[2018] UKFTT 0725 (PC)

REF/2017/0912

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN:

KEITH WILLIAMS & JANET WILLIAMS

Applicants

and

STEPHEN JOHN MERRELLS & MARGARET ELEANOR MERRELLS

Respondents

Property Addresses: **Nos. 8 & 10 STEPNEY ROAD, GARNANT, AMMANFORD SA18 1NN**

Title Numbers: **CYM 681709** and **WA 937192**

ORDER

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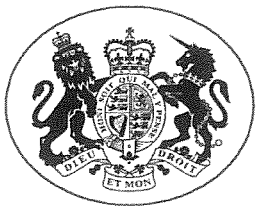
1. The Registrar is directed to cancel the Applicants' application dated 27th May 2016 (supported by a statement of truth dated 27th October 2016) to register an easement over the Respondents' property for the benefit of the Applicants' property.

2. A separate order in relation to costs shall be made, following receipt of the parties' submissions, unless costs are agreed.

Dated this 22nd October 2018

Ewan Paton

By order of the Tribunal



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Title Numbers: **CYM 681709** and **WA 937192**

Before Judge Ewan Paton
Sitting at: Swansea Civil and Family Hearing Centre, Swansea

On: 17th October 2018

Applicant Representation:
The First Applicant appeared in person, assisted by Mr. David Keith Williams
Respondent Representation:
Ms. Catherine Collins (Counsel), instructed by Gary Jones Solicitors, Ammanford

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DECISION

KEYWORDS: easement – right of way – prescription – scope of right claimed – contentious use

Cases referred to:

Newnham v. Willison (1987) 56 P&CR 8

Winterburn v. Bennett [2016] EWCA Civ. 482

Ironside v. Cook (1978) 41 P&CR 326

White v. Taylor (No.2) [1969] 1 Ch. 160

Introduction: the parties and properties

1. The Applicants, Mr. and Mrs. Williams, are the joint owners of no. 8 Stepney Street, Garnant, Ammanford ("no. 8"), the first registration of which is pending under title number CYM 681709. They have owned and lived at that property since 1982. The Respondents, Mr. and Mrs. Merrells, are the joint proprietors, under title WA 937192, of no. 10 Stepney Street ("no. 10"), and have been so since 20th July 2004. Prior to that, from 27th October 1999 the proprietor of no. 10 was their daughter, Margaret Box. She was the first registered proprietor of that title, having purchased it from Walter and Marianne Williams, who had purchased its freehold by a conveyance dated 10th November 1982.

2. The properties are separated from each other by a surfaced lane or driveway, some 8 feet 7 inches (260 cm) wide where it passes between them. I shall adopt the parties' terminology and refer to this as "the driveway". The driveway runs down from Stepney Road, past no. 10, where it then turns left (west) at an approximate right angle and runs behind the remaining even-numbered houses in that row. The whole of the initial section of the driveway, from Stepney Road all the way round to the boundary between nos. 10 and 12 (marked by a change in the colour of the render of those properties, and on the ground by a drain grille) is within the title WA 937192 to No. 10.

3. No.8 consists of the house facing on to Stepney Road, and a quantity of land to the rear (north) of the house. In its present configuration this includes a small patio at the rear of the house, accessed by a pedestrian gate from the driveway. Immediately to the

north of the patio is now a long strip of surfaced hard standing, which leads to a garage. North of the garage is a long area of garden land. The hard standing and garage are bounded by the driveway to their west, and are presently entered from the driveway through a pair of ornamental metal gates, one large (11 feet 3 inches/343 cm) and one smaller (3 feet 2 inches/94 cm), which are hung on two short sections of wall.

The issue: prescriptive vehicular right of way

4. The issue between the parties is whether no. 8 has a right of way with vehicles to pass and repass along the driveway, to and from the hard standing and garage area of no. 8 described above. The existence of a right of way on foot has never been disputed.

5. By an application for first registration of title on form FR1 dated 27th May 2016, the Applicants sought the inclusion in that registered title of a right described as follows:

"..our right to use the alleyway between number 8 Stepney Road and number 10 Stepney Road for vehicle access to the rear of our property at No. 8 Stepney Road and to establish a prescriptive right of way, having used the said access as per enclosed scaled title plan (Marked A) from the time we moved in and have never sought permission from any other person to do so, nor has any consistent objection to our use of the alleyway for vehicle use been raised until receipt of the letter of the 17th March...."

