

STATEMENT ON RIGHTS OF WAY DISPUTES IN RELATION TO APP/21/01310

AUTHOR: [REDACTED]

The Applicant's claim that he and others authorised by him are absolutely entitled to continue to use the right of way that was granted in 1987 through Tournerbury Farm "for all time, for all purposes and with or without vehicles" relies heavily on a letter from James Pavey of Irwin Mitchell to Steve Weaver at HBC on 8 November 2019, and which sets out the wording and context of the right of way, together with standard examples of case law in easement disputes.

It has been argued in this letter that there has never been excessive user over the servient tenement on the basis of Intermodal Transportation Ltd's traffic report. The letter also claims that the co-signees to the original agreement, Arthur Phillips and Francis Snell, the fathers of the current owners of the dominant and servient tenements, went into this arrangement with their eyes wide open and fully aware that any sort of development in Tournerbury Woods could lead to a much greater use of the Right of Way through Tournerbury Farm in the future. Ironically, in another right of way dispute in 2003, the Applicant's then solicitor May, May & Merriman described this very same track in the following terms: ".... the northern track remains a dirt track which our client is prohibited by English Nature from upgrading. Our clients have done the best they can in the circumstances [in February 2001 and spring 2002] to render the northern track passable by road vehicles but the effectiveness of these repairs is constantly being eroded and work is constantly required to maintain the track as passable to all vehicles." Later it is described as "an earth track which cannot currently be upgraded under SSSI regulations."

Mr. Pavey goes on to explain the grounds on which the existing right of way can accommodate a change of use of Tournerbury Woods by reference to Gale on the Law of Easements 20th edition, *White v Grand Hotel, Eastbourne*, 1913 and *United land Co. v Great Eastern Railway Co.* 1875. He states that the solicitor for the Phillips at the time of the sale was informed by the Vendor that Tournerbury Wood was being retained with the "possibility of commercial development, residential development or even a commercial forestry operation." As I hope I have adequately shown in paragraph 9 of my submission not all commercial developments are born equal. As a hypothetical example, if Mr. Snell had chosen a commercial development involving the full time employment of 15 people needing to access their business premises in Tournerbury Woods 5 days a week by car, this would have resulted in 75 movements in and 75 out each week, a very high increase in previous user. The tangible difference would be that all 15 employees would have a high chance of being local, of arriving and leaving at predictable times most days, and over time settle into a comfortable pattern of user based on mutual respect and care for and by the dominant and servient tenement users.

Beyond the examples listed by Mr. Pavey, there are other cases in English law when rights of way equally as wide as those that now belong to the owner of Tournerbury Woods have been challenged in the courts and the Court of Appeal, resulting in their suspension or loss. The two most important are *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214, and *Thompson v Bee* [2009] EWCA Civ 1212.

In the first of these the Court of Appeal upheld the judge's decision by asking two questions – (i) whether the development of the dominant land, ie. the site, represented a "*radical change in the character*" or "*change in the identity*" of the site, as opposed to "a mere change or

intensification in the use of the site"; (ii) whether the use of the site as redeveloped would *result in a substantial increase or alteration in the burden on the servient land*, in this case Tournurbury Farm. If the answer was yes to both, then the dominant owner's right to enjoy the easement would be suspended or lost.

In the second case which also went to Appeal, the original right of way was used in common with other persons, as also happens here. The original trial judge was entitled to conclude that the proposed user in the Thompson v Bee case would be excessive and amount to an actionable nuisance despite the existing right of way being expressed as "at all times and for all purposes". The Court of Appeal judgement went on to explain that reference to "all purposes" does not authorise use *to the point of an unreasonable or substantial level of interference with the rights of the servient owners to enjoy their property and to use the way in common with the occupiers of the dominant tenement*. Lord Denning in Jelbert v Davies [1968] 1 WLR 589 also explained that even a right of way granted in wide terms like "at all times and for all purposes" is not a sole right, if it is used in common with others, and *does not authorise unlimited use*.

In a world of unlimited funds, the Phillips might by now have decided to challenge through the courts the current legal status of the right of way over their property following the redevelopment of Tournurbury Woods from an unoccupied rural backwater into a major, commercially viable wedding venue from 2012 onwards. They have a strong case and ample evidence to prove that there *has* been a radical change in the character and change in the identity of the original pristine, low-lying and waterlogged site before the extensive landscape restructuring for the wedding venue redevelopment began. My submissions for APP/18/00943 and APP/19/01262 include detailed evidence and plans. If any further proof should be required as to the extent, height and degree of permanent change to the topography that took place from 2011 for the sole purpose of enabling a commercial venture of this nature to operate, they need only to stand on the marquee lawn and look at the deep recesses around every mature tree. This shows unequivocally just how much imported building material has been added to raise the previous ground level to the new venue level. Likewise, the pre-development potting shed once used by Jasper Shackleton which is still in place next to the track between Woods Cottage and the main car park can be seen at original ground level on the western side of the track, versus the post-development Log Cabin built immediately opposite on the eastern side where the ground level is about 1.5 metres higher.

There can be absolutely no doubt that, as a direct consequence of the radical changes in the character of Tournurbury Woods, the use of the wedding venue since the completion of these changes in 2012 has resulted in a substantial increase and alteration on the burden on the servient land. It is also beyond doubt that the servient tenement can no longer enjoy or use their property in common with the occupiers of the dominant tenement due to the unreasonable and substantial level of interference with their rights.

The fact that the opinions above, or the opposing opinions of Mr. Pavey, have not been determined in a court of law does not in any way undermine the principles sought by the judges involved, which was to redress unfairness and restore a reasonable measure of balance and justice in the relative rights of the two paired tenements. It is to be hoped that Havant Borough Council will bear these principles in mind if they are in any doubt as to the right course of action to take in the current case.