REF/2015/0730

FIRST TIER TRIBUNAL (PROPERTY CHAMBER)
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) SUSAN SCOTT HUNT
(2) NICHOLAS ANDREW HALL

APPLICANTS

and

HARINGEY COUNCIL

RESPONDENT

Property Address:	**The site of 14 Lynton Road, Crouch End, London**
Title Number:	**Title number MX460797**
Before:	**Mr Hansen (Tribunal Judge)**
On:	**18 August 2016**
Representation: **Respondent**	**The Applicants in person** **Mr B Stimmler of Counsel for the**

ORDER

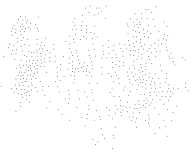
IT IS ORDERED THAT the Chief Land Registrar do cancel the application dated 9 March 2015.

Dated this 30th day of August 2016

William Hansen

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL



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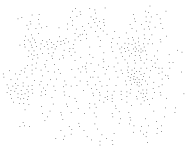
DECISION

KEYWORDS – Easement – Prescription – Lost Modern Grant – Extent of User - Whether Quality and Quantity of User sufficient – Knowledge of Servient Owner - Ultra vires

Cases referred to

Union Lighterage Company v London Graving Dock Company [1902] 2 Ch. 557



Tehidy Minerals Ltd v. Norman [1971] 2 QB 546

Mills v. Silver [1991] Ch 271

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

Bakewell Management Ltd v. Brandwood [2004] 2 AC 519

Housden v. Conservators of Wimbledon and Putney Commons [2008] 1 WLR 1172

Wilkin & Sons Ltd REF/2011/0420

Winterburn v. Bennett [2016] EWCA Civ 482

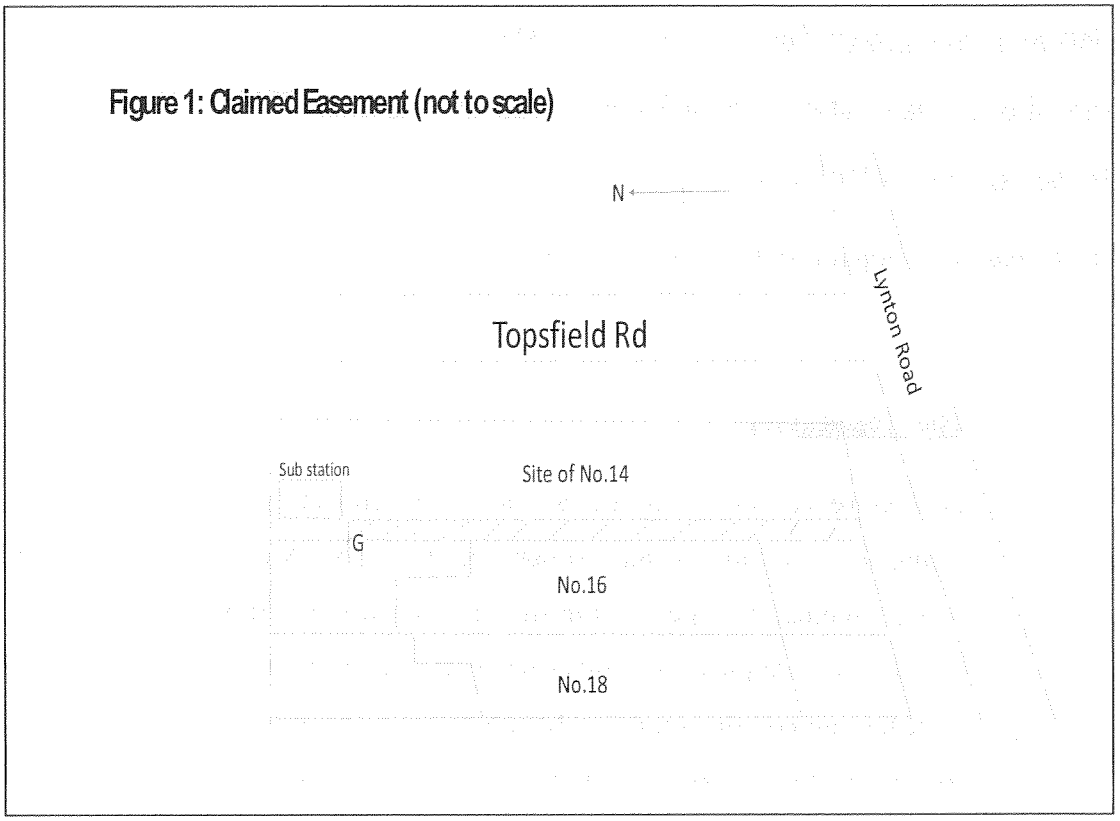
The Application

1. The reference before me arises out of an application by the Applicants, as the owners of 16 Lynton Road, Crouch End, London ("No.16"), to register the benefit of an easement over part of the site of 14 Lynton Road, Crouch End ("the Site of No.14"). The Applicants jointly own No.16 and their title is registered at HM Land Registry under title number MX351002. No.16 adjoins the Site of No.14. The house which once stood on the Site of No.14 was destroyed in or about 1944. The Respondent is the proprietor of the Site of No.14 and its title is registered at HM Land Registry under title number MX460797.

2. By an application in form AP1 dated 9 March 2015 the Applicants applied to register an easement over part of the Site of No.14 as follows: "*a pedestrian right of way one meter wide for the benefit of the applicants' registered title MX351002 leading from gates on the east side of registered title number MX351002 over a paved area of registered title number MX460797 running parallel to the eastern boundary wall of MX351002 on to the pavement along Lynton Road*". The form continued as follows: "*The claimed easement is shown hatched in green in Document 1*". Document 1 is document EX 1 at page 11 of the bundle which clearly shows the claimed easement hatched green.

3. For illustration purposes I set out below in Figure 1 the basic layout on the ground. The claimed easement is shown hatched on Figure 1 and runs from the opening at

point G on the eastern boundary of No.16 alongside the flank wall of No.16 over the Site of No.14 to the public highway known as Lynton Road.



Background

4. The Applicants were registered as the proprietors of No.16 on 18 October 1996. They purchased the property from Mrs Cecilia Davies, then an elderly widow who lived at the property with her grandson, Philip Davies. It is believed that Mrs Davies is now deceased and the Applicants did not maintain contact with Philip Davies after they bought the property. It is believed that the Davies lived at the property from about 1956. However, there is no direct evidence from any member of the Davies family as to their user of the claimed right of way.

