

B E T W E E N:

JEAN MARY ELIZABETH FOWLER

Claimant

- and -

**(1) GEOFFREY ELLIS
(2) ELANE MARGARET ELLIS
(3) GEORGE EDWARD FISHER
(4) ELMA FISHER**

Defendants

J U D G M E N T

INTRODUCTION

1. By this action, commenced in August 2002, Mrs Jean Fowler claims damages limited to £1,000 and injunctive relief for trespass on her land. Her claim against Mr and Mrs Fisher has been settled on terms of no relevance to her claim against Mr and Mrs Ellis. The latter denied trespass: they admit that they have passed over the Claimant's land - both on foot and in vehicles - but aver that they have a right of way acquired through their predecessors pursuant to Section 2 of the Prescription Act 1832 by virtue of 20 years' a continuous user immediately preceding the commencement of these proceedings.
2. As is often the case in this type of action the trial raised complex issues of fact. I propose to resolve only those necessary for the determination of this claim. The evidence occupied two full days. The Defendants accept that they bear the burden of proof, but because of administrative arrangements concerning the attendance of witnesses the Claimant's case was made first. In resisting the Defendants' Part 20 claim for a declaration Mr Cameron, counsel for the Claimant, raised a number of matters of law and the arguments, to which Mr Hill for the Defendants' responded, occupied the Court for a further day.
3. As will become clear, the issues in this case are of concern to a number of individuals besides the litigants. It is to be noted that this is the third action that has been brought concerning Mr and Mrs Ellis.

THE GEOGRAPHY

4. The Court is concerned with an area of land in the village of New Holland in North Lincolnshire. The overall area and dimensions are not in evidence but it can best be described as a triangle with the apex pointing approximately north. The western side of the triangle is bounded by Barrow Road which runs south north. Running

south north on the eastern side is the railway line. Running west east at the base of the triangle (to the south) is Oxmarsh Road, formerly Pelham Lane. At the apex of the triangle is an area of land that until the mid 1960's was owned by British Rail. It comprised a house and outbuildings known as the Laundry House. At the south western corner of the triangle is a number of terraced cottages comprising three sides of a rectangle. Inside the rectangle is an area of open recreational land bordering Barrow Road. At the northern end of the rectangle running west east are the premises numbered 1-11 Manchester Square. The western side of the rectangle runs north south and comprises numbers 14-21. The southern side of the rectangle running east west comprises 22-28. The Claimant occupies number 9. The Third and Fourth Defendants, Mr and Mrs Fisher, own number 11. These cottages were built about 100 years ago with external privies. Running west east behind the rear of premises 1-11 is a narrow roadway (known locally as a ten-foot). As its description suggests it is approximately 10 feet wide but there was evidence from the Claimant that until three years or so ago she and her neighbours cultivated a border of land about three feet deep at the north of this ten-foot. Once it reached number 11 the ten-foot opens out onto a small square of land before turning right and running north south behind number 12-21 leading out into Oxmarsh Lane. On the eastern side of this part of the ten-foot there were brick built pig houses. Behind the pig houses (and yet further to the east) there is an area of land approximately square shaped now known as 'the paddock'. This land is approximately in the middle of the triangle. At the base of the triangle running west east and on the eastern side of the ten-foot is a row of cottages called Perseverance Terrace. Yet further to the east and running west east along Oxmarsh Lane is a further row of houses - the most western one of which abuts the railway line at the south eastern corner of the triangle.

5. There is a number of plans in the court bundle and that at page 208 shows that which I have endeavoured to describe.

THE DISPUTE

6. The right of way claimed by the Ellis' is to cross on foot or with vehicles that part of the ten-foot running behind numbers 1-11, thence via the square piece of land owned by the Fishers into the paddock through a gate situated at its north western corner.

