[2022] JMSC Civ. 238

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV02191

BETWEEN	**OWEN FAIRCLOUGH**	**1st CLAIMANT**
AND	**PETA-GAYE FAIRCLOUGH**	**2nd CLAIMANT**
AND	**JACQUELINE FAIRCLOUGH**	**1st DEFENDANT**
AND	**RACHELLE ANN DAVIS**	**2nd DEFENDANT**
AND	**MARK RICKETTS**	**3rd DEFENDANT**

AND ANCILLARY CLAIM

BETWEEN	**JACQUELINE FAIRCLOUGH**	**1st DEFENDANT/ 1st ANCILLARY CLAIMANT**
AND	**MARK RICKETTS**	**3rd DEFENDANT/ 2nd ANCILLARY CLAIMANT**
AND	**OWEN FAIRCLOUGH**	**1st CLAIMANT/ 1st ANCILLARY DEFENDANT**
AND	**PETA-GAYE FAIRCLOUGH**	**2nd CLAIMANT/ 2nd ANCILLARY DEFENDANT**

IN CHAMBERS

Easement of Necessity – Intended Easement – Property sub-divided leaving one of two lots landlocked – Use of a common area

Mrs Symone Mayhew ,KC and Ms Leslie- Ann Stewart instructed by Mayhew Law for the 1st and 2nd Claimants/ 1st and 2nd Ancillary Defendants

Mrs. Tana'ania Small Davis, KC and Ms. Cavelle Johnston instructed by Livingston Alexander and Levy for the 1st and 3rd Defendants/ 1st and 2nd Ancillary Claimants

Ms. Joan Small instructed by E.D Davis and Associates for the 2nd Defendant

Heard on March 7, 2022 and March 8, 2022. Delivered April 29, 2022

PALMER, J

Background

[1] By their Fixed Date Claim Form filed on June 24, 2020 the Claimants sought the following orders:

1. *A declaration that the 1st and 2nd Claimants are entitled to one half of the legal and/or beneficial interest in the land described as "Common Area" on the Plan deposited in the Office of Titles on the 5th of July 2012 and now being part of land known as Lot 2 part of Barbican, No. 29 Paddington Terrace in the parish of St. Andrew registered at Certificate of Title Volume 1459 Folio 799 of the Register Book of Titles.*

2. *Alternatively:*

    i. *A declaration that the 1st and 2nd Claimants, as the registered proprietors of the parcel of land, known as lot 2 part of Barbican, No. 29 Paddington Terrace in the parish of St. Andrew registered at Certificate of Title Volume 1459 Folio 799 of the Registrar Book of Titles are entitled to a right of way over the land described as "Common Area" on Plan deposited in the Office of Titles on the 5th of July 2012 and now comprised in Certificate of Title registered at Volume 1249 Folio 424 of the Register Book of Titles to and from the 1st and 2nd Claimants' Lot to the main road known as Paddington Terrace for the purpose of passing and repassing by themselves, their servants, agents, licensees, visitors and tenants on foot and with motor vehicles and other vehicles at all times and for all purposes.*

    ii. *A declaration that the 1st 2nd and 3rd Defendants are not entitled to prevent, obstruct and/or otherwise impede the 1st and 2nd Claimants, their servants, agents, licensees, tenants and/or visitors entry or exit from the land described as "Common Area" on the Plan deposited in the Office of Titles on the 5th of July 2012 and now comprised in*

Certificate of Title registered at Volume 1249 Folio 424 of the Registrar Book of Titles.

3. *An order that both Certificate of Title registered at Volume 1459 Folio 799 and Volume 1249 Folio 424 be rectified to reflect a right of way over land described as "Common Area" on the Plan deposited in the Office of Titles on the 5th of July 2012 and now comprised in Certificate of Title registered at Volume 1249 Folio 424 of Register Book of Titles.*

4. *An injunction to restrain the 1st and 2nd Defendant, their servants and/or agents from:*

   (a) *Interfering with 1st and 2nd Claimants entry or exit from their servants, agents, licensee, tenants and/or visitors land described as "Common Area" on the plan deposited in the Office of Titles on the 5th of July 2012 and now comprised in Certificate of Title registered at Volume 1249 Folio 424 of the Register Book of Titles.*

   (b) *Preventing, stopping or obstructing the area described as "Common Area" on the Plan deposited in the Office of Titles on the 5th of July 2012 and now comprised in Certificate of Title registered at Volume 1249 Folio 424 of the Register Book of Titles.*

5. *Costs*

[2] After Mark Ricketts joined the claim as the 3rd Defendant, he and the 1st Defendant, Jacqueline Fairclough, filed an ancillary claim. The Amended Ancillary Fixed Date Claim Form filed on November 25, 2021, sought the following orders:

The Ancillary Claimants claim against [the] Ancillary Defendants, Owen Fairclough and Petagaye Fairclough, for a declaration that:

1. *The paved driveway wrongfully erected by the Claimants and being approximately 40.0 m2 (430.0 square feet) and located within the Common Access as shown on the Claimants certificate of title registered at Volume 1459 Folio 799 of the Register Book of Titles and on the Defendants certificate of title registered at Volume 1249 Folio 424 of the Register Book of Titles is an encroachment.*

2. *That the Claimants be ordered to remove the said encroachment and being approximately 40.0 m2 (430.0 square feet) and located within the Common Access as shown on the Claimants certificate of title registered at Volume 1459 Folio 799 of the Register Book of Titles and on the Defendants certificate of title registered at*

Volume 1249 Folio 424 of the Register Book of Titles, within 21 days of the date of the Order.

3. *The Claimants, whether by the servants and/or agents are restrained from erecting any structure within the Common Access as shown on the Claimants certificate of title registered at Volume 1459 Folio 799 of the Register Book of Titles and on the Defendants certificate of title registered at Volume 1249 Folio 424of the Register Book of Titles.*

[3] In May 1992, following the death of her husband, Eugenie Berry became the sole proprietor of 29 Paddington Terrace. In or around 2010 she subdivided the property into Lots 1 and 2, with Lot 2 being transferred to the Claimants by gift on July 6, 2012, and Lot 1 to the 1st and 2nd Defendants by gift in 2018. Mr. Ricketts, the 3rd Defendant, became a joint owner of Lot 1 on February 6, 2020. Jacqueline Fairclough is indeed at the centre of these "fractured family relationships" as one Counsel put it: Owen Fairclough (1st Claimant/ 1st Ancillary Defendant) and Rachelle-Ann Davis (2nd Defendant) are her children; Peta-Gaye Fairclough is her daughter-in-law (2nd Claimant/ 2nd Ancillary Defendant); and Mark Ricketts is her husband (3rd Defendant/ 2nd Ancillary Claimant).