5. In 1996 the property was advertised in the particulars of sale ("the Particulars") at pages 75-75 as being "*A Victorian end of terrace house requiring total modernisation and updating...*" I shall refer in more detail to the Particulars in due course as they shed valuable light on the condition of the property in 1996.

However, for present purposes, it is relevant to note that, consistent with the suggestion that the property was in need of modernisation, the Applicants began renovating the property following the completion of their purchase in October 1996 and it was in that context that they received a letter from the Respondent dated 29 April 1997 (p.110) complaining of a breach of planning control. The alleged breach of planning control was described as follows: "*Demolition of side wall/wooden gates/side extension with flue*". The precise detail of what they had done and whether it amounted to a breach of planning control does not matter for present purposes. However, the content of their letter in response dated 12 May 1997 ("the May 1997 letter") at pages 111-113 *is* significant, particularly the paragraph at the top of page 112 which reads as follows:

> *"When we purchased the property, there was an existing brick wall (approximately 2 metres high) along the outside boundary which abuts onto a public square. The wall begins at the end of the side of the building and continues for approximately 9.7 metres. When we purchased the property, there was an insecure and derelict wooden fence panel of about 2 metres which began where the wall ended and was unsubstantially joined to it. This fence panel was the same height as the brick wall to which it was joined. From the outside boundary of the property, therefore, there was a continuous line composed of the wall and then the fence. Entirely inside the old fence panel, there was a small and crumbling parapet wall. The fence was not attached to the parapet wall. We have not demolished any part of the higher wall. We have simply replaced the collapsing panel of wooden fencing with a more substantial fence which is openable. Thus, there is no change at all to the outside appearance or configuration of the boundary, except that the old wooden fence panel has been replaced by a new one".*

6. It would appear that the alleged breach of planning control was not pursued by the Respondent. The Applicants then completed their renovation of No.16. Although they said in the May 1997 letter that they had simply replaced an old wooden fence panel with a new openable one, in their ST4 made in support of the present application they said that they had "*installed a pair of robust wooden gates secured with a bolt and a lock and hinged on both sides*" (page 1P). The ST4 continued: "*We have used the gates continuously since purchasing the property in 1996*". Their evidence in support of the current claim concluded as follows at page 1R: "*Based on our own use of the gate between our property and the 'square'*

together our neighbours' reports of the Davies' use of the same opening to access the square, we consider we are reasonable in our belief that we have a right to an easement by prescription of over 40 years that entitles us to use the gate and to cross the paved area from the gate to Lynton Road".