THE HISTORY

7. By a conveyance dated 22 April 1966 British Railways Board conveyed the Manchester Square properties to a development company reserving, in terms, to the occupiers of the Laundry House the right to pass over that part of the tenfoot running to the rear of numbers 1-11 and thence into the Laundry House land. The entrance-way was via a gate situated at the north east corner of that part of the ten-foot, that is to say just about opposite the rear of number 11.
8. The Claimant (then Mrs Hillier) became the owner of number 9 Manchester Square on 27 September 1991. She occupied the property with her husband who died in

2002. The reservation of the right of way in favour of the Laundry House land remained. Mr and Mrs Fisher, of number 11, are subject to a like reservation.

9. In 1998 a Mr Andrew Cheyne acquired a number of properties between numbers 14 - 28 on the west and south side of Manchester Square. More recently he inherited number 8.
10. Mr and Mrs Ellis have lived at number 3 Perseverance Terrace since 1989. Mr Ellis' knowledge of the area dates back to the early 1970's when for several months he worked on the redevelopment of the Manchester Square premises.
11. From a conveyance relating to number 1 Perseverance Terrace dated 1968 it appears that the paddock was part of that property. However on 2 March 1999 the paddock was conveyed to Mr and Mrs Ellis and Mr and Mrs Fisher. They were not immediately able to go into occupation because the property was occupied by a Mr Brian Dent, who claimed ownership through adverse possession. The Defendants brought an action against him for possession. It appears that His Honour Judge Reddihough tried a number of preliminary issues in that action, resulting in the Defendants' ownership of the paddock being confirmed. It will be necessary to look in some detail at Mr Dent's activities concerning the paddock.
12. The reason for the joint purchase of the paddock between the two families was not explored in evidence but it appears that the land has some potential for development. The trial bundle in the Ellis & Fisher v Dent action has been made available. In May 1989 planning permission for a number of houses was granted subject to the provision of appropriate particular access from Oxmarsh Lane. That permission has long since lapsed but it is pertinent to note that in February 1998 there was a dispute between Mr and Mrs Ellis and Mr Andrew Cheyne. Put shortly, the Ellis' had interfered with the fencing and a piece of land forming part of the parking spaces behind numbers 27-29 Manchester Square. In June 2000 Mr Ellis gave an undertaking not to make use of the ten-foot behind numbers 12-21 Manchester Square save for the purpose of obtaining access to number 11. In November 1999 Mr Fisher had given a like undertaking. By their respective undertakings Mr Ellis and Mr Fisher accepted that they were forbidden to pass over this part of the ten-foot in order to gain access to the paddock via the Fishers' square of land behind number 11. In connection with this aspect of the dispute, Mr Cheyne visited the Land Registry. Investigations revealed that the area had been re-surveyed consequent upon a suggestion that an earlier plan contained errors. The later plan showed that the boundary between Manchester Square and Perseverance Terrace was further to the west than shown on the earlier plan. This supported Mr Cheyne's argument with Mr Fisher and Mr Ellis about the position and width of the ten-foot behind numbers 27-29 at Manchester Square. Moreover comparison of the later plan with the earlier showed that the northern boundary of the ten-foot behind Mr and Mrs Fisher's house (no 11) was in line with the southern boundary of the Laundry House land. During the course of the evidence it was suggested that at some time unknown the southern boundary of the Laundry House land had moved a little further south - I say now that I reject that argument. I do not find there was any change in the boundary line of the Laundry House land: any ambiguity was

caused by discrepancies between the plans that have now been determined by the later survey.

