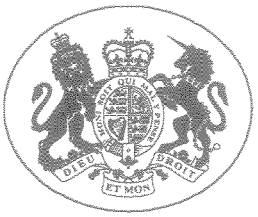

[2018] UKFTT 175 (PC)

REF/2017/0077

FIRST TIER TRIBUNAL (PROPERTY CHAMBER)
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

ALAN SODEN

APPLICANT

And

(1) RAYMOND FREDERICK TIMMINS
(2) ANNETTE TIMMINS

RESPONDENTS

Property Address:	**76 Beverley Gardens and the parking space belonging to 89 Beverley Gardens**
Title Numbers:	**Title numbers BK174911 and BK177956**
Before:	**Mr Hansen (Tribunal Judge)**
On:	**16-17 January 2018**
Representation:	**Mr D Gatty of Counsel for Applicant** **Mr T Calland of Counsel for Respondents**

DECISION

KEYWORDS – Easement – Prescription – Prescription Act 1832 - Lost Modern Grant – Extent of User - Whether Quality and Quantity of User sufficient – Whether User as of right or contentious

Cases referred to:

Wilkin & Sons Ltd REF/2011/0420

R v Oxfordshire County Council, ex p Sunningwell Parish Council [2000] 1 AC 335

Welford v. Graham [2017] UKUT 0297 (TCC)

Winterburn v. Bennett [2016] EWCA Civ 482

Taylor v Betterment Properties (Weymouth) Ltd [2012] EWCA Civ 250

Newnham v. Willison (1987) 56 P & CR 8

Burrows v. Lang [1901] 2 Ch 501

Wright v. Macadam [1949] 2 KB 744

R. (Beresford) v. Sunderland City Council [2004] 1 AC 889

Mills v. Silver [1991] Ch 271

Rolle v. Whyte (1868) LR 3 QB 286

Introduction

1. The Applicant is the freehold proprietor of 76 Beverley Gardens, Maidenhead ("No.76") which is registered at HM Land Registry under title number BK174911. The Respondents are the freehold proprietors of 89 Beverley Gardens ("No.89") which is registered at HM Land Registry under title number BK177956. Both properties are part of an estate built in or about 1980 on the edge of Maidenhead. Both properties were transferred with the benefit of a parking space although in neither case is the parking space contiguous with the main property.

2. This reference arises out of an application dated 16 May 2016 by the Applicant to register the benefit of a prescriptive right of way running over part of the parking space that serves No.89 ("the No. 89 Parking Space") and is owned by the Respondents as part of their title, albeit the No. 89 Parking Space is in fact immediately behind the garden fence at the rear of No.76 ("the Fence"). There is a gate in the Fence which opens onto the Parking Space ("the Gate"). Using the Gate, the Applicant claims that he has acquired by prescription the right to pass

back and forth over the No.89 Parking Space en route to the service road at the back of No.76 and the garage and parking space that are comprised within the title to No.76. The extent of the claimed right of way is shown coloured pink on the illustrative plan prepared by the Land Registry ("the claimed right of way"). The claimed right of way is 76cm wide, corresponding to the width of the Gate and extends in a straight line along the northern edge of the No.89 Parking Space as far as the mid-point of the service road.

3. The application was objected to and referred to this Tribunal on 19 January 2017.

Background

4. The estate was built in or about 1980. The first owners of No.76 were Mr and Mrs Breadmore to whom the property was transferred pursuant to a transfer dated 25 January 1980 ("the January 1980 transfer"). The property transferred included a dwelling house, a garage and a parking space ("the No.76 Parking Space"). The No.76 Parking Space is not directly behind No.76 but is in fact immediately behind the back fence of the house next door, No.77. There is no suggestion in the title deeds that the Gate or any similar gate existed at the time of the January 1980 transfer and the transfer contains no expressly granted right of way to access the No.76 Parking Space and/or garage from the rear garden of No.76 through the Gate across the No.89 Parking Space. There is, and has always been, ready access to the No.76 Parking Space and the garage by two alternative routes from the front of No.76, although neither is as convenient as the claimed right of way. The January 1980 transfer contains a covenant on the part of the purchasers and their successors in title not to use the No.76 Parking Space for any purpose other than as a parking space for a private motor car.

5. The first owners of No.89 were Mr and Mrs Hammond to whom the property was transferred pursuant to a transfer dated 30 May 1980 ("the May 1980 transfer"). The property transferred included a dwelling house, a garage and the No.89 Parking Space. The May 1980 transfer contains a similar covenant not to use the No.89 Parking Space otherwise than as a parking space for a private motor car. As noted above, the No.89 Parking Space is in fact immediately behind the Fence at

the back No.76's back garden. There is no suggestion in the title deeds that the No.89 Parking Space is burdened by any right of way, whether for the benefit of the owner of No.76 or otherwise.

6. The user relied on to found the present application begins on 11 December 1987, the date upon which the Applicant and his wife bought No.76. By that date it is clear that the Gate was in situ. There is no need to make a finding about when it was first installed as there is no evidence to support user before that date.

