

[2018] UKFTT 0078 (PC)

REF/ 2016/0578

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) JOHN HALLIDOR JONMUNDSSON
(2) LUCY HOPKINS

APPLICANTS

and

(1) CHRISTINE TAYLOR
(2) ARWYN TAYLOR
(3) LEE CHRISTIAN TAYLOR

RESPONDENTS

Property Address: 292 Swansea Road, Waunarlwydd, Swansea SA5 4SL

Title Number: WA250628 and WA529123

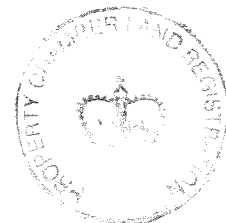
ORDER

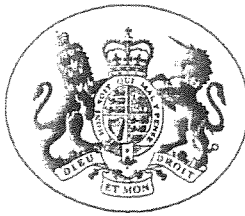
The Tribunal orders that the Chief Land Registrar do cancel the application of the Applicants to register a right of way over 294 Swansea Road, Waunarlwydd, Swansea SA5 4SL being the land comprised in title number WA529123 for the benefit of 292 Swansea Road, Waunarlwydd, Swansea SA5 4SL being the land comprised in title number WA250628

Dated this 3rd January 2018

Michael Michell

BY ORDER OF THE TRIBUNAL





[2018] UKFTT 0078 (PC)

REF/2016/0578

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) JOHN HALLDOR JONMUNDSSON

(2) LUCY HOPKINS

APPLICANTS

and

(1) CHRISTINE TAYLOR

(2) ARWYN TAYLOR

(3) LEE CHRISTIAN TAYLOR

RESPONDENTS

Property Address: 292 Swansea Road, Waunarlwydd, Swansea SA5 4SL
Title Number: WA250628

Before: Judge Michell

Sitting at: Port Talbot Justice Centre

On: Tuesday 3rd October 2017

Applicant Representation: Mr Phillips of Pilman Legal Services Ltd.

Respondent Representation: Mrs Christine Taylor in person

DECISION

*APPLICATION TO REGISTER A RIGHT OF WAY- WHETHER EXPRESS GRANT OF
RIGHT OF WAY- LAW OF PROPERTY ACT 1925 S. 62- WHETHER RIGHT ARISING BY
PRESCRIPTION OR LOST MODERN GRANT*

Cases referred to

Hollins v. Verney (1884) 13 QBD 304
Beddington v. Attlee (1887) 35 ChD 317
Roe v. Siddons (1888) 22QBD 224
Metropolitan Railway v. Fowler [1892] 1QB 165 at 171
White v. Taylor (No.2) [1969] 1 Ch. 160
Diment v. Foot [1974] 1 WLR 1427 at 1434, 1435
Barton v. The Church Commissioners [2008] EWHC 3091 (Ch)
Wall v. Collins [2007] EWCA Civ 444
Kent v. Kavanagh [2006] EWCA Civ 162

1. The Applicants, Mr Jonmundsson and Ms Hopkins have made an application to register the benefit and burden of an easement over land at the side and rear of 294 Swansea Road, Waunarlwydd, Swansea for the benefit of the neighbouring property, 292 Swansea Road. The application is dated 13th November 2015. I shall consider the basis on which the application was made below. The Respondents, the registered proprietors of 294 Swansea Road objected to the application and the matter was then referred to the Tribunal for determination.

2. The Applicants employed the services of a company called Pilman Legal Services Limited to make the application. Mr Phillips is a director of the company and he dealt with the application and a previous application on behalf of the Applicants. Pilman legal Services Limited had previously assisted the registered proprietor of 290 Swansea Road to make an application to register the benefit and burden of a right of way for the benefit of 290 Swansea Road over 292 and over the same area of land at the rear and side of 294 Swansea Road. Mr Phillips appeared at the hearing to represent the Applicants. He has no legal qualification. Mr Phillips told me that he had been a property developer and in that business, he had gained a knowledge of planning and property law. He had set up Pilman Legal Services Ltd in 2007 and that since then that company had been providing legal advisory services.

