Land registration – benefit and burden of easement – claim to right of way acquired by prescription – whether use was as of right or with permission – the legal burden of proof on the claimant – whether evidential presumption that use was as of right? – extent of the right acquired by use – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Appeal No: UT/2016/0209**

BETWEEN:

(1) DAVID WELFORD
(2) DIANE CAROLINE WELFORD
(3) ADRIANE DIANE WELFORD

Appellants

and

(1) DAVID JOHN GRAHAM
(2) ELIZABETH JANE GRAHAM

Respondent

Tribunal: Hon Mr Justice Morgan

Sitting in public in London on 26 June 2017

Mr Howard Smith, counsel, instructed by Punch Robson, for the Appellants

Mr Stephen Fletcher, counsel, instructed by Macks, for the Respondents

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FtT") (Judge Elizabeth Cooke), [2017] UKFTT 0058(PC), released on 20 May 2016 and against the order which Judge Cooke made, on 3 June 2016, to give effect to her decision. On 26 September 2016, Judge Cooke granted the Appellants permission to appeal on two of the six grounds of appeal they had put forward. On 9 November 2016, the Upper Tribunal (HHJ Behrens) granted permission on the Appellants' other grounds of appeal. In relation to the points of law which the Appellants raise, the appeal is pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007 and, in relation to other matters, the appeal is pursuant to section 111 of the Land Registration Act 2002.

The decision of the FtT

2. The reference to the FtT arose out of an application by the Appellants for the registration of the benefit of an easement, a right of way, as appurtenant to their land (Title No. CE192088) on which stood a building, to which the FtT referred as "the workshop", and for that easement to be noted as a burden on the adjoining land owned by the Respondents (Title No. CE214143) to which the FtT referred as "the yard".

3. The Appellants' case before the FtT, and on this appeal, was that their predecessors in title had acquired the benefit of a right of way by long use of the way, as of right. They relied upon the principles as to prescription by lost modern grant and they did not rely on section 2 of the Prescription Act 1832. This was because the relevant use had not continued up until the time that the dispute arose but had ceased some years earlier so that section 4 of the 1832 Act was not satisfied. The Appellants did not suggest that a right of way had arisen in any other way.

4. The history of the ownership of the workshop was that the persons named below were the owners of the workshop for the following periods:

    (1) Before 1935, Mr Richard Cowie;

    (2) From 1935 to 1947, Mr Herbert Jarvis;

    (3) From 1947 until 2006, Mr Herbert Raymond Jarvis;

    (4) From 2006 to 2012, Mr and Mrs Meeson; Mrs Meeson was the daughter of Mr Herbert Raymond Jarvis and the grandaughter of Mr Herbert Jarvis;

    (5) From 2012 to date, the Appellants.

5. The history of the occupation of the workshop was that it was occupied by the persons named below for the following periods:

    (1) Before 1947, Mr Herbert Jarvis;

(2) From 1947 to 1959, Mr Herbert Raymond Jarvis or his company;

(3) From 1959 to 1971, Mr Whitehead;

(4) From 1971 to 2012, Mr and Mrs Meeson;

(5) From 2012, the Appellants.

6. The history of the ownership of the yard was that the persons named below were the owners of the yard for the following periods:

(1) Before 1978, Mr Richard Cowie or his son Robert Cowie;

(2) From 1978 to 1988, Mr and Mrs Marshall;

(3) From 1988 to 2003, Mr and Mrs Lyell;

(4) From 2003 to 2012, Nerbrek Ltd;

(5) From 2012, the Respondents.

7. The Appellants relied on the evidence of three witnesses to prove that the yard had been used for many years, with and without vehicles, as a means of access to and egress from the workshop. These witnesses were Mr Marshall, Mrs Meeson and Mr Pawson. The judge summarised the evidence which they gave and she appears to have accepted their evidence as to the nature of the use and the period of the use of the yard.

