Neutral Citation Number: [2024] UKUT 00153 (LC)

Case No: LC-2023-684

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: 2022/0118

14th June 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Land Registration – Easements – claim to the acquisition of a right of way by prescription – what is required to prevent the use relied upon being use as of right – appeal against decision of the First-tier Tribunal that the wording of a sign erected on the servient land had been insufficient to prevent the use being as of right – cross appeal against the decision of First-tier Tribunal that the sign could have been read by anyone making their way over the servient land – decision that the First-tier Tribunal had been entitled, on the evidence, to find that the sign could have been read by anyone making their way over the servient land – cross appeal dismissed – decision that the First-tier Tribunal had been wrong to decide that the wording of the sign had been insufficient to prevent the use being as of right – appeal allowed and decision of the First-tier Tribunal re-made as a decision that the Respondents were not entitled to a right of way over the servient land on the basis of prescription

BETWEEN:

ADAM THOMAS NICHOLSON (1)
GAVIN STAFFORD (2)

Appellants

-and-

IAN REGINALD HALE (1)
JACQUELINE HALE (2)

Respondents

4 Derby Terrace,
The Park,
Nottingham,
NG7 1ND

The Chamber President, Mr Justice Edwin Johnson
14th May 2024

Paul Wilmshurst, instructed by direct access, for the Appellants
The First Respondent (Ian Hale), in person, for the Respondents

The following cases are referred to in this decision:

Edwards v Bairstow [1956] AC 14

R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council [2010] EWHC 530 (Admin)

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

Winterburn v Bennett [2016] EWCA Civ 482 [2017] 1 WLR 646

R (Lewis) v Redcar and Cleveland Borough Council [2008] EWHC 1813 (Admin)

Oxfordshire County Council v Oxford City Council [2004] EWHC 12 (Ch) [2004] Ch 253

Taylor v Betterment Properties (Weymouth) Ltd v Dorset CC [2012] EWCA Civ 250 [2012] 2 P&CR 3

Betterment Properties (Weymouth) Ltd v Dorset CC [2010] EWHC 3045 (Ch)

Southwark London Borough Council v Transport for London [2018] UKSC 63 [2020] AC 914

R (Barkas) v North Yorkshire County Council [2014] UKSC 31 [2015] AC 195

Regina (Newhaven Port & Properties Ltd) v East Sussex County Council [2015] UKSC 7 [2015] AC 1547

R (Beresford) v Sunderland City Council [2003] UKHL 60 [2004] 1 AC 889

Introduction

1. This appeal raises an interesting question on the nature and terms of signage which are required in order to prevent the acquisition of a right of way by prescription.

2. The Appellants are the freehold owners of a property known as 4 Derby Terrace, Nottingham NG7 1ND (**"Number 4"**). The Respondents are the freehold owners of a property on the same terrace of properties, next door but one to Number 4, which is known as 6 Derby Terrace, Nottingham NG7 1ND (**"Number 6"**).

3. On 17th September 2021 the Respondents applied to the Land Registry for registration of a right of way over an area at the front of Number 4 (**"the Application"**). The Respondents' case was that they have acquired the right of way by prescription. The Appellants objected to the Application. As I understand the terms of this objection, the Appellants' case, or a key part of the Appellants' case was that there was a sign on the relevant part of Number 4, adjacent to an open set of steps or staircase, which had been effective to prevent the acquisition of a right of way by prescription.

4. By reason of the Appellants' objection to the Application, the Land Registry referred the Application to the Property Chamber of the First-tier Tribunal (**"the FTT"**) for determination. The reference was made on 21st February 2022. The Application was heard before Judge McAllister (**"the Judge"**) on 27th June 2023.

5. By her decision on the Application, dated 20th July 2023 (**"the Decision"**) the Judge found that the relevant area of Number 4 had been used, for the benefit of the owners and occupiers of Number 6, for a period of 20 years and more from no later than 2nd December 1996. So far as the sign was concerned, the Judge found that the sign would have been visible to those going up the steps on Number 4, but decided that the wording of the sign was insufficient to prevent the acquisition of a private right of way.

6. With the permission of the Judge the Appellants appeal against the Decision, on the basis that the Judge was wrong to decide that the wording on the sign was insufficient to prevent the acquisition of a private right of way (**"the Appeal"**).

7. There is also a cross appeal. The status of the cross appeal (**"the Cross Appeal"**) is uncertain, in the sense that there is a question mark over whether permission has been granted for the Cross Appeal. Subject to this question, what the Respondents wish to argue, by way of the Cross Appeal, is that the Judge was wrong to find that the sign would have been visible to those using the relevant part of Number 4. As such, the sign was not effective to prevent the acquisition of a private right of way, whatever the effect of the wording of the sign.

8. At the hearing of the Appeal the Appellants were represented by Mr Paul Wilmshurst, counsel instructed on a direct access basis. The Respondents appeared in person. Mr Ian Hale acted as advocate for the Respondents at the hearing of the appeal. The Respondents are both solicitors. As such, Mr Hale was at no professional disadvantage in acting as advocate. It is however right that I should record the clarity and economy with which Mr Hale made his oral submissions. I am grateful to both advocates for their assistance in their oral submissions and (in this case including Mrs Jacqueline Hale, the Second Respondent) in their written submissions.

9. I should also mention that Mr Wilmshurst did not appear at the hearing of the Application before the Judge (**"the Hearing"**). The Appellants were represented by different counsel, Mr Taylor, although I do not think that anything turns on the change of counsel. The Respondents appeared in person at the Hearing.

The conventions of this decision

10. In this decision all references to Paragraphs are, unless otherwise indicated, references to the paragraphs of the Decision. Where I quote from the Decision it should be kept in mind that the Respondents were the Applicants before the Judge, while the Appellants, as respondents to the Application, were the Respondents before the Judge.

11. Italics have been added to quotations in this decision.

The properties

12. An understanding of the topography of Number 4 and Number 6, and the immediately surrounding areas is essential to understanding the issues which have to be resolved in the Appeal and, subject to the question of its status, the Cross Appeal. For this reason I need to spend some time explaining the topography. My knowledge of the topography comes from the Judge's helpful description in the Decision itself and from the evidence which was before the Judge. This evidence principally comprised plans, photographs and a virtual tour of the relevant areas filmed, with a commentary, by the Appellants.

13. Derby Terrace comprises a terrace of properties which were originally built in the 1830s. The terrace (**"the Terrace"**) is Grade II listed. Each property in the Terrace is three storeys high, with a basement and attic. The construction of the properties (**"the Properties"**) is such that their grounds floors are at an elevated level, in relation to the public highway, Derby Road, which runs adjacent to the Terrace. As a result, the basement of each Property is on the same level as Derby Road, while the front door of each Property (on the ground floor) is at an elevated level. The Terrace stands on what is roughly an east-west axis.

14. I believe that the Properties are, or at least were originally numbered 1-9. In any event Number 4 and Number 6 retain their original numbering. I will use the same numbering to refer, individually, to the remainder of the Properties. Number 1 therefore refers to the Property which is located at the western end of the Terrace, and so on to Number 9, which refers to the Property located at the eastern end of the Terrace.

15. Access to the Properties, at ground floor level, is obtained by means of a raised walkway which runs along the front of the Properties (**"the Walkway"**). As matters now stand, access to the Walkway is obtained at the eastern end of the Terrace. One passes in front of a building called *"the park Octagon"* and proceeds on to the Walkway itself. I understand, from the evidence which I have seen, that the Walkway runs only as far as Number 2. I understand from this evidence that the Walkway does not extend to the frontage of Number 1, at the western end of the Terrace.

16. Certain of the Properties have been built out, at their front basement level, so as to extend to the edge of the pavement of Derby Road (**"the Pavement"**). I understand, from the

evidence which I have seen, that this is the case in respect of Number 9, Number 3 and Number 2. Where the Walkway passes in front of these Properties it is considerably wider, occupying what I assume to be the roof of the extended front basement areas of these Properties. Where the Walkway passes Numbers 8, 7, 6, 5 and 4 (proceeding along the Walkway from east to west) it is narrower. There is a gap between the edge of the Walkway and the front elevation of each of the Properties, with the exception of Number 1 to which the Walkway does not extend. Access across this gap to the front door of each of these Properties is obtained by a spur (or bridge) from the main part of the Walkway to the relevant front door. It follows that where the Properties have been built out at their front basement level, so as to extend to the edge of the Pavement, there is a gap between the built out area and the main part of the basement of each Property. The Pavement itself is part of the public highway on Derby Road.

17. A photograph of the Terrace dating from 1900 discloses that each of the Properties was then built out at front basement level, so that each Property, at basement level, extended to the Pavement. Above these extended basements was a railed off area, running the length of the Terrace, which the Judge described as a carriageway; see Paragraphs 9 and 10. At some point however these extended basement areas were demolished and were either replaced by new extended basement areas or were left as open areas. What had been the carriageway was replaced by the Walkway which, as I have explained above, does not run along the entire length of the Terrace and is fairly narrow where it passes in front of Numbers 8, 7, 6, 5 and 4.

18. The consequence of this is that, in the case of Numbers 5-8, there is an open paved area of what might be described as forecourt between the Pavement and the actual basement of these Properties. In the case of Number 6 this area of forecourt, title to which is unregistered, runs back from the Pavement under the Walkway. Adjacent to the edge of Walkway, on the side of the Walkway nearest to the front elevation of Number 6, there is a barrier comprised partly of a brick wall and partly of railings. A gate in the railings gives access to the open area, at basement level, between the Walkway and the actual basement of Number 6. I believe that there is a similar arrangement at basement level in the case of Numbers 5, 7 and 8.

19. In relation to Number 4 the position is now different. I will explain the previous position, in relation to Number 4. in the next section of this decision. As matters stand what was the forecourt area of Number 4, that is to say the area between the Pavement and a line drawn somewhere beneath the Walkway, where the Walkway passes Number 4, has been enclosed and converted into a front garden, comprising paved areas and plant beds. The enclosure has been achieved by erecting a brick wall at the front of this area, separating this area from the Pavement, with a door in the wall giving access on to the Pavement, and by erecting a brick wall on the eastern side of this area, separating this area from the forecourt area of Number 5. On the western side enclosure is achieved by the pre-existing external brick wall of the basement structure at the front of Number 3. I will refer to this pre-existing external brick wall, which encloses the garden on its western side and predates the creation of the garden, as **"the Wall"**.

20. The freehold title to Number 4 is registered under title number NT435727. The registered proprietors are the Appellants. The area of the enclosed garden is shown coloured blue on the registered title plan. In common with the Judge I will refer to this area of what is now an enclosed front garden as **"the Blue Land"**.

21. The Walkway is owned by a company called Nottingham Park Estate Limited (**"the Company"**). I understand that the Walkway is owned as a flying freehold, which I assume reflects the fact that the airspace and structures below the Walkway are not within the Company's title. I was told that the Company owns a substantial estate of land in Nottingham. I was also shown a plan which shows the Walkway and other roads in the vicinity which are in the Company's ownership.

22. I am attaching a plan to this decision, as an Appendix, which shows the position of the Terrace and the locations of Number 4 and Number 6.

The Blue Land

23. I understand that the Appellants acquired the freehold interest in Number 4 in May 2020. In July 2020 the Appellants applied to the Land Registry for their registration as owners of the Blue Land title to which was, I assume, formerly unregistered. This application was successful and, as I have said, the registered title to Number 4 now includes the Blue Land.

24. The Appellants have carried out a substantial refurbishment/restoration of Number 4. I assume that it was as part of this refurbishment/restoration that the walled garden on the Blue Land was created.

