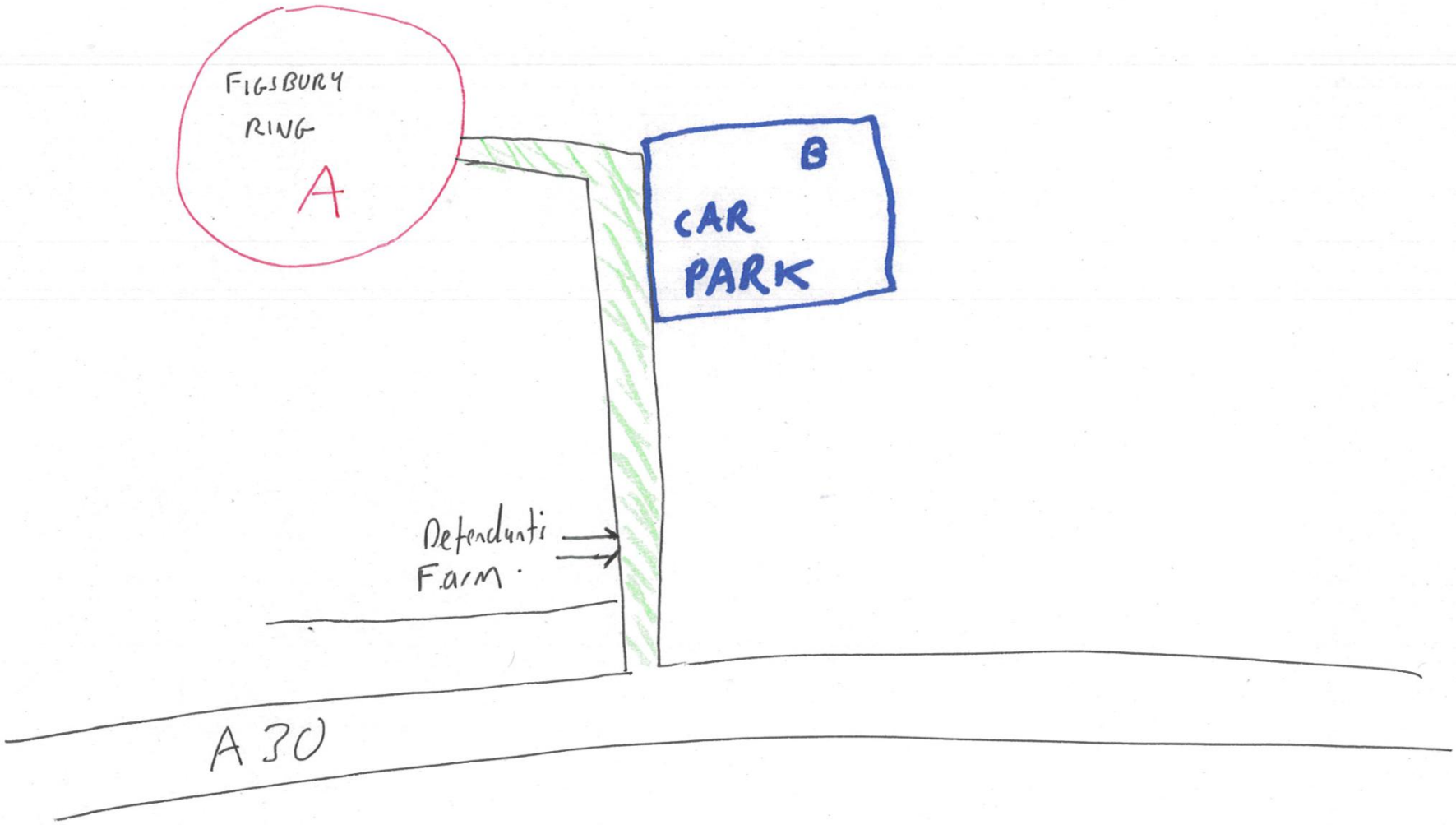
> I cannot help thinking that there not only may be, but that there must be, many things to be done in respect of the buildings on the white land which cannot be said to be mere adjuncts to the honest user of the right of way for the purposes of the pink land… A right of way of this sort restricts the owner of the dominant tenement to the legitimate user of his right, and the court will not allow that which is in its nature a burden on the owner of the servient tenement to be increased without his consent and beyond the terms of the grant. I do not think that it makes any difference whether the right of way arises by prescription or grant.

