IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No. HC/2014/001650

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 4th February 2016

Before:

HER HONOUR JUDGE WALDEN-SMITH
(Sitting as a Judge of the High Court)

Between:

LINVALE INVESTMENTS LIMITED
(Acting by Philip Matthews and Edward James Starling in their capacity as fixed charge receivers of the property known as Unit J1 Orbital Business Park, Ashford)
Claimant

-v-

CHRISTOPHER ERIC WALKER
Defendant

Counsel for the Claimant: MR BESWETHERICK

Counsel for the Defendant: MISS COX

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

HER HONOUR JUDGE WALDEN-SMITH:

1. This is the claim brought by Linvale Investments Limited, by its receivers of the property at Unit J1 Orbital Business Park, Ashford, Kent, that the property has the benefit of a right of way over a gravel pathway on adjacent land owned by its former director, the defendant, Mr Christopher Walker, for the purpose of providing an emergency fire exit for all the factory.

2. In 1998, Connolly Limited entered into a contract with Orbital Park Limited for the purchase of land at Orbital Business Park for £1.1 million. The transfer of that property took place on 2nd December 1998. Planning permission was granted to Connolly Leather Limited by Ashford Borough Council on 22nd October 1998 for production and warehousing facilities together with offices and external parking, loading and planting. At the time of the construction of the building it was intended to be for single occupation and Connollys did indeed occupy the building until mid-2002. In the report on title compiled by McGregors Solicitors, at a time when Linvale were interested in purchasing the property, details were provided that during the period of the seller's ownership they had used the property for leather finishing, sorting and cutting of leather from August 1999 until June 2002. The report provided information that there had never been any tanning or dyeing carried out on the property and that there had been no manufacturing processes on the property from June 2002 to date.

3. In 2005, Linvale entered into a contract to purchase the land together with the factory building. Ashlake, which is again Mr Walker's company, was the guarantor of that purchase. In 2004, Mr Walker had been approached by CRE, a West End land agent, as they had been marketing this property. Mr Paul Appelt of Atrium Surveyors had considerable and detailed experience of the land in Ashford. The property was being marketed on the basis that it would be sold together with a lease for a period of ten years having been granted to Meggitt Properties PLC, who were taking part of the land. The remainder of the property was the unoccupied factory, which had the benefit of a two-year rent guarantee from Connolly Limited. Having taken Mr Appelt's advice, Mr Walker was satisfied that, if the property was purchased for the asking price of £4 million (or about that price), then over the following two years the remainder of the property could be let and, dependent on how good the covenants were for those occupiers of the remaining land, the property could then be sold together with those tenants for £6 to £8 million. A profit of approximately £2 to £4 million which would allow Mr Walker to be able to start winding down his property business.

4. The original intention had been for the entirety of the land, including the factory, to be purchased by Linvale. I have been provided with a plan of both the land and the factory which, subject to one amendment, accurately represents the position on the ground. All the land coloured both green and yellow on the plan was to be purchased by Linvale. In March 2005, Mr Walker took advice from his accountants, Perrys Chartered Accountants of Tunbridge Wells. Mike Perry of that firm advised that if the land was purchased as a whole by Linvale then any profit made on the sale of the property would be taxed at the rate of 30 percent and then there could be further additional tax on any distribution of the profit by way of dividends to the shareholders.

That additional tax could amount to another 30 percent. In other words, any profit would result in being taxed twice, so far as Mr Walker was concerned.

5. The scheme that was devised by Mr Perry was that either the entirety, or part, of the land be purchased by Mr Walker himself, and that land was then to be held for a period of at least two years. That would result in any profit on the sale attracting capital gains tax at 30 percent, and the distribution of profits to the shareholders, including Mr Walker, being restricted to a further ten percent tax. That, as Mr Walker says in his evidence, was of particular importance to him because his intention was to find tenants with good covenants with respect to the land that was not already rented and then to sell on the property with those tenants for an increased price of £6 to £8 million, being a significant profit. This was Mr Walker's final investment before retiring from the property business.

6. The two-year rent guarantee given by Connollys with respect to those areas of the property that were not yet rented was set out in clause 18 of the agreement between Connolly, Linvale and Ashlake Properties Limited. Clause 18.1 provided as follows:

> "Commencing on actual completion and continuing on the first day of each calendar month thereafter the seller shall pay to the buyer without written demand a sum which is the aggregate of £624.66 per each day in that month, subject to clauses 18.2 and 18.3".

Clause 18.2 provides the mechanism for the payment of that sum:

> "The payments referred to in clause 18.1 should commence on actual completion and the first payment shall be in respect of the period from and including the date of actual completion until and including the last calendar month in which actual completion takes place".

18.3 provided that:

> "The payments required to be made in clause 18.1 shall cease upon the earlier of:
>
> (a) The second anniversary of the date of actual completion; and
>
> (b) The date upon which the vacant unit is deemed to be let as referred to in clause 18.4".

