Neutral Citation Number: [2015] EWCA Civ 538

Case No: A3/2014/1899

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRISTOL DISTRICT REGISTRY
Mr Justice Morgan
2BS31308

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 May 2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE LEWISON
and
LORD JUSTICE McCOMBE

- -

Between :

WOOD & ANR	**Appellant**
- and -	
WADDINGTON	**Respondent**

- -
- -

Mr Jonathan Karas QC & Mr Simon Atkinson (instructed by **Memery Crystal LLP**) for the **Appellants**
Mr Jonathan Gaunt QC (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing dates : 13 and 14 May 2015

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Judgment

Lord Justice Lewison:

Introduction

1. The question in this appeal is whether Mr and Mrs Wood enjoy rights of way over land at Teffont Magna belonging to Mr Waddington. The claim is put on four alternative bases:

   i) The rights were the subject of an express grant;

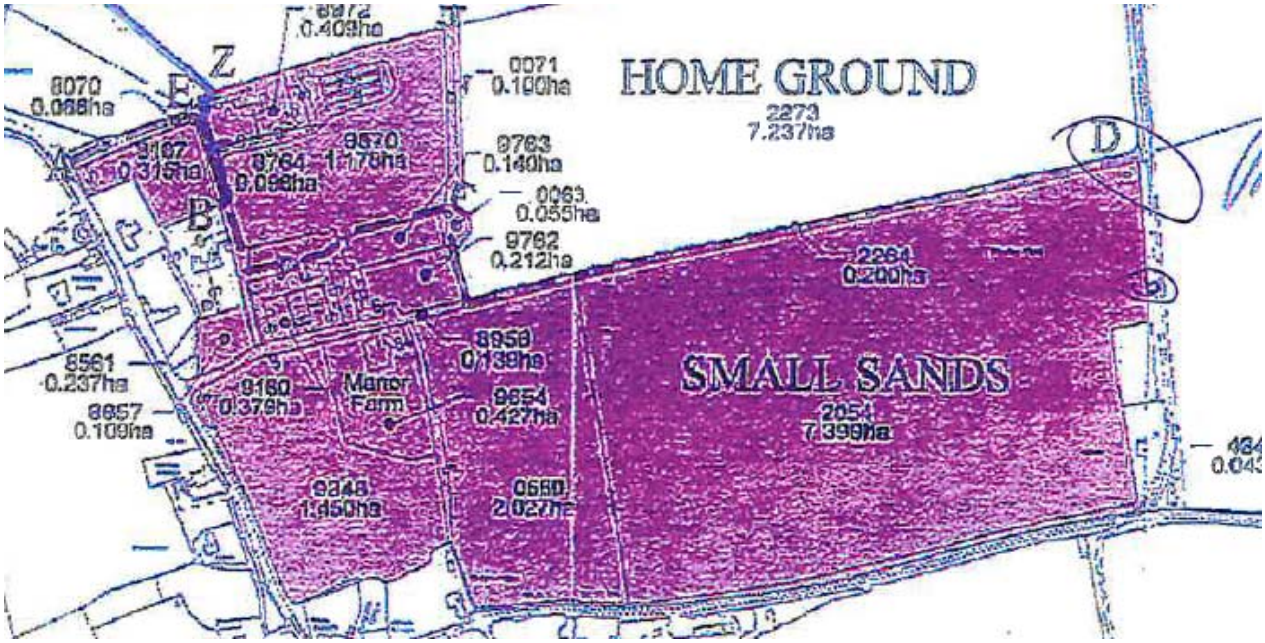
   ii) The rights arose by virtue of section 62 of the Law of Property Act 1925;

   iii) The rights were created under the rule in *Wheeldon v Burrows*;

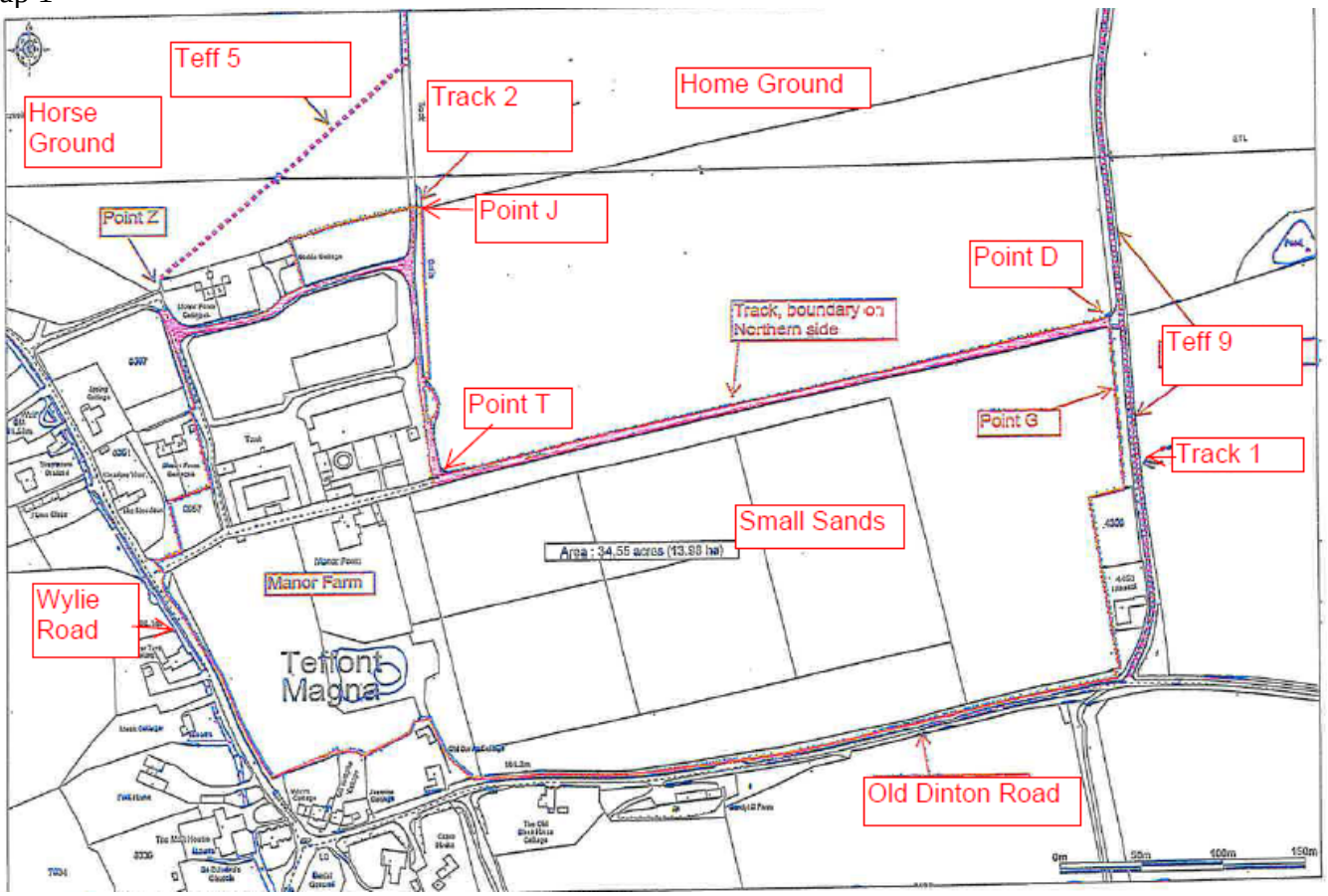
   iv) The rights were created in consequence of the common intention of the parties that the land conveyed was to be used in a definite and particular way.

