Clerk of the Court

8.3.88

Registered Easements

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HONOURABLE THE CHIEF JUSTICE

CAUSE NO. 71 OF 1985

THE 15th, 16th, 18th, 19th, 22nd and 23rd FEBRUARY 1988.

BETWEEN	MURMARSON LTD.	FIRST PLAINTIFF
	and	
	MICHAEL A. BROWN AND JO-ANNE BROWN	SECOND PLAINTIFF
	and	
	CHARLES A. MURRAY	THIRD PLAINTIFF
	and	
	DONOVAN ST. C. SMITH	FOURTH PLAINTIFF
	and	
	MICHAEL MARSHALL and LELA A. MARSHALL	FIFTH PLAINTIFF
	and	
	GRAHAM IRA THOMPSON and VIRGINIA THOMPSON	SIXTH PLAINTIFF
	and	
	JOHN CARTER DARBY and MRS. DARBY	SEVENTH PLAINTIFF

(hereinafter collectively called the Plaintiffs)

AND	KENT DALMAIN ELDEMIRE and ANGELA C. ELDEMIRE	DEFENDANTS

Mr. R. Alberga Q.C. instructed by Mr. M. Alberga of Myres & Alberga for the Plaintiffs

Mr.D. Ritch of Ritch and Conolly for the defendants.

COLLETT C. J. **J U D G E M E N T**

This action concerns certain easements which have been registered over parcels known as Savannah Block 28E parcels 49 and 50 in the Buena Vista subdivision in favour of the registered proprietors

of other parcels in that subdivision, including the Plaintiffs. The Defendants are the present registered proprietors of parcels 49 and 50. The easements consist of five vehicular and pedestrian rights of way which collectively run from the main public road at the northern entrance of that subdivision to the seashore which forms its southern boundary. These easements were granted by the First Plaintiff company Murmarson Ltd. which laid out the subdivision in or about 1980 pursuant to a development permission granted under the Development and Planning Law upon application made by Christopher Evans, Land Surveyor, acting for that company.

It is not in dispute that the developers conceived this whole subdivision as a high class residential area. The evidence is that they wished to lay particular stress upon the amenities which could be afforded to residents by reason of uninterrupted view obtainable of the ocean from the cliff which overlooks its southern boundary and by way of access to the sandy beach or cove which lies at the base of the cliff. Accordingly, they not only imposed restrictive covenants upon each of the parcels, which limit their use to single family dwelling houses of a substantial character, but also granted the easements which are the subject matter of this action. The subdivision runs from north to south and each of the 17 lots are designed to front onto a 30' access road over which the proprietors of each of them have been granted vehicular access. That access has been extended Southward over lots 49 and 50 by further grants of like easements which terminate in a wider rectangular area measuring 60' by 50' located as close as possible to the top of the cliff. From the southern side of that rectangle the pedestrian right of way, 6' wide then leads on down the cliffside to the seashore along the eastern side of lot 49.

Beyond the eastern boundary of lot 49 and part of the eastern boundary of lot 50 lies lot 64 of Savannah Block 28E but it is important to note that this lot does not and never did form part of the Buena Vista subdivision. Lot 64 was originally in the ownership of a Mrs. McTaggart who, together with her husband Mr. McTaggart, built a substantial two storey house with a balcony and curtain walls upon it in or about 1982. It is common ground that a small

portion of the structure of that house abuts or encroaches some 4' over the boundary onto that portion of lot 49 which is burdened with the easements of vehicular right of way and that a considerable part of its western curtain wall encroaches some 18' 6" to the westward of the boundary onto that same burdened portion of lots 49 and 50. That encroachment in law amounted to a trespass insofar as the persons entitled to possession of those lots were concerned but it also and quite separately amounted and still does amount to an actionable nuisence at the suit of any one of the lot owners entitled for the time being to the benefit of the easements of way over lots 49 and 50.

There is clear evidence that Mr. McTaggart was made aware at an early stage in 1982 of the encroachment of his building works onto the lots in question. I accept the evidence of Mr. Arthur Marshall to the effect that a number of meetings were held with himself and other representatives of Murmarson Ltd. at which Mr. McTaggart offered assurances that the encroachments would be rectified in the course of time. It appears that these assurances induced the first Plaitiff to refrain for the time being from filling in or finishing the greater part of the 60' x 50' rectangular area to the west of the McTaggart house which was designated as a turning area for vehicles using the right of way.

