



[2017] UKFTT 0344 (PC)

REF/2014/719/896/965

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**PROPERTY CHAMBER LAND REGISTRATION  
FIRST-TIER TRIBUNAL  
IN THE MATTER OF A REFERENCE  
UNDER THE LAND REGISTRATION ACT 2002**

**BETWEEN**

- (1) Donald John Bealing and Suzann Bealing  
(2) Stuart Frazer Keddie and Katherine Keddie

**APPLICANTS**

and

- (1) Gregory Parsons and Heidi Parsons  
(2) Paul Frederick Ewbank

**RESPONDENTS**

**Property Address: Mooredge Cottage and Scotgate Cottage, Pateley Bridge,  
Harrogate HG3 5NE**

**Title Numbers: NYK57750, NYK362633 and NYK92575  
NYK116638, NYK121213, NY413797**

**Before: Judge Owen Rhys**

**Sitting at: Harrogate Justice Centre**

**On: 29<sup>th</sup> and 30<sup>th</sup> November and 1<sup>st</sup> and 20<sup>th</sup> December 2016**

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**ORDER**

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**IT IS ORDERED THAT** the Chief Land Registrar shall give effect to the Applicants' applications dated 24<sup>th</sup> April 2014

Dated this 28<sup>th</sup> day of March 2017

*Owen Rhys*

BY ORDER OF THE TRIBUNAL







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<b>Bealings representation:</b>	Mr Edward Francis of Counsel instructed by Barber Titleys Solicitors
<b>Keddies representation:</b>	In person
<b>1st Respondent representation</b>	In person
<b>2<sup>nd</sup> Respondent representation</b>	Ms Vilma Vodanovic of Counsel instructed by LCF Solicitors

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**DECISION**

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## INTRODUCTION

1. This dispute relates concerns two adjoining cottages, situated on the hillside just to the north-east of Pateley Bridge, North Yorkshire. The first-named Applicants, Mr and Mrs Bealing (“the Bealings”) are the registered owners of Mooredge Cottage under title number NYK57750. This title was first registered in 1986, and the Bealings became registered proprietors on 22<sup>nd</sup> December 1994. The second-named Applicants, Mr and Ms Keddie (“the Keddies”), are the registered owners of Scotgate Cottage under title number NYK92575. This title was first registered on 26<sup>th</sup> August 1999 and the Keddies are the first registered proprietors. The two cottages (to which I shall refer collectively as “the Cottages”) form a single building, originally being the offices of the Scotgate Ash Stone Co Ltd, a company which in the late 19<sup>th</sup> and early 20<sup>th</sup> century carried out quarrying operations on the surrounding land. The building and adjoining quarry land was acquired by Pateley Quarries Ltd in 1915, and the building was converted into two dwellings and sold off around the end of the Second World War.
2. Mooredge Cottage occupies the northerly part of the shared building, and Scotgate Cottage the southerly part. Neither property is directly served by a public highway. They are both reached across land in third party ownership, as I shall now describe. The road running north-east from Pateley Bridge – which climbs steeply – is known as Old Church Lane. There is a track on the left hand side (running initially almost due north) which is a shared access to a number of dwellings, including the Applicants’ cottages. This track continues in a north-westerly direction, and enters land belonging to the first-named Respondents, Mr and Mrs Parsons (“the Parsons”). The track forms an access to the Parsons’ house known as Lower Wild Carr (registered under title number NYK121213 and coloured blue on the plan attached to the Bealings’ Statement of Case), and continues immediately in front of it for a further distance. Eventually it turns slightly to the north and joins up with another track running in from the east. The conjoined track then continues past Mooredge Cottage and provides access to it. There is a separate drive and entrance to Scotgate Cottage which runs off this track. I shall refer to the section of track from its entrance on Old Church Lane, past Lower Wild Carr and as far as the junction with the other track (east of

Mooredge Cottage) as “the Bottom Track”. Although there is no express right of way over the Bottom Track the Respondents conceded that the Applicants have a full vehicular right of way over it through long user.

3. There is another access to the Cottages. A short distance before the Bottom Track reaches Lower Wild Carr, another track runs off it in a north-westerly and then northerly direction. It climbs a short ramp (“the Connecting Ramp”) before reaching a higher level, just before the entrance to former quarry land known as Draymans Field Quarry. Once it reaches the higher level, this track turns north-west and runs in a straight line through several fields before joining up with the Bottom Track a short distance east of the Cottages. I shall refer to this track as “the Top Track”. Although there is considerable dispute as to the appearance of the Top Track over the years, it is known and commonly accepted that it runs along the bed of a former tramway, used to carry stone and other material in connection with the quarrying operations that ceased many years ago.
4. The Top Track runs across land in different ownerships to which I shall refer collectively as “the claimed servient land”. The eastern section, including in particular the Connecting Ramp, is within the ownership of the Parsons. This is registered under title number NYK116638 and is coloured green on the plan attached to the Bealings’ Statement of Case. I shall refer to it as the Green Land, and to Lower Wild Carr, where they reside, as the Blue Land. The second-named Respondent, Mr Ewbank, is the current owner of two parcels of land, NYK362633 and NYK413797. These titles are coloured in red and purple respectively on the Bealings’ plan and I shall refer to them by this description. The Purple Land lies to the north of the Green Land, higher up the slope. There is a gate (Gate 2) at the point where the Top Track enters the Red Land, which extends west from the Purple Land as far as a gate (referred to as Gate 3) accessing the field in which the Bottom Track and the Top Track merge. The section of the Top Track to the west of Gate 3 runs through land known as Sparrow Hawk Farm, currently in the ownership of Sharron Smith and Simon Slee. Although they initially objected to the Applicants’ claimed rights of way that objection was withdrawn, and the dispute therefore relates only to the section of the Top Track to the east of Gate 3.

5. The claimed servient land was in the ownership of Barbara Lawrence, Averil Fuller Thompson and Stephen Thompson at the end of the Second World War. It then passed through a variety of different ownerships. By the late 1980s Dr Sandra Hogarth Scott had acquired this land, which was then registered in her name, together with that of her partner, Katrina Brayshaw, in 1992. There have been a number of dispositions in recent years. Dr Hogarth-Scott and Miss Brayshaw sold the Red and Purple Land to Denis Hannam on 14<sup>th</sup> October 2008, and that land was removed from title number NYK116638 and registered in Mr Hannam's name under NYK362633. The Respondents say that Mr Hannam had a tenancy or grazing licence of this land for some years prior to this purchase. On Mr Hannam's death in 2009 the Red and Purple Land passed to his widow, Auriol Jane Hannam. It was during her ownership of this land that the dispute first arose, in the circumstances which I shall explain in more detail below. Jane Hannam transferred the Purple Land to Mr Ewbank on 4<sup>th</sup> April 2014, and it was separately registered under title number NYK413797. Dr Hogarth-Scott and Miss Brayshaw transferred the Green and Blue Land to the Parsons on 24<sup>th</sup> April 2014, and they were registered as proprietors on 16<sup>th</sup> May 2014. As the final piece of the jigsaw, Mrs Hannam transferred the Red Land to Mr Ewbank in 2015.

### **THE DISPUTE AND REFERRED APPLICATIONS**

6. The immediate cause of the dispute occurred on or about 13<sup>th</sup> May 2013. As I have explained, at that date the Red Land was in the ownership of Mrs Jane Hannam. On the western boundary of the Red Land there is a gate which provides access to and from the adjoining field, part of Sparrow Hawk Farm. For reasons which will become apparent, this gate has been referred to as Gate 3 and I shall use that description. The Top Track passes through Gate 3 and eventually meets up with the Bottom Track, to form a combined access to the Cottages. On 13<sup>th</sup> May 2013 Kirsty Hannam, the daughter of Mrs Jane Hannam, placed a lock on Gate 3. There is an issue as to whether or not Gate 3 had ever been locked previously, and I shall have to make findings of fact in that regard. What is not in dispute, however, is that the Applicants discovered the locked gate on 14<sup>th</sup> May 2013 and immediately raised a protest with Mrs Hannam. This was to no avail, and the gate remains locked to this day. There ensued a great deal of correspondence between the parties, which did not produce any resolution of the

dispute. Accordingly, on 24<sup>th</sup> April 2014, both sets of Applicants applied to Land Registry in Form AP1 (“the Applications”) to register the benefit of an easement over both the Top and Bottom Track in favour of their respective titles. By the same applications, they applied to register the burden of the easements against the claimed servient land – namely the Red, Blue, Green and Purple Land. All the affected proprietors – that is, the Parsons, Mrs Hannam and Mr Ewbank, objected to the Applications, and on 29<sup>th</sup> December 2014 the dispute was referred to the Tribunal. Mrs Hannam was named as one of the Respondents, but as appears from the above chronology of ownership, she sold the Red Land to Mr Ewbank in 2015, and since she no longer had an interest in the claimed servient land by order of the Tribunal dated 12<sup>th</sup> May 2015 she was permitted to withdraw from the references, but without prejudice to the Applicants’ right to apply for an order for costs relating to the period prior to the date of withdrawal. It will also be apparent that the Parsons obtained a transfer of the Blue and Green land on the same day as the date of the Applications, 24<sup>th</sup> April 2014. There is no existing objection to the Applicants’ use of the Bottom Track – it is conceded by the Parsons that they have a right of way over it. The dispute therefore relates only to the claimed easement over the Top Track.

### **THE PHYSICAL CHARACTERISTICS**

7. I shall now describe the salient characteristics and appearance of both the Top and Bottom Tracks, travelling from east to west, namely from the point of entry from the public highway as far as the Cottages themselves. I had the benefit of a site view immediately prior to the commencement of the hearing, which has greatly assisted me in my task. In addition, all the parties – particularly the Keddies and the Bealings – have provided very detailed descriptions of both tracks in their supporting documentation, with extensive reference both to plans and to photographs. The Bottom Track runs northwards off the public highway known as Old Church Lane. The first section is tarmaced, but as it turns in a more north-westerly alignment towards Lower Wild Carr the hard surface gives way to earth and grass to form a rutted track. This passes immediately in front of the Parsons’ house at Lower Wild Carr and continues westwards. It is built into the side of a slope, with the high ground to the right (north) side above Lower Wild Carr. There is a drop to the farmland on the left (south) side, and the steepness of the

drop increases as the Bottom Track runs south-east to north-west. A short distance past Lower Wild Carr the Bottom Track narrows. The constriction is caused by the presence on the right (north) side of a substantial dry stone retaining wall. The hillside at this point becomes much steeper and there are deposits of quarrying waste. The retaining wall appears to have been designed to protect the Bottom Track from slippage from above. There are loose stones and visible bulges, and trees and shrubs are growing though in some places. However, the wall, which is some 60 feet in height at its maximum, does not appear to be stable. This opinion is based merely on my own observation, and on the evidence (particularly photographs) supplied by the Bealings and the Keddies, but there has been no expert evidence from a surveyor as to its stability. There is also a low drystone wall on the left (south) side of the track presumably designed to prevent vehicles from falling onto the slope below. The effect of the two walls, on either side of the Bottom Track at this point, is to reduce the width to 2.12 metres (this being Mr Bealing's measurement which was not challenged). There are photographs in evidence of vehicles passing by this point. A standard road-going 4 x 4 has just enough room to pass through without touching either side. A Transit van, by contrast, fills the entire width, almost touching the retaining wall on one side, and actually riding over the low wall on the other. Because the retaining wall bulges out in places, it seems that Transit-sized vehicles necessarily run over the downhill wall to keep their bodywork clear, and there is evidence that vehicles have been damaged by hitting the retaining wall at this point. It is common ground that an oil tanker, using this section of the Bottom Track in 1993, actually came off the road at this point and fell into the field below. It is also common ground that the lower wall supporting the Bottom Track suffered a collapse in 2000, necessitating closure of the Bottom Track and rebuilding of the wall. Mr Potter (to whom I refer below) recalls an occasion when his vehicle slipped off the Bottom Track.

8. The Bottom Track continues past this section through a gate and then turns north and ascends a slope before merging with the Top Track shortly before reaching the Cottages. The slope on the left-hand side of the road is at its steepest on this bend, a characteristic which I shall refer to in more detail later in this Decision. Once the two tracks merge, the combined track passes the north side of Mooredge



Cottage, providing access to it. A separate driveway serving Scotgate Cottage runs off the combined track to the south-west, at a point before it reaches Mooredge Cottage.