13. It does not appear, therefore, that there is a vehicular access to the paddock between the western edge of the ten-foot and the eastern boundary of the property number 1 Perseverance Terrace.
14. Witnesses called in support of the Claimant's case produced logs of vehicle movements along the ten-foot running behind nos 1-11 Manchester Square into the paddock. Suffice it at this stage to say that Mr and Mrs Ellis dispute the amount of such vehicle movements; alternatively they deny that such movements are anything to do with them. The nature and extent of such user will fall to be considered if and to the extent to which the Defendants prove the existence of a right of way.
15. On 21 December 1979 Mr Richard Gardiner, the then owner of Laundry House, conveyed part of its land (a field and some outbuildings to the west of the main house) to a Mr John Beswick. He conveyed with it the right of way behind nos 1-11 at Manchester Square. Thereafter the conveyancing history is not clear but it suffices to note that on 15 March 1984 this land was conveyed to Mr Dent.
16. Meanwhile, in about 1982 Mr Dent purchased the Laundry House itself from Mr Gardiner. At that time the property was occupied by the Clayton family. During the 1970's Mr Dent was friends with a Martin Clayton, the grandson of the occupants. Mr Dent conveyed the property to his wife in 1985. The Dent family moved into the Laundry House in 1986. They moved out in 1991 or 1992, since which date the Laundry House has been rented out to several families. It is now occupied by a man called Cox. Thus between 1986 and 1991/92 the Laundry House and the adjoining field (known as the Laundry House Yard) were not only in common ownership but in common occupation.

THE EXPERT EVIDENCE

17. Mr Andrew Laws is a forensic imagery analyst with the Kalagate Imagery Bureau. Mr Laws had considerable experience in this field with the RAF and in 2000 was awarded the MBE for his contribution to this area of expertise. He has studied aerial photographs taken over the years and gave the Court his opinion about the development and user of the pieces of land relevant to this action. He was an impressive witness whose evidence I unreservedly accept.
18. A photograph taken in April 1967 shows the privies to the Manchester Square properties and the pig houses still in place.
19. A photograph taken in February 1976 shows the paddock land divided into two unequal portions by a hedge running north south. To the western side of the hedge was a large field. The eastern portion had been used for allotments but the northern half of this had been cleared. There was no evidence of vehicular activity within the field. There was however a footpath running alongside the northern boundary of the allotments west east giving access to the field. There were signs of vehicular

movement on the northern allotment land consistent, according to Mr Laws, with the general clearance and renovation works that had been carried out. Thus, according to Mr Laws, there was no vehicular access from the ten-foot behind nos 1-11 Manchester Square directly into the western part of what is now the entire paddock land.

20. By October 1987 the hedge boundary separating the field from the cleared allotment land had gone. The allotments to the south western corner were still in use. The original allotment land to the north east corner was still clear. There was some evidence of vehicular activity within this area but no evidence of how access was obtained. There was no evidence, according to Mr Laws, of vehicular activity through the area where the Ellis' have recently constructed the gate. It is important to note that there was a hedge around the Laundry Yard land. The southern line of this hedge (running west east) formed the boundary with the northern part of the field.
21. By July 1989 the original allotment area on the north western side of the paddock had been absorbed into the field. The allotment area at south western corner was overgrown. The photograph shows that the boundary line between the Laundry House and the paddock/cleared allotment land remained unchanged. There was however a break in the boundary between the paddock and the Laundry Yard land. That notwithstanding, there was no indication, according to Mr Laws, that this gap was being used as an access point. There were no signs of vehicular activity within either the cleared allotment land or the paddock.
22. In cross-examination Mr Laws was asked about some markings on the plan attached to a conveyance dated April 1966, which suggested that there may then have been a gateway in the southern boundary of what is now the Laundry Yard land into the paddock. Mr Laws' response was that even was that the case, the photograph taken in April 1967 showed a hedge running through it. I accept this evidence.
23. Mr Laws was also questioned about a photograph taken in 1985, apparently not available to him when he prepared his report. He found evidence of vehicular activity in the paddock. The post and wire fence that formed the southern boundary over the Laundry House land was still in place, but no different to that shown in the 1967 photograph. However he did find a gap in the southern boundary into the paddock at the point - as I understand his evidence - where the southern boundary of the Laundry House land joined that of the Laundry Yard land. This, in my judgment, is a critical piece of evidence.