8. Mr Marshall was able to give evidence about the position from 1964 when he became the tenant of certain stables to which the yard gave access. Further, Mr Marshall and his wife were the joint owners of the yard (and the stables behind the yard) from 1978 to 1988. He gave evidence that, from the 1960s, Mr Whitehead, as tenant of the workshop, drove across the yard to gain access to and egress from the workshop.

9. Mrs Meeson gave evidence that at least since the mid-1970s there had been vehicular use of the yard as a means of access to and egress from the workshop. Mr Pawson gave evidence that, from the 1980s, Mr Meeson drove across the yard to gain access to and egress from the workshop.

10. The judge made specific findings as to the use of the yard as an access to and egress from the workshop for a shorter period of time than was supported by the evidence of these witnesses. I do not understand the judge to have rejected their evidence as to the period of the use. Instead, the judge reduced the period which was relevant to her decision for three reasons.

11. The first reason was that the judge concentrated on the position prior to the coming into force of the Land Registration Act 2002. She said that reliance on use after that time "would run into difficulties because of the technical requirements of the Act". It is possible she had in mind the provisions of the 2002 Act which, in some cases, treat easements as overriding interests. The judge's second reason was that she considered that all that the Appellants had to show was a period of 20 years of relevant use. The judge's third reason was that she directed herself that the Appellants had to prove that the use of the

yard as a means of access to and egress from the workshop was without the permission of the owner of the yard and, as will be seen, she held that the Appellants could prove that matter for only part of the period of use on which they relied.

12. The judge made the following specific findings:

    (1) Mr Whitehead had used the yard for vehicular access to and egress from the workshop before 1978;

    (2) Mr Meeson drove across the yard to the workshop for many years, certainly from 1978 onwards and for at least 20 years before 2002.

    (In this paragraph, I have recorded how matters were described by the judge in her decision but I was told by Mr Fletcher for the Respondents that the year in which Mr Whitehead stopped using, and Mr Meeson started using, the workshop was 1971. The judge referred to 1978 as a relevant year because that was when Mr and Mrs Marshall became the owners of the yard and, as will be seen, she regarded 1978 as a significant date in relation to her later findings as to the use of the yard being without permission.)

13. Accordingly, the judge found that there had been use of the yard with vehicles to gain access to and take egress from the workshop from, at least, 1978 to 2002. On the evidence which she accepted, I consider that she could have found that there was such use from the 1960s to 2002 and, indeed, after 2002.

14. The judge next considered whether the Appellants had shown that the use relied upon was without the permission of the owner of the yard. She held that she only had evidence of the absence of such permission during the period 1978 to 1988 when Mr and Mrs Marshall were the owners of the yard. She made that finding because Mr Marshall had given evidence that he had not given permission for the use of the yard and, indeed, he had not appreciated that he was the owner of the yard, as distinct from the stables, to which the yard gave access. Accordingly, the judge held that the Appellants had established what she called "prescriptive use" from 1978 to 1988.

15. The judge then considered the position as to permission to use the yard before 1978 and after 1988. Mrs Meeson had been asked in the course of her evidence whether Mr Meeson had ever had permission to use the yard to access the workshop. She replied that he did not. She was then asked if it was possible that he had made arrangements with the owner of the yard to have access to the workshop and she replied: "No, he just did it". The Respondents did not call any evidence to support a finding that the use of the yard as an access to the workshop had been with the permission of the owner of the yard.

16. The judge considered the position as regards the presence or absence of permission before 1978. She said that Mr Marshall's evidence about what he did when he and his wife were the owner of the yard (from 1978 to 1988) told one nothing as to the position in relation to permission in the period before 1978. She held that she could not make a finding to the effect that the use of the yard as an access to the workshop was without permission before 1978 and that 1978 therefore became "a starting point from which a period of prescriptive use can run".