6. That last reference was to a letter dated 17th March 2016 sent by solicitors acting on behalf of the Respondents as owners of no. 10. The Respondents had become aware that the Applicants were marketing no. 8 for sale with the inclusion of such a right of way to the rear of the property, and so objected to the assertion of such a right. The Applicants later filed a slightly revised statement of truth in support of their application, dated 27th October 2016, but still asserting a right in the above terms. On 18th January 2017, the Respondents were given notice by the Land Registry of the Applicants' application to register such an easement against the title of no. 10. Following the Respondents' objection to that application, and the passage of a further period of time to allow for negotiations, the dispute was referred to the Tribunal by

notice dated 25th September 2017.

7. In their initial notice of application to register an easement, the Land Registry clearly understood that the right claimed, which would be noted on the respective titles if established, was:-

"..a right of way, with or without vehicles, over the land tinted blue on the title plan.... ....a right of way, with or without vehicles, in favour of 8 Stepney Road.."

8. The matter then progressed via directions to a final hearing on 17th October 2018. The parties filed statements of case, a small number of documents and photographs and witness statements. The Applicants' only witness statement was that of the First Applicant Keith Williams. The Respondents filed statements from the Second Respondent Margaret Merrells, the First Respondent Stephen Merrells (this was simply a short statement agreeing with the contents of his wife's statement) and their daughter Margaret Box.

Site visit and hearing

9. I had the benefit of a site visit on the afternoon of 16th October 2018, in the presence of the parties and the Respondents' solicitor. At the hearing on 17th October 2018, only the First Applicant attended. His wife, the Second Applicant has played no active part in the proceedings and he has conducted the proceedings on behalf of them both. Attending with the First Applicant Mr. Williams was another Mr. Williams – Mr. David Keith Williams (no relation to the Applicants) – who wished to assist the Applicants and appear as their "advocate". He has no formal legal or professional qualifications.

10. The Respondents were represented by counsel, Ms. Catherine Collins. While Ms. Collins initially expressed some reservations about the Tribunal hearing from an unqualified advocate, whose role appeared to exceed that of a "McKenzie friend" providing assistance, I took the view that I would permit the Applicants to proceed in this fashion, subject to my reminding Mr. David Williams where necessary of the proper limits and scope of his role, and that it would not be fair or consistent with the

overriding objective to shut him out completely.

11. I heard oral evidence from the First Applicant Mr. Williams, the Second Respondent Mrs. Merrells and Ms. Margaret Box. Despite the inevitable friction generated by such proceedings, this was not ultimately a case in which there were very many significant disputes of fact to resolve at the hearing. Cross-examination of the witnesses was relatively limited and brief.

History and findings of fact

12. As stated above, the Applicants first acquired no. 8, and moved in to live in it, in 1982. That was also the year in which the freehold of no. 10 was sold to Walter and Marianne Williams, there having been a merger and extinguishment prior to that sale of a former long lease of the property. The conveyance to Walter and Marianne Williams was dated 10th November 1982, and the property was expressed to be:-

"SUBJECT to the right of the owners for the time being of Numbers 12 to 28 Stepney Road Garnant (even numbers inclusive) in common with the Purchasers and the owners or owner for the time being of the property hereby conveyed and all others (if any) entitled to use the same to pass and repass with or without vehicles over and along the driveway situate between numbers 8 and 10 Stepney Road aforesaid and at the rear of the property hereby conveyed AND SUBJECT ALSO to the right of the owners of Numbers 6 and 8 Stepney Road on foot only to pass and repass over and along the portion of the said driveway which is adjacent to Number 8 Stepney Road aforesaid.."

13. Whether that was in itself a grant of such easements, to the owners of the properties mentioned, or simply an acknowledgment of pre-existing easements, does not particularly matter. It is common ground, and the Respondents have never disputed, that the other even-numbered properties to the west of no. 10 enjoy a vehicular right of way over the no. 10 section of the driveway, and that no. 8 and no. 6 have a right of way on foot over the same.

