Neutral Citation Number: [2019] EWHC 3425 (Ch)

Case No: PT-2018-000858

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 16 December 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) Alan Joseph Bate	**Claimants**
(2) D A Phillips & Company Limited	
- and -	
Affinity Water Limited	**Defendant**

- -
- -

Douglas Edwards QC and Philip Petchey (instructed by **Trowers & Hamlins LLP**) for the **Claimants**
Guy Fetherstonhaugh QC and Fern Horsfield-Schonhut (instructed by **Burges Salmon LLP**) for the **Defendant**

Hearing dates: 22-23 October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on a claim under CPR Part 8, issued on 13 November 2018, brought by the Claimants, the owners of the fee simple estate in land and premises at and known as 25-27 Potter Street, Bishops Stortford Hertfordshire ("the Property"), against the Defendant, a statutory water undertaker, in respect of (i) a water main passing underneath the Property, and (ii) a service pipe, stop tap and meter in an underground chamber on the Property, connecting the water main to adjacent premises at 31A Potter Street. In essence, the Claimants' claim is that the water main, service pipe, stop tap and meter all amount to an actionable trespass on the Property, for which the Claimants seek declaratory and injunctive relief, damages and interest.

2. The Defendant says that both the water main and the service pipe, stop tap and meter were installed in the exercise of statutory powers, or alternatively (in relation to the water main) that the water main was installed pursuant to the grant of an easement to that effect by a deed of grant dated 26 March 1947, made between the parties' predecessors in title. As a further alternative, the Defendant claims an easement by prescription. The Claimant however denies that any relevant statutory powers apply, that the deed of 26 March 1947 created any more than a revocable licence, and also that any prescriptive easement has been established.

3. At the trial of the claim before me Mr Douglas Edwards QC and Mr Philip Petchey appeared for the Claimants, and Mr Guy Fetherstonhaugh QC and Ms Fern Horsfield-Schonhut appeared for the defendant. I am very grateful to them for their clear, helpful and measured submissions, and appreciate the co-operative spirit in which this matter was litigated and tried. I am also grateful to them for their patience in dealing with a number of suggestions that came from the bench during the course of the hearing.

4. The claim is supported by two witness statements of the First Claimant, dated 12 November 2018 and 23 April 2019, and also a witness statement of his solicitor Emma Salvatore, dated 12 November 2018. The claim is opposed by a witness statement of Timothy Monod dated 12 December 2018, and a witness statement of Kenneth Pearman, dated 5 April 2019. The evidence of Ms Salvatore and Mr Pearman was not challenged, and they were not called. Therefore, only Mr Bate and Mr Monod were tendered for cross-examination.

5. Mr Bate was a clear and transparent witness, and I accept that he was telling the truth so far as he knew. Mr Monod was perhaps less clear. Indeed, he became confused and a little flustered over a letter from his solicitors dated 22 March 2018 which in part was inconsistent with his evidence. But he was nonetheless transparent, and equally honest, and I accept that he also was telling the truth so far as he knew. Unfortunately, the nature of this case is such that there were no witnesses who could speak to relevant historical events. It has therefore been necessary to place considerable reliance on the documents available, and on inferences that may properly be drawn from them.

Fact-finding

6. This is an unusual case, because in large part it concerns and depends upon events that took place many years ago, indeed probably before any of those now involved were born. On the other hand, it is a claim under CPR Part 8, which is only appropriate where there is unlikely to be a significant dispute of fact. And, indeed, at trial there were very few disputes of fact. Nevertheless, I make clear that in our system civil judges look carefully at all the oral and written material presented, with the benefit of forensic analysis (including cross-examination of oral witnesses, where that is important), and the arguments made, to them, and then make up their minds. But, even so, decisions made by civil judges are not necessarily the objective truth of the matter. Instead, they are the judge's own assessment of the most likely facts based on the materials which the parties have chosen to place before the court, taking into account to some extent also what the court considers that they should have been able to put before the court but chose not to. And, whilst judges give their reasons for their decisions (as I am doing now), they cannot and do not explain every little detail or respond to every point made.

Documentary evidence

7. In cases, and especially commercial cases, where witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective. In *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [16]-[20], an experienced commercial judge, Leggatt J (as he then was), commented on modern research into the nature of memory and the unreliability of eyewitness evidence. I have already commented on the particular feature of the present case that there are no witnesses who were involved in some of the important matters which have to be considered. In my judgment, the absence of contemporary witnesses means that the documentary evidence available to the court becomes even more important. But in finding the facts for my decision, I have given appropriate weight to all of the different kinds of evidence in this case: the documentary evidence, the "real" evidence and the oral evidence.

Facts found

The 1914 Conveyance

8. The story begins over a century ago. On 29 September 1914, one Marshall Taylor of Bishops Stortford conveyed to the UDC certain land described in the conveyance and situated

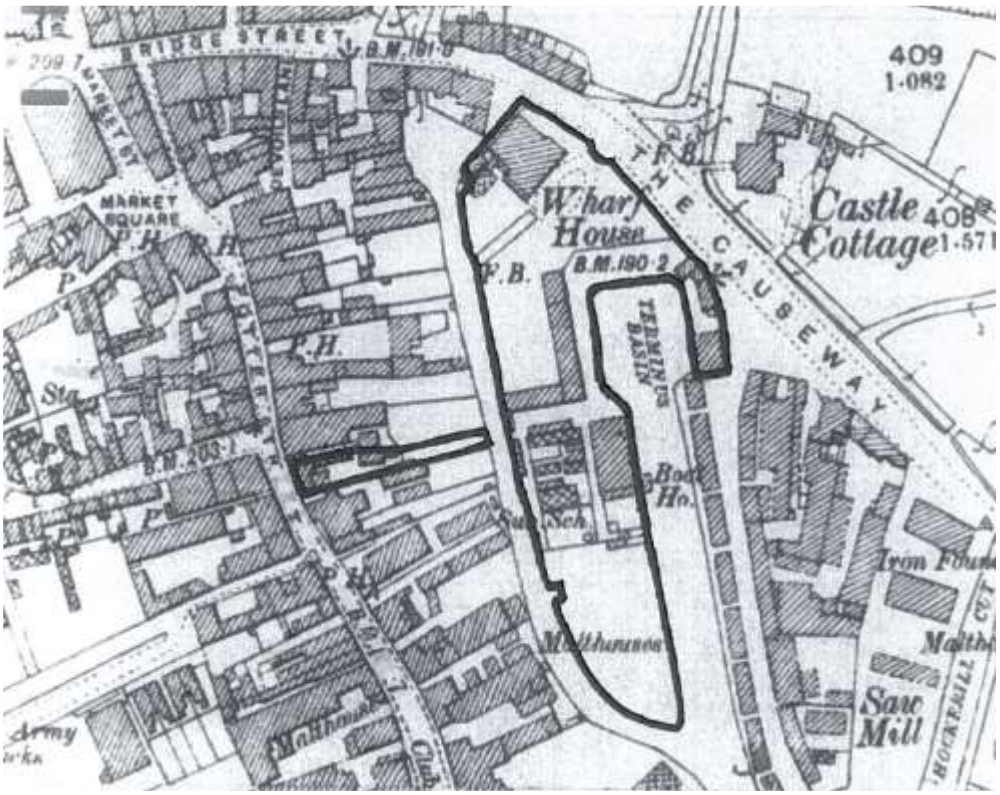
> "on the south side of The Causeway in Bishops Stortford aforesaid and for the purpose of identification but not for enlarging or restricting the description hereinbefore contained particularly delineated in the plan annexed to these presents,"

for an estate in fee simple absolute in possession. This was then unregistered land, and it remained so until 1995.