25. Prior to the refurbishment/restoration the Blue Land comprised a paved area of forecourt at the front of Number 4, similar to the forecourt areas of Numbers 5-8. In the case of the Blue Land however there was a railed metal staircase, with open treads, which ran from the surface of the Blue Land up to the Walkway. This staircase (**"the Staircase"**) ran in an east to west direction, parallel with the Pavement and with the Walkway where it runs in front of Number 4. The Staircase ascended from a point in the middle of the Blue Land to a top step giving access to a point on the Walkway located at the corner of the roof of the basement structure in front of Number 3. A person reaching the top of the Staircase and turning to the left would have come, within a few steps, to the front door of Number 4.

26. The Staircase was demolished as part of the works to create the front garden on the Blue Land. The Judge found that the Staircase was removed, without warning, on 29th November 2020 by the Appellants, and has not been replaced; see Paragraph 5.

The Sign

27. There is, located on the Wall, a sign (**"the Sign"**). The Sign is located close to the top of the Wall and at a level around about the height of the top step of the Staircase, when the Staircase was in place.

28. The Sign is fairly small, occupying what looks like not much more than the face of a single brick in the Wall. The Sign measures 20cm by 6cm. The wording on the Sign (**"the Wording"**) is as follows:

"THIS STAIRCASE AND FORECOURT
IS PRIVATE PROPERTY
NO PUBLIC RIGHT OF WAY"

29. The Judge found that there was no clear evidence as to when the Sign was first erected. The Judge did however record that there was a photograph showing the Sign in place in July 2000 (Paragraph 15). The Sign is still in place.

The claim to the right of way

30. As I have said, the Respondents are solicitors. They practise as the firm of French & Co, and have done so at all times material to the Application. The Respondents practised from part of Number 5 between 1991 and 1996, when they acquired Number 6 and commenced practice from Number 6.

31. At the Hearing the Respondents gave evidence that, when they were practising from Number 5, they and others used the Staircase to obtain access to and from the front door of Number 5. As from 1996 their evidence was that they and others had used the Staircase to obtain access to and from the front door of Number 6.

32. By the Application the Respondents applied for the registration of an easement by prescription over the Blue Land. Specifically, the Respondents claimed that they had acquired by prescription, for the benefit of Number 6, a right of way to pass, on foot, over the Blue Land and the Staircase, for the purpose of obtaining access to and from Number 6.

33. I will refer to the right of way which the Respondents have claimed, on the basis of prescription, as **"the Right of Way"**. It will be appreciated that this form of expression is not intended to prejudge the questions which I have to decide in relation to the Appeal and the Cross Appeal.

The Decision

34. The Judge decided that the claim to the Right of Way had been established. On the question of the extent and quality of the Respondents' use of the Staircase and the remainder of the Blue Land the Judge made the following findings, at Paragraphs 53-38:

> *"53. I have no hesitation in concluding, on the basis of the evidence before me, that the Staircase was used for the benefit of the owners and occupiers of No 6 for a period of 20 years and more from no later than 2 December 1996. The user was as of right: for the reasons set out above it is not incumbent on the Applicants to prove that the relevant owners of No 4 had actual knowledge of the user. In my judgment, it would have been plainly obvious to the owner of the land, taking reasonable care, that it was being exercised.*
> *54. Nor is it necessary, as also explained above, for the Applicants to prove that No 6 was not tenanted at the outset of the relevant period.*
> *55. Mr Taylor submits that the owner of No 4 would not have known, or would not have necessarily known, that the Applicants and others visiting No 6 were in fact going to that property and not to another. Again, this seems to me to misunderstand the nature of the right of way claimed. It may be that other people on the terrace also had right of way: that does not affect the*

fact that the Applicants were exercising a right which would have been obvious to any reasonable owner.

56. *The user was not occasional: it was consistent, and constant, both during the week and at weekends. The user was both by the Applicants and by people visiting the offices of French & Co: I accept entirely the evidence given by the Applicants on this point.*
57. *The fact that the Applicants were tenants of No 5, and later of part of No 4, is not relevant to the issue I have to determine. The right claimed arises in respect of the ownership of No 6 alone. In any event, I fully accept that the user of No 4 was limited to two rooms and on no occasion involved the use of the front door of No 4.*
58. *It was not argued that the right of way claimed falls foul of section 29 of the Land Registration Act. Again, this seems to be right. On the facts of this case, the Respondents were clearly aware of the use made of the Staircase by the owners of the various houses on the terrace at the time of purchase. The right would have been obvious to a reasonable purchaser. The Staircase clearly made access to some of the properties (including No 6) easier. The correspondence with the Council on this point fortifies my conclusions on this."*

35. As can be seen, the Judge accepted the Respondents' evidence of their own use and the use by others of the Blue Land, including the Staircase, for the purposes of obtaining access to and from Number 6, as from 1996.

36. The Judge then turned to the question of whether the presence of the Sign had been sufficient to prevent the use of the Staircase by the Respondents and others going to and from Number 6 being as of right; that is to say the question of whether the Sign had been sufficient to convey that the use was contentious. The Judge set out her findings and conclusions on this question at Paragraph 59:

> *"59. So far as the Sign is concerned, my conclusions are as follows. Although small, and although placed at a considerable height from the ground, the Sign in my judgment could be read by anyone going up the Staircase. However, the Sign does not prevent the acquisition of a private right of way. It unequivocally states 'no public right of way'. The position would be entirely different if the Sign had said 'No right of way'. But by limiting the prohibition to public use, it does not, in my judgement, affect the acquisition of a private right. The Sign is defining the type of right that it being prevented. The Staircase was not to be used by the public as an extension of the road. Stating that the property was private does not affect the outcome: rights of way are typically acquired over someone else's private land."*

37. At Paragraph 60 the Judge recorded the acceptance by the Appellants' counsel that the removal of the Staircase did not prevent the Judge from giving effect to the Application. At Paragraphs 61-62 the Judge stated her view that counsel had been correct in this acceptance:

> *"61. In my judgment* [this acceptance by Mr Taylor] *is correct. The owner of the servient tenement cannot act in such a way as to render the easement*

incapable of being enjoyed, albeit that it is not incumbent on him to carry out repairs. It may then be that neither party is liable, if, at some point, the Staircase falls down or otherwise becomes so obviously unsafe that the right of way cannot be exercised.

62. But this is not the case here. The Staircase was removed over a weekend, without informing the Applicants or giving them any opportunity to consider whether or not the Staircase was in fact so defective that it was beyond any prospect of repair."

38. At Paragraph 63 the Judge concluded, for the reasons set out in the Decision, that she would order the Chief Land Registrar to give effect to the Application. On 20th July 2023 the Judge made a formal order (**"the Order"**) requiring the Chief Land Registrar to give effect to the Application.

39. The Judge did not, so far as I can see, identify the specific form of prescription on the basis of which the Right of Way had been acquired. I assume however that the Judge relied upon doctrine of lost modern grant, which requires evidence of use of the relevant subject matter for a period of 20 years or more. In contrast to the Prescription Act 1832, the doctrine of lost modern grant does not require that the period of 20 years or more must have continued to the point where the right which is claimed is called into question in a suit or action.

40. The Judge stated her findings and conclusions by reference to the Staircase. It seems to me however that the Right of Way is, strictly speaking, a right of way which is claimed over the Blue Land, including the Staircase. In common with the Judge I find it convenient to analyse the issues raised by the Appeal by reference to the Staircase. In referring to the question of the acquisition of rights over the Staircase I am however, where I refer to the Staircase rather than the Blue Land, including in this reference all those parts of the Blue Land, including the Staircase, over which it was necessary to pass in order to obtain pedestrian access over the Blue Land between the Pavement and the Walkway. It seems clear to me that the Judge proceeded on the same basis.

41. I will use the expression **"the Use"** to refer to the use of the Blue Land, including the Staircase, which, as the Judge found, had been made by the Respondents and others in order to obtain access to and from Number 6 for the period of 20 years and more from 1996. I should however make it clear that my use of this expression leaves open the question, which arises in the Appeal and the Cross Appeal, of whether the Judge was correct to decide that the Use was as of right.

<u>The Appeal</u>

42. The Judge granted permission to appeal to the Appellants by an order made 19th September 2023. Permission to appeal was granted only in respect of grounds 1 and 2 in the Appellants' application for permission to appeal.

43. The permitted grounds of appeal (grounds 1 and 2) are as follows:
    (1) The first ground of appeal (**"Ground 1"**) is that the Judge went wrong in law in her construction of the Wording. The Appellants contend that the Wording was sufficient to prevent the Use from being as of right.

(2) The second ground of appeal (**"Ground 2"**) is not quite so easy to summarise. The Appellants contend that the Judge was wrong to construe the words *"NO PUBLIC RIGHT OF WAY"* as not affecting the acquisition of a private right of way. As I understand the Appellants' argument in Ground 2, it is, in essence, as follows:

(i) Users of the Staircase would have been using the Staircase to pass between the Pavement, which is a public highway, and the Walkway which, if not a public highway, is an area to which the public has access.

(ii) In these circumstances a reasonable owner of the Blue Land would have considered that they had done enough, by the erection of the Sign, to render use of the Staircase contentious and not as of right.

(iii) Essentially those using the Staircase were using it as if they were members of the public passing from one location, namely the Pavement, to which members of the public had free access, to another location, namely the Walkway, where members of the public also had free access.

(iv) As such and even if, contrary to Ground 1, the Wording would not otherwise have been sufficient to render the Use contentious and not as of right, the reference to no public right of way on the Sign, given the particular location of the Staircase, was sufficient to achieve this result.

44. Ground 3, for which permission was not granted, concerns the question of the extent of the Blue Land which should be subject to the Right of Way, assuming that the Right of Way has been validly acquired. I understand that the Judge is prepared to deal with this question in the exercise of her powers of review of the Decision. It will also be appreciated that this third ground of appeal only arises if the Order stands. In these circumstances ground 3 is not, in any event, relevant to what I have to decide in what I am referring to as the Appeal. The Appeal is concerned with whether the Judge was right to decide that the Sign was insufficient to prevent the Use being as of right. As such, I am not concerned with ground 3.

45. In summary therefore, and on the basis of the arguments contained in Grounds 1 and 2, the Appellants say that the Judge was wrong to decide that the Sign was insufficient to prevent the Use being as of right.

The Cross Appeal

46. The response of the Respondents to the Appeal and the grounds of the Cross Appeal are set out in a document described as a Respondents Notice and Cross Appeal. The document is undated, but the index to the appeal bundle gives its date as 17th November 2023.

47. The first part of this document contains (under the headings of *"Ground 1"* and *"Ground 2"*), the reasons why the Respondents say that the Judge was right to decide that the Sign was insufficient to prevent the Use being as of right. The second part of the document contains the grounds of the Cross Appeal.

48. The grounds of the Cross Appeal are not numbered, but the argument of the Respondents is helpfully summarised in the conclusion to the grounds, in the following terms (I have added the square brackets around what appears to be a misplaced double negative in ground 2):

"The learned Judge misdirected herself in that:

1. *The height and position and small size of the sign was such that it was in fact not legible to a user of the staircase*
2. *She did not deal with the issue of why neither R1 nor R2 (who she held to be regular users of the stairs and forecourt land) could* [*not*] *recall ever seeing the sign during the course of use of the staircase over more than 20 years.*
3. *She held that the sign could be read by anyone going up the staircase even though there was no evidence before her of any past user of the staircase stating that they were aware of the sign and had read it while going up the staircase.*

In the circumstances this aspect of the Judgment should be overturned and replaced with a determination that the sign was too small and wrongly placed to be legible to a normal user of the staircase and that therefore the sign (irrespective of the wording) was incapable of preventing any prescriptive rights from accruing."

49. Essentially therefore, the Respondents challenge, by the Cross Appeal, the finding of the Judge, in Paragraph 59, that the Sign could be read by anyone going up the Staircase. The Respondents' case is that the Wording was insufficiently legible to be seen or read by those using the Staircase, as borne out by their own evidence that neither of them could recall reading the Sign or being aware of the Sign when using the Staircase. As such the Sign was insufficient to prevent the Use being as of right, regardless of what the effect of the Wording would have been if the Sign had been legible.