7. There is a plan provided by the Applicant (p.868) which shows the locus and the relevant dimensions ("the Plan"). Whilst this was not an agreed plan, no rival plan has been provided by the Respondents and I proceed on the basis that the Plan is accurate, according as it does with what I saw on site on 15 January 2018 and the measurements taken on site. Whilst it is true that the parking spaces are not as clearly marked out on the ground as they could be, or as the Plan suggests, the position is that the parking spaces at the rear of No.76 are generally 2.67m wide but the No.89 Parking Space is in fact 4m wide, comprising as it does an additional area approximately 1.33m wide which comprises half of what the parties have described as the Arched Area, by reference to the shape of this additional area of land as shown on the May 1980 transfer. Thus it can be appreciated that even if I direct the Chief Land Registrar to give effect to the application, it will not in practice stop the Respondents from parking in the No.89 Parking Space. The average width of a car is, I am told, 1.8m. Thus there will be more than sufficient space to park a car of that width in a space of 3.24m (4m less 76cm which is the width of the claimed right of way), even allowing for the fact that the First Respondent is disabled and uses a wheelchair. That said, this is purely by way of observation. I must determine the application on its factual and legal merits in the usual way.

8. The Applicant and his wife completed their purchase of No.76 on 11 December 1987. They have never lived at the property. It has been consistently let out to tenants, with few very voids, and none of sufficient duration to be relevant. The Gate was in situ at the date of purchase. According to the Pre-Contract Enquiries dated 18 November 1987, there had been no disputes affecting the property

(Answer 2A). No.76 was transferred into the sole name of the Applicant on 8 May 2013.

9. The Respondents completed their purchase of No.89 on 19 November 2004. They bought the property from Mr Hammond's executors. According to the Seller's Property Information Form, there had been no disputes (Answer 2). In fact, there had been a dispute between Mr Hammond and the Applicant in August 1997. That much is common ground. However, it is the Applicant's case that that dispute was resolved almost as soon as it had begun and did not continue beyond August 1997. I shall have to revisit this issue when I come to consider the evidence and make my findings because this dispute forms a central plank of the Respondents' defence, the contention being that any user after August 1997 was contentious and thus not as of right, at least until 2004 when Mr Hammond died. If that is right, it is sufficient to defeat this claim because of the chronology.

10. Following the Respondents' purchase of No.89, there was a further dispute, this time between the Applicant and the Respondents. The date of this dispute is not agreed. The Second Respondent says it was in 2005. The Applicant says it was in 2007 and relies on a letter dated 22 June 2007. The Second Respondent denies receipt of that letter. On the face of it, this is a significant factual dispute, going to credit (at least). In fact, I am not persuaded that it really matters whether the dispute was in 2005 or 2007 and ultimately neither party suggested it did. On balance I am inclined to think that it was in 2007 and that the Second Respondent has simply forgotten a letter which she had no real reason to recall until many years later. What matters is the substance: what was said or not said, and how it was resolved. I shall have to return to this dispute later, as again it forms a central plank of the Respondents' defence, the allegation being that user was contentious as from 2005 or 2007. Again, if correct, this is sufficient to defeat the claim.

11. Throughout the relevant period of user relied on, No.76 was tenanted. On or about 15 September 2014 Kersti Ludvig and Mihkel Olop became tenants. On or shortly before 9 February 2015 Mr Olop left a note on the First Respondent's car which read as follows: "*Please don't block our gate. I don't want to scratch your car with my bike*". The Second Respondent replied by letter dated 9 February 2015 as follows:

"You left a note on my car which tells me that your landlord has not explained the situation to you.

You should not have a gate there. You are encroaching onto my private car parking space as shown on my title deeds.

I have been through this with your landlord before and I have said that when neighbouring spaces are not being used I will try not to park in front of your gate as a good neighbour. However, as the workmen are currently parking in Eileen's space I am having to use all of mine. I do not wish to have to go to a solicitor about this but I will if I have to.

Please ensure that you do not scratch my car with your bike as my car is parked where it should be.

Let me know if your landlord wishes me to take this matter further or if he will abide by the law of ownership".

12. Unfortunately, relations appear to have deteriorated fairly rapidly following that letter. The tenants contacted the Applicant on 25 March 2015 complaining about "*one of the neighbours … blocking our back gate*". They enclosed a photograph of the Second Respondent's car parked half way across the gate. Correspondence then ensued between the Applicant and the Second Respondent, with the former threatening injunction proceedings in the High Court. I do not propose to explore the detail of that correspondence. It may be relevant to costs in due course but it sheds no particular light on the merits of this dispute. Suffice it to say, the parties corresponded between March and May 2015 whereupon both parties appear to have consulted solicitors. The solicitors then took up the cudgels. The Applicant's solicitors maintained that their client had obtained an easement by prescription to pass back and forth over the No.89 Parking Space via the Gate. The Respondents' solicitors called for evidence to prove the claim whilst also indicating a willingness to consider alternative dispute resolution. In the meantime the problems on the ground escalated. On 29 August 2015 the tenants complained that that the Second Respondent was now "*block[ing] our access entirely*". Shortly thereafter, in or about September 2015, the Respondents erected a fence panel behind the Gate to prevent use of the Gate and it remains in place.

13. As noted above, the Applicant applied to the Land Registry to register the benefit of a prescriptive easement on 16 May 2016. The legal basis of the claim is/was s.2 of the Prescription Act 1832 ("the 1832 Act") and/or the doctrine of lost modern grant. Under s.4 of the 1832 Act, the 20-year period relied on must be the 20 years "*next before some suit or action*". Where the easement is asserted by an application to the Land Registry, the date when the application to the Land Registry is made is regarded as the date of the suit or action for the purposes of the 1832 Act: see *Wilkin & Son Ltd v. Agricultural Facilities Ltd* (REF/2011/0420) at [109]-[113]. We are therefore concerned here with the 20 years before 16 May 2016 under the 1832 Act and any 20-year period within the period of 28 years between 1987 and 2015 for the purposes of the doctrine of lost modern grant.