9. The Causeway was then and still is a road running roughly north-west to south-east through the centre of Bishop's Stortford, and to the east of the Property, on the far side of the branch of the River Stort which then ran along the Property's eastern

boundary. (As I describe below, this branch has now been filled in and replaced by a tarmac road running on the same course, called Riverside.) The plan attached to the 1914 conveyance makes clear that the land conveyed to the UDC included the whole of a tongue of land to the south of The Causeway between that same branch of the River Stort (on its western side) and the River Stort navigation channel leading to a wharf basin (on its eastern side), the wharf basin itself being included in the conveyance.

10. Rather than append the plan to the 1914 conveyance (which does not show the Property), I reproduce below a copy of part of an Ordnance Survey map of 1896. This is only for the purpose of showing their respective positions, and is not otherwise significant. It shows the Property on the left and the land conveyed in 1914 to the UDC on the right, in each case bounded by a thick line, and separated by a branch of the River Stort.



11. Most of the tongue of land conveyed to the UDC in 1914 is now covered by a shopping centre to the north, called the Jackson Square Shopping Centre, and a multi-story car park to the south. But on the western edge of this tongue of land, almost directly opposite the eastern end of the Property, there is a water pumping station, the current structure having been constructed in the 1970s. It contains water pumping and purification equipment, and two boreholes, one disused, and one still in operation. The multi-storey car park occupies the area to the east and north of it, and the air space above it (this latter by virtue of a long lease granted on 1 April 2005 by the Defendant under an earlier name).

The first borehole

12. During the Second World War the UDC, in common with other local authorities, took steps to safeguard its water supplies under wartime conditions. But, by late 1943, with the tide of the war turning, the UDC had appointed a subcommittee to consider general improvements to services and amenities of the town of Bishops Stortford after the war was over.

13. On 16 November 1943, this subcommittee considered a report prepared by a subcommittee of the Highways, Public Health, Water Works, Housing and Town Planning Committee, which referred to

> "a scheme for the sinking of a bore hole and the installation of necessary pumping plant at a point in the Causeway for the purpose of supplementing the supply to the town".

14. On 14 December 1943, the Highways, Public Health, Water Works, Housing and Town Planning Committee itself considered that report from its subcommittee and looked forward to a final report. That subcommittee met on 21 December 1943. The minutes of its meeting show that the subcommittee

> "expressed itself as being in favour of the proposals now submitted to construct a 33 inch borehole, together with suitable pumping plant on land in the Wharf Depot and first to sink a trial borehole…"

15. The minutes of the meeting of the Highways, Public Health, Water Works, Housing and Town Planning Committee on 9 May 1944 state that

> "the Ministry of Health had now approved the construction of a trial borehole in the Council's Depot".

Four tenders for the work were submitted, and the lowest tender was selected.

16. The minutes of the further meeting of that committee on 11 July 1944 refer to the trial borehole as having been "recently constructed on land in the Council's depot." The suggestion was made that pumping plant should be installed in the trial borehole and water pumped directly into the mains. The committee authorised the purchase of suitable plant and the carrying out of necessary work.

17. The minutes of a meeting of a subcommittee of that committee held the following day, 12 July 1944, show that the Ministry of Health had approved

> "the proposal to pump direct into the mains from the trial borehole recently constructed on land in the Council's depot the Causeway."

They also show that suitable second-hand pumping equipment had been located.

18. It is clear from the minutes and the licence that the first, trial (or test) borehole was sunk in the first half of 1944, *ie* before the enactment of the Water Act 1945. This dating is confirmed by two section drawings which were in evidence. One, with the legend "Trial Bore in the Council Depot The Causeway", is dated June 1944. The other, with the legend "Borehole at Depot – Causeway" is dated 5 May 1948. (This latter drawing is expressly attributed to the Borough "Engineer & Surveyor".) The section drawings are in substance identical, and are clearly of the same borehole.

They show the composition of the soil down to a depth of 250 feet, so the borehole shown must have been sunk by the time of the first drawing. They also show that the borehole had a diameter of 8 inches. On the other hand they do not refer to the second, 'main' borehole referred to in the minutes, intended to be of 33 inches diameter, or show that it had by then been sunk.

19. The minutes of the meeting of the committee held on 12 September 1944 state that

> "the Surveyor referred to the scheme for securing supplies of water from the new borehole in the Causeway which would in due course necessitate the laying of permanent mains in substitution for the temporary mains and suggested that in order to save time he might now be authorised to proceed to secure the necessary way leaves where the mains would have to pass through privately owned land".

It was accordingly resolved

> "that the Surveyor be authorised to proceed to obtain the necessary way leaves as suggested by him."

In fact, as will be seen later, there is no record of any wayleaves being sought until 1947.

20. It is also to be noted that at the conclusion of the same meeting there was a discussion of the "question of water supplies to the district", and it was stated

> "that it would appear that the crisis with which the committee was faced some few weeks ago had now passed".

The Council's Engineer was congratulated on having

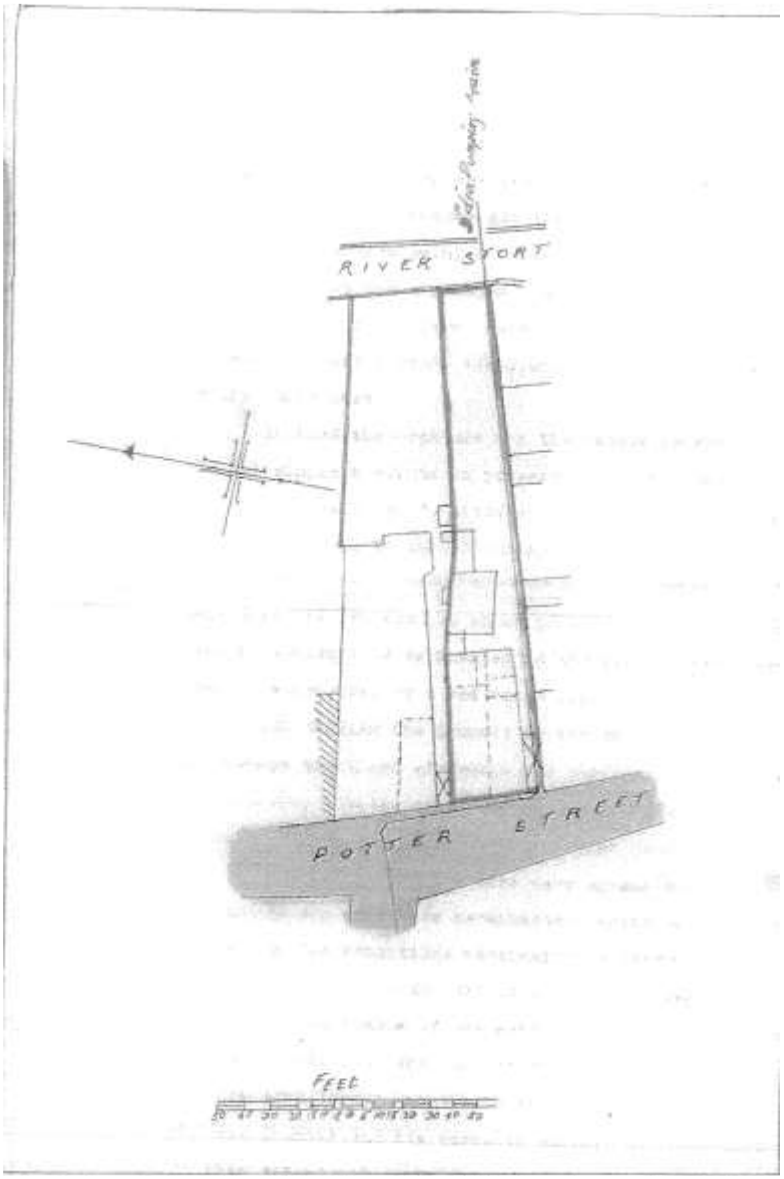
> "realised the difficulty might be encountered consequent upon the drought periods of the last two years and an increase in the consumption of water due to war conditions and [on having] taken the necessary steps to meet the emergency well in advance".

