PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2016/0158

BETWEEN

Ian Robert Gordon

Applicant

and

Roxanna Rachel Steele

Respondent

Property address: Riverside, Herodsfoot, Liskeard PL14 4QX
Title number: CL310380

Before: Judge Wear

ORDER

UPON the matter coming on for hearing at Truro Magistrates Court on 17 January 2017 until 20 January 2017

UPON hearing counsel for the Applicant and counsel for the Respondent

IT IS ORDERED as follows:-

1. The Registrar shall after 26 May 2017 give effect to the Applicant's application as if the Respondent had not objected to it by making the following entry in the Proprietorship Register of title no. CL310380 (and of such other title nos. as together

comprise the registration of the Applicant as freehold proprietor of Riverside, Herodsfoot, Liskeard):

"The land has the benefit of a right to park one vehicle on the land [hatched black on the plan attached to the Tribunal's decision dated 2 May 2017] on the title plan. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen"

2. The Registrar shall after 26 May 2017 give effect to the Applicant's application as if the Respondent had not objected to it by making the following entry in the Charges Register of title no. CL181481:
"The land [hatched black on the plan to the decision of the Tribunal dated 2 May 2017] on the title plan is subject to the right of the proprietor of Riverside to park one vehicle thereon. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen"

3. The Registrar is at liberty to apply such other description of the land hatched black referred to as he may see fit

Michael Wear

Dated this 2 May 2017

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF/2016/0158

BETWEEN

IAN ROBERT GORDON

Applicant

and

ROXANNA RACHEL STEELE

Respondent

Property address: Riverside, Herodsfoot, Liskeard PL14 4QX
Title number: CL310380

Before: Judge Wear

DECISION

Easement by prescription-whether right to park one car or two cars—whether user became contentious-whether acquiescence for a sufficient period of time-Prescription Act 1832

Cases referred to:

Ironside Crabb & Crabb v Cook (1981) 41 P&CR 326

White v Taylor (No. 2) [1969] 1 Ch 150

Winterburn v Bennett [2016] EWCA Civ. 482

Bosomworth v Faber (1995) 69 P&CR 288

Bridle v Ruby [1988] 3 All ER 64

Dalton v Angus & Co (1881) 6 App Cas 740

R v Oxfordshire CC ex parte Sunningwell [2000] 1 AC 335

Jobling-Purser v Jackman [2001] IEHC 186

Wilkin & Son Limited v Agricultural Facilities Limited (REF/2011/420)

Introduction

1. On 17 October 2014 the Applicant applied for the first registration of his freehold title to the property known as Riverside Cottage, Herodsfoot. Riverside Cottage ("Riverside") had been conveyed in fee simple to the Applicant by a Conveyance dated 12 November 1968 made between (1) K M Gordon (2) The Applicant. It had not been necessary to register the title at that point.

2. Accompanying the first registration was a Statutory Declaration made on 8 October 2014 in which the Applicant claimed to have inter alia a right to park cars on the land adjoining Riverside to the north. Part of that land is within the registered title to the Respondent's property, known as Little Bridgen. The title number for Little Bridgen is CL181481 and the part over which the Applicant claims a right to park is shown coloured blue on the plan attached to this decision. References hereafter to the land coloured blue are to all of the land so shown.

3. As a result of the application the Land Registry served a Notice in Form B13 on the Respondent informing her of the claim to the right to park on the land in CL181481. The Notice was served on 26 March 2015 although the plan to it was incorrect. The plan was corrected by letter dated 16 April 2015. The Respondent had objected through her then solicitors by letter dated 7 April 2015. Her objection has been treated throughout as relating to the amended notice.

4. The matter was referred to the Tribunal by the Land Registry on 10 March 2016. I conducted a site visit on 16 January 2017 and the case was heard in Truro over four days from 17 January to 20 January 2017. The Applicant was represented by Mr Holmes-Milner of Counsel and the Respondent by Mr Dickinson of Counsel. First, it is necessary to say a little bit more about the application in the Land Registry.

The Application

5. The Applicant's Statutory Declaration, in addition to supplying evidence to support the parking right, dealt with matters relevant to the boundaries of Riverside and to a claim for title by adverse possession to a portion of the river bank. It also referred to a right to use a coal bunker,

a right to bring electric cables into Riverside and a right to enter Little Bridgen for the purposes of access to and inspection of a stopcock serving Riverside but situated on Little Bridgen.

6. Apart from the question of parking, none of the other issues in the Applicant's Statutory Declaration have been referred to the Tribunal. The Tribunal makes no ruling on them.

7. Secondly, the paper title to the freehold of Riverside includes a grant of a right of way "at all times over the piece of ground now or formerly belonging to the said Richard Oliver and situate adjoining the River on the north western side of the said hereditaments". It was not disputed at the hearing, that this right is over the blue land. Whether it extends to any other land was not debated and the Tribunal makes no ruling on the point.

8. Although the blue land falls entirely within CL181481 there is a parcel of unregistered land between the blue land and the public highway which has to be crossed if vehicles (or people) are to be able to leave Riverside or Little Bridgen. This land was referred to at the hearing as the triangle or the unregistered land. The Tribunal is concerned solely with the parking rights on the blue land and makes no finding regarding the triangle.

List of Issues

9. The following issues arise for determination by the Tribunal:

    1. Has the Applicant been parking on the whole of the blue land or only on the land hatched black.

    2. Has the Respondent shown evidence of a permission to park or that the Applicant's parking has been by force?

    3. Assuming the Respondent does not make out her case over what period has there been parking by the Applicant as of right?

    4. In connection with the Applicant's claim under Prescription Act 1832 what is the end point of the 20 year or 40 year period?

    5. If there has been use as of right for a sufficient period, how many vehicles is the Applicant entitled to park?

The Applicant's Case

10. The Applicant puts his case on the basis that he has a prescriptive right to park cars on the blue land acquired through long use sufficient to mean that either the doctrine of lost modern grant applies or that the existence of the right is presumed since time immemorial pursuant to Prescription Act 1832.