14. As noted above, from September 2015 the Applicant was prevented from using the claimed right of way because of the fence panel erected by the Respondents. That does not prevent reliance on the 1832 Act because, under s.4 of that Act, only an interruption that is acquiesced in for more than a year serves to break the continuity of user required under s.2 of the 1832 Act. Here the application was made within a year of the interruption and, in any event, it is hard to see how it could be said that the interruption was acquiesced in, given the terms of the solicitors' correspondence.

The Issues

15. Against that background, the issues, as agreed between the parties and set out in an Agreed Lists of Issues, are as follows:

(1) Whether for a period of at least 20 years before the making of this application A (with his wife during their period of join ownership of 76 Beverley Gardens) and his/their tenants and licensees made use of a way leading from a gate in the rear fence of 76 Beverley Gardens across RR's land situated behind 76 Beverley Gardens ("the Way") sufficiently continuously to have established a right of way by prescription, if such use was as of right.

(2) Whether such use of the Way as was made by A/his wife and his/their tenants and licensees was not as of right because it was:

(a) Contentious from 1997 or

(b) Contentious from 2005 or

(c) Precarious

(3) If it is found that there has been user of the Way as of right for at least 20 years, what easement is A entitled to?

16. Subject to the qualification that I propose to treat issue (2)(b) above as though the words "*or from 2007*" were included after "*2005*", I shall proceed as per the Agreed List of Issues.

The Law

17. The doctrine of lost modern grant and prescription under the 1832 Act both require the Applicant to show 20 years' uninterrupted user "*as of right*", that is to say without force, without secrecy and without permission (*nec vi, nec clam, nec precario*).

18. The purpose of the law whereby a person may acquire rights by prescription is that the legal position should reflect and recognise the fact of long use. In *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 Lord Hoffmann said at p.349:

> *"Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment."*

19. By way of explanation of the need for the long user to be without force, secrecy or permission and therefore "as of right", Lord Hoffmann said in the same case at p.350:

> *"The unifying element in these three vitiating circumstances was that each constituted a reason why it would not be reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."*

20. Whilst the legal burden of proving 20 years' user as of right is on the putative dominant owner, once 20 years of open user is proved, such user gives rise to a presumption of an earlier grant and the evidential burden shifts to the servient owner to rebut the presumption by showing, for example, that the user was contentious or permissive: see *Welford v. Graham* [2017] UKUT 0297 (TCC) at [41]-[47].

21. In the present case, the central disputes relate to whether the user relied on became contentious, i.e. not nec vi, as from 1997 in the first instance, as a result of a dispute between the Applicant and Mr Hammond, and/or from 2005 or 2007 as a result of a dispute between the Applicant and the Second Respondent. The law in that regard has recently been considered by the Court of Appeal in *Winterburn v. Bennett* [2016] EWCA Civ 482 where David Richards LJ said this:

> *13. The phrase "without force" carries rather more than its literal meaning. It is not enough for the person asserting the right to show that he has not used violence. He must show that his user was not contentious or allowed only under protest. This appeal is concerned with what constitutes protest on the part of the owner of the land for these purposes.*
>
> *14. Mr Gaunt QC for the appellants rightly emphasised that the basis of the law of prescription is acquiescence on the part of the owner of the land. In Dalton v Angus (1881) 6 App Cas 740, in which the doctrine of lost modern grant was authoritatively established, Fry J, one of the judges asked to give his opinion to the House of Lords said at p.773 in a passage cited with approval by Lord Hoffmann in Sunningwell:*

"But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest."

15. Mr Gaunt submitted that, to counter acquiescence in the unlawful use of land, it must be resisted or suitably protested against in a proportionate manner. The circumstances must indicate that the owner objects and continues to object to the unlawful use. If reliance is placed on protests, they must be continuous and repeated.

16. In a commendably economic manner, Mr Gaunt cited from a number of the leading authorities, beginning with Dalton v Angus. In that case, the House of Lords was concerned to establish whether the owner of a building enjoyed a right of support from neighbouring land and, if so, how this right arose in the absence of contract or ancient user. For these purposes, the House of Lords sought the opinions of seven common law and equity judges who were present when the case was argued and whose opinions are reproduced in full at pages 742-789 of the report. It is important to note that exactly what can or cannot constitute "without force" was not the issue in the case but the requirement for user "as of right" was in point because all the judges, and the members of the House of Lords, considered that the right of support either was an easement that could be acquired by prescription or arose in a manner analogous to the acquisition of an easement by prescription.

17. Some passages from the opinions of the judges on this issue have subsequently been cited, with approval.

18. Fry J said at p.774:

"It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of another; 2ndly, the absence of right to do that act in the person doing it; 3rdly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not

afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases.

As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer."

19. Part of this passage was cited with approval by Lord Neuberger in R (Barkas) v North Yorkshire CC [2014] UKSC 31, [2015] AC 195 at [18]. This passage and other passages in some of the older authorities suggest that the owner of the land must take steps by physical means or through legal proceedings to prevent the wrongful user. However, the passage cited from the opinion of Fry J ends with a reference to a right being "acquired and enjoyed by the tacit consent of the sufferer" and in a passage of the opinion of Bowen J, also cited in later cases, he said at p.786:

"The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions on which the presumption of right is raised: Eaton v Swansea Waterworks Company."