2. In a detailed and comprehensive judgment Morgan J held that Mr and Mrs Wood were not entitled to any of the rights that they claimed. His judgment is at [2014] EWHC 1358 (Ch) and is available on Bailii.

3. As is usual in these cases the dispute is almost unintelligible without a map. In the Preface to the 17th edition of Gale on Easements the editors (Jonathan Gaunt QC and Morgan J) made a request to judges to include maps in their judgments. They repeated the request in the Preface to the 18th edition, so here are two. The first map is a copy of the relevant transfer plan. The second map shows the various features on the ground which are central to the case. In both cases north is at the top of the map.



Map 1


Teff 5
Horse Ground
Track 2
Home Ground
Point Z
Point J
Point D
Track, boundary on Northern side
Teff 9
Point T
Point G
Track 1
Small Sands
Area : 34.55 acres (13.98 ha)
Manor Farm
Wylie Road
Teffont Magna
Old Dinton Road

Map 2

The land

4. The land with which we are concerned is part of Manor Farm, Teffont Magna, near Salisbury, Wiltshire all of which was once owned by Mr Crook, who lived in Manor Farm House. In 1998 he sold the land in parts. One part was acquired by Mr and Mrs Sharman (now Lord and Lady Sharman), who were the predecessors in title to Mr and Mrs Wood. The other relevant part was acquired by Mr Waddington. The land was crossed by various farm tracks and two public bridleways. The soil over which the public bridleways ran was part of the land acquired by Mr Waddington. The land acquired by Mr and Mrs Sharman is coloured (or shaded for those looking at a black and white copy) on Map 1. It included Manor Farm House which had been Mr Crook's home, a paddock between the house and the public highway on the western boundary (Wylye Road marked on map 2) and some traditional buildings including a coaching house with stables and tack room. In addition under the transfer they acquired several fields and tracks, including the track which separated the field marked "Small Sands" from the field marked "Home Ground". The southern border of the field marked "Small Sands" is a highway called Old Dinton Road (marked on Map 2). To the east of Small Sands a public bridleway, designated as "Teff 9" on the definitive map (and on Map 2), runs over a track (marked "Track 1" on Map 2) northward from Old Dinton Road. The width of the bridleway itself is 2.5 metres but the track (together with its verges) is wider than that. Track 1 has hedges on both sides. Point D on Map 2 is on a track running from Manor Farm via point T which Mr and Mrs Sharman acquired. That track was metalled and was covered with tarmac, although the hard surface stopped at point D. Point D is part of the way along Teff 9, but is separated from the bridleway itself by a bellmouth. We were told that point D corresponds with the centre line of the hedge which lies on the western boundary of Track 1. The bellmouth is in a clear gap in the hedges both to its north and to its south. Whether Mr and Mrs Wood, as successors in title to Mr and Mrs Sharman, are entitled to cross the bellmouth in order to access the track over which Teff 9 runs (Track 1) and thence to access Old Dinton Road is the first issue in the appeal. The right claimed is not limited to use by pedestrians and animals, but extends to vehicles as well.

5. The track conveyed to Mr and Mrs Sharman runs westward from point D to point T, when it turns northward to point J. To the north of point J is another public bridleway, designated as "Teff 5" on the definitive map (and on Map 2 by dotted lines). It can be seen that Teff 5 crosses the field called "Horse Ground" at a diagonal and is separated from point J by another stretch of the track some 200 metres long. The judge described that stretch of track as a "hard track". It was also metalled, but not tarmacked. It is marked on Map 2 as "Track 2". The second issue in the appeal is whether Mr and Mrs Wood, as successors in title to Mr and Mrs Sharman, are entitled to cross that stretch of track on foot or on horseback in order to access Teff 5.

6. The rights claimed are pleaded in the Particulars of Claim as follows:

> "rights of way from Point D to Old Dinton Road … running along Track 1 … for themselves, their servants, agents and licensees on foot and with or without horses, carriages, motor vehicles and other conveyances at all times and for all purposes;" and

> "a right of way from Point J along Track 2 to the point at which the bridleway described as Teff 5 intersects with Track 2 for themselves, their servants, agents and licensees on foot and with or without horses at all times and for all purposes."

7. It is common ground that the rights that Mr and Mrs Wood have can be no greater than those of their predecessors in title. So it is easier to deal with the issues by reference to the rights that Mr and Mrs Sharman acquired when they bought the relevant land from Mr Crook.

8. Since the date of the transfers in 1998 Mr Waddington has greatly improved the surface of Track 1 and has laid tarmac over the bellmouth. Although there are photographs of the land included in the case papers, none of the relevant photographs I think pre-dates those improvements and they are consequently little guide to the physical appearance of the bellmouth in 1998. The other relevant event that has taken place since the date of the transfer is that in 2000 Mr and Mrs Sharman began a livery business in the stables, which did not exist in 1998. Mr and Mrs Wood carry on that business and have expanded it by the addition of an indoor riding arena.

Interpretation of the transfer

9. The first way of putting the case is a question of interpretation of the transfer by which Mr and Mrs Sharman acquired the land. The transfer must be interpreted in the light of the physical features of the land that it purports to convey. In *Pennock v Hodgson* [2010] EWCA Civ 873 Mummery LJ put it as follows:

> "Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction."

10. The land conveyed to Mr and Mrs Sharman was described in the transfer as part Manor Farm "being all that land more particularly delineated and shown coloured pink on the plan annexed hereto ("the Plan")". As I have said that plan is reproduced as Map 1. The Plan showed the track at the northern edge of Small Sands as far as point D within the pink colouring. Thus the track itself (as far as point D) was conveyed to Mr and Mrs Sharman. That is consistent with the reservation in clause 12.1.1.ii of a right of way for the transferor "over and along the road dashed brown between the points marked E-B-C-D on the Plan". The Plan itself was originally drawn on a scale of 1:1500, although the copy in the case papers appears to have been mechanically reduced. It is not (at least to my eye) possible to discern from the Plan the precise location of point D. However the judge found at [24] that point D was not the edge of bridleway Teff 9 but that between point D and the bridleway there was a bellmouth that was conveyed to Mr Waddington. That conclusion accords with the plan attached to Mr and Mrs Wood's Particulars of Claim, based on the registered title

plan, which shows point D as being separated from Track 1 by the bellmouth. That conclusion is not challenged on appeal.

11. At the date of the transfer there was no physical barrier between point D and Teff 9. It would therefore have been possible to travel eastwards along the track, past point D and across the bellmouth, in order to debouch onto Track 1.

12. Clause 12 of the transfer contained a number of provisions dealing with ancillary rights. Clause 12.1.1 reserved a number of rights of way to the transferor. These rights were described by reference to lettered points on the Plan. Clause 12.1.2 contained provision for varying the route of those rights of way. Clause 12.1.3 required the transferor to contribute towards the maintenance of those access ways. Clause 12.1.5 contained a right of way for Mr and Mrs Sharman with horses and vehicles "over and along the road dashed brown between points marked A-E on the Plan". That would have given them access to Teff 5 at the point marked "point Z" on Map 2. Clause 12.2 dealt with the water supply to the land. There was what was, in effect, a common water supply and that part of the transfer dealt with both the supply of water and the payment of water charges. Clause 12.3 contained general rights and reservations. The particular clause on which Mr and Mrs Wood rely is clause 12.3.3 which provides:

> "Save as varied by the preceding subclauses of this clause 12 the Property is sold subject to and with the benefit of all liberties privileges and advantages of a continuous nature now used or enjoyed by or over the Property or Lot 4 and without any liability on the Transferor to define the same."