3. I inspected the land the subject of the application on the afternoon before the hearing, accompanied by Mr Phillips and Mr and Mrs Taylor. 294 to 288 Swansea Road (even numbers only) are a block of 4 attached houses. 294 is at the left-hand end of the block when viewed from the road. A strip of land runs alongside the left-hand flank wall of 294. The

strip is included in the registered title of 294. There is currently a fence with a pedestrian gate in it across the strip, roughly in line with the front of the house. From the strip it is possible to walk onto a concrete path that runs along the rear wall of 294. That path leads to the wall between the gardens of 292 and 294 and through a gap in the wall into the rear of 292. A rear extension has been built in the garden of 292 and the rear door to 292 is in the side wall of that extension, facing towards the garden of 294.

4. The Applicants first made an application to alter the title to 294 to show it as being subject to a right of way in favour of 292 in February 2015. On 9th September 2015, Mr Thomas Davies, Assistant Land Registrar at Land Registry Wales Office wrote to Mr Phillips observing that the Applicants' claim to a right of way depended on showing that there was an implied reservation in a conveyance of 294 by the then owner of 294 and 292 dated 30th September 1936, that it did not seem a right could be implied, and asking that if the Applicants intended to apply on the grounds of lost modern grant or prescription, they should provide a statement of truth setting out the basis for such a claim. On 29th October 2015 Mr Phillips wrote to Land Registry for Wales stating that the Applicants agreed to withdraw of their current application and wished to make an alternative application to have a right of way over 294 recorded on the register "based on the four statements of truth that have recently been provided to you". Mr Phillips went on to write that he had provided a short summary of what he considered to be the legal basis why a right of way already existed when the Applicants bought 292 and that "the application is made based on the four legal alternatives set out in that summary document". Mr Thomas Davies, Assistant Land Registrar wrote to the Respondent saying that he expected a revised application from Pitman Legal Services based on long user for the benefit of number 292 and if and when Land Registry received that application, it would serve new notices. In a letter dated 26th January 2016 to the Respondents, Land Registry stated that the application lodged the previous year based on the contention that there was a deed of grant or express reservation in a deed dated had been cancelled and that Pilman Legal Services had lodged a further application "which is now based on the long user of the rear access". The letter enclosed copies of the four statements of Glenn Sheehan, Roger Gammon, Theresa Gammon and Margaret Davies.

5. The Case Summary dated 26th July 2016 states that the Applicants have applied to register a right of way "based on Statements of Truth provided by Margaret Davies, Roger Gammon, Theresa Gammon and Glenn Sheehan". It also refers to the notification of the

application given to the Respondent. It appears to me that the application accepted by Land Registry and referred for determination is an application based on the contents of those statements. The statements go to the issue of whether the Applicants are entitled to a right of way acquired by prescription. The application based on a deed of grant or an express reservation was rejected by Land Registry. Notwithstanding that this application was rejected by Land Registry, Mr Phillips sought to argue before me that the Applicants were entitled to a right of way based on an express reservation or an express grant. As the application based on those arguments was rejected by Land Registry, I do not consider that it is open to the Applicants to advance a case on those arguments. However, in case I am wrong in this regard, I shall consider the arguments.

6. Mr Phillips put his case in four different ways in the alternative.

Firstly, he submitted that I should find on the balance of probability that the conveyance of 294 dated 30th September 1936 included an express reservation of a right of way over 294 for the benefit of 292.

Secondly, he submitted that “there was an express grant of a legal right of way for the benefit of each of the properties at 294, 292, 290 and 288 created by s. 62 of the Law of Property Act 1925 arising from the conveyance of the freehold estate in [294-288] on 8th July 1927 because each of the houses at [294-288] had the benefit of a right of way on the date of that conveyance, because each was occupied by a separate tenant of the common landlord”.