The temporary water main

21. It is clear from the minutes above and in paragraphs 24 and 25 below, as well as the letter of January 1947 referred to in paragraph 26 below, that a temporary main had been laid on the ground (rather than underneath it), under wartime Defence Regulations, to connect the first, trial borehole with other sections of the water system in the town. The trial borehole on the UDC's land was a matter of only a few yards away from the Property, separated only by the River Stort. So this temporary main crossed the river at the eastern edge of the Property, ran over the surface of the whole length of the Property from east to west, through the passageway on the south side of the Property, and out into Potter Street. Once in Potter Street, the mains pipe turned north and then, after a few yards, west into Church Street.

22. The situation on the ground is shown on the plan attached to the deed of grant of 26 March 1947, reproduced below. This has the council's land at the top, above the River Stort, and the Property below that, on the other side of the river. There is nothing in the materials before me to suggest that the line drawn on that plan for the laying

underground of the water main in 1947 was significantly different from the route of the overground pipe used from 1944.



23. From the materials before the court, it appears that the water main then joined the existing water system at the junction of Basbow Lane and High Street, which is at the other end of Church Street. It also appears that this temporary main was laid under emergency wartime powers, although nothing turns on this for present purposes. At all events, it must have been severely inconvenient to pedestrian and wheeled traffic alike to have an important water main lying on the road surface along several hundred yards in the centre of the town in this way. Perhaps ramps were used to overcome the problem. But for present purposes it does not matter.

24. The minutes of a meeting of the Public Health and Works Committee held on 5 November 1946 referred to the surface level water main as follows:

> "The Surveyor referred to the question asked at a previous meeting of the Committee regarding the water main on the ground level in Church Street and he stated that he was now engaged in the taking of levels and in preparing a scheme for placing this main underground and for carrying out other incidental works relating to the supply of water".

The scheme to lay the water main underground

25. The scheme for taking the main underground was referred to again at a meeting of the same committee on 3 December 1946:

> "The Clerk referred to the recent discussion regarding the laying of the rising main underground which main was at present laid on the ground surface as a temporary wartime emergency measure. He stated that this rising main formed part of a large scheme which included the new borehole constructed in the Wharf, which scheme the Ministry had approved in principle."

The "detailed scheme for the laying of the new 9 inch rising main from the Pumping Station in the Causeway" to replace the ground level main was then the subject of a report by the Clerk at the ordinary meeting of the full Council on 28 January 1947. It was resolved by the Council that the consent of the Ministry of Health should be sought to borrowing money for the purposes of this scheme.

26. The evidence shows that, in addition to the owners of the Property, a number of other persons had access to the passageway running alongside no 27, over which the water main ran, and under which it was proposed to be laid. There is no evidence that in 1947 there was any gate at the Potter Street end of the passageway. On 8 January 1947 the Clerk wrote to Mr Percy Stevens, a piano dealer of South Street (a continuation south of Potter Street), but who also appears to have been occupying premises on the Property, behind the shops at 25-27 Potter Street.

27. The letter (on UDC letterhead, and signed) says:

> "You will no doubt recollect that in July 1944 an emergency arose in connection with water supplies in this district and a Notice was served upon you under Defence Regulations, intimating that the Council intended to lay a water main on the ground along the passage-way adjacent to your premises and to which you have the right of access in common with two other owners.
>
> The Council are now desirous of placing this water main under ground and will be glad to know that you will grant the necessary way-leave.
>
> I shall be glad to hear from you hereon at your early convenience."

28. The face of the letter has a diagonal line in manuscript striking through the text, and the characters "P.T.O" written at the bottom of the page. On the reverse there appears the following manuscript:

> "Please carry on – Shall be very pleased when same is done."

Underneath is a signature which appears to read "P H Stevens".

29. The Clerk must also have contacted Mrs J C Walters, who then sold ladies' underwear and corsets at 27 Potter Street, under the style "E M Rundle". There was in evidence a handwritten letter from her on "E M Rundle" headed notepaper dated 16 January 1947, in these terms:

> "I am relieved to hear from you that you are proposing to put the over ground water pipe underground & as far as I am concerned I shall be only too pleased to see it done."

The letter is signed "J C Walters". Mrs Walters was a party to a later deed of 1956 concerning rights to light, where she is described as "Grantor's Lessee". A photograph in the materials shows that the Rundles name was still being used in connection with the shop at 27 Potter Street into the 1960s. The photo was used at an auction sale of the Property in 1969.

30. Mrs Walters' letter of 16 January 1947 prompted a short acknowledgement from the Clerk dated next day, 17 January 1947:

> "Very many thanks for your letter of the 16th instant having reference to the Council's proposal to lay a water main under ground which is now on the ground surface in the passage-way adjoining your premises."

31. This letter was addressed to Mrs Walters at "23a Potter Street" instead of at 27. The explanation for this appears to be that Mrs Walters was using old notepaper of E M Rundle, which gave that address, when she wrote to the Clerk on 16 January. But it appears from a copy of a letter dated 4 May 1938, addressed from the Borough Surveyor to Mrs E M Rundle at 23A Potter Street, and handed up to me during the hearing, that the street had been renumbered in 1938, and 23A had become 27. The old notepaper was, however, still being used.

32. It is thus clear that it was ultimately the *Clerk* who contacted interested persons to ask whether they would grant "wayleaves", rather than the Surveyor, as contemplated by the minutes of the Council Committee meetings more than two years earlier. It is equally clear that those persons, having access to the passageway and having had to live daily since 1944 with the existence of a ground laid water main, were only too pleased to give their consent to the proposed works. The (non-occupying) owners of the Property were also approached. They entered into a written document, the deed of March 1947.

