



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No 103

**BETWEEN**

**RICHARD MARK SOUSA**

**Plaintiff**

**-and-**

**SACHA BEARDON**

**First Defendant**

**-and-**

**IAN STONE**

**Second Defendant**

**-and-**

**MICHELLE STONE**

**Third Defendant**

Mr. T. Marshall for the Plaintiff

Mr. J. Pachai for the Defendants

## **JUDGMENT**

1. The central issue in this case is whether a right of way granted by the First Defendant's predecessor in title as owner respectively of two lots of land now owned by the Plaintiff, situate at Hill Crescent in Pembroke Parish, is a right exercisable along that road way only for the purposes of access to or egress from said properties, as the first Defendant

contends, or includes access to and egress from the waters of Mills Creek including specified auxiliary purposes as the Plaintiff contends.

2. Two concessions have been made in this case which have enabled this judgment to be confined to the central issue described above. The first has been made by Mr. Marshall for the Plaintiff. He concedes that his alternative claim under the doctrine of lost grant cannot stand alongside his claim of a right of way. Mr Pachai satisfied the court of that proposition arising from the judgment of the Court of Appeal in Moulder-v-Slaughter et al Civ App 1 of 2007.
3. The second concession was made by Mr Pachai for the First Defendant. It is a qualified one. His position is that if the court finds that the right of way includes access to the dock at the termination point of the subject roadway, then access to the waters of Mills Creek would be strictly limited and would not include the auxiliary purposes claimed by the Plaintiff. In other words his position remains that the First Defendant has not in any way encroached upon the right of way by erection and rental of the boat birth contiguous to the dock.

## **HISTORY**

4. The Plaintiff Richard Mark Sousa is the owner of lots 3 and 8 of the subdivision of located in the area known as Hill Crescent. Lot 3 is a water front lot; lot 8 is not a waterside lot. I shall refer to Richard Mark Sousa as “the Plaintiff” for the sake of clarity (there being other Sousas referred to herein).
5. The First Defendant Sacha Beardon is the owner of lots 1 and 2 of the above referred subdivision. Both lots 1 and 2 are water front lots. The Second and Third Defendants are lessees of Ms. Beardon of a mooring located at the water’s edge adjacent to the right of way in issue. The placement and rental of this mooring has brought about the contentious issue between the parties.
6. By agreement of counsel the Second and Third Defendants did not take an active role in the trial of this matter, but provided undertakings that they would be bound by the judgment of this court. I shall refer to the First Defendant therefore as the Defendant hereinafter.
7. Some history of the subdivision is necessary for a proper understanding of this case and the positions taken by the parties. The uncontested facts are that on 8<sup>th</sup> November 1965 a large parcel of land was purchased by Audrey and John Rego Sousa. The parcel of land came to be known as Rego Port Estate. A proposed subdivision of the parcel of land was drawn up in December of 1965 creating 8 lots. In the result lots 1, 2 and 3 were the only water side lots.

## **OWNERSHIP OF THE LOTS**

8. In October of 1972, Mr and Mrs Sousa conveyed lots 6 and 7 to their daughter Patricia (now) Harrington and her (then) husband Michael DeCosta prior to the creation of and registration of the subdivision. In 1985 as a result of a 1983 divorce between Audrey and John Rego Sousa and a judgment of the Court of Appeal, the property comprising Rego Port Estate was divided between Mr and Mrs Sousa by reference to the proposed subdivision.
9. In the result lots 1 and 8 were conveyed by Mr and Mrs Sousa to Mrs Sousa absolutely; lots 2, 3, 4 and 5 were conveyed by Mr and Mrs Sousa to Mr Sousa absolutely; lots 6 and 7 remained in their joint ownership. Mr and Mrs Sousa had the title to the roadways created under separate deed which they held in their joint names subject to certain easements including the one in issue.
10. Several conveyances of lots took place over the ensuing decade. Mr Rego Sousa died on the 29<sup>th</sup> June 1987. Mrs Sousa sold lot 8 to the Plaintiff, her nephew on the 29<sup>th</sup> January 1987. On the 28<sup>th</sup> September 1989 Michael DeCosta by then divorced from Patricia Harrington purchased lot 3 from Mr Sousa's estate representatives. In 1991 Mrs Sousa conveyed lot 5 to her daughter Mrs Harrington.
11. Thereafter on the 2<sup>nd</sup> October 1991 Mrs Sousa and her daughter executed a deed of exchange whereby Mrs Sousa received lot 5 and Mrs Harrington lots 1 and 2. By voluntary conveyance of September 1992 Mrs Sousa conveyed the roadways to the estate to her said daughter under separate title. The conveyance of the roadways remained subject to all easements of way over the roadways.
12. In March of 1998 The Plaintiff purchased lot 3 from Michael DeCosta. In 1999 Patricia Harrington conveyed lots 1, 2 and the road ways to the trustees of Spanish Point Trust. In March of 2008 the First Defendant purchased lots 1 and lot 2 from the aforementioned trustees; said lots were conveyed under separate title deeds. The purchase of lot 2 was made subject to the benefit of the easements of way (the roadways).