13. The judge held that this clause did not give the rights that Mr and Mrs Wood now claim. He held:

    i) The transfer described express rights of way in great detail and it was unlikely that clause 12.3.3 was intended to convey further unspecified rights of way which would have been easy to describe.

    ii) The general scheme of the transfer was to impose upon the dominant owner to contribute to the servient owner's costs of maintaining rights of way. If clause 12.3.3 conveyed the rights of way now claimed, it would fall outside that scheme.

    iii) Clause 12.3.3 is limited to advantages of a "continuous nature" and a right of way over a made up track, although it may be "apparent," is not "continuous". Moreover, the clause seems to be concerned with rights that might be difficult to define, which could not be said of the claimed rights.

    iv) If interpreted in the way for which Mr and Mrs Wood contended, the effect of the clause, which was even-handed as between the grant and reservation of easements, would have given the Transferor extensive rights over the land conveyed to Mr and Mrs Sharman, which was unlikely to have been intended.

    v) Evidence of subsequent use by Mr and Mrs Sharman of the track between point D and Teff 9 (to which Mr Waddington did not object) was not of probative value.

14. The concept of "continuous and apparent easements" is one that is now well-known in the law of easements. It finds its best-known expression in the judgment of Thesiger LJ in *Wheeldon v Burrows* (1879) 12 Ch D 31:

> "… in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership…"

15. The concepts of "continuous" and "apparent" easements were borrowed in the first edition of Gale on Easements from the French Civil Code (arts 688 and 689 as Lord Blackburn explained in *Dalton v Angus & Co* (1881) 6 App Cas 740, 821): see also AWB Simpson *The Rule in Wheeldon v Burrows and the Code Civil* (1967) 83 LQR 240. Under the Code continuous easements are those that are enjoyed without any human activity; such as rights of light, rights of support, rights of drainage and so on. By contrast a right that involves human activity for its enjoyment, such as a right of way, is not a continuous easement: Code Civil art 688. As it has developed in English law, the notion of an easement being "continuous and apparent" for the purposes of the rule in *Wheeldon v Burrows* has moved away from the rigid distinction in the French Code Civil from which the concepts were originally borrowed. Although under the Code a right of way is not continuous, a right of way is capable of being "continuous and apparent" for the purposes of the rule. The clearest example is a made up road: *Borman v Griffith* [1930] 1 Ch 493. Although the phrase used is still "continuous and apparent", the word "continuous" is all but superfluous in the context of the rule in *Wheeldon v Burrows*: see AWB Simpson *The Rule in Wheeldon v Burrows and the Code Civil* (1967) 83 LQR 240, 245; Charles Harpum: *Long v Gowlett: A Secure Fortress* [1979] Conv 113, 116.

16. Mr Karas QC (who did not appear below) submitted that (a) what clause 12.3.3 of the transfer was concerned with was easements falling within the rule in *Wheeldon v Burrows*; (b) the fact that only part of the traditional phrase "continuous and apparent" had been used either did not matter, or pointed in favour of the conclusion that a right of way was encompassed in its scope; and (c) an easement was continuous within the meaning of clause 12.3.3 if there were discernible signs of it on the ground and those signs were not intermittent.

17. The distinction between a continuous easement and one that is not continuous is also made in English law as Megarry & Wade on Real Property (8th ed) explain at 28-022:

> "A "continuous" easement is one which is enjoyed passively, such as a right to use drains or a right to light, as opposed to one requiring personal activity for its enjoyment, such as a right of way."

18. Mr Karas accepted that the distinction between continuous and discontinuous easements continued to have utility in the context of the extinguishment of easements; but argued that it had no utility in connection with the interpretation of grants. However, in my judgment the general proposition stated in Megarry & Wade, and adopted by the judge, is supported by a number of cases to which the judge referred at [89] including *Suffield v Brown* (1864) 4 De GJ & S 185 ("continuous" "means

something the use of which is constant and uninterrupted"); *Polden v Bastard* (1865) LR 1 QB 156 ("There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements."); *Watts v Kelson* (1871) LR 6 Ch App 166 ("the well-established distinction between rights of way, which are only used from time to time, and what are called continuous easements had been overlooked"); *Borman v Griffith* [1930] 1 Ch 493 (a right of way over a made up road "is not continuous").

19. It was submitted to the judge that the word "continuous" in clause 12.3.3 was used in a looser sense than its strict meaning. Before the judge counsel then appearing for Mr and Mrs Wood relied on *Ward v Kirkland* [1967] Ch 194 in which Ungoed-Thomas J said of a claimed right to enter land adjoining a cottage for the purpose of repairing the cottage wall:

> "Here, there has certainly been continuous user, in the sense that the right has been in fact used whenever the need arose."

20. The judge said at [90] that he did not find this case helpful. He said that Ungoed-Thomas J had not intended to define the meaning of "continuous". Nor was he satisfied that in our case access from point D to Teff 9 satisfied the test of "exercised whenever the need arose", largely because there was no need. Third, he pointed out that if "continuous" in clause 12.3.3 was interpreted in the way suggested it would mean that quasi-rights that were not apparent and had not been regularly used would have been created by the transfer. He regarded that as an improbable intention. I agree with all these reasons. In addition it is plain that Ungoed-Thomas J was using the word "continuous" in a very unorthodox way. Nor, so far as I can tell from the report, was Ungoed-Thomas J referred either to *Suffield v Brown* or to *Polden v Bastard*. Although the argument was raised again in the skeleton argument in support of the appeal it was not pressed in oral submissions, and rightly so.

21. The usual meaning of "continuous" (both in ordinary English usage and in the context of conveyancing) is uninterrupted or unbroken. The right or advantage claimed is a right to *use* the ways, not the ways themselves. Accordingly it is the *use* that must be continuous. In my judgment in the context of clause 12.3.3 the reasonable reader would interpret the word "continuous" in its conventional sense. Given that there is a well-defined category of easements which are "continuous" I conclude, in agreement with the judge, that clause 12.3.3 should be interpreted as being confined to easements of that category. The claimed rights of way are not among them.

22. The judge was invited to take account of conduct that post-dated the transfer as an aid to interpretation of clause 12.3.3. The conduct in question was use by Mr and Mrs Sharman of access from point D to Teff 9 without objection by Mr Waddington. It is now well settled that, by way of exception to the general law of contract, subsequent conduct is admissible for the purpose of determining the boundary of land conveyed by a conveyance: *Ali v Lane* [2006] EWCA Civ 1532; [2007] 1 P. & C.R. 26; *Piper v Wakeford* [2008] EWCA Civ 1378; *Norman v Sparling* [2014] EWCA Civ 1152; [2015] 1 P. & C.R. 6. However, as Carnwath LJ stressed in *Ali v Lane* the evidence of subsequent conduct must be probative of the true boundary. I would also add, in agreement with the judge at [97], that the established exception thus far applies only to the determination of a boundary. Conduct which is probative of the position of a boundary would almost inevitably be evidence of possession of the disputed land: in

other words that one neighbour has excluded the other from the land. Where (as here) the suggested conduct in using the claimed right of way does not itself interfere with the servient owner's own use of the land, it is highly unlikely that evidence of such use would prove anything. Moreover, the judge held at [99] that even if the evidence of subsequent conduct could be taken into account, he did not find it probative. The evaluation of the probative value of evidence is essentially a matter for the trial judge. An appeal court should not interfere with his assessment. Again Mr Karas did not press this strongly in oral argument.