[4] Lot 2 is landlocked; Lot 1 to its southern boundary, a gully is to the north and the boundaries to the east and west are for privately owned properties. Lot 1 has its front to Paddington Terrace, and the main access to Lot 2 is through an area described as the "common area" that runs along the western boundary of Lot 1 to a rectangular plot of land that to the front of Lot 2. This common area remained part and parcel of Lot 1 after the subdivision in or around 2011, as displayed on the DP Plan No. 13511 annexed to the Duplicate Certificate for the said lot. The use and access to this common area are at the centre of the dispute and have been the source of substantial family discord since the death of Eugenie Berry.

[5] According to the Claimants, since the death of Eugenie Berry, the 1st and 3rd Defendants have interfered with their use of the common area in ways which have denied them the unencumbered use of same that she intended. This has resulted in several confrontations between the parties, allegations and counter-allegations, police reports, and police visits to the property.

[6] The primary issues are:

(i) Whether the Claimants are entitled to one-half of the legal and beneficial interest in the common area;

(ii) Whether Lot 2 is landlocked and the Claimants are entitled to the use of the common area as an easement in favour of Lot 2.

(iii) Whether the Claimants are entitled to an injunction

TRIAL

Claimants' case

[7] Before the trial began, the Claimants indicated that they would remove the stones from the pavement area they created and there was an admission by Owen Fairclough that the fence encroaches on Lot 1. This issue more precisely affects the ancillary claim which I will refer to further later.

[8] In the Claimants' pleadings, they mentioned that a survey of all the land comprised in Certificate of title registered at Volume 1249 Folio 424 of the Register Book of Titles was conducted by Commissioned Land Surveyor, C. P Fletcher, to facilitate the application for subdivision by his grandmother. The said plan indicated two lots with a strip of land to their western side demarcated as the common area and that the land was intended for the use and benefit of Lots 1 and 2. According to Mr. Fairclough, in the formal transfer documents, Eugenie Berry conveyed Lot 2 to him and his wife with explicit reference to the deposited plan prepared by C.P. Fletcher; evidence that he asserts demonstrates her intention for both lots to share the common area. Mr. Fairclough stated that he completed the construction of his house in 2015 and since the death of his grandmother in 2016, his mother has interfered with their use of the common area.

[9] The 1st Claimant states that the common area extends over the shared driveway, and the rectangular portion of the common area is found to the south of Lot 1. The reason that the driveway was expanded to include the rectangular area, he says, is that there was a pit on the western boundary wall that made it unsuitable for parking and driving in

that area. He said that the 1st and 3rd Defendants erected a parking bay covering their sewage and electrical lines, and the low wall they erected blocks their access to the driveway leading directly to their property. The 1st Claimant rejects the 1st Defendant's suggestion of the creation of two driveways and says that the driveway and the rectangular area can be used equitably by owners/occupants of both lots, as they represent the only way to access Lot 2. Mr. Fairclough stated that the paved driveway is not a separate right of way and does not obstruct the use of the rectangular area of the common area. In the formal transfer by his grandmother of Lot 2 to him and his wife, there was a specific reference made to the DP number of the said plan that contains a drawing of the said common area demarcated on the Title for Lot 1.

[10] The Claimants say that the 1st and 3rd Defendant's suggestion would force them to move their gate and construct same in line with the narrow driveway, limiting their access to the larger common area that was intended by his grandmother for joint use by both lots. He also claimed that the paved driveway with interlocking brick overlay is situated directly in front of Lot 2 and does not interfere with the use of the common area as the 1st and 3rd Defendant's tenants and visitors are still able to drive over the rectangular parking area to their respective spaces. He stated that on the other side of the paved driveway, as depicted in a sketch plan by Andrew Jackson, there is a grass area that is not impeded or blocked. He further stated that when this driveway was constructed in or around 2016, there was no objection by the Defendants until this Claim was filed. Mr. Fairclough spoke of an open gutter that he says was constructed to assist with draining water that would pool in the common area, which he said is shallow and does not prevent vehicles from accessing and driving into the rectangular section of the common area.

[11] Mr. Fairclough identified from photographs the area where he drives to access Lot 2 and pointed to a dirt path he navigates to avoid a manhole to access the gate to his premises. Paving of the area was completed a year or two after construction of his house was concluded, but he did not, however, pave the left or right of the driveway area, which is part of the common area.

[12] In cross-examination, Mr. Fairclough was asked about the pavement laid in the rectangular area. He admitted that the paving was laid two years after he had completed the construction of his home which began in 2013. He agreed that he had only paved the portion of the common area which is directly before his gate and no other section. Mr. Fairclough was then shown a photo exhibit in which he identified a wall that he had erected in 2020 after the claim was brought.

[13] Mr. Fairclough admitted to the existence of tenants at the house but disagreed that there were five tenants, but instead three. He however spoke to the fact that there was a point at which he was aware of five tenants living at the property. He agreed that the tenants would drive down the common area and park on the rectangular area of land. It was suggested to Mr. Fairclough that the semi-circular area to the back of Lot 1, previously a badminton court on which all users of the property apparently used to park, was subsumed into what is now Lot 2 and that the common area was designed to offset that loss. He disagreed with the suggestion but acknowledged that there is no reference to the common area in his title nor does it demonstrate that he has any interest in the common area.

[14] It was suggested to Mr. Fairclough that was no pit in that area and he disagreed but did not know its specific location. When he had installed sewer and electrical, the main sewer line for one of the flats could not be located and Mr. Fairclough says that he concluded that the pit was located in that area. He was shown a photo exhibit of a portion of the common area where he had constructed a wall and agreed that there was free passage into Lot 2 from where he identified. He was asked if he can turn left when exiting Lot 2 and he stated that he could not do so without risk to the pit. Reference was made to a fence he had constructed in or about 2014 or 2015 which blocked the common area. He denied ever agreeing to remove the fence but agreed that the fence was eventually removed, though not by him.

1st and 3rd Defendant's case

[15] In her affidavit filed on June 30, 2021, Jacqueline Fairclough, outlined that she lives at Lot 1 with her husband, Mark Ricketts, and her sister who has special needs. The property was originally owned by her parents who from their first acquisition, had tenants. The property continued to have renters after her father's passing. There were five self-contained flats to the front and rear of the premises, and before the sub-division of the property into two lots, tenants parked at the rear of the premises in the horse-shoe (semi-circular) shaped annex; part of what is now the common area. The rental income is used for the care of her sister who suffers from developmental disabilities from birth.

[16] When the subdivision occurred, the original parking for tenants which was in use since the 1970s was subsumed into Lot 2. After the subdivision, Eugenie Berry, permitted the tenants to park in the rectangular area in the common area. Despite constructing a two-car parking bay to the front of Lot 1 there is insufficient space for tenant parking without the use of the common area, she said, and they continue to park in the rectangular area without obstructing the access to and from Lot 2.