## **THE ROADWAYS**

13. The properties in issue are located in a larger area known as Hill Crescent. Mr and Mrs Sousa named their home on lot 1 Rego Port, and the area has been referred to as Rego Port Estate. I shall refer to the subdivision hereafter as the Estate for the sake of clarity.
14. The Estate is a small neighbourhood. It comprises what were the 8 original lots of the subdivision (over time there has been a merger of lots 6 and 7 and lots 1 and 2). There is a commanding view of the waters of Mills Creek and neighbouring properties to the east. Typographically the land comprising the Estate begins from an elevated approach from

the north with gradual sloping in a southerly direction whence it shortly drops off into a steep decline down to three waterside lots.

15. Lots 6, 7 and 8 are located at the Estate's most northern reach. They are at the highest elevation of the estate. A dwelling house now straddles lots 6 and 7. Patricia Harrington and her husband own and occupy this property. Access to the estate property from Spanish Point Road is via a 14 foot roadway. On entering the estate the 14 foot roadway runs along the eastern boundary of lot 7 narrowing as it deviates to the right into a 10 foot roadway which leads in a southwesterly direction to service lots 4 and 5. These lots are also elevated in relation to the remaining lots of the estate.
16. The 14 foot roadway also branches to the left and becomes a 16 foot roadway which descends southward for approximately two thirds of its length at a width of 16 feet. It drops precipitously downward to run along the western boundary of lot 8 owned by the Plaintiff. A part of the way down its length as it approaches the first third of lot 3 which is on the left (also owned by the Plaintiff) a 10 foot roadway branches off to the right in a westerly direction to lot 1. This road way traverses the northern portion of lot 2 and separates it from lot 5 situated above it topographically.
17. The above mentioned 16 foot roadway narrows at the northwestern corner of lot 2 into the subject roadway 10 foot wide. The subject 10 foot roadway continues to descend in a southerly direction running along the balance of the length of lot 3 which is situated to the east, or the left hand side of the road travelling toward Mills Creek. Lot 2 which is situated to the west is on the right hand side of the road. The 10 foot portion of the roadway shortly reaches its southern most termination point. Its road surface terminates just outside of the gate of the Plaintiff's property on lot 3.
18. At the termination point of the subject 10 foot roadway is a dock beyond which lies the waters of Mills Creek. This dock stretches seamlessly to the west along the front of lots 1 and 2. In front of lots 1 and 2 for its whole length are berths, which according to the Defendant number 15. They accommodate large vessels which allow access the adjacent dock surface directly without the need of stairs.
19. By contrast there are steps leading to the water on the portion of the dock in front of the 10 foot roadway. A pylon is clearly visible a few feet off shore situated in such a position (as was observed on the day of my visit) that a boat tethered to it would abut the dock, rendering the steps located in this portion of the dock practically useless. This is the disputed berth.
20. On a visual survey there did appear to be sufficient room for a person to immerse them self into the water from the steps, however the spring lines securing the moored boat in the disputed berth appear hazardous for any swimmer. For any purpose other than

swimming there is consequently a restricted access to the waters. Access to or by any other boat would not be possible in the circumstances.

21. The termination point of the roadway is an important factor, although not necessarily conclusive of the real issue in the case. The conveyance of the easement over the roadways for the estate lots therefore now require close scrutiny, in particular the description of the right of way over the subject 10 foot roadway.

#### **THE SUBJECT (10 FOOT) RIGHT OF WAY**

22. In so far as lots 6 and 7 are concerned, the relevant portion of the description of the subject 10 foot right of way reads as follows:

“ALSO SPECIALLY TOGETHER WITH full free and unrestricted right and liberty of way and passage for the said Michael James DeCosta and Patricia Ann DeCosta their heirs and assigns as the owners and occupiers for the time being of the said parcel of land hereinbefore described or any part or parts thereof and their respective tenants and servants and all other persons lawfully authorized by them OVER AND ALONG the roadway varying in width as shown on the said plan from Sixteen feet (16’) to ten feet (10’) and delineated and coloured yellow thereon and leading as shown thereon from its junction with the aforementioned roadway Fourteen feet (14’) wide for the majority of its length firstly in a Southeasterly direction and thence in a Southerly direction to join the Waters of Mills Creek FOR THE PURPOSE of providing access to and from the said Waters of Mills Creek”.