The deed of 26 March 1947

33. The full Council on 25 March 1947 approved the issue of a number of cheques, including one in favour of Elvy Robb & Co for £12 in respect of "Legal Costs – Wayleave Agreement". This presumably refers to the deed of grant that was made in favour of the UDC on 26 March 1947 by Edward Elvy Robb, a London solicitor, and Vera Carlotta Bellairs, a widow from Cornwall. They are described as

> "the Grantors which expression shall include the Grantors and their successors in title owner or owners for the time being"

of the Property. I infer that they were executors or trustees, but nothing turns on that. The UDC was also a party to the deed, and was equally described in such terms as to include its successors in title.

34. The deed recited that the UDC,

> "as the Water Undertakers for the Town of Bishops Stortford are desirous of laying and constructing a water main beneath [the Property] in the line and direction shown on the said plan annexed hereto by the colour green."

It further recited that

> "the Grantors have agreed to grant to the [UDC] the rights and easements hereinafter mentioned on the terms and subject to the conditions hereinafter appearing".

35. Clause 1 of the deed provided as follows:

> "In pursuance of the said agreement and in consideration of the covenants on the part of the [UDC] hereinafter contained the Grantors hereby grant unto the [UDC] in fee simple the right for the [UDC] and its servants workmen and licensees from time to time and at all times hereafter to lay construct maintain inspect and use a water main not exceeding 9 inches in diameter beneath the said land along the line and in the position indicated by a green line on the said plan annexed hereto and the like right from time to time to renew alter and remove the said water main or any part thereof and the right at all times to enter upon the said land and to excavate along the whole course of the said main as shown on the said plan for the purpose of exercising the rights hereinbefore granted the [UDC] making good any damage thereby done to the surface of the said land and restoring the same to the satisfaction of the Grantors Surveyor for the time being."

The plan referred to is that already reproduced earlier in this judgment. It refers to the water main running through the Property as a "pumping main".

36. Clause 2 of the deed set out certain covenants with the Grantors by the UDC, stated to be made "IN consideration of the grant hereinbefore contained". Two of these covenants read as follows:

> "(d) THAT the said main shall be constructed at such a depth beneath the surface of the said land as not to prejudice or interfere with any reconstruction redevelopment of the said land and in the event of the Grantors requiring to alter the position of the said main (so far as it runs beneath the said land) in connection with any such rebuilding or reconstruction the [UDC] will on being requested so to do by notice in writing make such alteration at its own expense to the satisfaction of the Grantors Surveyor for the time being PROVIDED ALWAYS that the Grantors shall give the [UDC] not less than three months notice of their desire to have such alteration made in the position of the main and further that the Grantors shall grant to the [UDC] an easement for the construction and maintenance of the main along the altered line such grant to be subject to the same terms covenants and conditions mutatis mutandis as are contained herein.

> (e) THAT the [UDC] will pay to the Grantors the sum of one shilling annually on the 25th day of March in every year as an acknowledgement rent in respect of the grant hereby made."

(As readers of my age will know, under the former pre-decimal system, there were 20 shillings to the pound, so that each shilling was worth 5p in modern currency. But of course the purchasing power of that sum in 1947 was greater.)

37. There was then the usual testimonium clause appropriate for a deed entered into between individuals and a corporation. I should also mention that the backsheet to the deed described it as

> "GRANT of easement for the laying of a water main through property in Potter Street Bishops Stortford in the county of Hertford."

The materials before me contained copies of both versions of the deed as fully executed, that is, the one executed by the Grantors and the one executed by the UDC.

38. It is clear from this document that, notwithstanding the previous references to "wayleaves", the intention of the parties in entering into this deed was to create an easement rather than a licence (and an easement rather than, for example, to grant a fee simple estate in or a lease of the subsoil displaced by the pipe). As I have already said, at this time the Property was unregistered land. So current tenants of the Property (such as Mr Stevens and Mrs Walters) would not be bound by the grant of an easement by the owners subsequent to their own tenancies, and so their consent would also be needed. This could be done by simple wayleave agreement, or even perhaps just a bare licence. But any *subsequent* tenancies granted by the fee simple owners would be subject to any legal easement already created by deed.

Government approval

39. At a meeting of the Public Health and Works Committee held on 6 May 1947, it was reported that the Ministry of Health's response to the request for government approval of the scheme to lay underground "a water main now on the ground level in Church Street" was to suggest that,

> "in view of the present difficult position regarding supplies of cast iron and steel, the Council might consider deferring the carrying out of this work for a period of six months".

Accordingly, the Committee resolved so to defer the works. There is no separate minute dealing with the water main at ground level running through the Property. Since government approval would have been necessary to lay the main underground through the Property too, I infer from this that the reference was to the whole of the ground level main, including that running through the Property.

40. In December 1947 the Committee resolved to ask the Ministry again. At a meeting held on 6 July 1948, it was reported that the Ministry would not agree to a 9 inch main being laid underground, but *would* agree to a 7 inch main. The Surveyor was authorised by the Committee to proceed with the work by direct labour. A letter dated 12 August 1948 was subsequently received from the Ministry confirming the

Minister's consent, and stating that there would be further communication about authorising a loan for the works. Formal ministerial consent to the loan was reported to the Committee at its meeting on 5 October 1948. Given the evident inconvenience of the ground level main in the centre of the town, I infer that the new main was soon thereafter laid underground, including through the Property.

41. However, by that date, the owners of the fee simple estate in the Property had already sold and conveyed it to Christ's College Cambridge, on 30 September 1947. It was therefore Christ's College who owned the property at the time of laying the main underground, and it was the College that granted a tenancy to Mr Stevens, the piano dealer, of his premises to the rear of 25 and 27 Potter Street by a written agreement (which I did see) dated 24 February 1949 for one year from 25 December 1948 and thereafter from year to year. Both this agreement and the earlier letter from the Clerk to Mr Stevens in January 1947 make clear that Mr Stevens had a right of access from Potter Street to his premises along the passageway running alongside no 27 Potter Street, and in which the new mains pipe was laid.

Acknowledgement rent

42. The one shilling acknowledgment rent was paid annually by the UDC to Christ's College from 1948 to 1959, when the water undertaking was transferred to the Herts and Essex Water Company, as set out below. That company paid the rent in 1960. The following year it was paid by the Lee Valley Water Company, to whom the undertaking had been further transferred (as also set out below). The College's ledgers show no payments between 1962 and 1966, and the ledgers themselves are missing thereafter. There is no evidence before the court of any acknowledgement rent being paid (or demanded) after 1961.

The second borehole

43. The original project to sink a further, wider borehole was not abandoned. It is clear that the UDC pressed ahead with it after a few years. On 11 July 1951 the Minister of Local Government and Planning, on the application of the UDC, granted a licence under section 14(6) of the Water Act 1945, to drill a

> "33 inch diameter borehole to a depth of 250 feet at The Depot, Causeway, Bishops Stortford".

The plan attached to the licence is at a small scale, but it is sufficient to show without doubt that the location of the intended new borehole was on the land conveyed to the UDC in 1914, and very close to where the trial borehole had already been drilled.