[17] The 1st Defendant refutes the evidence of her son on the characterisation of the common area and says that the semi-circular driveway to the back of the original property was a carry-over from the established driveway, which was sixteen feet wide. The common area was used by tenants and visitors to the property, and after the sub-division, the semi-circular driveway was eliminated and the common area at the south of the property was enlarged.

[18] Jacqueline Fairclough denied that she or her tenants ever interfered with the Claimants' enjoyment of the common area, but that instead the 1st Claimant intimidated and harassed she divorced his father. She recounted incidents in which the main entrance was blocked by the Claimants' vehicles for prolonged periods because they were away from the property. A Commissioned Land Surveyor was engaged to assess and establish the boundaries for the common area and found that the Claimants had breached the common area by erecting the fence. She spoke of several incidents in which the police

were contacted and alleged that during one of these incidents Mr. Fairclough even assaulted her husband, Mr. Ricketts. After the intervention of the police she claimed that the 1st Claimant agreed to remove the offending fence, and in exchange she would remove some plants. However, though she honoured her end of the 'agreement' by removing the plants, she said Mr. Fairclough did not, despite her several reminders. Mr. Fairclough denied the existence of this agreement at trial.

[19] Jacqueline Fairclough proposed that the only solution was for the Claimants to access their property from the common driveway in a straight line along the western boundary of Lot 1. This, she espoused, would allow easy access to Lot 1 and the placement of the right of way over the common area that is not direct and straight is illogical and would diminish Lot 1's equivalent rights and usage over the area. They would no longer be able to access Lot 2 through their existing gate and presumably would have to create an entrance that can be accessed along that western boundary.

[20] As stated in the ancillary claim, the Claimants had erected a paved driveway in the rectangular portion of the common area and encroached on the common area as outlined in the Sketch diagram of Andrew McKenzie. Jacqueline Fairclough rejected the suggestion that the Claimants' actions to construct a paved driveway were genuinely connected to the location of the sewer lines. She outlined several encounters with the 1st Claimant that resulted in the intervention of the police. She was also of the view that certain acts by the 1st Claimant, including his construction of the paved driveway with an open gutter that hindered passage of vehicles of small vehicles, erecting a fence in the common area that she had to remove at her cost, and leaving sand in the paved driveway, were all designed to impede her and her tenants reasonable use of the common area.

[21] She stated further that it was the joint right of the Claimants and Defendants to use the common area in a reasonable manner and that further, it was reasonable use that was contemplated and accepted by all the beneficiaries of the subdivision. Mrs. Fairclough argued that there is no connection between the Defendants actions and any legitimate concern for sewage on the part of the Claimants. Also, the Claimants creation

of the paved driveway has impeded the tenant's access to the remainder of the common area has been impeded.

[22] The Defendants called Commissioned Land Surveyor, Andrew Mckenzie, who was appointed an expert witness and prepared a report. The Surveyor gave evidence that there is no joint ownership of the Common Area, but that at the time when he had prepared the report he did not know that Lot 1 was multi-tenanted property. He was also unaware that the rectangular area was used for parking prior to the subdivision. He gave evidence that in his experience there would be separate titles that represent the interest of each of the other users of the common area. He was asked if he would agree that the entrance to Lot 2 is permitted anywhere on the common boundary of the Common Area and he stated that since there is no joint ownership he would not say anywhere.

[23] He was then asked what in his opinion should be done in regards to the creation of an easement in which he responded that *"the right of way would be defined by a certain width and would be over a certain section. It cannot be haphazard on the plan. The person could not drive anywhere he wants but would have to drive a certain distance and width. The burden of the mathematical figure places in a certain position for the person to understand it. It must be definitive".*

[24] In cross examination, Mr. McKenzie stated that a right of way is different from a common area. He stated it can mean shared ownership but each situation must be proved by an instrument to show the burden of each property. He agreed that the common area would be for the access of Lot 1 and Lot 2 and that the approval plan was for the access to the common area. He however disagreed with counsel when it was suggested to him that approval would not have been granted for subdivision if landlocked, then stated that it would as when it comes to holding of land the endorsement on the title is important. He was asked if he agreed that there was no easement endorsed on the title and he agreed, but agreed that the common area would be the access point.

[25] In the witness's expert report, he was asked:

> *Question: From your observation on ground, how should the driveway of the occupants of Lot 2 be positioned:*
>
> *Answer: The entrance to the driveway to Lot 2 is permitted anywhere on the common boundary of the common area and Lot 2 but the driveway itself must be represented on the interior of Lot 2, and not the common area otherwise it is an encroachment…*

[26] During cross examination counsel had raised a question quoting the above answer and further asked:

> *Question: … Had it not been about your concern that it was endorsed that the common area was jointly owned by Lot 1 and 2… you are withdrawing your position because you discovered that it was not endorsed on the title as to joint ownership between Lot 1 and Lot 2"*
>
> *Answer: Yes*

[27] The witness was further asked:

> *Question: You gave evidence about an analogy over a right of way. If your land was represented in the same way as in the deposit plan and you agreed to the owner of Lot 2 to allow access to an area like that, that he could put his gate anywhere along that area for common access*
>
> *Answer: No, there is limitation as to where he can put his land. If you investigate the right of way over land there are limitations to how you exercise those rights.*

[28] When further questioned in relation to what was meant by limitation, he stated that limitations exist in that he would be allowed a right of way but he is not expected to put his gate half way up the driveway. He was then asked if the Claimant can put his gate anywhere along the boundary without limitation he stated that he can put his gate but it has to be on the boundary that was expressed.

2nd Defendant's case

[29] The Second Defendant, Rachelle Davis, no longer resides at any of the lots and has remained substantially neutral throughout the proceedings. She neither admitted nor denied the pleadings of the Faircloughs and presented no arguments in defense of the claim. Mrs. Davis however, highlighted the fact that she is aware of the disagreements and believes that both parties should have use of the common area. She indicated that

she does not reside at the property and cannot expound on the incidents which have transpired between the parties.

[30] In her Examination in Chief, Mrs. Davis spoke to the fact that there was no consultation between herself and the 1st Defendant about the use of the common area or the building of the wall. She stated that she is aware of the entrance to Lot 2 and that it has always been used by the claimants and she finds no issue with same. The use of the rectangular area has not affected her, however, she stated that the use of the common areas has affected access to Lot 2 and recalled having gone there on occasions and being unable to pass as her mother's car was on the edge causing her to squeeze around the wall and the car. She stated that she had discussions with the persons regarding this practice as there were spaces to the front of the property where they could park.