The burden imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the way in excess of the grant. There can be no doubt in the present case that, if this building is used as a factory, a heavy and frequent traffic will arise which has not arisen before. This particular burden could not have arisen without the user of the white land as well as of the pink. It is not a mere case of user of the pink land for a building, with some of the usual offices on the blue land connected with the buildings on the pink land. The whole object of this scheme is to include the profitable user of the white land as well as of the pink.

Romer LJ

… the defendant might have erected a building on the land coloured pink and used it for a, contractor's business, and made use of the right of way for that purpose ; but what he is really doing here is, under guise of the enjoyment of the dominant tenement to try and make the right of way become a right of way for the enjoyment of both lands, the pink and the white, and using the land coloured pink as a mere continuation of the right of passage from the pink to the white.

National Trust v White [1987] 1 WLR 907

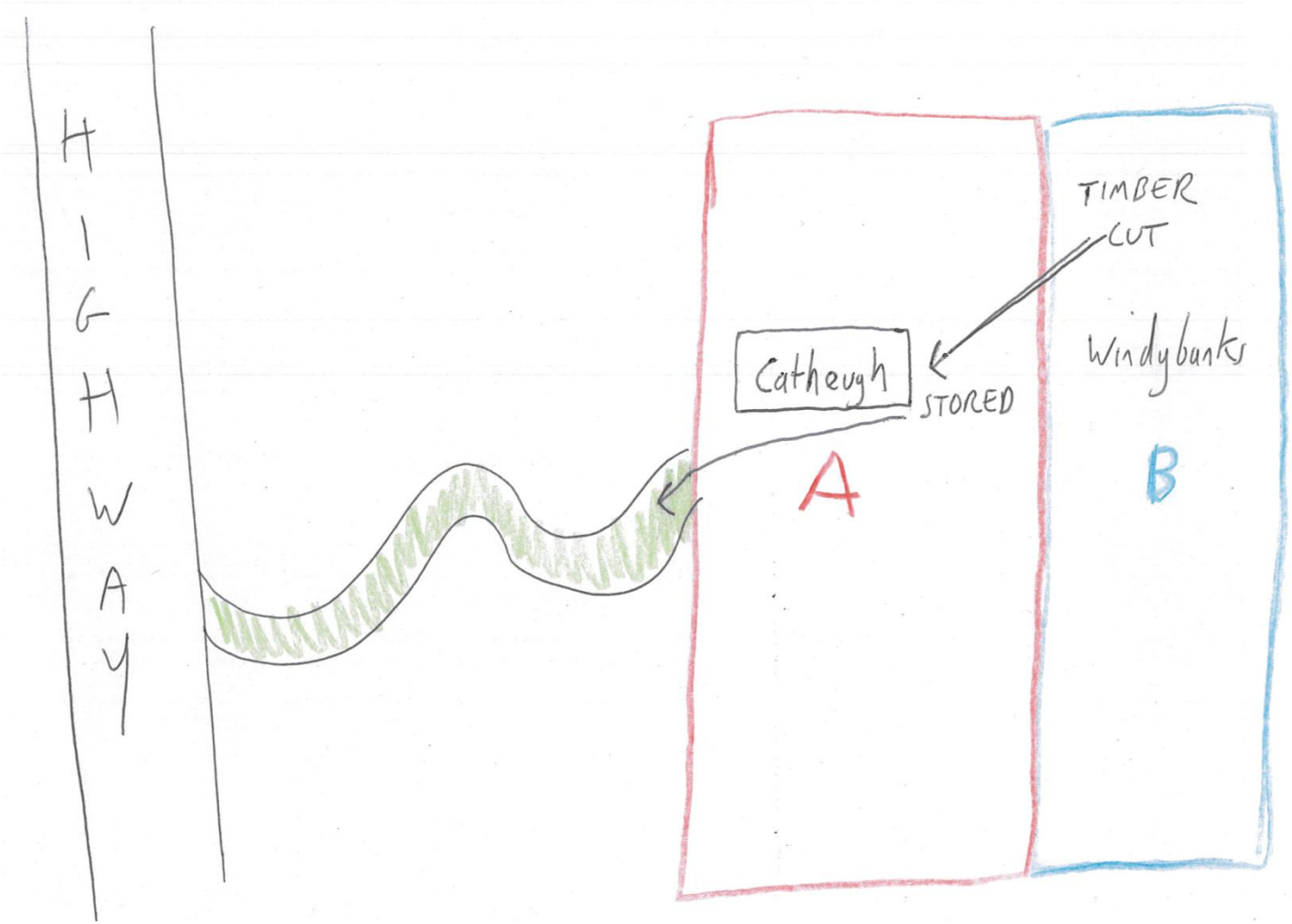


Warner J on *Harris v Flower:*