7. I was told that the Applicants have already successfully registered the benefit of a right of way on foot from point G across the Site of No.14 to Topsfield Road pursuant to an application made in December 2014 ("the First Application"). Following the hearing and at my request I was supplied with official copies of the title to No.16 and the Site of No.14 in which the benefit and burden of such easement is duly noted.

8. It was common ground that the easement registered is an easement from point G across the Site of No.14 to Topsfield Road. However, there was no suggestion that the evidence provided in support of that earlier application has previously been tested or that the success of that application was in any way material to my decision on the present application and I proceed accordingly.

9. The present application is dated 9 March 2015. It was made following a course of correspondence between the Applicants and the Respondent which began with a letter from the Respondent dated 5 February 2014 to the occupier of No.16 in the following terms:

> *"Dear Sir/Madam*
>
> *Re: Council land Adjoining 16 Lynton Road London N8*
>
> *We are instructed by the Asset Management Service and are writing to you as the occupier of 16 Lynton Road N8.*
>
> *The Council is the owner of the land adjoining the abovementioned property...*
>
> *Our instructions are that following a site inspection it has been discovered that a gate has been erected on the boundary between 14/16 Lynton Road which enables access onto the adjoining Council land. According to our records there is no formal agreement permitting access onto this land.*
>
> *In the absence of a license or other formal permission a trespass is committed when entering Council land. Please be advised that any future unauthorised*

access may result in the issue of legal proceedings seeking an order from the court and for damages and costs and without further notice to you".

10. The Applicants replied on 8 February 2014 seeking clarification of the Council's position and describing the history. They claimed to have erected the gate in 1997 in place of a "*dilapidated fence panel*" which "*opened onto the square and had old rusty bolts in it*". The reference to the "*square*" in this letter and other documents is a reference to the Site of No.14.

11. The Respondent subsequently reiterated its position in a letter dated 14 April 2014, asking Applicants to desist from accessing Topsfield Road via the gate "*pending a final decision on the future use of this land*". This latter phrase appears to have set alarm bells ringing in the minds of the Applicants and their neighbours about possible development of the land, the Applicants' reply dated 22 April 2014 expressing concern "*that the Council has plans to develop the land or to sell it to someone who will be allowed to build on it*". This, the Applicants said, "*would be a critical issue for the whole of our neighbourhood*" as "*the square serves as a valued amenity to the local area*".

12. Following further correspondence, the Council by letter dated 7 October 2014 offered the Applicants a license at a total cost of £1,350.

13. The Applicants were not satisfied with this offer and instead proceeded to make the First Application. As stated above, they then made the current application in March 2015.

The Issues

14. The Applicants rely on common law prescription, lost modern grant and prescription under the Prescription Act 1832. They clearly cannot establish prescription at common law for the reason given in paragraph 14 of the Respondent's skeleton argument: the alleged servient tenement was the site of a house until the Second World War and any enjoyment of the alleged right has clearly been of more recent date than the time of legal memory.

15. The doctrine of lost modern grant and prescription under the 1832 Act both require the Applicant to show 20 years' uninterrupted user "as of right", that is to say without force, without secrecy and without permission (*nec vi, nec clam, nec precario*).

16. The purpose of the law whereby a person may acquire rights by prescription is that the legal position should reflect and recognise the fact of long use. In *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 Lord Hoffmann said at p.349:

> *"Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment."*

17. By way of explanation of the need for the long user to be without force, secrecy or permission and therefore "as of right", Lord Hoffmann said in the same case at p.350:

> *"The unifying element in these three vitiating circumstances was that each constituted a reason why it would not be 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."*

18. In the case of prescription under the 1832 Act, the user must be "*next before some suit or action*", i.e. up to the date of the application to Land Registry: see e.g. *Wilkin & Sons Ltd* REF/2011/0420. In the present case I consider that the user became contentious (see e.g. *Winterburn v. Bennett* [2016] EWCA Civ 482) as from the date of the above-mentioned letter from the Council dated 5 February 2014, more than a year before the present application was made. I therefore consider that the claim under the Act must fail. However, under the doctrine of lost modern grant, twenty years' uninterrupted enjoyment of an easement, having the necessary qualities to fulfil the requirements of prescription, is sufficient to give rise to a presumption of a lost grant, whether or not the enjoyment was next before

some suit or action. I therefore propose to focus on the claim under the doctrine of lost modern grant.