14. The Applicants do not claim any different pre-existing easement arising from any transaction or use before 1982. Their claim for a vehicular easement rests wholly on alleged use after that date, during their own period of ownership. It is well-established, and not in dispute, that an easement originally granted or arising for a certain limited mode of use (such as on foot only) may by long use of the necessary character and duration be expanded into a wider right (such as a vehicular right).

The applicable law

15. There is little dispute as to the basic principles necessary to generate an easement by prescription, whether under the doctrine of lost modern grant or under the Prescription Act 1832. The Applicants have to establish a period of at least 20 years' use of the necessary type, either "next before action" for the purposes of the Prescription Act, or for some continuous period in the past for the purposes of inferring a lost modern grant. While the Applicants' statement of case was not professionally pleaded, and did not refer to 'lost modern grant' by name, I took the view that it was clear that they were relying on use from 1982, so that a finding of any period of 20 years' use of a sufficient character (and not just next before action) was one which was open to the Tribunal to make.

16. The key principles, simply summarised, are as follows:-

i) there must have been a period of use of at least 20 years or more either "next before action" (disregarding interruptions acquiesced in for less than a year) in relation to the 1832 Act, or (in the case of lost modern grant) use for some continuous period of use for 20 years or more at any point in the past.

ii) the use must have been as of right, meaning in the purported exercise of a lawful right, and "nec vi, nec clam, nec precario": without force, secrecy or permission. In the present case there is no suggestion that any use relied upon was secret or by permission

iii) As will be set out below, there is an issue in this case as to "nec vi" or forcible use,

in the sense of such use becoming contentious and over the protest of the would-be servient owner. Use becomes contentious and therefore "vi":

"..once there is knowledge on the part of the person seeking to establish prescription that his user is objected to and that the use which he claims has become contentious." [*Newnham v. Willison* (1987) 56 P&CR 8, 19, per Kerr LJ].

iv) That statement was approved and refined more recently by the Court of Appeal in *Winterburn v. Bennett* [2016] EWCA Civ. 482, a case involving 'no parking' signs, in which the court (per David Richards LJ at paragraph 36) held that the authorities did "..not support the proposition that a servient owner must be prepared to back his objection either by physical obstruction or by legal action or the proposition that the servient owner is required to do everything, proportionately to the user, to contest and to endeavour to interrupt the user." All that is required is a clear and proportionate response indicating objection to the use. The ".. circumstances must indicate that the owner objects and continues to object.." to the use made (paragraph 37).

v) As to the degree, volume and visibility of use required to generate a prescriptive easement, the general principle stated in *Union Lighterage v. London Graving Dock* [1902] 2 Ch. 557, 571 is that the use must have been:-

"..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 had a reasonable opportunity of becoming aware of that enjoyment."

v) In the case of non-continuous easements such as rights of way, constant daily use is not required (*Hollins v. Verney* (1884) 13 QBD 304), but the law as stated in *Gale on Easements* has been approved and applied by the Court of Appeal (in *Ironside v. Cook* (1978) 41 P&CR 326) namely:-

"In those easements which require the repeated acts of man for their enjoyment, [such] as rights of way, it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him - an indication that would not be afforded

by mere casual or occasional exercise."

Other cases have put it thus:-

"...the user must be shown to have been of such a character, degree and frequency as to indicate the assertion by the claimant of a continuous right, and of a right of the measure of the right claimed." (*White v. Taylor (No.2)* [1969] 1 Ch. 160, per Buckley J., p192)

History of the properties and driveway use: 1982 to 1997

17. In relation to the period 1982 to 1997, the only available direct evidence was that of the First Applicant Mr. Williams. I considered his statement of case, previous statements of truth and witness statement, and heard his oral evidence. I make the following findings of fact in relation to this period.

18. Perhaps the most significant feature of the properties during this period was that the area of no. 8 which now comprises the hard standing and garage was then garden land, and was *not in fact directly accessible by vehicles from the driveway*. The boundary with the driveway, on which are now situated the metal gates in front of the hard standing, was demarcated by a low hedge and some small sections of wall, running from a position close to where the corner of the garage on no. 8 now stands up to a small pedestrian gate. The pedestrian gate, leading to the rear patio of no. 8, is in the same position as it always has been, although the sections of wall or pillars either side of it are later substitutions of previous sections.