7. With respect to the meaning of the unit being deemed to be let, clause 18.4 provided that it is the date it is physically occupied by the buyer or a connected party or on the letter of the date of completion of the lease, tenancy, agreement or licence permitting occupation in respect of it and the date from which a rent or licence fee becomes payable in respect of it, which equates to or exceeds the daily rate of £624.66 per day. For those purposes, in the event that the lease, tenancy, agreement or licence includes a rent-free period of twelve months or longer the payment made by the seller to the buyer shall cease on the expiry of twelve months from the term commencement date of such lease. 18.6 provides that in the event that the rental or licence fee payable in respect of the vacant unit is less than the daily rate, that is the £624.66, the payment made by the seller to the buyer pursuant to clause 18.1 shall be the difference between

the rent or licence fee payable in respect of the vacant unit. Obligations were then placed upon Linvale, as the buyer, to use all reasonable endeavours to procure the letting of the vacant unit with all due expedition.

8. As Mr Walker said in his evidence before this court, it was his intention to use all reasonable endeavours to let the property. Throughout, he acted in good faith. I have no reason to think that he did anything other than do the very best he could to let this property as promptly as he possibly could. The intention was either to find a buyer, if that was the best way forward, or find a tenant and then find a buyer. The purchase price was £4,225,000. The evidence of Mr Walker was quite clear that it was both his desire, and the desire of Linvale, to maximise the profit from this property and that they would not want to do anything that would encumber the property in any way which could in any way reduce the potential pool of tenants for the property.

9. The advice that I have referred to, which was provided by Mike Perry on 15th March 2005, was disclosed by Mr Walker. The attendance note sets out that the tax implications of the property being purchased by Linvale and then sold on, was that both the profit from any sale and any distribution of that profit would be taxed. He notes:

> "What I have suggested as an alternative is that a ransom strip is held outside the company. This would be registered in Chris Walker's name, holding it as a non-lien for the other parties. I have had a look at the plans and recommend that the area to be dealt with in this fashion would be the common parts that fall outside the leases on the two premises. This is mainly the verges, etcetera. I would suggest a purchase consideration of £50,000. It could either be argued by you on the purchase that this land has little value as it cannot be rented or that it has a very high on sale redevelopment value".

10. The redevelopment area of the land that was to be conveyed to Mr Walker was that which is referred to as the proposed four bay future extension. In his evidence, Mr Walker did not suggest that any other part of the land which was to be conveyed to him could be developed. With respect to the phrase "ransom strip", there is no evidence before me that Mr Perry was using that phrase as a term of art. Mr Walker's understanding was that the intention was to put into his name all that land which did not actually form a necessary part of the factory so that, in due course, it could be argued that the land was as valuable as it possibly could be in order for the scheme to be as tax efficient as possible. There is certainly no reference within the accountant's file note which indicates that the path which is the subject matter of this litigation was being held by way of a ransom to the remainder of the property. I have not had the benefit of hearing from Mr Perry as to his meaning of the note, and Mr Walker very fairly said that he was basically doing what he was told to do as being in his own best interests. He was not the accountant and he followed his accountant's advice.

11. Mr Walker was being entirely upfront and honest about what was happening. The purchase of the land was initially being funded by the Cooperative Bank in the main and on 19th April 2005 Mr Walker wrote to a Mr Dawson at the Cooperative Bank setting out the following:

> "I hope this is not too premature as we have not yet exchanged but my thoughts have been straying to the eventual sale of the completed project. Having received advice from my accountant, it would seem that we can have the opportunity to take best advantage of capital gains tax regulations if part of the site was in my personal ownership and part in Linvale. Therefore, could you consider what difficulties such a split would cause your bank and what we need to do to overcome them, so you do not perceive that your position has in any way changed. To make things clearer I enclose a plan of the site showing the area leased to Meggitt edged in red, the area to be owned by Linvale edged in yellow, and the area proposed to be owned by me edged in blue. I appreciate that this is a further complication but the benefits against the common enemy are potentially significant".

12. There was a response to that letter from Mr Dawson, the corporate manager, on 22nd April 2005. He acknowledges the letter of 19th April and that the letter outlined the potential split of ownership on the site between Linvale Investments Limited, part of which would be let to Meggitt, and Mr Walker himself. He said this:

> "I have no issue with the concept here. However, we would need to amend the structure slightly as you shall hold part of the security but the lending will be to Linvale, I shall need to tie you into the transaction by way of personal guarantee. I know we have spoken about this issue previously and it is a situation that you would be keen to avoid. I cannot see, however, that there is any other way of tying in the security with the company borrowing".

13. As matters transpired, there was not in fact a guarantee from Mr Walker as he said he did not trust banks and he was not willing to provide such a guarantee. The loan itself was secured both against the land going to Linvale and the land that was held by Mr Walker. There were transfers to both Linvale and Mr Walker. Both those transfers took place on the same date in 2005. On the day of those transfers to Linvale and to Mr Walker, Linvale executed the deed of trust declaring that the properties were held on their respective plots on trust for both Mr Walker and his two associates, Mr Hughes and Mr Appelt. Mr Hughes and Mr Appelt were partners in Atrium Chartered Surveyors.