19. The principal issue is thus whether the Applicants can prove user of the requisite quality and quantity to justify the right claimed ("the User Issue"). In particular, given that they only purchased No.16 in October 1996, it is clear that that they must prove that the user that they rely on to found their claim began at a time when the Davies family lived at No.16. The Respondent resists the application on the basis that the Applicants cannot prove user of the requisite quality and quantity. In particular, they contend that the alleged user, even if proven, was not, in the period before 1997 when the fence was replaced by a set of gates, user of which the servient owner had knowledge, either actual or constructive ("the Knowledge Issue"). Finally, as a discrete point, the Respondent alleges that any grant would have been impossible and ultra vires, by reason of the Local Government Act 1972 and its predecessors, and this is sufficient to defeat any claim based on prescription ("the Vires Issue").

Site Visit

20. I had the benefit of a site visit on 17 August 2016. There is now a set of wooden double doors at point G providing access from the garden of No.16 onto the Site of No.14 (see e.g. photos at pages 134, 171 and 174). These were put in by the Applicants in 1997. This is the starting point of the claimed easement. Just inside the double doors within the curtilage of No.16 is a raised area of decking. The decking is above the level of the remaining garden. The decking is more or less level with the top of a single course of bricks across the opening at point G. The presence of this single course of bricks in the threshold at point G means that there is, in effect, a very small step down from point G onto the Site of No.14. Underneath the decking I was shown a step approximately 9 inches high leading from the garden to the opening at point G. I was told that this replaced a previous step in the same position.

21. The Site of No.14 is now paved and largely indistinguishable from the surrounding pavement. It adjoins and merges into the pavement on Topsfield Road and the pavement on Lynton Road (see photo at page 121). There are, however, a number

of beds with shrubs and bushes towards the eastern edge of the Site of No.14 and a curved line of edging stones separating the Site of No.14 from the main pavement.

22. Exiting through the double doors on to the Site of No.14, I noted the presence of a cherry tree slightly south of point G and about 1.5 metres from the eastern boundary wall of No.16. Further south, towards Lynton Road, and much closer to the eastern boundary wall of No.16 I noted the presence of a media cabinet adjacent to the old chimney breast as shown in the plan at page 11 (see also photos at pages 121 and 157).

23. More significantly, I noted the presence of what is an electricity sub-station ("the Sub-Station), immediately north of the opening at point G, as illustrated in Figure 1 above (see also photos at pages 125 and 154). Title to the land on which the Substation stands is vested in Eastern Power Networks plc and is registered at HM Land Registry under title number MX471148 (pages 177-179). Immediately north of the Substation there is a wooden door or gate leading to a narrow passage way between the northern boundary wall of the Substation and the southern boundary wall of the adjacent property on Topsfield Road (see top photo on page 126). On looking over the wooden gate I noted the presence of an old wall approximately 2ft 6 inches running behind the Substation from north to south in line with the eastern boundary wall of No.16 ("the Low Wall").

The Evidence

24. I heard evidence from the Applicants and three neighbours or former neighbours of theirs.

25. I heard evidence first from Mrs Charwin who has lived at No.17 Lynton Road (on the east side of Lynton Road, almost opposite Topsfield Road) since 1967. She confirmed the evidence contained in an ST4 dated 3 March 2015. She said she had a good view of the Site of No.14 from her property.

26. In her ST4 she said this: "*Ever since my family and I have lived at No.17, the paved area comprising 14 Lynton Road has been continuously used as a public garden, play area for children, gathering place and right of way by me and my*

family, by other residents of the immediate neighbourhood and by the public generally".