The Court of Appeal held that he was not entitled to do that because it would amount to increasing the size of the dominant tenement and thereby increasing the burden on the servient tenement. The Court of Appeal, however, recognised that it would have been otherwise if user of the right of way for access to the white land had been merely “subsidiary” and the “principal user” had been for access to the pink land.

… since the right claimed by the National Trust is no more than a right to authorise people to use the track for access to the car park for the purpose of visiting Figsbury Ring, it is properly to be regarded as ancillary to the enjoyment of Figsbury Ring. It is not as if the National Trust claimed a right to authorise people to use the track for access to the car park for the purpose of enjoying the car park itself, e.g. by picnicking there. Indeed, one way of describing the right claimed by the National Trust is as a right to authorise people to use the track to get to Figsbury Ring, in their vehicles as far as the car park and on their feet from there on.

Jobson v Record (1998) 75 P. & C.R. 375



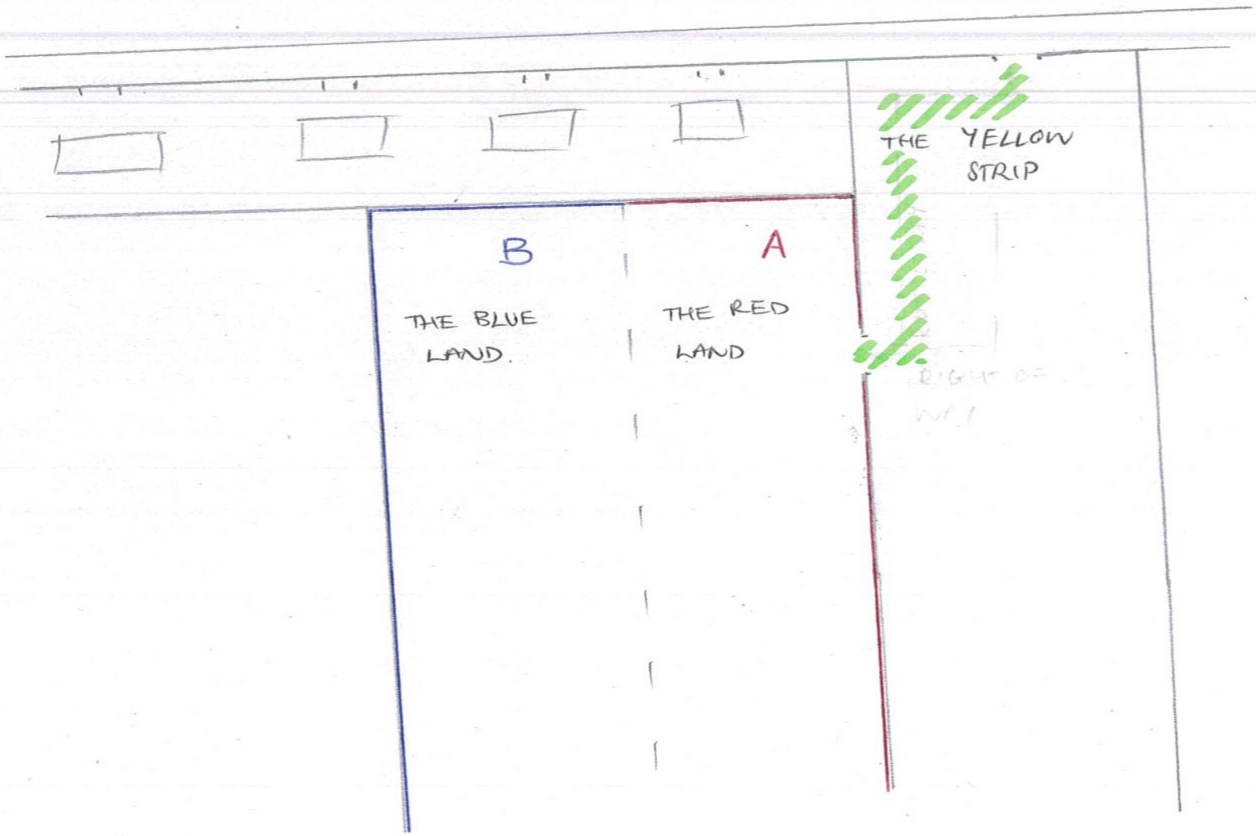
Right of way for "all purposes connected with the use and enjoyment of the property hereby conveyed being used as agricultural land".

