



Neutral Citation Number: [2024] UKUT 217 (LC)

Case No: LC-2023-698

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: 2022/0137

Royal Courts of Justice,
London WC2A

29 July 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – EASEMENTS – whether right of way acquired by prescription over private road – sign warning of no public right of way – whether sufficient to make use of way by neighbours contentious – period of interruption – ss.2, 4, Prescription Act 1832 – appeal allowed

BETWEEN:

MR MOHAMMED SAGIER

Appellant

-and-

MRS HARBANS KAUR

Respondent

60 Victoria Park Road,
Smethwick,
Birmingham B66

Martin Rodger KC,
Deputy Chamber President

14 May 2024

*Mr Michael Buckpitt and Mr Paul Wilmshurst, instructed directly, for the appellant
Ms Anya Newman, instructed by Mezzle Solicitors, for the respondent*

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The following cases are referred to in this decision:

Dalton v. Angus & Co. (1881) 6 App.Cas. 740

Newnham v Willison (1987) 56 P&CR 8, 18

Nicholson v Hale [2024] UKUT 153 (LC)

R. (Lewis v Redcar and Cleveland Borough Council (No. 2)) [2010] 2 AC 70

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

Reilly v Orange [1955] 2 QB 112

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

Welford v Graham [2017] UKUT 297 (TCC)

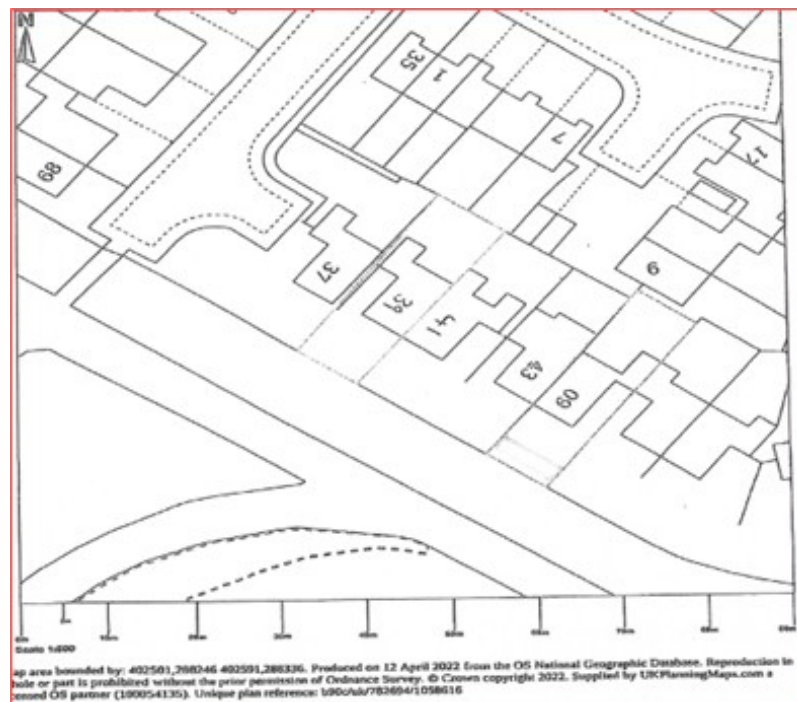
Winterburn v Bennett [2016] EWCA Civ 482, [2017] 1 WLR 646

Introduction

1. The issue in this appeal is whether Mr Sagier, the owner of a house on a private road, has acquired a right of way on foot over part of the road belonging to one of his neighbours, Mrs Kaur.
2. The appeal is against a decision of the First-tier Tribunal, Property Chamber (the FTT) published on 16 July 2023 and an order of the same date directing the Chief Land Registrar to cancel an application by Mr Sagier for registration of a private right of way over part of Mrs Kaur's land at 60 Victoria Park Road, Smethwick (registered title number WM703126) for the benefit of Mr Sagier's land at 39 Pool Road, Smethwick (title number WM701127).
3. At the hearing of the appeal, for which permission was given by the FTT, Mr Sagier, the appellant, was represented by Mr Michael Buckpitt and Mrs Kaur, the respondent, was represented by Ms Anya Newman. I am grateful to them both for their submissions.

The facts

4. In 1999 Barratt Homes completed a new housing development adjoining Victoria Park in Smethwick. It included new homes on two existing public roads, Pool Road and Victoria Park Road, which run parallel to one another and terminate at the railings which surround the Park. The development also included nine new houses situated on a new private road immediately adjacent to the Park and connecting Pool Road and Victoria Park Road. Although the new private road linked two existing public highways it has never been adopted and remains private land with each successive strip owned together with the adjoining house.
5. The general layout is shown below, with Pool Road on the left.