50. The grounds of the Cross Appeal seek the setting aside of the relevant part of the Decision and its replacement with a determination that the Sign was too small to be legible to a normal user of the Staircase. In their skeleton argument for the hearing of the Appeal and the Cross Appeal the Respondents put forward an alternative case, if they were successful in overturning the relevant part of the Decision. The alternative case was that the question of the visibility of the Sign should be remitted to the FTT for determination. In oral submissions Mr Hale identified the outcome sought on the Cross Appeal as the setting aside of the relevant part of the Decision and a remission of the question of the legibility of the Sign to the FTT. In further written submissions, which I received after the hearing of the Appeal and Cross Appeal, in circumstances which I will explain in the next section of this decision, the Respondents reverted to their previous position. By this I mean that the Respondents returned to their primary case that, if the relevant part of the Decision was overturned, I should substitute a determination that the Sign was neither of a suitable size nor in a suitable location to prevent the Use being as of right. Alternatively I should remit this question to the FTT for determination.

51. There is, as I have said, a question mark over whether permission has been granted for the Cross Appeal. By her order of 19th September 2023 the Judge granted the Respondents permission to cross appeal out of time *"in respect of grounds 1 and 2 as set out in their application dated 1 September 2023"*. The application of 1st September 2023 was not in the appeal bundle, and I was not shown a copy of this application. This left me somewhat in the dark as to the grounds on which the Respondents had been granted permission to cross appeal. I assume however, and this appeared to be Mr Hale's position in his oral submissions, that the Judge granted permission for a cross appeal which encompassed the arguments set out in the second half of the Respondent's Notice and Cross Appeal. For

his part, Mr Wilmshurst did not actively pursue an argument that no permission existed for the Cross Appeal, as it is explained in the second half of the Respondent's Notice and Cross Appeal and as it was further elaborated in the Respondents' skeleton argument for the hearing before me and in Mr Hale's oral submissions.

52. In these rather unusual circumstances I have concluded that I should proceed on the basis that permission to appeal has been granted for what I have identified as the Cross Appeal. I do not think that I can or should refuse to entertain the Cross Appeal on the basis that no permission has been granted for the Cross Appeal, in circumstances where I am aware that permission to appeal was granted for a cross appeal and I have not seen any evidence on the basis of which I could safely conclude that the permission to appeal was not granted for the Cross Appeal. The obvious inference is that permission to appeal was granted for the Cross Appeal.

53. This clears the way for my analysis of the Appeal and the Cross Appeal. It seems to me that, logically, I should take the Cross Appeal first. If the Judge was wrong to find that the Sign could be read by anyone going up the Staircase, and should have found that the Wording was in fact illegible to anyone going up the Staircase, it seems to me that questions of the effect of the Wording become irrelevant and the Appeal falls away. If no one could read the Sign, what it said was irrelevant. Equally, if the Judge was wrong to find that Sign could be read by anyone going up the Staircase and if, as the Respondents now contend (as their alternative case) in the Cross Appeal, the question of the legibility of the Sign should be remitted to the FTT for further consideration, this has implications for the Appeal. This is because the Appeal is, on this hypothesis, potentially academic. If the question of legibility is remitted to the FTT, and decided in favour of the Respondents by the FTT, the position, subject to any appeal against that remitted determination, reverts to what it would have been if I had been asked to decide, on the Cross Appeal, and had decided, on the Cross Appeal, that the Judge should have found that the Wording was in fact illegible to anyone going up the Staircase. On this hypothesis, the effect of the Wording becomes irrelevant and the Appeal falls away. One is back in the position where, because no one could read the Sign, what it said was irrelevant. In overall terms, it seems to me that it plainly makes sense to consider the Cross Appeal first.

54. I should also mention that the Respondents attached to their skeleton argument for the hearing of the Appeal and the Cross Appeal four witness statements. These witness statements comprised a witness statement made by each of the Respondents and witness statements from two other individuals. These witness statements were all recent witness statements, dated in May 2024. As such, they constituted new evidence, which was not before the Judge at the Hearing. Mr Wilmshurst objected to this new evidence being adduced by the Respondents, on the basis that the Respondents should not be permitted to introduce new evidence into the hearing of the Appeal and the Cross Appeal. In the event, and sensibly, Mr Hale did not pursue an application for permission to introduce the witness statements at the hearing of the Appeal and the Cross Appeal. If this application had been pursued, I should make it clear that I would not have allowed the application. There was no evidence that any of the criteria for introducing new evidence on an appeal were met in relation to this evidence.

55. In the event the only relevance of the new evidence is that it did include two photographs of the Staircase which had been before the Judge, and a further photograph of the Staircase, taken from a lateral position, which was not before the Judge. So far as the

photographs were concerned, there was no difficulty in considering the first two photographs as they were before the FTT. On that basis I did look at the two photographs. So far as the third photograph was concerned, it did not seem to me to take matters further, one way or the other, in relation to the Cross Appeal or, for that matter, the Appeal. In those circumstances I came to the conclusion, notwithstanding Mr Wilmshurst's objections and notwithstanding that I would not have been prepared to permit the new witness statements to be brought into the Appeal, that there was no harm in my considering the third photograph. I need say no more about the remainder of the new evidence which, as I have said, Mr Hale did not ultimately seek to introduce.

56. There is one final point I should make, preliminary to my analysis of the Cross Appeal. In their arguments in support of the Cross Appeal the Respondents have referred to the question in issue as one relating to the legibility of the Sign and also as one relating to the visibility of the Sign. It seems to me that legibility and visibility are not necessarily the same thing. Visibility may be said to relate to the question of whether the Sign could be seen by a user of the Staircase, without necessarily answering the question of whether the Wording could actually be read by a user of the Staircase. Legibility may be said to relate to the question of whether the Wording could be read by a user of the Staircase. In the present case however I understand the Respondents' references to legibility and visibility to refer to the same thing; namely the question of whether a user of the Staircase would have been able to see and read the Wording, as it appeared on the Sign. In my analysis of the Cross Appeal I will refer to the question as one of legibility of the Sign; which means the question of whether a user of the Staircase would have been able to see and read the Sign or, putting the matter with strict accuracy, the question of whether a user of the Staircase would have been able to see the Sign and read the Wording.

Analysis of the Cross Appeal

57. The starting point is the relevant finding made by the Judge. It seems to me that the relevant finding is set out in the second sentence of Paragraph 59:

> *"Although small, and although placed at a considerable height from the ground, the Sign in my judgment could be read by anyone going up the Staircase."*

58. It seems clear to me that this was a finding of fact by the Judge. The finding was that the Sign could be seen by anyone going up the Staircase. The Judge then proceeded to consider the effect of the Wording, which would not have been necessary if the Judge had found that the Wording would not have been legible to those using the Staircase.

59. In support of the Cross Appeal the Respondents advanced what were effectively three arguments, each of which is helpfully summarised in the concluding section of the Respondent's Notice and Cross Appeal, which I have set out in the previous section of this decision.

60. Before dealing with these individual arguments there are two general points to be made in relation to the Cross Appeal.

61. The first point relates to the nature of appeals to the Upper Tribunal. In general terms, but subject to important exceptions, the right of appeal to an Upper Tribunal from a decision of a First-tier Tribunal is a right to appeal on a point of law arising from the decision of the

FTT; see Section 11 of the Tribunals, Courts and Enforcement Act 2007 (**"the 2007 Act"**). In the case of appeals to the Lands Chamber there are a number of specific statutory rights of appeal from the FTT. In particular, in the case of decisions of the FTT made under the Land Registration Act 2002, such as the Decision, there is a general right of appeal under Section 111(1) of the Land Registration Act 2002. This right of appeal does not extend to appeals on points of law. This does not mean that appeals on points of law are precluded by Section 111(1). Rather, if and to the extent that an appeal in such a case engages a point of law, the right of appeal exists under Section 11(1) of the 2007 Act.

62. In a case where the relevant appeal is an appeal on a point of law, made pursuant to Section 11(1) of the 2007 Act, and the appeal is made against a finding of fact made by the FTT, the circumstances in which an error of law can be said to have been made are fairly narrowly defined. The most well-known statement of what is required in order to establish such an error of law can be found in *Edwards v Bairstow* [1956] AC 14. In his speech in the House of Lords Lord Radcliffe explained the law in the following terms, at page 36 of the report:

> *"When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."*

63. *Edwards v Bairstow* was not amongst the authorities put before me at the hearing of the Appeal and Cross Appeal. This was no doubt because the parties were not confined, either in the Appeal or the Cross Appeal, to an appeal on a point of law. Given however that the Cross Appeal is, in my judgment, an appeal against a finding of fact made by the Judge, I considered it relevant to invite the parties to make further written submissions on the implications of *Edwards v Bairstow* in relation to the Cross Appeal, with particular reference to the extract from Lord Radcliffe's speech which I have cited above. My concern was to identify whether it was said by the Respondents that the Judge had gone wrong in law in her finding that the Sign could be seen by anyone going up the Staircase and, if so, on what basis. Both Mr Wilmshurst, for the Appellants, and the Respondents did provide further written submissions in response to this invitation. I was therefore provided with submissions on the implications of *Edwards v Bairstow* for the Cross Appeal, which I have taken into account in my analysis of the Cross Appeal.

64. The second, and related point is that it has been said many times that appeal courts should be slow to interfere with findings of fact made by the first instance court. The same applies to appeals from first instance tribunals. Where a judge has seen and heard all the evidence, the appeal court or appeal tribunal, which will not have had the same advantage, should not interfere with the findings of fact made by the judge without good reason. In the present case I was not taken specifically to any of the authorities where this point has been made, but Mr Wilmshurst took his stand, in relation to the Cross Appeal, on the argument that the Judge's finding on the legibility of the Sign was a finding of fact with which I could not and should not interfere.

65. In relation to these two general points I am not convinced, in the circumstances of the present case, that the position is as straightforward as Mr Wilmshurst contended. The finding of fact made by the Judge was a finding that the Sign could be read by anyone going up the Staircase. While it will be understood that this is not, in any way, a criticism, the Judge did not make a site visit. In making her finding that the Sign would have been legible I assume that the Judge relied, in part at least, upon much of the same material as was before me; namely the photographs of the Sign and the virtual tour of the location, which included film of the Sign, prepared by the Appellants. This was not a case, at least so far as the Cross Appeal was concerned, where the Judge was required to resolve a conflict of evidence between two witnesses, whose evidence she heard and saw. In the latter case it would be very difficult for me to interfere with the Judge's resolution of the conflict of evidence. On the question of the legibility of the Sign, there may be an argument that I am in as good a position as the Judge to consider the question of the legibility of the Sign, on the basis that we are both looking at the same documentary evidence. I will deal with this argument in my analysis of the specific grounds advanced in support of the Cross Appeal.

66. With the above two general points in mind, I turn to the specific grounds of the Cross Appeal.

67. The Respondents' first ground is that the Judge, who is said to have had to work from very limited photographic evidence, misdirected herself in that the height and position and small size of the Sign were such that it was in fact not legible to a user of the Staircase. As is apparent, this is essentially an argument that the Judge got her finding wrong.

68. I am not able to accept this argument, essentially for two reasons.

69. My first reason is based upon my own assessment of the evidence which I have seen. It is true that the Sign is a small one. It is located at a high point on the Wall. It is not actually possible to read the Wording on any of the photographs of the Sign which I have seen, or in the virtual tour at those points where the Sign is in camera shot. That said, none of the photographs were taken and none of the film was shot from the position in which a user of the Staircase would have been at the point when they would have passed the Sign, immediately to their right as they approached the top of the Staircase. The reason why film could not be shot nor photographs be taken from the key position was because the Staircase was removed, without prior notice to the Respondents. If the question of the legibility of the Sign was before me, as a first instance tribunal called upon to decide this question, I would, on the evidence which I have seen, have reached the same conclusion as the Judge. I would have found that the Sign, although small and placed at a

considerable height from the ground, could have been read by anyone going up the Staircase.