Morritt LJ:

1 Neither forestry nor agriculture includes the separate activity of storing timber felled elsewhere. Thus had Catheugh been used as a timber storage depot, that would not be an agricultural use for the purposes of the grant of a right of way. To be agricultural the storage must be of timber grown on and felled off the land in question. If the storage was a separate operation it was not an agricultural use of Catheugh.

2 If it was not an operation separate from the felling of the timber then the use of the right of way for the removal of the timber felled at Windybanks Plantation was in substance for the accommodation of Windybanks Plantation. Either way the use of the right of way was not authorised by the terms of the grant.

PEACOCK v CUSTINS (2002)
1 WLR 1815.



… subject to a right of way at all times and for all purposes in favour of the owner or occupier for the time being of the property adjoining the rear of the property herein described all which said right of way is for the purpose of identification only edged yellow on the said plan annexed hereto

Schiemann LJ:

The law is clear at the extremes. To use the track for the sole purpose of accessing the blue land is outside the scope of the grant. However, in some circumstances a person who uses the way to access the dominant land but then goes off the dominant land, for instance to picnic on the neighbouring land, is not going outside the scope of the grant.

… where a court is being asked to declare whether the right to use a way comprises a right to use it to facilitate the cultivation of land other than the dominant tenement, the court is not concerned with any comparison between the amount of use made or to be made of the servient tenement and the amount of use made or that might lawfully be made within the scope of the grant. It is concerned with declaring the scope of the grant, having regard to its purposes and the identity of the dominant tenement. The authorities indicated that the burden on the owner of the servient tenement is not to be increased without his consent. But burden in this context does not refer to the number of journeys or the weight of the vehicles. Any use of the way is, in contemplation of law, a burden and one must ask whether the grantor agreed to the grantee making use of the way for that purpose.

It is in our judgment clear that the grantor did not authorise the use of the way for the purpose of cultivating the blue land. This cannot sensibly be described as ancillary to the cultivation of the red land.

Das v Linden Mews Ltd (2003) 2 P & CR 58

A right to pass and repass over the [private road] to and from the highway to their respective properties by foot and with vehicles and a right to halt a single vehicle immediately adjacent to their respective properties for the purposes of loading and unloading the said vehicles

Mr Lewison Q.C. argued that the rule is subject to a qualification

"… that, because the agreed easement was to accommodate the use of number 4 as the dominant tenement, the lawful exercise of that easement extended to accommodating any use that was **ancillary** to use of the dominant tenement… to drive up the carriageway to the garden ground was not to do something ancillary to the easement; rather, it was to use the easement for the very purpose for which the servient owner must be taken to have granted it, that of accommodating the dominant tenement."

Argument rejected. *Harris v Flower* would have been decided differently if it was right, because “profitable user of the white land was ancillary to and supported the profitable use of the pink land”.