23. Accordingly the claim based on the express terms of clause 12.3.3 must fail.

Section 62 of the Law of Property Act 1925

24. The second way of putting the case was based on section 62 of the Law of Property Act 1925. Section 62 (1) applies to conveyances of land and section 62 (2) applies to conveyances of land with buildings. Each of those sections operates to convey with the land (or the buildings):

> "… all ... liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance … occupied, or enjoyed with … the land."

25. Consideration of that section required the judge to make findings of fact about the way in which the claimed rights had been used in the period leading up to the transfer to Mr and Mrs Sharman. That was because section 62 only applies to advantages etc. "enjoyed with" the land at the time of conveyance although, as the judge rightly accepted, "the time of conveyance" includes a reasonable period before the conveyance. Before the transfers to Mr and Mrs Sharman on the one hand and Mr Waddington on the other all the relevant land had been occupied by Mr Crook. Accordingly there had been no "diversity of occupation". Diversity of occupation helps to distinguish between cases where a landowner is simply making use of the whole of this land as he pleases, and cases where a particular use can be discerned as being in the nature of an easement (or quasi-easement) enjoyed for the benefit of a particular part of the land. However, although the usual circumstances in which section 62 applies are cases where there has been diversity of occupation, the judge held at [131] that there was no absolute bar to the operation of section 62 even where there has been no diversity of occupation. He said:

> "…a right, such as a right of way, can pass under section 62 even where there has been no diversity of occupation, provided always that the right was continuous and apparent."

26. In reaching that conclusion the judge referred to the decision of this court in *Alford v Hannaford* [2011] EWCA Civ 1099 in which Patten LJ said:

> "…where there has not been diversity of occupation prior to the sale, the generally held view is that s.62 can only operate to grant easements over the land retained by the vendor where the exercise of the relevant rights has been continuous and apparent in the sense described in *Wheeldon v Burrows*."

27. Having considered how the concept of "continuous and apparent" easements had been deployed in the context of the rule in *Wheeldon v Burrows* the judge said at [132]:

> "However, in that context, the phrase "continuous and apparent" does not stand alone as it operates in conjunction with a requirement that the right claimed is necessary for the reasonable enjoyment of the land conveyed. This further requirement helps to identify the relationship of dominance and servience between the land conveyed and the land retained. Further, the phrase "continuous and apparent" on its own has been considered to be lacking in clarity: see *Dalton v Angus* (1881) 6 App Cas 740 at 821 per Lord Blackburn. If the phrase "continuous and apparent" is to be used as a proxy for the statutory words "enjoyed with", then (in the context of section 62) what must be apparent is that the advantage claimed is enjoyed with the land to be conveyed rather than enjoyed as part of the common ownership of both the land to be conveyed and the land to be retained."

28. The judge concluded at [133]:

> "There is no absolute rule that a right of way cannot be claimed under section 62 where there has not been diversity of occupation before the relevant conveyance. The ultimate question is whether the advantage in question was, on the facts, "enjoyed with" the land conveyed. Those words require two things to be shown. The advantage must have been "enjoyed" in the period before the conveyance. Further, the advantage must have been enjoyed "with" the land conveyed so that, after the conveyance, it will be appurtenant to the land conveyed as the dominant tenement. For these purposes, a consideration of how the advantage was actually used and whether it was apparently for the benefit of the land conveyed and apparently a burden on the land retained will be of great importance."

29. Mr Karas' argument under this head is that

i) The claimed rights were "continuous and apparent" within the meaning of the rule in *Wheeldon v Burrows.*

ii) Provided that the physical features on the ground are "continuous and apparent" there is no additional requirement that the use itself must be continuous and apparent. All that matters is that the claimed rights have in fact been enjoyed with the land conveyed.

iii) Enjoyed with does not necessarily mean "used". A right may pass under section 62 even if it has never been used (for example in the case of a house on a newly laid out housing development with private roads). But if use is necessary then the judge found that use had been proved.

iv) The rights were in fact used with the land conveyed to Mr and Mrs Sharman (which included the track to the west of point D).

v) There is no additional requirement that the use must be "apparently" for the benefit of the land conveyed, if there are visible signs of the advantage enjoyed.

30. Mr Gaunt QC argued that the judge was right at [132] to say that it must be *apparent* that the enjoyment is for the benefit of the land conveyed; otherwise (unless there is diversity of occupation) there is no reliable way of distinguishing between an owner's right to use his land as he pleases and a continuous and apparent easement that will pass under section 62. He relies in particular on *Long v Gowlett* [1923] 2 Ch 177. Sargant J said in a passage on which Mr Gaunt particularly relies (and to which I have added numbers to the sentences):

> "[1] But it has never been held, and would I think be contrary to principle to hold, that (in default of there being a made road over Blackacre forming a continuous and apparent means of communication) a sale and conveyance of Whiteacre alone would carry a right to pass over Blackacre in the same way in which the common owner had been accustomed to pass. [2] As it seems to me, in order that there may be a "privilege, easement or advantage" enjoyed with Whiteacre over Blackacre so as to pass under the statute, there must be something done on Blackacre not due to or comprehended within the general rights of an occupying owner of Blackacre, but of such a nature that it is attributable to a privilege, easement, right or advantage, however precarious, which arises out of the ownership or occupation of Whiteacre, altogether apart from the ownership or occupation of Blackacre. [3] And it is difficult to see how, when there is a common ownership of both Whiteacre and Blackacre, there can be any such relationship between the two closes as (apart from the case of continuous and apparent easements or that of a way of necessity) would be necessary to create a "privilege, easement, right or advantage" within the words of s. 6, sub-s.2, of the statute. [4] For this purpose it would seem that there must be some diversity of ownership or occupation of the two closes sufficient to refer the act or acts relied on not to mere occupying ownership, but to some advantage or privilege (however far short of a legal right) attaching to the owner or occupier of Whiteacre as such and de facto exercised over Blackacre."

31. Mr Gaunt relied particularly on the second sentence of the quoted extract; and the statement that the advantage claimed must arise out of the ownership or occupation of Whiteacre "altogether apart from the ownership or occupation of Blackacre". In our case, he says, Mr Crook's use of the various tracks was simply a case of a land owner making use of the whole of his land as he pleased. However, the second sentence of the quoted extract is both immediately preceded and immediately followed by the express exclusion of cases in which there is a made road or a continuous and apparent easement. That is the context in which the second sentence must be read; and in my

judgment it is not concerned with cases where there is a made road or other continuous and apparent easement.

32. What is important is the extent to which there are visible signs of a track or road. In *Bayley v Great Western Railway* (1884) 26 Ch D 434, 456 Fry LJ put the point of principle thus:

> "…if one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if two tenements belonged to several owners there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre , then the grant of Blackacre either "with all rights usually enjoyed with it" or "with all rights appertaining to Blackacre," or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre."