14. As I have already mentioned, Mr Walker knew Mr Appelt and had taken his advice with respect to the purchase of this property. It was the intention of Mr Hughes and Mr Appelt to market this property, as they did in due course with Strutt and Parker. Their own financial interest in the property was being kept away from public view, not for any improper motive, but simply because, as Mr Walker said in his evidence, and I paraphrase, it was better for them not to be seen to be dabbling their toes in the same water that their clients operated in. They were chartered surveyors who were endeavouring to both find and sell properties for others and, as was recognised by them, it might not have done their business much good if those they acted for could see them also having interest in a substantial property in the area. So far as Mr Walker was concerned, the greatest incentive he could give to them, both to work hard in renting the property and then selling the property for maximum profit, was that they themselves would benefit from any profit obtained. The single aim of them all, Mr Walker, Mr Hughes, Mr Appelt and Linvale, was to let the property and then sell the

property for the maximum return possible, a relatively simple scheme, other than, unfortunately for the parties, the property crash intervened and matters did not proceed as had originally been envisaged.

15. The factory building has the benefit of a number of emergency exits. That includes three fire doors, marked as "A", "B" and "C" on the plan I have referred to. Those fire doors exit onto a two-metre wide gravel pathway which runs along the edge of the building. The building does not run directly north-south but, for ease of reference, the actual direction is being described as if the top wall is to the north and the wall to the right is to the east and this gravel pathway runs along the edge of the building which is referred to as the east wall towards the top of the building and the north of the building. That gravel pathway is also marked on the plan I have referred to and should be attached to this judgment in due course, coloured an orangey colour. The exits themselves are clearly marked both within the building and outside the building as emergency exits. They have very distinctive signage and that signage is not only on the door itself but on the area around the door. The two-metre gravel pathway upon which anyone exiting these three doors would come out onto leads to a concrete clearing on Linvale land and from there to the highway.

16. As I have already mentioned, during the negotiations for the sale of this property to Linvale, Connolly granted a lease to Meggitt Properties PLC. That lease was over the unit to the southern part of the property. It is marked on a plan with a red line. That red line does in fact appear to have been put in the wrong position over the factory floor and it should run in line with the northern end of what I am going to describe as service rooms. There is a fire door in the corner of that area of the property and Meggitt itself did not need to access the three fire doors marked "A", "B" and "C". The Meggitt lease is dated 17th May 2005 and therefore a couple of months before the transfer of the property to Linvale and Mr Walker.

17. The evidence of Mr Walker, which I accept, is that Meggitt did not in fact enter into occupation of the property for some time in order to give Linvale the opportunity to remove roller shutters that were in place. Meggitt were defence contractors and before occupying the property it was essential that the shutters were blocked off. The land that was conveyed to Mr Walker is the land around the north and eastern part of the factory. By a lease dated 5th February 2007, the company Tyreweb Limited took a demise of the area to the northwest of the factory, which is known as unit 2, and Meggitt took a further lease of an additional part of the factory on 30th March 2007, that being known as unit 3.

18. In the course of the negotiations for the granting of those further leases, solicitors became alive to the issue of whether there was proper access from the fire doors across the gravel pathway, it becoming apparent that that gravel pathway fell within the ownership of Mr Walker and not of Linvale. Concern was raised to whether both Tyreweb and Meggitt would have the right of egress over that gravel path in case of emergency. That concern was raised in or about March 2007 and the solicitors agreed between them that a right of way in case of emergency ought to be granted over that gravel pathway. That was duly done. There had been discussion that the part of Mr Walker's land which formed that part of the gravel pathway ought to become part of the demise to both Tyreweb and Meggitt to ensure that there was no difficulty with respect to access over that gravel path but, and to use the words of the solicitor in the

course of the email correspondence, in order to "keep Chris's title as clean as possible", it was dealt with by the grant of that right of way.

19. On 2nd July 2007, there was a refinancing of the purchase of the land. The loan with the Cooperative Bank was redeemed by EFG Private Bank Limited. In addition to redeeming the monies outstanding to the Cooperative Bank, and by that time they had already paid off around £1 million, the difference between that which was borrowed for the purpose of redeeming the borrowing from the Cooperative Bank, and the amount borrowed from EFG was used, it is said by Mr Walker, to speculate on the currency market. It appears from the evidence of Mr Walker that was not an entirely successful venture. Mr Walker has made it clear with his evidence that he feels extremely aggrieved by the behaviour of EFG Private Bank. On 26th April 2013, a demand was made by EFG that Linvale pay forthwith the sum of £4,108,241.51. He undoubtedly feels that the bank acted precipitously and "pulled the rug from beneath him and Linvale".

20. Mr Walker acknowledged in his evidence that so far as this land was concerned at the Orbital Business Park there had been a split of ownership for tax purposes with the intention that when sold it would be sold together in order to obtain as high a price as was possible. He said that there was no conflict of interest between himself, Linvale or the other two beneficiaries, Mr Hughes and Mr Appelt. There was, as he said, a community of interest between them to maximise profits. He said that came to an end once the bank appointed receivers over the Linvale land.

21. It was clear as a matter of fact from the evidence before me that the fire doors were obviously fire doors, both from inside and outside of the factory. It was also clear on the ground that the right of egress from those fire doors, A, B and C was from the points entered onto the gravel pathway through to the concrete hard standing and thereafter the highway. That is clear from the photographs that I have seen in the bundle but is also clear from the photographs that were used by Strutt and Parker and Atrium on the marketing literature sent out to any prospective purchasers or lessees of this land, together with any other agents who might have clients who would be interested.