11. Mr Dickinson took a pleading point against the Applicant. He said that the doctrine of lost modern grant was not properly raised in the Applicant's Statement of Case. (See page 1-4 of the agreed bundle). As a result, the Applicant asked to amend his Statement of Case by the inclusion of the words "and/or by reason of lost modern grant" in the first line of paragraph 10a of the Statement. After argument the Tribunal allowed the amendment and now gives its reason in writing.

12. Mr Holmes-Milner pointed out that there was no question of any new evidence being adduced to support lost modern grant or any question of the Respondent being surprised. Mr Dickinson in response said that he would have wished for more time in order to produce evidence to rebut those aspects of the Applicant's evidence which were relevant to lost modern grant. He was, however, unable to say what this evidence would be. Rather than delay the case further to permit what seemed to be a slightly speculative quest by the Respondent, I allowed the amendment and continued with the hearing.

13. In my judgement, it is desirable that all the issues between the parties should be dealt with whilst the parties and their witnesses were present and the Courtroom available. To refuse the amendment would mean that the Applicant, if he was unsuccessful, could re-apply to the Land Registry for the parking right relying on lost modern grant and take the case through the Tribunal on the basis of exactly the same material. This struck me as a course which is disproportionate, having regard to the anticipated costs and the resources of the Tribunal. See further Rule 3(2)(a) of the Procedure Rules 2013 (SI 2013 No. 1169). Mr Dickinson reserved his right to refer to the Tribunal's ruling when it came to any Order for costs.

14. It is convenient to notice some other features of the Applicant's case at this stage. No reliance is placed on the operation of Section 62 Law of Property Act 1925 notwithstanding that it is referred to in the Applicant's Statement of Case.

15. Secondly, the Applicant already has an express right of way as explained in paragraph 7 above. Mr Holmes-Milner submitted that any right of way acquired by prescription enlarged and defined

the express right. In his closing submission, however, he accepted that there was no need to refer to a right of way by prescription.

16. I would in any event have found Mr Holmes-Milner's submission difficult to accept. It does seem to me that an express grant of a right of way cannot be explained or interpreted by evidence of subsequent (or even earlier) examples of its exercise. Nor is a right allegedly acquired through prescription in any way assisted by evidence of an express grant: to the contrary, an express grant will often be evidence of a permission to use which will undermine the prescriptive case. I accept, however, Mr Holmes-Milner's further submission that a dominant landowner can through prescription acquire rights over and above those he holds by express grant: Gale on Easements 19th Edition para. 4.119.

Evidence for the Applicant

17. The Applicant himself gave evidence and called as witnesses:-

    Sharon Savigar

    Derek Sturtch

    Trixie Gordon

18. Mrs Sandercock made a Witness Statement in support of the Applicant's case but she did not attend and was not cross-examined.

19. The Applicant is some 69 years old and started work as an agricultural sales representative with Food Services Livestock Limited in 1976. That company was taken over by Bell & Sons Limited in 1986 and the Applicant took on an advisory role as well as continuing to handle some sales. The Applicant's company was sold twice more with the Applicant ultimately working for Dennis Brinicombe Group as the Territorial Sales Manager for Cornwall and South Devon. His role was to sell the company's products and, latterly, offer training to other representatives and to offer advice to farmers in the dairy sector with a view to increasing their profitability.

20. The Applicant's mother bought Riverside for the Applicant in June 1968 and it was vested in the Applicant by the 1968 Conveyance already referred to. The Applicant told me he took up occupation when his mother bought Riverside in June 1968. The Applicant from the start had his own car which he parked on the blue land parallel with the wall on its western side. Parking was for the most part on the strip of land contiguous with the western wall and having a width

throughout of the gate which forms the boundary of the blue land with Riverside. This parcel of land is shown hatched black on the plan attached to this decision.

21. In cross-examination, the Applicant said that he did not regularly park outside the land hatched black "unless there are other circumstances". His habit was to reverse his car into the land hatched black parking close to the wall. In this way he was able to open the driver's door unimpeded. When the weather was very cold or snow was falling, it might be that he did not reverse in but parked facing Riverside and, necessarily, further from the wall to permit the driver's door to open.

22. The Applicant left room for the occupiers of Little Bridgen to park outside their property on the blue land although he did have cause to drive over the entirety of the blue land in the course of manoeuvring his vehicle or if he had to turn left on leaving the blue land.

23. The Applicant sought to rely on parking by his predecessor in title Mr G L Stevens. As evidence of this he drew the Tribunal's attention to a Statutory Declaration made by Mr Stevens on 29 November 1977. In it Mr Stevens states, amongst other things, that he parked his motorcar on the piece of land "contiguous with the coal bunker". The Declaration has a plan but its quality is very poor. The Respondent prepared an enlargement of the plan and used it to found an argument that Mr Stevens' parking took place on land within the freehold title to Riverside and not on the blue land.

24. In my judgement, the Respondent's challenge fails. The enlargement of the plan simply makes a poor quality plan even poorer. It is not possible to interpret the colouring on the plan in the way the Respondent seeks. Furthermore the wording of the declaration points away from the Respondent's interpretation. The coal bunker (from my site inspection) is simply a cupboard set in the building at ground floor level at the boundary of Little Bridgen and Riverside. The blue land might be described as immediately contiguous with the coal bunker, it being an open parcel of land part of which touches the door to the coal bunker. The declaration might have helped the Respondent, had it referred to parking on the land co-extensive in length with the door to the coal bunker. But it does not say this.

25. The Declaration is evidence that Mr Stevens resided at Riverside until 1965. He did not, however, sell it until the Conveyance dated 3 February 1967 made between (1) G L Stevens (2) E A Clements.

26. The Applicant said that Mr Stevens parted from his wife in 1965 and moved out of Riverside. His wife remained with her new partner, Don Howlett. There is no evidence that either of these parked their car on the blue land.

27. On the 30th November 1968 the Applicant and his first wife, Shirley, had their first daughter, Sharon. Shirley did not in those days drive. Shirley was taught to drive by Sharon after Sharon had passed her driving test. The evidence of when this happened is not clear.