27. She said she knew the previous residents of No.16, Mr and Mr Davies, who lived at No.16 until 1996. She then continued: "*During all the time when the Davies lived at No.16 I was aware there was an access point comprising an openable fence panel leading from the rear garden of No.16 directly onto the paved area of No.14. Members of my family, including my children, who, when young, often played on the paved area of No.14, frequently observed the Davies using this access point. My children and I specifically recall Mr Davies coming out of his garden, waving a stick at them and telling them off for kicking balls against the wall of the house. The Davies always used the opening for carrying out the rubbish and taking it to Lynton Road in front of the house. I recall that sometimes Mr Davies used a trolley to move the dustbins over the paved area to Lynton Road*". She then described the bins as being "*metal dustbin(s) about a metre high, which had a lid on the top and two handles on the side*". She then continued: "*To the best of my knowledge and belief this use of the access and exit point in the garden fence at No.16 and the use of a route across the paved area of No.14 continued during the whole of the time that Mr and Mrs Davies lived at the property as well as when, following the death of Mr Davies, Mrs Davies continued to live at the property alone and, later, when her grandson, Philip Davies, lived with her at the property, up to the date when Mrs Davies sold No.16 to the current owners*".

28. In examination in chief, Mrs Charwin, who is 75, was asked about how the ST4 came to be prepared. She said she discussed her recollection with the First Applicant who then prepared the statement for her. She said she considered the statement to be a fair reflection of her discussions with the First Applicant. She was also asked about the gate or fence panel and she said that there was always a gate there and she remembered "*a scruffy bit of wood across to keep the children out*". She said she did not remember a step up from the garden to the gate.

29. In cross-examination she repeated the account of her son being told off by Mr Davies waving his stick. She was asked what the entrance looked like from the outside and she said that someone standing on the Site of No.14 would see the

wall, i.e. the eastern boundary wall of No.14, and then a scruffy fence panel with hinges. She said the fence panel opened inwards. She said that the Davies carried out the bins by hand, not with the assistance of a trolley. In re-examination she suggested that a trolley had only been used after Mr Davies died.

30. I then heard evidence from Jane Roberts who has lived at 2 Topsfield Road since 1986. She confirmed the contents of her statement at page 183 in which she said: "*I did not know the previous inhabitants of No.16 socially but ... I have a clear recollection of seeing the previous inhabitants of that property coming in and going out of an opening between the rear garden of No.16 and the open land, whether to cross the land to Topsfield Road or to cross the land to Lynton Road*". Her statement was prepared by the First Applicant, again following discussions with the First Applicant. In examination in chief she said she could not see the opening at point G from her house but said she remembered the occupiers of No.16 using the side entrance to drag out their bins. She also said she remembered decorators with ladders using the side entrance. In cross-examination, when asked about the opening, she said that what was there before the wooden gates was "*a rickety fence panel, not a gate*".

31. I then heard from Mr Charwin, Mrs Charwin's son. He confirmed the contents of his statement at page 182. He was born in 1965 and lived at No.17 from 1967 until 1999. His statement was prepared by the First Applicant, following discussions he had with the First Applicant. In his statement he said this: "*When my brothers and I used to play football and other games in the square, Mr Davies sometimes came out of a gap in his garden fence (an openable fence panel) and waived a stick at us and told us off. I also remember that he and Mrs Davies often used a path from the openable fence panel to carry rubbish bins and other items to the pavement in front of No.16*". He also said that Mrs Davies continued this user after Mr Davies died and when she became less mobile, her grandson, Philip, moved in and continued "*to use the same path in the same fashion*".

32. In examination in chief Mr Charwin confirmed that he was a builder by trade and had worked for Mr and Mrs Davies. He said he remembered the openable exit. He was asked what it looked like from the outside and said: "*It looked like a fence panel more than a gate, a bit rickety*". He said it opened outwards and had two hinges on the right hand side looking at it from the Site of No.14. He said he did not remember any obstacles to the Davies' user of the "entrance". He was asked how often they used it and his reply was as follows: "*I don't know. It would be a guess but I think about once or twice a fortnight*". He said he did not remember any steps up to point G from the garden. He thought the ground levels were not that different. In cross-examination he repeated his apparently vivid recollection of Mr Davies waving his stick at him as a young boy. He said he did not remember anything in the entrance by way of obstruction.