22. In my judgment, there can be no dispute with respect to the obvious nature of the fire doors and the gravel pathway. It is in my judgment equally clear that while Meggitt was occupying only the first unit in the factory, that is the unit towards the southern end, that they did not use or need to use those fire doors, having an alternative exit closer to where they were operating. So far as Tyreweb and Meggitt were concerned, when units 2 and 3 were occupied, it was the simplest remedy to any potential dispute that the express right of way was granted as it was. However, the mere fact of the grant of that express right does not prohibit there already having been a right of way in existence and I do not feel it is of any assistance to try to ascertain what either solicitor may have thought the true position was at the time. There either was already in existence a right of way or there was not and the grant of an express right of way would not alter the actual situation if there was already a right of way in existence.

23. The claimant seeks to establish that there was such a right of way already in existence under three headings: first, pursuant to the provisions of section 62 of the Law of Property Act 1925; second, pursuant to what is known as the Rule of *Wheeldon v Burrows;* and thirdly, and this is the principle argument raised by the claimant, that the

intention of the parties to the 2005 transfers was that there was such a right of way. Paragraph 7.2 of the agreement for the sale of land from Connolly dated 20th June 2005 was that the transfers to both Linvale and Mr Walker were deemed to be simultaneous.

24. In my judgment, this case concerns not a reservation of a right on a conveyance but the creation of a right. That is an issue of importance when considering section 62 of the Law of Property Act 1925 and it is section 62 that I will deal with first. The land was not as it would have to have been if there was a reservation of the right first conveyed to Linvale and then conveyed in part to Mr Walker. All was conveyed by Connolly simultaneously, the major part to Linvale and the smaller part to Walker. The evidence is that Meggitt may have had a contractual right to occupy before the conveyance as the lease was dated May 2005 but in fact they were not in occupation and there was, therefore, no diversity of occupation.

25. Section 1 of the Law of Property Act provides that:

> (1) "The only estates in land which are capable of subsisting or of being conveyed or created at law are—
>
> (a) An estate in fee simple absolute in possession;
>
> (b) A term of years absolute.
>
> (2) The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—
>
> (a) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute provided that in a deed executed after 31st December 1881 which is sufficient in the limitation of an estate in fee simple to use the words in fee simple".

26. Section 62 of the Act provides, so far as is relevant to this matter, under subsection 2 that:

> "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof".

It is accepted on behalf of Mr Walker that section 62(2) is capable of creating a right of way and it does so by express grant if the necessary conditions are fulfilled. The question in this matter is was the right of way demised, occupied or enjoyed by the dominant land, that is the Linvale land, at the time of the conveyance of the land to Linvale.

27. In *Wheeldon v Burrows [1879] LR 12 Ch D 3,* which I will be coming back to, Thesiger LJ said as follows:

> "In the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of ownership but that would be the exception which I have referred to in easements of necessity. You cannot imply similar reservation in favour of the grantor of land".

28. In the case of *Alford v Hannaford & Anor [2011] EWCA Civ 1099,* Patten LJ provided this explanation with respect to the operation of section 62. At the end of paragraph 34, he said:

> "The operation of section 62 therefore depends upon proof of the prior exercise of such rights and the most common cases of implied grant under the statute are where the dominant tenement has been let prior to the sale with the benefit of rights over the servient tenement which are then retained as incidents of the freehold of the dominant tenement when it is sold".

He goes on to say in paragraph 35:

> "This has led to the view that section 62 cannot operate to pass the benefit of quasi-easements to the purchaser unless there has been diversity of occupation prior to the sale. Where that condition is satisfied (as under a lease) it is possible to identify the rights which the common owner has allowed his tenant to exercise over the retained land. Assuming that the use is sufficiently substantial to amount to an easement or other right enjoyed with the demised land then it will be caught by the general words incorporated into the conveyance under section 62(1). 'Enjoyed with' does not mean enjoyed as a term of the lease. It can include a right exercised by the tenant with the permission of the landlord during the currency of the lease: see *International Tea Stores Co v Hobbs [1903] 2 Ch 165; Wall v Collins [2007] EWCA Civ 444*". But where there has not been diversity of occupation prior to the sale, the generally held view is that section 62 can only operate to grant easements over the land retained by the vendor where the exercise of the relevant rights has been continuous and apparent in the sense described in *Wheeldon v Burrows"*.

29. Then, in the most recent authoritative decision on these rights of ways and easements, the Court of Appeal in *Wood v Waddington [2015] EWCA Civ 538*. In paragraph 52 and onwards, Lewison LJ said:

> "Where there has been no use at all within a reasonable period preceding the date of the conveyance (whether or not there had been use outside that period) it is clear that section 62 cannot operate to create an easement: *Nickerson v Barraclough [1981] Ch 426; Payne v Inwood (1996) 74 P & CR 42, 47; Campbell v Banks [2011] EWCA Civ 61... [He says he does not accept counsel's submissions to the contrary].* But on the judge's findings of fact the claimed route from point D to Old Dinton Road had

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

> 'User has been limited to quite a few occasions in each year. Particulars of the user were given in evidence both by Mr Foot himself and by Mr Mitchell, his tractor driver. The occasions of user were these… *[he sets them out]*. To get the point out of the way, I have no doubt that the user was sufficient in extent and regularity to be capable of creating a right of way. On the other hand, obviously it would only be apparent to anybody who happened to be there on one of those ten or so days in the year, apart from whatever traces were left on no 415 by vehicles passing across it'".