28. In 1979 Mr Sturtch became the Southern Regional Manager for FSL Bells Limited. FSL Bells Limited was the name taken by Food Service Livestock Limited after it combined operations with Bell & Sons Limited. The Applicant was one of the team of sales representatives for which Mr Sturtch assumed responsibility. It was Mr Sturch's practice to drive to Riverside and park directly in front of the Applicant's car. The purpose of the visit was to review the sale report sheets and discuss the customer record cards and the customer accounts.

29. Mr Sturtch's visits were on not less than two occasions in every month but increased when the Applicant became a sales trainer in 1985. The Applicant had suffered with back pain for many years and in 2003 he had an operation which meant he was unable to drive for 4-5 months. Over this interval Mr Sturtch's visits were more frequent. He would collect the Applicant and drive into hospital for treatment as required.

30. In 1986 Shirley's father died and she inherited his Mazda car. The earliest evidence of the Mazda being parked at Riverside is when Sharon had passed her driving test and started to teach Shirley to drive. In her witness statement Sharon stated that this happened in 1987 but a copy of the schedule to her driving licence, filed after the hearing, gives an earlier date. According to Sharon, Shirley's car was on occasions parked on the land hatched black but, on just as many occasions, was left in the layby on the other side of the public highway. After she passed her driving test the Applicant bought Sharon her own car, a Ford Escort Mark 1.

31. In October 1989 Sharon moved away to train as a nurse in Plymouth, but she returned on a few occasions in 2003 to help the Applicant when he needed to attend hospital.

32. On the 16th December 1992, Shirley and the Applicant were divorced. Shirley left Riverside and the Applicant was there alone until his second wife, Trixie, moved in in July 1994. The Applicant and Trixie were married on the 21st July 1997. From the start Trixie parked on the land hatched black. Depending on the direction she was coming from she would reverse in or drive in in order to park against the north eastern wall. The only time this did not happen was if there were

visitors or workmen parked on the land hatched black. It was not her habit to park other than against the wall. The only departure from this practice was in 2014 when the Applicant had a hip operation which meant he walked with crutches. If Trixie brought the Applicant home she might park in the middle of the blue land to allow the car door to open and to be as close as possible to the front door at Riverside.

33. The parking of two vehicles on the land hatched black by the Applicant and his wife continues to the present day.

34. Much of the evidence on both sides concerned the background to the dispute which has arisen between the parties. I will refer to this where it bears on the legal issues before the Tribunal but otherwise it does not call for comment. One of the unfortunate aspects of this case has been to witness the neighbourly relations between the Applicant and the Respondent flourishing and then declining over a period of some nine years.

35. The Applicant himself gave his evidence in a confident manner. He had a long familiarity with Riverside and with Herodsfoot generally. But his bluff approach might on occasions mean that he was slapdash. Many of the dates given in his evidence were inaccurate. Some were obvious errors such as describing photographs taken late in the year 1800 (page F of the index). Other errors were more troubling – for example the fact that in his witness statement he thought he divorced his first wife in 1987 when it should have been 1992, or that he corrected a date in his Statutory Declaration (some two years after he made it) which was inaccurate by 20 years. The Tribunal approaches the Applicant's evidence with a certain amount of caution.

36. The Applicant's wife gave her evidence truthfully, but she had to concede that her unconditional approval of the Applicant's witness statement could not be supported. Subject to this she was an credible witness.

37. Mr Sturtch was also a confident witness and anxious to provide support for the Applicant's case. His memory for dates was also a little vague. Subject to this, I accept his evidence in fully.

38. The Applicant's daughter also had difficulty recalling some dates. She provided a copy of her driving licence after the hearing had finished but it did not seem to offer support for the date on which she said she had passed her driving test. Sharon was a truthful witness but did not have a command of the detail.

39. The Applicant also filed a witness statement made by Veronica Sandercock who had lived in Herodsfoot for over 68 years. In her short statement she supported the fact of parking on the blue land and the land adjoining it by the Applicant and other owners of Riverside. She gave no further detail and, in the absence of cross-examination, very little weight can be given to her evidence.

The Respondent's Case

40. The core of the Respondent's case is that the Applicant's parking was:-

    (i) over the land hatched black only and

    (ii) by permission of herself or one of her predecessors in title and/or

    (iii) carried on in circumstances which made the parking contentious.

    As a result there has been no prescription and no lost grant can be presumed.

41. The Respondent gave evidence herself and called the following witnesses:-

    Colynne Brooks

    Oliver Dobbs

    Martine Sinke

    Richard Foster

42. There were seven occasions on which the Respondent said that permission was given to park or parking was carried out by force, they are:-

	Date	Action Taken	By Whom
1.	1977	Permission	Mrs Brooks
2.	1986/7	Objection	Mrs Brooks
3.	1992	Objection	Mrs Brooks
4.	2002	Permission	Mr and Mrs Balding
6.	2007	Permission	The Respondent
7.	2012	Objection	The Respondent

43. It was common ground between the parties that the Applicant had the burden of proving parking as of right over a sufficient period of time but that the Respondent had an evidential burden if she wished to allege that she or a predecessor had given permission or that any of the use by the Applicant had been by force.

44. Colynne Brooks owned Little Bridgen from September 1976 until August 2002 when she sold it to a Mr and Mrs Balding. The Baldings sold it to the Respondent on 12 April 2007. Mrs Brooks is a music teacher. She had been teaching in the East of England but a change of job meant that she had to move to Cornwall in 1976. She viewed Little Bridgen on only two occasions before buying it with her husband on 8 September 1976. The Applicant's parking only became apparent after she moved in, although she had been told of the Applicant's right of way over the blue land.

45. In 1977 Mrs Brooks made an offer to buy the coal bunker from the Applicant as she wished to use it store solid fuel for her boiler. At the same time the Applicant's parking was discussed. This happened in the kitchen at Little Bridgen. The Applicant refused to sell the coal bunker and became abrupt when the parking was raised. As a result, Mrs Brooks consulted her solicitor who wrote to the Applicant. The content of that letter is unknown because neither side kept a copy. In cross-examination Mrs Brooks accepted that the advice she had received was that the Applicant had a legal right to park one car outside her kitchen window. Mrs Brooks accepted she could not give or refuse the Applicant permission for this but she could give or refuse permission for a second car. Mrs Brooks said the letter went on to refuse permission for a second car.