9. I shall now describe the Top Track, also from east to west. As I have already stated, it diverges from the Bottom Track at a point shortly before it reaches Lower Wild Carr. It then ascends the hillside initially in a north-westerly and then northerly direction. This section of the Top Track is referred to as the Connecting Ramp and is unmade. It is, I think, generally accepted that it can be slightly challenging to negotiate when wet or icy. When it reaches the top of the slope it passes through a gate ("Gate 1") and then turns sharply left (west). At this point it joins the course of a disused tramway, constructed prior to 1909, which carried stone from Draymans Field Quarry to a spur of the Pateley Bridge railway line somewhere to the west of the Cottages. Draymans Field Quarry forms the northern part of the Green Land. The former tramway runs west-north-west in a straight line and this is the route of the Top Track. There is a second gate ("Gate 2") on the Top Track, at the boundary between the Green and Red Land, originally erected by Mr Hannam in around 2008 when he bought the Red Land from Dr Hogarth-Scott and Miss Brayshaw (who at that time still retained the Green Land). The tramway and Top Track continues across the fields that comprise the Red Land until meeting a third gate ("Gate 3") at the boundary of the Red Land and Sparrow Hawk Farm to the west. There is a dispute as to whether this gate was ever locked prior to May 2013 and this is an issue I must resolve. However, the effect of the lock placed on the gate in May 2013 was and is to prevent the Applicants from accessing the Cottages via the Top Track. The Top Track is not hard surfaced, but for the most part there is a stone bed (derived from the disused tramway) which allows the track to be used in all weathers. There is a dispute as to the nature and appearance of the surface of the Top Track over the years, and I shall have to make findings about this issue. Its condition of course varies according to the seasons and the weather. For present purposes, however, I think it is safe to say that the Top Track, which is consistently marked on the Ordnance Survey map, has always been discernible to some extent as a worn and in places rutted track and is usable in most conditions.

## THE APPLICANTS' CASE

10. As I have said, the Bealings have been proprietors of Mooredge Cottage since 1994, and the Keddies proprietors of Scotgate Cottage since 1999. It is their case that the Top Track has been used by themselves, and their predecessors in title, over a period in excess of 50 years with and without vehicles, for all purposes connected with the use of the Cottages. The Bealings rely on the evidence of predecessors in title dating back to 1981, and statutory declarations from earlier predecessors in title dating back to 1945. The Keddies have no statutory declarations, but they have obtained statements from predecessors in title dating back to 1962, many of whom gave live evidence. The only gap in their evidence is for the period 1990 to 1999, the period of ownership of a Mr and Mrs Wild, whose evidence was to the effect that user of the Top Track was permissive. This is an issue I shall have to resolve. The Applicants also rely on the evidence of other witnesses, who have never owned the Cottages but are and have for many years been familiar with the area in general and the use of the Top Track in particular. I shall refer to their evidence in more detail below. However, it would be fair to say that all these witnesses, former owners included, were unanimous in their recollection that the Top Track was regularly used as an access to the Cottages over the entirety of this period. There were nuances in the evidence, as one might expect. They were all agreed that the primary means of access to the Cottages has been over the Bottom Track. However, they were also all agreed that it was necessary for larger vehicles to use the Top Track since the Bottom Track was too narrow. Some witnesses said that use of the Top Track was irregular, particularly when ground conditions were poor. Some witnesses said that use of the Top Track in snowy conditions depended on the state of the Bottom Track, which was liable to drifting. Some witnesses recalled that they and their visitors preferred to use the Top Track – others that they preferred to use the Bottom Track. With the exception of the Wilds, none of the Applicants' witnesses was aware of any permission being asked for or given for the use of the Top Track. On the basis of this evidence, the Applicants claim that a full vehicular right of way has been obtained, over the claimed servient land and for the benefit of the Cottages, by virtue of long user. I shall set out the relevant law at the appropriate juncture, but in essence the Applicants must establish a period of more than 20

years' user of the Top Track, as of right – that is, without force, without secrecy and without permission. This, in a nutshell, is the Applicants' case.

## THE RESPONDENTS' CASE

11. The Respondents' cases are somewhat more opaque. I shall take each case separately. The following passages from the Parsons' Statement of Case identifies their position follows:

*"8. We have reviewed the applicant's statement of case individually and carried out extensive investigation into the matters raised in their statements. As is quite correctly pointed out we are unable to give an opinion based on first-hand knowledge of the applicants use of the upper route however we are able to make judgment based on the information provided to us. This we have done in the following points.*

*12 a) Any such use of the upper route would appear to have been so infrequent and for exceptional circumstances alone and therefore permitted by the relevant land owners as a good neighbourly act. No Right should be derived from the act. We see nothing in the documents to suggest otherwise and statements received from the previous owners confirm that no general usage of the upper track took place.*

*12 c)..... All statements infer any exceptional use of the upper track was on a permissive basis and not the Applicants exercising a right.*

*13. As explained previously, due to our very limited occupancy at Lower Wild Carr we have no capacity through personal knowledge on whether the Applicants have a Right of Access through "Long User". Our only option is to decipher the information and declarations given to use by the previous owners and other users and to assess and verify factual information submitted to us by the Applicants. Based on the above there is no clear evidence to suggest a Right of access on the upper route. There is no evidence submitted of continued use for a period far in excess of one year prior to our purchase of the property..... It would appear that such use has been so infrequent and of a permissive nature, granted purely to assist neighbours."*

12. The Parsons, therefore, are unable to provide any evidence as to the Applicants' user of the Top Track. Their case is based on their reading of the evidence relied on by the Applicants, whom they are putting to proof. They conclude that the user was infrequent, for exceptional purposes and permissive. The Parsons have prepared their case without the benefit of legal representation. They do not absolutely deny that there has been some user, but they challenge the frequency and duration of the user, and make a positive case of permission. This seems to be the core of their objection.

13. Mr Ewbank's case is to be found at paragraph 4 of his Statement of Case, in this passage: *"The Applicants' produced evidence is incomplete and I am unable to comment on matters to which they infer [sic] and may evidence at a later date but the Applicants' Statement of Case does suggest that any use by them or their predecessors of the Top Track has been minimal, and is no more than a use dependent upon the tolerance and good nature of the land owner and not such as to put the land owner on notice that a right is being asserted. Here there has been no acquiescence on the part of myself and my predecessors in title. Any use by the Applicants has been so occasional only or by the permission of my predecessors in title."*
14. His case seems to be that any user has been minimal, *"dependent on the tolerance and good nature of the land owner"* and therefore no acquiescence by him and his predecessors. Bearing in mind that this Statement of Case was signed by Mr Ewbank's solicitor (unsatisfactory in itself given that the Statement is written in the first person) it is unhelpfully vague. Since a prescriptive easement depends on acquiescence in long user, it is unclear how *"a use dependent upon the tolerance and good nature of the land owner"* lacks the essential characteristic of a user as of right. Although permission is alleged, no particulars are given. Finally, like the Parsons, it seems that Mr Ewbank accepts that there has been some use of the Top Track, which he describes as *"minimal"*. Ms Vodanovic, who appeared for Mr Ewbank, lodged a Skeleton Argument, which scarcely clarifies the case. At paragraph 13 she writes: *"In any event, during this period and from 2009 onwards, Mr Ewbank and Mrs and Ms Hannam have never seen the top track being used in the manner which has been described by the Bealings. The extent of the use that they allege is likely to have been noticeable to the land owners, yet they have confirmed that they have not come across the First or Second Applicants when they used the top track. This would suggest that use was occasional and insufficient to establish a right of way by prescription and also indicative why they did not have knowledge of any right being asserted."*
15. It may be noted that the Respondents – and the Hannams as original objectors – deny the existence of any easement over the Top Track. They do not, for example, concede some limited rights – for emergency vehicles, perhaps, or for

commercial vehicles as opposed to private cars. Their case is based unequivocally on a denial of any right of way for any purpose.

## THE RELEVANT LAW

16. I have already highlighted the essential characteristics of a prescriptive easement, and there is no dispute between the parties in this respect. The Applicants must establish at least 20 years' continuous user "as of right" – namely, without force, openly and without permission. Since the Applicants are relying on the doctrine of lost modern grant, it is enough that they establish any period of 20 years' user – there is no requirement to establish 20 years' user immediately prior to the making of the claim, as would be the case if they were relying on the Prescription Act 1832. Once a prescriptive easement is established, it can only be extinguished by abandonment, and that is not alleged in this case. In relation to this point, Mr Francis relies on Smith v Brudenell-Bruce [2002] P & CR 4, where the fact that the user became contentious after the 20-year period had elapsed was held not to have affected the existence of the easement once it had become established. Although the basic requirements of a prescriptive easement are not disputed, there remain certain legal issues between the parties, namely:

- a. The extent and regularity of the necessary long user. Mr Francis for the Bealings cites Hollins v Verney (1884) 13 QBD for the proposition that the proven user must be: *".... enough to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance is intended"* per Lindley L.J at p.315. He also relies on the following passage in Gale on Easements at paragraph 4-143 as follows: *"In those easements which require the repeated acts of man for their enjoyment, as rights of way, it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him – an indication that would not be afforded by a mere accidental or occasional exercise."*
- b. For her part, Ms Vodanovic argues (see paragraph 15 of her Skeleton Argument) that the user of the Top Track *"was so infrequent it was*

tolerated by the land owners such that “continuous use” cannot be established.”, citing an unreported decision of the Court of Appeal namely Goldsmith v Burrow Construction Ltd, 16<sup>th</sup> July 1987 in support.

- c. She also argues that; “*The more regular use that is being asserted by some witnesses spanned short periods and would not necessarily be known to the owners of the land. The respondents cannot be burdened with a right of way, the extent of which he was unaware of and which is more onerous in nature than when it originally started*”, for which proposition she relies on Dewan & others v Lewis [2010] EWCA Civ 1382 per Carnwath L.J at paragraph 24. As far as I can tell, this Court of Appeal case decided that a right of way for agricultural purposes acquired by long user did not include a right to drive cattle where there had been no evidence of this specific use.
- d. Ms Vodanovic also argued that the Applicants’ use of the Top Track was permissive and cited a decision of Silber J in Odey v Barber [2006] EWHC 3109 (Ch). I do not think that the Applicants could or would dispute that the long user, if it took place with the actual permission of the servient owner or owners, would not amount to user “*as of right*”.
- e. Ms Vodanovic also argues that the presence of certain signs on the gates across the Top Track rendered any use by the Applicants and their predecessors contentious and therefore not “*as of right*”. She submits that since these signs include the word “Private” this made clear that the Top Track was not to be used by owners and occupiers of the Cottages. She relies upon the recent decision of the Court of Appeal in Winterburn v Bennett [2016] EWCA Civ 482 and this passage in particular: “... *the erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land.*” Mr Francis points out that this issue was not raised until long after the service of Mr Ewbank’s Statement of Case, and he objects to the introduction of this point. However, the existence of the signs is not in dispute, and it

must be open to the Tribunal to take this issue into consideration when deciding if the claimed long user has been “*as of right*”.

- f. The Parsons claim that they acquired the Green Land free from any alleged easement, relying on paragraph 3 of Schedule 3 to the 2002 Act. A legal easement is of course binding on a transferee as an overriding interest whether or not registered, save where the exception in paragraph 3 applies. The exception applies to:

- (1) *A legal easement ... which at the time of the disposition –*
  - (a) *is not within the actual knowledge of the person to whom the disposition is made, and*
  - (b) *would not have been obvious on a reasonably careful inspection of the land over which the easement .. is exercisable*
- (2) *The exception in sub-paragraph (1) does not apply if the person entitled to the easement or profit proves that it has been exercised in the period of one year ending with the day of the disposition.”*

- g. Mr Francis, for the Applicants, submits that the Parsons are unable to bring themselves within the exception for two reasons. First, because they had actual knowledge of the claimed easement which was obvious on a reasonably careful inspection of the Green Land. Secondly, and in any event, because the Applicants had last exercised the right of way on 13<sup>th</sup> May 2013, within one year of the date of the disposition whereby the Parsons acquired the Green Land. The Keddies also adopt this argument.