70. My first reason assumes however that it is appropriate for me to make any own decision on the question of the legibility of the Sign. This is not the position, which brings me to my second reason for being unable to accept the first ground of the Cross Appeal. I am hearing the Cross Appeal by way of a review, not a rehearing. By an order made on 18th October 2023 Martin Rodger KC, the Deputy Chamber President, directed that the Appeal should be heard by way of a review. It seems to me that the same applies to the Cross Appeal. The hearing before me was not therefore a rehearing of the Application.

71. The question for me is therefore whether there is any basis on which I can and should interfere with Judge's finding. Even if I had reservations as to the correctness of the finding made by the Judge, which I do not for the reasons which I have just set out, I do not think that I would be entitled to interfere with the finding. While I have assumed that the Judge, at least in part, relied upon much the same material as was before me, I do not think that the position is this straightforward. To return to the question which I left outstanding above, I do not think that I am in as good a position as the Judge to make a decision on the legibility of the Sign. The Judge heard all the evidence which was put before her at the Hearing, and all the argument on that evidence. The Judge heard the oral evidence of each of the Respondents and the First Appellant, Mr Nicholson. I understand that all three witnesses were cross examined. The question of the legibility of the Sign to a user of the Staircase was ultimately a matter for the evaluation of the Judge on the basis of all the evidence. It seems to me that it was not a question to be resolved by the oral evidence of any particular witness. The Judge was however able to make her evaluation on the basis of all the evidence, including the oral evidence. I am not in the same position. The finding made by the Judge on the question of the legibility of the Sign is not, on any view of the matter, obviously wrong. Nor can it be said to have engaged any obvious error. There plainly was evidence on the basis of which the Judge could conclude that the Sign could be read by anyone going up the Staircase. In those circumstances I do not think that I would be entitled to interfere with the Judge's finding on the question of legibility even if, which is not the position, I entertained doubts as to the correctness of the finding.

72. The second ground of the Cross Appeal accuses the Judge of failing to deal with the evidence of the Respondents, which is said to have been that they could not recall ever seeing the Sign during the course of their use of the Staircase over more than 20 years.

73. There are a number of problems with this second ground. The first of these problems is that I have not seen a transcript of the evidence given at the Hearing. I have not been able to confirm for myself that the Respondents did give this evidence, without challenge or qualification. If however it is assumed that the Respondents did give this evidence, without challenge or qualification, the question of what account to take of this evidence was a matter for the Judge.

74. In this context I note that the Judge reviewed the evidence of the Respondents in some detail in the Decision. I note, in particular, that the Judge recorded the following evidence of the Respondents in relation to the Sign, at Paragraph 44:

> *"44. As to the Sign, Mr and Mrs Hale's evidence is that it was small and difficult to read; the size of an envelope. It was placed 1.7/1.8 metres high on the wall to the west of the Staircase so that anyone walking up the Staircase would see it, if at all, once they were well on the way to the top. On their evidence, it was not easily legible, if at all, from the bottom of the staircase. In any event, the Sign clearly referred to a public right of way."*

75. It is quite clear that the Judge had the evidence given by the Respondents in relation to the Sign well in mind. If the Respondents did give evidence, without challenge or qualification, that they could not recall ever seeing the Sign, I am entitled to assume that the Judge took this evidence into account in making her finding on the legibility of the Sign. A judge is not required to record, in a judgment or decision, every item of evidence read or heard by the judge in the relevant hearing.

76. This leaves the question of what account the Judge should have taken of this part of the Respondents' evidence, assuming that the evidence was that the Respondents could not recall ever seeing the Sign. The key point here is that this evidence was not decisive on the question of the legibility of the Sign. The Judge had to decide whether the Sign was legible to users of the Staircase. The question was not, or at least was not directly whether the Respondents saw the Sign. The question for the Judge was whether a reasonable user of the Staircase would have seen the Sign.

77. That this is the correct question is clear from a case to which the Respondents made extensive reference, both in their Respondents Notice and Cross Appeal and in their skeleton argument for the hearing of the Appeal and the Cross Appeal. The case in question is *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin), which is more conveniently referred to as **"the *Warneford Meadow* case"**. In his judgment in this case, at [22], Judge Waksman QC, as he then was, set out a set of general principles in relation to the question of whether a sign was adequate to prevent the acquisition of a right over land by prescription. For present purposes, the first two principles stated by Judge Waksman are relevant:

> *"22. From those cases I derive the following principles:*
> *(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;*
> *(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;*

78. The Judge found that the Respondents had made regular use of the Staircase. As such, it seems to me that the Respondents' evidence that they did not recall seeing the Sign was evidence which was relevant to the question of whether the Sign was visible and legible to users of the Staircase; see principles (1) and (2) as stated by Judge Waksman in the *Warneford Meadow* case. The question of what weight to give that evidence was however a matter for the Judge. I can see no basis on which I can or should interfere with the

Judge's evaluation of the evidence given by the Respondents, so far as it was relevant to the question of the legibility of the Sign.

79. In these circumstances it seems to me that the second ground of the Cross Appeal must fail. It is not clear to me that the Respondents did give evidence, without challenge or qualification, that they could not recall seeing the Sign. If this evidence was given, the Respondents have failed to establish that it was not taken into account by the Judge. To the contrary, it is clear that the Judge did take into account the Respondents' evidence in relation to the Sign. As for the weight to be given to this evidence, this was a matter for the Judge. The Judge was not compelled by this evidence to find that the Sign was not legible to users of the Staircase, and there is no basis on which I can or should interfere with the finding which the Judge did make as to the legibility of the Sign.

80. This leaves the third ground of the Cross Appeal. The argument here is that there was no evidence before the Judge of any past user of the Staircase stating that they were aware of the Sign and had read the Sign while going up the Staircase.

81. The problem with this third ground of the Cross Appeal seems to me to be similar to the last of the problems which I have identified in relation to the second ground of the Cross Appeal. As I understand the position, the only witnesses who gave evidence at the Hearing were the Respondents and Mr Nicholson, the First Appellant. Mr Nicholson was not able to give evidence as to the historic position. His evidence, as recorded, in Paragraph 52, was that neither he nor the Second Appellant, Mr Stafford, saw anyone using the Staircase during the 22 month period from first viewing Number 4 to the demolition of the Staircase. The Respondents have said that their evidence was that they did not recall seeing the Sign. I therefore assume that it is correct that there was no evidence before the Judge of any past user of the Staircase having been aware of the Sign while going up the Staircase.

82. I can see that this gap in the evidence might have been said to have some relevance to the question of the legibility of the Sign. As with the Respondents' evidence however, the weight to be given to this gap in the evidence was a matter for the Judge. The question for the Judge was not whether past users of the Staircase had been aware of the Sign and had read the Sign. The question for the Judge was whether the Sign was legible to a reasonable user of the Staircase, so that it could be read by that user. The Judge found that the Sign could be read by anyone going up the Staircase. In answering this question the gap in the evidence to which I have referred was not decisive. At best, the gap in the evidence might have been said to have some relevance to this question. It was a matter for the Judge to decide whether and, if so, to what extent, weight should be given to this gap in the evidence. I can see no basis on which it can be said that this gap in the evidence compelled or came anywhere near compelling the Judge to find that the Sign could not be read by users of the staircase. In these circumstances it seems that the third ground of the Cross Appeal must fail.

83. What I have said above is sufficient for the determination of the Cross Appeal. There is no sufficient ground for challenging the Judge's finding that the Sign could be read by anyone going up the Staircase. I should however also make brief reference to the test stated in *Edwards v Bairstow* because the Respondents did contend, in their further written submissions, that the Judge had gone wrong in law in her finding on the legibility of the Sign.

84. It seems to me that the grounds of the Cross Appeal come nowhere near satisfying the test stated in *Edwards v Bairstow*. While I pay tribute to the drafting of the further written submissions filed by the Respondents, which was of a high standard, the essential problem confronting the Respondents was that they were compelled effectively to repeat their arguments in support of the Cross Appeal as reasons why the Judge had made an error of law in her finding that the Sign could have been read by anyone going up the Staircase. While it seems to me that these arguments do not have merit, for the reasons which I have set out above, it seems to me that they also come nowhere near establishing that the Judge reached a conclusion on the evidence which was not open to her.

85. The Respondents did, in their further written submissions, seek to argue (i) that the Judge had failed properly to consider the evidence given by the Respondents, and (ii) that the Judge had failed properly to consider the absence of any evidence of any user of the Staircase having seen the Sign, and (iii) that the Judge had failed to explain her reasons for not taking this evidence into account. These arguments seem to me to be misconceived, for the reasons which I have already explained in my analysis of the Cross Appeal. The Judge clearly did have all the relevant evidence in mind, when she made her finding on the legibility of the Sign and, as I have said, her finding was plainly one which, on the evidence, she was entitled to make.

86. It follows from my analysis of the Cross Appeal that the finding of the Judge that the Sign could be read by anyone going up the Staircase does not fall to be set aside. In my judgment the Judge did not go wrong in her finding that the Sign could be read by anyone going up the Staircase, either as a matter of fact or as a matter of law. In these circumstances there is no basis for me to make my own determination of the question of the legibility of the Sign, independent of the fact that my own determination would, as I have explained above, have been the same as the finding made by the Judge. Nor is there any basis for this question to be remitted to the FTT for further determination.

87. For the reasons which I have set out, the Cross Appeal fails and falls to be dismissed. It follows that the Appeal does arise for decision, without any qualification concerning the status of the Judge's finding that the Sign would have been legible to anyone going up the Staircase. I therefore turn to my analysis of the Appeal.

Analysis of the Appeal – the law

88. Where an easement is claimed on the basis of prescription the relevant use which is relied upon must be user as of right. What this means is that the user must not have been by force, or in secret, or by permission. The Latin expressions which have in the past been used to express these negative requirements are nec vi (neither by force), nec clam (nor secretly), nec precario (nor by permission).

89. This concept was explained by Lord Hoffmann, in his speech in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, in the course of his masterful explanation of the origins and development of the law of prescription. Lord Hoffmann said this, at pages 350F-351C:

> *"The result of these developments was that, leaving aside the cases in which (a) it was possible to show that the right could not have existed in 1189 and (b) the*

doctrine of lost modern grant could not be invoked, the period of 20 years' user was in practice sufficient to establish a prescriptive or customary right. It was not an answer simply to rely upon the improbability of immemorial user or lost modern grant. As Cockburn C.J. observed, the jury were instructed that if there was no evidence absolutely inconsistent with there having been immemorial user or a lost modern grant, they not merely could but should find the prescriptive right established. The emphasis was therefore shifted from the brute fact of the right or custom having existed in 1189 or there having been a lost grant (both of which were acknowledged to be fictions) to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, nee vi, nee clam, nee precario: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see Mills v. Colchester Corporation (1867) L.R. 2 C.P. 476, 486.) The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right—in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in Dalton v. Angus & Co. (1881) 6 App.Cas. 740, 773, Fry J. (advising the House of Lords) was able to rationalise the law of prescription as follows:

> *"the whole-law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest."*

90. It should be noted that *Sunningwell*, in common with the bulk of the authorities to which I was referred in relation to the Appeal, was a case concerned with commons registration. It is however clear that the same general principles apply, when considering the question of whether a particular user has been as of right, whether one is dealing with a commons registration case or a claim to an easement on the basis of prescription; see David Richards LJ, as he then was, in *Winterburn v Bennett* [2016] EWCA Civ 482 [2017] 1 WLR 646, at [31].