23. The plan annexed to the conveyance shows the subject roadway coloured in yellow. Said roadway continues across what is identified as the foreshore encroachment and terminates at the point where the said road meets the waters of Mills Creek. This plan was drawn by the above mentioned David Mello Jr. and is dated 1972.

24. As mentioned above, as a result of the court ordered partition Mrs Rego Sousa solely received lot 8 of the subdivided lots. The description of the right of way in that conveyance is the same as that for lot 8 provided in the Plaintiff’s conveyance reads as follows:

“TOGETHER WITH full free and unrestricted right of liberty of way and passage for the owners and occupiers for the time being of the said land hereinbefore described their tenants, servants and agents and all other persons lawfully going to or from the said land or any part thereof with or without animals or vehicles of all description OVER AND ALONG the said roadway delineated and coloured yellow on the said plan and bounding the said land westerly as aforesaid and leading in a Northerly Westerly direction to join the roadway next hereinafter described AND OVER AND ALONG the roadway Fourteen feet (14’) wide and coloured blue on the said plan and leading there from in a Northerly direction to join the public road known as “Spanish Point Road” AND OVER AND ALONG the said roadway Sixteen (16’) wide in a Southerly direction AND THEN

OVER AND ALONG a roadway Ten Feet (10') wide also delineated and coloured yellow on the said plan leading from the roadway lastly hereinbefore described in a Southerly direction *to* the waters at Mills Creek” (emphasis added).

25. The Plaintiff purchased lot 3 from Michael DeCosta who had earlier purchased it from the executors of Mr. Rego Sousa’s estate. As mentioned Mr Rego Sousa solely acquired lot 3 as a result of the partition ordered by the court on divorce. A brief description of the right of way so far as is relevant reads as follows:

“OVER AND ALONG the said roadway 10 feet wide for the majority of its length delineated and coloured yellow on the said plan and forming the greater part of the said western boundary of the said lot of land hereinbefore described and leading as shown thereon *from* the said waters of Mills Creek in a Northerly direction to join the said roadway next hereinbefore mentioned...” (emphasis added).

AND ESPECIALLY TOGETHER WITH full free and unrestricted right and liberty of way and passage for the owners and occupiers for the time being of the said land hereinbefore described or any part or parts thereof and their respective tenants servants and agents and all other persons lawfully going thereto or therefrom with or without animals and vehicles of all descriptions OVER AND ALONG the said roadway Ten feet (10') wide for the majority of its length delineated and coloured yellow on the said plan and forming the greater part of the said Western boundary of the said land hereinbefore particularly described and leading as shown thereon from the said Waters of Mills Creek in a Northerly direction to join the said roadway next hereinafter mentioned AND OVER AND ALONG the said roadway Sixteen feet (16') wide for the majority of its length also delineated and coloured yellow on the said plan and forming the remaining part of the aforementioned Western boundary of the said land hereinbefore particularly described and leading therefrom firstly in a Northerly direction thence in a Northwesterly direction to join the roadway next hereinafter mentioned AND ALSO OVER AND ALONG the last mentioned roadway Fourteen feet (14') wide for the majority of its length partially delineated and coloured blue on the said plan and leading from the said roadway hereinbefore lastly mentioned firstly in a Northerly direction thence in a Northeasterly direction and thence again in a Northerly direction to join the Public Road known as “Spanish Point Road”.

26. As is the case with lots 6 and 7, the plan attached to the conveyance of both lot 8 and lot 3 show the roadway extending over the foreshore to the water.
27. The description of the right of way serving lots 8 and 3 calls for an interpretation of the phrases “to the waters of Mills Creek” and “from the waters of Mills Creek”? Counsel for the Defendant sought to distinguish the quality of the grant of the 10 foot right of way in Mrs. Harrington’s above referred conveyance of lots 6 and 7 from that in the plaintiff’s conveyance of lots 3 and 8. His argument is that the reference to the waters of Mills Creek in the latter 2 description is directional only. He therefore disputes that the extent

and purpose of the right given to Mr. and Mrs. Harrington was intended to be given in relation to the Petitioner's lots.

