[2019] UKFTT 0727 (PC)

REF//2018/1016

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

SHUGHIE ENTERPRISES LIMITED

APPLICANT

and

(1) MR JONATHAN MOON
(2) MRS NATALIE MOON

RESPONDENTS

Property Address: Land on the West Side of Ewhurst Road, Peaslake, GU5 9RW
Title Number: SY829362

ORDER

The registrar is directed to give effect to the Applicant's application dated 14th June 2018 as if the Respondents' objection had not been made.

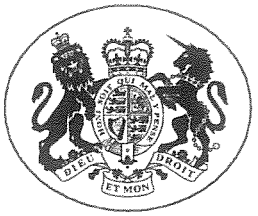
For the avoidance of doubt the entries to be made in the register are to be those set out in the B13 notice dated 14th August 2018.

Dated this 15th November 2019

Daniel Dovar

By order of the Tribunal

PROPERTY CHAMBER LAND REGISTRATION



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Title Number: SY829362

Before Judge Dovar
Sitting at: Alfred Place, London
On: 22nd and 23rd October 2019

Applicant Representation:	Mr Armstrong, counsel instructed by C.L. Clemo & Co
Respondent Representation:	Mr Moon, in person

DECISION

Easements – Rights of Way – Parking – Prescription – Doctrine of Lost Modern Grant - Scope of referral after withdrawal of part of application

Cases referred to:

Hollins v Verney (1883-84) L.R. 13 QBD 304
Tehidy Minerals Ltd v Norman [1971] 2 QB 528
Bean v Katz [2016] UKUT 168 (TCC)
Inhenagwa v Onyeneho [2018] 1 P & CR 10 (Ch D)
Lowe v William Davies Ltd [2018] 4 WLR 113, UT (LC)
Hallman v Harkins [2019] UKUT 245 (LC)

Introduction

1. The Applicant claims easements over a grass verge which runs adjacent to a row of cottages in the village of Peaslake, situated in the Surrey Hills. The claims rely on the doctrine of lost modern grant or alternatively on the common law or alternative on the Prescription Act 1832.

2. The verge runs in a north to south direction parallel to Ewhurst Road. To the north is the centre of the village, the bus stop shelter, the village store, pub and bicycle store. As picturesque and charming as the village is, it has no village green, nor it appears sufficient parking.

3. The verge runs south, to the east of Birch Cottage, then past Box Cottage, and Bowbrook, and East View Cottage, then the Applicant's land ('the Retained Land') and then Hawthorn Cottage ('the Cottage') (which plays a central role in this case), then Old Vine Cottage before finally getting to just past the southern part of Rangers Cottage, where it ends in line with the northern boundary of Rose Cottage. As it moves south so it broadens. It also contains a water filled ditch or small stream immediately adjacent to the road. In order to obtain access to the various cottages from the road, a number of crossings have been installed. One appears outside the Cottage, another further north near East View Cottage and two more further south, outside Old Vine and Rangers Cottage.

4. Until around 2007, the Cottage and the Retained Land were part of one title and used as one plot.

5. Title to land containing the verge is now divided and as it has been since at least November 2018. The northern part is owned by the Respondents. That is the stretch between the southern boundary of Old Vine Cottage and the extreme northern point, where it tapers of next to Birch Cottage. The Second Respondent also owns the Cottage and both Respondents own Old Vine Cottage.