91. Although the first of three negative conditions (not by force, nor secretly, nor by permission) refers to force, it is clear that force, in this context, extends further than physical force. The person claiming the easement on the basis of prescription must show that the user which is relied upon was not contentious or allowed only under protest. This was explained by David Richards LJ in *Winterburn v Bennett*, which I have mentioned above. After reviewing the authorities, David Richards LJ said this, at [19]-[21]:

> *"19 Part of this passage was cited with approval by Lord Neuberger of Abbotsbury PSC in R (Barkas) v North Yorkshire County Council [2015] AC 195, para18. This passage and other passages in some of the older authorities suggest that the owner of the land must take steps by physical means or through legal proceedings to prevent the wrongful user. However, the passage cited from the opinion of Fry J ends with a reference*

to a right being "acquired and enjoyed by the tacit consent of the sufferer" and in a passage of the opinion of Bowen J, also cited in later cases, he said 6 App Cas 740, 786:

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

20 Although this was said by Bowen J in the context of rights of support where active steps to interrupt the user would normally be wholly disproportionate, it has been cited in more recent cases as demonstrating a much broader proposition. See R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70, paras 88—91, per Lord Rodger of Earlsferry and Newnham v Willison (1987) 56 P&CR 8, 18, per Kerr LJ. In the latter case, Kerr LJ continued, at p 19:

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

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

92. At [22]-[23] David Richards LJ went on to make the point that the continuous presence of legible signs could be sufficient to render user contentious:

> *"22 The issue in the present case is whether the continuous presence of legible signs stating that the car park was private property and for use by the club's patrons only was sufficient to render the use of the car park by the claimants and their suppliers and customers contentious.*
>
> *23 The decision of this court in Taylor v Betterment Properties (Weymouth) Ltd [2012] 2 P&CR 3 ("Betterment") establishes that the continuous presence of legible signs may be sufficient to render user contentious."*

93. It is therefore the case that the continuous presence of legible signs may be sufficient to prevent use being as of right, for the purposes of a claim based on prescription. The reference is to legible signs in the plural, but it seems to me that the question of whether a single sign is sufficient, or whether multiple signs are required is a fact sensitive question, which depends upon the size and topography of the land over which the relevant right is claimed.

94. This leave the question of what such a sign or signs need to say. As I have explained in my analysis of the Cross Appeal, a set of general principles in this respect has been helpfully set out in the judgment of Judge Waksman QC, as he then was, in the *Warneford Meadow* case. The full statement of these principles, in Judge Waksman's judgment at [22], was in the following terms:

> *"22. From those cases I derive the following principles:*

(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;

(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;

(3) The nature and content of the notice, and its effect, must be examined in context;

(4) The notice should be read in a common sense and not legalistic way;

(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the Court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in Brudenell-Bruce (supra) to "consistent with his means". That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more. As it happens, in this case, no point on means was taken by the Authority in any event so it does not arise on the facts here.
In my judgment the following principles also apply:
The reference to means by Pumfrey J seems to have its source in the quotation in the judgment from Dalton v Angus (1881) LR App Cas 740 at p773 where Fry J quotes Willes J's reference to the need of a party claiming a right by acquiescence to show that the servient owner could have done some act to put a stop to the claim "without an unreasonable waste of labour and expense". That suggests that reasonableness comes into any means-related argument. So a simple consideration of means does not seem to be enough. Hence my reservation about Pumfrey J's formulation.

(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean; that is simply another way of asking the question as to what the reasonable user would have made of it;

(7) Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;

(8) There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been

communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant users."

95. In terms of examples of notices which have and have not been held to be sufficient, it is convenient to start with the *Warneford Meadow* case. The *Warneford Meadow* case was a commons registration case and involved an application for judicial review of a decision by Oxfordshire County Council to register land known as Warneford Meadow as a town or village green. The evidence was that notices had been erected on the land, adjacent to certain paths which crossed the land. The notices read *"No Public Right of Way"*. The County Council had appointed an inspector (Vivian Chapman QC) to conduct a public inquiry into the question of whether the land should be registered as a town or village green. The advice of the inspector was that the land should be so registered. The application for judicial review failed. For present purposes the relevant point is that Judge Waksman agreed with the inspector that the notices which had been erected on the land had clearly been directed to the paths which crossed the land. The notices were not effective to render contentious the recreational use of the land as a whole.

96. Judge Waksman explained his reasoning on this point at [49]:

> *"49. In my judgment the facts overwhelmingly pointed to the conclusion that under the principles referred to in paragraph 22 above and in particular looking at the notices objectively in context, they did not render the recreational user contentious. This is for the following brief reasons:*
>
> *(1) The notices were clearly directed to the paths nearby. The Inspector found that the notice at point B was referential to FP 111 and that at point C referred to FP111 and the Diagonal Path. They could not have referred to FP 80 as this was already a public right of way. Given those facts the obvious meaning to be ascribed to them was that those paths were not to, and did not, give rise to a public right of way;*
>
> *(2) There was no reason why they should be taken objectively to refer to recreational use of the Meadow as a whole. Mr George QC said that a sign referring to there being no right of way is not necessarily limited in its scope to a particular path and he gave the example of an open field with no paths on it at all. That may be so in that context but that is not this case. Here the notices were by paths and have been found as a fact to refer to them and there is a quite separate and distinct use of the Meadow which has nothing to do with the paths, or is only incidentally related to them, namely the general recreational user; here the notices only make sense if they relate to the paths and rights of way in relation to those paths. They are in fact silent as to any other use of the paths for example crossing them while walking the dog or "milling around" in their vicinity;*
>
> *(3) If the Authority had wanted to render user of the land as a whole contentious, it could and should have said so by using an appropriately worded notice; see the examples referred to by Sullivan J in paragraph 22 of Lewis (supra) or that used in the Oxfordshire case (supra), as referred to in paragraphs 20 and 21 above. The Inspector made this obvious point in paragraphs 369 and 384 of the Report. See also paragraphs 11 and 14 of Mr Deluce's Response. And there would also*

have been many more signs, given the number of different access points, as can be seen from the photograph at p276AD; the fact that the users from HTRN may have concentrated on the entrance at point C is no answer to this argument;

(4) There is in fact no body of evidence from users to challenge this interpretation of the notices. Mr George QC placed emphasis on the evidence of Mr Dunabin referred to at paragraph 36 above because he was from HTRN. But in fact he did not live there at the material time in 1989. On the other hand, Dr Salmon, whose evidence is referred to at paragraph 37 above, did. And if anything, his evidence supported Mr Deluce's case not that of the Authority; moreover the Inspector was entitled to reject Mr Dunabin's view of the sign in his determination of what he thought, objectively, it meant to the users in general. There is no challenge to any such rejection;

(5) The form of notice here is a classic response to an application for the establishment of further public footpaths, bringing into play the evincing of a contrary intention for the purposes of s31 (1) and (3) of the Highways Act 1980; and see paragraphs 10 and 13 of Mr Deluce's Response."

97. Judge Waksman also referred, in his judgment, to two other cases which provide useful guidance on what constitutes adequate wording on a sign, and from which the judge derived the statement of principles which I have quoted above. Judge Waksman mentioned the first of these cases at [19]:

> *"19. In R (Lewis) v Redcar and Cleveland Borough Council [2008] EWHC 1813 (Admin) Sullivan J had to consider the adequacy or otherwise of a sign erected on the owner's land in relation to its user for recreational purposes as part of a claim that it be registered as a TVG.*
> *The notice said this:*
>
> *"Cleveland Golf Club*
> *Warning*
> *It is dangerous*
> *to trespass on*
> *the golf course"*

98. At [20] the judge quoted at some length from the judgment of Sullivan J, as he then was, in the *Redcar* case. The *Redcar* case subsequently went on appeal, but the judgment of Sullivan J at first instance is the relevant decision for present purposes:

> *"20. Sullivan J found that the local people using the land were aware of the notice. He then said this:*
> *"21. I accept that the wording of the notices should not be considered in the abstract. The surrounding context, including any evidence as to their effect upon those to whom they were directed, should also be considered. The response to a notice may well be an indication as to how it was understood by the recipient. Moreover, the notices should be construed in a common sense rather than a legalistic way because they were addressed not to lawyers but to local users of the land.*
> *22. If the defendant was not acquiescing in the continued use of its land by local people for recreational purposes, it would have been very easy to erect notices saying, for example, "Cleveland Golf Club. Private*

property. Keep out" or "Do not trespass", followed by a warning "It is dangerous to trespass on the golf course". The fact that local users took umbrage at being described in the notices erected in 1998 as trespassers does not mean that those notices told them to stop trespassing, as opposed to warning them that if they continued to trespass it would be dangerous....

23. In the present case there was no evidence before Mr Chapman that the erection of the notices in 1998 had any practical effect whatsoever, much less that it had, even temporarily, 'seen off' the use of the land by local people for recreational purposes. The witness who gave evidence about the notices, Mr Fletcher, said that they had been painted out on the night that they were erected. They were re−painted and re−erected three times and then the club gave up. In these circumstances, given the ambiguity and the wording of the notices (to put their possible meaning at its highest from the point of view of the defendant), no landowner in the position of the defendant could reasonably have concluded that by erecting those notices in 1998 it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users.."

99. The judge referred to the second of these cases, where the relevant notices were adequate to prevent the relevant use being as of right, at [21]:

> *"21. By way of contrast in Oxfordshire County Council v Oxford City Council [2006] Ch 43, the relevant sign read:*
>
> *Oxford City Council.*
> *Trap Grounds and Reed Beds.*
> *Private Property.*
> *Access prohibited*
> *Except with the express consent*
> *Of Oxford City Council"*

100. The judge referred to the decision of Court of Appeal in *Oxfordshire County Council v Oxford City Council*. The case went on appeal to the Court of Appeal and then to the House of Lords. For present purposes however I believe that the appropriate reference is to the judgment of Lightman J at first instance; see *Oxfordshire County Council v Oxford City Council* [2004] EWHC 12 (Ch) [2004] Ch 253. It was in this judgment that Lightman J decided that the above wording was sufficient to mean that the recreational enjoyment of the relevant land in that case could, following the erection of the relevant notices, no longer be as of right; see the judgment of Lightman J at [29].

101. Returning to *Winterburn v Bennett*, the issue in that case was whether the claimants, who owned and operated a fish and chip shop, had acquired a right by prescription, for the benefit of their premises, for themselves and their customers and other visitors to park on adjacent land owned by the defendants. The relevant land had been used as a car park by the defendants' predecessors in title, the Conservative Club Association. The club had erected two signs, one at the entrance to the car park and one in the window of the club premises. Each sign stated: *"Private car park. For the use of club patrons only. By order of the committee"*. The essential question before the Court of Appeal in this case was not the wording of the signs, but whether the erection of two signs was sufficient, or

whether the club needed to have done more than erect signs, in order to render contentious the use of the car park by the claimants and their visitors.

102. In his judgment David Richards LJ rejected the argument of leading counsel for the claimants that the club, in response to the signs being ignored by those visiting the fish and chip shop, should have done more. As David Richards LJ explained, at [40]:

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

103. I should also quote what David Richards said in [41], by way of conclusion to his judgment:

> *"41 The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land."*

104. As can be seen, *Winterburn v Bennett* provides clear authority for the proposition that a landowner does not need to do more than erect an appropriate sign or signs, in order to prevent the acquisition of a legal right over their land. The erection of *"clearly visible signs"* is sufficient. For the policy reasons explained in [41], *"the erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others"*. Those who choose to ignore such signs should not thereby be entitled to obtain legal rights over the relevant land. While this is all extremely useful guidance, it can be seen that the wording of the notices in *Winterburn v Bennett* does not appear to have been directly in issue. If, as the Court of Appeal decided, the club had not needed to do more than erect the signs, the wording of the signs was sufficient to make clear that the car park was *"private and not to be used by others"*.