Lewison LJ goes on to say that, while the claim failed for other reasons, he could see no reason why user of once a month falls short of a regular pattern of use. Use to that extent can support a claim to have acquired an easement by prescription and Lewison LJ could see no reason why it should not support a claim to have acquired an easement by virtue of section 62. What I take from that judgment is that it is a requirement that there is regular use but that regular use does not have to be extensive.

30. In *Nickerson v Barraclough,* one of the authorities that Lewison LJ refers to, Eveleigh LJ held that:

> "Section 62 is a conveyancing section; it passes only that which actually exists already, be it, for example, a right of easement, or be it an advantage actually enjoyed. In some cases that which is enjoyed is enjoyed by the exercise of the general right of ownership, and may become a particular legal right of some kind in the purchaser. Nonetheless, the section envisages something which exists and is seen to be enjoyed either as a specific right in itself, or as an advantage in fact. Section 62 says: 'A conveyance of land shall be deemed to include...' a number of things, all of which are clearly shown to be in actual existence either, as I say, as a right or as a factual advantage. It conveys that which is there to be conveyed, and from this it follows that that which is conveyed can be described, and by section 62 is deemed to be conveyed and consequently described. That means that it is described accurately".

In this case, in order to establish an easement by virtue of section 62 of the Law of Property Act, the claimant needs to establish that there was a user, that that user was a user in a regular pattern and it had to be during a reasonable period of time before the transfer in 2005.

31. In *Green v Ashco Horticulturist Ltd [1966] 1 WLR 889,* Cross J. said:

> "One ought to look at a reasonable period of time before the grant in question in order to see whether there was anything over that period which could be called a pattern of regular user in any particular way or ways".

32. In *Campbell & Anor v Banks & Ors [2011] EWCA Civ 61*, Mummery LJ gave the leading judgment of the Court of Appeal. He said, in reference to *Sovmots Investments Ltd v Secretary of State for the Environment [1979] AC 144* and *P & S Platt Ltd v Crouch [2004] 1 P& CR 18*, that these cases provided the statements of principle of the importance of some actual user and enjoyment of the right claimed and he refers to the submissions made by counsel that, in light of the findings of the judge at first instance, the section 62 point could not succeed factually, as there was no evidence of relevant actual use or any evidence from which such use could be inferred, or of reputation of the use. He refers to Roch LJ in *Payne v Inwood*:

> "If there is a quasi-easement, in that there is evidence of user or a physical state of affairs which indicates the existence of a quasi-easement, then section 62 can operate to convert that into an easement".

There has to be, it was held by Mummery LJ, regular use of the way.

33. In this case, as I have already referred to in this judgment, there are clear observable features on the ground that show the claimed easement over the gravel path from the three clearly marked and apparent fire exits. As I have indicated, the evidence, particularly the photographic evidence before me, show the fire doors to be clearly marked, both inside and out, and that the gravel pathway is equally clear. That, it seems to me, is not a proper matter of dispute. Miss Cox, counsel on behalf of the defendant, does not seek to challenge on that point but where it is said that the claimant struggles is in establishing a regular pattern of user for a reasonable period before the transfer.

34. The evidence before me is that the units known as units 2 and 3, those later rented to Tyreweb and Meggitt, were vacant for more than two years at the time of the demise. There is evidence provided from the papers that there had been a security guard in residence but there was no evidence with respect to his use of the property or that he had made any use of those three fire doors or any one of them at any time for egress in time of emergency. There was no evidence that there was any user and this is not a matter where there is sufficient for me to be able to properly say that there should be an implied user. It is, as was submitted before me, a great leap to say that there was a security guard in residence, to then say he was making use of this pathway. Section 62 does not create new easements. It converts quasi-easements into easements if there is evidence of user, combined with the physical state of affairs. Here, we have the physical state of affairs but not evidence of user and not evidence of regular user in any period prior to the date of demise. Connolly stopped using this factory in or about June 2002 and Meggitt have not occupied any part of the land and certainly not the area abutting the fire exits before the date of the demise.

35. While Mr Beswetherick for the Claimant has submitted that the nature of a fire escape and the right of egress around a fire escape route is such that it is enjoyed by reason of being there, I do not accept his contention on that point. He has, and I understand why he has done so, relied upon an entirely non-binding decision of the Land Court in the Massachusetts Appeal Court as a decision which is illustrative of the proposition he

puts forward that, in order to enjoy a fire escape a party is enjoying it and making use of it by reason of the fact that it is in existence. I do not accept that as a correct proposition and in my judgment section 62 of the Law of Property Act simply does not apply in this case. Consequently, the claim relying upon section 62 of the Law of Property Act must fail. The gravel path was not in my judgment enjoyed with or appertaining or reputing to appertain to the Linvale land at the time of the transfers. Even if the fire escapes were used and enjoyed when Connollys were in occupation, and there is no evidence of that, that occupation came to an end at the very latest by June 2002 and therefore not within a reasonable time before the conveyance in 2005.