33. I then heard from Mr Hall, the Second Applicant. He recounted his recollection of visiting the property when it was for sale and being shown around by Mr Philip Davies. He said, as is consistent with the Particulars, that the property was in need of "*total modernisation*". He explained that he had had previous experience of developing properties and so was not put off by this. He confirmed that the handwriting and sketch plans that one now sees drawn on the Particulars (in particular at page 75) were drawn by him at the time of his pre-purchase visit to the property. At this point, before I set out in more detail the terms of Mr Hall's evidence, I must digress to explain, in words, the two sketches on page 75.

34. There are two sketches; one, in the bottom left hand corner of page 75, is a sketch of the eastern boundary fence. It shows a stretch of "*fence*", 9.5m wide and 6'4" high, and then a "*gap in garden*" of 6'4", with a solid line across the gap at a much lower level, just above the following annotation: "*2'6" high low wall*". To the right of the low wall the sketch continues with what appears to be a drawing of the southern and eastern walls of the Substation. The solid line across the gap then continues north but the line as drawn is fainter, reflecting the fact that it would have been obscured from the viewer's perspective by the Substation. A picture paints a thousand words. There is no substitute for looking at the sketch in the

bottom left hand corner of page 75. The plan in the bottom right hand corner is less important, relating as it does to the bathroom, but it does have a series of what appear to be quite precise measurements: 4'2", 8' and 2'2".

35. Mr Hall maintained that he had not had a tape measure or other measuring device at the time and that his sketches and plans and the measurements shown on them were all approximate. He described them as "*brief informal surveys*". He said that the sketch was made from the Site of No.14 looking into the garden. He confirmed that the 2ft 6in high low wall which he identified in the sketch is the same as the small crumbling parapet wall referred to in the May 1997 letter. He said the 2ft 6in measurement was taken from the ground level of the garden. He said there was then a step up of approximately 9 inches and then the parapet wall which, he said, consisted of 2 courses of bricks at that time. He said that the bricks were each 4 inches high plus the height of the mortar which he put at 1 inch. This was how he got to his approximate measurement of 2ft 6in. He said the wall finished at the southern end of the Substation.

36. Finally, I heard from Ms Hunt, the First Applicant. She explained her role in composing the various witness statements deployed by the Applicants and, in explaining how she came to make the present application, said she had been encouraged to "give it a go" by a friend when the Respondent challenged her use of the way over the Site of No.14.

37. She accepted that the May 1997 letter was a careful and considered response to the Council's letter alleging a breach of planning control but maintained she that she did not feel any need to mention in that letter that the old fence panel was openable. She said: "*Had I had a crystal ball, I would have mentioned it*". She said that the parapet wall now visible behind the Substation was different from the low wall described in the May 1997 letter.

38. She concluded by saying that she believed the Respondent was being unreasonable and she believed that they Applicants had acquired the right to use the way claimed based on long user.

Findings of Fact and Conclusions

39. *The User Issue*. I am satisfied that the Applicants have used the way as claimed since 1997 (i.e. once or twice a week for ordinary domestic purposes as described), the date when (so I find) they installed the new wooden gates at point G. I accept that their user was of the necessary quality from 1997 up to February 2014 when it became contentious. It follows that they must prove that there was user of the requisite quality from February 1994 at the latest; alternatively they must prove user of the requisite for any continuous period of 20 or 40 years in the period between 1944 when No.14 was destroyed and 2014.

40. There is no evidence of the alleged user prior to 1967 when the Charwins moved into No.17 and claimed to have seen the Davies family using the access at point G to bring their bins from the back garden of No.16 to Lynton Road. The other evidence as to user in the period before the Applicants moved into No.16 comes from Jane Roberts. In order to succeed, the Applicants are therefore dependent on the evidence of the Charwins and Jane Roberts and their evidence of the user alleged when the Davies family lived at No.16. However, that evidence must be assessed in the light of all the other evidence, including two important documents which shed light on what was there on the ground in 1996 and, by inference, for some time before 1996. I am referring here to the Particulars (or rather the Second Applicant's sketch plan on those Particulars) and the May 1997 letter. These documents were prepared at a time when there was no suggestion of any claim being made to an easement. The May 1997 letter was, I find, a carefully drafted and considered response to a letter from the Council alleging a breach of planning control. The sketch plan and drawing on the Particulars were, I find, carefully drawn by someone with experience of developing property and contained reasonably accurate measurements. For these reasons I consider that I can and should place considerable weight on these two documents.