20. Although this was said by Bowen J in the context of rights of support where active steps to interrupt the user would normally be wholly disproportionate, it has been cited in more recent cases as demonstrating a much broader proposition. See R (Lewis) v Redcar & Cleveland BC (No.2) [2010] UKSC 11, [2010] 2 AC 70 at [88] – [91] per Lord Rodger of Earlsferry and Newnham v Willison (1987) 56 P&CR 8 at p.18 per Kerr LJ. In the latter case, Kerr LJ continued:

"In my view, what these authorities show is that there may be "vi" – a forceful exercise of the user – in contrast to a user as of right once there is knowledge on the part of the person seeking to establish

prescription that his user is being objected to and that the use which he claims has become contentious."

21. In the light of the development of the authorities, it cannot now be said, even if it ever could, that to avoid acquiescence, the owner of the relevant property must take steps through physical means or legal proceedings actually to prevent the wrongful user.

22. David Richards LJ then went on to consider whether "*the continuous presence of legible signs*" prohibiting user of the club car park (as it was in that case) by anyone other than club patrons "*was sufficient to render the use of the car park by the appellants and their suppliers and customers contentious*". He held that it was and referred to the case of *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250 as supporting that proposition. The *Betterment* case was a commons registration case and at [34] David Richards LJ noted that:

"The present case does not feature the factual difficulties involved in Betterment that a significant number of members of the public using the land probably did not see the signs which were erected and re-erected by the owners. In the present case, there were two signs clearly visible to all users of the car park and clearly informing all users that it was a private car park for the use of Club patrons only. The signs were never vandalised or, until 2007, removed and no occasion arose for their replacement. In those circumstances, applying the judgment of Patten LJ, the answer would appear to be clear that the signs were by themselves sufficient to make contentious the parking of cars and other vehicles by the appellants, their suppliers and customers".

23. Finally, at [37]-[41] David Richards LJ said this:

37. Mr Gaunt put his case in a number of ways. First he said that there must, quoting Bowen J, be "continuous and unmistakeable protest" by the servient owner. The circumstances must indicate that the owner objects and continues to object to the parking. I agree that the circumstances must indicate to persons using the land that the owner objects and continues to object to the parking. As Patten LJ put in Betterment at [30] the issue is whether the owner has taken sufficient steps so as to effectively indicate that the unlawful user is not acquiesced in. On the facts of the present case, the presence of the signs in my judgment clearly indicated the owner's continuing objection to unauthorised parking. Mr Gaunt submitted that the protest needs to be proportionate to the user. Again I would accept that but in my view the continuous presence of the signs asserting that it was private property for use by the Club's patrons only was a proportionate protest. Mr Gaunt submitted

that, in the face of parking by those not entitled to do so, there should have been additional signs ordering such parking to cease. I can see no reason why such further signs should be required. Any reasonable person, whether in the position of the owner of the land or those unlawfully parking on it, would understand the meaning and effect of the signs to be that persons other than the Club's patrons were not allowed to park on the car park and should not do so. […].

38. Mr Gaunt submitted that where, as was obvious in the present case, the signs were being ignored, it was incumbent on the owner of the land to take such further steps as were practicable. He accepted that if a sign was all that could practically be done, then a sign would be sufficient. But where, as here, the owner knew that the appellants (and their suppliers and customers) were unlawfully using the land, the owner must communicate directly with the appellants. He submitted that a stiff letter from the secretary of the Club or its solicitors every year would have been sufficient.

39. In his skeleton argument, Mr Gaunt submitted that there was a power in the owner of the car park to stop the user "by the simple expedient of erecting a chain across the entrance to the car park, or objecting orally, or writing letters of objection, or threatening or commencing legal proceedings, but the owner conspicuously abstained from doing any of these." In the course of his oral submissions, Mr Gaunt suggested that, if one level of protest was insufficient to stop the unlawful parking, a more potent step should be taken, leading ultimately to the commencement and the prosecution of legal proceedings.

40. In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.

41. The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in

order for people to retain and defend what is theirs. 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.

24. Mr Calland submitted that the whole of the relevant law in relation to contentious user was now to be found in the *Winterburn* case but Mr Gatty additionally referred me to the following passages in the *Betterment* case:

> *40. The question of how far the landowner must go was considered by Pumfrey J in Smith v Brudenell-Bruce [2002] 2 P&CR 51 (a case about the acquisition of a private right of way by prescriptive user). He said that:*
>
> > *"It seems to me a user ceases to be user "as of right" if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when a servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."*
>
> *41. This requires to be unpacked a little. Assuming that the notice is in terms sufficiently clear to convey to the average reader that any use of the relevant land by members of the public will be treated as a trespass then it will be irrelevant that individual users either misunderstood the notice or did not bother to read it. The inhabitants who encounter the sign have to be treated as reasonable people for these purposes to whom an objective standard of conduct and comprehension is applied. But the last sentence of this dictum suggests a wider test under which the owner who does everything reasonable to contest the user will thereby have made such user contentious regardless of the extent to which his opposition in fact comes to the notice of those who subsequently seek to establish the prescriptive right.*
>
> *42. In the case of a private right of way, the situation is much less likely to arise because any sign erected along the route of a potential right of way will almost certainly come to the attention of the dominant owner and the judgments in the right of way cases have to be read in this context. But in the case of a town or village green where the area of land will often be much larger, the problems of visibility may be more common.*
>
> ...