36. I turn therefore to what is known as the Rule in *Wheeldon v Burrows*. I have already referred to part of the judgment of Thesiger LJ in *Wheeldon v Burrows.* The famous statement by him is that:

> "On the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which of course I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted".

37. This and the requirements of establishing an easement under the Rule in *Wheeldon v Burrows* is set out usefully in Megarry & Wade, the Law of Real Property. In paragraph 28,020 of the 2012 edition it is set out as follows:

> "Upon the grant of part of a tenement, there would pass to the grantee as easements all quasi-easements over the land retained which:
>
> (1) were continuous and apparent;
>
> (2) necessary for the reasonable enjoyment of the land granted; and
>
> (3) had been and were at the time of the grant used by the grantor for the benefit of the part granted".

38. The Rule in *Wheeldon v Burrows* is as has been set out by Lord Wilberforce in the case of *Sovmots Investments Ltd v Secretary of State for the Environment* a part of the principle that there should not be derogation from grant. He put it in these terms:

> "The Rule is a rule of intention, based on the proposition that a man may not derogate from his grant. He cannot grant or agree to grant land and at the same time deny to his grantee what is at the time of the grant obviously necessary for its reasonable enjoyment. To apply this Rule to a case where a public authority is taking from an owner his land without his will is to stand the Rule on its head: it means substituting for the intention of a reasonable voluntary grantor the unilateral opposed, intention of the acquirer".

39. At first instance in *Wood v Waddington*, Morgan J, who set out in great detail the various matters that need to be considered in cases such as this, said the following with respect to the implied grant under the rule of *Wheeldon v Burrows*::

> "The first way the case was put [by the claimants] was by relying on the rule in *Wheeldon v Burrows.* This rule is very well known. For present purposes, I can summarise matters by saying that Mr and Mrs Wood must show that, at the date of the transfer to Mr and Mrs Sharman, the rights claimed were:
>
> (1) continuous and apparent in that they were used and enjoyed for the benefit of the land conveyed;
>
> (2) necessary for the reasonable and convenient enjoyment of the property conveyed; and
>
> (3) not inconsistent with the express terms of the conveyance.
>
> These requirements appear from *Wheeldon v Burrows* itself, in particular per Thesiger LJ at 49, from the summaries of the rule given by Lord Wilberforce and Lord Edmund Davies in *Sovmots Investments Ltd v Secretary of State for the Environment*, and from many other cases which have applied the rule, examples of which include *Borman v Griffith [1930] Ch 493*, *Ward v Kirkland [1967] Ch 194*, *Millman v Ellis [1995]) 71 P&CR 158 and Wheeler v Saunders [1996] Ch 19*, to which my attention was drawn. The rule is a rule of intention based on the proposition that a grantor may not derogate from his grant. The same rule means that it is much more difficult for a grantor of land to contend that he has impliedly reserved an easement over the land granted; it is the duty of the grantor to reserve the easement expressly out of the grant.
>
> In the present case, Mr and Mrs Wood contend that, by implication, the rights which were claimed were impliedly granted to Mr and Mrs Sharman and the transfer to Mr Waddington was subject to such rights. As explained earlier, although there are different rules for an implied grant and an implied reservation, because this is a case of simultaneous dispositions, the rule as to implied grants is applied to both dispositions. Thus, Mr and Mrs Wood can invoke the rule as to implied grants without the court having to inquire into the precise sequence as to the making of the contracts of sale.
>
> As to the meaning of 'continuous and apparent' in this context, it has been said that there must be some sign on the land of the enjoyment of the quasi-easement, which sign is discoverable on a careful inspection. In *Sovmots Investments Ltd v Secretary of State for the Environment* Lord Wilberforce said that there must be actual, and apparent, use at the relevant time. The requirement that the right claimed must be necessary for the reasonable and convenient enjoyment of the property conveyed is an important qualification of the principle. This requirement was referred to by Lord Neuberger of Abbotsbury in *Moncrieff v Jamieson [2007] 1WLR 2620*. He emphasised the importance of both the necessity and the

> reasonableness in the formulation which refers to 'necessary for the reasonable enjoyment' of the property conveyed. The requirement also has a further important function; it serves to connect the right claimed with the land conveyed which, after the conveyance, will be the dominant tenement with the benefit of the right. Whether that connection is something which is independently necessary pursuant to the requirement that the use is continuous and apparent is less clear".

40. Consequently, in this case, in order for the rule in *Wheeldon v Burrows* to apply it is necessary for the claimant to establish not only that the easement is apparent by reason of its physical features, and as I have said that is not a matter in dispute, but also there must be evidence of user. I am drawn to the issue that is also raised in *Wheeldon v Burrows* as to whether the use of the right of way is necessary when I go on to consider the claimant's primary case: that there is an implied easement by intention. In my judgment, the rule in *Wheeldon v Burrows* does not assist the claimant in this case. There is no evidence of user. For the reasons I have already given with respect to the contentions under section 62 of the Law of Property Act, user for the purposes of the rule in *Wheeldon v Burrows* is not satisfied simply by reason of the existence of the right of way, even in a case where there is an emergency access or egress where it would not be normal for there to be a considerable amount of use. The mere existence on the ground of something that obviously appears to be a right of access or egress combined with fire exits does not in itself satisfy the rule. I must also consider the issue of necessity but I will consider that later. The contention that there is an easement by reason of the rule in *Wheeldon v Burrows* fails for the reasons I have already referred to.