17. From 1988 to 2003, the owners of the yard were Mr and Mrs Lyell. In relation to the period from 1988 onwards, the judge said there was "an absence of evidence" as to whether the use of the yard as a means of access to the workshop was with the permission of the owner of the yard. As to whether Mr and Mrs Lyell had given such permission, she said:

> "There is no evidence that they did and no evidence of any value that they did not, because I can see no reason why a conversation between Mr Meeson and Mr or Mrs Lyell about his access across the yard would have been reported to Mrs Meeson. It might have been but it might well not have been. It is impossible to prove a negative, but there must be something to tip the balance of probabilities and to show me that it was more likely than not that Mr Meeson did not have permission to use the yard during the Lyells' ownership and there is simply no evidence either way."

Later she said:

> "Accordingly, the Applicants' application fails because they have not proved that the requirements for prescriptive use were met for a period of twenty years before the end of 2001."

18. Although the judge held that the Appellants had failed to establish any right of way acquired by prescription, she went on to consider two further points which had been argued but which only arose if the Appellants had established a right of way. These two issues concerned the extent of any right of way which might have been acquired by prescription and whether any such right of way had been abandoned.

19. As to the extent of any right of way, the judge held that any right of way would not have been "for all purposes". She said:

> "The use acquired by prescription would have been limited to loading and unloading material for the purposes of a single business conducted at the workshop."

The judge then made certain findings as to the use of the yard to gain access to the workshop. She referred to Mr Meeson parking his van half in and half out of the workshop for the purposes of loading and unloading. I interpose that it was explained to me that the part of the van parked outside the workshop was on part of the curtilage of the workshop which was owned by the owner of the workshop itself. She said:

> "There is no evidence that Mr Meeson drove across the yard in order to keep a vehicle inside the workshop with the doors closed."

And later she said:

> "Accordingly, the evidence points to use predominantly in order to get materials in and out of the workshop."

20. The judge then held that any right of way acquired by prescription had not been abandoned. There is no appeal against that finding.

The grounds of appeal

21. The Appellants put forward lengthy grounds of appeal which can be summarised as raising the following four contentions:

    (1) That the FtT was wrong in relation to the burden of proof in respect of the presence or absence of permission for the use of the yard;

    (2) If, contrary to (1) above, the burden was on the Appellants to prove that the use of the yard to gain access to the workshop was without permission, that they had adduced sufficient evidence to discharge that burden;

    (3) The FtT was wrong to hold that any easement would be limited to access for loading and unloading; and

    (4) The FtT was wrong to hold any easement would be limited to use of the dominant tenement as a single business workshop.

The first ground of appeal: the burden of proof

22. The Appellants' case before the FtT was that their predecessors in title had acquired a right of way by prescription. The principles relied upon were the principles relating to prescription by lost modern grant. This is one of three modes by which an easement may be acquired by prescription. The other two modes are prescription at common law and prescription under the Prescription Act 1832. The 1832 Act deals with rights of way in section 2 and deals with rights of light in section 3. Apart from the acquisition of rights of light under section 3 of the 1832 Act, all modes of prescription require there to have been relevant use for a sufficient period of time and the use must be "as of right".

23. In order for the use in question to be relevant use for the purposes of prescription, it must have certain qualities and have been of a certain character. In particular, the use must be such as to carry to the mind of a reasonable person, in possession of the servient tenement, the fact that a continuous right of enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance to it is intended: see Hollins v Verney (1884) 13 QBD 304 at 315.

24. The use must be "as of right". It has been explained that "as of right" does not mean "by right" but instead it means "as if of right": see R (Beresford) v Sunderland City Council [2004] 1 AC 889 per Lord Walker of Gestingthorpe at [72] and R (Barkas) v North Yorkshire County Council [2015] AC 195 at [14]. "As of right" means, in Latin, *nec vi, nec clam, nec precario,* or in English, not contentious, not secret and not with permission: see Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 at 238 and 239; R v Oxfordshire CC ex parte Sunningwell PC [2000] AC 335 at 350H.

25. In the present case, the FtT held that the burden of proving that the use in question was "as of right" was on the party claiming to have acquired the right by prescription. This was not in dispute at the hearing of this appeal, provided

that it was understood that it was subject to the all-important qualification that what was being discussed was the legal burden of proof and not the burden of adducing evidence in relation to the question of the presence or absence of permission. Although the incidence of the legal burden of proof was not in dispute, it is worth addressing the authorities which establish that proposition.