The Application

6. An application, dated 14th June 2018, was made to Land Registry to change the register of title numbers SY220543 (the Retained Land) and SY829362 (the northern verge in the ownership of the Respondents: the southern part of the verge is registered under title number SY849295) in the following manner:

> *"Registration of the benefit and noting the burden of an easement, being a right of way on foot and with vehicles for the benefit of the applicant's land (title number SY220543) ("the Property") over that part of the land edged in green on the plan annexed to each of the statutory declarations listed in panel 5 (title number SY829362) that immediately abuts upon the Property parking on this area whenever necessary"*

7. Two statutory declarations accompanied that application, one from Peter Cross, the other from his daughter, Amanda Davies-Cross. Mr Cross's was dated 18th May 2018 and he declared that for periods since 1958 he had resided at the Cottage, had owned it in 2006 and disposed of it in 2007. In that time, he declared that he had

> *" ... gained access to it on foot and with vehicles over the land edged in green on the attached plan and in particular by walking and driving along that part of the land edged in green that immediately abuts upon the land edged in red parking on this area whenever necessary ..."*

8. The plan attached shows the Cottage and the Retained Land as one parcel edged red and part of the verge described above outlined in green; but only up to just past East View Cottage to the north and south to the end of Pear Tree Cottage. In that respect, it covers land that is outside of title number SY829362 (being the southern part, past Old Vine Cottage) and does not cover all the land within that title (being the northern part, past East View Cottage). For one stretch the green area abuts the red outline of the Cottage, roughly along the line of the Retained Land.

9. Mrs Davies-Cross's declaration is dated 1st June 2018. She declares that she visited the Cottage regularly and first drove there in around 1968 and then

regularly drove there from around 1982. She acquired Hawthorn Cottage from her father in 2006, sold that part containing the cottage in 2007, but retained the Retained Land to the north in 2016. She declares that between 2007 and 2016 she used the Retained Land *'for storage purposes'*. She then repeats the quote set out above from her father verbatim.

10. In response to requisitions from the registrar, the Applicant stated

> *"We no longer wish to include a right to park in our application and limit it to a right of way (vehicular and pedestrian)"*

And

> *"We do not require an entry to be made on the register of title number SY849295"*

11. On 14th August 2019, the Land Registry wrote to the Respondents about the application, which they stated was for a right of way; this was a B13 notice, notifying the Respondents of an application affecting their land. In light of the response to requisitions, they did not state that there was any claim for parking; as there was none at this time. In terms of the proposed note to be placed on title, it was to be

> *"The land edged blue on this title plan is subject to a right of way with or without vehicles for the benefit of land on the north side of Hawthorn Cottage. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen.*
>
> *NOTE 1: The land in this title is not subject to the parking right that is referred to in the Statutory Declarations below."*

12. The land edged blue on the plan is the within the Respondent's part of the verge.

13. The Respondents objected, in doing so they stated '*Peter Cross in his declaration that he had resided at Hawthorn Cottage since 1958 for*

'extensive periods' without clarifying exactly when those periods were, and whether there had been any breaks in those periods. We will require this to be clarified.'

The Referral

14. Given the Respondents objection to the application, the matter was referred to the Tribunal. The draft case summary provided by the Land Registry on referral did not make any mention of a claim for parking. The Applicant did not seek to amend that summary. Directions were given which provided for the parties to file statements of case. The Applicant's statement of case starts

> *"The Applicant seeks to register an easement (with and without vehicles and including a right to park) over the area edged in green on the plan at document 3 ('the land')"*

15. Document 3 was a reference to statutory declaration of Peter Cross mentioned above. So at this stage, despite the answers to requisitions removing the claim to park and the extension of the claim to outside the Respondent's land, the Statement of Case sought to reintroduce those two points. It is unclear at what point or why the Applicant decided to change its mind in relation to the easements or whether this was simply an oversite.

16. A further change occurred in my attempts to clarify the scope of what was being claimed in that although the Applicant confirmed that they were not claiming a right of way over the southern part of the verge, they were now claiming land to the north, i.e. a the part from the north of East View Cottage up to Birch Cottage. This was even though this was outside of the green area marked on both statutory declarations.

17. In terms of the extent of the parking right sought, it was clarified that it was only to that area of land immediately adjacent to the Retained land as it abuts the verge.