[31] In her Cross Examination by the Claimants Counsel, Mrs. Davis stated that her mother had 3 self-contained flats with three tenants. The house had 5 bedrooms and 4 bathrooms. She would use some of the space for family which include nieces and nephews going to school and she had other self-contained flats with their own entrances. She stated that the back bedrooms were converted into self-contained flats and that there are more tenanted spaces at the location. She states that now when she visits, the tenant's park to the left and to the back, but not on the paved section. She was shown Exhibit A5 and stated that they would park to the left where there is a grass area, but before that they had parked on the paved driveway.

[32] When questioned, she agreed that prior to her grandmother's death parking was done on the badminton court, on the semi-circular driveway and some areas on the rectangular portion of land. She stated that she is unaware of any discussions with her mother as it relates to seeking consent to pave the driveway, nor is she aware of any consent from her mother for use of that area for an entrance to Lot 2.

[33] In her cross examination by the Defendants Counsel, she was shown Exhibit A8 and asked if there was space to drive to the right of the paved driveway that can be seen there and she stated that there was. She was shown the sketch plan prepared by Mr.

McKenzie and it was pointed out to her that the shaded area is a pathway to Lot 2 and she agreed. She was asked if there were manholes there and she stated that you don't see them but you hear them.

SUBMISSIONS

Claimants' submissions

[34] The Claimants submitted that considering the circumstances an implied easement was created. The claimants in their submissions relies on the case of ***Re Ellenborough Park*** **(1953) 3 All ER 667** in outlining the ingredients that create an easement in law:

a. There must be dominant and servient tenement
b. The easement must accommodate the dominant tenement
c. The dominant and servient tenement must be owned by different persons
d. A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant

[35] The claimant initially submitted that an easement arises in the circumstances by way of necessity, intention and within the rule of ***Wheeldon v Burrows (1879) 12 Ch D 31***. However, after the trial in closing submissions submitted that the circumstances did not apply to the instant case. The Claimants submit that the evidence shows that Lot 2 is landlocked and as such an easement of necessity arises on the facts. The Claimants argued that an intended easement was also created, they relied on the case of ***Stafford v Lee*** (1992) 65 P and CR 172 in which the plaintiff obtained planning permission for a house that fronted a driveway belonging to the defendants. In 1955, the land had been conveyed by deed of gift to the plaintiffs, but the deed contained no express grant of a right of way to use the driveway. The defendants asserted that the plaintiffs had no right to pass along their driveway for any residential purposes. The court held that on the balance of probabilities, the 1955 deed and plan attached thereto showed that the land was to be used in some definite and particular manner and the easement claimed was necessary to give effect to that use.

[36] The Claimants submitted that in light of the transfer document exhibited in their pleadings, the plan annexed to the title and the subdivision of the original lot into the two lots, the intention of Eugenie Berry was that the common area would be used for the benefit of both Lots. It is defined and designated for the use of Lot 2, as it was the only area from which occupants of Lot 2 could access their property, a fact of which both transferor and transferees were aware at the time of the grant. The necessary implication, the Claimants contend, is that an easement arises by virtue of the intention of the parties, in particular the intent of Eugenie Berry.

[37] The Claimants considered whether the legal right over the common area is essentially a claim of joint ownership and acknowledged submitted that once joint ownership is established an easement will not be created, as the grant of exclusive and unrestricted use of land passes the property or ownership in that land and not merely an easement on it. The Claimant's relied on the case of ***Copeland v Greenhalf [1952] 1 All ER 809*** in which the Defendant had used the land in such a way which asserted a right to the land. The court held that the right claimed would put him in the position of joint user of the land and an easement would not be formed.

[38] It is argued by the Claimants that it was clearly the intention for the common area to be for the benefit of both lots. It is demarcated on the deposited plan for both lots and in addition, the transfer documents signed by Ms. Euguenie Berry made explicit reference to the Deposited Plan Number which itself shows the common area. They submitted that it must have been a conveyancing error that the common area was not comprised in a separate title to be held by the owners of both lots, and there is sufficient evidence of the common intention for the area considering the grant of love and affection by the Grantee, and the Claimants have established their entitlement to a beneficial interest in the common area.

[39] Counsel argued that the evidence is that the subdivision was spearheaded by the 1st Claimant and as such he was the only party before the court that could speak definitively about the intention of the grantor at that time and stated that according to the plan of C.P. Fletcher prepared for the subdivision of land, the common area was intended

for the use and benefit of both lots. The 1st Defendant having admitted that she was not an owner of the property at the time of the subdivision and had no personal knowledge of the intention of the parties to the conveyance, Counsel submitted that her assertions as to the use of the common area should accordingly be disregarded.

[40] Counsel contended that the view of the 1st and 3rd Defendants that the area was intended for the use of the tenants should be rejected as it ran contrary to the 1st and 3rd Defendants affidavit evidence that the common area was for the benefit of both lots. Counsel submitted that during cross examination, the Claimant maintained that he has always travelled to Lot 2 from the main road by passing between the existing four-foot wall and the man hole, then passing over the rectangular section of the common area to enter his lot. The evidence is that the entrance to Lot 2 is where it has always been. Counsel highlighted that this was confirmed by the evidence of Mrs. Davis, which shows that there has been continuous user of that particular pathway since the subdivision.

[41] Counsel argued that it has been established through the evidence that the Claimants are entitled to a beneficial interest in the common area. They argued that the evidence of Commissioned Land Surveyor, Andrew Mckenzie was that a common area is jointly owned by the owners of lots who enjoy the use of the common Area as was seen in townhouse complexes.

[42] As it relates to the issue of the establishment of an easement, the Claimants submitted that the easement arises out of necessity but submitted that having recognized such need there was also an intended implied grant of an easement by the Grantee at the time of the subdivision. It was argued that according to the Halsbury Laws of England (4 Ed.) paragraph 47:

> *"An easement may rest either upon an express grant actually subsisting or upon a presumed grant, or upon a grant arising merely by implication. An easement arising merely by implication is virtually created by express grant, since the creation of the easement was in effected by the legal construction of the instrument, even though it contains no express mention of the easement."*

[43] Counsel submitted that based on the authorities, an implied/ intended easement will arise in favour of a Grantee of land if it can be established that the parties to the grant

had a common intention and that an easement was necessary to effect that intention. Counsel argued that though, much was made of the pit in the amplification of the evidence, it is no determining factor in the claim.

[44] Counsel argued that the evidence of Commissioned Land Surveyor Andrew McKenzie is of note, as his evidence showed that access is required if the land is landlocked and the report of the Kingston and St Andrew Corporation ("KSAC") revealed that this was a requirement of the subdivision. Counsel made direct reference to the witness's answer to question C in which he stated:

> *"Where land is landlocked and has no shared access road or common way then a right of way is designed on the plan to be submitted for approval. When preparing a proposal for a subdivision plan, I Would not include a right of way where a common area of egress and ingress is already designed and reflects and I would submit the plan for approval within a represented common area. "*

[45] Counsel further submitted that in his cross examination the land surveyor appreciated the fact that a right of way may not appear on a title but may still exist on the ground. Counsel argued that even though there is no express endorsement on the title of a right of way on a review of the plan, the logical conclusion is that the right of way extends over the entire common area.