44. The evidence as to drilling and use of the new borehole at the trial was limited. However it was sufficient to persuade me on the balance of probabilities that the new borehole was sunk after July 1951, but that the borehole was only used for a few years, and that by the late 1950s it had become disused.

Transfers of the undertaking thereafter

45. On 24 April 1958, the UDC (as water undertakers for Bishops Stortford) and the Herts and Essex Water Company (as water undertakers for the purposes of the Herts

and Essex Water Act and Order 1953) entered into an agreement, intended to lead to a transfer of the UDC's water undertaking ("the Undertaking") to the Herts and Essex Water Company. The agreement attached a plan to which I refer below. The parties agreed to apply to the relevant minister for an order under the Water Acts 1945 and 1948 for the transfer to and vesting in the Herts and Essex Water Company of the Undertaking. The UDC further warranted and represented to the Herts and Essex Water Company that the lands of the Undertaking and the easements in respect of mains and pipes belonging to the Undertaking were those comprised in the scheduled documents of tile. These included the deed of grant of 26 March 1947.

46. Following this, the Herts and Essex Water (No 2) Order, SI 1958 No 1622, was made under ss 9(1), 23 and 33 of the Water Act 1945 by the Minister of Housing and Local Government on 26 September 1958, transferring the Undertaking to the Herts and Essex Water Company on 1 October 1958. The transfer included not only waterworks, sources of supply, machinery, mains and so on, but also the lands described in the first schedule to the order and also

> "the rights, powers, easements, interests and privileges then vested in or enjoyed by the [UDC] in connection with the said undertaking and all liabilities and obligations of the [UDC] to which they shall then be subject".

47. The undertaking of the Herts and Essex Water Company was subsequently transferred to the Lee Valley Water Company, incorporated under the Lee Valley Water Act 1959, a private Act of Parliament, on 1 April 1960. The terms of this Act were not in evidence, but I was told without demur that they provided for the transfer of the whole water undertaking, rights and liabilities. This was confirmed to me after the trial in the Claimants' Further Note, footnote 2, referring in particular to section 15 of the 1959 Act.

The pumping station

48. It was not in evidence what structure (if any) housed the borehole and pumping equipment from the inception of their use in 1944 to provide water to the town's water system. But I infer that, given the need to secure that supply, and keep it clean and pure for domestic use, there must have been some sort of structure to protect it from the elements, wildlife and any other threats (including theft of materials and equipment). The plan attached to the agreement of 24 April 1958 (to which I referred above) shows a structure comprising two contiguous squares, one larger than the other, though with no explanation of what it might be. The plan attached to a deed of 4 July 1966 (referred to below) shows a similar structure (again of two contiguous squares of different sizes) in the same place, but this time labelled "pumping station".

49. There was photographic evidence of the construction of outhouse-like buildings in 1963 and in 1973, each of which was apparently referred to as the "pumping station". The current structure appears to be more solid than its predecessors, and may well be larger, but it performs the same function today. A description of any original structure and its contents in 1944 as a "pumping station" would not have been incorrect. It was a place in which water was pumped out of the ground and through a mains pipe into the town's pipe network and thence to a local reservoir at Silver Leys.

Subsequent events

50. On 4 July 1966, Christ's College Cambridge, still then owners of the fee simple estate in the Property, entered into a deed with the UDC surrendering and releasing the UDC in fee simple all their riparian rights in the River Stort in respect of the Property, although expressly reserving and not conveying the relevant part of the riverbed. The deed recited that the UDC wished to divert the River Stort from its present course and to fill in the channel. The UDC covenanted to fill in the channel and carry out certain other accommodation works for the benefit of the Property, including the provision of a close boarded fence and gates, as well as constructing a roadway and footpath along the site of the former riverbed, by the beginning of 1973. Photographs of the back of the Property taken in the 1990s show that by then the river had indeed been filled in and a roadway constructed on the surface, so that vehicular access to the rear of the Property was now possible.

51. On 12 December 1969, however, Christ's College had sold and conveyed the fee simple estate in the Property to Footwear Trustees Ltd. The conveyance was expressed to be subject to and with the benefit of

> "… The restrictive covenants, easements and way leaves contained in various documents specified in the Second Schedule hereto but only so far as the same may still be subsisting and capable of being enforced."

One of these documents was the deed of grant of March 1947.

52. On 4 January 1972 the UDC by the Bishop's Stortford Urban District (South Street Service Road) Compulsory Purchase Order, confirmed by the Secretary of State on 24 July 1972, acquired 28 square yards of the Property at the rear of the site. The order itself was not before me, but there is a notice of entry dated 12 August 1972, addressed to BSC Footwear Ltd, as owner of land to the rear of the Property. This order may well have been made in connection with the filling in of the River Stort, perhaps representing the acquisition of the Property's share of the former riverbed. But there was no evidence of this before me, and in any event it does not affect the result of the case.

53. On 17 Oct 1990, the Lee Valley Water Company became incorporated under the Companies Act 1985 as a public company, under the name Lee Valley Water plc. It was re-registered as a private company on 21 February 1992 as Lee Valley Water Ltd, and then re-registered as a public company on 31 March 1994 as Three Valleys Water plc. Although there are other events to mention that occur in the interim, it is convenient just to skip ahead and record here that Three Valleys Water plc was re-registered as a private company under the name Veolia Water Central Ltd on 1 July 2009. The company then changed its name once more, on 1 October 2012, to its current name, Affinity Water Ltd. But these changes of status and name made no difference to the assets and liabilities of the undertaking, which continued to belong to and inhere in the same corporation as was the Lee Valley Water Company in 1960.

54. In the meantime, the fee simple estate in the Property was first registered at HM Land Registry on 24 July 1995 as freehold land with title absolute, but

> "subject to the rights granted by [the] deed of grant dated 26 March 1947".

In or about 1999 (but before 2001) Footwear Trustees Ltd sold its estate in the Property to Gracemont Development Ltd.

The 2005 installation

55. In 2005 a new property in Potter Street, no 31A, adjacent to the rear of no 27, but behind other properties fronting onto Potter Street, requested a supply of water. The Defendant decided to provide this supply by installing a service pipe, stop tap and meter firstly from the water main passing under the Property, just a few feet away. On 16 September 2005 these were installed. The Defendant did not seek or obtain the grant of a further easement, or even a licence, but installed the new pipe, tap and meter purportedly under its powers as a statutory water undertaker. No formal notice to the owners and occupiers has been located and put in evidence. The Claimants say that these statutory powers did not and do not apply, and this action constituted an actionable and continuing trespass. On 21 June 2010 Gracemont Development Ltd sold the fee simple estate to Townsend Developments Ltd.

Planning permission

56. On 16 September 2015, planning permission was granted (with conditions) for demolition to the rear of 25 Potter Street and the erection of two two-bedroomed dwellings. I understand that this permission lapsed in 2018. As is made clear below, the First Claimant has expressed the intention of seeking further or renewed planning permission in order to develop the rear part of the Property. However, as I understand the position, such planning permission has not yet been obtained.