Scope of the application

18. Given the changing nature of the application, I was concerned over the jurisdiction of this tribunal to determine issues that were not pursued in the original application to the Land Registry; both parking and the northern tip of the verge. It is clear that at the time of the reference both from the requisitions, the B13 notice and the case summary, that there was no claim at that time for a parking easement or for the northern tip.

19. The Upper Tribunal in *Hallman v Harkins* [2019] UKUT 245 (LC), considered this Tribunal's jurisdiction in the context of claims to beneficial interests in land and whether the Tribunal was limited to just determining whether any interest had been established rather than the quantification of that interest. In finding that it was the former, the Deputy Chamber President stated:

> *"54. The jurisdiction of the FTT has been determined by Parliament and is defined, in this instance, by the Land Registration Act 2002 ("LRA 2002"). ...*
>
> *57. Subject to exceptions which are not relevant in this case, section 73(1), LRA 2002 permits anyone to object to an application to the Registrar to enter a restriction. Where an objection is received which the Registrar is not satisfied is groundless, and which it is not possible to dispose of by agreement after notice has been given to the applicant, section 73(7), LRA 2002 provides that "the registrar must refer the matter to the First-tier Tribunal".*
>
> *58. Section 73(8) provides that rules may make provision about references under section 73(7) . The Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003 lay down the procedure to be followed. The Registrar is required by rule 3 to prepare a case summary containing details of the disputed application and of the objection to it. The case summary must then be sent to the FTT together with a written notice "stating that the matter is referred to the First-tier Tribunal under section 73(7) of the Act" and the parties must be so informed (rule 5(2)).*

59. Part 11, LRA 2002 is concerned with adjudication. The functions to be performed by the FTT are identified by section 108(1) which provides that:

> *"The First-tier Tribunal has the following functions –*
>
> *(a) determining matters referred to it under section 73(7) , and*
>
> *(b) determining appeals under paragraph 4 of Schedule 5 ."*

60. The limit of the FTT's relevant jurisdiction is defined by these functions and is therefore confined to determining the "matters" referred to it by the Registrar ..."

20. This Tribunal is therefore limited to dealing with the matter referred to it; what is meant by 'matter'? In *Inhenagwa v Onyeneho* [2018] 1 P & CR 10, Ch D, Morgan J stated, at para 42

> ' "The matter" referred to the adjudicator is defined in the notice of referral given under r.5 of these Rules'.

21. Morgan J provides a similar explanation in *Lowe v William Davies Ltd* [2018] 4 WLR 113, UT (LC) in the context of a boundary dispute. In that case, as well as the process from application to referral, he also referred to the closing stages, namely what this Tribunal is empowered to do with regard to the referral under Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which provide:

> *"(1) The Tribunal must send written notice to the registrar of any direction which requires the registrar to take action.*
>
> *(2) Where the Tribunal has made a decision, that decision may include a direction to the registrar to—*
>
> *(a) give effect to the original application in whole or in part as if the objection to that original application had not been made; or*
>
> *(b) cancel the original application in whole or in part.*
>
> *(3) A direction to the registrar under paragraph (2) must be in writing, must be sent or delivered to the registrar and may include—*

(a) a condition that a specified entry be made on the register of any title affected; or

(b) a direction to reject any future application of a specified kind by a named party to the proceedings—

(i) unconditionally; or

(ii) unless that party satisfies specified conditions."

22. If I were limited to rule 40 (2), then I think it would be clear that even if I had jurisdiction to make findings as to the substance of the dispute, I would be limited to simply saying yes or no to the application that was before the Land Registry at the moment it was referred to me and that would inform as to the content of the 'matter'; i.e. as to whether to permit the proposed note on title set out in the B13 notice. At that point, the referral did not contain any application in relation to parking or the northern tip.

23. However, Rule 40 is more nuanced than that. It goes on to provide at rule 40(2) that I can direct the registrar to give effect to the application 'in whole or in part' and under rule 40 (3) I can add a condition to the direction.