33. A "made" road, however, is not essential. In *Hansford v Jago* [1921] Ch 322 Russell J said:

> "Now what is required in the case of a quasi-easement is the quality of being apparent. That quality may be arrived at in different ways, and, no doubt, the easiest case is that of a made-up road; it is most important, if not essential, that the road should be made up when it is sought to establish the apparency of a quasi-easement of way over an unenclosed piece of land. But when every other possible indication is present as here and they all point to a defined and enclosed strip having been set aside to provide an access to the rear of certain houses, I certainly decline to hold, unless compelled to do so by authority, that the absence of a made-up road prevented the establishment of an implied grant."

34. Russell J referred also to *Donnelly v Adams* [1905] 1 IR 154, a case in the Irish Court of Appeal in which Fitzgibbon LJ said:

> "I admit that neither by express nor by implied grant can a vague or uncertain right be created. Every lawful way must be capable of identification; it must have a *terminus a quo*, and a *terminus ad quem*. But it is not essential to a way that there shall be a beaten track between its *termini*."

35. Both *Bayley v Great Western Railway* and *Hansford v Jago* were cited to Sargant J in *Long v Gowlett*; and *Bayley v Great Western Railway* was mentioned expressly in his judgment ([1923] 2 Ch 177, 179). I do not consider that *Long v Gowlett* can be taken as having added an extra requirement to what those cases decided. I agree, therefore, with Patten LJ in *Alford v Hannaford* that in cases where there has been no diversity of occupation, all that is necessary to establish is that the exercise of the relevant rights has been continuous and apparent in the sense developed for the purposes of the rule in *Wheeldon v Burrows*.

36. It is common ground that, for the purposes of section 62, if a quasi-easement falls within the category of easements "enjoyed with" the land conveyed, there is no additional requirement that such an easement must be *necessary* for the reasonable enjoyment of the land: *Watts v Kelson* (1871) 6 Ch App 166. In this respect section 62 differs from and is broader than the rule in *Wheeldon v Burrows*. It is difficult to see how Mr and Mrs Wood could succeed under the rule in *Wheeldon v Burrows* if they fail under section 62. Since the rule in *Wheeldon v Burrows* is concerned with implication, while section 62 operates by way of express grant that is, perhaps, not surprising.

37. In order to reach a conclusion about the applicability of section 62 it is necessary to consider both the features observable on the ground at the date of the conveyances in 1998 and the use made of the claimed rights.

38. I will begin with the physical features observable on the ground. So far as the relevant part of the track over which Teff 9 ran is concerned (i.e. from Old Dinton Road to that part of Track 1 opposite point D) the judge found that at the date of the transfer it was badly potholed. It was passable in a 4 x 4 vehicle or a heavy farm vehicle, but would have been very challenging for an ordinary car. The track itself was clearly visible. There was no gate at point D which was at a gap in the hedges (and hence nothing to separate point D physically from the track). There were wheel ruts crossing the bellmouth but the judge accepted the unchallenged evidence of Mr Durtnall, a local resident, that the pattern of the wheel ruts showed that the main traffic route went northwards along Track 1 rather than southwards to Old Dinton Road. There was also a sign on the track immediately to the north of point D warning drivers that Track 1 north of point D was a bridleway only and was not a through route for vehicles. The judge inferred from that that vehicles did from time to time come up Track 1 from Old Dinton Road, and that they were allowed to turn left at point D, at least if they wanted to visit the main part of Manor Farm. The judge's inference necessarily meant that any such vehicle would have crossed the bellmouth.

39. The next consideration is the extent of use. The judge read evidence from witnesses who were not called to give live evidence and also heard live evidence. One of those witnesses was Mrs Fisher, a local resident, whose evidence the judge found to be "completely reliable". She said in her witness statement:

> "From my personal observation over many years I can confirm that Points D, G and J were used on a continuous basis by farm traffic from Manor Farm throughout that period including during the period in which the Crooks were resident. During that period I have also often seen traffic driving to and from Manor Farm from the Old Dinton Road via Point D."

40. In the course of her cross-examination Mr Gaunt asked her how often she saw vehicles going from point D up the track and into Manor Farm, or vice versa. Her answer was:

> "Well, let us be on the safe side and say about once a month because I did not mark down every time I saw a vehicle."

41. Mrs Fisher also gave evidence in cross-examination that the postman and other delivery people used Track 1 from point D to Old Dinton Road.

42. The other witnesses whose evidence the judge accepted at [28] were Mr Crook, Mr White and Mr Pitcairn. Mr Crook had in fact made two witness statements, one for each party. The judge noted that they did not agree with each other; and held that since Mr Crook had not given oral evidence, he was not prepared to accept the evidence given in the statement provided to Mr and Mrs Wood where it was inconsistent with the statement provided to Mr Waddington.

43. Mr Crook's evidence was that he regularly used the track from point T to point D in order to access that part of the farm which lay to the north of the land transferred to the Sharmans. He crossed the bellmouth in a vehicle two or three times a day, but turned north on Track 1. He "hardly ever" used the lane from the end of South Sands to Old Dinton Road. His use of that part of Track 1 was not connected with farming purposes, but was "out of routine, like coming in from the pub". He estimated that his use of that part of Track 1 was once a month or once every two months. Mr White was the tractor driver at Manor Farm. His evidence was that the track from Old Dinton Road to point D could be used with a Land Rover or a tractor but given the other routes in and out of Manor Farm "it was not worth the hassle." He used that route less than once every six months. Mr Pitcairn's evidence was that the length of track from Old Dinton Road to point D "was rarely used by anyone from Manor Farm, except perhaps by the gamekeeper" to get to the Common or to go to Dinton and beyond. At [39] the judge said:

> "I accept the evidence contained in the witness statement of Mr Crook which was put in by Mr Waddington. I also accept the evidence of the tractor driver, Mr White, who said that he used the track from Point D to Old Dinton Road, in connection with Manor Farm, less than once every six months, even in a tractor or landrover. I also accept the evidence of Mr Pitcairn that that part of the track was "rarely used"."

44. The judge returned to his factual findings at [134]:

> "I find that the first right claimed by Mr and Mrs Wood, a right of way with or without vehicles from Point D over the bellmouth at Point D and then on to the track from Point D to Old Dinton Road was not enjoyed with the land conveyed. On the facts, access in that way was used rarely, at the very most once a month by Mr Crook. Mr Crook's evidence was that he "did not regard it as a route for getting to the farm"; although his subjective belief is not directly relevant, it does support the evidence that this access was hardly ever used for the benefit of the land conveyed. I do not consider that it was apparent that the track from Point D to Old Dinton Road was an advantage enjoyed with the land transferred to Mr and Mrs Sharman. The markings at Point D described by Mr Durtnall showed that generally the traffic turned left at Point D to go northwards up the track rather than south to Old Dinton Road."

45. Mr Karas points to the unchallenged evidence of Ms Green who has lived in the area since 1981. In her witness statement she said:

> "There was no gate at Point D or Point G until early 2012. throughout my time in Teffont I saw both points used on a continuous basis by farm traffic from Manor Farm. This included farm traffic accessing the Old Dinton Road from Point D. In particular I remember having to take great care when using the track from the Old Dinton Road to point D during the time that the Crooks lived there because I often encountered farm traffic also using that track."