19. This physical fact was pointed out by the Respondents in their statement of case. They say, as was clear from viewing the site, that the garden area which is now the hard standing was originally at a significantly lower level than the driveway (possibly up to 2 feet below it). The hard standing has raised the level to some extent, so that vehicles can now travel from the driveway to that standing, but the slope and drop in height are still visible on the ground.

20. The Applicants said in their statement of case that they had "used the driveway for vehicular access to the rear of their property since 1982" and would "provide witness statements, as required, to support this claim". Neither the statement of case, nor any of the previous statements of truth filed, mentioned the fact that at all times between 1982 and 1999 there was a hedge and wall separating this rear part of no. 8 from the driveway, and that the only means of access onto no. 8 from that side was via a pedestrian gate. In other words, actual vehicular access from the driveway *onto* the Applicant's property was physically impossible, and was not therefore exercised during this phase of their ownership.

21. So what was the Applicants' evidence and case as to the "use" of the driveway in this period? Mr. Williams' witness statement, and oral evidence, clarified what he meant by this. He was not in fact saying that he had driven vehicles down the driveway and then onto his land. His evidence of use was as follows:-

    i) he had, regularly and several times a week, driven his vehicle, sometimes with a trailer, down the driveway, but had then stopped and parked (as he had to) on the driveway itself

    ii) he then carried items in and out of his property on foot. He described having to carry in sacks of coal, and items stored in his shed and house. To do so he would therefore pass on foot through the pedestrian gate still in place today

    iii) his vehicle was therefore parked on the driveway temporarily, simply for the purpose of this loading and unloading on foot. He did not say that he parked on the driveway generally, or for indefinite periods of time

    iv) in his witness statement he said that he would drive his car down "..as far as the gate where I would unload items from my car and take them through the gate into the shed." In his oral evidence, when this was put to him, he then said that he had at times parked slightly beyond the position of the pedestrian gate when doing this.

22. While in some other respects discussed below, Mr. Williams was not a wholly satisfactory witness, I find that from around 1982 to 1997 he did make the use of the

driveway described above, on a reasonably regular basis. The Respondents have no direct evidence to gainsay Mr. Williams' evidence from this period, and it is reasonably plausible that he would have made such use for the purposes he described.

23. This use, however, does not reflect the right now claimed by the Applicants, in their initial FR1 application, their statement of truth or their statement of case in these proceedings. As set out above, and as the Land Registry correctly assumed when reading the application, the right claimed was and is a *right to pass and repass with or without vehicles to and from the Applicants' property*.

24. The use made by the Applicants between 1982 and 1997 is better characterised as:-

    i) the driving of vehicles on to the driveway to park them there temporarily, for the purposes of loading and unloading items; then

    ii) the exercise, from that point onwards, of the existing and admitted right to pass and repass between the driveway and no. 8 on foot, while carrying the items being loaded or unloaded

    The first of these would be a quite different right from a right to pass and repass with vehicles all the way to and from the dominant land. The terminus of such a right would not be on the dominant land, but on the driveway itself. The actual passage between the driveway and the dominant land would be pursuant to the existing right on foot.

25. It is not clear to me that it is strictly open to the Applicants to claim such a lesser right in the alternative, given the way in which their application has been presented throughout, and given the terms of the reference from the Land Registry. Their statement of case did not, for example, plead an alternative claim based on the above use for a period of 20 years giving rise to a more limited easement to drive, stop and unload short of their own property. Their stated case was in fact that this 'phase' of the case only lasted for a period of some 17 years, between 1982 and 1999, so that any use in that time could not by itself have generated any right

26. I will nevertheless deal later below with the possibility of such a right existing, on the evidence as to use and dates as it eventually came out at the hearing.

1997 to 1999: contentious use?

27. Mr. Williams provided further evidence as to the period from 1997 to 1999. His statement of truth accompanying his initial FR1 application stated as follows:

"Historically, in or around 1997, there was a falling out between ourselves and Mr. Williams of Number 10 Stepney Road who moved into that property some time after we moved into number 8 Stepney Road, and he asserted that he had total control over the alleyway separating both properties. We considered this not to be the case (Our Title Plan [A] showed the true configuration and we ignored his comment and continued vehicle and foot access as we had been doing for the previous fifteen years of our residency, without any impediment from Mr. Williams or anyone else.."