THE EVIDENCE OF BRIAN CHARLES DENT

24. Evidence concerning Mr Dent's user of the paddock land is central to the issues in this case. He is in a curious position. I was somewhat surprised that he was called on behalf of the Claimant, given the admissions made by Mr and Mrs Ellis and the fact that they bear the burden of proof. I think the reason was to rebut any contention by the Ellis' that there had ever been an access way into the paddock

directly east from the ten-foot running behind nos 1-11 Manchester Square through the gateway which they had recently constructed. Given other evidence called by the Claimant that of Mr Dent's on this issue was unnecessary. So far as the Defendants are concerned, I was told that throughout the proceedings that they took against Mr Dent by which he claimed adverse possession, they sought to minimise the period over which he used the paddock land. In this action they have to rely on his usage over a much longer period. In the event there were several aspects of this case about which he was not asked to give any evidence. He was not cross-examined about any evidence given in the adverse possession proceedings. In this regard I emphasise that I have ignored the contents of the trial bundle in that case and confined myself to the evidence given by and about Mr Dent in the proceedings before me. I found Mr Dent an honest witness doing his best to assist the Court but his evidence lacked crucial details in important areas. I do not find his evidence wholly accurate, particularly as to dates.

25. His connection with the paddock land dates from the early 1970's. He and Michael Clayton used to shoot rabbits. The rubble left over from the demolishing of the piggeries was a breeding ground for rats which they also used to shoot. Mr Dent claims that he used the paddock land for the purpose of grazing livestock from 1981 to early 2002. I am not satisfied as to the accuracy of his evidence as to the starting date. His evidence was, however, that he used to gain access with a vehicle from Oxmarsh Lane via a piece of land adjacent to the railway line. This gateway was, I find, sited in the south eastern corner of the triangle to which I earlier referred. The gateway was to a field owned by a farmer and via that field into the eastern side of the paddock. Although he purchased the Laundry House in 1982 there is no evidence that he would have been able to enter the paddock from the Laundry House land and there are several aspects of the evidence which positively indicate that he did not do so. First, he would have had to come to some arrangement with his tenant. There is no evidence of this. Second the evidence of Mr Laws is that the post and wire fence forming the southern boundary of Laundry House was still there in 1985. Third - for reasons which I shall later give - there is no evidence of a direct access way from the ten-foot leading off Barrow Road directly into the paddock land. It is important to recall, however, that from March 1984 onwards Mr Dent owned the Laundry House Yard with its right of way along the ten-foot around the Laundry House.
26. The evidence of Mr Andrew Cheyne was that when he purchased his Manchester Square properties in 1987 there was a post and wire fence running north south along the western side of the paddock land. It was with part of this fence Mr Ellis interfered in 1988 that led to the proceedings taken against him by Mr Cheyne. At the northern end of this fence the Defendants constructed a gateway through which they now seek access to the paddock land, directly from the ten-foot running behind the northern Manchester Square properties.
27. Mr Benjamin Beswick gave evidence that he fenced the paddock land all the way round. His evidence is important and requires careful analysis. In his witness statement he said (para 2) that his father (also Benjamin) purchased the land in 1979, approximately two years before his death in 1981. However, when giving

evidence he was anxious to correct the year of his father's death to 1980. Benjamin Beswick junior had two brothers, John and William. It appeared that John Beswick was the original purchaser of the Laundry yard land from Mr Gardiner in 1978. In September 1980 John conveyed it to Benjamin Beswick. I infer that this was to his father, because the purchaser is described as living in a caravan on the land. The conveyance of this land to Mr Dent in March 1984 was from the three brothers and the document records a gift of the land to these brothers the preceding month by Betsy Beswick who, I infer, was the widow of Benjamin Beswick senior.