24. The cases dealing with jurisdiction referred to above fall into two categories; boundary disputes and beneficial interest cases. In the first type of case, in order to determine whether the application is made out, the tribunal will have to determine where the boundary is (save possibly where it is said that the plan is inaccurate), in those circumstances, rule 40(2) and (3) can be utilised in effect to: a.) determine whether part of the application is made out and if so b.) stipulate, as a condition, for that part not made out, where the remainder of the boundary is. An example is found in *Bean v Katz* [2016] UKUT 168 (TCC), where Judge Cooke, on noting that the Judge at first instance had found that part of the plan was accurate, said, at paragraph 26

"Accordingly success or failure may be in whole or in part. And Rule 40(3) above enables the First-tier Tribunal to add a condition to its direction. As to the small section where the line determined by the First-tier Tribunal differed from the Applicants' line, I take it that the direction to the registrar to give effect to the application included a

condition that a specified entry (the line along the right angle) be made on the register in accordance with rule 40(3) above."

25. By contrast, beneficial interest cases, as in *Hallman*, do not require the tribunal to ascertain the quantification of any interest. Significantly, given that the register cannot record the quantum of any interest, any finding the Tribunal makes in that regard could not impact the register and following *Hallman* that issue is outside the jurisdiction of the Tribunal.

26. In my judgment, both the additional claims fall within the 'matter', given that in determining the underlying substance of the dispute I am asked to consider the extent of the use over the verge and whether any prescriptive rights have arisen from them. In that respect, this is more akin to the boundary type cases, than the beneficial interest ones. Further, if I find that at least part of the application is made out as it existed on referral, then any condition that I make in respect of either additional claim would fall within both the broad context of what the Registrar has proposed as a note on title and within what can be registered on title.

27. With that preliminary point out of the way, I then turn to the facts of the case.

Background

28. The following facts appear to be relatively uncontentious and help to form a background to the issues that I have to determine.

29. From at least the 1950s the Cottage (which then included the Retained Land) was occupied and owned by May, Florence and Beatrice. At some point May purchased a car, probably around the early 1950s, but could not drive at first.

30. Mr Cross lived nearby and would visit them regularly. Although it appears he was not related to them, they were like a family. When his father died in 1952 he went to live with them until 1960 when he got married and moved out to Gomshall, which is a few miles north of Peaslake.

31. Beatrice outlived Florence and when she died in 2006 she left the cottage to Mr Cross who after a year passed it onto his daughter.

32. By a transfer dated 19th November 2007, Mrs Davies-Cross transferred the Cottage to Glyn Jarvis and Sabine Carraud, but retained the Retained Land and reserved out of that transfer a right to pass 'on foot only over the area of land shown coloured brown on the plan'. The plan shows two coloured areas, however only one is over the transferred land which enabled access to the Retained Land on foot only.

33. From around the 1950s at least, cars would be driven over the verge to access the properties that run adjacent to it. This is clear from the construction of a number of bridges over the ditch (which are of sufficient width to permit vehicles) and is a practice that has continued in various forms to date. Further, from time to time cars would be also parked on the verge.

34. The Bray estate, which had owned the land until around 2016, had not objected to driving over the verge and parking had only relatively recently become an issue that the Parish Council had taken up.

35. In 2011, the Respondents purchased Old Vine Cottage and in 2014, the Second Respondent purchased the Cottage from the Mr Jarvis and Mrs Carraud.

36. In 2016, Mrs Davies-Cross sold the Retained Land to the Applicant. Title to that property notes that it has the benefit of a right of way over the land tinted brown on the attached plan. That shows a broad strip running east/west across the verge running to the Cottage. When taken with the reservation in the 2007 transfer referred to above, this would give access to the Retained Land from the road; albeit the latter stretch on foot only.

37. In February 2016, the Respondents, together with the owners of Rangers Cottage, purchased the verge, subject to a lease to the Parish Council. In 2017, they divided up ownership with the Respondents retaining the northern part.