## **THE EVIDENCE**

28. In his evidence the Plaintiff confirmed the contents of his witness statement and the exhibits thereto. There are two copy plans exhibited, one at page 30 and the other at page 31. His evidence was that the subdivision of the estate property into lots was depicted on a plan drawn up by David Mello Jr referenced S835. From the plan exhibited at page 31, tab 3 of the Plaintiff's witness statement it would appear from a note thereon that the plan for the subdivision was drawn up and dated December 7<sup>th</sup> 1965. That would have been shortly after Mr and Mrs Sousa purchased the estate property.
29. However a note on the plan at page 30 indicates that the subdivision was not registered until the 28<sup>th</sup> November 1983. All of the roadways in the estate are clearly marked on that early plan. There is no dispute that in all the relevant conveyances the subject roadways are verbally described and referred to as coloured in yellow on the annexed plans.
30. The Plaintiff's evidence is that subdivision approval was obtained on 4<sup>th</sup> January 1985. This does not appear to be entirely accurate from a close inspection of the plan exhibited at page 31 of the Plaintiff's witness statement. The plan there shows that a revision to the subdivision was approved on 4<sup>th</sup> January 1985 by the Planning Department under reference number S/835A. This revision appears to relate to minor realignments of the boundaries between lots 4 and 5, and between lots 5 and 2. The roadways otherwise remain as depicted in the early mentioned plan at page 30.
31. The plan at page 31 of the Plaintiff's witness statement appears to be the older of the two plans referred to above. The plan clearly shows that the subject 10 foot roadway extends to the waters of Mills Creek. It also reveals that the water front property and the subject road's termination point is the high water mark on the land. This evidence was not challenged by the Defendant and the plans were not disputed. I believe my assessment of the plans to be correct. I therefore accept those plans as proved as I have outlined them.
32. A large part of the dispute in this matter relates to the fact that the dock referred to above actually came into existence as a result of an encroachment on the foreshore. The foreshore encroachment can be seen depicted on the plan exhibited at page 30 aforesaid. A note thereon indicates that the foreshore licence was granted on the 3<sup>rd</sup> of January 1968. The grantees would have been Mr and Mrs Rego Sousa who acquired all of the estate in 1965. The plan at page 30 was drawn by David Mello Jr. and dated the 11<sup>th</sup> September 1989. A copy of this plan is annexed to the conveyance of lot 3 from Mr. John Rego's estate representatives to Michael DeCosta. The plan shows that the subject roadway 10 foot wide traverses the foreshore encroachment and terminates at the waters of Mills Creek.

33. The foreshore encroachment can be seen in the plan annexed to the schedule of Patricia Harrington's 1972 conveyance of lots 6 and 7 when she and her then husband Michael DeCosta acquired the lots from her parents. The plan dated 1972 was also drawn up by David Mello Jr. The subject roadway is described in the same manner and is referred to as coloured yellow on both plans. On the 1972 plan the subject roadway traverses the encroachment and terminates at the waters of Mills Creek.
34. The Plaintiff states that the primary purpose of the 10 foot roadway is to give each land owner in the estate access to the water. He states that as lot 8 is not a water side lot the right of way to the water has as its primary purpose access to the water. The Plaintiff states that when Patricia Harrington improved the dock adjacent to lots 1 and 2 he assisted Mr DeCosta in erecting the dock at the southern end of the 10 foot roadway to enable the neighbouring properties improved access to the water. He confirms that Mrs Harrington erected berths along the waterfront of lots 1 and 2 but did not erect any so as to restrict access to the water in front of the 10 foot right of way.
35. The plaintiff states that since the Defendant erected the disputed mooring in front of the 10 foot right of way she has effectively denied him reasonable use of the purpose and intent of the subject right of way. He seeks damages in the sum of the rental receipts that she has earned.
36. The earliest history of building on the waterside comes from the evidence of Mrs Patricia Harrington, the daughter of Mr and Mrs Rego Sousa. Her evidence is that her former husband Michael DeCosta constructed a house on lot 1 for her parents. Having completed that, he and her father built the original dock which ran the full length on the water side of lots 1 and 2.
37. Her evidence is that prior to the construction of the dock mangroves lined the shore in front of lots 1, 2 and 3 and the only access to the waters of Mills Creek was via the subject 10 foot roadway. It is her evidence that very liberal use was made of the roadway as an access point to the waters of Mills Creek and her father historically used and allowed others the use of that access.
38. Mrs Harrington states that she was aware that the residents of the estate property used the right of way to access the water and to egress from the waters of Mills Creek. Her evidence was that they did this particularly for the purpose of launching and removing their boats from the waters of Mills Creek.
39. After her father's death, Mrs. Harrington became the owner of lots 1 and 2 as shown above. She states that she always believed that her father's intention when creating the subdivision was that the residents of the Estate would continue to have a right of access to the water.