During this period there is no doubt that Mr. McTaggart was in negotiation with two brothers by the name of Maynard who between them owned the servient lots 49 and 50 of the subdivision and it appears from the evidence of Mr. Evans and the plans identified by him that the purpose of those negotiations was to relocate the western boundary of lot 64 further to the westward on lot 49 so that the encroachments should no longer constitute a trespass. As part of those negotiations it was suggested that the site of the turning area should be moved to a site lying outside the northwest corner of the McTaggart house which would be re-lotted as part of lot 50 and would replace the turning area designated by the existing easements. It is self evident that such a change could not be legally effected merely by agreement between the McTaggarts and the Maynard brothers alone, since it would necessarily involve an alteration to the rights of way enjoyed by the other lot owners in the subdivision. For this reason it would be logical to involve

at an early stage Murmarson Ltd. the developers. There is a letter dated 26th July,1982 written on behalf of a number of the lot owners to the Director of Planning which indicates such an involvement and despite Mr. Marshall's denial in evidence that his comapny was so involved I am satisfied that it was indeed and that the proposal was given serious consideration at the time.

It is equally evident however that the proposed changes came to nothing. The reason for this failure can only be a matter of surmise but it is on record that Mr. Evans did further survey work and drew further plans upon the instructions of the McTaggarts and with the approval of the Maynards. The plans in question were lodged with the Land Registry in support of an application for re-lotting but before this could be effected, in December 1983 a firm of Attorneys acting on behalf of the Maynards revoked their approval and withdrew the documents from the Registry. In the event the re-definition of the boundaries between lots 64 and lots 49 and 50 was never registered and never therefore took effect in law.

At or shortly after these events the 1st Defendant, Mr. Kent Eldemire, entered into negotiations with Mr. McTaggart for the purchase of lot 64 and the house and appurtenances which had been built upon it. Those negotiations resulted in a sale and a transfer of title into the names of the two Defendants which was duly registered on 25th April 1984. Shortly after that sale the McTaggarts left these Islands and their present whereabouts has not been ascertained. Mr. Eldemire, who is an experienced real estate agent familiar with the Torrens system of land registration in this and other jurisdictions, elected to negotiate this purchase without the benefit of legal advice. In evidence he stated that he examined the Land Register and inspected the pertinent information as to the title not only of lot 64 which he was purchasing but also of the adjacent lots 49 and 50 and was, therefore, at the time of purchase quite well aware of the existence of the registered easements of way in favour of the other lot owners. Furthermore, although in correspondence before action and in the Defence and Counterclaim the Defendants had alleged that they were unaware of the encroachments at the time they bought this lot, Mr. Eldemire in evidence admitted that he was in fact aware of the existence of these encroachments at that time although he was also aware of the negotiations in progress designed to solve the problem

which they posed.

Mr. Eldemire denied the suggestion put to him in cross-examination that he had taken a chance by proceeding with his purchase of lot 64 in the light of his knowledge of an unresolved encroachment problem. As an experienced real estate agent however, it must have been apparent to him that the relocation of the boundaries of the lots in question had not been legally effected by any registration of the required instruments and that the possibility remained that the negotiations between the McTaggarts and the Maynards might not in the end bear fruit. He also agreed that he had knowledge of the fact that the Maynards had withdrawn their consent to the re-lotting application, a fact that at the very least would have indicated to his mind a temporary hitch in those negotiations. Moreover, Mr. Eldemire also stated in cross examination that he never did approach the other lot owners in the subdivision prior to making his purchase so as to ascertain whether or not they were in agreement with the changes which were proposed to the location of their right of way. Bearing these considerations in mind it is impossible to resist the conclusion that Mr. Eldemire did indeed decide with full knowledge of the facts to take a chance that he would subsequently be able to resolve the problem by securing the agreement of the other persons whose respective rights would necessarily be involved in any settlement.