26. Megarry & Wade, The Law of Real Property, 8th ed., at para. 28-048 states that the burden of proving that the use was "as of right" is on the party claiming the easement and cites Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 and Patel v W.H. Smith (Eziot) Ltd [1987] 1 WLR 853.

27. Gardner v Hodgson's Kingston Brewery Co contains a number of statements to the effect that the burden of proving that the use was without permission was on the party claiming the easement. In that case, the claimant had proved use of a way across a yard for a sufficient period of time but the servient owner adduced evidence that a payment had been regularly made by the user of the way to the owner of the yard. There was a dispute as to why the payment was being made. The servient owner contended that the payment was a rent or a licence fee for the use of the way; if so that use would have been permissive and could not be relied upon for the purpose of prescription. The claimant contended that the payment was in the nature of a perpetual payment attached to some original grant of the right of way. Some members of the House of Lords took the view that the payment was clearly a rent or licence fee and that finding meant that the claim to prescription failed. Other members of the House of Lords held that, at best from the claimant's standpoint, the position was ambiguous and therefore the claimant had failed to discharge the burden on her of explaining the reason for the payment and showing that the use of the way had been made without the permission of the owner of the yard: see at 233, 234, 238 and 239.

28. In Patel v W.H. Smith (Eziot) Ltd, Balcombe LJ approved the statement in an earlier edition of Megarry & Wade in the same terms as in the current 8th ed. to the effect that the burden of proving that the use was as of right was on the claimant. He expressly mentioned the burden of proving that the use was *nec precario* and he referred to Gardner v Hodgson's Kingston Brewery Co.

29. Balcombe LJ also referred to Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd [1959] 2 Lloyd's Rep 472. In that case, there was an issue as to whether the use in question was permitted by an earlier deed. The judgment of the Court of Appeal was given by Harman LJ. He held, at page 477, that it would be a strange result that something done under a claim to have a contractual right to do it could be treated as an adverse act when it had been done on the assumption of a permission by the other party to the grant. On the issue as to whether there had been an assumption of permission, there was no direct evidence and so the court was left to inference. He concluded, at 477:

> "It seems to us that, in the absence of all evidence the appellants have not discharged the burden which lies on them to show that their user was not *precario*, but was a deliberate invasion of the respondents' property. On this footing, no prescriptive rights were acquired."

30. These cases do establish that a claimant bears the legal burden of proof that the use relied on was use as of right. This is the position even though the claimant had the legal burden of proving a negative state of affairs, i.e. that the use was *nec vi* and *nec precario.* In the case of proving use *nec clam,* this may not involve proof of a negative state of affairs as one is required is to prove that the use was carried on openly and that involves proof of a positive state of affairs. Although the case of Thomas W Ward is consistent with the other cases in holding that the claimant bears the legal burden of proof, the reasoning in that case must be reconsidered in the light of the later decision in Bridle v Ruby [1989] 1 QB 169 at 177.

31. Mr Smith, for the Appellants, submitted that although the legal burden of proving that the use was without permission was on the party claiming the easement, that party could be assisted in discharging the legal burden by relying on an evidential assumption that was established by a long line of authority. The evidential presumption for which he contended was that if the putative easement was used for the necessary period of time in the requisite manner, i.e. openly and so as to bring home to a reasonable owner of the servient tenement that a right was being asserted, then there was a rebuttable presumption that the easement had been enjoyed as of right and, in particular, without permission. It was then open to the servient owner to call evidence that there had been permission, or that the use was contentious, to rebut that presumption. If such evidence were given, the court would then decide on the evidence whether the presumption had been rebutted.