Purchase of the Property by the Claimants

57. The Claimants bought the fee simple estate in the Property on 24 March 2017, as trustees of a pension fund for the benefit of the First Claimant, and this acquisition was registered at HM Land Registry on 30 March 2017. On 22 May 2017 the First Claimant wrote to the Defendant to inform them of the purchase, to assert that the terms of the deed of 1947 had been broken (in that the acknowledgment rent of one shilling per annum had not been paid), and to ask for the removal of the water main from under the Property. By a letter dated 6 July 2017, an in-house solicitor for the Defendant wrote to the First Claimant to inform him that the Defendant considered that it had a valid easement for the laying and using the water main, which protected the main from obstruction or encroachment. The letter stated that no record could be found of historic payments of the acknowledgment rent. In fact, as has been seen (at [42]), further enquiries since have shown that the acknowledgement rent was paid from 1948 to 1961.

58. There ensued a correspondence about the matter, which was taken up by external solicitors for the Defendant. On 10 May 2018 solicitors acting for the First Claimant sent a letter before claim to the Defendant's solicitors. Ultimately, the claim form was issued on 13 November 2018.

59. During the correspondence, the First Claimant issued to the Defendant a number of documents, each headed "Invoice", which purported to charge (initially) £10,000 per calendar month "rent" from 29 July 2017 in respect of the use of the land by the Defendant by running the watermain through the Property. The First Claimant

explained in cross-examination that he had arrived at the figures set out in the invoices by reasoning that, if he obtained planning permission to build two small houses at the rear of the Property the net lettable area would go up from 4000 ft² to 15,000 ft². The rental value would therefore increase from £84,000 per annum to £300,000 per annum. In the second year, from August 2018, the payment demanded by the invoices increased by 25%, to £12,500 per month, and similarly (compounded) in the third year, from August 2019, to £16,625 per month. The First Claimant explained this as compensation for the loss of commercial rent. The Defendant has not paid any of these charges.

Issues arising

60. A number of issues arise on these facts:

    i) Did the 1947 deed create an easement for the water main in favour of the UDC, binding the Property?

    ii) If not, has a similar easement been acquired by prescription?

    iii) Was the water main laid in the exercise of statutory powers?

    iv) Were the service pipe, stop tap and meter installed in the subsoil of the Property in 2005 in the exercise of statutory powers?

61. Two issues that do *not* arise are (i) whether, if the deed of 1947 did not create an easement but only a licence, such licence was revocable after the works of laying the main had been executed (see *eg Winter v Brockwell* (1807) 8 East 308, *Liggins v Inge* (1831) 7 Bing 682), and (ii) whether the doctrine of proprietary estoppel, typified by cases such as *Crabb v Arun District Council* [1976] Ch 179, CA, could apply to the facts of this case. When I mentioned these points during the argument, counsel for the Defendant made clear that it did not rely on either point in this case, and therefore I heard no argument on them.

The law

62. I begin with the relevant functions of an urban district council in the 1940s. The Public Health Act 1936 formerly provided, so far as material,

> "1.-(2) In this Act the following expressions have the meanings hereby assigned to them:-
>
> > 'local authority' means the council of a borough, urban district or rural district;
> >
> > 'urban authority' means the council of a borough or urban district;
> >
> > […]
>
> 111. It shall be the duty of every local authority –

> (i) to take from time to time such steps as may be necessary for ascertaining the sufficiency and wholesomeness of the water supplies within their district; and
>
> (ii) for the purpose of securing, so far as is reasonably practical, that every house and school has available within a reasonable distance a sufficient supply of wholesome water for domestic purposes –
>
> > (a) to provide a supply of water to every part of their district in which danger to health arises from the insufficiency or unwholesomeness of the existing supply, and a general scheme of supply is required and can be carried out at a reasonable cost; and
> >
> > (b) without prejudice to their obligations under the preceding sub-paragraph, to exercise their powers under this Part of this Act of requiring owners of houses to provide a supply of water thereto."

63. Next, I turn to the power of a local authority in the 1940s to acquire interests in land. So far as material, the Local Government Act 1933 provided:

> "1.-(1) For the purposes of local government, England and Wales (exclusive of London) shall be divided into administrative counties and county boroughs, and administrative counties shall be divided into county districts, being either non-county boroughs, urban districts or rural districts, and county boroughs and county districts shall consist of one or more parishes.
>
> […]
>
> 157.-(1) A local authority may, for the purpose of any of their functions under this or any other public general Act, by agreement acquire, whether by way of purchase, lease or exchange, any land, whether situate within or without the area of the local authority.
>
> […]
>
> 305. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them—
>
> > […]
> >
> > 'County district' means a non-county borough, urban district or rural district;
> >
> > […]
> >
> > 'Land' includes any interest in land and any easement or right in, to or over land;
> >
> > 'Local authority' means the council of a county, county borough, county district or rural parish;
> >
> > […]."

The requirements for the valid grant of an easement

64. The first issue is whether the 1947 deed created an easement for the water main in favour of the UDC, binding the Property. There was no real dispute between the parties as to the requirements before a valid easement can be granted. For many years the leading case was *Re Ellenborough Park* [1956] Ch 131, CA. More recently, Lord Briggs in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2019] AC 553, SC, (with whom Lady Hale and Lords Kerr and Sumption agreed) said this:

> "35. Before addressing the *Ellenborough Park* case directly, it is convenient first to summarise what, by the 1950s, were the well-established conditions for the recognition of a right as an easement. Writing in 1954, Dr Cheshire described the four essential characteristics as follows: i) There must be a dominant and a servient tenement; ii) The easement must accommodate the dominant tenement; iii) The dominant and servient owners must be different persons; iv) A right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant. Aspects of these requirements are better understood when it is appreciated that easements may be created, not only by express grant, but also by implied grant, upon the transfer of part of land formerly in single ownership under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31, under section 62 of the Law of Property Act 1925 and by prescription […]."

Lord Carnwath dissented, but not in relation to this statement of the requirements.

Accommodation of the dominant tenement

65. As to the accommodation of the dominant tenement, in the same case Lord Briggs said:

> "38. In the present case, the Court of Appeal described this requirement, at para 56, as follows:
>
> > 'In our view, the requirement that an easement must be a "right of utility and benefit" is the crucial requirement. The essence of an easement is to give the dominant tenement a benefit or utility as such. Thus, an easement properly so called will improve the general utility of the dominant tenement. It may benefit the trade carried on upon the dominant tenement or the utility of living there.'
>
> 39. Save only for easements of support (which may be said to benefit the land itself), easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings. Thus, a right of way makes the dominant tenement more accessible. Service easements enable the occupiers of the dominant tenement to receive water, gas and electricity. A drainage easement enables rainwater and sewage to be removed from land, in circumstances where its use would otherwise be inhibited by flooding.
>
> 40. The following general points may be noted. First, it is not enough that the right is merely appurtenant or annexed to the dominant tenement, if the enjoyment of it has nothing to do with the normal use of it. Nor is it sufficient that the right in question adds to the value of the dominant tenement. Thus for