Shortly after completion of the purchase a letter was addressed to Mr. Eldemire on 18th May 1984 by the Attorneys for the Plaintiffs drawing attention to the existence of the encroachments and demanding either their removal or the holding of a meeting to explore alternative means of solving this problem. Mr. Eldemire responded to that letter on 26th June, 1984. In the interim however he had successfully negotiated with the Maynard Brothers for the sale to the Defendants of the whole of lots 49 and 50 and those lots were subsequently transferred into their names. He adverted to that purchase in his written reply which set out a proposal for solving the problem. This involved the relocation of the turning area upon the north east corner of lot 50 and the construction of a 10 foot easement along the northern and western boundaries of that lot and down the western boundary of lot 49: it also involved the establishment of new steps at the southern end of the right of way to give access

to the beach. This is substantially the proposal which the Defendants have persisted with up till the present time and which, by their counter claim, they are asking the Court in effect to impose over the objections to the Plaintiffs.

The Plaintiff's objections to the Defendants' proposal were made clear in a letter from their Attorneys dated 4th July 1984. Thereafter the 1st Defendant approached the Director of Planning seeking permission to vary the existing easements to his proposed new location. He was met with the reply that such easements could only be released by agreement of the owners of the dominant tenements or else by order of a court; an unexceptionable statement of the law which is contained in the Director's letter of 6th August 1984. In that letter the Director suggested to Mr. Eldemire that he should seek planning approval for his proposals and then carry out the necessary work on the ground with a view to enticing the other lot owners to agree to the proposed variation. This suggestion was subsequently followed by Mr. Eldemire insofar as, sometime in 1985, he put in hand the necessary work which has resulted in the creation of a new asphalted turning area, pathway and steps down to the beach in the location which he proposed. These remain in place at the present time.

Meanwhile however the Plaintiffs by their Attorneys' letter of 20th August, 1984 raised a counter-proposal for solution of the problem. That was in effect for the shifting westward of the vehicular rights of way to the extent necessary to re-establish them beyond the area of the encroachment, a shift which was estimated at some 15' in the letter but which the evidence at the trial indicates would be of the order of 18' 6" in order to accomplish its purpose. That counter proposal, which the Plaintiffs in turn have persisted with down to the present time, would leave the turning area at the top of the cliff to the westward of the Defendants' house and, subject to one minor issue which will be examined separately, would also enable the existing pedestrian right of way to the seashore and the steps which have been constructed to facilitate its use to remain in use the benefit of the lot owners generally as originally envisaged.

The Defendants, however, rejected this counter-proposal. It is not

difficult to discern from the evidence why they did so. In his letter of 31st July, 1984 to the Director of Planning Mr. Eldemire stated - "I intend to combine the adjoining land with my home and therefore do not wish to have a public (sic) easement running through the middle of my property". Although in his testimony Mr. Eldemire disclaimed any present intention of combining the lots, he did in cross-examination assign equal importance to the aspect of preserving his own and his familiy's privacy with to the aspect of solving the problem of the encroachments. A glance at the very helpful survey plan prepared by Mr. Evans in 1985 and put into evidence is sufficient to show that the counter proposals of the Plaintiffs would in practice prevent the consolidation of the three lots owned by the Defendants into a single area which could be laid out as pleasure grounds and would permit the passage of others on foot or in vehicles at a far closer proximity to the Defendants' house than would the use of the facilities constructed by Mr. Eldemire at his preferred alternative location.

By their Writ and Statement of Claim filed on 13th February, 1985 the Plaintiffs are asking the Court to declare and enforce by injunctive relief the original easements of way in their favour, alternatively they seek a modification of those easements by shifting them westward in accordance with the counter-proposal already noted together with injunctive relief to protect them in their new location. By their Defence and Counterclaim the Defendants deny the Plaintiffs' right to that relief and seek the Court's intervention to relocate the easements along the route of the Defendants' proposed alterations as already constructed on the ground by them, a course which the Plaintiffs in turn deny should be adopted by the Court for a number of reasons. These are the issues for determination in this action, which will now bear examination.

The starting point for this examination is S.96 of the Registered Land Law (Revised) of the Cayman Islands. That section reads as follows:-

> "The Court shall have power, on the application of any person interested in land affected by an easement, restrictive agreement or profit by order wholly or partially to extinguish or modify any such easement, profit or restrictive agreement (with or without payment by the applicant of compensation to any person suffering loss in consequence of the order), on being satisfied -
>
> (a) that, by reason of changes in the character

" of the property or the neighbourhood or other circumstances of the case which the court deems material, the easement, profit or restrictive agreement ought to be held to be obsolete; or

(b) that the continued existence of the easement, profit or restrictive agreement impedes the reasonable user of the land for public or private purposes without securing practical benefits to other persons or, as the case may be, will unless modified so impede such user; or

(c) that the proposed discharge or modification will not injure the person entitled to the benefit of the easement, profit or restrictive agreement.".