41. By contrast, I do not place any great weight on the evidence given by Mrs Charwin, Mr Charwin and Jane Roberts. Ultimately, I found their evidence to be unreliable for the following reasons.

42. Firstly, I considered all three witnesses to be somewhat suggestible, because of their desire to preserve the "*amenity space*" represented by the Site of No.14. I further consider that this suggestibility was compounded by the fact that their statements were not their own words, but were prepared for them by the First Applicant. I accept that the First Applicant first discussed matters with the witnesses but I do not consider that the final statements represent the witnesses' own words.

43. Secondly, the oral evidence they gave at trial differed considerably from their written evidence. Potentially important new evidence emerged in the course of their giving evidence which I would have expected to be contained in their statements. For example, although he did say that the fence panel was openable, Mr Charwin's statement made no mention of any hinges, whereas his oral evidence contained specific details about the type of hinges, the allegation being that they were t-hinges. As a builder, I would have expected him to remember this detail and for it to be included in his written statement. Similarly, by contrast with her oral evidence, Jane Roberts' statement said nothing about the Davies using the entrance to take their bins out or to let decorators with ladders in. She just referred to them "*coming in and out of the opening*".

44. Thirdly, oral evidence was given which contradicted what was in their statements or contradicted evidence given by the other witnesses. For example, in her statement Mrs Charwin said that Mr Davies sometimes used a trolley to move the dustbins over the paved area to Lynton Road. In cross-examination she said that the Davies carried out the bins by hand, not with the assistance of a trolley. In re-examination she suggested that a trolley had only been used after Mr Davies died. By way of a further example, Mrs Charwin said the fence panel opened inwards whereas her son said it opened outwards.

45. Fourthly, their collective evidence about the quality and quantity of user was vague, imprecise, lacking in detail and ultimately inconsistent with what was present on the ground at the material time, in particular the 2 foot 6 inch wall

depicted in the sketch drawing on the Particulars. None of these witnesses had any recollection of any obstruction at point G when the "openable" panel was open, whereas the sketch on the Particulars at page 75 clearly shows and refers to a "*2'6" high low wall*" in the gap and the May 1997 letter refers to their being "*a small and crumbling parapet wall ... entirely within the old fence panel*". By way of a further example, Mr Charwin's evidence about the frequency of the user was incredibly vague and unconvincing. When asked about how often the Davies used the alleged side entrance, his first answer was "*I don't know*" and that what followed would be "*a guess*". His abiding memory appeared to be one of Mr Davies coming out of his garden and waving his stick at him as a boy, not using the entrance regularly as a way to take out his rubbish. Ultimately, I was unpersuaded by the evidence as to the user pre-1997.

46. I accept there was an old fence panel at point G but I do not accept that it was openable in the sense of being on hinges. It may have been possible to walk through it because it was collapsing or had collapsed and was not properly fixed to the adjoining wall. In that sense there may have been a gap, depending on the position of the fence panel at any particular time. However, I am not satisfied that there was a hinged and openable panel. In the May 1997 letter in which the Applicants described the changes they had made, they contrasted "*the collapsing panel of wooden fencing*" with its replacement which they described as "*a more substantial fence which is openable*". In fact, it was not a fence as such that they replaced it with but "*a pair of robust wooden gates*" as described in their ST4. In any event, I find that the old fence panel was not openable in the sense of being on hinges. It was simply a dilapidated and insecure wooden fence panel.

47. Inside the old fence panel was, I find, a wall, approximately 2 feet 6 inches high measured from the surface of the paved area on the Site of No.14. That is how the wall is described and shown in the sketch in the bottom right hand corner of the Particulars. I found Mr Hall's attempts to distance himself from the clear depiction of that wall in his sketch utterly unconvincing and his alternative measurements based on the step and the two courses of bricks did not add up. The presence of such a wall in such a position makes it improbable that Mr and Mrs Davies would have taken their metal bins out this way. Neither was in the first flush of youth. A wall of that height and in that position would have presented a significant