46. The Applicant denied that the conversation discussed parking generally. The Applicant said that Mrs Brooks, in discussing the coal bunker, said that if the coal bunker did not belong to the Applicant then he would have no right to park on the land outside it.

47. The result of the letter that was sent was that the 1977 Statutory Declaration was prepared by Mr Stevens at the request of the Applicant. Mrs Brooks accepted that a Statutory Declaration had been made and that it had been sent to her, but when shown Mr Stevens Declaration said she did not recognise it. She also said that there was no response to the 1977 letter to the Applicant.

48. There was a second letter to the Applicant after Shirley Gordon had learnt to drive the car she inherited from her father. Following this letter Mrs Brooks said that Shirley parked her car in the layby on the opposite side of the road. No copy of this letter was kept and its receipt was denied by the Applicant.

49. In 1985 Mrs Brooks and her first husband were divorced and on 20 February 1986 the legal and beneficial interest in Little Bridgen was conveyed to Mrs Brooks alone.

50. The third letter to the Applicant followed the arrival of Trixie Gordon with her car at Riverside. Mrs Brooks said that that letter agreed to the parking of one car but objected to the second car being parked. Trixie did not as a result cease to park on the blue land.

51. In December 1996 Mrs Brooks moved to Newton Abbot with her second husband. It was her habit to return to Little Bridgen at weekends and, until the middle of 1997, give music lessons at Little Bridgen on the Monday following. After the middle of 1997 she and her husband spent all week at Newton Abbot. In 2000 Little Bridgen was put on the market by Mrs Brooks. It was eventually sold in March 2002 to Mr and Mrs Balding.

52. Mrs Brooks' evidence was at times confused. She was clear in her mind that three letters had been sent to the Applicant but was not clear whether they were objecting to the presence of both cars or giving permission for a single car and objecting to a second one. In cross-examination she accepted that the Applicant had a right by 1977 to park one car on the basis that he had been doing so for 12 years. She also accepted that the consequence was that the letter sent in 1977 could not have amounted to a permission for one car because the Applicant had a legal right for this.

53. Mrs Brooks made a poor witness. It is difficult to accept her witness statement save where it is supported by documentary evidence or other proven facts. I will return to her evidence when making findings of fact.

54. The Respondent's son is Oliver Dobbs. He is 18 years old and gave evidence of an incident in December 2015 when the Applicant without asking permission entered the Respondent's garden from his and proceeded to do work on the fence forming the boundary between Little Bridgen and Riverside. Mr Dobbs thought this behaviour was not normal and recorded it on his mobile 'phone. Mr Dobbs was challenged about this but it was not in the end disputed that the Applicant had entered Little Bridgen without warning and without permission.

55. Very little of Mr Dobbs' evidence had any bearing on the legal issues in this case. Mr Dobbs was an articulate and careful witness whose evidence I accept.

56. Martine Sinke is a resident of Herodsfoot and had known the Respondent since 2007. She gave evidence of the psychological pressure that the Respondent was under as a result of the dispute

with the Applicant. Ms Sinke was a helpful witness regarding the history of the dispute but had little to say about the legal issues in the case.

57. Richard Foster was the Respondent's partner from 2006 until 11 March 2011 when they separated. He was able to give evidence about the Respondent's purchase of Little Bridgen in April 2007. There was a meeting with the Sellers at the Property prior to the purchase. Mr and Mrs Balding said that the owners of Riverside had permission to park on land adjacent to the wall on the north-western boundary of the Property. Mr Foster was also present when the Respondent visited her solicitor, Richard Miller, prior to completion of the purchase. The advice received at that meeting was that the Applicant and his wife had a right of way across Little Bridgen to Riverside. The Respondent was also advised "to confirm the parking arrangements in writing" with the Applicant and his wife.

58. After the Respondent and Mr Foster moved into Little Bridgen they had a meeting with the Applicant and his wife. The Respondent said that the parking arrangements could continue as before. Mr Foster described the Applicant and his wife as pleased with this suggestion. The Respondent also said that her son might one day want a space to park a car. Mr Foster also confirmed that during his occupation the vehicles connected with Riverside were always parked alongside and close to the wall on the north-western boundary.

59. Mr Foster was cross-examined extensively about the meetings he attended. He accepted that it would have been better if the parking had been addressed before the Respondent completed her purchase. He said he was not surprised that Mrs Brooks had conceded the Applicant's right to park one car in her evidence. He described the Applicant as "a Jekyll and Hyde character" and spoke of the Applicant's influence over Mrs Brooks.

60. Mr Foster was a truthful witness although he accepted his Witness Statement did not deal with every relevant event.

61. The Respondent works a furniture showroom sales executive in Cornwall. Before moving to Little Bridgen she lived in Polperro. She viewed Little Bridgen on 24 February 2007 and on at least one other occasion. The purchase completed on 12 April 2007 and the Respondent moved in on 16 April, the following Monday. The Respondent remembers, shortly thereafter, and no later than 16 April, visiting the Applicant and introducing herself. This involved the Respondent knocking on the door of Riverside and speaking to the Applicant. A week or so later, the Respondent and

and spent time there discussing the training and other business matters. Prior to this there would only have been one car.

(vii) The Applicant said that on 13 November 1968, when his first daughter was born, there were visitors and family calling at Riverside who parked on the blue land. There was a similar pattern of parking on 16 May 1970 when his second daughter was born. But in order to achieve a right by prescription there has to be a continuity of use: *Ironside, Crabb and Crabb -v- Cook, Cook and Barefoot (1981) 41 P&CR 326* where the Court of Appeal approved a dictum in *White -v- Taylor (No.2) [1969] 1CH 150* that "the user must be shown to have been of such character degree and frequency as to indicate an assertion by the claimant of a continuous right and of a right of the measure of the right claimed".

(viii) In my judgement, evidence confined to what happened on the dates of birth the Applicant's children does not pass this test.