Peacock recognised the possibility of “a very limited extension of the enjoyment of the access to the dominant tenement, rather than, as we are asked to find in this case, extension of enjoyment of the dominant tenement”.

Buxton LJ distinguished *National Trust v White* because there "… the car park abutted on to the way, and was used for access to the way rather than separately for access to the Ring, it was possible for Warner J. to analyse the mechanics of its use as he did; and not possible for it to be said, as it can be said in the present case, that the principal or real use of the way that is asserted is a right to use the way to access land that is not part of the dominant tenement."

Massey v Boulden [2003] 1 WLR 1792

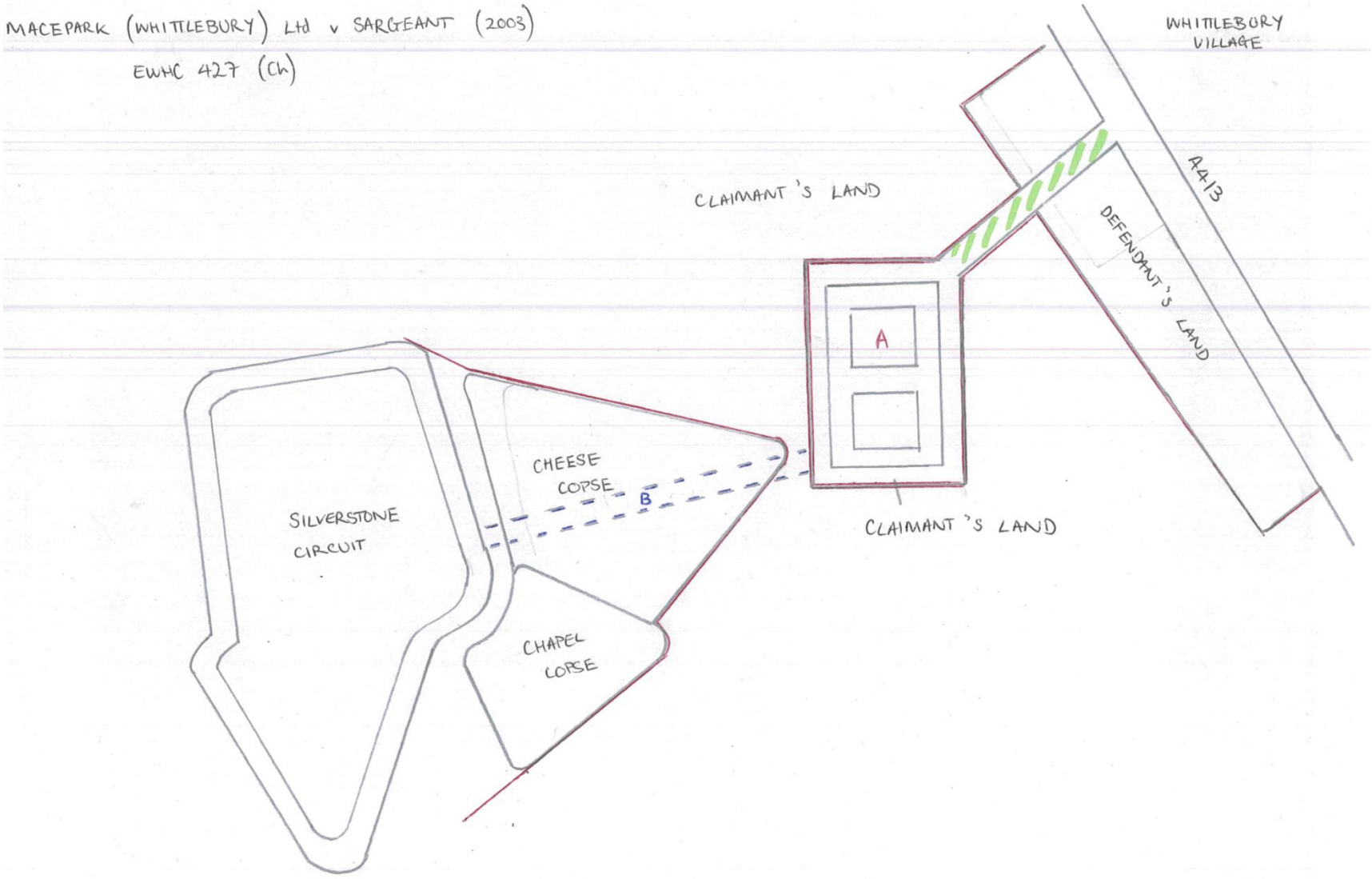
Simon Brown LJ recorded that the argument on behalf of the claimants consisted of a wider and a narrower submission.