## **THE ISSUES TO BE RESOLVED**

17. Having regard to the facts and matters set out in the respective Statements of Case, and the arguments advanced in the parties’ Skeleton Arguments and Statements of Issues, it seems to me that the issues, evidential and legal, are as follows:

- a. Has there been any user of the Top Track for access to and from the Cottages by the owners and occupiers thereof? If so:
  - i. What was the nature, type and frequency of that user?
  - ii. Over what period did the user take place?
  - iii. Was the Top Track used openly?
  - iv. Was permission given for their use of the Top Track?

- b. Was Gate 3 locked periodically prior to 13<sup>th</sup> May 2013 and, if so, what is the legal effect?
- c. Did the Parsons take the Green Land free from any established rights of way over the Top Track by virtue of the provisions of paragraph 3 of Schedule 3 to the 2002 Act? This raises certain sub-issues, namely (a) did the Parsons have actual knowledge of the easement, (b) was it obvious on a reasonably careful inspection, and (c) on what date was it last exercised?
- d. Did the presence of certain signs at the entrance to the Top and Bottom Track and at points along the Top Track render any user contentious, following the decision in Winterburn v Bennett [2016] 2 P & CR 482? This also raises a factual issue, namely what signs were erected, by whom and when were they erected and what did they say?

#### **THE EVIDENCE RELIED ON BY THE APPLICANTS**

18. The Applicants claim that they have acquired an easement over the Top Track in favour of their own titles. There are thus two alleged dominant tenements, Mooredge Cottage and Scotgate Cottage. Each set of Applicants must therefore establish, on the evidence, that there has been 20 years' user as of right of the Top Track as an access to and from their respective properties. Having said that, the two cottages form one building, albeit that they have separate entrances, and evidence of long user in respect of one increases the probability that there was the same user in respect of the other. The alleged rationale for using the Top Track – namely, the unsuitability of the Bottom Track at certain times of year, and for certain types of vehicle – is identical for both of the Cottages.
19. In addition to the witness statements and “live” evidence, relied upon by both sets of Applicants, the Bealings also submitted a number of statutory declarations from predecessors in title. I shall consider these first.
- a. **Sandra Hogarth-Scott**, owner of Mooredge Cottage between 1973 and 1981. She made a statutory declaration on 10<sup>th</sup> April 1981 in which she stated that “*During the whole period of my occupation of the said property the said ways or tracks have been used by me and my agents employees and friends as of right without the consent of any person and without*



*interruption and without payment of any kind to any person .... The said use has been to pass and repass along the said ways or tracks by day and night with or without vehicles of any description for all purposes connected with the said property.”* The “said ways or tracks” are shown on the attached plan and comprise both the Top and the Bottom Tracks. She also produced a letter from her predecessor in title, Dora Louise Platten, stating that she had enjoyed “*free access over the road or track leading from Moor Edge Cottage to the main road without any payment interruption or permission from any person.*” However, she does not identify the road or track referred to and it is not clear from this statement whether she means the Top Track. I shall refer to other evidence in due course which sheds more light on this statement.

- b. **Timothy Hancock**, owner (with his wife) between 1981 and 1988. He made a statutory declaration on 3<sup>rd</sup> March 1988 in which he stated that “*the only means of vehicular access to [Mooredge Cottage] is over the ways or tracks coloured yellow on the plan annexed hereto and marked “A”. .. I have lived at the property for approximately 7 years and can confirm that I have experienced no difficulty in gaining access to the property.*” Both the Top and Bottom Tracks are identified by yellow colouring on the attached plan.
- c. **John Franklin**, owner (with his wife between 1988 and 1990). His statutory declaration was made on 7<sup>th</sup> December 1990, and includes this statement: “*During the whole period of my occupation of the said property the said ways or tracks have been used by me and my agents employees and friends as of right without the consent of any person and without interruption and without payment of any kind to any person since 1988 until the present time..... The said use has been to pass and repass along the said way or track by day and night with or without vehicles of any description and with or without animals for all purposes connected with the property.*” The plan identifies both the Top and Bottom Track.
- d. **Steven Potter**, owner of Mooredge Cottage (together with his wife) between 1993 and 1994. His statutory declaration was made on 7<sup>th</sup>

December 1994. The declaration includes the following passage:  
“During the whole period of my occupation of the said property the said ways or tracks have been used by me and my agents employees and friends as of right without the consent of any person and without interruption and without payment of any kind to any person since 1993 until the present time..... The said use has been to pass and repass along the said way or track by day and night with or without vehicles of any description and with or without animals for all purposes connected with the property.” Again, the plan identifies both the Top and the Bottom Tracks.

20. These statutory declarations cover the period between January 1973 and December 1994, when the Bealings bought Mooredge Cottage and moved into it, where they remain. Of these declarants, only Mr Potter gave live evidence. Dr Hogarth-Scott made a witness statement on 1<sup>st</sup> July 2014 in support of Mr Ewbank, the Second Respondent. This statement was inconsistent with her statutory declaration, and in the event Mr Ewbank chose not to call her to give live evidence.
21. In addition to these statutory declarations, the Bealings themselves had made unusually comprehensive witness statements, which they verified on affirmation and oath, and upon which they were cross-examined extensively by Mr Parsons and Ms Vodanovic. In their statements, Mr and Mrs Bealing provided a detailed account of their use of the Top Track since their purchase of Mooredge Cottage in December 1994. They also describe the physical characteristics of both tracks in considerable detail – as do the Keddies. They accept that the primary means of access to the Cottages is over the Bottom Track, but draw attention to the severe limitations on its use caused by the width restriction I have mentioned and the unstable nature of the retaining walls. They refer to the steep drop below the Bottom Track (to the south) and state that in wet and icy weather it is sometimes difficult to control vehicles descending the track where it turns towards Lower Wild Carr. Generally, they say that the Bottom Track can be hazardous for all vehicles in certain weather conditions, and is entirely unusable by larger vehicles. They state that they never asked for nor were they given permission to use either the Top Track or the Bottom Track and have always assumed that they had a right

to do so. They also state that the gates across the Top Track have never been locked nor has there been any obstruction to the track until Gate 3 was locked in May 2013. They never saw Mr Hannam's wife or daughter on the land. Their specific uses and activities on the Top Track may be summarised as follows:

- a. **Deliveries and tradesmen.** They say that the Top Track has been used as the only means of access for delivery vehicles and tradesmen's vehicles beyond the size of a small van, and give numerous examples, including:
  - i. The removal vehicle when they moved in;
  - ii. Builders engaged at various times to carry out works to Mooredge Cottage including the carriage of building materials and scaffolding;
  - iii. Deliveries of items such as a range cooker, kitchen units, piano, kennel, garden furniture, bathroom furniture, oil-fired heater;
  - iv. Regular periodic deliveries of coal for heating system prior to 1996;
  - v. Regular periodic deliveries of kerosene for replacement oil-fired heating system from 1996 to onwards.
- b. **User by private vehicles:** Although they accept that the Bottom Track is their normal means of access to Mooredge Cottage when a car is used, there have been many occasions when private cars have used the Top Track. This has been the case particularly when the Bottom Track has been blocked by snow, or is hazardous due to icy conditions, or when there has been a partial collapse of the Bottom Track. Mrs Bealing would also regularly drive her car along the Top Track, approximately once per fortnight, to check its condition.
- c. **Maintenance.** Mr Bealing, with Mr Keddie's help, carried out regular acts of maintenance to the Top Track, filling in holes, cutting back gorse, clearing ditches and cutting channels to take the run-off from the upper fields. In 2000 Mr Bealing, with the help of Mr Lumley and Mr Keddie,

undertook a more extensive repair, as described by Mr Lumley and shown in Mrs Keddie's photograph 57.

22. Mr and Mrs Keddie have also provided witness statements dated 15<sup>th</sup> November 2015, which they verified on oath and upon which they were thoroughly cross-examined by Mr Parsons and Ms Vodanovic. These statements include extensive background material regarding the history of the tracks and quarry and other related matters, including many photographs dating back to 2000. Like the Bealings, they have provided a detailed description of both tracks, identifying the same physical limitations on the use of the Bottom Track and its periodically hazardous nature. They state that they never asked for nor were they given permission to use either the Top Track or the Bottom Track and have always assumed that they had a right to do so. They also state that the gates across the Top Track have never been locked nor has there been any obstruction to the track until Gate 3 was locked in May 2013. They never saw Mr Hannam's wife or daughter on the land, although Mr Keddie did occasionally see Mr Hannam there. Their evidence of actual user may be summarised as follows:

- a. **The demonstrator vehicle.** Mr Keddie was employed by a power tool company (Makita (UK) Ltd) between 1999 until April 2008. As part of his job, he took a large demonstration vehicle to trade shows and to train customers. The particular vehicle was an Iveco long wheel base van with twin rear wheels. This vehicle was used by Mr Keddie approximately one week in every six, and was parked overnight at Scotgate Cottage (and secured by wheel clamp). This vehicle was too wide to use the Bottom Track and Mr Keddie invariably used the Top Track to access the cottage.
- b. **Bonfire Night.** Since they moved into Scotgate Cottage the Keddies have held a bonfire night party to which numerous friends and family members were invited. Some of these invitees, particularly those in larger cars, used the Top Track to obtain access – others used the Bottom Track.
- c. **Deliveries.** All deliveries by larger vehicles use the Top Track throughout the year. This included the delivery of heating oil to Scotgate Cotatge prior to the locking of the gate in 2013. The deliveries made by Mark Lumley and described by him came over the Top Track.

d. **Use by cars.** Mrs Keddie uses the Top Track when a trailer is attached to her Land Rover. She uses the trailer to take rubbish to the collection point at the junction of the Bottom Track and Old Church Lane, or in the case of bulkier rubbish to the Council tip. She has also moved furniture in and out of the cottage using the trailer. She has transported large kitchen appliances to Mooredge Cottage using the large boot of her Land Rover. On all these occasions she used the Top Track. Mrs Keddie describes other occasions thus: *“When the children were at primary school, I know we always returned home along the top track every Friday afternoon. The children would already be in their “late games” PE kit, so it was easy for them to climb gates and open them. We used to play a game whereby the children used to run along behind the landrover and if they could catch me up, I would squirt them with the rear washer water! It was always great fun to drive along the top track when the children had “townie” friends coming for sleepovers.... I frequently used the top track for no reason at all, other than to make sure that no heavy farm machinery had been churning up our infill maintenance... Our family and friends regularly used the top track. Most had used the bottom track once or twice and quickly decided that the top track was the more convenient option.”*

e. **Maintenance.** Mr Keddie regularly cleared grass and gorse – using a petrol lawnmower and industrial brush cutter – from both the Top and Bottom Tracks, concentrating his efforts on the Connecting Ramp rather than the remainder of the Top Track which generally required less maintenance.

23. In addition to their own evidence, the Applicants obtained in excess of 40 statements from other witnesses familiar with the use of the Top Track. The Tribunal directed the Applicants to limit the number of witnesses to be called to give live evidence with a view to keeping the length and cost of the hearing within reasonable bounds. With that in mind, the Applicants limited their oral evidence to the following witnesses, namely:

a. **James Edward Townley Morris.** He and his wife made a joint witness statement on 30<sup>th</sup> October 2014. He and his wife had owned and resided

at Scotgate Cottage between February 1973 and May 1977. In summary, it was their evidence that they used both the Top Track and the Bottom Track for access, of which the Bottom Track would be used 95% of the time. However, large vehicles would always use the Top Track, which was a former railway and therefore had a solid base and remained usable in all weathers. They would drive over the Top Track in their own car every two months or so to check its condition. They never saw any farm machinery or sheep pens on the Top Track, the surrounding land being used for grazing only. None of the gates across the Top Track were ever locked during their period of ownership, and their use of it was never challenged, nor did they ever ask for permission to use it.