49. All the relevant authorities in this area proceed on the assumption that the landowner must take reasonable steps to bring his opposition to the actual notice of those using his land. Disputes about whether the wording of the notices was sufficient to make it clear that any use of the land was not consented to and would be regarded as a trespass would be irrelevant if the landowner did not have to make his position known. They assume that some process of communication is necessary. If the landowner keeps his opposition to himself and makes no outward attempt to prevent the unauthorised use of his land he may be taken to have acquiesced.

...

52. I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowner's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly positioned to give reasonable notice of the landowner's objection to the continued use of his land.

...

56. In these circumstances the position in relation to the maintenance of the fences is, I think, secondary and not essential to the outcome of the appeal. The fencing was obviously important while the land continued to be used for grazing but, as Mr George points out, it did not really affect local inhabitants who obtained access to the registered land via the footpaths. I also accept his submissions that the occasions on which a member of the Curtis family or one of their employees actually challenged someone using the land were too infrequent to be treated as sufficient in themselves to make the local inhabitants' user of the land contentious.

25. I should also mention one further case referred to in the *Winterburn* case and relied on by both parties for different propositions. Mr Calland relied on the following passage from the judgment of Kerr LJ in *Newnham v. Willison* (1987) 56 P & CR 8 at page 19 where, after referring to *Eaton v. Swansea Waterworks* and *Dalton v. Angus*, he said this:

"In my view, what these authorities show is there may be vi – a forceful exercise of the user – in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious".

26. Mr Gatty invited me to read on. The passage continues:

> *"If he then overcomes the objections, and in particular if he overcomes them in a physical way, expressed by the word 'vi' or 'force', such as by removing an obstruction, then that is sufficient evidence to show that on the one hand the owner of the servient land was objecting to the use, so that the user was no longer as of right, and on the other hand that the person who claims the right was aware that he was not exercising it as of right but in the face of objections by the servient owner".*

27. Mr Gatty then referred me to the ultimate decision in that case by which the Court of Appeal allowed an appeal against the first instance decision in favour of the plaintiff (who claimed an easement by prescription under the 1832 Act only) on the basis that there had been an interruption for more than one year which defeated the claim. Mr Gatty submitted that the servient owner must take reasonable steps to bring his continuing opposition to the notice of the person using the land and that this case supported the proposition that a period of contentiousness of less than a year was not sufficient to break continuity or render the user not as of right. Before I leave this case, I observe that Eastman J, in agreeing with Kerr LJ, appears to have regarded the mere sending of a solicitor's letter as sufficient to render user contentious: see at page 20.

28. My ultimate conclusions on the contentious user issue will obviously depend on my findings of fact and the proper application of the law to those facts.

29. There was one other issue of law raised by Mr Calland which I can deal with shortly at this stage. As is apparent from the List of Issues (issue 2(c)), there is an issue as to whether the user was "precarious". This was not, at least in the first instance, an allegation that the user was permissive, and thus not nec precario, in the classic sense. Instead the submission was that the user was precarious in the sense that it was dependent on the will of another person (see *Burrows v. Lang* [1901] 2 Ch 501 at 510-11), the point being that user of the claimed right of way was only possible if "*enabled by the servient owner*", to use Mr Calland's phrase, and thus was not as of right because it depended on whether the Second Respondent chose or happened to park in the Parking Space in such a way as to

obstruct the Gate or leave it clear. However, the case of *Burrows v. Lang* was concerned with whether the right asserted - being an alleged right to take, for the purposes of watering cattle, so much water (if any) as might happen to be left in an artificial watercourse after the owner of the water course had taken what he required for his own purposes - was a right known to the law. Farwell J held that that was not a right known to the law and used the word "*precarious*" to describe a right unknown to the law. The proper analysis of *Burrows v. Lang* and the use by Farwell J of the word "*precarious*" in that case is explained by Jenkins LJ in *Wright v. Macadam* [1949] 2 KB 744 at 750-751 where he said this:

> *A certain amount of confusion has been introduced into the discussion on this aspect of the case by the circumstance that some of the learned judges have used the word "precarious" in describing rights of a kind unknown to the law, and in particular the expression was so used by Farwell J. in the case of* Burrows v. Lang *(2); but in this context the precariousness enters into the character of the right as distinct from the title to the right. The right is precarious in the sense that, to take the example of the surplus water, there may be no water at all, and that the right is in itself liable to be defeated in that way. It is necessary to keep clearly in mind the distinction between "precariousness" in the sense in which it is used in relation to quasi rights of that description, and precariousness of title as used in relation to a permissively exercised right.*

30. It is right, as Mr Calland pointed out, that *Burrows v. Lang* is also referred to by Lord Rodger in *R. (Beresford) v. Sunderland City Council* [2004] 1 AC 889 at [58], but there is nothing in that citation that suggests that Lord Rodger was treating nec precario as meaning anything other than without permission or license. In the present case there is no question but that the right asserted is a right known to the law and the only question then for the purposes of issue 2(c) is whether the user in question was permissive. No evidence was led on behalf of the Respondents to suggest that there was ever any express grant of permission and there is no evidence, in my view, which justifies an inference of permission. I therefore reject any contention that user was permissive or precario in the traditional sense.