Thirdly, he submitted that “there was a legal right of way for the benefit of [292] included by s.62 of the Law of Property Act 1925 into the conveyance of [292 and 294] on 6th March 1928”.

Fourthly, he submitted that “there was an express grant of a legal right of way created by s. 62 of the Law of Property Act 1925 following each conveyance of 292 in 1963, 1983 and 2009 when a right of way existed over a known route, which would have been used by all of the sellers of that property”.

7. The Applicants produced an extract from a sales catalogue for a sale by auction on 30th March 1927. The particulars included as lot 11

“Freehold Ground Rent of £2 per annum arising out of and fully secured against those dwelling houses and gardens known as 1-4 Farmers Row, Waunarlwydd. Let on lease to Mr William Thomas for 3 lives. 99 years from September 29th 1854. Together with

the reversion to the full rack rental value thereof at the expiration of the lease about 27 years hence estimated at £48 per annum”.

The Applicants also produced a List of Documents sent to Land Registry on 19th January 1981 on the occasion of first registration of 294 Swansea Road. Included in the list is an examined copy of a lease dated 30th September 1854 made between Henry Griffith and William Thomas. Also included in the List is a copy conveyance dated 8th July 1927 by Thomas Williams and David Lewis to John Thomas and also a copy conveyance dated 6th March 1928 by John Thomas to David, Sarah and Edmund Anthony, Mary Davies and Elizabeth Hogg.

8. The Applicants also produced a transcript of an abstract of title of David George Lloyd and Christine Mary Lloyd to 290 Swansea Road (formerly 3 Farmers Row). The abstract included a conveyance dated 6th July 1927 by Thomas Williams and David Lewis to John Thomas. It also included the conveyance dated 6th March 1928 by John Thomas to David, Sarah and Edmund Anthony, Mary Davies and Elizabeth Hogg. The abstracted parcels clause indicates that the land conveyed on 6th March 1928 was 1 and 2 Farmers Row (294 and 292 Swansea Road). The extracted habbendum states that the land was conveyed

“subject to the right as theretofore exercised by the owners for the time being of the adjoining dwellinghouses known as Numbers 3 & 4 Farmers Row aforesaid and their tenants and the persons authorised by them to pass and repass with or without horses cattle and other animals carts carriages motor cars and other vehicles over and along the road coloured Yellow on the said Plan and for foot passengers only over and along the path coloured Green on the said plan”.

The conveyance plan shows the road coloured yellow as being a strip along the western side of land conveyed and the path coloured green as a strip running east-west behind the houses. It is therefore apparent that on the conveyance of 1 and 2 Farmers Row (294 and 292 Swansea Road) John Thomas reserved a right of way in favour of 3 and 4 Farmers Row (290 and 288 Swansea Road).

9. Edmund Anthony, Mary Davies and Elizabeth Hogg conveyed [? 1 Farmers Row/294 Swansea Road] to Elizabeth Thomas on 30th September 1936. No copy of that conveyance or abstract of it is in evidence. A conveyance of 294 Swansea Road dated 9th January 1981 by Margaret Davies (executrix of the estate of Elizabeth Mary Thomas) to Roger Gammon and Theresa Locke conveyed 294 Swansea Road “subject to the right of way more particularly

referred to in the Conveyance and Assignment". The Conveyance and Assignment is identified as being a conveyance dated 30th September 1936 by Edmund Anthony, Mary Davies and Elizabeth Hogg to Elizabeth Mary Thomas.