32. Mr Smith submitted that the above cases dealing with the legal burden of proof did not discuss this evidential presumption but it was established by a separate line of authority. In the present case, the FtT did not have the benefit of the citation of these authorities. In the following discussion of the authorities, I will refer to the person claiming the easement as "the claimant", whether he was the Plaintiff or the Defendant in the action, I will refer to the right claimed as "the easement" and the owner of the land over which the right is claimed as "the servient owner" although, of course, the issue in the cases was whether the claimant had established an easement.

33. It is helpful to begin the reference to authority by considering the decision in Campbell v Wilson (1803) 3 East 294, 102 ER 610. This case is cited in Gale on Easements, 20th ed., at para. 4-103 as authority for the evidential presumption for which Mr Smith contends. The statement in the 20th ed. appeared in the same terms in the first edition of Gale on Easements (1839) at page 121.

34. The report of Campbell v Wilson has the following headnote:

> "Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above 20 years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant, which must have been made within 26 years, as all former ways were at that time extinguished by the operation of an Inclosure Act."

35. In Campbell v Wilson, the defendant was claiming a right of way acquired by prescription. He had proved the use of the way for 26 years. The servient owner contended that the use could be explained by the fact that the persons using the way had the benefit of an express right of way under an inclosure award. However, the express right of way was over different land from the way actually used. The report of the case says that the evidence showed that the use in question was "adverse" and that is explained by reference to evidence which referred to the use having an adverse effect on the servient tenement. The report also says that: "no leave was proved to have been at any time asked" by the users of the way and the use was not interrupted although this part of the report does not make it wholly clear whether this is a reference to the fact that the servient owner failed to prove the grant of leave or the claimant proved that no leave had been asked for.

36. The trial judge directed the jury:

> "That the use of a road as a matter of right by those who claimed it, and submitted to as a matter of right by the possessor of the land over which it was used, was to be considered as an adverse enjoyment.
>
> …
>
> But that if the jury were satisfied from the whole of the evidence that the defendant's enjoyment had been only by leave or favour, or otherwise than under a claim or assertion of right, it would repel the presumption of a grant, and in that case, or if they thought it had not been enjoyed adversely for 20 years, they must find for the plaintiff."

37. The jury having found for the defendant that he had established a right of way by prescription, the servient owner challenged the judge's direction to the jury. Counsel for the servient owner referred to a number of cases, Lewis v Price, Dougal v Wilson, Darwin v Upton and Griffiths v Matthews which, he accepted, established that the enjoyment of an easement for 20 years, uninterrupted and not explained, was evidence for the jury to presume a grant but evidence which went to explain the enjoyment and to show that it originated by mistake or licence or in any other manner than on a claim of right, would rebut the presumption of a grant. The four earlier cases to which counsel referred are not all independently reported but they are discussed in a lengthy note by Serjeant Williams in his report of Yard v Ford 2 Wms. Saund. 172, 129 ER 1124.

38. Lord Ellenborough CJ held that the trial judge had correctly directed the jury. He held at pages 300-301 that the case was like "the common case of adverse enjoyment of a way for upwards of 20 years, without any thing to qualify that adverse enjoyment" and that there was "no reason why the jury should not make the presumption, as in other cases, that the defendant acted by right". Grose J held, at page 301, that the judge had correctly left the question to the jury to decide on the evidence. Lawrence J said at pages 302 that: "if there were an adverse possession for above 20 years, and not explained by any evidence, why might not the jury presume a grant?" Le Blanc J said at 302:

> "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favour, or otherwise than under a claim or assertion of right, and indeed unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant."

39. Mr Fletcher for the Respondents submitted that, in Campbell v Wilson, there was a positive finding that the use was "adverse" to the servient owner. He then submitted that such use would not have been adverse if it had been permitted by the servient owner and therefore I should consider that case as one where there was a positive finding that the use was without permission. I do not accept that submission. The court referred to the matters which made the use adverse to the servient owner. Those matters related to the physical impact of the use on the land and did not concern the presence or absence of permission. Further, the comments in the case as to when it was appropriate to hold that there was a presumption that the use was without permission would not make any sense if, on the facts of that case, there was an earlier positive finding that the use was without permission.