- b. **Steven Potter.** Together with his wife, he had owned and resided at Mooredge Cottage between April 1993 and December 1994. He recalled numerous occasions when the Top Track was used for the purposes of access both to Mooredge Cottage and Scotgate Cottage, then in the ownership of Mr and Mrs Wild. He had also made the statutory declaration referred to above.
- c. **Julian Ingleby.** His parents, Alan Henry Bell Ingleby and Helen Betty Ingleby had owned and lived at Scotgate Cottage between 1962 and 1970, when they sold the property to Richard Clive Duggleby. He gave numerous instances of regular vehicular use of the Top Track both by larger vehicles and private cars.
- d. **John Ingleby.** He is the brother of Julian Ingleby and gave evidence to the same effect.
- e. **Susan Duggleby.** She and her husband made a joint statement dated 31<sup>st</sup> October 2014. They bought Scotgate Cottage (to which they referred as “Scotgate House”) in 1970 and sold it in 1973 and lived there during that period. She gave evidence as to the use of the Top Track on a regular basis by cars and larger vehicles.
- f. **Sheila Williams.** She lived at Scotgate Cottage between February 1977 and January or February 1988. She owned the property, together with

some adjoining land, jointly with her husband. She gave evidence as to the use of the Top Track on a regular basis by cars and larger vehicles.

- g. **Richard Charles Piers Dutton.** He is a long-standing friend of Mr Keddie, having known him since 1976, and more recently his brother-in-law, having married Mrs Keddie's sister. He stated that he had visited the Keddies at Scotgate Cottage more than 50 times since 1999, and regularly used the Top Track with vehicles during that period.
- h. **Michael Garnett.** He is Mrs Keddie's father and spoke to his regular use of the Top Track with a car over the entire period since the Keddies' purchase of Scotgate Cottage.
- i. **Mark Lumley.** He is a local farmer, from a family which has lived and farmed in the area since 1871, on land to the north and west of the claimed servient land. He is also a friend of the Keddies, who are godparents to his three children, and has known them since they moved into Scotgate Cottage in 1999. He too spoke of a variety of instances whereby he used the Top Track to access Scotgate Cottage both for social purposes (such as for the annual bonfire party) and for the purposes of delivering heavy items. He has also done work on their property with his tractor, always accessing it via the Top Track. He recalled an occasion in 2000 or 2001 when he assisted the Mr Keddie and Mr Bealing with extensive repairs to the Top Track. They spent several days in the summer transporting rubble from the disused quarry into the ruts of the Top Track. Mr Bealing dug out the ditches in between loads. He has seen oil and coal deliveries to the Cottages being made along the Top Track. He had never seen any of the Hannams on the Top Track, although he did see Dennis Hannam from time to time at auctions. He was never told that he could not use the Top Track to access Scotgate Cottage, whether by the Hannams, Mr Ewbank or Dr Hogarth-Scott. The gates across the Top Track were never locked, and although the condition of the track varied according to the season, it has always been clearly in regular use.
- j. **Katherine Ann Lumley.** She is the wife of Mark Lumley, and has been a friend of the Keddies for approximately 10 years. She has lived at her

husband's property since approximately 2004. She said that when she bought a Land Rover Discovery in 2008, she was unable to use the Bottom Track and thereafter always used the Top Track. She has also used the Top Track when accessing Mooredge Cottage, when looking after the Bealings' chickens in 2010, 2011 and 2012. Generally, she confirmed her husband's evidence as to the user of the Top Track. She has found herself in the unfortunate position of being a friend or acquaintance of people on both sides of the dispute (with the exception of the Hannams) and is worried about how this will affect her children's relationships, in particular with the Parsons children. She gave evidence of text messages sent to Heidi Parsons, attempting to alert her to the disputed right of way before she and Mr Parson bought Lower Wild Carr. In cross-examination (by Mr Parsons) she said that she had explained the nature of the dispute to Mrs Parsons, which she said had arisen because a gate had been locked (although she did not specify which gate) and that solicitors were involved. She wanted to make this known to her because: "*I wanted you guys to know what you were letting yourself in for.*"

- k. **Jonathan Edward Wardman.** He was until August 2014 a delivery driver for R.M. Hawkesworth and Hawkesworth Coal Company, and a resident of Pateley Bridge for his entire life, having been born in the late 1950s. He recalled in cross-examination that deliveries to both Cottages were made by means of the Top Track, until his company bought a Nissan Cabster which was more or less the same width as a car and narrow enough to use the Bottom Track. There were two or three collapses on the Bottom Track and after that all deliveries to the Cottages took place via the Top Track. The Bottom Track was only used to serve Lower Wild Carr, where he was able to turn the vehicle round. The gates on the Top Track were never padlocked until recently. He never met anyone on the Top Track when he was making his deliveries.
- l. **Ian Wetherhead.** Mr Weatherhead has lived around Pateley Bridge all his life (he is 77 years of age) and at Book House Farm for 65 years. Book House Farm lies just to the south-west of the Cottages. His family used to own the quarry to the north and west of the Cottages. He has



known the Bealings since 1994 and the Keddies since 1999. He accepted that his knowledge of the Top Track is not recent. However, he has witnessed deliveries being made to Scotgate Cottage over the Top Track, and also oil and coal being delivered by that means. He said: *"I have always been aware that the cottages in the quarry had unchallenged access over the top track. This has been the case throughout my life time."*

**m. Jeanette Weatherhead.** She is the wife of Ian Weatherhead, and has also lived in Pateley Bridge for some 70 years. She estimates that her family has lived there for several hundred years. Broadly she confirmed her husband's evidence, although she accepted that her knowledge of the Top Track ceased about 20 years ago. At that time the gates across the Track were never locked.

**n. Joyce Beckett.** She is more than 70 years of age and has lived at Pateley Bridge all her life. She is the daughter of Mr Alan Iveson, who was a previous owner of the claimed servient land. She accepted that she did not have knowledge of the use of the Top Track in recent years, but has seen it being used for deliveries to the Cottages. The gates across the Top Track were never locked in her time.

24. As I have said, the Applicants have also relied on a large number of other witness statements, all of which are consistent with the evidence to which I have specifically referred and support the Applicants' claim to have acquired an easement over the Top Track. All this evidence is of course admissible as hearsay. Although I have regard to this evidence, I do not need to refer to these other statements in making my findings of fact.

#### **THE RESPONDENTS' EVIDENCE**

25. **Mr Gregory Parsons.** He did not make a witness statement, but relied on his Statement of Case, to which I have already referred. Essentially, he has no independent knowledge of the alleged user of the Top Track over the past years, having purchased Lower Wild Carr as recently as April 2014. However, he did say that at the time of purchase there was no evidence that there was a right of way over his land in favour of the Cottages. This was due to the presence of the lock on Gate 3, and the absence of clear track marks beyond his boundary with

the Red and Purple Land (Gate 2). He also says that prior to his purchase of the land, he was not informed in terms that the Applicants claimed a right of way, but he had been told by the vendors that a right of way had been “requested”. He also says that “*I received a telephone call from one of the applicants requesting if we would be happy to provide a right of way across the upper route.*”

26. **Mr Paul Frederick Ewbank.** He made a witness statement on 30<sup>th</sup> June 2014, which stood as his evidence in chief at the hearing, and upon which he was cross-examined. In paragraph 1 he states that he had grazed the Red and Purple Land under licence since June 2009. The statement continues:

*“3. I attend the land at Lower Wild Carr and Springfield Grange by agricultural vehicle and on foot on a daily basis.*

*4. At no time during my licensed grazing of the land at Lower Wild Carr have I encountered or witnessed Mr or Mrs Bealing of Mooredge Cottage or their agents, or Mr and Mrs Keddie or their agents, use the land in question for access or any other purpose on foot or by vehicle.....*

*6. Throughout my licensed use of the land at Lower Wild Carr I have on occasion parked agricultural vehicles and equipment on the tramway for periods of time.*

*7. I have known the boundary gate at the north end of the land at Lower Wild Carr to be periodically locked prior to May 2013.*

*8. I regularly witness the owners of Mooredge Cottage use the access track in front of Lower Wild Carr for access by vehicles or by foot.”*

This was the extent of Mr Ewbank’s evidence prior to cross-examination.

27. **Mrs Auriol Jane Hannam.** Her witness statement is dated 27<sup>th</sup> June 2014. She was cross-examined. She says that she has occupied the farmhouse at Springfield Grange since July 1997, and her family have farmed the land since 1978. Her late husband Dennis purchased the Red Land in 2008 and “*5. Between 10<sup>th</sup> January 1989 and 1<sup>st</sup> June 2009, my late husband, myself, and my daughters worked on the land in question at Lower Wild Carr on a daily basis for the purposes of checking and feeding livestock, administering medicines and vaccines using livestock pens located on the tramway, and other maintenance tasks such as walling, fencing, stubbing/spraying of thistles, muck-spreading and pest control such as mole trapping and shooting of rabbits. 6. Since 1<sup>st</sup> June 2009 the land in question has been grazed under licence by Paul Ewbank.... 7. At no time have I encountered or witnessed Mr or Mrs Bealing of Mooredge Cottage or their*

*agents, or Mr or Mrs Keddie of Scotgate Cottage or their agents use the land in question for access or any other purpose either on foot or by vehicle.....16. During my family's occupation of the land at Lower Wild Carr I have never seen any visible marks on the ground to suggest that vehicles other than our own and those of agents and permissive users have driven on the track leading up to the land or the tramway itself 17. Throughout my family's occupation of the land at Lower Wild Carr I have known the boundary gate at the north of the property [i.e Gate 3] to be periodically locked."*

28. **Miss Kirsty Hannam.** She is the daughter of Mrs Hannam. She made a witness statement on 27<sup>th</sup> June 2014, upon which she was cross-examined. The statement is in virtually identical terms to that of her mother.
29. **Miss Katrina Brayshaw.** Miss Brayshaw was, together with Dr Hogarth-Scott, the registered owner of the house and land at Lower Wild Carr (registered under title number NYK116638) from January 1992 until May 2014 (when it was sold to the Parsons). She has also lived at Lower Wild Carr since November 1989. She says that throughout this period *"I have not regularly and continuously seen the owners of Mooredge Cottage or Scotgate Cottage or their agents use the land at Lower Wild Carr or the short track leading up to the land [i.e the Connecting Ramp] for access or for any other purpose."* She goes on to say that she gave Mr Andrew Wild, the former owner of Scotgate Cottage, *"my permission to drive his Yorkshire Preserves Limited van through the land at Lower Wild Carr. This permissive access ended when he sold Scotgate Cottage."* She adds that *"I am aware that Mr Hannam periodically locked the boundary gate located at the north of the land [i.e Gate 3] through his tenancy of the land at Lower Wild Carr."* She states that *"the only means of delivering oil to Lower Wild Carr in the past few years has been by 4x4 vehicle and bowser and this is how all recent heating oil deliveries were made up until I sold Lower Wild Carr in 2014."* She also says that she has been advised by Kettlewell Fuels that they are unable to deliver heating oil by tanker to the Cottages by way of the Top Track.
30. **Mr Andrew Wild.** Mr Andrew Wild's statement is dated 27<sup>th</sup> January 2016. He attended court and was cross-examined. Paragraphs 2 and 3 of his statement read as follows: *"We accessed the property from the track which runs to the south of*

*Lower Wild Carr. We understood and accepted that this was the only legal right of way to the property. We bought the property on that basis. ..This is the access that we used with both of our motor vehicles and the vans for our business (Renault Trafic).” He goes on to say that some three years after they bought the property they decided to change their solid fuel central heating to oil and “We asked Dr Sandra Hogarth-Scott if we could have oil delivered along the top track and she kindly agreed.... The only other time that we used the top track would be when the bottom track was snowed in, but on only one occasion... So far as we are aware, everyone used the bottom track.”*

31. **Mrs Sheridan Wild.** Mrs Wild also made a statement, dated 13<sup>th</sup> July 2016, which somewhat unusually was made in response to Mrs Keddie’s earlier witness statement dated 5<sup>th</sup> November 2015. Permission was given for this statement to be relied on. In her statement, Mrs Keddie describes the occasion when she and her husband viewed Scotgate Cottage prior to buying it from the Wilds. Both Wilds were present. There was apparently some discussion of Mrs Keddie’s footwear, which were smart town shoes and somewhat unsuited to the rustic surroundings. Curiously, both ladies can recall this detail after some 16 years. The essence of her evidence was that there was no mention whatsoever of the use of the Top Track being by permission only. No distinction was drawn by Mrs Wild between the two tracks, and she told the Keddies that whilst they used the Bottom Track with their cars, deliveries and larger vehicles used the Top Track. She specifically stated that removal lorries would have to use the Top Track. In her statement, Mrs Wild rejected much of Mrs Keddie’s evidence, describing it as “*a complete fabrication*”, “*a complete lapse of memory on her part or a wonderful flight of fancy*”, “*blatantly untrue*” and “*Mrs Keddie conveniently misconstrues matters*”. According to her, she made it clear to the Keddies that use of the Top Track was by permission only, but that “*normally deliveries and workmen accessed Scotgate along the bottom track*”. She goes on to say: “*There were subsequent occasions when, due to oversized delivery/workmen vehicles or snow blocking the bottom track, when we further asked Sandy Howgarth-Scott [sic] for permission to use the top track. These occasions were rare and as country people, respectful of others’ land, we would never assume any right of access over private land without the courtesy of asking owner’s permission.*” .