6. Viewed from Victoria Park the new houses along the private road are numbered, from the left, Nos. 37, 39, 41 and 43 Pool Road followed by Nos. 60, 61, 62, 63 and 64 Victoria Park Road. With one exception the houses are all semi-detached, and No. 43 Pool Road and No. 60 Victoria Park Road form a pair. It is convenient to refer to each property simply by its number and to semi-detached pairs by both their numbers.
7. Mr Sagier owns No. 39. Three doors along, Mrs Kaur owns No. 60. Mrs Kaur and her late husband, Mr Mohan Singh, bought No. 60 in March 1999 and she has lived there ever since. The first owner of No. 39 was a Mrs Hewitt, who purchased it in July 1999 and later sold it to Mr Sagier in August 2015.
8. Each of the houses on the private road has a small, paved area and its own tarmac driveway immediately to the front and to the side of the building. The road itself is simply the succession of driveways over which neighbours have to walk or drive to get from their own houses to the public highway at one end or the other. There is no designated footway but a narrow strip of land adjoining the Park railings is not paved or tarmacked.
9. When the houses along the private road were first occupied in 1999 the new owners complained to Barratt that there was nothing to stop vehicles using it as a convenient cut-through to get from Pool Road to Victoria Park Road. To prevent access Barratt erected a timber barrier, lower than knee height, stretching from the front wall of Nos. 43/60 all the way to the Park railings. This barrier was sufficient to prevent vehicles passing from one end of the private road to the other, but still low enough to enable any able bodied pedestrian to step over it and continue on their way without difficulty. Nor did it present any serious obstacle to cyclist or parents pushing prams or pushchairs as these could easily be picked up and lifted over the barrier.
10. After 1999, when the development was completed, pedestrians made very regular use of the private road. There is a school, a community centre, a doctor's surgery and some shops on the eastern side of the Park, as well as gates into the Park at the end of Victoria Park Road. The most convenient route for many pedestrians wishing to get to those facilities from Pool Road was to walk along the private road, stepping over the timber barrier on their way. The alternative was a short diversion through the Park or a long diversion of perhaps 600 metres back along Pool Road; so the route over the private road was popular with children and others going regularly backwards and forwards in both directions. It was also used, in both directions, by those who lived on the private road.
11. Barratt's original timber barrier was not very obvious to drivers who didn't know it was there and who would come some distance along the private road before they realised that it was blocked. They would then have to turn round in quite a confined space or reverse back in the direction they had come from. Nor did the barrier limit where pedestrians could walk as they passed directly in front of the houses, which were not separated from the road by any garden or fence. That wasn't very satisfactory for the owners of the houses, who soon found their own solution to both of these issues.
12. The first self-help measure taken to reduce the inconvenience and nuisance experienced by the owners of the houses was to put up some signs. In January 2000 Mr Sidhu, who lives at one end of the private road at No.63, talked to his neighbours at that end of the road and as far along as No. 43 (Mr Jackson) and they agreed to put up two signs, each stating "No public right of way". One sign was put up on the Park railings opposite Mr

Sidhu's house, so as to be visible to drivers before they turned into the private road at that end, and another on the Park railings adjacent to the timber barrier. Mr Sidhu discovered that these signs were repeatedly removed and had to be replaced from time to time until about 2005, by which time he had had enough and gave up replacing them.

13. Later in 2000 or 2001 a second self-help measure was taken by some of the owners at the Victoria Park Road end who replaced the low timber barrier with a low metal fence, about waist high, in the same position. The new fence had railings topped by decorative finials and was high enough to prevent anyone from comfortably stepping over it. But the owners who arranged for the new fence also appear to have decided that it should not block the whole width of the private road. Instead of running from the wall of Nos. 43/60 all the way to the Park railings, the new fence stopped short of the railings by about two metres or six feet. In that gap the owners left a stretch of Barratt's original low timber barrier spanning the grassy space between the end of the new fence and the Park railings. The result was that pedestrians could continue to step over the timber barrier when going from one end of the private road to the other.
14. On 27 September 2020 Mrs Kaur and her late husband put up a higher wooden barrier or fence blocking the gap between the metal fence and the Park railings and making it impossible for pedestrians to pass from one end of the road to the other. This short stretch of wooden fencing is referred to in the FTT's decision as a "picket fence". Later, in 2021, Mrs Kaur and her late husband took away the picket fence and the original metal fence, which had stood for twenty years, and replaced them with a much higher metal fence which is impossible to jump or climb over.
15. Unfortunately, but entirely predictably, the separation of the Victoria Park Road end of the private road from the Pool Road end by the erection of increasingly formidable barriers has caused conflict between neighbours.

The proceedings

16. On 2 December 2020, after the erection of the picket fence but before the installation of the higher metal fence, Mr Sagier applied to HM Land Registry for the registration of a right of way said to have been acquired by long use. His case was that he and his predecessor as owners of No. 39 had used part of the drive of No. 60 on foot since 1999.
17. The claimed route of the way begins at what had been the gap between the end of the low metal fence and the Park railings, which since 2000 had been blocked only by the short stretch of the timber barrier put up by Barratt. From that point the claimed route crosses directly over Mrs Kaur's front drive parallel to the Park railings before exiting onto the driveway of No. 61. No additional claim was made with respect to the drives of Nos. 61 to 64.
18. Mrs Kaur objected to the application and the dispute was referred to the FTT which held a hearing before issuing its decision on 16 July 2023 directing the cancellation of Mr Sagier's application.
19. One puzzling feature of these proceedings should be noted. The only registered title in evidence before the FTT was that of No. 60, which referred to a Transfer of that property to Mrs Kaur and her late husband on 26 March 1999. No copy of that Transfer was in evidence and I was told that none was available; nor was the July 1999 Transfer of No.