40. In Cross v Lewis (1824) 2 B&C 686, 107 ER 538 the claimant relied on the fact that windows on his land had enjoyed the passage of light over the adjoining land for 38 years. This case was prior to the 1832 Act so that it was necessary to show that the use of the light had been as of right. There was no specific discussion about the possibility of there being permission for the opening of the windows and there was no specific evidence either way as to whether the use had been made with the permission of the owner of the land over which the light passed. It was held that proof of the use for 38 years raised a presumption of right and in the absence of evidence to rebut that presumption the right was established. Bayley J said at 689:

> "I do not say that twenty years' possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of Darwin v Upton, it has been held, that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it."

Holroyd J's judgment at 690 was to the same effect.

41. The earlier cases to which I have referred were considered at various levels of decision in Angus & Co v Dalton. The decision of the trial judge (Lush J) is reported at (1877) 3 QBD 85 and the decision of the Court of Appeal is reported at (1878) 4 QBD 162. The decision of the House of Lords is reported as Dalton v Angus & Co at (1881) 6 App Cas 740. The various judgments discuss the presumptions which are to be made in a case where a claimant to an easement has proved that he has used the putative easement openly for the requisite period of time. The majority judgments in the Court of Appeal and the decision of the House of Lords are to the effect that:

(1) such use gives rise to a presumption of an earlier grant of an easement;

(2) that presumption may be rebutted by certain matters such as showing that the use was with the permission of the servient owner; but

(3) the presumption may not be rebutted by proving that there had not been an actual grant prior to the commencement of the use.

It can be seen from this case that the presumptions arising from the fact of long use are of different kinds. The presumption that the use was as of right is an evidential presumption which can be rebutted by evidence which shows that the use was not as of right because, for example, it was with permission. However, if it is established (with the aid of this evidential presumption) that there was use as of right for the requisite period, then there is a legal presumption, or a legal fiction, that there had been an earlier grant of an easement and this presumption or fiction cannot be rebutted by showing that there had not in fact been such a grant.

42. It may also be relevant to refer to one case as regards the evidence to be given, as to the presence or absence of permission, following the 1832 Act. Section 5 of the 1832 Act introduced rules as to what parties had to plead in a disputed claim to an easement alleged to have been acquired by prescription. Under section 5, it was held that the claimant should plead use as of right. It was also held that even if the defendant only pleaded a general traverse of that allegation, without a positive pleading that the use was with permission, the defendant could call evidence that the use had been with permission. The case which illustrates the operation of section 5 in this respect is Beasley v Clarke (1836) 2 Bing. NC 70, 132 ER 271. Simplifying the facts somewhat, the party claiming the right of way had proved use of the way for the requisite period. The trial judge permitted the servient owner to call evidence to show that the use had been with permission. This evidence having been admitted, the jury found that the claimant had not established an easement by prescription. The claimant then appealed contending that the evidence should not have been admitted because the servient owner had only pleaded a general traverse of the claim that there had been use as of right. The appeal failed, on the true interpretation of section 5 of the 1832 Act. However, for present purposes, what is relevant is that the argument and the decision only make sense if the evidential burden was on the servient owner to call evidence that the use had been with permission.

43. Turning to more modern times, the way in which the matter was described by Lord Hope in R (Lewis) v Redcar & Cleveland BC (No. 2) [2010] 2 AC 70 at [67] (a case concerning whether use of land as a town or village green was "as of right") was as follows:

> " … they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If 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 (see R (Beresford) v Sunderland City Council [2004] 1 AC 889, paras 6, 77), the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—

> either because it has not been asked, or because it has been answered against the owner—that is an end of the matter."

I consider that this passage is consistent with the servient owner having the burden of raising, and calling evidence to support, the contention that the use in question was with permission and therefore was not as of right.

