

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION
3

4 Cause No: G 145/2015
5

6 BETWEEN:

7 THE PROPRIETORS OF STRATA PLAN 70
8

9 PLAINTIFFS
10

11 AND:

- 12 1. PETER LEWIS
13 2. JOAN LEWIS
14

15 DEFENDANTS
16

17 Appearances:

18 Mr. Nicholas Dixey and Mr. Colm Flanagan of
19 Nelson & Co. for the Plaintiffs
20

21 Mr. Thomas Lowe Q.C. instructed by Mr.
22 George Giglioli of Giglioli & Company for the
23 Defendants

24 Before:

Mr. Justice Alastair Malcolm Q.C. (Actg.)

25 Heard:

24th – 25th February 2016
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27 JUDGMENT
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1. This is an application by the Plaintiffs for an Interlocutory Injunction restraining the Defendants from:

- a. maintaining locked gates on the 3ft pedestrian right of way enjoyed over the property situated at Registration Section West Bay South, Block 5C, Parcel 222; and
- b. placing or allowing to be placed upon the Right of Way anything obstructing, restricting, preventing or otherwise interfering with the reasonable enjoyment of the Right of Way by the Plaintiff and those authorised by them for passage at all times and for the purpose of access and egress to the beach, on foot; and
- c. doing any act whereby the Plaintiff and those authorised by them may be hindered or obstructed from free lawful use of the said Right of Way until the conclusion of the full hearing of this case.

2. The Plaintiffs are the registered owners of the properties comprised in Strata Plan 70 which is situated at Registration Section West Bay South, Block 5C, Parcel 225 – commonly known as Windsong, Boggy Sand Road, West Bay (Windsong). Almost immediately across the road from Windsong is 170 Boggy Sand Road which is Parcel 222, referred to in the application, and it is owned by the Defendants (“the Lewis Property”).



1 3. The Lewis property has a beach frontage and the Right of Way runs along the
2 boundary to the property from Boggy Sand Road to the beach.

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4 4. The Easement had been granted by Robert and Marnel Turner and was registered on
5 the 26th June 1985. The Turners owned both the Lewis Property and Windsong at the
6 time and signed the Grant as Grantors and Grantees as officers of Strata Plan No 70.

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8 The consideration was a peppercorn and clearly they wanted to enhance the value of
9 Windsong by providing ready access to the beach. Following the granting of the Right
10 of Way the Turners sold the Lewis Property and their interest in Strata No. 70.

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12 5. As far as the Plaintiffs are concerned, there was no difficulty until the 28th May 2015
13 when the Defendants erected gates at each end of the Right of Way. These gates were
14 secured by a lock and the Defendants supplied one set of keys to each of the Strata
15 properties. Those keys could not be duplicated on Island and could only be obtained
16 from the Defendants at a cost of US\$300 per set.

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18 6. The problem as far as the Defendants are concerned are set out in the affirmation of
19 Mr. Peter Lewis dated 11th February 2016. He says that they were barely aware of
20 people using the Right of Way until early 2014. He surmised that some or all of the
21 Strata properties, which formerly had been occupied by the owners or long term
22 tenants, were now being let on short term holiday type rentals. Both he and his wife set
23 out incidents where people were sitting, or depositing property such as towels, on his
24 property. By May 2015 the Defendants were concerned that the Right of Way was
25 being used by those who were not entitled to and he shared his concerns and plans to
26 erect gates with Mr. Botes, the developer of Boggy Sand Club. Mr. Lewis affirms that
27 Mr. Botes stated that neither he nor Windsong had any objection to the gates and they
28 were agreeable to each bearing one third of the cost.



1 7. A further complication is that in there have been acts of vandalism and the Defendants
2 have erected a further gate. Again only one key has been supplied to each strata
3 property.