(ix) Little Bridgen was owned freehold by Mr P Phillips from 1962 until he sold it to Mr and Mrs Brooks. The Applicant told the Tribunal, and I accept, that Mr Phillips did not live at Little Bridgen. He let the property to a Mr and Mrs Moyles. The consequence is that any period of parking by the Applicant could not give rise to a prescriptive right : Gale on Easements (20th Ed.) paragraph 4.75.

(x) After Mr and Mrs Brooks completed their purchase of Little Bridgen with vacant possession on 8 September 1976, Mrs Brooks ascertained that the Applicant parked his car on the land hatched black. I accept that Mrs Brooks did not know about parking before then. She made only two visits to Little Bridgen before she bought. Given that the Applicant had by then started his job as a travelling representative with Feed Service Livestock, it is more probable than not that his car was not parked there when Mrs Brooks visited.

(xi) At some point in 1977 Mrs Brooks approached the Applicant regarding the coal bunker with a view to buying it from him. That conversation also involved a discussion of the Applicant's parking on the blue land.

(xii) Mrs Brooks' offer to buy the coal bunker was refused. From my observation of the Applicant I consider that he might have dominated the discussion with Mrs Brooks over the question of parking. Mrs Brooks described the Applicant as aggressive in her Witness Statement but resiled from this description when pressed in cross-examination.

(xiii) As a result, Mrs Brooks consulted a solicitor who advised her that she could do nothing about the Applicant's right to park one car on the land hatched black. Mrs Brooks said that she was told that after the passage of 12 years the Applicant's right could not be challenged. This advice may, in retrospect, not have been correct but I think it unlikely that Mrs Brooks manufactured it.

(xiv) The result of Mrs Brook's visit to her solicitor was that a letter was sent to the Applicant. The Applicant accepted in evidence that he received a letter from the solicitor for Mrs Brooks and the Tribunal finds that one was sent.

(xv) The Applicant said that the letter questioned his title to the coal bunker and it went on to say that if he did not own it, he could not park in front of it. I do not accept this. As a result of the letter, the Applicant made contact with his solicitor, Stephens & Scown. The Applicant's brother-in-law was a partner in Stephens & Scown and he then arranged to see Mr G Stevens, the Applicant's predecessor in title to Riverside. As a result of that meeting the Statutory Declaration by Mr Stevens was made on 29 November 1977. Paragraph 6 of the declaration reads:

"At no time during my said period of occupation did anyone at any time claim ownership of the said coal bunker, the said piece of land contiguous thereto or the said garden as edged red on the said plan or in any way challenge my entitlement thereto"

From this it is clear that coal bunker, the blue land and the garden were in issue.

(xvi) On the balance of probabilities I find that the letter challenged the Applicant's use of the blue land for anything beyond the parking of one car. I reject Mrs Brooks' evidence that she gave permission for parking a second car on the land hatched black for two reasons. First, in 1977 no one was parking a second car in front of Little Bridgen with any frequency or consistency. Mr Sturtch did not start visiting until 1979. It is most improbable that Mrs Brooks would have consented to something which was not taking place. Secondly, it is tolerably clear from Mrs Brooks' evidence and the content of paragraph 6 that the parties were regarding the issue as one of title rather than a right by prescription.

(xvii) I found the Applicant's account of this episode confusing. He said that he had not kept a copy of the letter from Mrs Brooks' solicitor because Mr Brooks, her husband, told him to ignore it. On the other hand, he did take the trouble to visit his solicitor and gather evidence about his parking rights on the blue land.

(xviii) The Applicant is someone who, in my judgement, readily resorts to self-help in his differences with his neighbours. The incident described by Oliver Dobbs illustrates this. He would only visit a solicitor if there was some uncertainty or doubt in his mind about his legal position. The fact that Mrs Brooks' husband may have told the Applicant to ignore the letter makes no difference in my judgement. It is sufficient if any one of the joint proprietors of the servient land objects. It is the Applicant's duty to prove acquiescence on the part of the servient owner.

Mr Foster encountered the Applicant and his wife Trixie on the gravel drive in front of Little Bridgen. The Respondent said she gave her permission for the Applicant to park their cars against the boundary wall and the Applicant and his wife were pleased with that offer and were happy to continue to park as suggested by the Respondent.

62. After this conversation, Mr Foster suggested to the Respondent that something should be put into writing. As a result the Respondent telephoned a Mr Shutt at Richard Miller for advice. The Respondent made a rough note of the advice she was given. Mr Shutt thought that there should be a letter to the Applicant recording that they could park by agreement with the Respondent. The Respondent did not, however, do anything more about this. She told me that she had just come through a very difficult divorce and did not want any further involvement with contentious legal work.

63. The next event of significance was on 7 May 2015 when the Respondent wrote to the Applicant to withdraw the permission she said she gave him to park on the gravel area in front of Little Bridgen. This letter had been preceded by a steady deterioration in the relationship between the Applicant and the Respondent. The Respondent said the deterioration started when Little Bridgen and Riverside flooded in November 2012. After a heavy fall of rain the Looe River overran its banks and the water gathered in front of both properties, eventually penetrating Little Bridgen through the front door. There was a second storm in December 2012 when the flooding recurred. The Respondent said that she made a claim for the damage to her personal and other property against the insurance company. This disconcerted the Applicant because he thought that the insurance premium for Riverside would, as a result, increase.

64. There were other actions by the Applicant and the Respondent marking the deterioration of relations. These included:-

- The Applicant parking in such a way as to impede the Respondent's access to Little Bridgen
- The applicant pouring green paint on to the gravel area in front of Little Bridgen to indicate the location of the stop cock for the water supply to Riverside
- The Applicant hanging signs in the trees adjoining the river stating that they were the property of Riverside Cottage
- The Applicant placing bins on the land coloured blue without seeking the Respondent's permission

- The Respondent installing a surveillance camera on the front of Little Bridgen
- The Respondent moving the Applicant's rubbish bins so that they were not regularly emptied by the Council

65. None of these incidents directly bear on the questions of title in this case, although they are part of the background to the dispute.

66. The Respondent was a careful and conscientious witness. The dispute has been and. at the time of the hearing was, a considerable strain for her. She was a truthful witness and, save where stated, I accept all of her evidence.