The Evidence

31. I had the benefit of a site visit on 15 January 2018. I inspected the No.89 Parking Space and the adjoining spaces on either side. The No.89 Parking Space is immediately behind the Fence and is readily accessible through the Gate, or would have been until September 2015 when the Respondents erected a fence panel behind the Gate. The width of the Gate is 76 cm. For the purposes of the site visit, the Applicant had marked out the spaces on the ground with pieces of wood. They are not clearly marked on the ground. A number of the spaces are marked with a yellow sign which says "*Private Parking, No. 85*" (or otherwise as the case may be) affixed to the fence which separates the back gardens from the parking spaces. The No.89 Parking Space is marked by a sign attached to a pole located just in front of the Fence which says "*89*" and also has the words "*private parking*" albeit these words have faded significantly over time. The Applicant had previously taken measurements for the purposes of the Plan and in order to mark out the spaces on the ground. I am satisfied that those measurements are reliable. The normal spaces are 2.67m wide. The No.89 Parking Space, which has the benefit of half the Arched Area, is noticeably wider than the normal spaces and is 4m wide. There is sufficient room to park an ordinary motor car in the No.89 Parking Space whilst leaving the Gate unobstructed. The claimed right of way is shown on the illustrative plan running along the northern edge of the No.89 Parking Space. It is shown on that plan as extending over the No.89 Parking Space and into the service road but in fact ought to stop at the mid-point of that service road because the Applicant has an express right of way over the remainder of the service road.

32. I heard evidence from the Applicant and the Second Respondent. Both were vigorously cross-examined. I found them both to be truthful witnesses who were trying their best to assist the court in relation to events going back over many years. Whilst I found them both honest and straightforward, that does not mean that I accept everything that they both said. On one or two important issues, I consider that they were wrong. I do not propose to rehearse their detailed evidence here. Where relevant to the findings I make below, I will of course refer to the evidence in more detail and the reasons for my findings, but I do not propose to repeat the contents of the various witness statements and statutory declarations relied.

33. The other evidence consisted of statements from people not called as witnesses. However, in the case of three of the Applicant's witnesses, Mr Olop, Mr Calleran and Mrs Butterly, this was because their evidence was agreed. So I proceed on that basis. However, in respect of other witnesses, whose evidence was not agreed and who did not give evidence, I place little weight on their evidence.

Findings of Fact and Conclusions

34. *Issue (1).* What would ordinarily be the central issue in a case such as this can actually be disposed of quite shortly. Mr Calland put the Applicant to proof on the issue of user but he made no real challenge to most of the evidence of user relied on and confirmed that he took no point on the continuity/frequency of user. He submitted that I should approach the Applicant's evidence on this issue with caution and submitted that the Applicant could not know what was happening on a daily basis because he did not live there. The latter point is correct of course but the Applicant was, I find, actively involved in the management of his lettings, and his evidence, supported by records, was that he visited No.76 forty times a year on average and that the property had been let out more or less continuously since 1987/8. I accept this evidence. I also accept the detailed evidence that he gave in relation to his visits to the property and his use of the Gate and the claimed right of way and the user of the claimed right of way by his tenants: see, in particular, at paragraphs 5-10 of his statement dated 12 May 2016. I note too the agreed evidence of Mrs Butterly who said this:

> 2. *"I have lived at 77 Beverley Gardens for approximately 24 years. […]. My property is semi-detached to Mr Soden's property, 76 Beverley Gardens.*
>
> …
>
> 4. *As Mr Soden's property is semi-detached to mine I have known him and his wife since I moved into the property. I have also known all of his tenants over the years too.*
>
> …
>
> 10. *Both myself, the tenants who live at 76 Beverley Gardens and the owners (Mr & Mrs Collins) of 75 Beverley Gardens have always used*

the access via our rear gates. It is common sense to do so as this is the shortest and most convenient route to access our properties. It is far longer to walk round to the front door of all properties and is made even more inconvenient when carrying lots of items from the car into the house. I would rarely use my front door. I don't recall seeing the tenants at 76 Beverley Gardens using their front door either (until recent events have left them with no choice)."

35. The evidence of Mr Hallaran is also supportive of the Applicant's case, in relation to the period from 2008. The evidence of Mr Olop also supports the Applicant's case, suggesting that there was no problem with access until building works at the beginning of 2015 led the Second Respondent to park her car in a position which obstructed the Gate.

36. The Respondents cannot give evidence as to what happened before 2004 when they purchased No.89. Even after their purchase, they could not see the Gate or the No.89 Parking Space from No.89. Unless they happened to be there at a time when the Gate was being used, they cannot know how or with what frequency it was being used. The Second Respondent's evidence says little or nothing to counter the Applicant's evidence of user. Rather it deals, briefly, with what she knows about the dispute in 1997 between the Applicant and Mr Hammond but its primary focus is on her dispute with the Applicant in 2005 (on her case) or 2007 (on the Applicant's case) and events leading up to the obstruction of the Gate in 2015. I shall have to return to these matters when dealing with the issue of contentious user but there is no meaningful evidence adduced by the Respondents to challenge the evidence of user adduced by the Applicant.

37. I am satisfied that the Applicant and his wife during their period of joint ownership and his/their tenants and licensees have since 1988 openly and continuously used the Way as claimed and had done so for at least 20 years prior to events in 2015. I accept the Applicant's evidence that he and his tenants have generally walked in and out in a straight line through the Gate across the No.89 Parking Space, there being no obvious reason to deviate or take any other route. If there was a car parked in the No.89 Parking Space, they generally walked past on the driver's side, which would be along the northern edge of the No.89 Parking Space assuming, as appears to have been the case, that any car was parked nose-in to the

Fence. I am further satisfied that that user was sufficient to bring home to the mind of a reasonable person in possession of the servient tenement the fact that a continuous right to enjoyment was being asserted: see e.g. *Mills v. Silver* [1991] Ch 271. The Applicant is therefore entitled to a prescriptive right of way, commensurate with the established user, unless that user was or became contentious following the dispute in 1997, alternatively the dispute in 2005 or 2007.