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5 8. The Plaintiffs claim that the combination of three gates with three different keys along
6 with only one set of keys per property has substantially restricted the Right of Way.
7 The Defendants require that the gates are relocked after each use. If the occupants of a
8 property do not all go to the beach at the same time it is, the Plaintiffs say, impossible
9 for someone to access the beach later unless those who have gone first sit at the beach
10 end of the Right of Way so that they can see someone who wishes to use the Right of
11 Way waiting on the road. Alternatively, those at the beach must be contacted by cell
12 phone by those wishing to go to the beach.

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14 9. I observe that in her affidavit (at 8h) Mrs. Lewis complains of people congregating at
15 the end of the Right of Way closest to the beach. That problem cannot be helped by the
16 issuing of only one key. Similarly, if one in the party wishes to leave the beach he or
17 she must be accompanied to the road by another, or, the remaining members of the
18 party cannot use the Right of Way until when and if the member returns.

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20 10. At the request of the parties I have had a view. The beach in front of the Lewis
21 property is narrow and can accommodate a limited number of people. I saw that a
22 number of the properties, including the Lewis property, have ropes to demarcate their
23 boundaries. The beach can be accessed easily from its southern end by anyone walking
24 up SMB. I noticed in the vicinity of the Lewis property two other gated paths from the
25 road to the beach but there is no evidence as to whom, if anyone, has a right of way
26 over them. Further up near the entrance to Boggy Sand Road, and some way from the
27 Lewis property, there is a Public Access to the beach.



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11. The Defendants complain that in recent times the use of the beach has increased. That increase, they say, is a result of the number of people using their right of way. Whether that is the cause of the increase in the use of the beach or whether it is a result of increased short term holiday letting in the area and the use of other ways to access the beach, is not a question I need to answer in this application.

12. Although the parties agreed to the installation of gates, there clearly has been a total breakdown since. The Plaintiffs claim that there was no consultation by the Defendants as to the method of locking the gates; their preference would have been a keypad system.

13. The Defendants' perception that the Right of Way is being misused is fuelled, and in my judgment understandably, by the fact that at least one of the properties is being advertised on the internet for short term let as having access to a "beach club" and the internet advertisement includes in its photo gallery ~~along with~~ pictures of the interior of the Strata property along with a picture of the Lewis property. In fact there is no beach club – although I am told one is planned as part of Mr. Boges' development, albeit not on the beach. ¶ This issue of the planned beach club is however likely to be the reason why Mrs. Lewis has been asked if their house is the beach club – an otherwise bizarre question as it is obviously a private dwelling. Whether the beach club issue is a matter that affects the issues to be tried, again, it is not for me to decide, but undoubtedly, it has not helped the mistrust between the parties.



1 14. A number of issues have been raised which will be required to be resolved at the full
2 hearing of this action. The arguments have been set out clearly in the written
3 submissions and eloquently argued by Counsel. In the light of the decision I have made
4 it is unnecessary for me to decide them, and no discourtesy is intended by not referring
5 to the various arguments.

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7 15. In an application for an interim injunction I have to consider the balance of
8 convenience. If at the final hearing it is found that the Plaintiffs have a right of way
9 over the Lewis property, the issue is likely to come down to by what method the gates,
10 which were erected by agreement, should be secured. If I were to grant an interim
11 injunction I would be, in all likelihood, having to answer what will be the ultimate
12 question in this case, without any evidence to the cost or feasibility of the competing
13 methods of securing the gates.

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15 16. The status quo to be maintained is not as it was 20 years ago but as it was at the time
16 the gates were erected with, I repeat, the agreement of the Plaintiffs. I accept that the
17 access is not now as free as when the easement was granted however, the Plaintiffs still
18 can use the Right of Way. In those circumstances, in my judgment, the balance of
19 convenience is that the gates should remain as they are with the Plaintiffs being
20 supplied with one set of keys per property until trial.

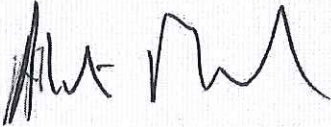


1 17. For the reasons above I do not grant an interim injunction.

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3 18. Costs will be in the cause.

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7 **Dated this the 30th day of May 2016**

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9 **Mr. Justice Alastair Malcolm Q.C. (Actg.)**
10 **Acting Judge of the Grand Court**