32. In addition to the witnesses who attended court, the Respondents rely on statements from Prof and Dr Moody, and Dr Hogarth-Scott. Dr Hogarth-Scott's statement is in virtually identical terms to that of Katrina Braysshaw. The Moodys state that they were given permission to use the Top Track on foot by Dr Hogarth-Scott. They also say that "*I have not seen the owners of Mooredge Cottage or Scotgate Cottage or their agents regularly and continuously use the land at Lower Wild Carr or the short track leading up to the Land [i.e the Connecting Ramp] for access or for any other purpose.*" They also say that they periodically found Gate 3 to be locked between 1984 and 2008.

### **PHOTOGRAPHS AND MAPS**

33. The Top Track, including the Connecting Ramp, is shown on the 1956 OS map and in subsequent editions, and thus also on the Land Registry title plans. The old tramway, being the site of the Top Track, is shown on OS maps dating back to 1909. There are also a number of historic photographs which show the Top Track and the connecting ramp, in particular:

- i. The photographs exhibited to the statement of Julian Ingleby and dated 1962 and 1964;
- ii. The photograph of the Connecting Ramp taken in Easter 1968 with the sign "*Heavy vehicles Scotgate and Mooredge ONLY*" with an arrow pointing to the Top Track;
- iii. The aerial photograph of the land dated 1972 (exhibited to Mrs Keddie's statement);
- iv. Various photographs taken by Mrs Keddie in Autumn 2000 showing a distinct rutted track on the route of the Top Track;
- v. Various photographs produced at the hearing by Miss Kirsty Hannam and marked "KH1" to "KH6". These are dated between 2008 and November 2013. The photographs show that the condition of the Top Track varied according to the weather and the position. "KH1" taken in 2008 shows a well-defined track running as far as Gate 3. The Connecting Ramp and the first section of the Top Track as it crosses the field is quite muddy, but the track

becomes less so as it runs west. “KH2” and “KH6” are taken in October 2009, more or less at the centre point of the Top Track, and there is less mud but clearly defined ruts nevertheless. I infer that there had been a period of lower rainfall prior to the photographs being taken.

## **FINDINGS OF FACT**

34. Having regard to the evidence which I heard, and taking into account the photographs, maps and witness statements, my conclusions are as follows:

- i. There has been regular user of the Top Track as an alternative access to both of the Cottages, certainly since the early 1960s and very probably for many years before that date.
- ii. The Top Track has been the sole access for larger vehicles – that is, vehicles wider than approximately 2 metres – but other smaller vehicles have also used it on a regular basis according to the preference of the driver and the state of the Bottom Track.
- iii. The use has been open, in the sense that there has been no concealment of the use which has occurred whenever required during the day or at night.
- iv. The owners and occupiers of the Cottages and their visitors did not ask permission nor were they ever given permission to use the Top Track.
- v. The use of the Top Track was never obstructed by locked gates or other obstructions until the locking of Gate 3 by Ms Kirsty Hannam on 13<sup>th</sup> May 2013. Prior to that time the owners and occupiers of the Cottages and their visitors had free and unobstructed access over the Top Track which was in regular use. The Applicants had used the Top Track on or immediately before 13<sup>th</sup> May 2013 and therefore within one year of the date on which the Parsons acquired their interest in the Blue and Green Land.
- vi. Various signs were erected from time to time. By 1968 there was a sign at the foot of the Connecting Ramp instructing drivers of

heavy vehicles accessing the Cottages to use the Top Track. A previous owner of Scotgate Cottage, Mrs Williams, recalled erecting a sign at the entrance to both tracks from Old Church Lane stating that the route was private. There were other signs erected on gates 1 and 2. Gate 1 had a sign stating “*Private. No public right of way*”, and a smaller sign saying “*please close the gate*”. It is known (from the photograph at Tab 36 of Vol 1 of the Bealings’ Trial Bundle) that this sign was present in 2000. Around the date on which Gate 3 was locked by Ms Kirsty Hannam, the sign was replaced by one which read: “*Private Road. No access without permission*”, also indicating a private right of way. Mr Hannam erected a sign to on Gate 2 when he purchased the Red and Purple Land in 2008 – this read “*Private. No public right of way*”. Gate 3 had a sign marked “*Private*”.

- vii. The right of way was obvious on a reasonable and careful inspection of the claimed servient land at the date of the Parsons’ purchase in 2014.
- viii. At the date when they purchased the Blue and the Green Land, the Parsons had actual knowledge that the Keddies were claiming a right of way over the Top Track and were in dispute with the servient owners.

35. In reaching these conclusions, it is apparent that I have preferred the evidence of the Applicants and their witnesses to that of the Respondents and their witnesses, where that evidence conflicts. I shall begin by explaining in more detail the reasons for my findings, before moving on to my assessment of the witnesses and the evidence that they gave.

#### **USER OF THE TOP TRACK**

36. The evidence adduced by the Applicants to prove the long-standing use of the Top Track as an access to the Cottages can properly be described as overwhelming. The Bealings rely on an unbroken chain of statutory declarations from 1973 onwards. Statutory declarations occupy an important role in the world of conveyancing. They carry great weight, and are often used to improve or

perfect an otherwise unmarketable title. However, even though a person making a false declaration can be prosecuted for perjury, they are essentially hearsay statements equivalent to an affidavit. It is certainly possible for a court or tribunal to reach conclusions on the basis of untested statutory declarations, but generally it is necessary to adduce evidence which can be tested by cross-examination.

37. In this case, however, the Applicants have also adduced evidence from witnesses whose collective period of recollection dates back to the early 1960s. For example, Julian and John Ingleby, whose parents owned Scotgate Cottage between 1962 and 1970. They were able to give very detailed evidence as to the user and maintenance of the Top Track for that entire period, both in their statements and in cross-examination. In his statement Julian said that he spent most of his school and university holidays at Scotgate in the 1960s (he was aged 15 in 1962). He recalled numerous specific deliveries being made along the Top Track. He also recalled Miss Platten, the elderly lady who lived at Mooredge Cottage between 1945 and 1973. When she required an ambulance to get to hospital or the Health Centre he recalled that it would use the Top Track due to the width restriction on the Bottom Track. She had no electricity, and relied on coal for cooking and heating. He recalled the coal lorry using the Top Track to deliver sacks of coal to both Cottages. Under cross-examination, Julian accepted that he was able to drive along the Bottom Track when he drove his Austin A35 or Renault 4, and therefore generally used that means of access. However, he was adamant that he also used the Top Track when he was driving a larger car, and confirmed that larger vehicles used it when making deliveries. He was always able to open the gates on the Top Track, which were kept closed by a variety of means, but never locked shut. He recalled that the surface of the connecting ramp was well maintained by using stone spoil (“quarry bottoms”) from the quarry. These would be used to fill in the ruts and allow the Top Track to be used during wet and wintry periods. He also recalled that ash or road salt would be scattered on the connection ramp leading to the Top Track to improve grip. His brother John Ingleby (born 1940) also gave evidence on which he was cross-examined. He stated that he visited his parents many times when they lived at Scotgate Cottage – in cross-examination he estimated that it was roughly three times a year. He recalled his father carrying out maintenance to both the Top and Bottom



Tracks. He too accepted that the main access to the Cottages was via the Bottom Track, but all deliveries were made via the Top Track, which was also used when the Bottom Track became blocked for any reason. He drove a Riley motor car and he himself preferred to use the Top Track. This was because there was a gate close to the narrowest point on the Bottom Track, which had to be opened and closed when driving through. There was a danger that his car door would be damaged by the wall when opened at this point. He did not recall seeing anyone in the fields around the Top Track.

38. Julian Ingleby also produced photographs showing parts of the Top Track dated 1962 and 1964. These demonstrate that the Top Track was clearly in regular use, and showed signs of repair and maintenance. Both witnesses identified their father in the 1968 photograph to which I have already referred. This clearly shows a hand-made sign at the bottom of the Connecting Ramp, directing heavy traffic, destined for both Mooredge and Scotgate along the Top Track. It also shows the Connecting Ramp itself to be well maintained, with stone chippings or gravel having been used to infill the tyre tracks, just as stated by both the Ingleby sons in their live evidence. The Ingelebys' evidence covers the period from 1962 to 1970. This long pre-dates the ownership of the claimed servient land by Dr Hogarth-Scott, and the period of recollection of the Hannams or any of the Respondents' other witnesses. The sign is entirely consistent with the statutory declarations relating to Mooredge Cottage.

39. In 1970 Scotgate Cottage was bought by Richard and Susan Duggleby. Mrs Duggleby gave evidence, verifying and being cross-examined on her witness statement. She gave numerous instances of the use of the Top Track. She said that they had never doubted for a moment that the Cottages had a right of way over the Top Track, which was obviously in regular use judging by its worn and rutted appearance. Indeed, they would not have bought Scotgate Cottage unless there was an alternative access, in view of the constraints of the Bottom Track. She recalled regular coal deliveries for her neighbour Miss Platten at Mooredge Cottage – every one or two weeks. They also had regular coal deliveries, because they could not store large quantities of coal. She recalled a Bedford 10 ton flat back lorry – belonging to her family – which was used to move their furniture into the cottage, and remove them when they left. This could only access the cottage

by the Top Track. She recalled numerous instances of other delivery vehicles using the Top Track, and also other lorries belonging to her family, for example to deliver a steel RSJ. She recalled her friends with a cherished red 2-door BMW with Martini stripes – probably one of the rare and famous CSL coupes that raced in the 1970s. Because of the width of the Bottom Track they invariably used the Top Track and they visited every week or two on a regular basis. Other visitors preferred to use the Top Track due to the hazards of the Bottom Track, although that remained the primary access to the Cottages. She never saw anything other than grazing sheep in the fields around the Top Track, certainly no farm machinery or farming activities. None of the gates on the Top Track were ever locked. Their access was free and unimpeded, and they simply accepted what Mr Ingelby had told them, which was that there were two means of access to the cottage, including the Top Track.

40. Mr James Morris owned and resided at Scotgate Cottage between 1973 and 1977 – he bought it from the Dugglebys and sold to the Williamses. He also made a witness statement and attended for cross-examination. In his statement he accepted that the Bottom Track was used as an access to Scotgate Cottage “95% of the time because there was only one gate instead of two... However, we always used the top track for any vehicle larger than a normal car.... The top track did not really need much maintenance. It already had solid foundations and the sheep kept the grass trimmed.” In addition, he recalled that the “coal wagons” used the Top Track, usually twice per year. When they moved into Scotgate Cottage, and when they left, their removal vans used the Top Track. Their neighbour at Mooredge Cottage was Dr Hogarth-Scott, who carried out a great deal of building work. Mr Morris assumed that the workmens’ vehicles would have needed to use the Top Track. He and his wife used the Top Track in their car every two months or so, just to make sure that it remained usable. In cross-examination, he confirmed that the surface of the Top Track was “decent”, even that of the Connecting Ramp. He said that he never noticed any signs, or indeed anyone else using the Top Track.