39 to Mrs Hewitt. The property register nevertheless records that No. 60 has the benefit of rights granted by but is subject to rights reserved by that Transfer. What those rights are, and whether they include express rights of way, is unknown. These proceedings have been conducted on the assumption that no such express rights exist.

Relevant legal principles

20. In English law rights over land belonging to someone else may be acquired by individuals or by the public in general as a result of long use. In theory there are three ways in which such rights can be acquired, but in practice there are only two.

Common law

21. In medieval times proof that use had commenced before 1189 was sufficient, but the passage of time made that impossible and no more need be said about it.

Inference of a lost modern grant

22. In response to the difficulty of proving sufficient use to satisfy the common law requirement, judges developed more practical rules to avoid the disturbance of long established uses. Proof of long use, of the required quality and duration, was taken to give rise to a legal presumption that a previous owner of the land must have done something to confer a lawful title on the person or group who had been making use of the land, including title to use it for recreation as a village green or title to a right of way over it. That presumption is referred to as a “lost modern grant”, and its evolution was explained by Lord Hoffmann in *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335, at 349-351. The grant which is presumed is fictional but it nevertheless gives rise to a right which binds the owner of the land just as much as if the owner had themselves granted the right of way or dedicated the land for public use; the use is said to be “as of right”. A grant will be presumed where it is proved that the use has been enjoyed for a period of 20 years, provided the use for that period has been of the required quality or character to justify the law treating it as if it had a lawful origin.
23. To justify treating sufficiently long use as if it was use “as of right”, the law requires that the use must have three characteristics: it must not have been enjoyed by force; it must not have been enjoyed secretly; and it must not have been enjoyed with the permission of the owner of the land. In *Sunningdale* Lord Hoffmann used the traditional Latin phrase, *nec vi, nec clam, nec precario* to refer to these three qualities before explaining why the absence of force, stealth or permission had been insisted on:

“The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right--in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in *Dalton v. Angus* (1881) 6 App.Cas. 740, 773, Fry J. (advising the House of Lords) was able to rationalise the law of prescription as follows:

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

24. In this appeal the only one of these three qualities which is contentious is the first, that the use of the right of way must not have been “by force”.
25. It is not suggested that Mr Sagier’s use of the route over Mrs Kaur’s driveway involved physical force or violence. “Force”, in this context, means contentiously or subject to protest or objection. To defeat the accrual of a right based on long use it is therefore enough for an owner to make it clear that they do not acquiesce in the use of their land. In *Dalton v. Angus & Co.* (1881) 6 App.Cas. 740, at 786, Bowen J suggested that “continuous and unmistakable protests” should be enough:

“The neighbour without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions on which the presumption of right is raised [...].”

This tentative suggestion has become fully incorporated into the modern approach to the requirement that the use relied on must not be forcible.

26. In *Newnham v Willison* (1987) 56 P&CR 8, 18, at page 19, Kerr LJ concluded from a review of the authorities that a use of land may become forceful “once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious.”
27. In *R. (Lewis v Redcar and Cleveland Borough Council (No. 2))* [2010] 2 AC 70, Lord Rodger of Earlsferry JSC cited Bowen J’s suggestion in *Dalton v Angus* and explained the requirement that the use should be without force, or “peaceable”, in the same way:

“If the use continues despite the neighbour’s protests and attempts to interrupt it, it is treated as being *vi* and so does not give rise to any right against him.”

28. In *Winterburn v Bennett* [2016] EWCA Civ 482 the issue was whether a fish and chip shop had acquired a right by prescription for its owners and their customers to park on the car park of an adjoining social club. The club had erected two signs stating that the car park was private and for the use of its patrons only, but the owners of the shop argued that these were not enough to prevent the right they claimed from having accrued through long use. The Court of Appeal held that the signs were sufficient and that it had not been necessary for the club to do more. Having reviewed the authorities since *Dalton v. Angus*, David Richards LJ concluded:

“[40] In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be “as of right”. Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest.

But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.

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

Prescription Act 1832

29. Side by side with the fiction of a lost modern grant which had developed through judicial pronouncements, Parliament also provided for the acquisition of rights over land by long use in the Prescription Act 1832.
30. Section 2 of the Act prevents a claim to the use of a way or other easement from being defeated if the use of the way “shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years”. Although the same underlying principles apply to a claim under the 1832 Act as to one based on a lost modern grant, so that the required use must have been without force, stealth or permission, claims under the Act are subject to additional rules about when the required use must have occurred and about the consequences of any interruption.
31. A claim founded on the fiction of a lost modern grant can be based on twenty years use at any time. In contrast, for a claim under the 1832 Act, the first limb of section 4 requires that the period of use relied on must be “next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question”. This means that the period during which the use must be demonstrated for a claim under the Act is a period ending on the date on which proceedings are commenced in which the right is claimed or disputed.
32. Section 4 also qualifies the requirement of section 2 that the relevant use must have been “without interruption for the full period of twenty years” by limiting what is to be recognised as amounting to an interruption:

“[...] no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.”
33. The effect of sections 2 and 4 in combination was explained by Jenkins LJ in *Reilly v Orange* [1955] 2 QB 112, at 118:

“What must be shown is a full 20 years reckoned down to the date of action brought. That must be an uninterrupted period, but in considering whether it is an

uninterrupted period or not, interruptions not acquiesced in for at least a year are not to be counted as interruptions.”