46. Even though this evidence was unchallenged it does not add materially to the judge's finding. The first sentence in this extract does not specifically relate to access from point D southwards to the Old Dinton Road. The judge accepted Mr Durtnall's evidence that farm traffic tended to turn northwards up the track away from the Old Dinton Road. The second sentence simply says that the traffic that Ms Green saw "included" traffic moving from point D to the Old Dinton Road but is very general. The third sentence gives the frequency as "often" but as with Mrs Fisher that may mean no more than once a month. I consider therefore that we must proceed on the basis of the facts found by the judge, with the qualification that because the judge found Mrs Fisher's evidence to be "completely reliable" we may proceed on the basis that the route from point D to Old Dinton Road was used once a month, rather than "at the very most" once a month. In addition having accepted Mr Pitcairn's evidence at [28] the judge's summary of it at [39] overlooked Mr Pitcairn's qualification about use of Track 1 by the gamekeeper. It was suggested that Mrs Crook rode horses from point D across the bellmouth and onto the track. But the judge held that there was insufficient evidence for him to be able to make a finding.

47. In the present case there is a made up track at least as far as point D. That in the words of Fitzgibbon LJ in *Donnelly v Adams* is the *terminus a quo*. There is no barrier between point D and Track 1. Indeed the presence of the wheel ruts of which Mr Durtnall gave evidence shows that there were visible signs of vehicles having crossed the bellmouth onto the track. So far as the track from point D to Old Dinton Road is concerned, the judge's finding was that it was potholed which itself indicates vehicular use; and that the sign immediately to the north of point D led to the inference that vehicles turned left from Track 1 onto the track transferred to the Sharmans and thus into Manor Farm. These, in my judgment, were all visible signs that the track from point D to Old Dinton Road had been used for the benefit of Manor Farm. In the words of Fitzgibbon LJ Old Dinton Road was the *terminus ad quem*. That in itself may not be enough, because of the requirement that the easement in question must benefit *the land conveyed*. But the land conveyed included the track itself as far as point D; and in my judgment the obvious inference to anyone inspecting the site in 1998 was that having crossed the bellmouth from Track 1 vehicles proceeded westwards past point D and down the track conveyed to Mr and Mrs Sharman. As Mr Karas put it in his skeleton argument, on the judge's findings the track conveyed to Mr and Mrs Sharman goes nowhere. Since the track conveyed to the Sharmans was itself a means of access to other parts of the land conveyed to the Sharmans, I do not consider that this analysis falls foul of the so-called rule in *Harris*

v Flower (1904) 74 LJ Ch 127. See *Nickerson v Barraclough* [1980] Ch 325, 336 (unaffected by the appeal at [1981] Ch 426).

48. It seems to me, therefore, that there were sufficient signs on the ground for the claimed route to have been continuous and apparent for the purposes of the rule in *Wheeldon v Burrows*. If it were necessary in addition to examine the purpose of the use of Track 1 from point D to Old Dinton Road, Mr Crook's evidence about his personal use of Track 1 from point D to Old Dinton Road was that it was not for farming purposes, but for coming in from the pub. That use must have been attributable to his residence at Manor Farm which was part of the land conveyed to the Sharmans. Part of the use was use by the postman which would equally not have been for farming purposes. The use of Track 1 by the gamekeeper described by Mr Pitcairn does not appear to have been for farming purposes either. Thus even if the judge's gloss on *Long v Gowlett* is correct, it is satisfied on the facts of this case.

49. What, then, of the extent of use? In *Green v Ashco Horticulturalist Ltd* [1966] 1 WLR 889, 898 Cross J said:

> "One ought not, I think, in a case like this to confine oneself to a single moment of time — when possibly there might have been no user at all. One ought to look at a reasonable period of time before the grant in question in order to see whether there was anything over that period which could be called a pattern of regular user in any particular way or ways."

50. In *Costagliola v English* (1969) 210 EG 1425 Megarry J said that:

> "One must look at a reasonable period of time before the conveyance was made to see if there were any apparent or regular user."

51. Both these passages were approved by this court in *Pretoria Warehousing Co Ltd v Shelton* (unreported, 21 June 1993).

52. Where there has been no use at all within a reasonable period preceding the date of the conveyance (whether or not there had been use outside that period) it is clear that section 62 cannot operate to create an easement: *Nickerson v Barraclough* [1981] Ch 426; *Payne v Inwood* (1996) 74 P & CR 42, 47; *Campbell v Banks* [2011] EWCA Civ 61. I do not accept Mr Karas' submission to the contrary.

53. But on the judge's findings of fact the claimed route from point D to Old Dinton Road had been used once a month in the period immediately preceding the transfers. On the face of it that is both apparent use and a regular pattern of use. In *Diment v NH Foot Ltd* [1974] 1 WLR 1427 the defendant had used the plaintiff's field (OS 415) on six to ten occasions a year over a period of over 30 years (i.e. less than once a month and perhaps as little as once every two months). Pennycuick V-C said:

> "User has been limited to quite a few occasions in each year. Particulars of the user were given in evidence both by Mr. Foot himself and by Mr. Mitchell, his tractor driver. The occasions of user were these. In the early summer there was a check on

> the fences around the panhandle, and where necessary fencing gear was taken to the panhandle. In mid-summer, perhaps about June, there was hedge trimming and cutting of thistles. Again, from time to time, the drinking place was cleared out and whatever drainage work was necessary was done. It appears that no. 415 was not used more than on perhaps six to ten occasions in each year.
>
> To get the point out of the way, I have no doubt that the user was sufficient in extent and regularity to be capable of creating a right of way. On the other hand, obviously it would only be apparent to anybody who happened to be there on one of those ten or so days in the year, apart from whatever traces were left on no. 415 by vehicles passing across it."

54. That was a case in which the right of way was claimed by prescription, and it failed for other reasons. However, I see no reason to hold that use once a month falls short of a regular pattern of use; and if use to that extent can support a claim to have acquired an easement by prescription I see no reason why it should not support a claim to have acquired an easement by virtue of section 62. Likewise in *Mills v Silver* [1991] Ch 271 use of a visible farm track by vehicles "whenever occasions arose and the surface of the disputed track was dry enough to be passable" was sufficient to found a claim to have acquired an easement by prescription, even though the track was impassable in wet weather.

55. Accordingly, in my judgment, on the judge's finding of fact that the track was used from point D to Old Dinton Road once a month, there was a sufficient pattern of use to count as "enjoyment" for the purposes of section 62.

56. The second right claimed is the right to pass from point J to the bridleway some 200 metres to the north. As mentioned the judge described that as a "hard track"; so it was visible on the ground. That is borne out by one of the photographs in the case papers. There was no gate or fence which separated point J from the rest of the track, and the surface on the track south of point J and north of point J appears to the eye to be the same. Again I think that there is real force in Mr Karas' point that if the judge is right the track up to point J goes nowhere.

57. The judge found at [32] that it was likely that Mr Crook and his employees would have gone north along the track which was ultimately conveyed to Mr and Mrs Sharman from point T or point C, across point J and then on to the point where bridleway Teff 5 met the hard track. Mr White's evidence, which the judge accepted, was that the track was used by tractors and the Land Rover. It was again suggested that Mrs Crook went horse-riding along the same route. But the judge again said that there was very limited evidence about that; and he was unable to make a finding about the frequency of Mrs Crook's riding and how often (if at all) she crossed over point J. Again I would hold that there were sufficient visible signs on the ground to make the track from point J to the intersection with Teff 5 "continuous and apparent" for the purposes of the rule in *Wheeldon v Burrows*; and sufficient evidence of vehicular use to demonstrate that the hard stretch of Track 2 was enjoyed with (at least) the remainder of the track conveyed to Mr and Mrs Sharman.