[46] Counsel posited that in the case at bar, there is no evidence of any limitation of access to the area demarcated "common area" and as such, there can be no objection with the construction of an access point to Lot 2 at any point along its boundary within the common area. It was further submitted that there is no basis in fact or law to restrict the Claimants' right of access or right of way as proposed by the 1st and 3rd Defendants. Counsel argued that upon subdivision, the common area, is shown to include the shared driveway and the rectangular area and in this regard the owners of Lot 2 are entitled to enter and exit the property anywhere in the common area which borders their property and are free to construct their gate along that area. Further, Counsel submitted, the evidence has shown that the point of ingress and egress from Lot 1 to Lot 2 has been the same since subdivision and construction.

[47] As it relates to the ancillary claim, while the Claimants admit to the driveway being an encroachment and have agreed to remove same, they added that the interlocking brick is an act of ameliorating waste which adds to the value of land for which a court will not normally restrain by injunction.

[48] As it relates to the order for injunctions, the Claimants reiterated their reliance on ***Patterson v Murphy 1978 WJSC- 3275*** and ***Annette Nelson v Luscelda Brown anor [2012] JMSC Civ 76*** and opined that there is evidence before the court of the behavior of the 1st and 3rd Defendants which interferes with the Claimants right to pass and repass and as such the court should grant a permanent injunction to restrain such behavior.

2nd Defendants Submissions

[49] The submissions of the Second Defendant in the matter did not differ from that of the Claimants. Counsel quoted from Section 5(1) of the ***Local Improvements Act (1914)*** which provides that:

> *" Every person shall before laying out or subdividing land for the purpose of building thereon for sale, deposit with the council a map of such land ; such map shall be drawn to such scale and shall set forth all such particulars as the Council may by regulations prescribe and especially shall exhibit , distinctly delineated , all streets and ways to be formed and laid out and also all lots into which the said land may be divided, marked with distinctly delineated, all streets and ways to be formed and laid out and also all lots into which the said land may be divided, marked with distinct numbers and shall also show the areas and shall if required by the Council be declared to be accurate by a statutory declaration of Commissioned Surveyor"*

[50] Counsel thereby attached the plan for Lot 2, which she pointed out shows a common area. Counsel quoted from the case of ***Proprietors Strata Plan No. 79 v Dennis Singh*** (unrecorded)**,** for a definition of common property in lieu of a definition being provided in the Registration of Titles Act (1969) as follows:

> *" common property is a compendious phrase describing all those parts of a parcel of land which are not subject of individual ownership."*

[51] Counsel submitted that it is undisputed that the common area is in fact used by all parties to access both properties. It was submitted that it is only equitable that the 1st and 2nd Claimants have the right to traverse over the common area to include the rectangular

area but that it be done in an equitable manner. The 2nd Defendant agrees that the Claimants lot is landlocked; only accessible by traversing the common area, and as such an easement of necessity arises.

[52] Counsel went further to state that it is clear that there was the intention on the part of their grandmother that that the common area be used for access to Lot 2. Reference was made to the approval of the Building and Town Planning Committee for subdivision in which the Municipal Authority had to be satisfied with the means of access to the lot before granting permission to subdivide. While there is no express reference by Eugenie Berry as to how the property should be used, there is evidence that the property was used for parking to the front and the rear and it was submitted that parking to the rear must be in a manner which does not interfere with the access to Lot 2.

[53] The 2nd Defendant remained neutral in her position on the use of the common area and stated that all the parties to the Claim should have access to it and that the rectangular portion to the rear of the property is wide enough to facilitate all the parties. She further stated that the location of such access should not be determined by the 1st and 3rd Defendants.

[54] The Claimant and the 2nd Defendant's evidence on the location of the entrance to Lot 2, are corroborative of each other, in that they agree that the access point now used for Lot 2 is where it always has been. Relying on the dicta of Hibbert, J in ***Millingen & Thomas v Millingen 2015 JMSC Civ 26,*** Counsel submitted that in the instant case there is an easement by implication, as there had existed a unity of title and the creation of a subsequent separation of a dominant tenement by the grant resulting from the subdivision of the Lot. In addition to the evidence of both the 2nd Defendant and the Claimant showing that the means of access has remained the same, Counsel further submitted that the easement is necessary for the proper enjoyment of Lot 2.

[55] Counsel further submitted that the clear intention of Eugenie Berry was that the common area should be the point of access for Lot 2. She made reference to the common area in the Building and Town Planning Committee approval for subdivision which was

attached to the affidavit of Jacqueline Fairclough, which stated that the KSAC must be satisfied with the means of access to the lots. On that basis, Counsel submitted that the common area was for access to Lot 2 and there is no evidence of a contrary intent before the court. Counsel also stated that in the evidence of the 1st Claimant, he was party to the subdivision planning and this is evidence that an easement was intended and furthermore there was no objection to how they used the area to access Lot 2. Counsel in closing, asked that the Court find as a matter of fact that the Claimants are entitled to an implied easement, and the certificate of title be amended to reflect same.

1st and 3rd Defendants' Submissions

[56] The 1st and 3rd Defendants do not disagree that the Claimants do have a right to the use of the common area but their objection lies in how this right is exercised. Counsel quoted from the case of ***Annette Nelson, Luseceda Brown v Glasspole Murray*** **(supra)** in which L. Campbell J. stated:

> *"Prima facie the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way or a right restricted to foot passengers or restricted to foot passengers and horsemen or cattle.*

[57] It was submitted that the closeness of the driveway to the home of the Ancillary Claimants is more consistent with the intention of passage by foot and further the driveway for motor vehicles ought to be distanced from their home and more in line with the direct path to the Claimants property. They say that the Claimants' claim is frivolous and as such they have imposed themselves on the usage of the Ancillary Defendants by erecting an encroachment. They argue that the complaints of the Claimant do not meet the test for any actions of hardship, financial loss or show that they are landlocked without exit or access to their property. There was therefore, they posit, no demonstrable legal need for an adjustment to their title it.

[58] It was submitted that though Lot 2 was gifted to the Claimants, it was always the intention that a designated area be preserved to facilitate parking for tenants, as during Ms. Berry's lifetime, the rectangular portion to the left of the driveway was used for that

purpose. Counsel submitted that Mr. Fairclough made no mention of this in his affidavit evidence, neither did he deny Jacqueline Faiclough's statement of these facts in cross examination. Counsel submitted that the evidence of Commissioned Land Surveyor Andrew McKenzie is that where there is a designated common area all owners within the development are to have a legal and beneficial interest. Further in such cases, the common area is given its own title and each owners title records a proportionate share in the common area land. Counsel submitted the Claimants herein can only establish a legal and beneficial interest by reference to some kind of trust resulting from the common intention held by the parties to the transaction.