This Law provides the only available statutory authority for the intervention of this Court to modify the easements in contention in this case. Its genesis is section 184 of the Law of Property Act 1925 in England. That section however, unlike its Cayman Islands counterpart affects only restrictive covenants, which consist of negative limitations on the use to which the land affected may be put as contrasted with easements whose purpose is to grant positive rights of user to others over the land in question.

The first point taken in regard to section 96 is the Plaintiffs' submission that the alternative proposals made by the Defendants in their counterclaim do not constitute any modification of the existing easements within its true meaning and intendment. Mr. Alberga submitted that what the Defendants in fact are seeking is the grant of an entirely new set of easements in a different location, which is beyond the power of the Court under the section to impose, as well as extinguishment of the existing easements.

Reference to the Shorter Oxford Dictionary discloses that the original sense of the words "to modify" was to limit or restrain. A later accepted meaning is to make partial changes in, to alter without radical transformation. It was in the latter sense that the word "modification" was construed in the cases cited at p. 1687 of Strouds Judicial Dictionary and I accept that sense as the proper construction to place upon the word "modify" as used in section 96. The Defendants' proposals are for the substitution of vehicular and pedestrian rights of way leading from the access road of the subdivision to the seashore by a different and longer route along a different portion of the servient lots than the portion over

which the original easements lie. Those who are now entitled to use the existing easements would then be entitled to use the proposed easements for the same purposes, namely, for access to and egress from the beach and for the movement and turning of vehicles as necessary.

Thus considered I am unable to reach the conclusion that the existing easements would be extinguished or that their nature would even be radically transformed by the Defendants' proposals. Accordingly, it seems to me that what the Court is being asked to do in the counterclaim is to modify the existing easements albeit to a considerable extent. I hold that it is not beyond the jurisdiction of the Court under S. 96 to give effect under paragraph 1 of the Counterclaim provided always that at least one of the conditions for the exercise of that jurisdiction as set out in paragraphs (a) to (c) of that section are established to its satisfaction. In doing so I am fortified by the decision of Hutchinson A.C.J. in Re Lewis a New Zealand decision reported at (1959) NZLR 1040 in which he held that a similar relocation of the route of an existing right of way over servient land amounted to a modification of the easement in question rather than the extinguishment of that right and the creation of a new one.

Clause 26 of the Counterclaim rests the Defendants' claim to relief under the section upon the basis of paragraph (c) rather than of either paragraphs (a) or (b) and indeed I can see no evidence to suggest, either that the existing easements are obsolete within the meaning of paragraph (a) or that they impede the reasonable user of lots 49 and 50 as a whole to any extent greater than the modified easements would impede them without securing practical benefits to the other lot owners, as required by paragraph (b). Paragraph (c) then invites a consideration of the question, whether the Defendants proposed modification of the easements here will injure the lot owners who are entitled to the benefit of those easements and it is not disputed that the onus lies upon the Defendants to satisfy me that no injury will result.

Although the word "injure" in S. 96 (c) of the Cayman Law is not

qualified by the word "substantially" as it is in the comparable wording of the English section 184, Mr. Ritch submitted that upon the true construction of it, such a qualification might be implied. However, in Re Mason and the Conveyancing Act, a New South Wales decision reported at (1961) W.N. 925 where the applicable statute included the word "substantial", Jacobs J. observed that the word does not in context mean a large or considerable injury but rather an injury which has present substance, that is to say, not a theoretical injury but something which is real and which has present substance. I am content to adopt this formulation and to approach the present question with a view to deciding whether the Defendants' proposed modification will entail any real injury to the legitimate interests of the Plaintiffs or whether, as Mr. Ritch contends, the injury suggested is purely theoretical because, properly considered, the Plaintiffs will be getting as good or better and more convenient right of way than that which the present registered easements afford to them in every material respect.

