CASE STUDY – ACCOMMODATING RIGHTS OF WAY

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The problem

Packemin Apartments Limited ("PA") acquires a plot of prime development land for the construction of a block of luxury flats. Unfortunately, the land in question ("Plot A") has no direct access to the main public highway. In order to obtain the required access to this public highway PA has to obtain the grant of a right of way over the land lying between the Plot A and the public highway. The land in question is owned by Mr. Awkward, who charges a substantial premium for the grant of a right of way over his land, expressed to be for the benefit of Plot A ("the Right of Way"). PA duly constructs the block of luxury flats. Unfortunately, the constraints of Plot A mean that, while some visitor parking can be provided at the front of the block of flats, the provision of a parking space for each flat in the development can only be achieved by restricting the number of flats which can be built, which PA, true to its name, is not prepared to do. A solution presents itself to this problem, when a plot of land to the rear of Plot A comes up for sale. PA acquires this back land ("Plot B") and uses it to construct garaging for the use of the flat owners. The existence of this garaging allows PA to charge a substantial additional premium on the sale of each flat. Six months later, with all the flats occupied, and with flat owners making extensive use of the Right of Way to access the garages on Plot B, a letter from Mr. Awkward's solicitors arrives on the desk of PA, asserting that flat owners have no right to use the Right to Way for the purposes of obtaining access to Plot B, and threatening an injunction if this does not stop. News of Mr. Awkward's letter soon leaks out to flat owners, who express concern to PA, in addition to reminding PA of various representations which PA made to flat owners in relation to access to Plot B. On taking legal advice, PA is appalled to discover that Mr. Awkward's case may be well founded. PA thinks however that it has an ingenious solution to this problem. There is a minor road (ending in a cul de sac) which runs to the side of Plot A and Plot B, which is also a public highway. This minor road is of no use as a means of access to Plot A or Plot B, because at one end it leads to a cul de sac, while at the other end it gives on to a large housing estate which is not a convenient route for any of the flat owners. There are however access points on to the minor road from Plot A and from

Plot B. A letter is sent to flat owners, instructing them that, until the dispute with Mr. Awkward has been resolved, the direct access between Plot A and Plot B should not be used, and that flat owners should now drive their cars between Plot A and Plot B by the minor road, using the two access points on to the minor road. PA assures flat owners, in the letter, that the use of this route will prevent any difficulties with the use of Mr. Awkward's land for the purposes of getting to and from Plot B. For good measure, PA adds the assurance that Mr. Awkward would not have been entitled, in any event, to prevent flat owners using the Right to Way to drive on to Plot A, and then to drive on to Plot B using the direct access from Plot A to Plot B.
Are PA's assurances well founded?

Analysis

The short answer to the question is no. Neither of the assurances given by PA is reliable.

It is convenient to start with the second assurance. The problem here is that flat owners who use the Right of Way in order to get to and from the garages on Plot B are going beyond what is authorised by the Right of Way. The Right of Way was granted for the benefit of Plot A. It is well established that a right of way granted for the benefit of one plot of land cannot be used in order to obtain access to the first plot of land, and then to a further plot of land. The relevant principle was stated in the following terms by Romer LJ in Harris v Flower (1904) 91 LT 816, at 819 (italics have been added to all quotations).

> *"The law really is not in dispute. If a right of way be granted for the enjoyment of close A, the grantee, because he owns or acquires close B, cannot use the way in substance for passing over close A to close B."*

Intuitively, PA may find this hard to accept. Provided that flat owners use the Right of Way to drive their cars to and from Plot A, why should it matter if the cars are then driven to somewhere else from Plot A, or are driven from somewhere else on to Plot A? PA would also point out that this use of the Right of Way by flat owners makes little difference to Mr. Awkward, given that there is plenty of traffic making use of the Right of Way to use the visitor parking spaces on Plot A, without going near Plot B.

PA might also argue that, in National Trust v White [1987] 1 WLR 907, it was held that visitors to Figsbury Ring, a National Trust site, could use a track leading to the

site for the purposes of obtaining access to a car park and then, having parked, could continue on foot along the track to the site. The National Trust had the benefit of a right of way over the track, which had originally been granted for the benefit of the Figsbury Ring site. The right of way had not been granted for the benefit of the car park, which was located just over halfway along the track leading to Figsbury Ring. Warner J. held that the use of the track to obtain access to the car park, by visitors to Figsbury Ring, did not offend the principle in Harris v Flower. Use of the track to reach the car park was, so the Judge held, ancillary to the enjoyment of Figsbury Ring.

National Trust v White is however unlikely to be sufficient to see off Mr. Awkward's complaint. In Das v Linden Mews Limited [2002] EWCA Civ 590, the Court of Appeal was confronted with an apparently similar set of facts. Das was concerned with a small mews, containing seven properties. Two of the owners of these properties used an adjacent area of garden ground to park their cars, which was reached by a carriageway which also gave access to the properties. It was common ground in the case that the owners of the properties had a right of way over the carriageway for the purpose of obtaining access to their respective properties. The question in the case was whether the two owners could make use of this right of way in order to obtain access with their cars to the garden ground. The owners argued, not surprisingly, that their use of the carriageway to park on the garden ground was ancillary to their enjoyment of their properties. This argument was however rejected by the Court of Appeal, which concluded that the use of the carriageway in order to obtain access to the garden ground was separate from the use of the carriageway to reach the two properties. Buxton LJ summarised the position in the following terms, at paragraph 24 of his judgment.