[59] Counsel argued that the Claimants' claim to hold interest in the common area is insupportable on the facts as there is no evidence that Mrs. Berry had such an intention. Otherwise, a separate title would have been issued for the common area and it would have been registered in the joint names of the owners of the lots. Counsel contended that Mr. Fairclough assistance with the subdivision process would have placed him in a position to ensure that this was done had there been an intention for himself and his wife to have legal and beneficial interest in the common area.

[60] As it relates to the issue of an easement, Counsel quoted from the case of ***Re Ellenborough [1903] 1 Ch 697*** in which Lord Evershed stated:

> *"The easement is a right which accommodated and serves the dominant tenement and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders ownership of land more valuable, it is not an easement at all, but merely a contractual right personal to and only enforceable between two contracting parties. The importance of this point is that the court recognized that a right granted may fail to qualify as an easement because it is not connected with the normal enjoyment of the property. This reinforced the point that the purpose of the easement has to be directly connected to and facilitate the dominant tenements enjoyment of the property. It is also curtailed by the words "reasonably necessary"*

[61] Counsel went on to quote from the case of ***Pwllbach Colliery Company Limited v Woodman[1915] AC 634*** **,** in which Lord Parker stated:

> *"The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the property*

> *granted, or some land retained by the grant is to be used." Lord Atkinson concluded at page 643 : "[f]rom these authorities it is I think , clear that what must be implied is not a grant of what is convenient or what is usual or what is common in the district , or simply reasonable, nut what is necessary for the use and enjoyment in the way contemplated by the parties, of the thing or right granted."(original emphasis)*

[62] Counsel submitted that this is not a case for an implied or intended easement over the entirety of the common area. Intended easements are necessary to give effect to the common intention of the parties, and in the case at bar it has not been shown, Counsel contended, that there existed an intention for the servient land to be used in the manner claimed as an easement. Counsel further outlined the facts in ***Stafford v Lee (supra)*** and highlighted the fact that the case of ***Pwllbach*** was instrumental in the decision in that case. Counsel relied on the leading judgment of Justice Nourse in that case in which he stated that the parties must intend the subject matter of the grant to be used in a definite and particular manner and that the easement claimed must be necessary to give effect to it.

[63] Counsel contended that the common intention for the common area to be found on the undisputed facts is that space had to be designated for the common use of Lot 1's tenants and visitors. This was bourne out in the layout of the area and improvements which include the construction of the parking bay.

[64] Counsel argued that Mr. Fairclough acknowledged the need for parking space and has not established any common intention that access by Lot 2, should extend to the entirety of the common area. Counsel further submitted that there is nothing to suggest that an easement over the entire common area is necessary to give effect to the right of access. The deposited plan shows that there is adequate, reasonable and convenient right of way over the common area along the existing driveway and straight to Lot 2.

[65] Counsel submitted that there was no easement formed within the rules of ***Wheeldon v Burrows***, but agreed that there is an easement of necessity but with limitations***.*** (See ***MRA Engineering Ltd v Trimester Co Ltd*** **(1988) 56 P & CR 1)**. The case law, it was submitted, demonstrates that there are limitations on the easement of necessity and the right must be absolutely necessary to the dominant tenement. Counsel

contended that since no issue is taken with the need for the Claimants' right of access, such access should be defined. Counsel argued that the right of access for an intended easement is usually limited to what is expressed in the grant, and in lieu of same, the right is limited to what is reasonably necessary. Counsel argued that the subdivision refers to access over the common area, but this however, should not be interpreted as access over the entire common area.

[66] Counsel then provided arguments as it relates to the extent of the right of way, and argued that if a right of way is not defined, the grant may make the way so that it can be used as granted. Reliance was placed on the case of ***Newcomen v Coulson*** (1887) 5 Ch D133 in which it was stated that rights are limited to what is reasonably necessary, such as not to interfere with the servient tenements land more than necessary. Counsel argued that in determining what is reasonably necessary for the enjoyment of the right, the Court must conduct a balancing exercise.

[67] Counsel submitted, that contrary to their belief the Claimants are not entitled to enter their lot at any point along the registered boundary of Lot 2, nor is it for them to dictate how Lot 1, being the servient tenement, utilizes its land space. Counsel submitted that the servient owner, is the absolute owner of the servient tenement and his right to use his own land as he wishes will not be restricted more than is necessary to allow the dominant owner to exercise his right of way.

[68] Counsel relied on the case of ***Butler v Muddle*** (1995) 6 BPR 13 in which there was grant of easement for full and free right to pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof, in that case the court held that to determine the extent of the grant one must look at the reasonableness of it construing the grant in question. In this case the wording of the grant stated that the dominant tenement was entitled to more than one point of access, but only such access as is reasonable.

[69] Counsel referred to ***Petty v Parson*** [1914] 6 Ch 253 which was cited in ***Butler*** for approval, Young J at page 14, 986 stated:

> *"When looking at what was reasonable, the mere fact that the defendants [dominant tenement owners] deliberately designed their building in a certain way to make the best use of their land and so have great problems if they cannot enjoy the access that they now need is not the dominant consideration when working out what is reasonable. Again, the matter that the plaintiffs [servient tenement owner] are not currently using the land, is to my mind, of little relevance. I think the test really is, as Mr. Reuben hinted so strongly during his submission for the plaintiff, that it cannot be reasonable for the defendants to appropriate the plaintiffs' land and use it without the plaintiffs' consent as if it were their own, it seems to be that 13m out of the 23 being used by the defendant for their own purposes is far more entry points and entry space than is contemplated by the grant."*

[70] Counsel added that in ***Butler*****,** the Court found that the dominant tenement owners selecting more than one access point to suit their own building layout was unreasonable. Counsel relied on the case of ***Abson v Fenton and another(1823) 1 B& C 195,*** which involved an express grant, and highlighted the fact that even where there is an express grant with a right to construct a way, it was nonetheless considered to be relevant and necessary to take into consideration the reasonableness of the exercise of the right where in doing so it negatively, impacted the servient tenements enjoyment of land. Further, the court determined that the perspective that the matter should be considered from is that of the viewpoint of whether the person seeking to exercise the right would have made such a road over his own land.

[71] Counsel submitted that in this case, the Claimants are insisting on a way that is illogical, inconvenient and unreasonable and one that diminishes Lot 1's use of land. In relation to the construction of the paved driveway over a part of the common area, Counsel asked in the rhetorical, taking reference from ***Abson v Fenton*** *(supra)*, whether they, being in the dominant tenement, have made such a road over their own land.