38. *Issue 2(a).* The Applicant's account of what happened in 1997 is as follows. During the course of 1997 the Applicant had occasion to take delivery of a number of items of furniture through the Gate. He also had new carpets delivered. He encountered Mr Hammond on two occasions in 1997 prior to 10 August 1997 as the latter was parking his car in the Parking Space. On the first occasion he asked Mr Hammond to keep the Gate clear. Mr Hammond did not respond but did not obstruct the Gate. On the second occasion in 1997 Mr Hammond's car was partially obstructing the Gate as items of furniture were being delivered. The Applicant asked Mr Hammond to move his car over slightly and Mr Hammond obliged. On 10 August 1997 the Applicant was having a bed delivered. He again met Mr Hammond as he was parking and asked him to move his car over slightly to avoid any obstruction of the Gate. Mr Hammond responded by saying: "*You should not have a gate there and I will continue to park as I please*". The Applicant's response was to the effect that the parking sign which was then affixed to the Fence, but is now fixed to a pole as described above, should not have been fixed to the Fence. I accept this evidence.

39. The Applicant told me that subsequently, on 12 August 1997, he visited Mr Hammond at No.89 and handed him his parking sign which the Applicant had removed from the Fence. He also handed him a letter dated 12 August 1997 (p.584) and a copy plan (p.585) showing the allotted parking spaces. The letter reads as follows:

> *"Dear Sir*
>
> *On Sunday 10 August 1997 I requested that you did not obstruct the gateway to the rear of my property at 76 Beverley Gardens. You replied that I had no right to have a gateway to the rear of the property and indicated that it was your intention to continue parking in such a manner.*

As this is not the first time I have had my request for clear access rejected, I feel it is time to put things in the correct perspective.

I enclose a copy of Sterling Homes Deed Plan. This indicates quite clearly that the parking space allotted to plot 597 (your plot) does not extend to the boundary between plots 583 and 584. There is a gap which was put there to allow access from the rear gates of plots 583 and 584. These gates were in fact erected by the builders, Sterling Homes, at the time of construction of the properties.

I trust the above now clarifies the matter and that you will leave a clear access in the future."

40. The point that the Applicant sought to make was that the No.89 Parking Space did not extend over any part of the Arched Area and that the Gate was an original gate. He was in fact wrong about both those points. That is immaterial for present purposes. The Applicant's evidence was that Mr Hammond was silent in response. I find this evidence somewhat surprising but am prepared to accept it. I have set out above the terms of the letter dated 12 August 1997. The Applicant was cross-examined about the second paragraph in particular (*"this is not the first time I have had my request for clear access rejected"*) and the circumstances around this earlier occasion when, according to the letter, a "*request for clear access*" had been "*rejected*". The Applicant said that this was a mistake on his part and that there had been no prior occasion when a request for clear access had been rejected by Mr Hammond. I am afraid to say that I cannot accept this evidence. The letter is clear. I am satisfied that on some occasion prior to the events in August 1997, possibly earlier in the same year, there had been a conversation between the Applicant and Mr Hammond in which Mr Hammond had rejected a request by the Applicant to leave the access way from the Gate across the No.89 Parking Space clear.

41. As to what followed this exchange with Mr Hammond on the doorstep of No.89, the Applicant said this in evidence: "*He didn't state that I was correct but by his subsequent actions he accepted that I was right. He accepted my explanation as to usage of the Arched Area because he never mentioned the Gate again, never blocked the gate again and put the sign on a metal post*". In other words, the Applicant's evidence was that the dispute did not continue but ended almost as soon as it had begun. This evidence is potentially critical to the outcome of the

case and I have carefully considered whether I should accept it. I bear in mind of course that Mr Hammond died in 2004, and that I have not accepted all of the Applicant's evidence about his earlier dealings with Mr Hammond. However, the Applicant's evidence as to what happened after 12 August 1997 was steadfast and clear and I am persuaded that it was reliable. I therefore accept this evidence. If Mr Hammond had persisted in his objection, it is likely that there would have been further acts of obstruction, but I am satisfied that there were none.

42. Thus the position is that there had been two occasions on which the Applicant had asked Mr Hammond to leave the Way clear but which had been met with a refusal by Mr Hammond. On the first occasion, a request for clear access was rejected. On the second occasion, on 10 August 1997, Mr Hammond had said: "*You should not have a gate there and I will continue to park as I please*". Is this sufficient to render user thereafter contentious, at least until Mr Hammond died in or about 2004? I have not found this an easy point to decide. As noted above, in *Newnham v. Willison* (above) Eastham J appears to have proceeded on the basis that one solicitor's letter was sufficient to render user thereafter contentious. I note too the statement of Kerr LJ in the same case to the effect that "*there may be vi – a forceful exercise of the user – in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious*". Mr Calland relied heavily on this passage and submitted that it must have been clear to the Applicant following his exchange with Mr Hammond on 10 August 1997 that his user was being objected to. To my mind, the point has some force, particularly when one has regard to the observation of David Richards LJ in *Winterburn* at [41] that "*there is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs*". If a sign is sufficient, then why is it not sufficient if the servient owner speaks directly to the putative dominant owner and makes clear his objection? Does the law require that more be done than Mr Hammond did? To my mind, there is no simple answer that holds good regardless of the particular facts of any given case. Every case is fact-sensitive. The cases involving clear signage are, it seems to me, the easy cases, subject to any particular factual difficulties that may arise where, for example, the signs that are erected are subsequently

vandalised, meaning that they are not seen by the users of the land in question. A sufficient number of clearly worded signs is generally sufficient to render user thereafter contentious. There was a sign in this case but it did not object to the user in question and Mr Calland has, in my view rightly, not sought to rely on the sign. Had there been a clear sign objecting to the user in question, this is likely to have been sufficient. The great virtue of a sign, assuming it remains in situ, is that it represents a *continuing* demonstration of the landowner's objection to the user in question. I note that in *Winterburn* David Richards LJ expressly agreed with Mr Gaunt's submission that *"the circumstances must indicate to persons using the land that the owner objects and continues to object to the parking"* (my emphasis): see [37]. I note too his citation at [19]-[20] of what Bowen J had said in *Dalton v. Angus*, namely that:

> *"The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions on which the presumption of right is raised: Eaton v Swansea Waterworks Company."*

43. Whilst I am not persuaded by Mr Gatty's analogy with the law relating to interruptions under s.4 of the 1832 Act, the circumstances must indicate to persons using the land that the owner objects and continues to object to the user in question. Ultimately, and not without a degree of reluctance, particularly having regard to the social cost to confrontation to which David Richards LJ referred, I have concluded on the facts that the circumstances here were not such as to indicate to the Applicant that Mr Hammond, as the then owner of the land, objected and continued to object to the Applicant's user. As indicated in paragraph 41 above, I accept the Applicant's evidence that Mr Hammond *"never mentioned the Gate again, never blocked the gate again and put the sign on a metal post"*. I therefore accept that Mr Hammond never again voiced his opposition to the user in question or made any outward attempt to prevent the user. This indicates acquiescence in the user, not a continuing objection to it, and acquiescence lies at

the root of prescription. I therefore reject the contention that user was contentious from 1997.

44. *Issue 2(b).* I am not satisfied that the user became contentious in 2005 or 2007 as a result of the dispute between the Applicant and the Second Respondent. As previously indicated, I do not think it matters when the dispute was. On balance I think it was probably in 2007. What matters is the substance and the substance is clear and militates against any finding that the user became contentious at that point. The Applicant attended at the Respondents' property armed with a plan that he showed the Second Respondent. The point that he was trying to make was that the No.89 Parking Space did not extend over the Arched Area. In fact, that is wrong but that was his contention. The Second Respondent said in evidence that she was not sure what plan it was but said it had paths and gates on it and could have been the plan at page 587. The Second Respondent went and got her title deeds and said: "*These are what we'll go by*". These show that in fact the No.89 Parking Space includes part of the Arched Area. The Applicant then turned and left. The Second Respondent does not recall any specific response to her comment and assumed that the Applicant had accepted what she had said. However, the critical fact, it seems to me, is not so much what was said but what was not said. The Second Respondent said in evidence, referring to her conversation with the Applicant: "*I did not say stop using the Gate; I did not say stop going across my parking space*". To my mind, that is fatal to any allegation that user thereafter became contentious, as is the fact that the Second Respondent did not in fact park so as to obstruct the Gate after this encounter until January or February 2015. The Second Respondent said she had always parked wherever she liked within the whole of the No.89 Parking Space but I cannot accept this. Had she done so, a further dispute would have arisen much sooner than 2015. I note that the Respondents did not suggest that user became contentious earlier in 2015, more than a year before the application was made, or that if it did, that it amounted to an interruption or was otherwise legally relevant. It seems to me that they were right not to. Even if I considered that user did become contentious following the exchange of rather acrimonious correspondence in the first half of 2015 (26.3.15 to 6.5.15), it seems to me that this would not defeat any claim under the doctrine of

lost modern grant, given my other findings, and in any event there is no question of acquiescence on the part of the Applicant.

45. *Issue 2(c).* I have dealt with this in paragraphs 29-30 above. I am satisfied that the user was not permissive or precario.

46. *Issue 3.* Mr Calland submitted that if I were otherwise against him on his other points, nonetheless any easement should be qualified by the Respondents' right to park on the claimed right of way as and when necessary. I accept that, in principle, an easement may be qualified in this way, including an easement acquired by prescription: see e.g. *Rolle v. Whyte* (1868) LR 3 QB 286. However, the evidence of user must justify such a restriction or qualification. I am satisfied that it does not for the reasons previously given, in particular the fact that the use of the Way has not in fact been qualified or restricted over the period of user relied on. There will have been the odd occasion when the Way was obstructed or partially obstructed by a parked car but nothing more than this. Generally, the Way has been continuously enjoyed without restriction or qualification. Accordingly, I do not propose to qualify the easement in any way. The Applicant is entitled to an easement over a strip 76cm wide running in a straight line from the Gate across the northern edge of the No.89 Parking Space and terminating at the mid-point of service road.

Disposition

47. In view of my conclusions above, I shall order the Chief Land Registrar to give effect to the application. However, before the final Order is drawn up, I require the Applicant's solicitors to submit a draft Order and a further plan on an appropriate scale showing the true extent of the easement to which their client is entitled, namely an easement over a strip 76cm wide running in a straight line from the Gate across the northern edge of the No.89 Parking Space and terminating at the mid-point of service road.

48. I invite both parties to file and cross-serve written submissions on the incidence and quantum of costs, supported by a Schedule of Costs in the normal way. I will

then determine all issues as to costs, and summarily assess costs in the event that I make an order against either party.

BY ORDER OF THE TRIBUNAL

William Hansen

Dated this 14th day of February 2018