38. What was less clear and in parts contentious was the extent to which the use of the verge had been in connection with: the Cottage (for the period in which it included the Retained Land); and for the period after 2007, in connection with the Retained Land. A distinction also needs to be drawn between a right of way to pass and repass and an easement to park on parts of the verge, particularly that part adjacent to the Retained Land.

Evidence

39. I heard evidence over two days. For the Applicants, I heard from Peter and Amanda Cross, Mr Goddard and Mr Murray.

40. The witness statements supplied in support of the application were a little lacking in detail. Unfortunately some of the detail they did contain was undermined or made less clear by the oral evidence.

41. Mr Cross's witness statement provided the following:

    a. In 1953, when he was living at the Cottage he purchased a motorbike and would drive it over the verge and park there;

    b. He moved out in 1960 when he married but continued to visit 3-4 times a week;

    c. Produce was sold from outside the Cottage and customers would drive over the verge and park there whilst shopping. Although, it is not clear what dates this relates to;

    d. In 2005, he inherited the Cottage, which was in need of renovation, which he carried out. In doing so he drove his van over the verge and parked there. He then gave the Cottage to his daughter.

    e. From 2007 until 2016, when the Applicant purchased the Retained Land, he would visit 4-5 times a week to keep the grass trimmed and would use the verge for driving and parking.

42. From his written evidence, the frequency and type of any activity over the verge was not clear. It was also not clear how long was produce sold from

outside the Cottage? It also appears that given he gave the Cottage to his daughter in 2006, who then sold it in 2007, that the van use for renovation could only have lasted for around 2 years.

43. In oral evidence, Mr Cross had some difficulty in recalling events spanning around 70 years. No criticism is made of him for that; it is entirely understandable. What he did add was as follows:

a.

b. In 1960, he moved to Gomshall, which was about 1 ½ miles away;

c. Between 1960 and 1962 he continued to do the gardening at the Cottage, which was why he would visit around 4-5 times a week in those years. He also had around 100 beehives between his home in Gomshall and Cottage which he would visit en-route;

d. From 1963 he would still visit and would come with his van and carry out any maintenance that Florence and Bea wanted. He would visit 2-3 times a week as they were like his parents;

e. May had a car that he would drive. He had not mentioned that in his statement because he was concerned that he had done something wrong (which appeared to relate to a lack of licence, but the point was not clarified);

f. He had laid rubble and shingle down on the surface of parts of the verge in order to facilitate driving and parking;

g. He had never meet Mr Moon at the Cottage, but he would go early in the morning to collect items from the shed and would never see anyone;

h. From 2007, he employed someone to maintain the retained land about 1-2 times a year until it was sold.

44. I remained unclear about the extent of any vehicular use over the verge over the years since 1953. When I asked him how he would get to the Cottage from his home in Gomshall from 1960 onwards, he said it was by pushbike.

45. In her witness statement, Mrs Davies-Cross, stated:

    a. She visited the Cottage every year for Christmas between 1967 and 2003 with her parents who would park their Hillman Imp on the verge outside the Cottage as would her aunt and uncle;

    b. As a young girl she would play on the verge and cycle on it and ride along it when visiting with her boyfriend;

    c. She has been parking on the verge since 1982;

    d. She moved to Devon in 1984;

    e. She visited her father when he inherited the Cottage and noted he had parked his van and cars on the green when he was living there;

    f. She acquired the Cottage in 2006 and parked her cars on the verge and as her daughter was in school in Surrey she stayed at the Cottage frequently;

    g. She sold the Cottage in 2007, but kept the Retained Land and would go there about three times a year and her father continued to look after that land;

    h. In 2016 she sold the Retained Land to the Applicant;

