

IN THE PROPOSED CLAIM

Between:

Peter Robert Miles

Claimant

-and-

William Offley Hinchliffe Friend

Defendant

ADVICE

- 1 I am instructed to advise Mr Miles on his remedies (if any) for interference with a right of way.

The relevant land ownership

- 2 Mr Miles is the freehold owner of East Northdown House, Northdown, Margate, Kent, CT9 3TS (title number K57023I). Access to the house is by a private road leading from George Hill Road, a public highway. The private road is a public bridleway but the public do not have a right of way with vehicles.
- 3 Mr Miles bought his House from a Mr Irvine Friend. The transfer was dated 9th November 1982. It purported to grant a right of way for all purposes over the private road. However, Mr Miles says that Mr. Friend was unable to establish that he owned the private road. Apparently there was a High Court action but I have no detailed information about this. I have not seen a copy of the transfer dated 9th November 1982 and it would be helpful if a copy could be obtained.
- 4 Mr William Friend is the son of Irvine Friend. He is the owner of and lives at East Northdown Farm (title number K799114) He also owns a large amount of other land in the area, registered under title number K398436. This land was first registered in 1973 but it does not include the private road and the filed plan does not indicate that East Northdown House was ever part of this holding. It is possible that there is some other relevant land

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formerly owned by Irvine Friend. The 1982 transfer may make that dear.

The private road

5 If Irvine Friend did not own the private road his purported grant of a right of way over it is of no effect. However, the private road has been used as an access for vehicles for many years and it can be assumed that East Northdown House enjoys a right of way by prescription,

6 The private road gives access to East Northdown House, East Northdown Farm and several other properties. Two problems have developed over the last year or two. Firstly, some of the former agricultural buildings have been converted to industrial use and heavy vehicles now use the road which may be detrimental to it. Secondly, Mr (William) Friend has made a series of attempts to repair the road which have in fact worsened the road. In particular, he has dumped large quantities of unsuitable material on the western half. The result has been that domestic cars are forced onto the wrong side of the road when driving north. Mr Friend has also made excavations into the road surface. There are two reports from a Chartered Surveyor, Mr Baker, indicating that these works have damaged the road. The surface is now deteriorating quite rapidly. A recent estimate for resurfacing was about £15,000 including VAT but this will increase as the road deteriorates further.

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Mr. Miles has asked if he may in law be the owner of part of the road. Where there is no evidence as to the ownership of a road, the courts do sometimes apply a presumption that the adjoining owners each own half of it. I do not have enough information to be able to say whether the presumption would apply in this case, but even if it did it would not be of much importance. The presumption would only apply to that part of the road onto which East Northdown House had a frontage. That is a short section of road at the north end, whereas the main problem is at the southern end.

Remedies

- 8 The reports of Mr Baker indicate that the main cause of the deterioration of the road is Mr Friend's work, in particular, in his second report dated 15th September 2004 he says that the rate of deterioration in the area next to where Mr Friend has deposited scrapings is greater than for the rest of the road and greater than would reasonably have been expected.
- 9 Mr Friend's actions would be a trespass to the land constituting the private road. However only the owner of the land could sue.

10 There is cause of action in nuisance (or interfering with the exercise or an easement, such as a right of way. Such a claim can be made by a non-owner entitled to a right of way. The test is whether there has been a substantial interference with *the* exercise of the right of way. For example in *Saint v Jenner* [1973] 1 Ch 275, speed ramps were erected on a private road which caused potholes to develop adjacent to them. The court held that the speed ramps were not a substantial interference while the road remained in good repair but *the* deterioration in the road was. The owner of the road was only permitted to keep the speed ramps in place so long as he prevented the formation of pot holes.

11 On the basis of Mr Baker's reports my view is that there is a better than 51% chance of establishing a case of actionable interference with the right of way. However the remedy is quite limited. Mr. Friend can be ordered not to carry out any further damageing work and he can be ordered to remove what he has done or to pay the cost of doing so. However, he cannot be ordered to re-surface or otherwise improve the road. Mr Miles and the other people entitled to the right of way are entitled to be put in the position that they would have been in if there had been no interference. However, they 'will still be faced with a road that requires repair.

12 Where there is an express grant of a right of way it is normal to make provision for how the costs of maintenance will be met. However, in this case it seems (subject to seeing the 1982 transfer) that the right of way derives only from long use so there would not be any express terms. In this situation the principle is that anyone entitled to the right of way is entitled to carry out repairs, but is not obliged to do so. Nor is the owner of the land over which the right of way runs obliged to carry out repairs: This is a problem which is very frequently encountered with private roads and explains why they are so often in such bad condition. The obviously sensible course is for the users of the road to agree to share the cost of necessary repairs. However, they cannot be compelled to do so.

Use by heavy vehicles

13 Use of a right of way may be unlawful if either the type of vehicle is not permitted or if the amount is so excessive as to interfere with the use of the right of way by other persons entitled to it. See *White v Richards* (1993) 68 P&CR 105 at 106.

14 In this case it may be that the right of way acquired by the land on which the industrial units now stand was limited to agricultural purposes. If so, it may be that use for industrial purposes would be unauthorised. See, for example, *Loder v Gaden* (1999) 78 P&CR 223. However, it would only be the owner of the road who could prevent such use.

- 5 The position is different where there is excessive use. Other users have a right to prevent such use. See for example *Resting v Pitt* [1986] 54 P&CR 124 where a group of residents having a right of way over a lane obtained injunctions restricting the extent of use of the lane by another person entitled to the right of way.
- 16 It is difficult to establish that the level of use is excessive. In this case the road appears to be quite wide and to have been made up to a good standard, therefore it must be capable of taking quite a lot of traffic. I have no information as to the number or size of the heavy vehicles that are now using the road. There is no evidence of damage specifically caused by heavy vehicles. Mr Baker does not mention heavy vehicles in his reports. Indeed he describes the traffic usage as generally light. I cannot therefore say whether there is a cause of action. If there is, the defendants would be the people causing the traffic. I.e., the owners or lessees of the relevant industrial units.

Conclusion

17 On the basis of the limited information before me, there is a cause of action with a better than 50% chance of success to prevent Mr Friend from interfering with the right of way by carrying out damaging works. However, there is no basis for requiring him, or anyone else, to carry out work to improve the road. The best way of pursuing that would be to try to obtain agreement from all the users to share the cost of improvements.

18 There might be grounds for limiting the use of the road by heavy lorries but I do not have enough information to be able to advise on the prospects of success.

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