40. Her evidence is that she did not live in the house on lot 1, as she continued to reside in the house erected on lots 6 and 7 with her current husband David Harrington. Her evidence is that during her ownership of lots 1 and 2 at some point in the early 1990s she hired her former husband Michael DeCosta to improve the dock in front of lots 1 and 2.
41. The purpose of the improvements was to create berths for rent to boat owners who could walk on and off their boats onto the dock. By that I think that she meant large boats, as large boats were apparent in several of the moorings at the time of my observations of the area. She stated that in order to maximize space and accommodate larger boats no steps were erected on the dock in the area of the moorings.
42. It is Mrs. Harrington's evidence that she was aware of the 10 foot right of way and her father's manner of treating access to the water from it so liberally. For that reason when constructing the berths along the dock in front of lots 1 and 2 she ended the berths to the immediate west of the right of way thereby avoiding encroaching on what she believed was the resident's access to the water.
43. She states that she had the dock in front of the right of way improved for the benefit of the residents with legal access, as a means of improving their access to the water. Her evidence is that the water in front of the dock and steps at the end of the roadway was always kept open for access to and egress from Mills Creek.
44. In so far as the foreshore licence is concerned Mrs Harrington states that she obtained it because it is a government policy that any encroachment into the foreshore required it. She states that she did not believe that such licence allowed her to interfere with the estate resident's right of access to the water. Mrs Harrington further states that the erection of the mooring in issue, placed as it is at the end of the right of way prohibits access to the water for purposes previously enjoyed by the lot owners of the estate such as transporting people via the water to and from the roadway, off loading supplies from a boat, and launching a punt, all of which had been done historically.
45. Michael DeCosta, is the former husband of Patricia Harrington. After the death of Mr Sousa he purchased lot 3 from Mr Sousa's estate representatives in 1989. His evidence is that when he and his then wife acquired lots 6 and 7 the deeded right of way had a stated purpose of access and egress to and from the water because the lots were not water side lots.
46. His evidence is that he believed that when he acquired lot 3 the 10 foot right of way served two purposes in relation to lot 3. Firstly it provided access to the western boundary of lot 3, and secondly it provided a readymade access way to the waters of Mills Creek. In 1998 he sold lot 3 to the Plaintiff; his evidence is that he believed that the Plaintiff acquired the same right of way to the water over the 10 foot roadway.

47. In her evidence the Defendant states that at the time of purchase of lots 1 and 2 she was unaware of the right of way as expressed in Patricia Harrington's deed description to lots 6 and 7. She states that she did not ask anyone in the neighbourhood about the extent of the use of the 10 foot right of way. She became concerned however by the Plaintiff's use of the dock as a communal drop off point. She described that action as is irritating.
48. Further she states that the Plaintiff's guests have parked on the dock and on her property at lot 1 thereby obstructing tenants of her rented mooring from rights she has given to them to park on her land. She viewed the open water space below the right of way as an open invitation to abuse. She also wanted to prevent a group of young men whom she referred to as "dock rats" from congregating in front of the subject roadway on the dock. Her evidence is that she put the boat mooring there at the foot of the right of way to stop illegal access there.
49. The Defendants evidence is that she is not obstructing the Plaintiff's lawful right of way over the roadway. She takes the position that the Plaintiff's right is a right over and along the roadway only. Making a limited concession for the sake of argument, she is prepared to accept that given that the road way passes over the foreshore encroachment in the lot plans, the most that that affords the Plaintiff and other residents of the subdivision is access to the dock and the steps. Her evidence is that they have no right to enter the water to swim or to use a boat or for any other reason to access the water in front of the right of way.
50. The Defendant's evidence is that the Government owns the waters of Mills Creek. That she has purchased a lawfully obtained licence from the Government to erect the disputed berth in the water. Her evidence is that the Plaintiff has no such licence or privilege, but has an alternative access to the water in front of lot 3.
51. The Defendant acknowledges that access to the water is an important amenity for a property owner in Bermuda. She punctuated that remark by reference to the significant investment that she had made in acquiring lots 1 and 2 with the attendant moorings and roadways. Her evidence is that she has a right to the mooring in front of the subject roadway because the foreshore lease that she obtained from the Government includes the area of the dock in front of said roadway.

## **FINDING OF FACTS**

52. With the foregoing evidence in mind, my visit to the locus in quo (by the expressed invitation of counsel) and my review of the relevant documents, I find the facts to be as follows. The historic evidence and the documentation that I rely upon are not disputed, as they turn on matters that arose over time long before the Defendant became an owner of lots 1 and 2.

53. I find as fact that the roadway in issue originally terminated at its southern most extreme at the high water mark of the waters of Mills Creek. For this I place reliance on the original plan annexed to the conveyance of the whole estate to Mr and Mrs Rego Sousa in 1965. I find that that plan, the original subdivision plan and each of the plans used in the conveyances of the resultant lots upon transfer, sale or resale were drawn by the same surveyor David Mello Jr.
54. I find that with particular relevance to each non water side lot in the subdivision, a broadly worded unrestricted right of way along the subject road way extends beyond the boundaries of each respective lot southward to the waters of Mills Creek.
55. I find as fact that a foreshore licence was obtained by Mr and Mrs Rego Sousa in 1968 and, whether prior to said licence ( December 1965) or subsequently the roadway in issue was expressly and virtually extended on the above mentioned plans so that it crossed the foreshore encroachment so as to reach the waters of Mills Creek.
56. I find accordingly that when the subdivision was registered and the partition granted the rights of way over the road ways included a right of way over the foreshore to the water.
57. I accept the evidence of Mrs Harrington, Mr Michael DeSilva and the Plaintiff and find that the dock at the southern end of the subject right of way is a concrete expression of the subject road way's extension onto the foreshore.