44. I was also referred to a number of well-known cases concerning claims to rights of way by prescription where the reasoning of the court is consistent with the approach that there is an evidential burden on the servient owner to call evidence to show that the use of the way, which has been proved by the claimant, was use pursuant to a permission granted by the servient owner. The authorities to which I was referred (and some others which I have added) included Tehidy Minerals Ltd v Norman[1971] 2 QB 528, Bridle v Ruby [1989] QB 169 at 177F (referring to "otherwise unexplained), Mills v Silver [1991] Ch 271 at 285D-E, and London Tara Hotel ltd v Kensington Close Hotel Ltd [2012] 2 All ER 554 at [29].

45. In Jones v Price and Morgan (1992) 64 P&CR 404 it was held that there was permissive use where the use of a track took place on the basis of a common understanding that the use was permissive: see at page 407. Parker LJ added at page 408:

> "Even therefore, if the judge was not entitled to make a positive finding that the user *was* permissive, the first defendant's case [i.e. the case of the party claiming the easement] would fail on the ground that he had not discharged the onus of proof upon him."

I do not regard this statement as contrary to the existence of the evidential presumption for which the Appellants contend. The statement involved an application of what had been said in Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 at 238 to the effect that where the facts are open to two explanations, the burden is on the claimant to establish the explanation which is consistent with the use being as of right.

46. The existence of the evidential presumption relied upon by the Appellants makes very good practical sense and the absence of such an evidential presumption would make little sense. If there were not such an evidential presumption, then the claimant would have to adduce evidence that there was no permission at any point during the period of use. In the light of recent authorities, use is *precario* if there was either an express permission or an implied permission for that use. If the Respondents were right that the burden of proving *nec precario* was on the claimant, without the benefit of the evidential presumption, the claimant would have to call evidence to disprove the existence of an express permission at any time during the period of use and also to disprove the existence of any facts from which a permission could be implied during the same period. The claimant would often be unable to prove these matters, particularly during the time the dominant land was owned by a predecessor in title, even where there never had been any express or implied permission. I consider that whatever the legal requirement is in relation to *nec precario*, the same must apply to *nec vi*. As regards *nec vi*, there can be *vi* if there was force or certain other contentious acts, for example, use which was

contrary to letters written by the servient owner or signs erected by the servient owner. If the Respondents were right, then then burden would be on the claimant to call evidence to disprove the existence of such matters. As with *precario,* the claimant would often be unable to prove these matters, particularly during the time the dominant land was owned by a predecessor in title, even where there never had been anything which made the use *vi*. Further, it should be remembered that with a claim to prescription at common law, the period of user which might be relied upon by the claimant might be a very lengthy period indeed.

47. I consider that the Appellants' submission as to the existence of an evidential presumption is supported by the authorities and by good sense. I therefore accept the submission that, having called evidence to establish that the yard had been used openly and without interruption for a sufficient period of time, the Appellants had the benefit of an evidential presumption that such user was as of right. The Respondents did not call any evidence to rebut that presumption. It follows that the FtT ought to have held that the Appellants had discharged the legal burden of showing relevant use, as of right, for a sufficient period.

48. I would allow the appeal on this first ground and direct the Land Registrar to give effect to the application which had been made by the Appellants.

The second ground of appeal

49. The second ground of appeal only arises if I rejected the first ground of appeal. In the event, therefore, the second ground of appeal does not need to be considered.

50. Although I heard detailed submissions on the second ground of appeal, I have concluded that I should not consider whether this ground of appeal could be established. It is not necessary for me to deal with this ground of appeal and, if I had had to deal with it, there would have been difficulty in assessing the findings of the FtT as to the state of the evidence when I have not been provided with a note of the cross-examination of the witnesses called by the Appellants.

The third and fourth grounds of appeal

51. As I have held that the Appellants have established a right of way over the yard for the purposes of access to and egress from the workshop, I need to consider the third and fourth grounds of appeal. Both of these grounds of appeal involve the question as to the extent of a right of way which has been acquired by prescription. It is convenient to take these two grounds of appeal together.

52. The long-established principle is that where a right of way is acquired by use, the extent of the right is measured by the extent of the use. For more modern statements to this effect, see Mills v Silver [1991] Ch 271 at 287B and Loose v Lynn Shellfish Ltd [2016] 2 WLR 1126 at [36] and [44]-[46].