In this connection I must bear in mind the observations of Farwell J. in Re Henderson's Conveyance (1940) 1 Ch 835 at p 846 when he held that the comparable section of the English Statute was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner merely because in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes. That observation was cited with approval by Romer L.J. in giving the leading judgement of a unanimous decision of the English Court of Appeal in Truman, Hanbury, Buxton & Co. Ltd.'s Application (1956) 1 Q.B. 261. It was again cited with approval by a differently constituted Court of Appeal In re Ghey and Galton's Application (1957) 2 Q.B. 651. It is difficult to avoid drawing from the totality of the evidence in the present case an inference that the primary purpose of the Defendants' proposed modification of the easements here is to make his residential property more enjoyable or more convenient for his own private purposes than it would be if the far less considerable modification entailed by the Plaintiffs counter-proposal were to be adopted instead.

The essence of the Defendants' case upon this issue is that, when analysed, the rights of way which would be accorded to the Plaintiffs by the Defendants' proposed modification are just as convenient if not more so than the existing easements with one exception, that is to say the uninterrupted view of the sea obtainable from the existing designated turning area; and that in law and on a proper construction of the existing easements no right to enjoy the view from that location is conferred. I was referred to Aldred's case (1610) 77 E. R. 816 which established the proposition that an action of nuisence will not lie at Common Law for the interruption of a view or prospect. Accepting as I do the validity of that proposition, it by no means follows that the existence of a view or prospect is a factor to be ignored when the question under consideration is whether or not a restriction on the use of land ought to be modified so as to permit that view to be impeded and whether or not such a modification tends to the injury of those who are entitled to enjoy it. In Gilbert v Spoor (1983) 1 Ch. 27 the English Court of Appeal upheld a decision of the Lands Tribunal refusing to allow the modification of a restrictive covenant which would have permitted interference with a resplendent landscape view obtainable, not from the properties of the objectors to the modification but from land in the immediate vicinity. In that case Eveleigh L. J. observed that the loss of a view just round the corner from land may have an adverse effect upon the land itself for the loss of the view could prove detrimental to the estate as a whole.

It may indeed be the case as the Defendants contend that the rights of way conferred by the existing easements do not extend to parking rights upon the designated turning area or to allowing lot owners and their families to congregate at that point for social purposes or for an extensive admiration of the seascape. Upon any view however, they extend to the right to drive and reverse, to take up or set down passengers or domestic items and some enjoyment of the prospect thus obtained is thus a practical benefit which the right confers upon those entitled to that privilege. The same prospect is available to those who use the pedestrian right of way so as to approach the sea shore from that direction upon foot.

It is in my judgment impossible to say that if the lot owners of the Buena Vista subdivision are to be deprived of their rights under the existing easements and are instead compelled to approach the seashore by a longer and more circuitous route, to stop their cars and to reverse them in an area which will afford them no view of the sea whatever, then they will suffer no real injury. Properly considered what is proposed by the Defendants seems calculated to relegate the other lot owners of the subdivision to the status of being second class residents, obliged to approach the seashore by a concealed roundabout path and to stop their vehicles well short of the place where they could confidently expect to obtain a satisfying view of the ocean for however short a period. Under their proposal the Defendants alone will be entitled to approach the seashore by the direct access which the first Plaintiff had constructed for the benefit of all. In effect the general view will have become a private view for the Defendants' benefit alone and the Plaintiffs will be left with a substituted viewpoint 23' 1" wide from the westermost extremity of the clift on lot 49. Their rights are literally to be pushed aside.

There is another and quite separate reason why it cannot be shown on this evidence that no injury will result from the proposed modification to any of the Plaintiffs. That concerns the real incidental nuisence created primarily to the annoyance of the occupants of lot 51 but also to a lesser degree to those of lot 46 and to those of lot 47 if it should be built upon in future. This nuisence is caused by the noise of turning vehicles in the turning area which the Defendants have laid out at the northeast corner of lot 50. At night it is compounded by the headlight beams of these vehicles and sometimes by the playing of stereo music. The proximity of the house on lot 51 to this new turning area is striking and it could not in my estimation, formed when the Court visited the scene, fail to depress the value of lot 51 should the owner ever wish to sell that property.

For these reasons and despite the painstaking comparison which Mr. Ritch undertook between the merits and demerits of the existing easements and the proposed modifications I am at the end of the day quite satisfied

that the Defendants have not been able to establish that any one of the three possible prerequisites for the exercise of the Court's jurisdiction under section 96 exist in relation to paragraph (1) of their Counterclaim. In particular they have not satisfied me that no injury will result to the persons entitled to the benefit of these easements under paragraph (c) of that section.