10. I reject Mr Phillips' first argument. The conveyance dated 30th September 1936 is not in evidence. No copy of that conveyance is in evidence. There is no evidence as to the contents of that conveyance save for a reference in the conveyance of 294 dated 9th January 1981. That conveyance refers to the land conveyed being "subject to the right of way more particularly referred to in the Conveyance and Assignment" dated 30th September 1936 by Edmund Anthony, Mary Hannah Davies and Elizabeth Agnes Hogg to Elizabeth Mary Thomas. The land conveyed on 30th September 1936 was subject to a right of way in favour of 288 and 290 expressly reserved by a conveyance of 294 and 292 dated 6th March 1928, as appears from an abstract of that conveyance. There is therefore no reason to assume that the words in the 9th January 1981 conveyance refer to anything other than the land being subject to the right of way for the benefit of 290 and 288 reserved expressly on 6th March 1928.

11. In considering the second and third arguments, I should start by stating some basic propositions of the law of easements. Firstly, an easement is a proprietary right over the land of another. A person cannot have an easement over his own land – see *Metropolitan Railway v. Fowler* [1892] 1QB 165 at 171. In *Roe v. Siddons* (1888) 22QBD 224 at 236 Fry L.J. said
"When the owner of Whiteacre and Blackacre passes over the former to Blackacre, he is not exercising a right of way in respect of Blackacre; he is merely making use of his own land to get from one part to another".

Secondly, a grant of a right of way is made by the owner of plot A, the servient land, to the owner of plot B, the dominant land. It involves the grant of a right by a grantor who retains ownership of the land over which the right is granted. A person who conveys plot A to the owner of plot B does not thereby grant any right of way over plot A in favour of plot B. Thirdly, though it is possible for a tenant to have a right of way over other land owned by his landlord (so that the landlord owns the freehold interest in both the servient and the dominant tenancies), such a right of way determines with the expiration or other determination of the tenancy – see *Beddington v. Attlee* (1887) 35 ChD 317.

12. Law of Property Act 1925 Section 62(1) provides (so far as relevant)

“A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, ... , ways, ... , liberties, privileges, easements, rights , and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or, at the time of the conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof”.

13. Mr Phillips’ argument that the conveyances of 6th July 1927 and/or 6th March 1928 included the grant of a right of way over 294 for the benefit of 292, are wrong. The conveyance of 6th July 1927 was a conveyance which included 292 and 294. It cannot therefore have included the grant of a right of way over 294 for the benefit of 292. The vendor was not retaining an interest in 294 out of which he could grant a right of way in favour of 294. The purchaser could pass over 294 to get to and from 292 if he chose, not because he had a right over the land of another to do so (294 was his own land) but because he was owner of 294. Passing over 294 was simply the exercise of one of the rights of ownership and not the exercise of an easement. Similarly, the conveyance of 6th March 1928 was a conveyance of 292 and 294. It cannot have included the grant of a right of way over 294 for the benefit of 292. The vendor was not retaining an interest in 294 out of which he could grant a right of way in favour of 294. The purchaser could pass over 294 to get to and from 292 if he chose, not because he had a right over the land of another to do so (294 was his own land) but because he was owner of 294. Passing over 294 was simply the exercise of one of the rights of ownership and not the exercise of an easement.

14. Mr Phillips submitted that at the time of the conveyance of 6th March 1928, 294 and 292 were tenanted and that the tenant of 292 then enjoyed a right of way over 294. If that were the case, then the right for the tenant of 292 to pass 294 would be a right lasting only for so long as the tenancy of 292 existed and would determine on that tenancy coming to an end. The tenancy of 292 has come to an end. The Applicants are the freehold owners of 292 in possession and not in reversion, subject to a tenancy. The Applicants cannot therefore rely on a right of way granted to a tenant of 292 because any such right of way has come to an end.