53. The judge held that the use which had been made of the yard was for the purpose of access to and egress from the workshop, with and without vehicles.

She described the workshop as a joinery workshop. She also held that such access was typically for the purpose of loading and unloading materials. She said that she wanted to make it clear that any easement which might have been acquired by prescription would not have been an easement "for all purposes". She then said:

> "The use acquired by prescription would have been limited to loading and unloading material for the purposes of a single business conducted at the workshop."

54. It is not completely clear what the judge meant by the passage quoted above. If she was simply describing the use which had been made of the yard, then she was making a finding of fact which was not challenged before me. However, if she was saying that the easement acquired by prescription could only be exercised while the dominant tenement was used for the purposes of a single business as a workshop and, further, that the easement could only be exercised for the purposes of loading and unloading, then such a conclusion is challenged by the third and fourth grounds of appeal and, indeed, the challenge is not really resisted by the Respondents.

55. As stated above, it is clear that the extent of the easement acquired by prescription in this case is to be measured by reference to the extent of the use which gave rise to that easement. The judge has made findings as to the extent of the historic use. Issues may arise in the future as to the extent of the easement if, and when, the owner of the dominant tenement wishes to change the use of the dominant tenement from a joinery workshop to something else. If such issues arise, they will have to be addressed by asking two questions, which are:

(1) Does the intended change of use of the dominant tenement represent a "radical change in the character" or a "change in the identity" of the dominant tenement, as opposed to a mere change or intensification in the use of the dominant tenement? and

(2) Would the intended use of the dominant tenement result in a substantial increase or alteration in the burden on the servient tenement?

56. Mc Adams Homes Ltd v Robinson [2004] 3 EGLR 93 establishes that these are the two relevant questions which need to be considered. The same case acknowledges that these questions involve matters of degree and evaluation which require close attention to the facts and circumstances of the case. Accordingly, it is not possible in advance of a detailed identification of an intended change of use to be more specific as to the outcome of answering these two question in relation to some future change of use.

57. Notwithstanding the fact that the position as to future changes of use cannot be definitively resolved at this stage, the register of the relevant titles has to say something about the extent of the easement which has been acquired in this case. It is plainly possible to identify the dominant and servient tenements and to say that the easement is a right of way, with and without vehicles. As regards further attempts to spell out the extent of the easement, the practice of the Land Registry, as explained in Practice Guide 52: Easements claimed by Prescription, is to state in the register entry:

> "The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen."

The register entry then, typically, refers to the statutory declaration which was lodged in support of the application for the register entry. In the present case, it would be possible for the register entry to refer to the decision of the FtT and also this decision and to make those documents available for inspection. However, I consider that it will suffice in the present case if the register entry states:

> "The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen which was use for the purposes of access to and egress from the dominant tenement when being used as a joinery workshop."

58. The judge also referred to the historic use being limited to loading and unloading material for the purposes of the workshop. I do not see that as a relevant limitation which needs to be expressed in the register entry. The easement is a vehicular right of way for the benefit of the dominant tenement. The precise reasons why it was beneficial for the owner of the workshop to use that right of way to go to and from the workshop do not affect the character or extent of the use. At one point, I questioned whether the judge was intending to widen the extent of the easement by holding that the right of way carried with an ancillary right to station a vehicle on the yard for the purposes of loading and unloading: for such a possibility, see Bulstrode v Lambert [1953] 1 WLR 1064. However, Mr Smith for the Appellants told me that no such additional ancillary right was claimed. He accepted that when a vehicle was stationed for the purpose of loading and unloading, and only part of the vehicle was within the workshop building, the remaining part of the vehicle was still on land which was part of the dominant tenement and he did not assert that any part of the vehicle was stationed on the yard itself.

The result

59. I will allow the appeal and direct the Land Registry to make the register entries which are sought in the terms set out in paragraph 57 above.

MR JUSTICE MORGAN

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