My finding in that respect makes it strictly unnecessary to consider the further question of whether the Court would be prepared in any case to exercise its undouted discretion in favour of the Defendants proposed modification rather than against it. However on this issue also I have come to a clear determination and, in case the matter should go further, it is right that I should make it known. This is not in my judgment a proper case for the exercise of discretion in favour of the Defendants for the following reasons. Firstly, Mr. Eldemire bought lot 64 with knowledge of the existing encroachments and of the existing easements. As I have found, he took a chance and that chance having not come off, it is not for this Court to relieve him of his mistake over the objections of his neighbours. Secondly, there exists in the Plaintiff's counter proposal a perfectly reasonable alternative solution which will not involve the demolition of any structural works upon the Defendants' property and which will merely ensure to the Plaitiffs' benefits which they contracted to assume when each one bought his lot. Thirdly, the predominant purpose which the Defendants have had for persisting so tenaciously with their proposed modifications in preference to the Plaintiff's counter proposal is quite obviously to preserve and even to enhance the privacy of their own residence if necessary to the detriment of the other lot owners and to preserve the value of their own land if necessary at the expense of that of the Plaintiffs. This as Farwell J. observed it is not the purpose of the section to facilitate.

Paragraph (1) of the Cournterclaim must therefore be dismissed. The remaining paragraphs of the counterclaim are concerned with alleged infringements of the right of way over lot 56, the access road on the part of the third Plaintiff Mr. Charles Murray, but the Defendants by

their counsel elected not to persue these claims at the trial and no evidence was led in support of these allegations. Accordingly those paragraphs of the counterclaim also must be dismissed.

It remains to deal with the claims of the Statement of Claim by the Plaintiffs. At the trial by their counsel the Court was urged to grant them relief in terms of the alternative application for modification of the easements by moving them westward for a sufficient distance to clear the encroachments of the Defendant's house and wall - that is a matter of some 18' 6". That course was urged in preference to the claim for injunctive relief which would entail a partial demolition of the house and/or the wall. Clearly that is the more sensible, just and convenient course. Such a modification is also in my judgment well within the powers of the Court conferred by section 96 (c) of the Registered Land Law Revised. It will not injure the Plaintiffs who indeed urge that course upon me and it will also benefit the Defendants by relieving them of the necessity of otherwise abating the encroachments. The expense to which they may be put in consequence such as the relocation of the electricity supply to the house is likely to be very much less than what would be involved in physical measures of abatement of the present encroachment; let alone questions of domestic convenience.

One further point at issue remains and that concerns the definition of the pedestrian right of way. There is an ambiguity in the language of the relevant grant which speaks of a "6' pedestrian right of way to the beach.... following the eastern boundary of [lot 64] as shown in green on the attached copy of the subdivision plan", when reference is made to that plan itself which indicates by means of a pect line a route passing the eastern edge of the beach without turning towards it and leading one over lot 49 to the edge of the ironshore where, according to the evidence,no beach either exists or has formerly existed.

The steps which were constructed by the 1st Plaintiffs to facilitate the use of this right of way do however turn and lead to the eastern end of the beach. The original planning application spoke of a pedestrian right of way to the beach. At various times lot owners in the

subdivision have used these steps without demur for the purpose of going to and from the beach. The end of the pect line on the plan leads nowhere on the ground that would of the least utility except perhaps to a fisherman and the grant comprises no rights of fishery from the shore. I therefore consider that the ambiguity can be resolved by reference to these surrounding circumstances and will if necessary declare that the existing easement in question leads to the beach itself by way of the steps in the manner suggested on behalf of the Plaintiffs.

I accordingly give judgement in terms of paragraphs 6 and 7 of the Statement of Claim, ordering that the appropriate vehicular easement of way be modified by moving the same to the westward by the amount of the encroachment and declaring that the Defendants will not be entitled to obstruct the lawful use of the easement as so modified. I also grant an injunction restraining the Defendants or either of them by themselves their servants or agents from obstructing or interfering with such use.

The defendants must pay the Plaintiffs their costs of the action generally to be taxed if not agreed.

Dated the 8th day of March 1988.

CHIEF JUSTICE.