[72] Counsel relied on the facts from ***Copeland v Greenhalf*** [1952] 1 All ER 809 and submitted that the Faircloughs are entitled to a basic right of access to go, pass and repass their property, but are not entitled to diminish the usage of same by the owners of Lot 1, which occurred when they paved a section of the common area leaving a gutter which was not negotiable by smaller vehicles. Counsel further submitted that their exercise of user is damaging to the servient tenement and their action of turning left to drive onto the section of the common area which they have paved creates a deep rut

caused by the change in direction and torque force of the vehicles wheels as the paved area is higher.

[73] Counsel argued that in ***Bolton v Bolton*** (1879) 11ch D. 968 where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there is more than one way the grantee is entitled to the one way, to be selected by the grantor. Counsel quoted from the case of ***Wimbledon and Putney Commons Conservators v Dixon [1875]*** 1 Ch D 362 n per Mellish LJ, At Page 370***:***

> *"If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can, if the owner of the servient tenement wishes to confine him to a particular track, he must set out reasonable way, and then the person is not entitled to go out of the wat merely because the way is rough and there are ruts in it and so forth "*

[74] Counsel submits that Jacqueline Fairclough has identified the right of way to the Claimants as being along the existing driveway from Paddington Terrace continuing straight to Lots 2 boundary, which is the logical and reasonable way to access to Lot 2. Counsel further submits that the Faircloughs do not have the right to dictate the way nor do they have the right to travel over any part of Lot 1 or the common area as they wish.

[75] On the evidence of Mr. Andrew McKenzie, specifically his responses to questions relating to the terms and conditions of the approval for the subdivisions and his opinion as to how the driveway to Lot 2 should be positioned, it was submitted that that it became clear that he was not fully instructed, his evidence was consistent with some of the legal principles highlighted in ***Abson v Fenton, Bolton v Bolton, Wimbledon and Putney Commons Conservators v Dixon*** among other cases. Counsel submitted that the Court should make a declaration as to the right of way for the benefit of Lot 2, and that same should be defined as from the existing driveway at Paddington continuing straight to Lot 2 boundary at the southern end of the driveway.

[76] In relation to the ancillary claim, counsel argued that the experts finding is that the driveway is an encroachment in the common area and it is ultimately a finding of law for the court.

Discussion and findings

Easement

[77] The ingredients that make up an easement are outlined in ***Re Ellenborough Park (supra)*** were already adumbrated above but bear repeating:

> *(i) There must be dominant and servient tenement;*
>
> *(ii) The easement must accommodate the dominant tenement;*
>
> *(iii) The dominant and servient tenement must be owned by different persons;*
>
> *(iv) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant*

[78] As clearly established by the evidence, Lot 2, being surrounded by Lot 1 on one boundary, two private properties and a gully on the others, is indisputably, landlocked. The only access to and from Lot 2 is the common area, which subsequent to subdivision of the land, remained registered on the title for Lot 1. This demonstrates several ingredients essential to the formation of a valid easement. Firstly, both lots are owned by separate individuals. Secondly, the common area remains on the title of Lot 1, and is the only access to Lot 2, which is landlocked, making Lot 1 the servient tenement and Lot 2 the dominant tenement. Thirdly, by its very nature, the use of the common area is capable of forming the subject of a grant. It is a clearly demarcated sliver of land that could permit access to Lot 2, as shown in the deposited plan and the sketch plan of the expert witness. All parties agree that the ingredients of a valid easement are established on the evidence. However, while the 1st and 3rd Defendants contend that only an easement of necessity exists; to traverse over a small part of the common area to get to their boundary, the Claimants (and 2nd Defendant) contend that though an easement of necessity exists, an intended easement was created; that Eugenie Berry's intention was for her grandson and his wife to enjoy access over the entire common area.

[79] While there is indisputable evidence of at least an easement of necessity, is there evidence as the Claimants contend, of an intended or implied easement? Or is it as the 1st and 3rd Defendants contend that is no intended easement over the common area in its

entirety, but an easement of necessity to access through the front gate on Paddington Terrace in a straight line down to their boundary line?

[80] I do not find that the circumstances as a whole support a conclusion that accessibility of the common area to the Claimants was as limited as the 1st and 3rd Defendants posit, but do not find either that the access of the Claimants entitled them to interact with the space as if they were joint owners. It is patent on the evidence, that though quite mature in years and suffering increasing levels of infirmity, Eugenie Berry enjoyed the clarity of her faculties up to the time of the sub-division and for some time afterwards. On the evidence, after the subdivision and during Eugenie Berry's lifetime, not only did the Claimants have general access to the common area to drive or walk, they always gained access to their lot at the location where their gate is currently located. They drove along the driveway from Paddington Terrace on to the rectangular portion at the rear of Lot 1; a route that the 1st and 3rd Defendants now seek to prevent. Family events were held at Lot 2, which Jacqueline Fairclough attended with Mrs. Berry, and they entered through the area where the Faircloughs currently have their gateway. There is no evidence that Mrs. Berry objected to them having access to the rectangular section of the common area. She, together with Jacqueline Fairclough, accessed Lot 2 after subdivision, at the very same location of the Claimants' current entrance. Does the balancing act as advocated by Counsel for the 1st and 3rd Defendants, relying on the decision in ***Newcomen v Coulson*** *(supra)*, mean that the Claimants should be excluded from the rectangular area?

[81] Mrs. Jacqueline Fairclough was not a party to the discussion regarding the subdivision of the property, nor the intention for eventual access to Lot 2. It seems inescapable to conclude that what was intended by Mrs. Berry was access to Lot 2 via the common area and not the rights of usage attendant upon joint ownership. I agree with the submissions made on the behalf of the 1st and 3rd Defendants that what was contemplated and exercised during the life of Mrs. Berry, was reasonable access. She also intended for the common area's use by lot 1 for tenanted purposes such as for parking, to be preserved, and reasonable access is not interpreted to impede such usage.

[82] I accept the principle as laid out for the 1st and 3rd Defendants in ***Copeland v Greenhalf*** and having subdivided the property and given the Claimants Lot 2, and agree that what was contemplated was a right to pass and repass to their property. Where I the view of this Court and that Counsel departs, is as to where that basic access was to be exercised. Had there been no defined access point one might find the argument for the 1st and 3rd Defendants to be that more enticing, however, the clearly established convention after the subdivision of the property, prior to the gifting of Lot 1 to Jacqueline Fairclough and during the lifetime of Eugenie Berry, was access in the manner and location as it is now exercised. The gateway on which the Claimants have hung their gate merely establishes in concrete and steel, that which the parties had taken to be the convention regarding access to the property.