46. She supplemented the details in her written statement, with her oral evidence with the following:

    a. The area over which parking occurred was generally right outside the gate and along the wall which is part of the eastern boundary of the Cottage. She would park by the wall in front of the Cottage, although it was in a precarious condition;

b. Between 1979 and 1983 she drove a motorcycle along the verge and would drive her Fiesta car through the very narrow gap at the northern tip of the verge between the wall and the culvert;

c. Over the years she had parked all her cars on the verge and had driven over all the bridges;

d. Since she moved to Devon in 1984 and up to 2003, she would visit a minimum 2 times a year, for Christmas and Easter and probably at least 3 times;

e. Shortly before selling, she used the Cottage as a second home and was considering moving back to the area and had enrolled her daughter in a school in Reigate;

f. After she sold in 2016, she visited 2-3 times a year as she had kept some items in the sheds;

g. May had driven until her death in 1983;

h. She had split the title in 2007 as she had intended to build another cottage on the Retained Land to live in. She considered that it was foolish in retrospect not to have formalised the rights of way now claimed at that time. Her then solicitor had suggested taking more land to enable a vehicular right of access but she had said no. That is why it was limited to a right of way through the gates through the Cottage to the Retained Land.

47. Stuart Murray is an estate agent who has known Mrs Davies-Cross for a number of years and assisted her with the sale of the Retained Land to the Applicant in September 2016. His evidence was that he had visited the property around 30 times since around March 2016 and on many occasions had parked on the verge. He provided some photographs which showed his car parked on the verge adjacent to the boundary with the Retained Land. Finally, Mr Goddard, who is said to be the beneficial owner of the Applicant said he agreed with what Mr Murray had said in his statement.

48. There were 14 witness statements for the Respondents. However, only 4 gave evidence. I heard from Jonathan and Nathalie Moon, Mrs Jarvis and Mrs Lashari.

49. Sabine Jarvis, who had owned the Cottage prior to Mrs Moon and had purchased it from Mrs Davies-Cross said in her statement that she lived at the Cottage between 2007 and 2014. She only saw Mrs Davies-Cross once, when she purchased the property and that was despite having spent two periods of maternity leave at the Cottage. She had only seen Mr Cross a couple of times and the Retained Land had been overgrown during her residence in the Cottage. She recalled some parking on the verge and that Mr Cross had parked on the verge. She would also park outside her property, against the wall. If that area was taken then parking would take place further north or south.

50. Mr Moon's evidence was largely from the date of his purchase of Old Vine Cottage in 2011. He had not seen anyone attend the Retained Land, which was overgrown. He had attempted to contact Mr Cross on occasion to discuss the Retained Land, but to no avail.

51. Mrs Moon gave similar evidence, save that she had seen Mr Murray on one of his visits and had a short conversation with him. She recalled that on that occasion he had parked on the road and not on the verge.

52. Fiona Laskaris has lived at East View Cottage since April 1989. She had never met Mr Cross or Mrs Davies-Cross and had never seen anyone driving over or parking on the verge. In oral evidence she did say that she had driven along part of the verge from time to time and parked there. More latterly she mentioned that the Parish Council were not happy about parking on the verge.

53. The other statements were in a similar vein and were short accounts of matters from around 1989 onwards, but predominantly from around 2007. Each suggests that the historical activity asserted by the Applicant is exaggerated or simply wrong. Mr Carter of 3 Rose Cottages (the otherside of Ewhurst Road) said that he had seen Mr Cross visit but never with a

vehicle. Ann Klohs who used to live at the Cottage for a few years in the late 60s did not recall Mr Cross attending as much as 3 to 4 times a week. I bear in mind that I did not have the advantage of hearing oral evidence from these witnesses and so take that into account in terms of the weight that I attach to their evidence.

Conclusion on the evidence

54. Without relying too heavily on the balance of probability, it is still the Applicant's task to establish the evidence that is said makes out their case.

55. Whilst I can readily accept that vehicular use has been made over the verge and parking, I have struggled with whether there is sufficient detail to make out the periods of time in which that occurred, which property it related to and, particularly in respect of parking, over which area.