28. On any reasonable reading of that passage, in the context of an application to register a right of way over the driveway, he is here giving evidence (verified by a statement of truth) that in 1997 there was a dispute with Mr. Walter Williams, the then co-owner of no. 10, directly relating to the very "use" and "access" of the Applicants over the driveway of which elsewhere in the statement he gives evidence. He describes it as a "falling out", which suggests that it was something more than a single instance of words being exchanged over the hedge. The reference to there being an assertion of "total control" over the driveway can only reasonably be read, in this context, as a denial by Walter Williams that the Applicants were entitled to make the use they were then making.

29. In oral evidence, under cross-examination, Mr. Williams sought to row back on this, in my view because he realised or had been advised that this evidence might in some way harm his case. At this point I agree with the submission later made by Ms. Collins that his evidence went "all over the place". He first attempted to claim that this was a reference to a boundary dispute with Walter Williams. He then said that it related to a proposal that they built a joint garage structure together. He then oscillated between saying that there were a number of "disputes", to saying that this was simply a one off,

isolated incident never pursued further.

30. I find that, on the balance of probabilities, Mr. Walter Williams objected and complained to the Applicants about such use as they were then making of the driveway with vehicles, in sufficiently strong terms i) for there to be a "falling out" between him and the Applicants; and ii) to make the Applicants well aware that he objected to their use, so that their continued use of the driveway was in defiance of Walter Williams and over his protest.

31. I also find that this state of affairs continued until Walter and Marianne Williams sold no. 10 to Margaret Box in or about October 1999. It is true that there is no evidence of any letters, threats of proceedings or any attempts at physical prevention, and neither party has sought to call Walter Williams as a witness. Nor, however, do the Applicants adduce any evidence that there was any reconciliation with Walter Williams, or therefore any withdrawal of his previous objection, during the final two years of his ownership of no. 10. The best evidence comes from the First Applicant's own statement of truth, which is that he/they simply ignored the objection of Walter Williams and carried on what they were doing.

1999 to 2004: removal of hedge, and construction of the hard standing and garage

32. This was a phase on which, to borrow the phrase used above, the written evidence of the Applicants was likewise "all over the place", but on which the true position became reasonably clear at the hearing.

33. The statement of truth accompanying the original application stated as follows:

"From **1990** onwards we created a full vehicle access to the rear of our property by removing a low, insignificant shrub hedge on our land, and built a garage and vehicle hard standing as illustrated by photograph (Marked B.)" [emphasis added]

34. By the time of the statement of case, this had changed to the following assertions at paragraphs 9 and 10:

"On or around 1999 the Applicants removed a low shrub hedge which abutted the driveway at the rear of their property so as to make vehicular access easier and they constructed an area of hard standing on which to leave their vehicle.

On or around **1999** the Applicants then constructed a garage next to the area of hard standing at the rear of 8 Stepney Road. This is shown on the attached photograph marked as exhibit KW3. The Applicants accessed this garage with their vehicle by using the driveway of the Respondent's property on a daily basis until they moved out of the property in 2010." [emphasis added]

35. It was the Respondents' consistent case, in their statement of case and witness evidence, that most of these works had not been carried out until some time later, in around 2003 or 2004.

36. By the time of the hearing, it appeared that the Applicants now largely agreed with this. At the outset of the hearing Mr. Williams produced two new photographs showing the garage and hard standing in different stages of construction. The one which was referred to as "A" showed the bare concrete slab of the garage, immediately next to the garage of no. 10, outside which can be seen parked a green vehicle agreed to belong to Ms. Box. The photograph also shows the approximate two foot drop in height from the driveway to the slab. Mr. Williams placed this photograph in about 2002. The photograph referred to as "B" showed the blockwork shell of the garage as having been built, and now showed a different car – a small black one – parked in the no. 10 garage. This was agreed to be Mrs. Merrells' car. Mr. Williams placed this photograph in about 2003, but the evidence of Mrs. Merrells and Ms. Box, which I prefer and accept on this point, was that this black car was stored there after Mr. and Mrs. Merrells purchased the property from Ms. Box, which purchase took place in July 2004.