41. Turning, therefore, to what is the claimant's principal contention. This contention is based upon the determination of the House of Lords in the case of *Pwllbach Colliery Co Ltd v Woodman [1915] AC 634*. In that case, Lord Parker said as follows:

> "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used… *[He refers to Jones v Pritchard [1908] 1 Ch 630 and Lyttelton Times Co Ltd v Warners Ltd [1907] AC 476.]* But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use".

42. In the case of *Stafford & Anor v Lee & Anor [1993]* 65 *P & CR 172*, Nourse LJ refers to that decision in *Pwllbach Colliery Co Ltd v Woodman* and then continued by saying:

> "Intended easements, like all other implied easements, are subject to the general rule that they are implied more readily in favour of a grantee than a grantor. But even there, as Lord Parker points out, the parties must intend that the subject of the grant shall be used in some definite and particular

> manner. If the grantee can establish the requisite intention, the law will then imply the grant of such easements as may be necessary to give effect to it. There are therefore two hurdles which the grantee must surmount. He must establish a common intention as to some definite and particular user. Then he must show that the easements he claims are necessary to give effect to it… It is axiomatic that in construing any conveyance you must take into account the facts in reference to which it was made".

43. He continues in his judgment and refers to counsel's submissions and says:

> "The requirement that the parties should have intended a definite and particular use for the land does not require that the intention be proved as a certainty. As always, it is enough that it is proved on the balance of probabilities… There is no reason why their common intention, if it is not expressed, should not be implied from that as much as from any other part of the agreed material. There is every reason why, if it can be, it should be so implied".

44. In conclusion, he finds in his judgment on the balance of probabilities:

> "The parties can only have intended that it should be used for the construction of another dwelling to be used thereafter for residential purposes. I cannot see what other intention could reasonably be imputed to them. Having got to that point, I am satisfied that the easements, claimed by the plaintiffs and declared in their favour by the judge are necessary, and are no more than are necessary, to give effect to the intention so established".

45. The common intention, therefore, may be expressed, implied or reputed. In a more recent Court of Appeal decision in *Donovan and another v Rana and another [2014] EWCA Civ 99*, Vos LJ, who gave the lead judgment, held:

> "Counsel strenuously argued that whilst connection to mains utilities might be reasonable, desirable or even normally to be expected, that is nothing to the point because, in the words of Lords Parker and Atkinson in *Pwllbach Colliery*, such connection must be 'necessary for the use and enjoyment, in the way contemplated by the parties' or 'necessary to give effect to the common intention of the parties' for the land to be used in a 'definite and particular manner'. The dwelling house that the parties undoubtedly expected to be built could, Mr Isaac submitted, have used a septic tank and a bore-hole or a well, or could have obtained its service connections across other land. Thus, argued counsel, the requirement of necessity is here lacking as it was in *Pwllbach Colliery*".

46. Vos LJ continued:

> "Notwithstanding all these strictures, I have formed the clear view that the judge was right. Applying Lord Parker's second test, the parties must, as it seems to me, be taken to have intended that the building of a dwelling house on the building plot to the satisfaction of the Local Authority was to be undertaken in a definite and particular manner. That manner must be

taken to have included the connection to mains utility services and the maintenance of those connections across the obvious route, namely the Blue Land.

Lord Atkinson's formulation must be read in its context, namely that the authorities cited to the House of Lords demonstrated only that an implied grant had to be based on more than merely reasonableness or usual practice (as the jury had found the colliery's mode of operation to be), but had to be necessary for the use and enjoyment of the right granted in the way contemplated by the parties. In the context of this case, I am satisfied that the connection of the building plot to the main utilities across the Blue Land was indeed necessary for the building of a dwelling house on that plot in that locality in the manner obviously contemplated by the parties to the original transfer. That was, as the judge found, the inferred common intention of the parties. In my judgment, the easement proposed is necessary to achieve the parties' expressly intended purpose. It is not seeking to manufacture a necessity out of what is merely reasonable or desirable. The implication of the proposed easement is, in the context of this transaction in the modern times in which it took place, relating to this building plot in this locality, entirely necessary to give effect to the inferred common intention of the parties to the transfer".

47. It is clear to me from the evidence that I heard, in particular the evidence of Mr Walker, that his intention and that of Linvale, the properties being on trust for him and his two associates, was that the entirety of the property was to be used in such a way as to ensure maximum profit was obtained. The ultimate aim was to sell the entire property making a profit of up to £4 million. While the entire property was not sold, it was the common intention of Linvale and Walker that the property either be sold in part or be rented. The two-year rent guarantee being provided by the vendor means that the vendor would be keen for the responsibility for a guaranteed rent to be removed as quickly as possible and for the land to be fully occupied as soon as was reasonably possible.