41. Mrs Sheila Williams lived at Scotgate Cottage between February 1977 and January or February 1988. She owned the property, together with some adjoining land, jointly with her husband. She made a statement dated 4<sup>th</sup> September 2016,

and attended for cross-examination. She stated that when they bought the property, they understood from Mr Morris that there were two tracks, with the Top Track being used for larger vehicles, and the Bottom Track for cars. The Top Track was clearly in regular use, with two parallel ruts and a central grass strip. According to her, it looked very much as it appeared in the photograph (n. 53) taken by Mrs Keddie in 2000. She continues: *“the track was never obstructed, the two gates across the track were never locked, padlocked or blocked in any way. There were no signs on either of the two gates indicating it was a private property with no rights of access. As far as we and the vendors of the property were concerned there was an established right of access over the top track. During my time at Scotgate this was never disputed..... The top track runs over rough grazing land which is peppered with thistles and, in places (e.g to the right as you approach Scotgate quarry) rushes and reeds... When we moved to Scotgate it was in reasonable condition and seemed to be built on a solid stone base. It was not at all boggy. We never had to make any repairs or maintenance on it.... There were two gates; one splitting off from the bottom track and the other opening into the Scotgate quarry. The gate had a heavy chain that lopped over the gate post. I opened that gate so many times the sound of the chain clanking still lives in my head! Neither of these gates were ever locked, padlocked or blocked in any way. I can wholeheartedly confirm that the chain in Photo 56 below is the same chain and fastening mechanism and indeed the same gate that was in place during my time at Scotgate Cottage.”* Photograph 56, as described in Mrs Keddie’s statement, shows the post of Gate 3 – that is, the gate locked by Kirsty Hannam in 2013. Mrs Williams did recall Mr Iveson, who then owned the fields over which the Top Track ran, erecting small sheep pens for the purpose of inspecting and “dagging” his sheep. This meant that the Top Track would be blocked for an hour or two at the most. Mrs Williams also recalled placing a sign at the entrance to both tracks at the Old Church Lane end. This said something along the lines of *“Private Road; Access only to Lower Wild Carr, Scotgate Cottage and Mooredge Cottage”*. She said that this was installed *“to deter casual users who would be looking for a picnic spot and then block the track...”* She identified a photograph (20141022\_082101) as showing the post and mounting board of the very same sign, erected by her in or about 1978. She gave numerous examples of their use of the Top Track over her period of

residence, for a variety of reasons and purposes: for deliveries, for transporting building materials and other bulky items, or just for people who preferred to use the Top Track, this class including the vets from the Blackburn and Spedding practice in Ripon. She recalled at least three winters when the Bottom Track (which is prone to snow drifts) was impassable and the Top Track became the only access. She was also able to speak about the use of the Top Track for similar reasons and purposes by the occupants of Mooredge Cottage, initially Dr Hogarth-Scott and Ms Brayshaw, and subsequently the Hancocks.

42. In cross-examination, she emphasised that there had never been any suggestion that the owners and occupiers of Scotgate Cottage did not have a right of way over the Top Track. When Dr Hogarth-Scott bought the claimed servient land in the early 1980s, she said nothing to the Williamses about the use of the track. When Mr Iveson owned the land she was on good terms with him and would stop and chat if she saw him. He never said anything about the use of the Top Track. In summary, she said that the Top Track was used to access Scotgate and Mooredge Cottage on a regular basis, openly, and without any challenge.

43. The witnesses referred to in paragraphs 30-36 provide a detailed account of the use of the Top Track for an unbroken period of 26 years, from 1962 to 1988. It was their evidence, wholly unshaken in cross-examination, that the Top Track was in regular use as an alternative access to the Cottages. Although Ms Vodanovic did cross-examine these witnesses, she did not challenge their evidence to any meaningful extent, nor was she in a position to do so. Her instructions were emanating from Mr Ewbank, who did not become familiar with Lower Wild Carr and the surrounding land until 2009. This is not a criticism of her, but identifies the weakness at the heart of the Respondents' case, namely that they are simply in no position to gainsay the recollection of previous owners of the Cottages and their visitors for any period prior to 2009 as regards Mr Ewbank, and 2014 as regards Mr and Mrs Parsons. They do of course rely on witness statements from the Hannams, for instance, who claim to have a good knowledge of the Top Track for many years. However, their own ability to challenge the Applicants' evidence is very limited. In any event, as I have said Ms. Vodanovic made absolutely no headway with any of the witnesses I have referred to above. Collectively, they were very impressive, with a detailed recollection of the

physical characteristics of both tracks, and an equally detailed recollection of the use made of both tracks during their respective periods of ownership. They were all able to give little details that lent credibility to their recollection – for example, the Riley car driven by Mr Ingleby, the friends’ smart BMW recalled by Mrs Duggleby, and the installation of the “private” sign recalled by Mrs Williams. They were all equally adamant that there was never any doubt about their right to use the Top Track, and they expressed some surprise that this right was now being called into question. None of them have any connection with either the Bealings or the Keddies other than their previous ownership of the Cottages, and none showed any animus towards the Respondents or their witnesses, none of whom they knew. They were truly independent witnesses, and in my judgment, their evidence was unimpeached and unimpeachable.

44. The Applicants do not of course rely solely on these witnesses. The Bealings also called Mr Steven Potter, who (together with his then wife) owned and lived at Mooredge Cottage between April 1993 and December 1994, when it was sold to the Bealings. Mr Potter had also made a statutory declaration in December 1994 to which I have already referred. Interestingly, he says that he was initially reluctant to get involved in the dispute as a witness because his marriage had broken down whilst living at Mooredge Cottage and “... *I had closed that chapter on my life and didn’t want to look back on that period, however I understand your difficulties over the track and felt I should help you as far as I can.*” His witness statement, dated 1<sup>st</sup> December 2014, contains a detailed account of the use of the Top Track during his period of ownership. He stated that his wife mostly used the Top Track when driving her car (a Volvo 340) as the car would “*bottom out*” on the Bottom Track. He mainly used the Bottom Track, unless he was towing a trailer, which was too wide for the Bottom Track. He was obliged to use the Top Track for about 3 weeks after his Land Rover came off the Bottom Track into the field below. This was caused by his dogs running in front of the vehicle while chasing a rabbit. He had also seen an oil tanker falling off the Bottom Track. On both occasions repairs to the Bottom Track had to be carried out and the Top Track was the only means of access to the Cottages. He recalled a large Luton van using the Top Track when they moved into Mooredge Cottage, and when the contents were sold by auctioneers they collected it via the Top Track. He recalled

that the Wilds – former owners of Scotgate Cottage and witnesses for the Respondents – used the Top Track more than he did. They had a Subaru Legacy and a small van. The postman used to drive along the Top Track until Mr Potter installed a postbox just before Lower Wild Carr. Coal deliveries were made along both tracks. If a larger coal wagon was used, it would come along the Top Track. He regularly saw Dr Hogarth-Scott and Katrina Brayshaw, whom he got to know when they jointly objected to the Council’s proposal to create a picnic area on the open land near the Old Church Lane entrance to both tracks. They knew that he used the Top Track because they mentioned it to him. However, he was never challenged as to his use of the Top Track, he never sought permission nor was he granted it. He believed that they had a right to use both tracks, and had been told that when he purchased the cottage. None of the gates across the Top Track were ever padlocked, nor was the Top Track ever blocked. There was little difference in the surface and conditions of the two tracks, save that the Bottom Track was very narrow and had one less gate to open.

45. In cross-examination, he said that in 1993/4 a sign was erected at the eastern end of the two tracks, to discourage members of the public from using the tracks. This was done at around the time of the objection to the picnic site. He confirmed that he had seen the Wilds using the Top Track, but no-one else, and never saw the farmer, just his sheep. He denied that use of the Top Track was particularly inconvenient. Indeed, he regularly used to pull a trailer in connection with his building and labouring work, and always used the Top Track for that purpose since it was wider than the Bottom Track.
46. In addition to the independent witnesses, and statutory declarations, I also heard evidence from Mr and Mrs Bealing, and Mrs and Mrs Keddie. I have already referred to the fact that their witness statements are exceptionally thorough and well-researched, amply supported by photographs, plans and other materials. They were cross-examined fairly but thoroughly by Ms Vodanovic and Mr Parsons, without any real effect. I found them also to be reliable and compelling witnesses and I accept their evidence in its totality.
47. In reaching my conclusions, I have also taken into account the evidence of Miss Katrina Brayshaw. She made a witness statement – supported by a signed

statement of truth – which was relied on by Mr Ewbank, the Second Respondent. This was originally lodged in support of the Hannams’ objection to the Applications. I have summarised the contents of her statement at paragraph 28 above, which she verified on oath from the witness box after making minor corrections. The written statement includes this passage: “*I have not regularly and continuously seen the owners of Mooredge Cottage or Scotgate Cottage or their agents use the land at Lower Wild Carr or the short track leading up to the land [i.e the Connecting Ramp] for access or for any other purpose.*” In the next paragraph she says: “*Throughout my ownership of the house at Lower Wild Carr I regularly encountered and witnessed the owners of Mooredge Cottage and Scotgate Cottage on the track running in front of Lower Wild Carr by vehicle and on foot*”. She also stated that she had given express permission to Mr Andrew Wild of Scotgate Cottage to use the Top Track for limited purposes only, and this permissive access ended when Mr Wild sold Scotgate Cottage to the Keddies. The clear implication of this evidence is that neither the Bealings nor the Keddies, nor their predecessors in title, made any use of the Top Track between 1992 and 2014 other than the limited permissive access given to Mr Wild. If the inclusion of the words “*regularly and continuously*” in paragraph 4 was intended to suggest that there was some irregular and discontinuous use, this should have been and was not made clear.

48. However, when she was cross-examined on her statement, Miss Brayshaw gave completely conflicting evidence. In particular:

- a. She said that the occupants of the Cottages “*had enjoyed permissive use over the Top Track for heavy vehicles and emergencies*”.
- b. She accepted that “*You want to be neighbourly. The Bottom Track deteriorated. Obvious commonsense for large vehicles to use the Top Track.*”
- c. When it was put to her that the Hannams denied that the Bealings ever used the Top Track she replied: “*I’ve not said that.*”
- d. She agreed that the Bealings and the Keddies never asked for a formal right of way over the (Top) Track. “*I thought they had a permissive*

- right.*” When it was put to her that they never asked for permission she replied: *“Well – they don’t ask for permission every time.”*
- e. She accepted that she had actually directed Cottage-bound traffic onto the Top Track from time to time.
  - f. When she was challenged on paragraph 4 of her statement, she accepted that she had seen heavy goods vehicles on the Top Track on a regular basis, but not private vehicles on a regular basis. She grudgingly accepted that the form of words might have been suggested by Kirsty Hannam.
  - g. She accepted that there was regular use of the Top Track by delivery vehicles.
  - h. She agreed that she has actually instructed delivery vehicles to use the Top Track in preference to the Bottom Track.
  - i. She accepted that she and Dr Hogarth-Scott had said to the Applicants that *“under no circumstances should large vehicles use the Bottom Track”*, and that oil deliveries were made along the Top Track after the tanker went off the road (in the early 1990s) because *“it would be wrong not to point out the dangers”* of using the Bottom Track.
  - j. She agreed that there was a sign directing heavy vehicles up the Connecting Ramp to the Top Track.
  - k. She agreed with Counsel’s suggestion that the Bealings used the Top Track for all kinds of deliveries such as coal and oil.
  - l. She agreed that she did see private vehicles on the Top Track *“it was sort of a rare event, not a daily event.”*
  - m. She agreed that Mr Keddie took his *“works van”* over the Top Track.
  - n. She agreed that there was one winter when the Bealings used the Top Track because there was snow blocking the Bottom Track.
  - o. As to the locking of Gate 3 she said this: *“I never saw that gate locked. Before the land was sold to the Hannams the gate was a bit difficult to open. I never saw it locked.... We never saw a lock on the gate.”* She did



... say that Mr Hannam told her that he had locked the gate for a day or two, but her witness statement says this: *“I am aware that Mr Hannam periodically locked the boundary gate located at the north of the land [i.e. Gate 3] through his tenancy of the land at Lower Wild Carr.”*

49. Under cross-examination she was a frank and open witness who did not attempt to disguise the truth, even though it meant that she was departing from her written evidence. I therefore find it inexplicable how she could have signed and verified her witness statement in its present form – particularly when she was at pains to make certain very limited corrections to it before verification. At the very lowest it is disingenuous and economical with the truth. At worst it is misleading. Either way, her evidence provides further support for the Applicants’ case, demonstrating open and regular use of the Top Track by vehicles accessing both Cottages. It provides no support for the Respondents’ case that the user by the Applicants was permissive. The fact that Miss Brayshaw believed that the user was permissive is irrelevant. No actual permission was either asked for or given. She confuses acquiescence with permission.