37. Putting all the evidence together, I find that this was the probable sequence of events in the years 1999 to 2004:-

i) Mr. Williams probably did pull down the shed which previously stood on the

present site of the garage in about 1999, but he did not then immediately proceed with any further work

ii) any further groundworks such as removal of the former hedge and wall, the preparation of the ground for the hard standing, and the laying of the concrete slab for the garage, did not begin until 2001 at the earliest, and most probably began in about 2002

iii) the land remained as something of an unfinished 'building site', with partially completed excavations and works, until the garage was finally completed well into 2004.

38. That period of time corresponds approximately with the period of ownership of no. 10 with Margaret Box, the Respondents' daughter. She gave evidence before the Tribunal and was cross-examined. I found her to be a straightforward and reliable witness, and where there was any clash or difference of emphasis between her evidence and that of Mr. Williams, I prefer her evidence. I make the following further findings of fact about this period:-

i) the Applicants did make some use of the driveway as they had before when no. 10 was owned by Walter and Marianne Williams, but significantly less than they claimed, and less than their previous use.

ii) a principal reason for this was that, on his own evidence, Mr. Williams had pulled down his shed in about 1999, in which he had previously stored many of the items which he had reason to load and unload in the driveway

iii) while the land was in an unfinished and 'building site' condition, there would have been less reason for Mr. Williams to drive down the driveway to stop, load and unload from there. He may, as was suggested, have made occasional trips to deposit building materials and the like, but that would be a less regular and frequent use, and for limited periods only

iv) Ms. Box was only aware of him using the driveway on a few occasions. She

acknowledged that she could not have watched him come and go all the time, and that when she did see his vehicles there, their position on the driveway varied.

v) such use as was made was therefore, in my view, infrequent and sporadic, most probably limited to specific journeys to bring and deposit building materials for the construction works, at considerable intervals of time (given the prolonged period over which the works were completed).

39. I also find that, since the dates of construction of the garage were a matter particularly within the knowledge of Mr. Williams, and were not so very long ago, he made a deliberate attempt in his original application, statement of case then witness statement to push those dates back in time, in an effort to improve his case. The statements I have quoted above, giving the dates of first 1990 then 1999, were clearly intended to read as if full vehicular use to pass and repass from his property had commenced *from* those dates, when that was simply not true. I am not satisfied that this was simply a slip or a mistake. The true chronology was in the end fairly swiftly established and accepted by him at the hearing, and put the earliest date of commencement of such vehicular access as around 2004 at the earliest.

2004 to the present

40. There is little or no dispute about this phase of the case. The hard standing and garage were completed in about 2004, and after that time, during the ownership of no. 10 by the Respondents, the Applicants did pass and repass with vehicles along the driveway to and from their new hardstanding and garage. I accept and find that for almost 12 years they did so regularly, openly and without any protest from the Respondents. This phase ended with the solicitors' letters in March 2016 described above, sent when no. 8 was marketed for sale with a vehicular right of way to its rear. From that point onwards, even if further use has been made, it has clearly been contentious and over the protest of the Respondents, and has resulted in this disputed application being referred to the Tribunal.

41. I add that I heard oral evidence from the Second Respondent Mrs. Merrells, who was also a straightforward and honest witness, but in the light of the above largely agreed

chronology there was very little cross-examination of her, and no significant issues which depended on her evidence from this period.

Application of law to the above facts

42. The legal analysis and conclusions which follow from the above history and findings are, in the end, relatively straightforward.

43. First, on any possible view of the evidence and time periods, no prescriptive right of way *to pass and repass over the driveway to and from no. 8 with vehicles* – the right actually applied for and claimed - can have been established by 20 years' use of that nature. No such through vehicular access was even physically possible until around 2001/2002 at the earliest, when the hedge and wall which previously prevented such access were removed. Even then, the difference in height between the driveway and no.8, until the hardstanding was completed, would have made such access very difficult until the hardstanding was completed and the ground level raised.

44. At best, the Applicants were on the way to acquiring such a prescriptive right in 2016, having by that time accumulated just under 12 years' use of this nature. The Respondents' clear and unequivocal objection and protest, via their solicitors' letters in March 2016, then made any further such use contentious and 'vi', and so stopped time running for prescriptive purposes, on the application of the principles summarised above from *Newnham v. Willison* and *Winterburn v. Bennett.*

45. Second, the Applicants did not apply for, claim or plead, in the alternative, that before 2004 they had acquired through long use a different, lesser right - to drive vehicles on the driveway and temporarily park them there for the purpose of then loading and unloading to and from no. 8 on foot through the pedestrian gate. The generation of such a lesser right nevertheless became a theoretical possibility once the Applicants' evidence on dates shifted at the hearing, moving the date of the construction of the hardstanding and garage to after 2002 (cf. their stated case that this was 1999). It might then have been possible to argue that there was 20 years of "parking, stopping and unloading" from 1982 to 2002 sufficient to generate such a right via lost modern

grant. In his closing submissions, Mr. David Williams tentatively advanced such a case on behalf of the Applicants.