## THE LAW

58. Turning to the questions above concerning the nature and extent of the grant, is clear from the authorities referred to by counsel that the court's role is to ascertain Mr and Mrs Sousa's objective intention by interpreting the grant on the basis of the words used. This principle has been authoritatively stated in Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 149 which was relied on in this court by Mrs. Justice Dangor in **Ferreira-v-Aguiar** Civ. 1992 No. 405 @p 11 which provides:

“If a right of way is claimed under an express grant which is actually existing, the nature and extent of the right depends upon the proper construction of the language of the instrument creating it. It is for the court to put the true construction upon the words in the grant, guided in the absence of any clear indication of the parties, by the maxim that the grant must be construed most strongly against the grantor.”

59. Counsel for the Defendant contends that there can be no issue as to the proper construction of the words used or the clear indication of the parties in relation to the right of way expressed in relation to lots 3 and 8. Counsel bases his contention on the absence of words such as *access to*, or *egress from* the waters of Mills Creek; words expressly used in the grant contained in the conveyance of lots 6 and 7 to Patricia Harrington by her parents.

60. Guidance on construction of the language of an easement has been provided by the Court of Appeal in **Fisher-v-Cox** [1988] Bda LR 2. Taking their cue from Gale on Easements and several decided cases from England and Wales the Court of Appeal stated:
- “in the case of an easement expressly granted or reserved the right of the dominant owner depends on the words of the relevant deed construed in the light of the surrounding circumstances at the time of the grant.”
61. The Court of Appeal went on to consider how the intention of the grantor was to be ascertained. They quoted from Halsbury’s Law of England 4<sup>th</sup> edn Vol 12 sec. 1459, as follows:
- “the intention must be gathered from the written instrument in the light of such extrinsic evidence as is admissible for the purpose of construction. The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being for the purpose of interpretation, equivalent to the intention.”
62. It becomes necessary then to interpret two phrases in the grant of the right of way in issue, to declare their meaning and to give effect to the intention as expressed. The phrases are, “*to the waters of Mills Creek*” and “*from the waters of Mills Creek*”. What could have been Mr and Mrs Rego Sousa’s objective intention when they partitioned the estate and granted one to the other lots with a right of way over the subject 10 foot roadway *to* and *from* the water?
63. Mr Pachai for the Defendant argues that Mr and Mrs Sousa could not have intended to grant each other access to the waters of Mills Creek because both received waterside lots. Mr Sousa received lot 2 and Mrs Sousa received lot 1. He argues that each of the parties could have allowed access to their waterside docks for recreational purposes without creating any implied easements. In other words Mr and Mrs Sousa would have had no need to grant access to and egress from the water in relation to their non waterside lots. Mr Pachai for the Defendant further asserts that the two phrases are unambiguously directional only.
64. I am not impressed with these arguments. I believe that there is more force to Mr Marshall’s argument that an important factor in this case is that lots 1 through 8 form a subdivision of what had previously been a single property under a husband and wife’s joint ownership. The relevance of the subdivision he underscores by relying on the fact that the roadways were conveyed under separate title from the lots; a feature he contends is commonly found in subdivisions.