[83] ***Abson v Fenton and another*** spoke to an expressed grant of easement in undefined terms, and the Court found that there had to a reasonable interpretation of the grant. Here, though there was no expressed grant, there was a clearly established practice as to how access was to be gained to Lot 2 from the common area. There was suggestion by Mrs. Jacqueline Fairclough that the true genesis to this action is vindictiveness on the part of Mr. Fairclough towards her after her divorce from his father. Nothing much turns on this assertion except that it has become pellucid that if acrimony exists on the part of Mr. Fairclough, that it is a mutual sentiment. There does not seem to have been a problem during Mrs. Berry's lifetime when there were still tenants parking and the Claimants traversed the common area. Having considered the evidence, it is clear that the easement created was intended by the grantor, Mrs. Berry, to be for the benefit of Lot 2, and it was also of the utmost necessity. While no argument could be made that it allows for access to Lot 2 from anywhere on Lot 1, it did not restrict access in the way suggested on the behalf of the 1st and 3rd Defendants. I accept the argument that access along the common area must be reasonable, but do not find that access using the rectangular area runs contrary to this standard of reasonableness.

[84] Though established that an easement was created by way of necessity, it is also implied. Even that case law demonstrates that on occasion, the lines are blurred as it

relates to an intended easement and easement of necessity. For example, in ***Stafford v Lee*** the Court found that the deed and plan attached show some intention for the land to be used in a particular manner but also that the easement claimed was necessary to give effect to that use. The existence of one is not mutually exclusive to the other.

[85] This necessity is further highlighted in the evidence of Commissioned Land Surveyor, Andrew McKenzie, who stated that the deposited plan makes it clear that one will not access Lot 2 through Lot 1 as a whole, but rather through the designated common area. The approval of the application for subdivision by the KSAC was also clearly predicated on the fact that the common area preserved on the title for Lot 1 (the servient tenement), as demarcated in the deposited plan, was to be used for access to Lot 2 (the dominant tenement). I therefore find, that an easement in fact exists, not only of necessity in a straight line along the edge of the common area, but an intentional easement was granted to access the common area, to include along the rectangular portion, to get to where the gate was later established.

[86] The easement cannot be exercised in a manner to deny access to any of the Defendants, or their tenants, but must be reasonably exercised to gain access to their premises by them, their agents, servants, visitors and guests. It seems also evident from the usage prior to the establishment of the gate and the wall, that the Claimants were allowed access for parking for themselves and their guests, once such exercise was reasonable and did not inhibit access to Lot 1 by the owners, their tenants, guests, servants or agents. I find that the Claimants have established also an easement by intention, over the common area.

<u>Beneficial ownership of the common area</u>

[87] Having established that what was intended by the grant of was an easement, it would be somewhat superfluous to embark upon a detailed discussion of the beneficial ownership of the common area, as this was a remedy sought in the alternative and the two states of affairs, cannot co-exist. However, I will note that, from the evidence presented, the Claimant had discussions with his grandmother regarding the subdivision

and played a major part therein, and I accept such evidence. There is no evidence that Mrs. Berry intended for a beneficial interest in the common area to pass to her grandson and she had the time and opportunity to have done so had that been her intention. Mr. Fairclough's case is that he had discussions with his grandmother and mentions nothing about her indicating a desire for him to have anything beyond an easement.

[88] It was only after her passing, that the issues over the use of the common area arose, a development that I am confident she did not intend would generate such discord in the family. She evidently wanted to leave a legacy that could be used to generate income to care for her daughter with lifelong special needs, as well as provide a home and benefit to Jacqueline Fairclough and her (Mrs. Berry's) grandchildren; Mr. Fairclough and Mrs. Davis. In that vein, the concession of the Claimants at the commencement of the trial was appropriate. I do not believe, as aesthetically pleasing as it may have been to add, that Mrs. Berry intended that the Claimants be able to unilaterally construct a driveway or walls on the common area; actions that are more consistent with joint ownership of the common area. The Claimants claim fails on that point, and by implication, the ancillary Claim must succeed on this point.

Injunctive relief

[89] The evidence demonstrates that there is continued contention between the 1st and 3rd Defendants and the Claimants. The 1st and 3rd Defendants have sought to dictate the way in which the driveway is to be used by the Claimants. This is evidenced by the erection of the low wall by the 1st Defendant in front of the paved area which was created by the Claimants, and demonstrates her opinion that the rectangular portion of the driveway is to be used for the sole purpose of her tenants parking. This forced the Claimants to drive on the grassy area to the right of the paved driveway then mount the pavement to enter their property. The evidence of Mrs. Davis confirms the reality of this situation having encountered this experience herself.

[90] In the expert's responses, he was clearly of the opinion that there was joint ownership of the common area between the two parties, and formed the impression that

access to Lot 2 could be gained by entry anywhere on the common area. His position demonstrates how one's rights as a joint owner differs from that of one's rights secured through an easement. That is to say, having established that the easement was one which was intended because of the necessity, the right exercised must continue in the fashion as intended by the grantor at the time; prior to the Defendants acquisition of ownership of the servient tenement. In other words, the Faircloughs are to have the right to traverse along the driveway from the entrance, to the rectangular area and straight down to their gate. Once it does not impede access to the Defendants or their tenants, they and their guests are also permitted to park, but in view of evidence of repeated confrontations, such parking is limited just outside the Claimants' gate as I accept the evidence of the Claimants and 2nd Defendant that this was included as part of the customary use of the common area. In light of the above, I find that the Faircloughs are in fact entitled to injunctive relief and unencumbered use of the Common area, save as specified in regards to parking, as was the intention of the grantor.

[91] I further refer to the submission of Counsel made from the case of ***Wimbledon etal v Dixon***, where it was stated that if the servient tenement does not outline the right of way the parties must use the nearest right of way. It has already been established that based on the customary usage of the driveway, the route over the now paved area was the intended easement. As I have already indicated, I find that it was always the grantor's intention that the Claimants have access to the common area via the route customarily used, which leads through their front gate.

[92] Further, I do not accept the evidence that apart from the paved driveway inclusive of the rectangular area, there is nowhere else for the tenants to park. From the exhibits shown there is the existence of a parking bay and also grass area to the western boundary that can be used for parking by her tenants. The 1st and 3rd Defendants have the option of converting other areas to use for tenant parking which would make for equitable use of the common area.

Orders

[93] Based on the forgoing, on the substantive claim, orders are made in terms of paragraphs 2, 3 and 4 of the Fixed Date Claim form filed on June 24, 2020. Costs are awarded to the Claimants against the 1st and 3rd Defendants, to be taxed if not agreed. Claimants attorneys at law to prepare file and serve the orders herein.

[94] On the Ancillary claim filed, orders are made in terms of paragraphs 1 and 2 of the Ancillary claim filed on November 25, 2021. Costs awarded to the Ancillary Claimants against the Ancillary Defendants, to be taxed if not agreed.