58. Thus far I would hold that rights of way from point D over the bellmouth and along Track 1 to Old Dinton Road, and a right of way from point J over Track 2 fall within section 62 of the Law of Property Act 1925.

59. However, section 62 (4) of the Law of Property Act 1925 provides:

> "(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained."

60. The judge rightly held at [104] that where section 62 potentially applies it is not a case of implication but of express grant; and the question of a contrary intention "expressed in the conveyance" must be approached on that basis. It was common ground that clear words are needed to exclude section 62. The judge's conclusion that (if applicable) section 62 had not been excluded is challenged by way of Respondent's Notice.

61. Mr Gaunt QC relies on three points as demonstrating the "contrary intention." They are:

    i) The rights of way to be granted and reserved were specifically and comprehensively identified;

    ii) Obligations as to the maintenance of all such ways were expressed; and

    iii) Clauses 12.3.3 and 12.5.3 covered the same ground as section 62 but were confined to "continuous rights" which rights of way are not.

62. The grant in the written terms of a conveyance of a limited right will not exclude the operation of section 62 to confer a greater right than that which is contained in the terms of the conveyance itself. This is well illustrated by *Gregg v Richards* [1926] Ch 521. The plaintiff in that case was granted a right of way four feet wide over a roadway coloured green on the conveyance plan. The roadway was physically wider than four feet. In fact at the date of the conveyance the plaintiff had used the roadway with vehicles, which would not have been able to use a right of way only four feet wide. This court held that the restriction in the conveyance of the right of way to four feet was not a sufficient expression of a contrary intention to preclude section 62 from conferring a right over the whole width of the roadway. In so holding the court approved the decision of Russell J in *Hansford v Jago*, where the judge had come to the same conclusion. The effect of these cases is that "there is no room in such a case for the canon of construction usually known as *expressio unius exclusio alterius*": *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 2 EGLR 259, 264 (Hoffmann LJ).

63. The first of the points raised is, in my judgment, no more than an attempt to apply the canon of construction that Hoffmann LJ rejected as inapplicable to a case such as this.

64. The second point might be thought to be a variant on the same theme. Moreover, one the arguments advanced by the defendant in *Gregg v Richards*, which the court rejected, was based on the fact that the conveyance obliged the plaintiff to contribute to the cost of maintaining the way coloured green, and the submission that that

indicated the limit of the right. The court saw no difficulty in a scheme under which the plaintiff was required to contribute to the maintenance costs of only part of the roadway over which the right existed.

65. The third point is again, in my judgment another variant on the same theme. If (as Mr Gaunt submitted) the reference to easements of "a continuous nature" in clause 12.3.3 excludes discontinuous easements, it does so by omission rather than by express words. That is a paradigm example of the "*expressio unius*" principle of interpretation, which has no place in section 62 (4).

66. In my judgment neither singly nor cumulatively do the points on which Mr Gaunt relies "express" the requisite contrary intention with sufficient clarity. The judge reached the same conclusion at [142], and I agree with him.

67. I might also add that in *Commission for the New Towns v JJ Gallagher Ltd* [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3 at [59] Neuberger J held that the rebuttal in section 62 (4) must itself be "express". In fact there are parts of the transfer which might be thought to express a contrary intention, although not in connection with rights of way. Clause 12.3.1 deals with sewers, drains and watercourses; and clause 12.3.2 deals with conducting media. But in each case the clause is subject to a proviso:

> "PROVIDED THAT any rights relating to any water supply shall be defined only by clause 12.2 hereof."

68. There is no similar restrictive proviso to clause 12.1 which deals with the grant of rights of way, or in clause 12.2.3.

Scope of the right

69. That leads on to the next question: what is the content of the right conveyed? The problem here is the mismatch between the content of the rights claimed and the nature of the rights proved. In the case of the right from point D over the bellmouth and Track 1 to Old Dinton Road the use proved is vehicular use; but the right claimed extends to use on foot and on horseback as well. In the case of the right over Track 2 from point J to the intersection with Teff 5, the use proved is also vehicular use; but that is not claimed. What is claimed is limited to use on foot and with animals.

70. Mr Karas relies on the physical characteristics of the ways over which the rights are claimed. In *Cannon v Villars* (1878) 8 Ch D 415 Mr Villars granted Mr Cannon a tenancy of a house in Southwark together with a yard. There was a paved road which led to the yard, but the lease contained no express grant of a right of way over the paved road. It did, however, include a right for Mr Cannon to build a workshop on the property demised. It was common ground that a right of way must be implied, but the issue was whether it was limited to a right of way on foot or whether vehicular use was also permitted. Sir George Jessel MR said:

> "As I understand, the grant of a right of way *per se* and nothing else may be a right of footway, or it may be a general right of way, that is a right of way not only for people on foot but for people on horseback, for carts, carriages, and other vehicles.

> Which it is, is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the *locus in quo* over which the right of way is granted. If we find a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used."

71. He continued:

> "*Prima facie* the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot-passengers, or restricted to foot-passengers and horsemen or cattle, which is generally called a drift way, or a general right of way for carts, horses, carriages, and everything else."

72. As Mr Karas submits, rightly in my judgment, there is nothing in the physical features of the land over which the rights are claimed that is inconsistent with those rights.

73. In addition in *Davies v Stephens* (1836) 7 Car & P 570 Lord Denman CJ summing up to the jury directed them that:

> "The user proved rather goes to support a carriage-way than a footway but, if you think the former has been established, you may find in favour of the latter, as a carriage-way always includes a footway."

74. This proposition is also supported by *Cannon v Villars* in which Sir George Jessel said:

> "…it is admitted, from the width of the way, and from the character of the way, and from the mode in which the way was paved, that it is a cartway or carriageway, and nothing else, *except in so far as a carriageway and cartway always include a*

> *footway*. It was constructed for that purpose, and used for that purpose." (Emphasis added)

75. In *White v Richards* (1993) 68 P & CR 105 this court was concerned with a right:

> "to pass and repass on foot and with or without vehicles over and along the track coloured brown…"

76. One of the issues in the case was the extent to which this right permitted use by animals. The trial judge held that the dominant owner was not entitled to drive cattle along the way and that use by animals would be restricted to a pedestrian leading a dog or a horse. Nourse LJ (with whom Stuart-Smith and Mann LJJ agreed) held that the right as circumscribed by the judge was too narrow. He said:

> "Mr Ainger submitted that in the construction of a private right of way created by express grant the greater must include the less; or, to express it more appropriately to the law of easements, the more onerous must include the less onerous. That proposition, which has much in the way of common sense to recommend it, is not much discussed in the modern authorities. It is supported by *British Railways Board v Glass*, to which the judge was not referred."

77. Nourse LJ went on to say that a driftway was more onerous than a right of way with horses and carts and continued:

> "Applying that principle to the present case, I start by observing that motor vehicles include motorcycles. Use by motorcycles is more onerous than use by pedal cycles. So the right includes riding a pedal cycle. But there you reach a dead end, because it is impossible to argue from riding a pedal cycle to riding a horse. You have to take the route suggested by *British Railways Board v Glass*. A right of way with motor vehicles includes a right with horse-drawn carriages and carts and, as Heath J said in *Ballard v Dyson*: "A carriage-way will comprehend a horse-way, but not a driftway." So the right of way here includes a right with horse-drawn carriages and carts and with horses *whether ridden* or led on foot. Similarly, it includes a right to lead, though, not to drive, cows and other animals on foot.
>
> For these reasons I would vary the judge's second declaration so as to permit passage with animals to the extent indicated." (Emphasis added)

78. Assuming, therefore, as one must under section 62 that the transfer in the present case had included a right described in the terms of the use proved (i.e. with vehicles) it would also in my judgment have entitled the grantee to use the way on foot or on horseback (but not to drive animals).