- The wider submission was that the critical question is whether the use made of property B is more than merely ancillary to that made of property A.
- The narrower submission was that any the rule prevents only the use of property A for direct access to property B and that there has been no breach of that rule here given that the vehicles using the track were not driven through property A onto property B, but remained parked at the bottom of property A's garden.

Simon Brown LJ after discussing earlier cases, including *Das*, said that the narrower argument was wrong, but the wider argument was correct. On the facts, in so far as the use of the way served property B that could only sensibly be described as ancillary to its use for the purposes of property A.

Mantell and Sedley LJJ agreed

MACEPARK (WHITTLEBURY) Ltd v SARGEANT (2003)
EWHC 427 (Ch)



If Formula One drivers used the right of way in order to access Property A with a view to staying the night at the hotel and then driving through the proposed vehicular access through property B to the Silverstone race track, would that be a lawful use?

Mr Moss QC discussed the cases and said that they appeared to be in conflict. He concluded:

"Moreover, there seems no doubt that in *Massey v Boulden* [2003] 1 WLR 1792 the access was used for the benefit of the non-dominant land as well as the dominant land. The only way, therefore, in which the Court of Appeal could have regarded the use of the access to benefit the non-dominant land as "ancillary" is if they regarded it as insubstantial… The additional rooms which extended the dominant land appear to have been regarded as mere appendages to the dominant land, so that the use of the access could be seen as being in substance for the benefit of the dominant land and not in substance for the benefit of the non-dominant land".

“(1) An easement must be used for the benefit of the dominant land.

(2) It must not “in substance” be used for the benefit of non-dominant land.