65. The fact is that a subdivision was intended prior to the divorce and is evident by the drawing of a plan. It is as a consequence of the divorce that the partition resulted in the registering of the subdivision in 1985. I think two points arise from this.
66. Firstly there is the clear implication that whether in the short term or the long term lots would be disposed of whether by exchange, voluntary conveyance, sale or otherwise. The earlier disposition to their daughter stands in proof of this.
67. Secondly, a point relied on persuasively by Mr Marshall; it is inconceivable that in creating a subdivision Mr and Mrs Sousa would have intended the non waterside lots to have the same rights of way over the roadways, but not the same right to access and egress from the water as was granted explicitly to lots 5 and 7.
68. A further relevant factor is that for the non waterside lots and in particular lot 8, the only purpose served by granting a right of way over the subject roadway beyond each lot's boundary to the southern most extreme of the subject road way is to provide a connection to the waters of Mills Creek. At the time of the grant Mr and Mrs Sousa were clearly aware of the value of access to the water.
69. It is trite law that a right of way is a means of access to the dominant tenement (Megarry and Wade Real Property 5th Ed. P. 900). It stands to reason that if the right of way to lot 8 as provided is *from* the waters of Mills Creek then the waters of Mills Creek at the southern end of the 10 foot road way is as much an access point to lot 8 as Spanish Point Road is at the northern end of the 14 foot road. Following that logic strictly the same reasoning would apply of course to lot 3; the waters of Mills Creek at the southern end of the 10 foot road way is as much an egress point from lot 3 as Spanish Point Road is at the northern end of the 14 foot road.
70. There is nothing in the evidence before the court that suggests that Mr and Mrs Sousa intended to restrict non waterside lot owners from accessing the waters of Mills Creek at the end of the roadway. Quite to the contrary the uncontroverted evidence is that Mr and Mrs Sousa were aware of the access to the water via the subject roadway, used it themselves and allowed liberal use of it by others. The evidence is that they never sought to obstruct it at any time or at the time of the grant of the right of way in respect to lots 3 and 8.
71. The evidence of Patricia Harrington gives effect to Mr and Mrs Sousa's intention at the time of creating the subdivision and partitioning their interest in the lots. The evidence of Michael DeCosta provides further support of the intention of Mr and Mrs Rego Sousa that the subject roadway was a connection between each lot and the waters of Mills Creek.

72. Mr Marshall makes the point that at the time of drafting the easements a different lawyer was used by Mr Sousa in reference to lot 3 then by Mrs Sousa in respect to lot 8. He argues that in respect to the lots each lawyer used different ways of expressing the grant, however in common each with the other is the connection to the water as shown above beyond each southern boundary.
73. Mr. Marshall suggests that Mr and Mrs Sousa's intention is apparent, the lawyers just did not use as specific drafting language such as was used in relation to the conveyances of lots 6 and 7 to Patricia Harrington. I find force in this argument. The grantors' intention is clear from the surrounding circumstances pertaining at the time of grant. I conclude therefore that the phrases 'to the waters of Mills Creek' and 'from the waters of Mills Creek' are more than direction and are intended to grant to the owner of lots 3 and 8 access to and from the Waters of Mills Creek.
74. Having found as fact that the dock at the southern end of the subject right of way is a concrete expression of the subject road way's extension onto the foreshore the question then arises whether the Plaintiff has a right to use the dock and steps to access the water without obstruction by the Defendant such as with the mooring currently in place. Counsel for the Defendant submits that he does not. In support of that he relies on two things; the foreshore licence and a modern statement of principle set out in Gale on Easements in the 15<sup>th</sup> edition. It provides:
- "As every easement is a restriction upon the rights of property of the owner of the servient tenement no alteration can be made in the mode of enjoyment by the owner of the dominant tenement, the effect of which will be to increase such restriction beyond its legitimate limit. In the case of an express grant of the easement, the limit depends on the words used."
75. That principle was relied on in the case of **Fisher-v-Cox** [1988] Bda LR 2 to restrict activities on a dock and waters beyond the dock, access to which express provision had been made. In that case sunbathing was held to be a change in the mode of enjoyment of an expressed right of way and access to the dock. Mr Pachai for the Defendant relies on this authority to restrict the Plaintiff's access to the dock and to the water. His contention is that any access such as a right to unobstructed use of the water in front of the dock for the purposes proposed by the Plaintiff is an alteration in the mode of enjoyment of the right of way by the Plaintiff as owner of lots 3 and 8.
76. I do not agree with the application of the above mentioned principle in the manner suggested by the Defendant in this case. Such an interpretation of the grant is too restrictive. In my view counsel for the Defendant has mistaken activities consistent with the quality and extent of the enjoyment of the right granted with a change in the mode of enjoyment of the right granted.