obstruction to the ready use of this "*gap*" as the way to take out the rubbish. I find it improbable that they would have lifted their full metal rubbish bin or bins over a 2 foot 6 inch wall. To my mind, it is inherently improbable that there would have been an openable fence panel with a 2 foot 6 inch wall inside it. Anyone using the panel as an entrance or exit would have had to climb over the wall to get in or out. Further, I am not satisfied that the wall stopped at the southern end of the Substation as claimed by Mr Hall. His carefully drawn sketch shows the 2ft 6in wall continuing north behind the Substation. It is more likely than not, and I so find, that the Low Wall which I describe in paragraph 23 above originally continued south beyond the end of the Substation ending only at the 6'4" wall shown in the sketch at page 75. It is more likely than not that this wall would have consisted of about 6 courses of bricks not 2 as Mr Hall suggested. Furthermore, given my finding that the panel was not openable before 1997, I am not satisfied that there was any step up from the level of the garden to the panel. There would have been no reason for a single step in that position and I consider that the step I was shown on site was not present before 1997.

48. The onus of proof is on the Applicants to prove their case on the balance of probabilities. I am not satisfied that they have proved user of the requisite quality and quantity to make out their claim to a prescriptive easement, whether under the doctrine of lost modern grant or under the 1832 Act.

49. *The Knowledge Issue.* In any event, even if I had accepted that there was an openable, hinged fence panel in the position claimed, which was used once a week to take out the rubbish, I would still have rejected the claim on the basis that the user or enjoyment was not one of which the servient owner had either actual knowledge or the means of knowledge: Gale on Easements (19th Ed), 4-127. The user must be "*such as to bring home to the mind of a reasonable person that a continuous right of enjoyment is being asserted*": *Mills v. Silver* [1991] Ch 271, 288.

50. There is no suggestion of actual knowledge and I am not satisfied that there was constructive knowledge. As Romer LJ said in *Union Lighterage Company v London Graving Dock Company* [1902] 2 Ch. 557 at 571:

> *"a prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment".*

51. As the Applicants themselves said in their May 1997 letter: "*From the outside boundary of the property ... there was a continuous line composed of the wall and then the fence*". There was nothing to put the ordinary owner of the Site of No.14 on notice that what appeared to be a continuous line of wall/fence was in fact an openable panel and the starting/finishing point of a right of way over the Site of No.14. It was suggested that the rusty hinges that were said to be on the outside would have been sufficient notice, but I am entirely unpersuaded of this point, even if there were such hinges (and I have found that there were not). Given that the alleged servient tenement is the site of a building long since destroyed with no immediate plans for development, I am not persuaded that the diligent owner could or should have become aware of the sporadic user alleged in this case when there was nothing obvious on the ground to alert him or her to the claimed user. I consider that means of knowledge cannot be established merely by virtue of the fact that the servient owner could, in theory, have discovered the enjoyment if he had happened to inspect at the precise time and on the one day that week when the "right" was being enjoyed. That is not reasonable.

52. *The Vires Issue*. The basis of the law of prescription is that long-continued open and peaceful enjoyment of an apparent right should, if possible, be ascribed to a lawful origin. One of the requirements, if the presumption or inference of a lawful origin is to be made, is that the apparent right should lie in grant, that is, should be capable of being created by an express grant made by deed. The legal fiction of a supposed grant is adopted following 20 years' uninterrupted enjoyment of an easement unless the existence of such a grant is impossible, for example for some reason such as incapacity on the part of the purported grantor: see *Tehidy Minerals*

Ltd v. Norman [1971] 2 QB 528. The Respondent relies on s.123(2) of the Local Government Act 1972 (and its predecessor statutes to the same effect) and *Housden v. Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172 at [66] to contend that a grant would have been impossible as being ultra vires. Section 123(2) provides as follows:

> *"Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained".*

53. The provisions of section 123 do not establish that a grant would have been impossible or establish an incapacity on the part of the Respondent to grant the easement. The Respondent was and remained at all material times a competent grantor and a grant of the easement in question *could* have had a lawful origin: see *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519 at [31]-[39] & [49]-[59]. I am not therefore persuaded that there is any merit in this additional ground of objection taken by the Respondent but the claim fails for the reasons already given.

Disposition

54. I shall therefore order the Chief Land Registrar to cancel the application. As presently advised, I see no reason to depart from the normal rule that costs should follow the event but I invite both parties to file and cross-serve written submissions on both the incidence and quantum of costs, supported by a Schedule of Costs in the normal way. I will then summarily assess costs.

BY ORDER OF THE TRIBUNAL

William Hansen

Dated this 30th day of August 2016