34. Applying section 4 to a claim under the Act in this case, the relevant proceedings were those commenced by Mr Sagier’s application to HM Land Registry to note the right of way on his own and Mrs Kaur’s registered titles. The period during which use of the claimed route as of right had to be proved was therefore the period of 20 years ending on 2 December 2020. The use of the route was interrupted by Mrs Kaur and her husband erecting their own picket fence in the gap between the metal fence and the Park railings on 27 September 2020. But that period of interruption lasted for only a little over two months before the proceedings commenced. It was therefore not long enough to be deemed to be an interruption for the purpose of calculating periods of time under the Act; only an interruption of a full year would amount to an interruption for that purpose.

The burden of proof

35. Of the three characteristics of the use required to establish a prescriptive right, the fact that the use relied on took place openly requires proof of positive actions but the requirement that it was not contentious or with permission are negative conditions. While the person claiming the right can reasonably be expected to lead evidence of the use they or their predecessors have made of the claimed right, it would not be practical or reasonable to require that they also prove that the use was not contentious and was not with permission. The person in a position to adduce evidence about those matters is the owner of the land, who can say whether they gave permission for the use or took steps to resist it. These evidential realities are reflected in the burden of proof in a claim to a prescriptive right.
36. The allocation of the burden of proof was considered in detail by the Tribunal (Morgan J) in *Welford v Graham* [2017] UKUT 297 (TCC), at [22]-[48]. The effect of the authorities, and the conclusion reached in that case, are explained in *Gale on Easements*, 21st Ed. (2020) at paragraph 4-119, as follows:

“If the person asserting the easement proves that the putative easement was used for the necessary period of time, openly and in a way which would bring home to a reasonable owner of the servient tenement that a right was being asserted, then that person has the benefit of an evidential presumption that the enjoyment has been as of right and, in particular, without permission and without contention. The person asserting the easement can rely on this evidential presumption so that he does not have to try to prove that there was no express or implied permission, or no contention, during the relevant period of user.”

37. In this case, therefore, it was for Mr Sagier to prove that he and Mrs Hewitt had openly made use of the claimed route to go backwards and forwards over the private road. Once he had done so, he could rely on an evidential presumption that his and his predecessor’s use had been as of right and, in particular, that it had not been contentious. It was then for Mrs Kaur to defeat that presumption by showing that the use had in fact been contentious.

The FTT’s decision

38. Having recited the background facts the Judge identified 27 September 2020, the date on which Mr Singh and Mrs Kaur blocked the gap between the metal fence and the Park railings, as significant. It was more than 20 years after the houses along the private road had been sold, and, subject to proof of the necessary use, there had therefore been sufficient time for a prescriptive right of way to have been acquired.
39. The Judge then referred to the three methods by which a claim such as Mr Sagier's, which is based on prescription, could be made good. He dismissed reliance on proof of continuous use since the twelfth century since the development had been completed only in 1999. He briefly considered a claim under the 1832 Act but rejected it because of the need to show twenty years' use up to the date of commencement of the proceedings in December 2020; by that date the route had already been blocked off by the picket fence, so any use had ceased. The Judge then devoted the remainder of the decision to considering the claim based on the inference of a lost modern grant arising out of twenty years use of the route by Mr Sagier and his predecessor Mrs Hewitt.
40. The Judge recorded that it was agreed by the parties that it was for Mr Sagier to show that he and, before him, Mrs Hewitt, had used the claimed route for at least twenty years; it was not enough that other people had used it. If that was established it was for Mrs Kaur to show that the use relied on had not been forcible, in the sense explained in the authorities. It was also agreed that a protest in the form of signage could amount to "force" in that sense. The Judge said that an oral protest could also be relevant, but to the extent that oral protests were relied on it was necessary for Mrs Kaur to prove that they had been heard by Mr Sagier or Mrs Hewitt, and not just by other users.
41. It had not been suggested by or on behalf of Mrs Kaur in her own written evidence, or in the evidence of her neighbours at No. 61 (Mr G. Singh), No. 62 (Mr Grewal), No. 63 (Mr Sidhu), and No. 64 (Ms R. Singh), that she or her late husband had said anything to Mr Sagier or Mrs Hewitt objecting to their use of the claimed route. All that was said was that Mrs Kaur's husband had stopped trespassers, without identifying them. In her oral evidence, however, Mrs Kaur recounted a single occasion on which she said she had witnessed her husband remonstrating with Mr Sagier over his use of the route. The Judge accepted that evidence and said that he was satisfied that there had been "at least one oral protest" to Mr Sagier.
42. The Judge then considered the evidence on signage. It was not suggested that signs had been displayed while Mr Sagier had lived in the road so his denial of having seen any was not contentious. Ms Whiston, the owner of No. 41 since 1999, also denied having seen any signs, but the Judge did not place much reliance on her evidence because there had been periods of time when she had not been living there. The only witness to give evidence about signs was Mr Sidhu, whose witness statement said only that he had erected signs saying "No public right of way" outside No. 63 and No. 60, but these had disappeared and, after replacing them several times, eventually he had had enough of doing so. The Judge explained that during his oral evidence Mr Sidhu had given further details. The sign outside No. 60 was attached to the Park railings (where the Judge was satisfied it would have been visible). Furthermore "Mr Sidhu said signage went up in 2000 and remained up for roughly 5 years into the mid-2000s". The Judge said that he had found Mr Sidhu to be a careful witness who was doing his best to help the tribunal, and he accepted his evidence.