15. Mr Phillips referred me to the decision of the Court of Appeal in *Wall v. Collins* [2007] EWCA Civ 444. In that case, the issue was whether the appellant had a freehold right

of way for the benefit of his house, 231, over a passageway forming part of the neighbouring land, 233, owned by the respondents. The lessee under a lease for 999 years of 231 and 233 assigned 231 in 1911 and at the same time, granted for the benefit of 231 a right of way over the passageway. The right of way so granted could last only for as long as the unexpired term of the lease. The Court of Appeal held that this right of way did not come to an end on the merger of the leasehold interest in 231 with the freehold interest in 231. The Court of Appeal also held that on the conveyance of the freehold reversion in 231 in 1986 by the then freehold owner of both 231 and 233, Law of Property Act 1925 s. 62 had the effect of conveying with the freehold of 231 a right of way over the passageway. This case does not assist here. It is not a case in which the leasehold interest in both the land said to be subject to a right of way and the land said to have the benefit of the right of way was assigned to the same person at the same time. Nor is it a case in which the freehold interest in both areas of land was conveyed to the same person at the same time.

16. Mr Phillips also referred me to the case of *Kent v. Kavanagh* [2007] Ch 1. That is a case concerning the rights of the owners of two adjoining houses accessed by a path, one half of the width of which was included with the title to each property where the owners were former lessees who had each acquired the respective freehold reversions under the leasehold enfranchisement provisions of Leasehold Reform Act 1967 s. 8. The Court of Appeal held that on the conveyance of the freehold in house A by the common owner of houses A and B, a right of way over the half of the path included in the title to house B passed under Law of Property Act 1925 s. 62. However, s. 62 did not have effect to convey on the subsequent conveyance of the freehold of house B a right of way over the half of the path included in the title to house A because house A had already been conveyed away. The Court of Appeal was able to find that house B had the benefit of a right of way over the part of the path included in the title to house A because of the particular statutory provisions to be found in s. 8 of the Leasehold Reform Act 1967. The case does not assist the Applicants in this case.

Law: Prescription

17. The judgment of Morgan J. in *Barton v. The Church Commissioners* [2008] EWHC 3091 (Ch) contains a helpful exposition of the law of prescription:

“36. The doctrine of prescription at common law, and as to lost modern grant, is based upon the presumption of a grant, in that prescription presupposes that a grant was once made and validly subsisting, but has since been lost or destroyed. The

presumption of a grant is derived from proof of enjoyment of the right which is claimed...

37. The presumption of a grant is raised by proof of long enjoyment evidenced by acts of user on the part of the person claiming the right, or his predecessors in title. The reason for the doctrine of prescription is that it is the policy of the law to do all that it can to quiet titles so as to avoid litigation and preserve the security of property. When open and uninterrupted enjoyment, of what appears to be an incorporeal right, has continued for a long time the court will, where such enjoyment is wholly unexplained, presume, if it is reasonably possible, that the enjoyment is referable to a right which had a lawful origin. Every presumption is made in favour of long user. Not only ought the court to be slow to draw an inference of fact which would defeat a right that has been exercised during a long period, unless such inference is irresistible, but it ought to presume everything that it is reasonably possible to presume in favour of such a right...

38. Prescription at common law is based upon a presumed grant which the law assumes to have been made prior to 1189, the first year of the reign of Richard I. Enjoyment of the right must be proved from a time "whereof the memory of man runneth not to the contrary" that is to say during legal memory and the period of legal memory runs from 1189. As it is usually impossible to prove user or enjoyment any further back than the memory of living persons, proof of enjoyment as far back as living witnesses can speak raises a prima facie presumption of an enjoyment from an earlier time. Where evidence is given of the long enjoyment of a right to the exclusion of others, the enjoyment being as of a right in a manner referable to a possible legal origin, it is presumed that the enjoyment in that manner was in pursuance of a legal origin and in the absence of proof that the commencement of the user was modern, the user is deemed to have arisen beyond legal memory. Unexplained user of an incorporeal right for a period of twenty years is held to be presumptive evidence of the existence of the right from time immemorial but the rule is not inflexible, the period of twenty years being fixed as a convenient guide. In a claim to prescription at common law, it is not necessary to prove user during the specific period of twenty years before the commencement of the proceedings in which the claim is made. ...