## **PERMISSION**

50. As Mr Francis has pointed out in his Skeleton Argument, no specific allegation of permission has been made in the witness statements as regards use of the Top Track by the owners and occupiers of Mooredge Cottage, although the Respondents’ Statements of Case do include the somewhat vague references to permissive use cited at paragraphs 11 to 14 above. However, there is an allegation that Dr Hogarth-Scott and Miss Brayfield gave permission to Mr and Mrs Wild – the former owners of Scotgate Cottage – to use the Top Track. This allegation is contained in their (almost exactly identical) statements dated 1<sup>st</sup> July 2014, and submitted by Mr Ewbank, as follows: *“I gave Mr Andrew Wild, former owner of Scotgate Cottage, my permission to drive his Yorkshire Preserves Limited van through the land at Lower Wild Carr. This permissive access ended when he sold Scotgate Cottage... Throughout Mr Wild’s permissive access agreement his normal route of access to Scotgate Cottage by vehicle and on foot remained the access track running in front of lower Wild Carr.”* They also state that they gave their friends the Moodys permission to use the Top Track on foot.

51. I have already described the evidence of long user of the Top Track between 1962 and 1988 – a period in excess of 20 years. If it is established, on the balance of probabilities, that there had been such a period of 20 years’ user as of right, the owners and occupiers of Scotgate Cottage will have acquired a legal easement long before the Wilds bought the cottage. Unless it is being argued that the easement has been abandoned – and that has never formed part of the Respondents’ case – whether or not the Wilds considered that their user of the Top Track was permissive is of no materiality. Any purported giving and receiving of permission is of no effect once the easement has been established – this is the effect of Smith v Brudenell-Bruce [2002] P & CR 4 as relied on by the Applicants. Accordingly, although a fair amount of time was spent on this issue, it is of no legal significance. However, because this might potentially have a bearing on issues of credibility, I shall consider the evidence supporting the specific allegation that the Wilds’ use of the Top Track was permissive and make the necessary findings of fact.

52. There was considerable dispute between the Keddies on the one hand, and the Wilds on the other, as to the exact circumstances of the initial visit when the Keddies first inspected Scotgate Cottage prior to purchase, and in particular the extent to which Mr Wild and Mr Keddie were involved. Much of the cross-examination was directed to this. Of much more significance, of course, is whether Mrs Wild told the Keddies that the use of the Top Track was permissive or not. I have to resolve the conflict in the two versions of the conversation. My conclusion is that Mrs Keddie’s recollection of the conversation is more accurate than that of Mrs Wild, for the following reasons:

- i. I did not find either Mr or Mrs Wild to be an impressive witness. Both Mr and Mrs Wild were barely able to control their evident dislike for the Keddies. They were both aggressive and truculent witnesses, who were clearly resentful that they should have their evidence tested by cross-examination. This inexplicable (or at least unexplained) hostility towards the Applicants is a common feature of the Respondents’ witnesses.

- ii. One can only speculate as to the reasons for this manifest ill-will, but it is quite possible that Mrs Wild took against Mrs Keddie from the beginning, viewing her as an unsuitably-dressed townie who had no place in the country. The Wilds were friends of Dr Hogarth-Scott, and seemed affronted on her behalf that the Applicants have assumed the existence of a right of way. This is regarded as “*not respectful*” or lacking “*courtesy*”. It is perhaps ironic that Dr Hogarth-Scott herself has done exactly the same thing in regard to the use of the Top Track to access Mooredge Cottage, as her statutory declaration demonstrates.
- iii. More importantly, the Wilds’ evidence is inherently improbable. As the other owners of Scotgate Cottage have stated, use of the Top Track was long-established well before the Wilds bought it. Mrs Williams – who was one of the owners of Scotgate Cottage who sold on to the Wilds – was clear in her own mind that access over the Top Track was an accepted right and had been freely enjoyed for many years, including a lengthy period of time when the Top Track had been owned by Hogarth-Scott and Brayfield. It is highly improbable that Mr Williams would not have shared this opinion and equally unlikely that, as vendor, it would have been in interests to call into question the long-established use of the Top Track when selling to the Wilds.
- iv. Further, given the undoubted physical constraints of the Bottom Track, it must have been obvious to the Wilds that even relatively modest delivery vehicles would be bound to use the Top Track. Delivery drivers would have no idea that permission was required and no idea where to obtain that permission. The idea that Dr Hogarth-Scott would be asked for permission on each occasion is absurd.
- v. The statements of the Wilds are inconsistent. Mr Wild states that they used the Top Track on one occasion only when the Bottom Track was blocked by snow. Apart from this use, the Top Track

- was used for oil deliveries twice a year. Mrs Wild, however, said this: *“There were subsequent occasions when, due to oversized delivery/workmen vehicles or snow blocking the bottom track, when we further asked Sandy Howgarth-Scott [sic] for permission to use the top track”*.
- vi. Mr Wild does not mention at all the alleged permission to drive his Yorkshire Preserves Limited van along the Top Track, which is referred to in the statement of Miss Katrina Brayshaw (and Dr Hogarth-Scott). Indeed, he roundly denies that the Top Track was used for this purpose.
  - vii. Mr Wild’s statement that *“So far as we are aware, everyone used the bottom track.”* is inexplicable, given that the Bealings have given evidence that, from 1994 onwards, the Top Track was in regular use in the circumstances they describe.
  - viii. Mr Potter recalled the Wilds regularly using the Top Track.
  - ix. Finally, the only piece of directly contemporaneous documentation completely undermines the Wilds’ evidence. I am referring to the note left by Mrs Wild at the cottage when the Keddies moved in. Numbered paragraph 7 reads as follows: *“We use the bottom track only for cars. Heavy/wide vehicles must come top track.”* The Keddies rely on this note as calling into question the permissive nature of the user, and as supporting Mrs Keddie’s evidence that Mrs Wild never mentioned permission being obtained from Dr Hogarth-Scott. In my view it also calls into question the sworn evidence given by Mr and Mrs Wild before me, both in their statements and in cross-examination. I refer in particular to their evidence that they always used the Bottom Track for their business vehicles, including the Renault Trafic which they both mention. They insisted in cross-examination that this van used the Bottom Track, despite the evidence given by the Bealings and Mr Potter. I cannot see how their evidence can be regarded as reliable when it is so directly contradicted by the statement: *“We use the bottom*

track only for cars”, made long before this dispute arose and at a time when the use of the Top Track was not in issue.

53. Overall, therefore, I have concluded that the evidence given by the Wilds cannot be relied upon, and where it conflicts with the evidence given by the Applicants and Mr Potter I prefer the latter witnesses. Even if the alleged permission given to the Wilds was of any legal significance – which, as I have explained, it is not – I find that the Wilds regularly used the Top Track with vehicles larger than a car, and for other types of user, for deliveries and so forth, without any permission from Dr Hogarth-Scott or indeed anyone else. Miss Brayshaw’s evidence demonstrates I think the confusion in her mind between acquiescence and permission. I find that no permission as such was given to the Wilds. As to the Moodys, since they were never owners or occupiers of either of the Cottages, their recreational use of the Top Track is of no relevance on this issue.

#### **ASSESSMENT OF THE RESPONDENTS AND THEIR WITNESSES**

54. In making the findings of fact set out above, it is apparent that I have preferred the evidence of the Applicants and their witnesses to that of the Respondents and their witnesses (other than Miss Brayshaw for the reasons stated). In particular:

- a. **Mr Ewbank.** His evidence was simply that he had never seen anyone using the Top Track for the purposes of accessing either of the Cottages. It emerged during the course of his cross-examination that he farms several parcels of land in the area, totalling more than 700 acres. The largest parcel of land is at Middlesmoor, some 6 miles or so from Lower Wild Carr. It is true that he lives at Draymans Field Farm, which lies a short distance to the east of the Top Track. However, the farm is situated on the far side of a slope covered in trees, and it is clear that Mr Ewbank could not see if the Top Track was in use unless he was actually working on the Red or Purple Land itself. In his statement he says this: “*I attend the land at Lower Wild Carr and Springfield Grange by agricultural vehicle and on foot on a daily basis*”. Given the size of the farms which he runs, it seems to me to be inherently improbable that he would be anywhere near the Top Track “*on a daily basis*” such that he could monitor the use of the track by the occupants of the Cottages. There were

various unsatisfactory elements in his evidence. The statement itself was clearly written by Kirsty Hannam, since it bears a striking resemblance to all the other statements lodged by the Hannams with their original objection. The phraseology is largely identical. However, Mr Ewbank initially denied this, eventually reluctantly accepting that he would not have signed it if he did not believe it. However, it is clear that it contains statements which were untrue. For example, in paragraph 7 he says: *“I have known the boundary gate at the north end of the land at Lower Wild Carr to be periodically locked prior to May 2013.”* This was a critical piece of evidence, supporting Kirsty Hannam’s statement and conflicting with the Applicants’ evidence. In cross-examination he eventually admitted that he himself never had cause to use the gate and was simply relying on what Kirsty Hannam had told him. Equally, given the extensive user of the Top Track by the Applicants and their visitors during the entire period of Mr Ewbank’s association with the claimed servient land, it is wholly incredible that he never saw one single vehicle using the Top Track in this period of four years. Overall, I did not find Mr Ewbank to be a witness upon whose evidence I could confidently rely.

- b. **Ms Kirsty Hannam.** In her witness statement she said this: *“5. Between 10<sup>th</sup> January 1989 and 1<sup>st</sup> June 2009, my late father, my mother and myself worked on the land in question at Lower Wild Carr on a daily basis for the purposes of checking and feeding livestock, administering medicines and vaccines using livestock pens located on the tramway, and other maintenance tasks such as walling, fencing, stubbing/spraying of thistles, muck-spreading and pest control such as mole trapping and shooting of rabbits”* In cross-examination it emerged that she was born in 1981, left school in about 1997, and has had a succession of full and part-time jobs ever since, being self-employed since 2011. She lives at Springfield Grange, which is situated several hundred metres away from the Top Track, on the hillside well below Lower Wild Carr on the road leading towards Pateley Bridge. It was put to her by Mr Francis that she could not actually see the Top Track from the house, which she denied, claiming that it was possible to see the Top Track from certain rooms in

the house. However, unless a person was consciously looking out for a vehicle on those parts of the Top Track that were visible from Springfield Grange, it would be unlikely that they would notice any use of the Top Track in view of the distance and topography. If someone was actually present on the Red or Purple Land use of the Top Track would be apparent, hence perhaps her insistence that “.... *my late father, my mother and myself worked on the land in question at Lower Wild Carr on a daily basis..*” Mr Francis robustly challenged this evidence. He reminded her that not one of the Applicants’ witnesses, including long-established local farmers such as Mr Lumley, had ever seen her or her mother on or around the Top Track, although they had seen Mr Hannam on occasions. He suggested that she did not go onto the land at all, leave alone on a daily basis, given her age and the fact that she was engaged in employment after leaving school. Much as she denied his suggestions, I found her evidence to be quite unconvincing, and I think it highly improbable that she spent any time at all helping her father in the fields above Lower Wild Carr, and certainly not with the degree of regularity that she suggested. Her credibility on other points was also suspect. For example, she insisted that she had periodically locked Gate 3. However, she was unable to explain how the padlock was fitted, given that there was had always been a wire loop around the gatepost that was used to keep the gate shut, as shown in many of the photographs. Nor could she convincingly explain why she would have locked Gate 3. My conclusion is that the gate was never locked by her, or by anyone else, and this piece of evidence was untrue and deliberately included in her statement to bolster the objectors’ case.