> example, a right granted to the owners and occupiers of a house in Kennington to have free access to the Oval cricket ground on test match days might be annexed to the ownership of that house, and add significantly to its value. But it would have nothing to do with the normal use of the property as a home.
>
> 41. Secondly, the 'normal use' of the dominant tenement may be a residential use or a business use. Further, since easements are often granted to facilitate a development of the dominant tenement, the relevant use may be not merely an actual use, but a contemplated use: see for example *Moncrieff v Jamieson* [2007] 1 WLR 2620, per Lord Neuberger of Abbotsbury, at paras 132-133.
>
> 42. Thirdly, it is not an objection to qualification as an easement that the right consists of or involves the use of some chattel on the servient tenement. Examples include a pump (*Pomfret v Ricroft* (1668) 1 Saund 321), a lock and a sluice gate (*Simpson v Godmanchester Corpn* [1897] AC 696), and even a lavatory (*Miller v Emcer Products Ltd* [1956] Ch 304).
>
> 43. Fourthly, although accommodation is in one sense a legal concept, the question whether a particular grant of rights accommodates a dominant tenement is primarily a question of fact: see per Evershed MR in *In re Ellenborough Park* at p 173."

66. The litigation in *Re Ellenborough Park* and in *Regency Villas* concerned the need for "accommodation" of the dominant tenement (the second requirement), and the need for the right to be capable of forming the subject matter of a grant (the fourth requirement). In the present case, it is argued by the Claimants that there can be no easement to lay and maintain and use the pipe in the present case because there is no dominant tenement identified or capable of being identified (the first requirement), and also (but as a secondary point) because the right claimed would not accommodate the dominant tenement if there were one (the second requirement). Thus, any easement here would be an easement "in gross", which is not permitted in English law.

Identification of the dominant tenement

67. As to the identification of the dominant tenement, it is common ground that no land is so identified expressly in the deed of grant. The Claimants fairly pointed out that the deed was entered into before the decision of the Court of Appeal in *Re Ellenborough Park.* It is also common ground that extrinsic evidence is admissible to establish the identity of the dominant tenement. In *Johnstone v Holdway* [1963] 1 QB 601, a right of way was purportedly reserved in favour of a vendor over land being sold by him as trustee, which would enable the vendor and his beneficiary to reach retained land from the public highway. But the deed did not identify the retained land as the dominant tenement.

68. Upjohn LJ, giving the judgment of the Court of Appeal (Ormerod, Upjohn and Pearce LJJ), said (at p 610):

> "No-one doubts that in a properly drawn conveyance containing a grant or reservation of a right of way the proper and safe course is to identify therein, if necessary by reference to a plan, the dominant tenement for the benefit of which

> the easement is taken. That is the wise course. But the question we have to determine is whether that is essential to the validity of the easement or whether it is permissible to identify the dominant tenement by inferences from facts and circumstances which must have been known to the parties at the time of the conveyance. Mr. Seward [counsel for the purchaser of the 'servient' land] submits it is not permissible and he says, looking only at the body of the deed and the plan drawn thereon, that it is impossible to tell for the benefit of what land the easement was taken. He submits that in the absence of definition of the dominant tenement in the conveyance all that the vendor did was to reserve an easement in gross […]."

69. Upjohn LJ then reviewed the caselaw, and continued (at p 612):

> "We, therefore, can find no support in authority or in text books for this broad principle advanced by Mr. Seward. Indeed, the authorities negative it. In our judgment, it is a question of the construction of the deed creating a right of way as to what is the dominant tenement for the benefit of which the right of way is granted and to which the right of way is appurtenant. In construing the deed the court is entitled to have evidence of all material facts at the time of the execution of the deed, so as to place the court in the situation of the parties. In this case it is quite plain that, when investigating title in 1948, the purchaser must have had before him the agreement of April 1, 1936, because that was part of the equitable title which was being conveyed by the company. It is then clear that the purchaser would know that the vendor and the company were the owners of the land and quarry immediately to the northwest of the land conveyed, as identified in the plan annexed to the particulars of claim. In addition, it is to be noted that the quarry is mentioned on the plan annexed to the conveyance and the right of way is expressed to include the right of quarrying. In those circumstances, it seems to us perfectly plain that in this case the dominant tenement was the land and quarry. The judge in a careful judgment reached the same conclusion and, in our judgment, he was perfectly correct."

70. In *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31, at 37, Peter Gibson LJ (with whom Beldam and Ralph Gibson LJJ agreed) made clear that "the absence of an identified dominant tenement" was indeed fatal to a claim to an easement. The question therefore is whether in the present case a dominant tenement can be identified. The Defendant puts forward what are, in effect, a number of candidates. They are (i) the borehole or boreholes on the Defendant's land a few yards away on the other side of what was the River Stort and is now Riverside, (ii) the pumping station consisting of the boreholes, piping and pumping equipment, housed in a small building on the Defendant's land, and (iii) the general undertaking consisting of the network of pipes and pumps that supply the water flowing through the water main under the Property. In support of (iii) the Defendant refers to *Re Salvin's Indenture* [1938] 2 All ER 498, 506, and *Hanbury v Jenkins* [1901] 2 Ch 401. The latter case decides that a right of way can be appurtenant to another incorporeal hereditament (there a right of fishing). As to the former case, *Re Salvin's Indenture*, where the judge indeed held that the whole undertaking was the dominant tenement for a similar easement, the Claimants argue that it was wrongly decided.

71. In the present case, in 1944 water began to be pumped from the trial borehole through the pipe across the River Stort, then through the pipe lying on the surface of the

Property, out into Potter Street and then ultimately into the town water system. Before the decision in *Todrick v Western National Omnibus Co* [1934] Ch 561, CA, it had been thought that the dominant and servient tenements had to be contiguous. That case made clear that they did not. In any event, because the owners of the Property and the UDC as owners of the land on the other side of the (non-tidal) River Stort were riparian owners, in the absence of any indication to the contrary each owned the bed of the river up to the midway point: see *eg Micklethwaite v Newlay Bridge Co* (1886) 33 Ch D 333, CA. So these were in fact adjacent properties, and there would not have been a problem of non-contiguity even before *Todrick*.

72. The UDC knew, and the owners and occupiers of the Property must have known, that the water flowing through the pipe was coming from the borehole on the adjacent land just on the other side of the river. That borehole was the 'trial' (8 inch) borehole and not the later (33 inch) borehole. The pipe through the Property was laid on the ground in the exercise of emergency powers. But, whatever the source of the power, the correspondence with the occupants of the Property shows that it was plainly inconvenient to have it there. So they were delighted when the water main across the property was proposed to be put underground, and were only too happy to agree.

73. As I have said, it is plain from the terms of the deed of March 1947 that it was intended by the parties to it to create an easement, and not merely a licence. Therefore, when the owners of the Property entered into that deed of March 1947, they must be taken to have known that the right was being granted in relation to the Property in order to facilitate the transport of water pumped out of the (trial) borehole through what the plan called a "pumping main" into the rest of the town's water system. There is nothing to show that at that stage *the parties* (as opposed to the UDC alone) were contemplating the later use also of the 33 inch borehole.