79. That leads to the last question raised by the Respondent's Notice. The argument is that any rights to use the ways on horseback are limited to use for domestic purposes. Mrs Crook only rode horses for her enjoyment, whereas Mr and Mrs Wood wish to use both the ways on horseback for their livery business which did not exist at the time of the conveyance to Mr and Mrs Sharman. As a result of section 62 the transfer is treated as expressly including the grant of the rights enjoyed at the date of the transfer. A description of a right as "as at present enjoyed" does not refer to the purposes for which the right is used but to the manner of use (e.g. on foot only, with animals or with vehicles): *Hurt v Bowmer* [1937] 1 All ER 797. So the mere fact that use changes from domestic to commercial does not of itself amount to use in excess of the right granted. Even where a right is acquired by prescription or implication the right is "a right for all purposes according to the ordinary and reasonable use to which the dominant tenement might be applied at the time of the implied or supposed grant" *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214, [2005] 1 P & CR 30 at [79 (iii)]. It is also clear on the authorities that a mere intensification of use is not something to which the servient owner is entitled to object. In *Mcadams Homes* Neuberger LJ said at [50] that the servient owner's entitlement to object depended on the answers to two questions:

i) Whether the dominant land had undergone a radical change in the character or a change in the identity of the site as opposed to a mere change or identification of the use of the site;

ii) Whether the use of the dominant land as changed would result in a substantial increase or alteration in the burden on the servient land.

80. It is clear from Neuberger LJ's judgment at [51] that the servient owner is only entitled to object if both questions are answered affirmatively.

81. The judge did not need to answer either of these questions because of the view that he had taken that Mr and Mrs Sharman did not acquire the additional rights under section 62. So we must answer them for the first time. Since there were already stables on the land conveyed to Mr and Mrs Sharman I cannot see that the mere fact that Mr and Mrs Wood have started a livery business can amount to a radical change in the dominant tenement. The increased use of horses of which Mr Waddington complains is in my judgment no more than an intensification of use. In my judgment, therefore the first of the questions posed by Neuberger LJ should be answered "No". Mr Gaunt did not argue to the contrary. The second one does not, therefore, arise; and in any event the judge made no findings of fact which would allow us to answer the second question affirmatively.

Result

82. Accordingly in my judgment Mr and Mrs Wood are entitled to the rights they claim by virtue of section 62 of the Law of Property Act 1925.

83. It follows that the application of the rule in *Wheeldon v Burrows* does not arise; but it would I think have been an uphill struggle for Mr Karas to have successfully challenged the judge's finding of fact that the claimed rights were not *necessary* for the reasonable enjoyment of the land transferred. Nor is it necessary to consider the case based on the alleged common intention.

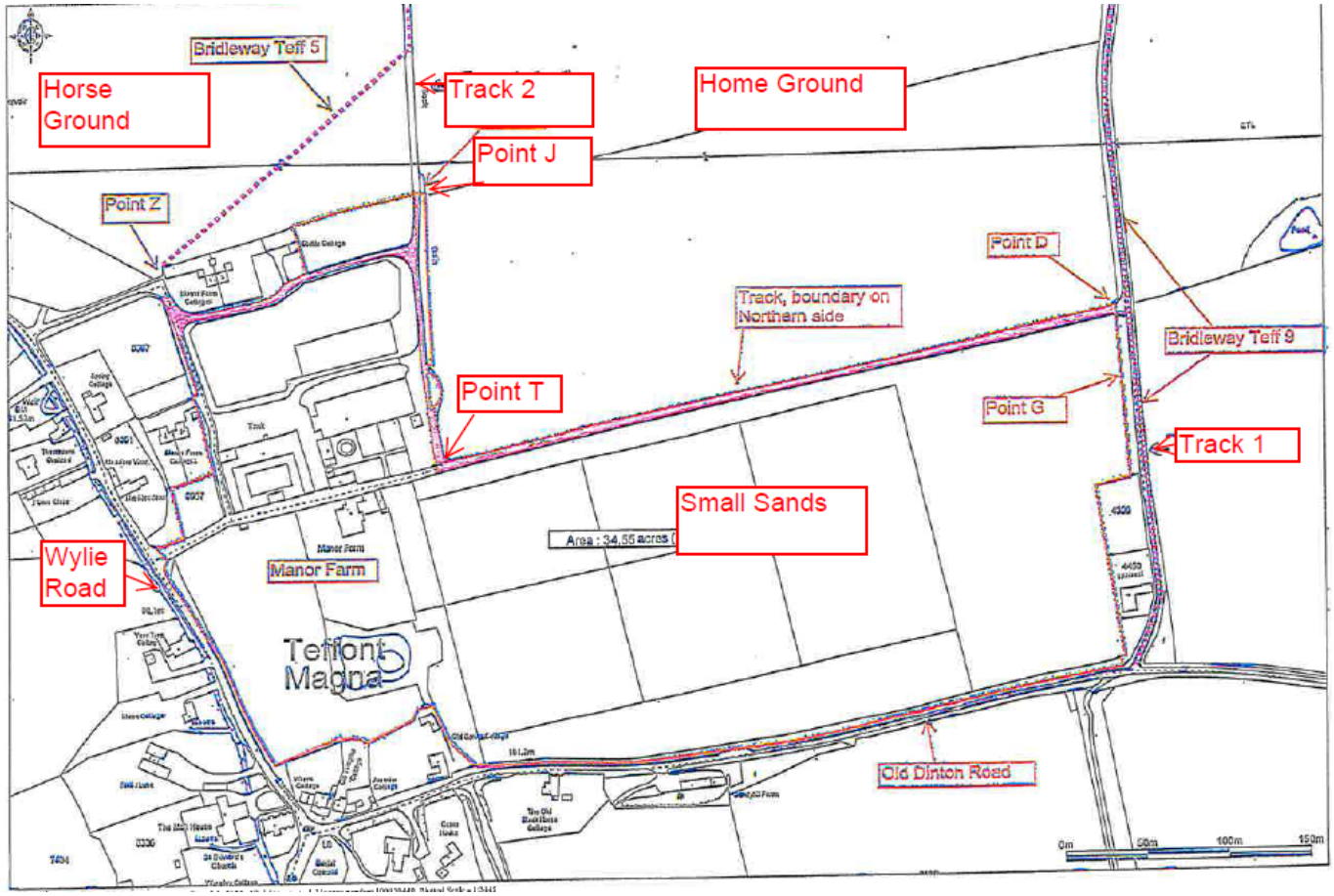
84. In those circumstances I consider that the appeal should be allowed and that we should declare that Mr and Mrs Wood are entitled to the rights claimed by virtue of section 62 of the Law of Property Act 1925.

Lord Justice McCombe:

85. I agree

Lord Justice Richards:

86. I also agree.


Bridleway Teff 5
Horse Ground
Track 2
Home Ground
Point J
Point Z
Point D
Track, boundary on Northern side
Bridleway Teff 9
Point T
Point G
Track 1
Small Sands
Area : 34.55 acres
Wylie Road
Manor Farm
Teffont Magna
Old Dinton Road
0m
50m
100m
150m