> *"I have no doubt that, for the practical reasons already given, that is a separate use from mere access. It is a use that takes place other than on the dominant tenement, and by using the carriageway to access that parking space the owner extends the dominant tenement. He does exactly that which the House of Lords said in Alvis v Harrison, quoted in 9 above; Cozens-Hardy LJ said in this court in Harris v Flower, quoted in 8 above; this court said in Peacock v Custins, quoted in 16 above; and Warner J said in White, quoted in 18 above; could not be done."*

What then of PA's first assurance? Is the solution to the problem directing the flat owners to drive between Plot A and Plot B using the minor road?

At first sight, this solution looks promising. It would be open to a flat owner to drive over the Right of Way, on to Plot A, and then on to the minor road. Similarly, a flat owner could drive from the minor road on to Plot A, and then over the Right of Way to the main public highway. There is authority to the effect that the principle established in Harris v Flower does not apply where close B (to use the language of Romer LJ) is a public highway; see Alvis v Harrison (1991) 62 P&CR 10.

Unfortunately, something similar to PA's solution has already been attempted, and failed, in the recent case of Giles v Tarry [2012] EWCA Civ 837. In this case Mr. Tarry owned a paddock which had the benefit of a right of way over a driveway which gave access to the paddock. There was also an alternative access to the paddock, from the public highway. Adjacent to the paddock was a much larger field, rented by Mr. Tarry, which was not physically separated from the paddock. Mr. Tarry's family wished to drive sheep along the driveway, in order to graze in the paddock and the larger field. The owner of the driveway, Mr. Giles, objected to this, on the basis that the right of way over the driveway had been granted for the benefit of the paddock, not the larger field. The solution adopted by Mr. Tarry's family was to drive the sheep along the driveway and into the paddock, then out of the paddock and on to the public highway, then back from the public highway and into the paddock, where they were left to graze the paddock and larger field. Their argument was that this did not offend the Harris v Flower principle, because the access to the larger field for grazing purposes was obtained from the public highway, not the driveway.

This argument failed. The judge at first instance found the following facts.

1. Mr Tarry's objective had been to graze his sheep both on the paddock and on the adjacent larger field.
2. The route taken by the sheep was a somewhat artificial device or expedient.

On appeal the argument of Mr. Tarry's Counsel was that, having made those findings of fact, the judge at first instance should have concluded that the use of the driveway for the composite purpose of getting the sheep through the various stages from the driveway to the larger field was impermissible. The use of the highway, so it was argued, was simply a transient stopping place, which could not be separated from the overall operation.

This argument was accepted by the Court of Appeal. Lewison LJ put the matter this way, at paragraph 57 of his judgment.

> *"We cannot go behind the judge's findings that Mr Tarry's "objective" was to graze the paddock and the green land together, and that he was using the highway as an "artificial device" to attain that objective. Mr Johnson submitted that we should break down the movement of sheep into its constituent elements. If (as I think) Mr Tarry was entitled to use the right of way in order to access Forge Lane from the paddock, then Mr Johnson submitted that what happened to them thereafter was irrelevant to the question whether the use of the right of way was lawful. I regret that I cannot accept that submission. In my judgment we are dealing with one continuous operation, the object of which as the judge found, is to enable the sheep to graze the green land* [the larger field] *via the right of way. The use of the highway as a transient stopover is itself a "colourable" use of the highway. The whole sequence is, as the judge found, an artificial device. It therefore falls foul of the principle in Harris v Flower."*

It is difficult to see how PA could escape from the same reasoning in the present case. In any proceedings commenced by Mr. Awkward, PA would be required to disclose its circular letter to the flat owners which, it will be recalled, instructed the flat owners to use the minor road in order to *"prevent any difficulties with the use of Mr. Awkward's land for the purposes of getting to and from Plot B"*. On the terms of this letter it would be easy for Mr. Awkward to argue that the use of the Right of Way by a flat owner in order to get from his land to Plot A and then to Plot B by the minor road was one continuous operation, which offended the principle in Harris v Flower.

Regrettably, for PA, the time will have come to look for a compromise with Mr. Awkward, to review its obligations to the flat owners in relation to use of the Right of Way, and to review the professional advice which it received on the acquisition of Plot B and the sale of the flats.

It will be seen that the law in this area is not in a particularly satisfactory state. The principle in Harris v Flower is that close A cannot be used, in substance, for the purpose of obtaining access to close B. There are however cases where the activity on close B is sufficiently connected to the use of Close A that it does not offend against this principle. An example sometimes given in the case law is obtaining access to the dominant land, and then going off the dominant land to picnic. In reality, the line

between these different types of case can be very difficult to draw. Why is National Trust v White on one side of the line, but Das v Linden Mews on the other?

The unsatisfactory state of the law is revealed by paragraph 58 of the judgment of Lewison LJ in Giles v Tarry. As his Lordship pointed out, there were measures which Mr. Tarry could have adopted to get round his problem.

> *"There are of course other ways by which Mr. Tarry can achieve his objective. One is to transport the sheep by road up to the gate into the paddock from Forge Lane. Another is to ensure that the sheep are turned onto the paddock to graze it first before proceeding on to the green land. That might necessitate the erection of some gated barrier between the paddock and the green land (which Mr Tarry was obliged to do by the terms of the conveyance to him of the paddock). But the fact that there may exist legitimate ways in which Mr Tarry can achieve his objective does not make an illegitimate one lawful. With regret, therefore, because the dispute between the parties is so narrow, I agree that the appeal on the right of way point must be allowed."*

PA might regret not having read Giles v Tarry before formulating its own solution to the Harris v Flower problem. It might have had a better case if flat owners had been required to leave their cars on Plot A, or the minor road, for a period of *"grazing"* time, before proceeding to or from Plot B. If this sounds absurd, it reflects the difficulties of trying to draw the line required by the application of the Harris v Flower principle.

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