Findings of Fact

67. The Tribunal makes the following findings:-

(i) The Applicant first occupied Riverside when his mother completed her purchase of it in June 1968. The Applicant attained the age of 21 in 1968 and at that time could not have taken a Conveyance of the legal title until he had done so. I base this on the copy document at page 39 of the bundle and paragraph 19 of the Applicant's Witness Statement.

(ii) The Applicant had one vehicle which he parked on the land hatched black in connection with his enjoyment of Riverside.

(iii) The Applicant's predecessor, G L Stevens, parked a vehicle on the blue land. This practice ceased in 1965 and did not resume until the Applicant himself started to park in 1968. I do not think Mr Steven's evidence assists the Applicant with his case.

(iv) It was the Applicant's practice to reverse his vehicle on to the land hatched black and to park it close to the wall on the north-eastern side. This practice was not followed when there was snow or adverse weather. In these cases the vehicle would be driven in and necessarily be parked further away from the wall to permit the driver to alight from the vehicle.

(v) The Applicant's parking involved no more than one car on the land hatched black. The Applicant's first wife, Shirley, did not have a car and did not drive until 1987.

(vi) It is accepted that in the ordinary way there would have been visitors to Riverside who on occasion would no doubt arrive by car but the evidence is insufficient to support any regular use of the blue land in this way until 1985 when Mr Sturtch made calls to Riverside

(xix) It is impossible from the evidence to say when the challenge was made save that it must have been before 29 November 1977, being the date on which the Declaration was made.

(xx) Mrs Brooks persisted in her opposition to the second car being parked at least until December 1996. Thereafter she spent more time away from Little Bridgen but did not take any steps or say anything to mean that her challenge was withdrawn. This position obtained until March 2002 when Little Bridgen was sold to Mr and Mrs Balding.

(xxi) Following the challenge in 1977, the Applicant continued with his parking and, from 1979 onwards Mr Sturtch from time to time parked a second car on the land hatched black. While the Applicant was a sales representative, the pattern would be for Mr Sturtch to park on the land hatched black and then accompany the Applicant on his farm visits. They would use either Mr Sturch's car or the Applicant's car for these visits, leaving the other car parked on the land hatched black while they did so. During this time the presence of two cars was fleeting. Once the Applicant took on the role of sales trainer the visits by Mr Sturtch would have involved spending more time at Riverside discussing the performance of individual sales staff. The Applicant told me that he performed this role from 1985 onwards. I find that the presence of two cars on the land hatched black before this date was insignificant.

(xxii) In 1987 the Applicant's daughter, Sharon, passed her driving test. A copy of Sharon's driving licence was sent to the Tribunal after the Hearing and it states that it runs from 30 November 1985, being Sharon's 17th birthday. This, however, is only the provisional entitlement. I do not think the information on the licence assists with the date of Sharon's driving test.

(xxiii) Use of a second car was associated with occupation of Riverside in 1987 after Sharon passed her test. This was the Ford Escort Mark 1 which the Applicant bought for Sharon. This car was on occasions parked on the land hatched black. Sharon was aware that she should not block the Applicant in if his car was already parked on the land hatched black. On these occasions she parked in the layby on the other side of the public highway.

(xxiv) Mrs Brooks did not expressly tell Sharon that the presence of her second car was opposed. I accept Mrs Brooks' evidence that Mrs Brooks' daughters, Tanya and Tasha, were on good terms with Sharon. Neither party wished to prejudice this friendship.

(xxv) By October 1989 Sharon had moved away from Riverside but at some point prior to this the Applicant's wife Shirley inherited her grandfather's car, a red Mazda. Shirley learnt to drive using this car and on occasions parked it on the land hatched black. Just as often, it was parked in the layby. I accept Sharon's evidence on this point. This practice ceased by December 1992 when the Applicant and Shirley were divorced.

(xxvi) Mrs Brooks said that she made a protest through her solicitor at Shirley's parking a second car on the land hatched black. A letter was sent but no copy of it is now available. Mrs Brooks could not say when the letter was sent, beyond saying it happened before the Applicant divorced. The Applicant denies having received any letter. In my judgement this piece of evidence on its own is insufficient to discharge the evidential burden incumbent on the Respondent when she is alleging the use of force. On this, there is nothing to support Mrs Brooks' account of matters.

(xxvii) The Applicant's second wife, Trixie, moved into Riverside in July 1994 and she began to park her car on the land hatched black. Mrs Brooks said she caused her solicitor to write in the late 1980s. This cannot be accurate if, as I have accepted, Trixie did not arrive at Riverside until July 1994. Mrs Brooks' evidence on this point is inaccurate and I cannot accept it.

(xxviii) Even though my finding is that neither of the letters referred to at 2 and 3 of paragraph 42 above were sent, I still consider that Mrs Brooks maintained her opposition to a second car from late 1977 until March 2002. I accept Sharon's evidence that relations between Mrs Brooks and the Applicant were strained throughout. There is nothing to think that Mrs Brooks attitude ever became one of acquiescence.

(xxix) The practice of parking two cars on the land hatched black continues until the present day.

(xxx) On 15 March 2002 Mrs Brooks sold Little Bridgen to M J Balding and T E Balding. The evidence that permission was given by the Baldings to the Applicant to continue parking on the land hatched black is, in my view, insufficient. That evidence is contained in a Statutory Declaration dated 27 May 2015 made by the Baldings for the purpose of this case. Neither party was called to give evidence and they were not cross-examined. Their evidence carries very little weight, the more so as it was not contemporaneous. The Applicant denied any permission was given and described his parking as an understanding with the Baldings. I prefer the evidence of the Applicant on this point. There was acquiescence in the matter.

(xxxi) It follows from the last paragraph that on 15 March 2002 Mrs Brooks' opposition to the parking of a second car came to an end.

(xxxii) In February 2003 the Respondent had an operation for a bulging disc. This meant that he could not drive for 4-5 months. During this interval he was driven by Trixie and, at times, the car would be parked away from the wall and close to the entrance to Riverside. In this way both parties could alight from the vehicle unimpeded.