105. In his judgment David Richard LJ made reference to the decision of the Court of Appeal in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250 [2012] 2 P&CR 3, and also to the decision of Morgan J at first instance in that case, for which the

neutral citation is [2010] EWHC 3045 (Ch). The decision of Morgan J at first instance was amongst those cited to me on the hearing of the Appeal and the Cross Appeal. The judgment of Morgan J contains an extremely useful analysis of whether the relevant uses made of the land in that case had been by force, in the sense of having been rendered contentious by the landowners, and thus not as of right. This analysis included consideration of the effect of notices erected on the land which had suffered repeated acts of vandalism. The particular wording of these signs, which took various forms, was not however directly in issue. Morgan J did however make the following findings in his judgment, in the first part of [94] (the underlining is my own):

> *"94. I now turn to the question of whether signs were erected and, if so, where they were erected, what they said and for what period of time they remained erected. I find without any hesitation that the Curtis family did erect and re-erect signs with reference to the total area of land which they owned. I find that this process of erecting and re-erecting signs continued for a period of years and was not a short lived affair. As to the location of the signs, there is sufficient evidence that there were clearly visible signs, and not just one or two of them, which would have brought home to a person using the registered land that the registered land was governed by such a sign. I also find that all signs which are relevant in this way would have made it clear that members of the public were being told they were not entitled to leave the footpaths. That was because the land apart from the footpaths was "private" or that the public were to "keep out" of that land or that their presence on the land would be "trespass"."*

106. The ultimate conclusion reached by Morgan J, on all of the evidence, was that the landowners had done sufficient to render the use of the relevant land contentious for periods of time which meant that the required period of 20 years use as of right could not be shown. The evidence of what the landowners had done was not confined to the erection of signs, with the consequence that Morgan J did not have to consider what the situation would have been if the use had been the subject of the signs erected by the landowners, but without any of the other relevant features, such as breaking down fences and ignoring warnings off. The process of the landowners erecting and re-erecting signs did however form part of the basis for the ultimate conclusion of Morgan J that use of the relevant land as of right could not be shown for the required period of 20 years. As I have said, the particular wording of the signs was not in issue. What however is clear, from the judgment at [94], is that Morgan J regarded the wording of the signs to have been sufficient to make it clear to members of the public that they were not to leave the footpaths.

107. The Court of Appeal upheld the decision of Morgan J that the use of the relevant land had not been as of right for a sufficient period of time. So far as the signs were concerned, the principal issue before the Court of Appeal was whether Morgan J had been entitled to find, on the evidence, that the signs erected by the landowners would have been seen by the reasonable user of the land. In that context Patten LJ went on to say this, at [52]:

> *"52 I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowner's case on whether the user was as of right.*

But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly positioned to give reasonable notice of the landowner's objection to the continued use of his land."

108. So far as the wording of the signs was concerned, Patten LJ was clear, at [55], that the wording of the signs was sufficient:

> *"55 Similarly there can be no issue about the wording of the signs. They were clearly sufficient to indicate to the reasonable observer that the landowner wished people to keep to the footpaths and not to trespass on the registered land."*

109. The decisions in *Winterburn* and *Betterment* (in the latter case both in the Court of Appeal and at first instance) are extremely useful in their statement of the principles which govern the question of whether a particular use of land has been rendered contentious by the actions of the landowner. They are not necessarily of direct assistance, save by comparison of wording, in relation to the question of what form of wording is sufficient. In terms of guidance on the wording of signs, what these cases do is to identify, in general terms, what message the sign must convey to users of the relevant land. What has to be made clear is that the property is private and not to be used by others (David Richards LJ in *Winterburn*, at [41]). In *Betterment* what mattered was that the signs made it clear, in contrast to the position in the *Warneford Meadow* case, that the land apart from the footpaths was private or that the public were to keep out of that land or that their presence on the land would be a trespass; see Morgan J in *Betterment* at first instance, at [94]). Turning to the Court of Appeal in *Betterment*, the signs indicated to the reasonable observer that the landowner wished people to keep to the footpaths and not trespass on the registered land.

110. I do not think that it is necessary to make specific reference to any of the remaining authorities to which I was referred. In relation to the question of whether the Wording was sufficient to render the Use contentious, and not as of right, it seems to me that my general approach should be as follows:
    (1) In terms of general guidance I should apply the principles stated by Judge Waksman in the *Warneford Meadow* case, in addition to the guidance to be found in the judgments in *Winterburn* and *Betterment*.
    (2) I should also rely on the authorities, so far as I can, to the extent that they provide examples of specific wording which has or has not been held to be sufficient to prevent use being as of right.

111. With this analysis of the law in place, I turn specifically to Ground 1.

The Appeal – analysis of Ground 1

112. In her analysis of the law relating to the acquisition of easements by prescription the Judge made reference, at Paragraph 27, to the judgment of David Richards LJ in *Winterburn*. After quoting from the judgment at [37] and [41], the Judge identified, at Paragraph 28,

the question which she had to answer, in terms of the adequacy of the Wording, in the following terms:

> *"28. It follows that an appropriately and unambiguously worded and placed sign may have the effect of making what would otherwise amount to prescriptive user contentious. But the issue will be fact specific: it will depend, clearly, on who erected it, for what purpose, and its exact wording. The question is an objective one, based on what the sign conveys to a reasonable person: it does not depend on the subjective interpretation of either the dominant or servient owner."*

113. It seems to me that the Judge was correct to identify the question as an objective, but fact specific one. What would the Sign, specifically, the Wording have conveyed to a reasonable person or, to use the specific language of the authorities, to a reasonable user of the Staircase?

114. The Judge answered this question at Paragraph 59. I have already set out Paragraph 59, but I set it out again for ease of reference:

> *"59. So far as the Sign is concerned, my conclusions are as follows. Although small, and although placed at a considerable height from the ground, the Sign in my judgment could be read by anyone going up the Staircase. However, the Sign does not prevent the acquisition of a private right of way. It unequivocally states 'no public right of way'. The position would be entirely different if the Sign had said 'No right of way'. But by limiting the prohibition to public use, it does not, in my judgement, affect the acquisition of a private right. The Sign is defining the type of right that it being prevented. The Staircase was not to be used by the public as an extension of the road. Stating that the property was private does not affect the outcome: rights of way are typically acquired over someone else's private land."*

115. I have already dealt with the Judge's finding as to the legibility of the Sign, in my analysis of the Cross Appeal. So far as the Judge's analysis of the Wording is concerned, the decisive factor, in her judgment, was that the Sign was limited in its effect. The Sign stated that no public right of way existed. This did not affect the acquisition of a private right. On the Judge's analysis, stating that the property was private did not affect the outcome, because rights of way are typically acquired over someone else's private land.

116. I am not able to agree with this analysis of the effect of the Wording. I say this essentially for two reasons, both deriving from the Wording itself.

117. First, the Wording stated that the Staircase and forecourt, that is to say the Blue Land, was *"private property"*. The Sign is of course still in place, but I use the past tense because I am concerned with the effect of the Sign during the period when the Judge found the Use to have been occurring; that is to say for a period of 20 years or more from no later than 2nd December 1996.

118. If the reference to private property is taken in isolation, I find it difficult to see what message it conveyed to the reasonable user other than that the Blue Land was private land

and was not to be used by others. I also find it difficult to see why the message that the Blue Land was private property was not sufficient to indicate to the reasonable observer that the landowner wished people to keep off the Blue Land. If land is identified as private property, the message which this identification seems to me to convey is that it is not open to persons other than the owner of the land and those authorised by the owner either to go on to the land or to make use of the land.

119. It will be recognised that I am, in my previous paragraph, using the same language as was used in *Betterment* and *Winterburn*. It seems to me however that the same conclusion follows if one considers specific examples, from the case law, of signs which were and were not effective to render the relevant use contentious. Returning to the *Warneford Meadow* case, Judge Waksman cited the decision of Sullivan J in *Redcar*. In *Redcar* however the notice stated that it was dangerous to trespass on the golf course. As Sullivan J pointed out, a notice could have been erected informing local people that Cleveland Golf Club was private property and that they should keep out. Alternatively, the notice could have stated *"Do not trespass"*. The problem was that the notice identified a risk of trespassing, rather containing an instruction not to trespass or an instruction to keep out. In the present case, the wording did not say *"keep out"* or *"no trespassing"*, but it did identify the Blue Land as private property. In *Betterment* at first instance, Morgan J considered that the notices had conveyed the required message to members of the public by identifying the land, apart from the footpaths, as private. This made it clear to members of the public that they were not entitled to leave the footpaths; see the judgment of Morgan J at [94].

120. In the *Warneford Meadow* case Judge Waksman also made reference to *Oxfordshire County Council v Oxford City Council*. In that case the relevant signs (referred to as notices) were sufficient. This was, in part, because the signs stated that the relevant land was private property. I say in part because the signs also stated that access was prohibited except with the express consent of Oxford City Council. It follows that the case is not on all fours with the present case. Nevertheless, this case does seem to me to provide some further support for the proposition that a reference to private property conveys the message that the land is not to be used by anyone not authorised to do so by the landowner.

121. As the Judge pointed out at Paragraph 28, and as the case law demonstrates, the nature and content of the relevant notice must be examined in context. The context here is a small area of land which, by the Staircase, provided a direct route from the Pavement to the Walkway, without the necessity to proceed to the eastern end of the Terrace and then along the Walkway from Number 9. This was not a case involving large areas of land, or land crossed by footpaths which the public were allowed to use. The Blue Land provided a short cut from the Pavement to the Walkway. To my mind, a sign stating that the Blue Land was private property should have been sufficient to inform those using the Blue Land as a short cut that they were not entitled to do so.

122. Thus far in my analysis I have taken the identification of the Blue Land as private property in isolation. The identification did not however appear in isolation. It was combined with the information that there was no public right of way. This brings me to my second reason for differing from the Judge's analysis. The Judge regarded the statement that there was no public right of way as the critical factor. The Sign was defining the type of right which was being prevented, and did not prevent the acquisition of private rights such as the Right

of Way. On this basis, and on the Judge's analysis, the identification of the Blue Land as private land made no difference. This identification effectively did no more than identify the nature of the land over which private rights could still be acquired.

123. I cannot agree with the Judge's analysis of the effect of the statement in the Wording that there was no public right of way. As Judge Waksman pointed out in the *Warneford Meadow* case, at [22(4)], a notice should be read in a common sense and not a legalistic way. The question is what a reasonable user of the Blue Land would have understood from reading the Sign. It strikes me as wrong to treat the reasonable user as taking the Wording to mean that, while no public right of way existed, the exercise of a private right was not prohibited. I do not think that the reasonable user should be treated as making legal distinctions of this kind.

124. In his oral submissions Mr Wilmshurst contended that the reference to no public right of way did not undermine the identification of the Blue Land as private property. I accept this submission. It seems to me that the reference to no public right of way did not qualify or undermine the identification of the Blue Land as private property. To my mind it reinforced the message that anyone other than those authorised by the owner of the Blue Land was not entitled to make use of the Blue Land as a route to the Walkway. In my view a reasonable user of the Blue Land would have understood that they had no right to make use of the Blue Land, on any basis.