28. Benjamin Beswick junior said in evidence that his brother, John, used the paddock in 1980, 1981 and 1982. He then said that "we all used it together". He also gave evidence that one reason for erecting the fence along the south side of the Laundry yard property was to stop the local kids upsetting his father. I infer from that that Benjamin Beswick senior was a frail and vulnerable old man. His son said that they constructed a gateway so that his father could go into the paddock to see the horses. There is no evidence that Mr Beswick senior made any use of the paddock land beyond these occasional visits and I find as a fact that he did not do so.
29. It follows from the above that there was no access into the paddock land for vehicles after that fence was erected. This is corroborated by the evidence of Mr Laws who speaks only of a worn footpath but no more.
30. Thus to the extent that Mr Dent made use of the paddock before he came into the ownership of the Laundry yard land I find as a fact that he did not make use of the land behind the Claimant's property to gain access to it. It is not proved that Mr Dent used that route before March 1984. Mr Dent was not asked detailed questions about this aspect of the case.

THE BESWICKS: THE BALANCE OF THE EVIDENCE

31. It follows from the foregoing that the Defendants cannot prove 20 years continuous use on the basis only of Mr Dent's activities concerning the paddock. They must therefore rely on evidence of the use of others, in particular the Beswick family. Thus the evidence of Mr Benjamin Beswick (junior) continues to require detailed analysis. Crucial parts of his evidence were difficult to reconcile. His evidence was that from 1968 he lived in Brigg, some distance away from New Holland and visited his father at the Laundry House approximately twice a week until his death. Given the correction of dates as to the death and the conveyance of the Laundry yard land to the Beswick family this must, I find, have been between 1978 and 1980. In cross-examination he said that having fenced that part of the paddock between the railway and the Pelham Public House (that is to say west east on the southern part of the triangle), he gained access from Oxmarsh Lane to a gate used as an access way next to the Laundry House "which we put in". He is therefore describing taking a northerly route at the ten-foot to the west of the Manchester Square properties. As to this gate he said that part of the Laundry House land has "come into the field". He maintained that Mr Dent had bought the land to the south of the Laundry House. This I take to be a reference to the proposition that the southern boundary of the Laundry House land has been moved further south and

has become, so to speak, absorbed into paddock land. I reject this argument. The explanation for any confusion lies in the discrepancy between the plans which Mr Cheyne discovered on his visits to the Land Registry [para 12, supra]. Later in his evidence he referred to his brother (unnamed) taking a horsebox through the five-bar gate from the Laundry land onto the paddock. I infer that this is a reference to the gateway constructed for the benefit of Mr Beswick senior through the boundary between the Laundry Yard land and the paddock (that is to say some distance to the west of the Laundry House land). This witness also referred to the Crousants family using the paddock land during the time that he visited his father. This family lived at the back of Manchester Square. He gave no evidence as to how this family got access to the paddock, in particular after he erected the fence on the western side of the paddock land. He confirmed in his evidence that the access way in the south eastern corner of the triangle was left unfenced. In paragraph 7 of his witness statement he stated as follows:

“I think it was approximately 1980 when my brother started renting the paddock and keeping his horses there. He continued to use the road I had marked green [that is to say the ten-foot to the north and nos 1-11 Manchester Square] to gain access to the paddock for two or three years while he continued to keep horses on that land.”

This evidence does not precisely square with his oral evidence.

“John used the paddock 1980, 81 and 82. We all used it together ... I packed up in 1982.”

This evidence does not square with that of bi-weekly visits to his father until the latter's death in 1980.

32. In the circumstances I find the evidence of Mr Benjamin Beswick junior vague as to the period for which he used the paddock land and as to his knowledge as to the period during which either of his brothers made such use. He was not asked to give any evidence as to the precise period of his brother's tenancy of the paddock. Given that quite apart from any arguments in law the Claimant might otherwise have, the Defendants have to prove continuous use of the disputed right of way into the paddock land for 20 years starting from August 1982, I do not find, based on the Beswick evidence, that they have satisfied that burden of proof on the balance of probabilities. The period after the death of Benjamin Beswick senior (some time late in 1980) is crucial and it is, I find, insufficiently precise.