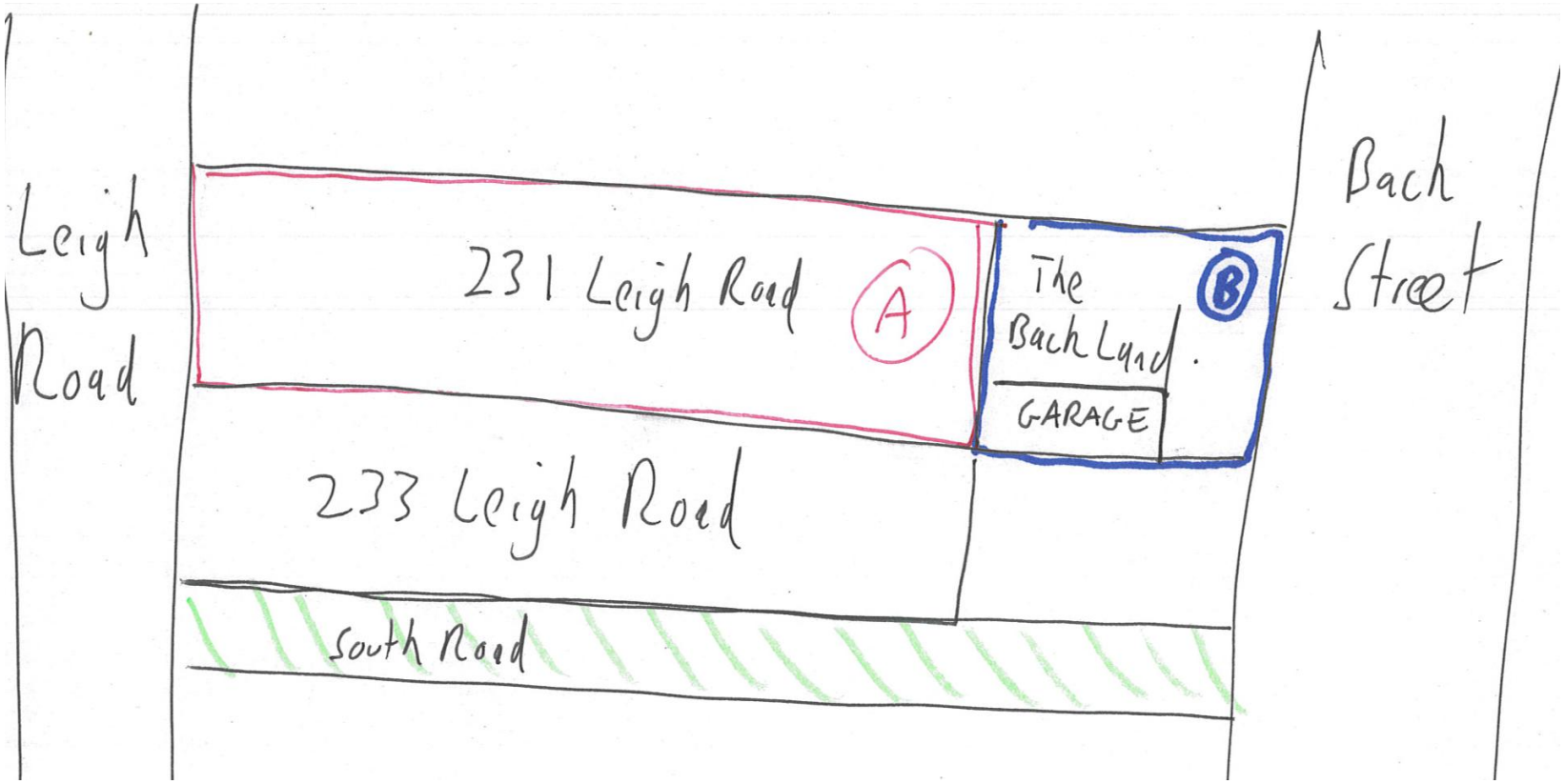
(3) Under the “ancillary” doctrine, use is not “in substance” use for the benefit of the non-dominant land if

(a) there is no benefit to the non-dominant land or if

(b) the extent of the use for the benefit of the non-dominant land is insubstantial, i e it can still be said that in substance the access is used for the benefit of the dominant land and not for the benefit of both the dominant land and the non-dominant land.

(d) “Benefit” in this context includes use of an access in such a way that a profit may be made out of the use of the non-dominant land, e g as a result of an arrangement with the owner of the dominant land”

Wall v Collins [2007] Ch. 390



Carnwath LJ:

> ‘The authorities show that, even where the original dominant tenement is extended, the enjoyment of the easement may continue for the benefit of the enlarged property if the additional use is merely “ancillary”.’
>
> But only authority referred to was *Massey v Boulden* – not *Dass v Linden Mews*.
>
> “I can see no reason for holding that the use of the garage on the back land is other than ancillary to (or an adjunct to) the ordinary residential use of No 231.”

Westfield Management v Perpetual Trustee Company [2007] HCA 45.

“The most recent edition of Gale on Easements[21] states: "The general rule is that a right of way may only be used for gaining access to the land identified as the dominant tenement in the grant.”…

… it is important to remark that care certainly must be taken lest the statement in Gale on Easements set out above be elevated to the status of a "rule", whether of construction or substantive law. What the statement does provide is a starting point for consideration of the terms of any particular grant. The statement is consistent with an understanding that the broader the right of access to the dominant tenement granted by the easement, the greater the burden upon the proprietary rights in the servient tenement.”

Conclusions

Can B be used with A if there is a pause before B is used?

Yes: *Williams v James* and Lewison LJ in *Giles v Tarry*

No: *Jobson v Record* (possibly), *Macepark (Whittlebury) Ltd v Sargeant*

When will use of property B be permissible as "ancillary" to property A?

When B is used as subsidiary to and supportive of the use of A: *Massey, Macepark, Wall*

When B is used as subsidiary and supportive of the use of the road itself: *Dass*