77. It would seem to me in the circumstances that unobstructed access at both the northern end and southern end of the roadways serves the purpose of the rights of way; that purpose being a way to the subject lots via Spanish Point Road from the north and via the waters of Mills Creek from the south.
78. I am fortified in this view by the principle expressed in Halsbury's Law's vol. 16 (2) (Reissue) that:
- ‘the express grant of an easement is also the grant of such ancillary rights as are reasonably necessary for its exercise or enjoyment. The ancillary right thus implied must be necessary for the use and enjoyment in the way contemplated by the parties, of the right granted.’
79. I have demonstrated that the right of way over the subject 10 foot road way includes a right over the dock. I have found from the surrounding circumstances at the time of grant that Mr and Mrs Sousa intended that lots 3 and 8 have access to and from the waters of Mills Creek consistent with their historic use and liberal treatment of the subject road way.
80. The implied ancillary rights that the Plaintiff argues for require an unobstructed liberty of way *to* and *from* the water by the Plaintiff, his tenants, servants and agents or persons lawfully going to each of his properties with or without vehicles. Specifically the Plaintiff argues for the following rights:
- (1) To obtain access to and from Mills Creek and to enjoy all of the normal amenities that are associated with access to a dock;
  - (2) To access the right of way from the water via the dock that was built for that purpose;
  - (3) To launch and pull up boats;
  - (4) As a pick up and drop off point; and
  - (5) As a staging area for the activities referred to above.
81. In my view what the Plaintiff has a right to do would be any activity carried out and or enjoyed when accessing the water from his properties along the right of way or egression from the water along the right of way to his properties. That would have been in the contemplation of the parties when granting the right of way over the subject roadway.
82. In this sense conveyance by boat to and from the dock, would be necessary for the use and enjoyment in the way contemplated by both Mr and Mrs Sousa of the right of way granted. Launching and pulling up a punt would also be an implied ancillary right. Swimming to or from the dock would also be a right reasonably necessary to the use and enjoyment of the right of way as was contemplated by Mr and Mrs Sousa.
83. Using the dock as a staging area for these purposes would also be reasonably necessary to the use and enjoyment of the right granted. In my opinion none of these activities if

carried out reasonably involve an alteration in the mode of enjoyment of the right of way by the Plaintiff, the effect of which will be to increase the restriction on the Defendant's property beyond its legitimate limit.

84. The ancillary rights only involve passage into and from the water by a person or by means of conveyance that are necessary to using and enjoying the right of way. I rely on the fact that the right of way over the roadways is very generously worded. Secondly exercising the ancillary rights places no restriction what so ever on the Defendant's property.
85. The use of the dock as a staging area for the rights referred to above necessarily involve stopping on the dock for brief periods of time, but would not justify parking on the dock for longer than would be reasonably required. None of the uses would permit coming onto the Defendant's property at lot 2 for any purpose including parking. Loitering, sitting or generally occupying the dock for other recreational purposes including smoking or drinking are activities of a different nature than the activities contemplated by the grant.
86. However the Defendant has argued that the licence that she obtained in for the mooring is superior in right to any claim that the Plaintiff has to the water in front of the dock. I disagree. The right of way and the purpose for which Mr and Mrs Sousa granted and respected it cannot now be defeated by the Defendant. The grant precedes the Defendant's foreshore licence; what the Defendant obtained on 4<sup>th</sup> March 2008 is an assignment of the lease granted in 1996.
87. Mr and Mrs Sousa and in turn Patricia Harrington all gave effect to the purpose of the right of way by preserving the waters in front of the right of way for access and egress notwithstanding that they held foreshore licences; Patricia Harrington having obtained the licence in 1996. Passage through the area as contemplated does not require a licence from Government. The Defendant therefore can claim no greater right to the waters in front of the right of way than her predecessors in title had in the circumstances (see Halsbury's Law's above).
88. The Defendant's purported exercise of right under the foreshore licence amounts to interference by the servient tenement of the use and enjoyment of the right of way of the dominant tenement. A licence permitting the Defendant or even a demand by Government pursuant to a policy cannot absolve her of the duty to give effect to the grant (see **Bond-v-Nottingham Corporation** [1939] 2 All ER 610). Further there are ample authorities that demonstrate the legal principle that the owner of the servient tenement cannot do anything in respect to the easement so as to render it incapable of enjoyment by the owner of the servient tenement (see also **Jones-v-Prichard** [1980] Ch D 630).



89. In all of the circumstances I declare and order that the Plaintiff's right of way includes an unrestricted liberty of way to pass over the dock and into and out of the waters of Mills Creek for such of the ancillary rights as have been stated above. Therefore the Petitioner shall have:

(1) A mandatory injunction requiring the First Defendant whether by herself or by her servants, tenants or agents or otherwise to;

(a) forthwith remove the centre console boat and any other obstructions in the waters (including the pylon erected in 2009 abutting the right of way);

(b) refrain from erecting (or permitting any use in the vicinity of the dock that interferes with the Plaintiff's enjoyment of the right of way and the purposes for which the right of way was granted; and

(c) refrain from using her foreshore licence and mooring permission in a manner that interferes with the uses in paragraph 6 above;

(2) A mandatory injunction requiring the Second Defendants to remove their boat from the right of way area, and to refrain from any further activity that obstructs the Plaintiff in his use and enjoyment of the right of way;

(3) An accounting of the monies that the First Defendant has earned from renting the mooring to the Second and Third Defendants;

(4) Damages to the sum of monies earned from the rental of the subject mooring

(5) interest

90. Unless the defendant can show within 7 days of the date hereof reasons why costs should not follow the event, the usual rule, the plaintiff shall have his costs taxed if not agreed.

Dated this                      day of    2012

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Charles-Etta Simmons

Puisne Judge