- c. Underlying all her evidence was a strong and manifest animus towards the Applicants. The extent of this can be gauged by her reaction to the letter dated 24<sup>th</sup> July 2014, written by Mrs Keddie’s solicitors, informing Mrs Hannam that Mrs Keddie had recently suffered severe chest pains and subsequent tests revealed that she may have suffered a heart attack. They pointed out that no ambulance could reach Scotgate Cottage via the Top Track, and “*therefore request as a matter of urgency and on humanitarian grounds, that you please immediately remove the padlock on the gate on*

...the Top track to allow an ambulance access to Scotgate Cottage. We are of course aware that you have lodged an objection to our clients' application for the registration of a right of way across the Top Track and Bottom track. We are asking therefore that the padlock be removed to the Top Track pending the Land registry decision." She was driven to accept that almost immediately afterwards she placed a new padlock on Gate 2, and although she denied that this was done in response to the request in the July letter, she could not provide any other credible explanation for this provocative act. Her mother's correspondence with the Keddie's solicitors – all written by Kirsty Hannam – itself demonstrates a surprisingly aggressive, even vindictive tone. At other points in her evidence, she insisted that there was no sign of the Top Track being used by vehicles other than her father's and claimed that she could recognise his wheel tracks. It strikes me as quite improbable that she could possibly "read" different sets of tyre tracks and be satisfied that they belonged to her father's vehicle and not to the Applicants'. She also produced a number of photographs dating back to 2008, from which she invited the Tribunal to find that there was no sign of the track extending as far as Gate 3. The 2008 photograph (KH1) appears to show a well-worn track leading at least as far as Gate 3, the opposite of what she had suggested. The Top Track, as I have already stated, is consistently shown on OS maps from the mid-1950s onwards. Overall, I find myself unable to rely on Kirsty Hannam's evidence which was self-serving and in certain parts incredible.

- d. **Mrs Jane Hannam.** Mrs Hannam was an angry, discourteous and truculent witness, who was barely able to control her temper whilst answering Mr Francis's questions. I have no idea what interactions have occurred between Mrs Hannam and the Applicants in the past, and whether or not their behaviour has provoked her in some way, but her outrage at their temerity in claiming a right of way over "her" land was palpable. Once again she insisted that the words of her statement were her own and not dictated by her daughter. When the fact that the phraseology was identical was pointed out to her, "*I dictated it to my daughter, she*



wrote it down. I can't help it if she used the same words." In the same breath, however, she agreed that she had had asked her daughter to carry on correspondence on her behalf with the Applicants because "*I am not good at writing letters.*" It seems perfectly obvious that Ms Kirsty Hannam was responsible for drafting these identical witness statements, but for some reason her mother was not prepared to admit this. Whilst on that point, it is worth noting that in the letter dated 26<sup>th</sup> July 2013 Ms Kirsty Hannam and her mother specifically asked the Applicants and their solicitors to write to her and not to correspond with her mother who found the correspondence "*distressing*" and "*emotive*". Mrs Hannam was permitted to withdraw from the proceedings (subject only to the question of costs) but demonstrated that she is still very much exercised by the Applicants' claim. Given her combative behaviour in the witness box, I find it very hard to believe that she would have been at all "*distressed*" by the Applicants' correspondence and this appears to be little more than tactical manoeuvring on the Hannams' part.

- e. My comments regarding the location of Springfield Grange and Farm, and its effect on the likelihood that the Hannams could monitor the Applicants' use of the Top Track, apply equally to Mrs Hannam's evidence. Whilst it would of course have been possible for her to have assisted her husband on the fields around the Top Track it is noteworthy that no other witness saw her there – it was only Mr Hannam himself who was seen working on the land. Mrs Hannam may have been present on the land from time to time, but I cannot accept that this would have been on a daily basis as she insisted, or anything remotely like it. The Red and Purple Land is a small area of poor grazing land – an adjunct to Mr Hannam's main holding lower down the slope at Springfield Farm - and would manifestly not required daily attendance by Mr and Mrs Hannam to maintain the land or for "*checking and feeding livestock*". Her evidence as to the amount of time she spent on the land is, in my judgment, a gross exaggeration. Given that large vehicles were regularly using the Top Track (even Miss Brayfield accepted this) it is simply not credible that

- Mrs Hannam would not even once have been aware of them. Either she was never on the land around the Top Track, or she is not telling the truth.
- f. Generally speaking, I consider that Mrs Hannam's evidence was self-serving, in certain parts incredible, and apparently motivated by a strong sense of grievance towards the Applicants. Overall, I cannot rely on it and prefer the Applicants' evidence where there is a conflict.
- g. **The Wilds** – I have already considered their evidence in the context of the allegation of permission.
- h. **Mr Parsons**. His evidence did not directly bear on the Applicants' use of the Top Track since he only came on the scene in 2014 after Gate 3 had been locked. His evidence goes to another issue, namely the extent to which he and his wife would be bound by any easement established by the Applicants. That in turn may depend on whether they had actual notice of the claimed easement, and whether the right of way would have been obvious on a reasonably careful inspection of the land. Mr Parsons was very much at pains to point out, both in his own evidence and during the course of his cross-examination of the Applicants, that there was no indication in the Land Registry paperwork that there was a right of way over the Green and Blue Land, and that he was an innocent party who had been saddled with a dispute not of his own making. He was also anxious to point out that he had wanted to settle the dispute with the Applicants amicably – indeed he had tried to include various “without prejudice” communications in the trial bundle in order to explain his position. These documents were of course inadmissible and I have not seen them at this stage.
- i. However, the Applicants contend that he was made well aware of the dispute prior to his purchase of the land, and he was cross-examined on this point by Mr Francis and Mr Keddie. It was Mrs Katherine Lumley's evidence that she had discussed the Applicants' claim to a right of way with Mrs Parsons prior to the purchase: as she put it when questioned by Mr Parsons: “*I wanted you guys to know what you were letting yourself in for.*” This evidence was not challenged. Furthermore, it is clear from the

text messages which she sent to Mrs Parsons that there had been some underlying discussion about the dispute. One message refers to Kate Keddie and uses this phrase: “*the whole track thing bugging her*”. That statement would be meaningless had the “*track thing*” – i.e the disputed right of way – not been explained to Mrs Parsons previously. Mr Parsons also accepted that he had spoken to Mr Keddie prior to the purchase, but he says that the nature of his claim to a right of way was not explained, and he simply thought that he was “requesting” a right of way. The conversation lasted nearly 15 minutes, and Mr Keddie’s evidence is that he did explain in some detail the history of the Applicants’ use of the Top Track and the nature of the claim. By this point in time, the Applicants (including the Keddies) had already consulted solicitors who had in correspondence on their behalf raised a claim to prescriptive rights of way. It is inconceivable that Mr Keddie would not have conveyed the substance of the claim to Mr Parsons in the course of this lengthy conversation, which was made in the context of the prior discussion between Mrs Lumley and Mrs Parsons and the attempts to open a dialogue between the Applicants and the Parsons prior to the impending sale. I therefore find that both Mr and Mrs Parsons were made aware of the claim to prescriptive rights of way over the Top Track before they purchased the Blue and Green Land and had “actual knowledge” of it. There is a sense, I think, in which Mr Parsons was being wilfully blind to the dispute that affected the land which he was about to purchase. Furthermore, I cannot accept that the existence of the Top Track “*would not have been obvious on a reasonably careful inspection of the land*”. There are any number of photographs in the bundles showing the state of the Top Track in or around 2013 and 2014, not to mention the fact that the OS map and associated Land Registry title plans shows the line of the Top Track. The land bought by the Parsons includes the Connecting Ramp and the section of the Top Track as far as Gate 2, and these have always been entirely obvious on the ground as access tracks. I accept that the Green Land was subject to an express right of way in favour of a third party, as noted on the register. However, the easement in favour of the Cottages runs over the same obvious route.

- j. **The Moodys** did not attend the hearing and could not be cross-examined.
- In view of the conflict in the evidence as to whether Gate 3 was locked, as they say, I cannot accept their evidence as it stands.

## THE LEGAL ISSUES

55. In relation to the legal issues which I have identified at Paragraph 16 of this Decision, my conclusions (by reference to the same sub-paragraphs) are as follows:

- a. In my judgment, the user demonstrated by the Applicants' evidence is more than enough: "*...to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance is intended*". In simple terms, the user was open and obvious and carried out on a sufficiently regular basis, and over a sufficient period of time, to alert any moderately sentient owner to the claim of right.
- b. By the same token, the user which took place over a period of more than 50 years was manifestly more than "*infrequent*" and discontinuous user as Ms Vodanovic sought to characterise it.
- c. The user of the Top Track was entirely open and unconcealed. Any servient owner who spent any time at the property would be well aware of the use made of the Track by the occupiers of the Cottages. It is just possible that the Hannams and Mr Ewbank were on the claimed servient land so rarely that they never once saw a vehicle using the Top Track to access the Cottages. It is more likely that these witnesses were being somewhat economical with the truth.
- d. I have held that there is no question of any permission having been requested by or given to the Applicants, or by or to their predecessors in title, to use the Top Track (or indeed the Bottom Track).
- e. As to Ms Vodanovic's reliance on Winterburn v Bennett [2016] EWCA Civ 482, in my judgment it is entirely inapplicable on the facts of this case. Certain signs were erected indicating that the Top Track was a

private access, and I have referred to these in my findings of fact. However, the use of the word “private” did not indicate any objection to the use of the Top Track by the Cottages such as to make continued user contentious. The signs were erected to keep members of the public away from the tracks, as the evidence of Mrs Williams (who had herself erected a sign) and Mr Potter made clear. Indeed, the sign shown in the 1968 photograph of Mr Ingleby specifically directs heavy vehicles to use the Top Track when accessing the Cottages. Miss Brayshaw accepted that larger vehicles were obliged to use the Top Track and that there had never been any attempt to prevent user of the Top Track by the owners and occupiers of the Cottages and their visitors. There was no evidence that the word “Private” was ever intended to prevent user of either track as an access to the Cottages, nor did any dominant or servient owner (with the possible exception of Mrs and Miss Hannam) ever regard it as such.

- f. The final issue (sub-paragraphs (f) and (g) in Paragraph 16) relates to the position of the Parsons, and whether they have taken the Green and Blue Land subject to any easements established by the Applicants. The answer to this issue turns on the application of paragraph 3 of Schedule 3 to the 2002 Act. Logically, I should first determine whether the right of way was exercised within one year of the date on which the Parsons obtained the affected titles by way of transfer from Dr Hogarth-Scott and Miss Brayfield. If that was the case, it is strictly not necessary for me to decide (a) whether the Parsons had actual knowledge of the easement and/or (b) whether the right of way was obvious on a reasonably careful inspection of the servient land. For the reasons explained at length above, I have held that the Applicants were using the Top Track right up until the date when Miss Kirsty Hannam padlocked Gate 3 and accordingly within a year of the date on which the Parsons acquired the affected titles. On this basis alone, the Parsons did not take their title free of the Applicants’ claimed easements.
- g. In case that finding is incorrect, the Parsons may still take free of the easement, if they can show both (a) that they did not have actual knowledge of the claimed easement and (b) that the claimed easement was

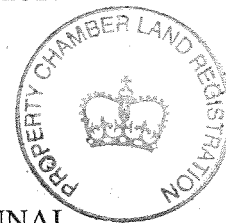
not apparent. However, in view of the factual findings that I have made, they are unable to do so and accordingly they are bound by the Applicants' claimed easements.

## CONCLUSION

56. Accordingly, I am satisfied that the Applicants have established full vehicular rights of way over the Top and Bottom Track, and their applications must therefore succeed. I shall direct the Chief Land Registrar to give effect to their Applications dated 24<sup>th</sup> April 2014 as if no objections had been made. As to costs, on the face of it I see no reason why the Respondents should not pay the Applicants' costs incurred since the date of the references. I also see no reason why Mrs Hannam should not also be liable for the Applicants' costs incurred prior to the date of her withdrawal. However, I will give Mr Ewbank and Mrs Hannam the opportunity to make written submissions to the Tribunal if they resist these orders. Such submissions should be filed and served no later than 4 pm on Thursday 6<sup>th</sup> April 2017. Mr Parsons has already filed his costs submissions, which I have not of course read at this stage. Unless persuaded to the contrary, I would propose to order that the costs should be subject to a detailed assessment on the standard basis, if not agreed.

Dated this 28<sup>th</sup> day of March 2017

*Owen Rhys*



BY ORDER OF THE TRIBUNAL