46. Putting aside the potential procedural unfairness and irregularity in allowing such an alternative claim to be made so late in the proceedings, and by virtue of an evidential change of position at the hearing itself, I find in any event that such a right would not be established on the findings of fact I have made. In particular:-

i) the Applicants may have been on the way to acquiring such a right in 1997, having (as I have found) used the driveway in this manner for some 15 years prior to that; however:

ii) the dispute and "falling out" with Mr. Walter Williams in that year made such continued use, during the remainder of the ownership of Walter and Marianne Williams until 1999, contentious and 'vi', on the same principle set out above

iii) even if that 1997-1999 period had not been contentious in this way, I have found that any further use between 1999 and 2004, during the ownership of no. 10 by Margaret Box, was significantly less frequent, and not sufficient to bring to the attention of Ms. Box or any reasonable owner that a right of this nature was being asserted and exercised. Such further use was occasional and sporadic, and Ms. Box's acquiescence in it can properly be characterised as mere toleration of occasional and minor trespass, out of general good neighbourliness.

47. So for the above reasons, even if such a lesser right had been claimed, or could now be claimed by way of amendment, the Applicants would still not have accumulated a sufficient period of 20 years or more of such use, capable of generating such a right via the doctrine of lost modern grant.

48. The Applicants' position is in some respects unfortunate. They have clearly made *some* use of this driveway during their 36 year period of ownership of no. 8. Their misfortune is that such use as they have made falls into two quite distinct categories and periods, and in neither case was the use in that period sufficient to generate a right corresponding to the use then made. For the reasons stated above, no vehicular right to

stop, park, then load and unload on foot from the driveway was established by use prior to 2004. The use after 2004 would have generated a conventional vehicular right of way, to pass and repass over the driveway to and from no. 8, had it continued without objection in the requisite manner for a further 8 years, but it has not.

49. I add for the sake of completeness that although Mr. Williams referred in passing in his witness statement to the failure of the Respondents to object either to his construction of the garage and hard standing, or (until 2016) to his use of the driveway, no claim was made on the basis of any proprietary or other estoppel arising from any representation or assurance by the Respondents as to the existence of any vehicular right. No basis for any such claim arises on the evidence, it being common ground that Mr. Williams simply carried out his works without any reference to the Respondents, and that nothing was said by either party until 2016 as to the existence or otherwise of any rights over the driveway.

50. For these reasons, I will direct the Land Registry to cancel the Applicants' application to register the benefit and burden of an easement on the parties' respective titles.

Costs

51. The Tribunal has the power, under rule 13(1)(c) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, to make an order for the costs of the proceedings from the date of the reference (in this case 25th September 2017). The usual starting point, by analogy with the position in court proceedings under the Civil Procedure Rules, is that costs follow the event i.e. the unsuccessful party should pay the costs of the successful party.

52. In this case, the Applicants' claim for an easement has been rejected, so on the face of it the Respondents are clearly the successful party. I am therefore provisionally minded to make an order that the Applicants pay the Respondents' costs of these proceedings after 25th September 2017, and summarily to assess the costs recoverable, upon the Respondents filing a costs schedule for the purposes of such summary assessment.

53. I will, however, give both parties the opportunity to make brief written submissions on costs, both as to the principle (of whether any costs order should be made) and as to the amount. I therefore order that the Respondents shall within 14 days of the date of this decision first file brief written representations, stating whether they seek a costs order against the Applicants; and if they do, also to file a costs schedule for the purpose of summary assessment. Unless they agree the position, the Applicants will then have a further 14 days in which to respond with their own representations, as to both costs liability and amount. The Respondents shall file any reply within 7 days of receiving such submissions from the Respondents.

Judge Ewan Paton

Dated this 22nd October 2018

Ewan Paton

By order of the Tribunal