43. The Judge then decided that the effect of the presence of signs was that any use of the drive of No. 60 was made “with force” and that, together with at least one altercation between Mrs Kaur’s husband and Mr Sagier, that meant that no right of way had been acquired for the benefit of No. 39 over the drive of No. 60.
44. The Judge did not say, in terms, what he made of Mr Sagier’s evidence that he and his family had made daily use of the claimed route to get to and from the facilities on the other side of the Park. Nor was he prepared to place reliance on the evidence of Mr Sagier’s predecessor, Mrs Hewitt, which was given only in writing. Nevertheless, reading the decision as a whole its effect is that the Judge was satisfied that the requirement of sufficient use had been made out. In her closing submissions Ms Newman, counsel for Mrs Kaur, had specifically invited the Judge to find that use by the owners of No. 39 had not been proven, but the Judge appears to have rejected that invitation in the only part of the decision dealing specifically with use, paragraphs [11] and [12], where he said this:

“Although this was contested by the respondent and her witnesses, I am satisfied that it is convenient for the owners of 37-43 Pool Road to cross the junction from Pool Road into Victoria Park Road to gain access to a local school, community centre and convenience store, rather than go the much longer route via the public part of Pool Road or even through the Park.

Although there is a path through the Park, some prefer not to use it in the dark and it is sometimes locked. Indeed, it is the respondent’s case that she and her witnesses have been plagued by pedestrians walking along the private part of Victoria Park Road, so it hardly lies in her mouth to allege that the route through the Park was preferred.”

45. Although that is not the clearest finding that the owners of the houses at the Pool Road end of the private road were in the habit of making use of the disputed route it does seem to be what the Judge was intending to convey: not only was it convenient, but it is what actually happened. Later in his decision he correctly recorded that once Mr Sagier had proved 20 years’ use, the evidential burden shifted to Mrs Kaur to show that the use was without force or permission and said that she relied only on the use having been “by force”. If the Judge had not been satisfied that the evidential burden had passed to Mrs Kaur, he would surely have said so and would not have rested his decision on his findings about signs and a single oral protest. Nor would he have granted permission to appeal.

The grounds of appeal

46. The Judge granted permission to appeal on two grounds. I subsequently granted permission for a third ground on paper and refused permission for a fourth at the hearing of the appeal.
47. Under the first ground it is said that the Judge was wrong in law to dismiss the claim under the Prescription Act 1832 simply because the use of the claimed route had ceased on 27 September 2020, and had not continued until the commencement of the proceedings in December 2020. The Judge refused permission for an appeal on this ground saying that the claim under the Act added nothing to the claim based on lost

modern grant. Mr Sagier also challenges that suggestion, and permission for this ground was granted by this Tribunal.

48. Under the second ground of appeal it is said that the Judge was wrong about the significance of the single incident of oral protest he had found to have occurred involving Mrs Kaur's husband and Mr Sagier. Neither Mrs Kaur nor the Judge had said when this incident took place, but Mr Sagier's evidence had been that he had had two amicable conversations with Mrs Kaur's husband at different times but that there had been a single altercation at the end of September 2020 after the picket fence had been erected. By that stage there had already been more than 20 years use of the route, so the incident was irrelevant as far as the claim based on lost modern grant was concerned. It was also a consequence of the same interruption of use within a few months of the commencement of proceedings and section 4 of the Act required that it be disregarded for the purpose of the statutory claim.
49. The third ground of appeal concerns signage. It is said that the signs relied on were addressed to the public at large and were not intended, nor were they sufficient, to convey to the owners of houses on the private road that their neighbours objected to their use of the claimed route to walk up and down their own street.
50. The Judge refused permission to appeal on a fourth ground of appeal. It was said that permission ought not to have been given on the day of the hearing for an amendment to Mrs Kaur's case to rely on the signs. The Judge refused permission for that ground because the signs were referred to in the witness statement provided by Mr Sidhu which had been served at the same time as Mrs Kaur's statement of case and well before the hearing. Following that refusal a further application for permission to rely on the fourth ground was made to this Tribunal. I considered that application at the commencement of the hearing but refused permission, for substantially the same reasons as had been given by the Judge.

Issue 1: Was the Judge wrong to dismiss the claim under the Prescription Act 1832?

51. In support of the first ground of appeal Mr Buckpitt submitted that the Judge had been wrong to dismiss the claim under the 1832 Act out of hand. After referring to the requirement in the first limb of section 4 of the Act that 20 years' use without force, secrecy or permission had to be shown to have occurred "next before some suit or action", the Judge had said simply that by the date of Mr Sagier's application to HM Land Registry the claimed right had already been blocked off by the picket fence, and the required use had already ceased. The Judge had not taken into account the second limb of section 4 and should have held that the interruption of use by the erection of the picket fence on 27 September 2020 could not be "deemed to be an interruption" at all and should be ignored. Had full effect been given to section 4, the Judge should have accepted that the relevant period of use had continued up to the commencement of the proceedings on 2 December 2020.
52. Mr Sagier was not professionally represented at the FTT hearing. Although the Judge paid tribute to his submissions on the law, one detail of which Mr Sagier appears to have been unaware was the direction in the second limb of section 4 of the Act that nothing is to be deemed to be an interruption of a period of use as of right unless it was submitted to or acquiesced in for one year. But it is clear that he was not alone in overlooking that provision. The Judge did not refer to it in his decision and in the transcript of Ms

Newman's closing submissions she is recorded as having submitted that if the signs put up by Mr Sidhu "was only up for, say 10 nights, that would have been sufficient" to interrupt the required period of use.