40. For a claim to prescription at common law or under the doctrine of lost modern grant, the user must have been "as of right", having been enjoyed neither as the result of force, secrecy or permission, *nec vi, nec clam, nec precario*. Acquiescence on the

part of the owner capable of making the grant lies at the root of prescription. A grant cannot be presumed from long user without the owner having had knowledge or the means of knowledge of the user. The owner cannot be said to acquiesce in an act enforced by violence or an act which fear on his part hinders him from preventing, or an act of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he sanctions only for temporary purposes or in return for recurrent consideration...

41. In general, what must be shown is continuous user. Unless satisfactorily explained long intervals between acts of user will go some way to defeat the right claimed. The period of non user of an alleged right which will operate to defeat a prescriptive claim has no fixed length. The user need not be constant; where the user has not been constant the evidence should show that the gaps in the user were not due to interference by the owner against whom the prescriptive right is claimed..."

18. The amount or regularity of use that must be shown to give rise to a prescriptive claim to an easement is a question of fact. Guidance as to the amount or regularity of use that must be shown can be found in *Hollins v. Verney* (1884) 13 QBD 304 at 315 in which it was said that the user must be user which is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance to it is intended. In *White v. Taylor (No.2)* [1969] 1 Ch. 160 at 192-195, Buckley J., dealing with a prescriptive claim to a *profit a prendre* for grazing, said

"User must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right and of a right of the measure of the right claimed".

This statement was approved by the Court of Appeal in *Ironside & Crabb v. Cook & Barefoot*. If long user of sufficient character, degree and frequency is shown then the burden is on the owner of the servient tenement to prove that he did not in fact know of the user – *Diment v. Foot* [1974] 1 WLR 1427 at 1434, 1435.

Evidence as to user

19. Although the Applicants and the Respondents both served a number of witness statements, none of the witnesses who made the statements were called to give evidence. I am therefore only able to give weight to their evidence where it is not disputed.

20. Margaret Davies lived at 294 Swansea Road from her birth in 1942 to 1965. Her mother, Elizabeth Mary Thomas (the daughter of Thomas Davies) lived at 294 from her birth in 1904 until 1980, 294 having been conveyed to her on 30th September 1936. Margaret Davies said “I was aware that the owners of 292 always had to use the path alongside and directly behind 294 to gain access from Swansea Road to the back door of their house. There was never any dispute about their right to do that, because my mother knew this path had always been used by the people living in the other houses in the terrace”.

21. Lillian Locke lived at 292 Swansea Road from 1963 until 1983. She said that there was a right of way permitting access to the rear of 292, 290 and 288 on foot or with a wheelbarrow. This right of way was used by coalmen delivering coal to each property. She stated “We all used the right of way no questions asked, as it was on the title deeds. Without using the right of way there was no way to access the rear entrances to our individual properties” and “My family and every family living in Farmers Row was aware of, used and in the case of the householders of 294 permitted use of a pedestrian and vehicular right of way via the rear of 294 Swansea Road”.

22. Theresa Gammon is the daughter of Lillian Locke and lived at 292 from 1963 until 1981. She owned 294 Swansea Road with her husband from 1981 until 1985. She stated “... access to the rear of all the houses in that row was achieved by using that right of way. It was never an issue and it was used regularly if not daily then several times a week for that twenty two year period”.

23. William Gammon is the husband of Theresa Gammon. He stated that he regularly accessed the rear right of way to use the rear door of 292 from 1979 until 1985. When he owned 294 he “permitted access through my property at 294 ... to my neighbours at 292, 290 and 288..., as was listed on the deeds of the property and had been the case for decades before we bought the property”.