125. Mr Hale made the point that the Sign could have stated that there was no public or private right of way. I take the point, but it does not seem to me to deal with the following difficulty which exists both in Mr Hale's argument, and in the analysis of the Judge. The reasonable user must be taken to have read the whole of the Wording, and not just the reference to no public right of way. If however the reasonable user is taken to understand the reference to no public right of way as having no effect on the acquisition of private rights over the Blue Land, how would the reasonable user have understood the reference to the Blue Land being private property? If one assumes, wrongly in my view, that the reasonable user was distinguishing between public and private rights of way, it seems to me that the Judge's analysis requires one to treat the identification of the Blue Land as private land as amounting to no more than a reinforcement of the message that there was no public right of way. If however one assumes that the reasonable user must be taken to have applied a level of analysis to the Wording which distinguished between public and private rights of way, I find it hard to see how the reasonable user can be treated as assuming that there was no restriction on the exercise of private rights over the Blue Land. If the Blue Land was identified as private property, as it was, there was no right to use the Blue Land as a short cut to the Walkway on any basis. It seems to me, on the basis of the Judge's analysis, that the reasonable user must be taken to have been aware of this fact.

126. If however one takes the Wording in a common sense way, and not in a legalistic way, it seems to me that the reasonable user would have taken the reference to no public right of way as a simple reinforcement of the message that they had no right to use the Blue Land as a short cut to the Walkway. The Blue Land was private land, so no one but the owner and those authorised by the owner had a right to be on it or to make use of it, and there was, in addition, no public right of way which entitled the reasonable user to make use of the Blue Land.

127. In support of his argument, and with particular reference to his point that the Wording could have said no public or private right of way, Mr Hale referred me to the judgment of Judge Waksman in the *Warneford Meadow* case, at [41]. At this point in his judgment Judge Waksman made reference to the findings of the inspector to the effect that the signs erected by the paths which crossed the land were intended to prevent the acquisition of public rights of way. As I have already explained, in my analysis of the law, Judge Waksman supported the inspector's findings as to the effect of the notices. It seems to me however that this part of the judgment in the *Warneford Meadow* case is clearly distinguishable in the present case. The problem which confronted the objectors to registration in the *Warneford Meadow* case was that the relevant signs, in stating that there were no public rights of way, were taken to be directed only to the paths. It was found that they had no application to the remainder of the land. In the present case, which involves a very small area of land, there is no scope for confining the effect of the Wording in the way that the wording of the notices was confined in the *Warneford Meadow* case. In the present case the Sign was stated to apply to the whole of the Blue Land, identified as the Staircase and the Blue Land, and quite clearly would have been understood by the reasonable user to relate to the whole of the Blue Land.

128. Once one takes into account the point that the Sign was stated to apply to the whole of the Blue Land, and would have been so understood by the reasonable user, I cannot see how the Wording was ineffective to make it clear that access was not available on any basis. As I have said, in my judgment the reference to no public right of way reinforced the message that there was no right of any kind to use the Blue Land, which was private property. In my judgment this is how the Wording would have been understood by the reasonable user.

129. Drawing together all of the above analysis, and for the reasons which I have set out, I cannot agree with the Judge's analysis. Applying to the Wording the principles and guidance which are to be found in the authorities to which I have referred in the previous section of this decision, it seems to me that the Sign was sufficient to make it clear to the reasonable user of the Blue Land that use of the Blue Land in order to obtain access between the Pavement and the Walkway was contentious, on any basis. As such, it seems to me that the Sign was effective to prevent the Use from being as of right, at least as from July 2000. I refer to July 2000 because the earliest evidence of the Sign being in its current location is the photograph referred to by the Judge in Paragraph 15, which shows the Sign in its current location in July 2000. The Judge found that the Use had continued for a period of 20 years or more from no later than 2nd December 1996. Given that the Sign was in place from at least July 2000 it follows that the Sign prevented the Use from being as of right for the greater part, at least, of this 20 year period.

130. In these circumstances I conclude that Ground 1 succeeds. The Judge was wrong to find that the Use was as of right. The Judge should have found that the Sign prevented the Use being as of right for the greater part of the period of 20 years relied upon by the Respondents, with the consequence that the Respondents were not entitled to claim acquisition of the Right of Way on the basis of prescription. The Use was not as of right for the required period of 20 years, with the consequence that the Respondents were not able to rely upon the doctrine of prescription.

131. As I have already explained, the right of appeal to the Upper Tribunal in this case is not confined to an appeal on a point of law; see Section 111 of the Land Registration Act 2002

and Section 11 of the 2007 Act. It seems to me however that the Judge, in finding that the Sign was ineffective to prevent the Use being as of right, did make an error on a point of law. This part of the Decision, in Paragraph 59, depended upon the Judge's determination of the meaning and effect of the Wording. Effectively, the Judge was construing the Wording, in the context of the question of how the Wording would have been understood by the reasonable user. In these circumstances it seems to me that the Appeal is correctly classified as an appeal on a point of law. It also seems to me that the Judge, in her conclusion in this part of the Decision, made an error on a point of law within the meaning of Section 12(1) of the 2007 Act.

132. This brings me to Section 12(2) of the 2007 Act, which provides as follows where an error on a point of law has been made by the FTT:

> *"(2) The Upper Tribunal–*
> *(a) may (but need not) set aside the decision of the First-tier Tribunal, and*
> *(b) if it does, must either–*
> *(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or*
> *(ii) re-make the decision."*

133. It seems to me that the consequence of the success of Ground 1 is that the Decision and the Order must be set aside. If, as I have determined, the Judge should have found that the Use was not as of right, the Respondents had failed to establish that they had a valid right of way over the Blue Land. On this basis the claim to the Right of Way should have failed, and the Chief Land Registrar should have been directed to cancel the Application. It follows that the Decision and the Order cannot stand, and must be set aside.

134. This leaves the question of whether I should remit the case to the FTT with directions for its reconsideration, or re-make the Decision. The answer to this question seems clear to me. There is no purpose in a remission, as I have decided that the claim to the Right of Way has not been established, because the Use was not as of right for the required period of 20 years. There is no factual question or other matter which requires reconsideration by the FTT. In these circumstances it seems to me that I can and should re-make the Decision, as a decision that the Use was not as of right for the required period of 20 years, with the consequence that the claim to the Right of Way fails. As such, there should be a direction to the Chief Land Registrar to cancel the Application.

135. On this basis, the Appeal succeeds on Ground 1.

136. It follows from the conclusions which I have reached in relation to Ground 1 that it is not strictly necessary for me to decide Ground 2. The Appeal has succeeded on Ground 1. Ground 2 was however fully argued and, in these circumstances, I will set out my analysis of Ground 2.

The Appeal – analysis of Ground 2

137. As I have explained, Ground 2 relies upon the particular location of the Blue Land as a means of obtaining access between the Pavement, which is part of the public highway, and the Walkway. In his skeleton argument for the hearing of the Appeal and the Cross

Appeal Mr Wilmshurst put his submissions on the basis that the Walkway is or had been a public right of way. The Judge did refer to the original railed off area, which previously ran along the length of the Terrace above the extended basements of the Properties, as a carriageway; see Paragraphs 9 and 10. Mr Wilmshurst drew my attention to the fact that a carriageway is a defined expression in the Highways Act 1980. Section 329 of the Highways Act 1980 defines a carriageway as *"a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles"*. Mr Wilmshurst also referred me to the decision of the Supreme Court in *Southwark London Borough Council v Transport for London* [2018] UKSC 63 [2020] AC 914, in which the meaning of the word *"highway"* was considered.

138. I do not think however that the Judge intended to make a finding that the carriageway, as she described it, was a public highway. The Judge did not say this in terms, and I can find no suggestion in the Decision that the Judge was treating the former carriageway as a public highway, or the Walkway as a public highway. Nor can I see that Section 329 or the *Southwark* case provide support for the argument that the Walkway was or is subject to a public right of way of any kind.

139. In oral submissions I understood Mr Wilmshurst to accept that he was not able to say that the Walkway had been or is a public right of way. Mr Wilmshurst's position in oral submissions was that the Walkway was, at least, an area to which the public had effective (Mr Wilmhurst used the Latin expression *"de facto"*) access. I am not in a position to make findings about what rights, public or private, exist over the Walkway, and I do not do so. It is however obviously the case that, given the absence of physical obstruction, anyone can proceed along the Pavement to the eastern end of the Terrace and, passing in front of the Octagon building, obtain access to the Walkway.

140. Mr Wilmhurst's argument in support of Ground 2, which I have already summarised, is that because the Blue Land lay between a public highway, namely the Pavement, and an area to which the public could obtain access, namely the Walkway, all that was required of a reasonable landowner, in order to render the Use not as of right, was to communicate the information that there was no public right of way. This on its own was sufficient, because it conveyed the critical message that there was no extension of the public right of way which existed over the Pavement into the Blue Land. A reasonable landowner would conclude that they had done enough by communicating the message that there was no public right of way. Thus, in the particular circumstances of this case, the Judge was wrong in her analysis in Paragraph 59 because, even if that analysis might have been justified in another case, it was not justified in the case of land where one was going from a public right of way to an area of effective public access.

141. In support of Ground 2 Mr Wilmshurst drew my attention to certain authorities which, so he submitted, supported his argument in relation to Ground 2.

142. In this context Mr Wilmshurst started with Lord Hoffmann's speech in *Sunningwell*. I have already quoted what Lord Hoffmann said at 350F-351C. Within this extract from Lord Hoffmann's speech Mr Wilmshurst referred me to the unifying element which Lord Hoffmann identified as lying between the three negative conditions which must be satisfied, in a prescription case, in order for the relevant use to be as of right. For ease of reference I repeat this identification of the unifying element, at 350H-351A:

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

143. Next, Mr Wilmshurst referred me to the judgment of Lord Carnwath in *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31 [2015] AC 195. Lord Carnwath commenced his judgment, at [51] and [52], by expressing his agreement with Lord Neuberger that the appeal in that case should be dismissed, but indicated that he considered it desirable to look at the matter in a wider context:

> *"51. I agree that, on the arguments presented to us, the appeal should be dismissed for the reasons given by Lord Neuberger. Those arguments have proceeded on the footing that in effect the sole issue is whether the use of the recreation ground by local inhabitants has been "as of right" or "by right", the latter expression being treated as equivalent to "by licence" (or "precario") in the classic tripartite formulation (nec vi, nec clam, nec precario) as endorsed by Lord Hoffmann in the Sunningwell case. On that basis, I have no doubt that the use by the local inhabitants in this case was "by right" as Lord Neuberger has explained (para 20-29).*
> *52. That would be sufficient to dispose of this appeal. However, since the underlying issue is of some general importance and as we are being asked to review the decision of the House in Beresford, I think it desirable also to look at the matter in a wider context. Before turning to the speeches in that case in more detail I shall make two more general points about the context in which the rights are here asserted."*

144. The second of the general points made by Lord Carnwath was consideration of the *"as of right"* test, in its context. Lord Carnwath sounded the following note of caution in relation to this test, at [58]-[60]:

> *"58. The "as of right"/"by right" dichotomy is attractively simple. In many cases no doubt it will be right to equate it with the Sunningwell tripartite test, as indicated by judicial statements cited by Lord Neuberger (paras 15-16). However, in my view it is not always the whole story. Nor is the story necessarily the same story for all forms of prescriptive right.*
> *59. This was a point made by Lord Scott in Beresford:*
>
> > *"It is a natural inclination to assume that these expressions, 'claiming right thereto' (the 1832 Act), 'as of right' (the 1932 Act and the 1980 Act) and 'as of right' in the 1965 Act, all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of*

right without taking account of their differences is dangerous." (para 34)

60. *On the same theme he commented on the differences between public rights of way on the one hand and town or village greens on the other:*

> *"Public rights of way are created by dedication, express or implied or deemed. Town or village greens on the other hand must owe their existence to one or other of the three origins specified in section 22(1) of the 1965 Act… Dedication by the landowner is not a means by which a town or village green, as defined, can be created. So acts of an apparently dedicatory character are likely to have a quite different effect in relation to an alleged public right of way than in relation to an alleged town or village green." (para 40)*

While I share Lord Neuberger's reservations on other parts of Lord Scott's speech, his observations on this point appear to me both valid and important."