OTHER EVIDENCE

33. Mr Roy Atkin gave evidence that he lived at no 6 Perseverance Terrace for five or six years from 1983. He said that he got access to the rear of his premises via a track running south north to the east of the Pelham Public House. He said that a man called Marsh had sheep in the field and also used this trackway. He said that he knew John Beswick “and his lads”. I infer that he meant the latter's sons. He said that John Beswick used the same way as he did when he visited. He confirmed

that Mr Dent had livestock on the field at a time when he had the Laundry House. In my judgment, this evidence is entirely consistent with the evidence that only Dent or the tenant for the time being of the Laundry House would have access to the paddock from the north from March 1984 onwards. This evidence did not assist the Defendants' case.

34. The only evidence called by the Defendants in support of their claim came from Mr and Mrs Dent themselves. It was confined to evidence concerning the quantity and quality of their use of the ten-foot behind nos 1-11 Manchester Square. That evidence did not contribute to that regarding the period of alleged prescription.

CONCLUSION

35. It follows from my findings with regard to the post and wire fence running north south on the western boundary of the paddock that the Defendants failed to prove 20 years continuous use either with vehicles or on foot of the ten-foot directly onto the paddock land. In my judgment the Defendants have proved the use of the ten-foot to gain access to the paddock land via the Laundry House and the Laundry House yard land since 1984. However they have failed to prove continuous use of that route to gain access to the paddock for a continuous period of 20 years commencing in August 1982. The Defendants' claim therefore falls at the first hurdle and it is not necessary for me to rule on the points of law taken by Mr Cameron on behalf of Mrs Fowler in the event of user for the prescriptive period's being proved.

POSTSCRIPT

36. It was put to Mrs Fowler and thereafter submitted that she was no more than a front person for Mr Cheyne who, having inherited no 8 Manchester Square, had an interest in ensuring that there was no development of the paddock land. Mrs Fowler candidly admitted that there was general concern amongst the residents of Manchester Square as to what would happen to this parcel of land. In my judgment all this is nothing to the point. Had Mr and Mrs Ellis proved a right of way over the disputed land, issues would have arisen as to the nature and extent thereof and as to the terms of any injunctive relief. Given that their case has fallen at the first hurdle, any use by them of the ten-foot save other than as invitees to the Fishers at no 11 but for no other purpose, would be trespass.
37. In light of the above, the evidence with regard to the quantity and quality of the use made of the ten-foot over recent years does not fall for consideration. Mrs Fowler told me that the strip to the far north of the ten-foot in which she planted shrubs was overridden from about 1999 by vehicles driven by Mr Dent. I accept this evidence but note that this increased use coincided with the conveyance of the paddock to the Ellis' and Fishers and with Mr Dent's claim to ownership by adverse possession of the paddock land. As to the use of the ten-foot since the Defendants obtained judgment against Mr Dent, I accept without reservation that evidence given by the Claimant's witnesses who have kept records. I found the evidence given by Mr and Mrs Ellis of their ignorance of the extent of this user

disingenuous. At one point they were maintaining that the gateway they had obstructed was kept locked, and at another it was not always locked. They adverted to the driving of vehicles by their erstwhile foster children and to the fact that use may be made of the land by Mr Cox, the present tenant of Laundry House. Mr Ellis owns a pick-up vehicle which he said was for use in conjunction with his employment as a ground worker. This may be so but I am satisfied that he has used this vehicle to bring scrap motor vehicles onto the land. Had I found that the Defendants had proved that through their predecessors they had obtained a prescriptive right to use the ten-foot for access to the paddock (that is to say had I rejected all Mr Cameron's legal arguments) I would have ruled that such right of way would be limited to only that necessary for low grade agricultural use of the paddock land.

RULING

38. In the circumstances the Defendants have failed to prove the right of way alleged. This judgment will be sent in draft to the parties and formally handed down on a date to be arranged. At that point I would wish to receive submissions as to the quantum of damages and, more importantly, as to the nature and extent of any injunctive relief in favour of Mrs Fowler.

**HIS HONOUR JUDGE PETER HEPPEL QC
DESIGNATED CIVIL JUDGE
HULL AND GRIMSBY COMBINED COURT CENTRES**

DATED THIS DAY OF JUNE 2003