24. Jennifer Ahern is one of the joint registered proprietors of 290. She stated that on purchase, her solicitor had advised her that she had a right of way over the path along the back of the houses to her back door and from her back door along the path to the pavement. She stated that from 1979 until 2009 she and her husband used the back path behind the houses

and along the side of 294 frequently and that they continued to do so. She stated that the people living in 292 did so also. The main use of herself and her husband of the right of way was to use the back door as the main entry and exit point for their house. She and her husband at weekends would carry a fibre glass boat which was kept in their back garden, along the path and down the side of 294 to put it on a roof-rack on their car. She also stated that when Roger and Theresa Gammon owned 294, all the house owners in the terrace used the path and side road, especially for the purpose of carrying out rubbish bags for the weekly refuse collection. She further stated that the former owner of 292, Archie Sheehan made a regular habit of waling from the back door of his house every morning to collect his daily newspaper from the local newsagent. She said that it was not until after Archie Sheehan's death that the Respondent and her husband started trying to stop people from using the path.

25. The Applicant, Mr Jonmundsson made a witness statement. He did not give oral evidence though he was present during the hearing. Mr Phillips said that Mr Jonmundsson could not give useful evidence.

26. The Respondent gave evidence. Her evidence was that from 1991 until 2014, no-one walked around the back of her house. Archie Sheehan did not walk across the back of 294 at all. At the time the Respondent and her husband moved into 294 there was a gate wedged into the gap in the wall between the rear gardens of 294 and 292.

27. The Respondent produced a witness statement from Alwyn Davies dated 24th October 1916. He lived at 295 Swansea Road from 1971 to 1999. He stated that no right of way was used behind 294 in that period except for coal delivery. He had no recollection of a fibre glass boat ever being taken around the back of the houses and he did not remember Archie Sheehan using the back of the houses as a right of way.

28. The Respondent also produced a witness statement from Ms BM Harris. She stated that she and her late husband purchased 294 in September 1989 and her daughter and son-in-law lived at 294 from then until January 1991. In that time she stated no one ever used or attempted to use the side or rear pathway.

29. The Respondent also produced a witness statement from JB Hutin. He said that he and his wife lived at 294 for a period of 18 months when it was owned by his wife's parents.

Over the whole period that he and his wife lived at 294, no access to other houses in the row was asked for, given or used.

30. There is a conflict of evidence on the witness statements as to whether the a path behind 294 was used otherwise than for the delivery of coal between 1971 and 1999 and as to whether it was ever used at all between September 1989 and January 1991. As the people making witness statements were not called to give oral evidence and to have their evidence tested by cross-examination, I cannot resolve that conflict. The consequence of that is that the Applicants have not established that the path was used by their predecessors in title between 1971 and 1999.

31. Mr Phillips submitted that I should find that there had been user for a period before 1971 such as to entitle to Applicants to succeed on the basis of lost modern grant. The court may presume a lost grant or deed where there has been at least twenty years' user as of right. The evidence of user for a period of twenty or more years is not sufficient in this case for the Applicants to succeed in my judgment. There is a conflict of evidence as to user after 1971. As to the period prior to 1971, the evidence is only in the form of the witness statements of Margaret Davies and Lillian Locke. Neither witness was called to give oral evidence and so their evidence could not be tested by cross-examination. The burden of proof of the necessary user to give rise to the presumption of user under a lost modern grant falls squarely on the Applicants. In my judgment, the Applicants have not discharged that burden. If they wished to prove the necessary user, they should have called their witnesses to give oral evidence in the usual way so that the evidence could be tested and a judicial assessment could have been made as to the weight to be attached to it.

Conclusion

32. The Applicants have not discharge the burden of proving that they are entitled to a right of way over the Respondents' land. I shall direct the Chief Land Registrar to cancel the application of the Applicants.

Costs

33. My preliminary view is that the Applicants must pay the Respondents' costs to be assessed. As the Respondents are in person, the costs recoverable by them are those to which they are entitled under the terms of the Litigants in Person (Costs and Expenses) Act 1975.

Any party who wishes to submit that some different order should be made as to costs should file written submissions with the Tribunal and serve them on the other party by 5pm on 18th January 2018.

BY ORDER OF THE TRIBUNAL

Michael Michell



DATED 3rd JANUARY 2018