56. Firstly, in relation to a right of way with vehicles, the evidence established the following:

    a. From 1953 to 1960s, there was some vehicular use over the verge in respect of the Cottage by Mr Cross;

    b. From the 1960s it was far from clear what pattern of use, if any, there was from Mr Cross. The level of use of vehicles was not clear, particularly given that he also rode a bicycle. Further there was insufficient evidence of any driving that May did on the verge or any parking to be of assistance;

    c. The most reliable evidence as to the consistency and nature of use came from Mrs Davies-Cross. Between 1967 and 2003, at least once a year, for Christmas, either her father or later she would drive to the Cottage and park on the verge. In oral evidence this was expanded to certainly Easter as well and then possibly one other occasion.

57. I was troubled by the fact that since 2007 when the Cottage was sold, save for Mrs Jarvis, the Respondents' evidence was clear in that no one had seen either Mr Cook or Mrs Davies Cook driving along the verge or parking

there. In terms of Mrs Laskaris, this went back to 1989. Whilst I can readily accept that no one was keeping a 24 hour vigil on the use of the area, I would have thought that their activities would have been noted. It is also consistent with the fact that save for a period up to 1960, neither Mr Cross or Mrs Davies-Cross was living at the Cottage, they were visitors.

58. In my view the combined evidence of Mr Cross and Mrs Davies-Cross supported a conclusion that from around 1967 to 2003 the verge was used for access to the Cottage with vehicles with a frequency of at least 2 to 3 times a year if not more.

59. In relation to the easement of parking, the frequency and nature was far less apparent. Firstly, it appeared that any parking on the verge was only occasioned when it wasn't possible to park inside the curtilage of the various cottages; because a car was already parked there. Secondly, in respect of the actual area claimed, being adjacent to the Retained Land, there was even less evidence of when this occurred. That seemed to be the option of last resort. So that Mrs Davies-Cross was only able to say that she parked there when it wasn't possible to park along the wall outside the Cottage. Whilst Mr Murray had parked in that spot, that was only from 2016.

Easements claimed

60. The Applicant claims both a right of way and an easement of parking as described above. The first basis it is claimed is by way of the doctrine of lost modern grant. The Court of Appeal in *Tehidy Minerals Ltd v Norman* [1971] QB 528, 552 said

> *"In our judgment Angus & Co. v Dalton decides that, where there has been upwards of 20 years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the 20 year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a*

grant was made, in spite of any direct evidence that no such grant was in fact made."

61. In terms of what is required to make out a prescriptive claim, they are that the use must be without force, secrecy or permission.

62. A further consideration is what amounts to sufficient continuity of use. The use must be sufficient to bring to the attention of a reasonable person in possession of the land over which the right is claimed, that the right is being exercised. In *Diment v NH Foot Ltd* [1974] 1 WLR 1427, a right of way exercised for 6 to 10 times a year was sufficient to establish the claim. In *Hollins v Verney* (1883-84) L.R. 13 QBD 304, the Court of Appeal suggested that in some circumstances one a year for a sufficient number of years would be enough.

63. It follows from my conclusions on the evidence, that subject to the further complications set out below, the evidence is just sufficient to establish use for a period of 20 years to make out an easement for vehicular access across the verge to the Cottage (at the time it included the Retained Land).

64. However, the same is not the case for any right of parking claimed adjacent to the Retained Land. There was very little evidence of that occurring. Counsel for the Applicant contended that although the claim related to a small area outside the Retained Land, that fell within a wider area over which parking had been established by long user. I do not agree. What the evidence established was potentially a right to park outside the wall to the Cottage (even then I do not think that there was sufficient evidence of continuity), it certainly did not come close to establishing a right further north outside the Retained Land or indeed a general right to park anywhere on the verge.