(xxxiii) On 12 April 2007 Little Bridgen was conveyed to the Respondent. She took up occupation with Mr Foster on 16 April. There was a conversation between the Respondent and the Applicant before she took up occupation. In this the Respondent introduced herself as the new owner of Little Bridgen.

(xxxiv) Some days after 16 April the Respondent with Mr Foster met the Applicant and his wife on the blue land. In that conversation the parking was discussed. In my judgement the content of the meeting meant that it was friendly discussion between neighbours about matters of mutual interest. The Respondent referred to parking and indicated that it could continue. .

(xxxv) The Applicant denied there was ever a meeting or discussion with the Respondent and Mr Foster but when cross-examined said that there had been the informal encounter when the Respondent alone called at Riverside as stated in the last paragraph. The Applicant's wife, Trixie, also denied the meeting of all four parties.

(xxxvi) I prefer the evidence of the Respondent and Mr Foster on this point and consider that the meeting of the four parties on the blue land took place. In my judgement the Applicant has persuaded himself that nothing of significance took place until 2014 but then had to accept that there had been contact with his neighbour prior to this. Trixie was influenced in her view by the Applicant.

(xxxvii) It is impossible to say from this discussion whether what was said crossed the boundary from acquiescence into permission. The Respondent said she made reference to the Baldings' permission but, as I have found, the evidence for this insufficient. The Tribunal finds that the Respondent has not made out her claim that she gave permission on this occasion.

(xxxviii) Much was made of the note prepared by the Respondent of a conversation she had with her solicitor after this meeting but in the end it is not clear that it helps with the point very much. I accept that the conversation took place and the right of parking was discussed but what was important was the communication to the Applicant of something which was intended to be understood as permission and was understood as permission. In my view this did not happen. I also find that the Applicant acted on the discussion by continuing to park cars on the land hatched black. The ensuing friendship between the parties demonstrates the Applicant's acceptance of the position

(xxxix) I accept the Respondent's evidence that she did not follow up the meeting with a letter recording its content because she felt that it would have set the wrong tone. In my judgement the Respondent is someone who would have naturally avoided confrontational behaviour.

(xl) Shortly before she put her house on the market in 2012 the Respondent invited the Applicant and his wife to Little Bridgen to tell them her plans. The parking was discussed and the Respondent said that she could not guarantee that the buyers would come to the same arrangement as she had with the Applicant. This took place prior to 22 March 2012 because on that date the Respondent wrote to her solicitor referring to the discussion. The

Applicant denied there had been such a discussion but I prefer the Respondent's version of the matter. In denying the Applicant an indefinite right to park in the context of the sale of Little Bridgen the Respondent had, in my view, put in issue the Applicant's parking. This is enough to make it contentious.

(xli) Although relations between the Applicant and Respondent deteriorated, the purported revocation of permission to park by the Respondent did not occur until the letter dated 7 May 2015 sent to the Applicant.

Legal Issues

68. The Tribunal has already found that the letter sent in 1977 by Mrs Brooks amounted to a challenge to the Applicant's parking of a second vehicle. In *Winterburn v Bennett [2016] EWCA Civ 482* the Court of Appeal had to consider whether some notices posted by the entrance to a car park were enough to make unauthorised parking contentious. In holding that they were, David Richards LJ said:

"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."

69. Applying this test, it was, in my judgement, sufficient that Mrs Brooks made her protest when she did and how she did. It was not necessary to write further or maintain a sequence of correspondence, still less to bring legal proceedings or fence off the land hatched black to permit only one car on it. Mr Holmes-Milner relied on *Winterburn* to submit that the servient owner has to show "continuous and unmistakable protest". He pointed out that after the letter of 1977 Mrs Brooks, as he put it, fell silent. This happened in the sense that there were, as I have found, no further letters but I do not read the above passage as requiring that there should have been. Still less can it be argued that ensuing silence meant acquiescence.

70. I therefore reject Mr Holmes-Milner's submission. Further, in my judgement, it made no difference that Mrs Brooks' husband told the Applicant to ignore the letter. The Applicant has to

prove acquiescence on the part of the servient landowner in order to found his claim through prescription. It cannot be said that there is acquiescence if one of two proprietors protest against the right claimed. Equally, the burden is on the Applicant to prove that the protest ceased or was withdrawn if the Applicant wishes to allege that his use ceased to be contentious.

71. Given the finding of fact that Mrs Brooks' opposition continued until March 2002, it follows that the Applicant's parking of the second car was contentious until that point.

72. Mr Dickinson accepted at the hearing that Mrs Brooks' evidence meant that he could not challenge a finding that there was a right in the Applicant to park one car on the land hatched black. In the course of his closing submission however, he said that he wished to argue that Mrs Brooks had been under a misapprehension as to her legal position in 1977. Had she received correct advice at that point she would have realised that the Applicant did not have a legal right to park one car. It followed that there could be no acquiescence on the part of Mrs Brooks because she did not think she had the legal means to prevent the Applicant parking.

73. Mr Milner-Holmes submitted that what was in the mind of the servient landowner has no bearing on whether there is acquiescence. He drew attention to a passage in *Sara on Boundaries and Easements (6th Edition)* at page 343 and relied on *Bosomworth v Faber (1995) 69P&CR 288.* It was common ground in *Bosomworth* that the erroneous belief of both parties that there was a right to take water granted by an indenture in 1858 did not prevent the acquisition of a prescriptive easement. Reference was also made to *Bridle v Ruby [1988] 3All ER 64.*

74. Neither of these cases strongly supports that Applicant. The point was not argued in *Bosomworth* and in *Bridle v Ruby* the mistaken belief was on the part of the dominant landowner. In answering the question of whether there has been acquiescence it is the actions of the servient landowner which are relevant. Mr Dickinson argued that where the mistaken belief held by the servient owner was known to the dominant owner the enjoyment of the right could not be said to be as of right. He described it as *"as of mistake"*.

75. The point is quite a difficult one but in the end it is not possible to accept Mr Dickinson's submission for two reasons. First, the three elements of acquiescence articulated by *Fry J* in *Dalton v Angus & Co. (1881) 6 App Cas 740* are:

    (i) knowledge of the acts done,

    (ii) a power in [the servient owner] to stop the acts or to sue in respect of them and,

(iii) an abstinence on his part from the exercise of such power.