53. When the Judge refused permission to appeal on this ground he had said that reliance on the Act added nothing to the claim based on lost modern grant, a proposition which Ms Newman supported in her statement of case and in her skeleton argument.
54. Mr Buckpitt challenged the consensus which appears to have existed at the FTT hearing, at least between the Judge and Ms Newman. The important difference between a claim based on a lost modern grant and a claim under the Act is that in determining the statutory claim interruptions during the 20-year period (at whatever stage) acquiesced in for less than a year do not count, and do not stop time running. Mr Buckpitt relied on Jenkins LJ's explanation of the effect of section 4 of the Act in *Reilly v Orange* (see paragraph [33] above) and on *Megarry & Wade: The Law of Real Property* 9th Ed. (2019) at 27-071 where it is said that "If D has used a way over S's land for over 20 years, and then a gate is locked or a barrier erected barring his way, D can still succeed in establishing an easement provided that, at the time the action is brought, he has not acquiesced in or submitted to the obstruction for one year after he has known both of the obstruction and of the person responsible for it." By 27 September 2020 there had been more than 20-years use of the claimed right and the interruption for the months immediately before the commencement of the proceedings did not count as an interruption at all.
55. In her oral submissions Ms Newman was inclined to acknowledge the distinction between a claim under the Act and a claim put solely on the basis of lost modern grant. She also acknowledged that the single incident recalled by Mrs Kaur in which her late husband had remonstrated with Mr Sagier about his use of the claimed way had occurred on or after 27 September 2020, when the picket fence had just been erected.
56. There seems to me to be no doubt that the Judge omitted a full consideration of the possibility of a claim under the Act. The Judge's reason for dismissing that way of putting the claim was simply that the proceedings had been commenced almost three months after the obstruction of the way by the erection of the picket fence. I accept Mr Buckpitt's submission that that approach overlooked the second limb of section 4. A physical obstruction of the way which existed for less than 12 months ought not to have been sufficient to rule out reliance on a claim under the Act where 20 years use could already be shown by the date of the interruption.

Issue 2: Did the single oral protest make any difference?

57. It is clear from the transcript of the proceedings that the confrontation between Mr Sagier and Mrs Kaur's late husband was recalled by those who heard it as having taken place at the end of September 2020, and after the picket fence had been erected in the gap used by Mr Sagier, his predecessor Mrs Hewitt, and their neighbours for more than the previous 20 years. That was what Mr Sagier said and how it was put to the Judge by Ms Newman in her closing submissions. Ms Newman did invite the Judge to accept that there had been many other such incidents, but he was not prepared to do so.
58. On the basis that the single protest found to have been directed by Mrs Kaur's late husband to Mr Sagier occurred after the period of use relied on, it cannot be relevant to

the acquisition of rights either under the Act or on the assumption of a lost modern grant. I therefore accept Mr Buckpitt's submission on the second ground of appeal.

59. Whether these conclusions in Mr Sagier's favour on the first and second issues make any difference to the outcome of the proceedings depends on the final issue which is concerned with the effect of the signs which the Judge found had been erected.

Issue 3: Did the display of signs prevent the acquisition of prescriptive rights?

60. To recap the Judge's findings in relation to signs, these were that Mr Sidhu had erected two signs reading "No Public Right of Way" one outside his own home at No. 60 and the other on the Park fence beside the gap used by those passing up and down the private road. The signs were first put up in January 2000 but they disappeared and had to be replaced several times before eventually, after about five years, Mr Sidhu had stopped replacing them.
61. Mr Sidhu was the only witness called in support of Mrs Kaur who mentioned the signs. He was not asked how often they had been taken down and had to be replaced, or whether there were gaps during the five years between one sign being removed and a replacement being erected. The only evidence on that topic was in his witness statement in which he said no more than that the signs which he erected had disappeared and, after replacing them several times, he had had enough.
62. Mr Sagier, Ms Whiston and Mr Mahboob were all asked about signs and said that they had never seen any.
63. The final issue gives rise to a number of questions. The first is whether a sign which refers to there being no public right of way is sufficient to prevent the acquisition of a private right by a neighbouring owner. The second is whether any impact which the signs might have been capable of having on the acquisition of private rights in favour of No. 39 under the 1832 Act depended on them having been on display for at least a year. The third is whether signs put up by Mr Sidhu could prevent the acquisition of rights over No. 60, which belonged to Mrs Kaur and her late husband.
64. The law on the effect of signs on a claim to have acquired an easement by prescription, has very recently been reviewed by the Tribunal (Mr Justice Edwin Johnson, Chamber President) in *Nicholson v Hale* [2024] UKUT 153 (LC), a case concerning a sign which included the statement "Private Property – No Public Right of Away". The FTT had held that the sign did not prevent the acquisition of a private right of way by the owners of adjoining property. The Tribunal's decision, reversing the FTT, was not available when I heard this appeal but I gave both parties the opportunity to make further submissions to address it.
65. In *Taylor v Betterment Properties (Weymouth) Ltd & Anor* [2012] EWCA Civ 250 the effect of signs was considered by the Court of Appeal in the context of a claim that a large area of grazing land should be registered as a village green. There was evidence that signs had been erected by the owners of the land (Betterment), but that these had been repeatedly removed, and so had not been seen by all of the users of the land. Patten LJ stated the general principle, at paragraph [48]:

“If the landowner erects suitably-worded signs and they are seen by would-be peaceable users of the land then it follows that their use will be contentious and not as of right.”

66. The question sometimes arises, as it does in this appeal, whether a particular sign is “suitably-worded” to convey to would-be peaceable users that the use of their land is objected to by the owner. In *Taylor v Betterment* Patten LJ referred with approval to some of the general principles on the interpretation of signs which had been derived from earlier authorities by HH Judge Wacksman QC (sitting as a Judge of the High Court) in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin), as follows:

“22. From those cases I derive the following principles:

- (1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;
- (2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;
- (3) The nature and content of the notice, and its effect, must be examined in context;
- (4) The notice should be read in a common sense and not legalistic way; [...]

67. The Judge did not refer in his decision to the case put to Mr Sidhu by Mr Sagier in cross examination, which was that the signs had not been intended to notify his neighbours along the private road that they were not welcome to walk over the claimed way. Mr Sagier had argued that the signs targeted only public use, and not use by the small group of people who lived on the road. Mr Sidhu had not understood the distinction put to him between public and private rights of way but said that the signs were intended to deter “strangers”, which he explained included anyone who lived at the Pool Road end of the private road.
68. Mr Buckpitt (and Mr Wilmshurst in written submissions on *Nicholson v Hale*) submitted that the signs erected by Mr Sidhu were plainly addressed to members of the “public” not householders and neighbours living on the private road, some only a door or two away. The signs were intended to tell the world at large that the private road was private and the Judge had failed to consider what they would have been understood to mean by those living on the Pool Road side of the fence.
69. In support of his submission Mr Buckpitt referred to *Giles v Donald* (CA 10.12.1997 Lexis Citation 5023), an unreported decision of the Court of Appeal refusing an application for permission to appeal in a case on somewhat similar facts to these, but although apparently helpful to his argument, the brief observations of Butler-Sloss LJ cannot be regarded as authoritative.
70. The one case in which consideration has been given to the effect of a sign including the words “no public right of way” is this Tribunal’s very recent decision in *Nicholson v*

Hale. In that case a terrace of houses was set above the level of the adjoining street and served by a pedestrian walkway running along the front of the terrace. The walkway was reached by a staircase at the top of which was a small sign which read: "This staircase and forecourt is private property. No public right of way." The FTT considered that the sign did not prevent the acquisition of a private right of way over the staircase for the benefit of one of the houses in the terrace but this Tribunal allowed an appeal against that conclusion. In doing so it applied the principles described by Judge Waksman QC and approved by the Court of Appeal in *Taylor v Betterment*. Taken in isolation the statement that the staircase was private property would convey to any reader that access was not available to persons other than the owner of the land and those authorised by the owner. That message was reinforced by the statement that there was no public right of way. The reader of the notice would not understand that a distinction was intended between public and private rights of way.

71. Ms Newman acknowledged that the language of the sign in *Nicholson v Hale* was different. She nevertheless suggested that the statement "no public right of way" would be understood to mean "no right of way" by a reasonable reader without any particular legal knowledge. It would convey to anyone crossing the low wooden barrier that they were doing so without the consent of the owner of the land they were stepping onto. The distinction between public and private rights of way was not one which would occur to users of the way, whether they lived on the private road itself or on Pool Road, or further afield.
72. The Judge did not deal with this issue in his decision. The general question is: what would the sign convey to a reasonable user of the claimed right? As the right claimed is a private right for the benefit of the owners of No. 39, the reasonable user must be assumed to have similar characteristics to those by whom the right is claimed (i.e. that they are an owner of a house on the private road). In *Betterment* at paragraph [50], Patten LJ referred to what the reasonable person "standing in the position of the actual user should have realised". The assumed user of the route, and reader of the notice, must therefore be assumed to have the same background knowledge as an owner of one of the houses on the private road would have had. I do not accept Ms Newman's submission that the notice should be interpreted by asking how it would be understood by anyone living on the estate.
73. The question is to be addressed by reference to the context in which the notice was displayed. That context was that the signs were erected on a new private road initially in January 2000, within a year of the completion of the estate and a few months after the developer had put up a low wooden barrier to discourage the use of the route by vehicles. The context was modified when the wooden barrier was replaced over most of its distance by the original metal fence, leaving pedestrian access through the gap between the metal fence and the Park railings. The route was frequently used as a convenient shortcut for pedestrians making their way to and from the local facilities and by the owners of houses on the private road as they crossed each other's frontages.
74. In that context, to whom would a reasonable user of the claimed route who lived on the private road understand that the signs were addressed? Such a user would have appreciated that the sign outside No. 60 was aimed at pedestrians, since the way was already blocked to vehicles at that point (the sign outside No. 63 was more ambiguous and might have been taken simply to be addressed to motorists).

