



**PROPERTY CHAMBER  
FIRST –TIER TRIBUNAL  
LAND REGISTRATION DIVISION**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY**

**LAND REGISTRATION ACT 2002**

**REF/2016/0626**

**BETWEEN**

**Janette Roberts**

**Applicant**

**and**

**(1) Carl Anthony Metcalf  
(2) Carole Metcalf**

**Respondents**

**Property Address: Land at the back of 73 Cutler Lane, Stacksteads and land at the back  
of 69 Cutler Lane, Stacksteads, Rossendale  
Title Number: LA760749 & LA728266**

**Judge Colin Green**

**At: Manchester Employment Tribunal  
On: 6 June 2017**

Applicant Representation: In Person

Respondent Representation: Lewis Bretts of counsel

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**DECISION**

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## **Introduction**

1. The Respondents are the registered proprietors with freehold title absolute of land under title no. LA760749 (“the Respondents’ Land”). Adjoining this is land currently registered under title No. LA728266 with freehold title absolute (“the Applicant’s Land”) in the name of Kenneth Sutcliffe, the Applicant’s father, who died on 25 October 2006. On 17 March 2016, the Applicant applied in form AP1 to register the benefit of an easement by prescription against the Applicant’s Land and the burden against the Respondents’ Land. After the death of her mother in 2013, the Applicant is now the sole beneficial owner of the Applicant’s Land and executrix of her father’s estate under a grant dated 9 March 2016. It is accepted that although the Applicant is not the registered proprietor of the Applicant’s Land, nevertheless she has sufficient standing to make the application. The Respondents objected and the application was referred to the Land Registration Division of the Property Chamber. The issue I must decide is whether the Applicant’s Land enjoys the benefit of a right of way with or without vehicles over the Respondent’s Land, acquired by way of prescription.

## **Title history**

2. The properties 67 to 73 Cutler Lane form a row of terraced houses. Behind such houses is an area of open land (“the Rear Land”), which was owned by Rossendale Borough Council (“the Council”). Primary access to this land was obtained by a roadway leading from further up Cutler Lane (“The Access Road”), which was established in about 1967. For a period, the Rear Land was let by the Council to a Mr. Haworth.
3. The Respondents lived at 73 Cutler Lane from 1982, initially as tenants but in 1989 they purchased the property. At about this time, the First Respondent agreed with Mr. Haworth, who was moving, to take over his tenancy of the Rear Land. He did so for the purpose of a garage, garden and parking and for use as a play area for his children.
4. In 1993 the First Respondent agreed with the Council to surrender his tenancy of part of the Rear Land, being a strip behind 67 Cutler Lane (occupied by a Mr. Robinson) and 69 Cutler Lane (owned by Mr Sutcliffe). The part behind 67 was let to Mr. Robinson and that behind 69 – The Applicant’s Land – was purchased by Mr.

Sutcliffe by a transfer of part dated 26 November 1993. The remaining land – the Respondents’ Land – was purchased by the Respondents from the Council in 1996.

### **The Applicant’s case**

5. According to paragraph 4 of the Applicant’s first Statement of Case dated 10 October 2016, her father’s use of the route across the Respondents’ Land to the Applicant’s Land was “through an agreement with Mr Metcalf”. The Tribunal wrote to the Applicant pointing out that her Statement of Case failed to comply with the Tribunal rules as it did not contain a schedule of documents on which she wished to rely. A further Statement of Case was served dated 4 November 2016, containing such a schedule, but the body of the Statement was substantially revised, and did not contain the above assertion. Instead, paragraph 10 stated: “At no [time] did my father mention that an agreement was in place between himself and Mr Metcalf regarding access, or of access terminating on his death.”
6. In cross-examination, the Applicant accepted that she was aware from her father that there was an agreement with the First Respondent concerning access, but she had not been present when such an agreement was reached, never discussed the matter with her parents and was unaware of the terms of the agreement.
7. The First Respondent’s evidence was that in about 1994 or 1995 – at this juncture it is difficult to be precise as to the exact date – he was approached by Mr. Sutcliffe and told that Mr. Parkinson at 67 had erected a fence which prevented Mr. Sutcliffe from obtaining access to the Applicant’s Land, which at that point was overgrown and had a tree on it. Mr. Sutcliffe asked if the First Respondent would allow him to use the Respondents’ Land to gain access. At that point, the First Respondent was renting the Respondent’s Land from the Council (he and his wife purchased the freehold in 1996). The First Respondent spoke to his grandfather, who advised him to agree to the request in the interests of neighbourliness but to ensure that the permission was personal to Mr. Sutcliffe and could not be used by anyone else if Mr. Sutcliffe should sell his property. Therefore, the First Respondent agreed with Mr. Sutcliffe that he could have access over the Respondents’ Land, but that the right was personal to him. A while after that Mr. Sutcliffe constructed a hard standing on the Applicant’s Land

and then a garage which he used to park his car. This continued up to the day before Mr. Sutcliffe's death.

### **The Law**

8. For current purposes, the law relating to the acquisition of an easement by prescription, whether under the Prescription Act 1832 or the doctrine of lost modern grant, is straightforward: there must be continuous user for a period of at least twenty years. One of the requirements of that user is that it be as of right, and therefore "nec precario" (without permission), see: *Gale on Easements*, Twentieth Edition at paragraphs 4-124 to 135. Accordingly, since the Applicant's Land and the Respondents' Land were in common occupation prior to 1993, the continuous period of twenty years must fall between 1993 and the date of the Applicant's application in 2016.

### **Findings**

9. The Applicant was not able to challenge the First Respondent's account of the agreement reached with her father. Indeed, she acknowledged that there had been an agreement but had not spoken to her parents about it and did not know the terms agreed. Accordingly, I accept the version of events given by the First Respondent and that the permission was personal to Mr. Sutcliffe so that that it expired on his death in 2006. Since the use he made to get to his garage was permissive, there can be no reliance on prescription until after that date, at the earliest, which would fall substantially short of the twenty years required.
10. I also heard evidence concerning use after Mr. Sutcliffe's death and submissions on whether such use was also permissive, or sufficiently regular to constitute continuous user of a right of way. In the light of the above, it is not necessary for me to deal with those issues.

### **Conclusion**

11. Accordingly, I will direct that the Applicant's application be cancelled.

**Costs**

12. In this jurisdiction, costs usually follow the event. In principle, it follows that the Respondents are entitled to their costs since the date of the reference. A single up-to-date schedule has not yet been provided and therefore I make the following directions.
  - 12.1. On or before 26 June 2017, the Respondents' solicitors shall send to the Applicant and the Tribunal a schedule of costs suitable for summary assessment supported by invoices and counsel's fee notes.
  - 12.2. The Applicant should by 10 July 2017, send to the Respondents' solicitors and the Tribunal a response dealing with both the Applicant's liability for costs (should this be contested) and the amount of costs being claimed.
  - 12.3. The Respondents' solicitors may, before 24 July 2017, send to the Applicant and the Tribunal a short reply to such response.
13. After completion of the above, I will consider the application for costs.

Dated this 9<sup>th</sup> day of June 2017

BY ORDER OF THE TRIBUNAL