All three elements are present in this case. Secondly, I bear in mind the words of Lord Hoffman in *R v Oxfordshire County Council ex parte Sunningwell [2000] 1AC 335* when in the course of tracing the history of adverse possession/prescription he said *"the law was not concerned with the acts or the state of mind of the previous owner who was assumed to have played no part in the transaction".*

76. Mr Dickinson relied on *Jobling-Purser v Jackman [2001] IEHC 186* an Irish case of acquiescence by a beneficiary in a breach of trust and on a passage from *Kerr on Fraud and Mistake (7th Edition)* at page 595. In my judgements these have no connection with the rules relating to the presumption of a lawful origin for a right long enjoyed over the land of another.

77. As regards the claim based on Prescription Act 1832 a point arose under section 4 which reads:

4. Before mentioned periods to be deemed those next before suits.
Each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

78. In calculating the 20 year or the 40 year period time has to be reckoned from the date of the suit or action in which the claim or matter is questioned. Both Counsel were agreed that this should be the date on which the Applicant applied for first registration of Riverside, 17th October 2014. Nevertheless, the Tribunal asked for submissions on the question of whether it could be a different date, it appearing that an application for first registration was not an occasion on which the claim is questioned, still less a lis inter partes.

79. Counsel for the Respondent referred the Tribunal to the decision of the Adjudicator to the Land Registry in *Wilkin & Son Limited v Agricultural Facilities Limited (REF/2011/420)* decided on the 10th April 2012. In that case at paragraph 111 the Adjudicator distinguished *J A Pye v Graham (2000) CH 676* on the grounds that it was concerned with the meaning of the word action in the context of limitation not prescription. The Adjudicator went on to say that

"the making of an application by a party seeking to pursue a claim which is later opposed by the objector, the result of which the matter is then referred to the Adjudicator falls within the statutory requirement". In other words I consider that [date of the Application to the Registry] is the correct position and that the making of the application constitutes "suit or action".

80. This approach is approved by the authors of the Practical Guide to Land Registration Proceedings at paragraph 22.13. Given that the point has been considered by the Adjudicator (who is to be regarded as a judge of a jurisdiction coordinate with the Tribunal) after legal argument, I consider that the date for the purposes of the claim under the 1832 Act in this case is the 17th October 2014. This means that the commencement of the 20 year period is the 18th October 1994 and of the 40 year period is the 18th October 1974.

DECISION

81. **Lost modern grant**

(a) The Applicant has parked one car on the land hatched black for a period of 20 years commencing on 8 September 1976 without stealth, without permission and without force. None of the occasions on which it was said that there was an objection or permission are supported by sufficient evidence. The objection made in or before 22 March 2012 came too late to defeat the Applicant's accrued right. The Applicant succeeds on this aspect of his claim therefore.

(b) The Applicant's claim to park a second car on the land hatched black fails. From 1976 until March 2002 it was contentious. It became contentious after 22 March 2012 as well. There is therefore no unbroken period of 20 years from which a grant can be presumed.

82. **Prescription Act 1832**

The decision in the last paragraph makes it unnecessary to consider the claim under the 1832 Act save in regard to the parking of a second car but in case the matter goes further the Tribunal would have decided as follows.

(a) In the 20 years ending with 17 October 2014 the Applicant has not parked one car on the land hatched black as of right. The Applicant's parking became contentious no later than the 22 March 2012.

(b) In the 20 years ending with 17 October 2014, the Applicant's parking of a second car on the land hatched black was contentious until March 2002 and became contentious again no later than 22 March 2012.

(c) In the 40 years ending with 17 October 2014 the Applicant has not shown the continuous parking of one or two cars on the land hatched black as of right. The result of the lease of Little Bridgen was that the parking of one car was not acquiesced in until 8 September 1976. The parking of a second car has not taken place as of right for 40 years.

83. **Order**

In his closing submission Mr Dickinson said that if a parking right was established it should be confined to "the strip of land approximating to the width of the gateway to the dominant land and adjacent to the wall on the eastern side" and that the number of vehicles should be specified. He also said that any parking by the Applicant should not interfere with the Respondent's parking on the blue land "as they have done previously".

84. Mr Dickinson further submitted that nothing needs to be said about any right of way. Mr Holmes-Milner in his draft of the entry in the register which he sought, accepted there need be no reference to the right of way but said that parking should not be confined to any part of the blue land.

85. Given the Tribunal's finding that the parking outside the land hatched black was not such as to bring home to the Respondent or any predecessor that it was an assertion of right I cannot accept Mr Holmes-Milner's submission that the parking should be at large. The Tribunal will however allow the parties until 26 May 2017 to make submissions on the extent of the land hatched black. The plan was prepared as part of this decision and was not in evidence at the hearing. It is based on the plan handed up at the hearing.

86. As regards Mr Dickinson's point about not interfering with the Respondent's parking at Little Bridgen, I do not think the words proposed fit with the terms of a grant which the Tribunal is presuming has been made. The words are unacceptably vague and would tie the parking right to a pattern of behaviour at a fixed point in the past.

87. As regards the question of a right of way, no one has argued for any right of way by prescription which exceeds or is distinct from the right expressly granted and described at paragraph 7 of this Decision. In my judgement there is no need to say anything further about the point in the register of title.

88. Given the Tribunal's findings to the number of cars which were parked on the land hatched black, I cannot accept Mr Milner's submission that this should not be expressly stated.

89. There will be an Order directing the Registrar to enter in the Property Register of the Applicant's title number CL310380 and CL311689 the following:-
"The land has the benefit of a right to park one vehicle on the land [hatched black] on the title plan. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen."

90. In the register of title number CL181481 the entry will be *"The land [hatched black] on the title plan is subject to the right of the proprietor of Riverside to park one vehicle thereon. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen".*

91. The Tribunal will allow the parties until 26 May 2017 to make submissions on the question of costs.

Michael Wear

Dated this 2 May 2017