145. Lord Carnwath went on to say this, at [61]-[62]:

> *"61. Lord Scott's analysis shows that the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole. This includes consideration of what Lord Hope has called "the quality of the user", that is whether "the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right" (R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70, para 67). Where there is room for ambiguity, the user by the inhabitants must in my view be such as to make clear, not only that a public right is being asserted, but the nature of that right.*
>
> *62. This is not a live issue in most contexts in which the tripartite test has to be applied, whether under this legislation or otherwise, because there is no room for ambiguity. It was not an issue in Sunningwell itself, where the land was in private ownership, and there was no question of an alternative public use. Twenty years use for recreation by residents, the majority of whom came from a single locality, was treated as an effective assertion of village green rights."*

146. Lord Carnwath returned to this theme in *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7 [2015] AC 1547, which concerned a challenge, by way of judicial review, to a decision by East Sussex County Council to register an area of foreshore at Newhaven, known as West Beach, as a town or village green. In his judgment, at [131], Lord Carnwath identified the following three possibilities, in terms of the basis for the right of the public to use West Beach:

> *"131 It remains to consider what lessons can be drawn for the present case. In the absence of argument to the contrary we must proceed on the basis that Blundell v Catterall and Brinckman v Matley were rightly decided. It follows that public use of the West Beach during the relevant period cannot be attributed to a general public right to use the foreshore for recreational*

purposes. Leaving aside the arguments relating to the byelaws under the second issue, there are three possibilities: (a) some form of prescriptive or customary right (b) implied licence (as found by Lewison LJ) (c) trespass tolerated or acquiesced in by the owners (as found by the majority of the Court of Appeal)."

147. At [134] Lord Carnwath quoted from the judgment of Lewison LJ in the Court of Appeal in the case:

> *"134 Explanation (b) accords with the view of Lewison LJ in the present case [2014] QB 186, 278. He said he thought that the foreshore should be treated as "a special case", for a number of reasons:*
>
> > *"128. . . . (i) The nature of the land is such that it cannot readily be enclosed. It would be wholly impractical to attempt to enclose it on the seaward side; and even on the landward side any attempt would be fraught with difficulty. (ii) Historically the foreshore has been Crown property (although there are private persons who derive title from the Crown) and the Crown would not, in practice, prevent citizens from resorting to the foreshore for recreational purposes. This has been the case since time immemorial, and in those circumstances it is not unreasonable to presume that the Crown has implicitly licensed such activities. (iii) Even where the owner of the foreshore does attempt to enforce his strict legal rights, there are serious impediments in obtaining an injunction. (iv) Although in theory it is possible to prescribe for rights over the foreshore or to establish a customary right, there is no case in the books where a recreational right over the foreshore has been established. (v) It would take very little, having regard to the nature of foreshore and the manner in which it is generally enjoyed, to draw the inference that use is permissive by virtue of an implied licence.*
> >
> > *"129. Even if this is not, on its own, an independent reason for concluding that the use of the foreshore in this case is precario, it does in my judgment provide the context in which the byelaws are to be interpreted."*

148. Lord Carnwath then returned specifically to what he had said in *Barkas*, and to its implications in the present case, at [135]-[136]:

> *"135 I agree, but I would put the emphasis on the point (v). It is the character of the foreshore and the use which is traditionally made of it, without question or interference, which leads to the natural inference that it is permitted by the owners in accordance with that tradition. As I said in Barkas [2015] AC 195, para 61 (referring to comments of Lord Scott of Foscote in Beresford [2004] 1 AC 889, para 34):*
>
> > *"Lord Scott's analysis shows that the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole."*

Applying that approach to public use of beaches generally, I see no difficulty in drawing the obvious inference, in the absence of evidence to the contrary, that their use, if not in exercise of a public right, is at least impliedly permitted by the owners, rather than a tolerated trespass.

136 That general approach cannot necessarily be applied without question to the present case. This is not an historic beach, but one created artificially in relatively recent times, as a consequence of the statutory harbour works. Nor was public use accepted without question. As appears from the application for registration, the public were barred for some time after the end of the First World War, and their use only resumed in response to a public protest. There might well be a case for treating what followed as tolerated trespass, or use "as of right", had not the whole area been brought under formal regulation by the making of the byelaws. For the reasons given by Lord Neuberger PSC, I agree that thereafter the only possible inference is that the use was permitted by the harbour authorities and was therefore "by right"."

149. I will come back to these authorities but, returning specifically to Ground 2, it seems to me that there is a confusion in Ground 2. The confusion seems to me to exist between two different questions which may arise where a right is said to have been acquired over land by prescription. In such a case, as in the present case, the question may arise as to whether the relevant use has not been as of right on the basis that the use was by force, or by secrecy, or by permission.

150. Where, as in the present case, it is said that the use was by force, and thus not as of right, the question which then arises is whether the landowner has done sufficient to render the relevant use contentious. The case law which I have considered, in my analysis of the law relevant to the Appeal, establishes three particular points. The first point is that the reference to force is not confined to physical obstruction of the relevant use, for the reasons explained in the case law; see by way of example David Richards LJ in *Winterburn*, at [40] and [41]. The second point is that what the landowner is required to do in any particular case is a fact sensitive question, which depends heavily on the particular circumstances of each case. The third point is that the case law also establishes that use can be rendered contentious, so as not to amount to use as of right, by the erection of an appropriate sign or signs; see again David Richards LJ in *Winterburn* at [40] and [41]. The question of whether a particular sign is effective to render use contentious is, again, a fact sensitive question. In terms of the question of how the relevant sign would have been understood by users of the land, this question falls to be answered from the perspective of the reasonable user. This question is not answered from the perspective of a reasonable landowner; see the general principles stated by Judge Waksman in the *Warneford Meadow* case, at [22]. In particular, Judge Waksman said this, at [22(6)]:

> *"(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean -? that is simply another way of asking the question as to what the reasonable user would have made of it;"*

151. Mr Wilmshurst framed his arguments in support of Ground 2 on the basis that the owner of the Blue Land would have considered that he had done sufficient by erecting a sign stating there was no public right of way over the Blue Land even if that would have been insufficient in the case of land which did not lie between a public right of way and land to

which the public had effective access. As I have said, this argument seems to me to confuse two questions.

152. The first question is whether the owner of the Blue Land could have prevented the Use being as of right by erecting an appropriate sign. If the owner of the Blue Land had erected an appropriate sign, would the owner have done all that could reasonably be expected of them to render the Use contentious? The answer to that question is that the owner of the Blue Land could have rendered the Use contentious by the erection of an appropriate sign. The case law establishes that the erection of an appropriate sign, without more, was capable of being sufficient to prevent the Use being as of right. If an appropriate sign was erected, the owner of the Blue Land was not expected to do more.

153. The second question is whether the Sign itself was an appropriate sign; that is to say a sign sufficient to perform the task of rendering the Use contentious. At this point the emphasis switches to the reasonable user. Was the Sign sufficiently visible and legible to the reasonable user and, assuming that it was, was the message conveyed to the reasonable user by the Wording sufficient to convey to the reasonable user that they had no right to use the Blue Land in order to obtain access between the Pavement and the Walkway? The second question is not answered by considering whether a reasonable landowner would have considered that they had done enough in the particular circumstances of the case. The second question is answered by considering what the reasonable user would have understood the Sign to mean. This requires consideration of the Wording. This is because the visibility and legibility of the Sign are not in issue. The Judge found that the Sign was visible and legible and the attempt of the Respondents, by the Cross Appeal, to challenge that finding has failed.

154. I have answered this second question, as it arises in the present case, in my analysis of Ground 1. I have decided, in respectful disagreement with the Judge, that the Sign was sufficient to render the Use contentious, and not as of right.

155. In answering the second question, I can see that the particular location of the Blue Land, between a public right of way and the Walkway, is a relevant factor. Indeed it is a factor which I have taken into account in my analysis of Ground 1.

156. What I cannot see is any scope for a separate argument that, by reason of the particular location of Ground 2, the Sign was effective to prevent the Use being as of right because a reasonable landowner would have been entitled to consider that it was sufficient for the Sign to make it clear that there was no public right of way. It seems to me that this argument properly belongs in Ground 1, and is properly framed as an argument that, if the Sign had simply said no public right of way, a reasonable user of the Blue Land would, by reason of the location of the Blue Land, have understood that they were not entitled to use the Blue Land for access purposes, on any basis.

157. It is not necessary for me directly to decide this particular argument, because the Wording was not confined to a statement that there was no public right of way. The Wording also made it clear that the Blue Land was private land. My analysis of how the Wording would have been understood by a reasonable user of the Blue Land is set out above, in my analysis of Ground 1. That analysis is based upon the entirety of the Wording. The analysis is not confined to the statement in the Wording that there was no public right of way. As I have said, I regard the particular location of the Blue Land as a relevant factor

in considering how the Sign would have been understood by a reasonable user, which I have taken into account in my analysis of Ground 1. As however I have also said, I cannot see any scope for a separate argument based on the location of the Blue Land, advanced on the basis set out in Ground 2.

158. I indicated that I would come back to the authorities cited by Mr Wilmshurst in support of Ground 2. I have set out above relevant extracts from the judgments of Lord Carnwath in *Barkas* and *Newhaven*. I do not see how those authorities assist Ground 2, or indeed are relevant to Ground 2. I say this for two reasons. First, it seems to me that Lord Carnwath was saying no more than that the tripartite test for determining whether use had been as of right, namely by asking whether the relevant use had been by force, or in secret or by permission, was not always the whole story, nor necessarily the same story for all forms of prescriptive right. The circumstances of the relevant case have to be considered as a whole, including consideration of the quality of the user; see Lord Carnwath in *Barkas* at [58]-[61]. Second, it is apparent from the same part of Lord Carnwath's judgment in *Barkas* that Lord Carnwath's reservations about the tripartite test were directed, or at least principally directed to the process by which a town or village green may come into existence; see Lord Carnwath's quotation, in *Barkas* at [59], from the speech of Lord Scott in *R (Beresford) v Sunderland City Council* [2003] UKHL 60 [2004] 1 AC 889.

159. I have difficulty in seeing how any of this supports the Appellants' argument in support of Ground 2. The argument is that the particular location of the Blue Land, between a public highway and an area to which the public could obtain access, meant that it was sufficient for the Sign to state that there was no public right of way. This is said to have been sufficient on the basis that a reasonable owner of the Blue Land would have been entitled to consider that they did not need to do any more, given the location of the Blue Land. For the reasons which I have explained, the particular location and topography of the Blue Land do seem to me to have some relevance, in relation to Ground 1, to the question of whether the Wording was sufficient to prevent the Use having been as of right. I cannot see however that there is anything in what Lord Carnwath said in *Barkas* or *Newhaven* which supports the Appellants' argument in support of Ground 2.

160. I therefore conclude that Ground 2 is misconceived. In relation to Ground 1, the argument underlying Ground 2, based on the location of the Blue Land, seems to me to have merit and to be a relevant factor in considering how the Sign would have been understood by a reasonable user. I cannot however see that Ground 2 has merit as a free-standing ground of appeal, at least on the basis on which it was advanced. I therefore conclude that Ground 2 fails, as a free-standing ground of appeal.

The outcome of the Appeal and the Cross Appeal

161. For the reasons set out in this decision the outcome of the Appeal and the Cross Appeal is as follows:
    (1) The Appeal is allowed, on the basis of Ground 1.
    (2) The Decision falls to be set aside and to be re-made as a decision that the claim to the Right of Way fails because the Use was not as of right for the required period of 20 years.
    (3) The Order also falls to be set aside.
    (4) The Cross Appeal is dismissed.

(5) I will make an order giving effect to (1) to (4) above, and giving such direction to the Chief Land Registrar as may be required to ensure the cancellation of the Application.

The Chamber President

Mr Justice Edwin Johnson

14th June 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

APPENDIX

Public Access Available to 6 Derby Terrace