65. A final point on this issue is the extent to the north over which the right is claimed. I do not consider that there was sufficient evidence to establish a right of way over the northern tip of the verge. Whilst Mrs Davies-Cross did say she had driven her Fiesta through the narrow gap by the side of the culvert, there was no evidence as to the frequency of that route. Having

viewed the site, it strikes me as odd that anyone would want to try and fit through a very narrow gap when the road is available. Further, I note that it falls outside the area originally claimed on the referral.

Retained Land

66. The right established was in relation to the Cottage when it contained the Retained Land. This gives rise to two considerations: did the splitting of the land convey the easement to both parts, even though the easement appeared to be predominantly to access the Cottage itself, rather than the Retained Land; and what is the extent of the user if it did pass and could the intended use amount to excessive user.

67. In relation to the first, I do consider that it did pass. An easement ostensibly attaches to all the land in the title and there is nothing on the facts of this case which lead to me to consider otherwise.

68. As to the second, I agree with counsel for the Applicant that this is a matter that is not for me to decide. If an entry is to be made on the register to reflect a prescriptive easement, then that records just that and the nature and extent of the use is dictated by that.

Subsequent sale

69. The final issue engages the impact of s.29 of the Land Registration Act 2002, which provides that an unregistered interest can be defeated by a subsequent sale.

> *"Section 29 Effect of registered dispositions: estates*
>
> > *(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.*

(2) For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

(i) is a registered charge or the subject of a notice in the register,

(ii) falls within any of the paragraphs of Schedule 3 ...

70. As the easements were not registered at the date of the sale to the Respondents in February 2016, the Applicant needs to come within Paragraph 3 of Schedule 3, which provides:

(1) ... which at the time of the disposition—

(a) is not within the actual knowledge of the person to whom the disposition is made, and

(b) would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable.

(2) The exception in sub-paragraph (1) does not apply if the person entitled to the easement or profit proves that it has been exercised in the period of one year ending with the day of the disposition."

71. The Applicant accepted that it had not been registered and so they needed to bring themselves within one of the exceptions set out above. It was accepted that paragraph 3 (1)(a) did not apply in this case; it not being suggested that the Respondents had actual knowledge of the easements claimed. Reliance was placed on 3 (1)(b) in that it would have been obvious on a reasonably careful inspection.

72. I do not agree with that contention. Even by the time the Respondents first came to the area (which was said to be when they visited the Jarvis), the Retained Land was to the outside world almost derelict. Even if they had

been aware of others using the verge to access their properties or driving over it, there was nothing to suggest that they were aware of any activity in relation to the Retained Land. Further, neither Mr or Mrs Moon had seen anyone parking by the side of the Retained Land on the verge or even driving on the verge to then access the Retained Land.

73. That leaves an exercise of the right within one year of the purchase under paragraph 3 (2). I was less certain on this aspect. There was no specific evidence as to what occurred between February 2015 and February 2016 when the sale occurred. Reliance was placed on the evidence of Mrs Davies-Cross that she visited the retained land around 2 to 3 times a year.

74. In light of my findings that she did visit, albeit sporadically, in my view this exception is made out in relation to the right of way, but not to parking. It is too uncertain where she parked over the years, let alone whether on the couple of occasions she visited in this period, that it was on the area claimed. So that even if I were wrong about the establishment of a parking easement, it would not survive the subsequent sale.

Conclusion

75. The Applicant has made out a prescriptive right to pass over that part of the verge in the ownership of the Respondents, but not including the northern part. However, no right to park is made out.

76. I will accordingly direct the Registrar to allow the application and make an entry on the register as suggested in the B13 notice.

77. If either party wishes to claim their costs, then they must make such an application within 28 days of receipt of this decision setting out both the basis of the application and a schedule of costs incurred since the date of referral to this Tribunal (not the date of the application to Land Registry). In the event that any application is made, the other party has 14 days to submit any response and thereafter any reply to that response must be submitted within 14 days.

Judge Dovar

Dated this 15th November 2019

By order of the Tribunal