75. Users would also have read the sign assuming that neither Barratt, when they installed the wooden barrier, nor those owners who later put up the metal fence leaving a gap at the end, can have intended to prevent all pedestrian access. It was suggested by Mrs Kaur in her evidence to the FTT that the fence did not extend all the way to the Park railings because there were flowers growing on the grass verge. The Judge did not say what he made of that suggestion, but it is the impression which the sign created in the mind of the user which is important. The wooden barrier was no obstacle to pedestrians and by leaving a stretch of it in place when the fence was erected the owners would have appeared to be indicating that they were content for at least some pedestrians to continue to cross over it. They cannot be taken to have left the gap solely for their own convenience to enable them to reach Pool Road over their neighbours' frontages, while denying those same neighbours the reciprocal opportunity to get to Victoria Park Road.
76. In those circumstances there is force in Mr Buckpitt's submission that the sign asserting "No Public Right of Way" would not have been understood by the owners of houses on the private road as a message from their neighbours that they were not permitted to cross over the low wooden barrier. After all, the owners at the Pool Road end of the road were subjected to the same inconvenience as their neighbours at the other end by the comings and goings of the public, who passed over the driveways of Nos. 37 to 43 just as frequently as those of Nos. 60 to 63. The sign appeared specifically to be aimed at the public, and whether or not they appreciated the lawyer's distinction between a public right of way and a private right, I do not consider that a householder living on the private road and over whose own frontage the public also walked would have clearly understood that they were included in that classification. It would have been obvious to someone living at No. 43, for example, that their next door neighbours at No. 60 on whose land the sign was displayed were not inhibited from walking over their neighbours' property either to reach Victoria Park Road or Pool Road. In my judgment a reasonable owner of No. 39 would, at the very least, have been in considerable doubt over whether the sign was intended to convey a message to them that they were not also welcome to do so. I think it more likely that they would have understood that they and their neighbours were fellow residents of the private road, and not the public whose presence was objected to.
77. In this context it is clear from the authorities that an ambiguous warning will not do. In *Dalton v. Angus*, Bowen J suggested that "unmistakable protests" should be recognised as having the same effect as physical obstructions and that statement has since been quoted with approval at all levels. In *Newnham v Willison* Kerr LJ referred to "knowledge" on the part of the person seeking to establish prescription that his user is being objected to. And in *Winterburn v Bennett* Richards LJ said that where an owner has made his position "entirely clear" through the erection of clearly visible signs, the unauthorised use of the land could not be said to be as of right. Accordingly, if it was unclear to reasonable residents of the private road whether the signs were addressed to them, as well as to other users, (as I think at best it would have been) that would not have been enough to render their use contentious.
78. I do not regard the Tribunal's decision in *Nicholson v Hale* as an obstacle to this conclusion. Both the wording of the sign in that case and the location and context in which it was displayed were very different.
79. My conclusion that the signs erected by Mr Sidhu did not make the use of the way by the owners of houses on the private road contentious is sufficient to dispose of the appeal. I can deal with two other points raised in argument briefly.

80. Mr Buckpitt pointed out that the Judge made no findings about how long the signs were on display before they were taken down. Mr Sidhu's written evidence was very concise and said only that the signs had been taken down and had had to be replaced several times. The Judge asked when the signs had first been put up and when Mr Sidhu had stopped replacing them, but not how long they had been displayed on each occasion before being removed. Where a claim to a prescriptive right is made under the 1832 Act, an interruption of use as of right which lasts for less than a year is not deemed to be an interruption at all. For the signs to have had any effect it was therefore necessary that they should have been displayed more or less continuously for at least a year, but the evidence did not establish whether that had happened. The evidence showed only that signs were present for part of the period from 2000 to 2005 during which they were removed and reinstated on a number of occasions. How often they had to be replaced and how long were the intervals between their removal and reinstatement were not investigated. Mrs Kaur bore the evidential burden of showing that the use of the way had been contentious and in the absence of evidence on the point Mr Sagier's application should have succeeded.
81. There is less in the final point, which is whether signs put up by Mr Sidhu, the owner of No. 63 could prevent the acquisition of rights over No. 60, which belonged to Mrs Kaur and her late husband. The evidence appears to have been that the signs were erected after consultation between neighbours and they must be regarded as having been displayed with the concurrence of each of them.

Disposal

82. For these reasons the appeal succeeds and I will direct the Chief Land Registrar to give effect to Mr Sagier's application for registration of the private right of way over the claimed route over Mrs Kaur's land. If the whole fence is not to be removed it will be necessary either for the original gap to be reinstated or for a gate to be created and a key supplied at least to Mr Sagier.
83. The usual order in a land registration appeal is that the successful party is entitled to receive their costs from the unsuccessful party. No order has yet been made by the FTT concerning costs. Any application for costs (including in respect of the costs before the FTT) should be made to this Tribunal within 14 days of this decision.

Martin Rodger KC,
Deputy Chamber President
29 July 2024

Right of appeal

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