48. The issue is whether the right of way over the gravel pathway with egress through the three fire doors was necessary in order for the land to be used and enjoyed in the way that was contemplated by the parties. Mr Walker accepts that the existence of a fire escape route was necessary in order for the property to comply with the applicable fire safety regulations and therefore for it to be occupied in full. He does not accept, however, that it was necessary for this escape route to be in operation because there are alternative means of complying with the applicable fire safety regulations. Those solutions include both the fire corridor that is referred to in the evidence of the experts and their joint report and also the engineered solution. There was initially some dispute between the parties as to whether the fire corridor was in fact workable as it appeared initially that that fire escape corridor would only be able to exit onto Mr Walker's land, but it appears that issue has now been remedied.

49. The evidence that Mr Savage has provided, and his opinion on the solution to travelling across distance on the factory floor if there were a fire or other emergency, is to provide a fire resisting corridor. The alternative being to introduce a bypass door between units 2 and 3. The other solution that I have referred to is the engineered solution and he sets out in detail within the joint report how in his opinion the building

without the need for change complies with the Building Regulations. He provides that in his opinion it is reasonable to assume that the overall distance that would need to be travelled is such that on a conservative basis the Regulations can be complied with on that engineered solution and with negotiation with the relevant fire officers.

50. So far as that solution is put forward by Mr Davies, Mr Savage's position is either that he agrees with him or he accepts that he is not someone with the necessary expertise to determine whether or not what is being proposed is correct or not. So far as this is concerned, the defendant's position is that there cannot be the implication of an easement because it is not in fact necessary for these three doors and the gravel pathway to be used. In my judgment, that is not in fact the correct analysis of the authorities. The issue that the court has to determine is not whether the land can be used in some alternative way but whether the easement is necessary in order for the land to be used in the way contemplated by the parties. The common intention in this case was clearly that the land be fully occupied and be fully occupied in order that the maximum profit could be realised from the property. In order for that to happen, there needed to be a right of way allowing the full extent of the building to be utilised with the operation of the existing fire escapes and that, if it became necessary, as it did in fact become necessary, to divide up the occupation of the property in order to maximise those profits, then the property should be able to be used to its full extent without there being the necessity either for the addition of further escape routes which could interfere with the floor area of the property or for parties to have to travel over property within the demise of another party.

51. It is clear to me that the common intention of the parties was that these fire doors and this pathway were to be used by the occupiers of the land. There was no evidence put before me that there had been an intention at that time either to remove the fire doors or to take away the pathway upon the demise of the land to Mr Walker. The plain common intention of the parties was for the land to continue to enjoy the benefit of those fire exits and also the gravel pathway outside the property for the purpose of obtaining access out onto the concrete hard standing and the highway beyond. All the evidence before me points towards that being the case.

52. As was the situation in *Donovan v Rana,* it is possible for the defendant to put before the court alternatives as to how the necessity of complying with the Building Regulations and the Fire Regulations can be satisfied. As was submitted in the case of *Donovan v Rana,* while use of these fire exits were reasonable, desirable or even to be expected that was not sufficient as it was not necessary for the use and enjoyment of the land.

53. The point that is made quite properly by counsel for the claimant in this matter is that in *Pwllbach Colliery Co Ltd v Woodman* the determination of what is necessary is not simply what is necessary for any use and enjoyment of the property but it is that which is necessary for the use and enjoyment in the way contemplated by the parties. It is that which is necessary to give effect to the common intention of the parties and in my judgment that necessity is present in this case. It was the common intention of the parties that the property be used in such a way that included the use of these fire exits and the passage outside. Reference was made by counsel for the defendant in this matter that the factual circumstances of *Donovan v Rana* were entirely different and somewhat extreme. What was being suggested in *Donavan v Rana* was that the property should not have the benefit of mains sewerage or drainage or indeed the

benefit of connection to the water services from the mains. In those circumstances it is understandable as to why the Court of Appeal found that the connection to the main utilities was necessary for the building of a dwelling house on that plot.

54. While I accept that the factual circumstances in *Donovan v Rana* are more extreme than they are in this case, that does not take away from the principle that an easement is implied because it is necessary to give effect to the common intention of the parties. In those circumstances, therefore, while I do not accept that either section 62 of the Law of Property Act or the rule in *Wheeldon v Burrows* assists the claimant in this case, there having been no evidence of user of the fire egress and right of way, in my judgment the claimant has satisfied the necessary test to establish that there is a right of way by reason of it being the intention of the parties to the transfers.

55. Having come to that conclusion, it seems to me on the point that the actual declaration sought by the claimant is not as it should be. It does not seem to me that there is any requirement for a declaration that the claimant is entitled to a right of way from the three doorways to the building for itself, its successors in title, etcetera, on foot or mobility vehicle at all times for the purpose of egress in the event of an emergency. What should properly be declared, although I will take further submissions on this point if it be necessary, is a right of way in very similar terms to that which was granted expressly when this issue arose when there was the demise to Tyreweb. So, that is my determination.

[Judgment ends]

Plan attached to the judgment of HHJ Walden-Smith
dated 4 February 2016