74. In my judgment, the dominant tenement contemplated by the parties, although not expressly mentioned by them in the deed, was the small area of land belonging to the UDC just on the other side of the River Stort containing the borehole and the pumping equipment. Whether the *structure* that undoubtedly enveloped this small area is included or not, and whether it is called a pumping station or not, frankly does not matter. Thus the extrinsic evidence identifies the dominant tenement for the purposes of the deed 1947, and the requirement that there be a dominant tenement is therefore satisfied. I have found that the 33 inch borehole was sunk in the 1950s, but was disused by the end of that decade. So now, as in 1948, it is the "trial" borehole that provides the water flowing through the water main on the Property.

Whole water undertaking as dominant tenement

75. It is not therefore strictly necessary for me to decide the further question whether the dominant tenement of such an easement as this could be the water undertaking as a whole, that is the corporeal hereditaments (the various parcels of land, including the boreholes, reservoirs, *etc*) and the incorporeal hereditaments (the statutory rights, rights of way, *etc*). But the matter was argued, and in case I am wrong about the borehole land, and the matter goes further, I will express a view.

76. *Re Salvin's Indenture* [1938] 2 All ER 498 was a decision of Farwell J. The defendant's predecessor in title had a statutory power to lay water mains and pipes under land belonging to the plaintiffs' predecessor in title. But in the circumstances

this power was not exercisable, and so in 1880 those parties entered into a deed by which the latter granted to the former a right to lay and maintain its pipes under the latter's land, in consideration of an annual rentcharge of £3. The plaintiffs as current owners of the 'servient' land now claimed that the supposed right was a mere licence, and not binding on them as successors in title. In particular, they said that there was no dominant tenement identified in the deed.

77. As Farwell J said (at 506B-D):

> "[The plaintiffs] say that, at the most, this grant can only have been the grant of a personal licence. It is, they say, an attempt to create an easement in gross, and – and as to this there is no possible doubt – an easement in gross is a right unknown to our law. That being so, it may have had the effect that the licence which was granted by the grantor may not have been binding upon him, but, at any rate, it cannot have been binding on any successor of his. As I say, if this be in fact an easement in gross, it follows that it cannot be now binding upon the plaintiffs, and the question that I have to determine is whether or not it is an easement in gross. It is said that it is an easement in gross, because it is said – and said quite truly – that, in order to create a valid easement, there must be a dominant and servient tenement, and it is said that here there is no dominant tenement."

78. But the judge rejected the argument in these words (at 506D-F):

> "In my judgment, that is not sound. The undertaking in this case, which is now vested in the defendants, consists of corporeal hereditaments and incorporeal hereditaments, the corporeal hereditaments being the lands which the company acquired for the purpose of its object – that is to say, lands for the erection of reservoirs and similar purposes – and incorporeal hereditaments being the rights which it acquired in the lands of others, to lay pipes and for other purposes. The undertaking, in my judgment, being composed of corporeal and incorporeal hereditaments, is capable of being the dominant tenement in respect of such a grant as this."

79. The result was (at 506H-507A):

> "In the present case, in my judgment, it is plain that this easement was one which was intended to be, and was capable of being, used and exercised in connection with the undertaking of the Weardale Company, and, if that be so, it must follow, in my judgment, that this was an easement which is capable of being created, not an easement in gross, and one which the then owner of the property could validly grant, and, having validly granted it, as he did, it is a grant which is binding upon the other persons on to whose land the property comes."

80. In my judgment, that is a decision clearly supporting the view that the whole undertaking – the lands and incorporeal property rights – of the water undertaker (such as the UDC was in 1947) can be the dominant tenement for an easement such as is claimed in this case. If there were nothing else in the case, then it would be a decision which, unless I were convinced it were wrong, I should follow. But the claimants say that *Re Salvin's Indenture* was wrongly decided. They say it is inconsistent with subsequent authority, namely *dicta* of Evershed J in *Newcastle under Lyme Corporation v Wolstanton Ltd* [1947] Ch 92, approved by the majority of

the Court of Appeal [1947] Ch 427 (though that court reversed his actual decision on other grounds), and also approved by the High Court of Australia in *Commissioner of Main Roads v North Shore Gas Co Ltd* (1967) 120 CLR 118, 133-34.

81. *Newcastle under Lyme Corporation v Wolstanton Ltd* was a case involving gas pipes rather than water, though I agree with the present Claimants that that in itself that cannot make any difference. The defendant mining company by its workings damaged the plaintiff gas undertaker's pipes which had been laid under the public road surfaces, and the plaintiff sued for damages. It appears to have been common ground that no claim in negligence was possible. At all events none was brought. The pipes had been laid pursuant to a statutory power in the Gasworks Clauses Act 1847, s 6, rather than pursuant to any agreement or grant. The plaintiff argued that the road surfaces had a right of support from the underlying minerals (which had long before been severed from the surface), and that, the pipes which had been laid having ceased to be chattels and having become part of the freehold, the plaintiff occupied the space in which the pipes were laid. The summary of the argument of its leading counsel Charles Harman KC (at 97) shows that it expressly disclaimed reliance on any claim to an easement as the basis for the claim.

82. Evershed J said (at 101-02):

> "The property in the mains and pipes, in the chattels themselves, is clearly vested in the plaintiff corporation. But what is the right or interest of the plaintiff corporation in respect of the land, that is *(a)* in respect of the space or area occupied by the pipes, *(b)* in respect of the subterranean strip of land on which the pipes rest? Such right or interest must be one or other of the following: the plaintiff corporation may be owners or proprietors, they may be tenants, they may have an easement or some other incorporeal right analogous to an easement, they may be licensees. Having determined what that right or interest is the plaintiff corporation will be entitled to prosecute such claims as flow therefrom according to the general law and do not therefore arise by reason only of the Sanitary Acts.
>
> The answer to the problem must depend upon the true interpretation and effect of the relevant statutory powers exercised to the laying and maintenance of the pipes by the plaintiff corporation or their predecessors as gas undertakers. And, since all the pipes in question were laid under public highways these powers are to be found in s. 6 of the Gas Works Clauses Act, 1847, incorporated with all the relevant private Acts, or in provisions of those Acts which may for present purposes be taken to be similar to those of s. 6 of the Act of 1847."

83. The judge then considered various of the relevant statutory provisions, and reached this conclusion:

> "In the circumstances and bearing in mind the general rule that no greater rights or interests should be treated as conferred on the undertakers than are necessary for the fulfilment of the object of the statute, it seems to me reasonably clear as a matter of the construction of s 6 of the Act of 1847, that the terms of the section are not intended to confer and are not apt to confer on the undertakers any right of ownership or proprietorship of the land affected."

84. Thus far, the judgment does not assist the present claimants. However, the passage relied on by those claimants then immediately follows (at 103-04):

> "Equally in my judgment is the language of the section inappropriate to create in favour of the undertakers any tenancy or any easement or interest analogous to an easement. It is true that the rights of the undertakers are the creatures of statute, and that it is within the competence of Parliament to confer or create interests without regard to those incidents which are regarded as requisite to an agreement inter partes. Thus, Parliament may create an easement in gross as it may, I assume, create a tenancy without provision for the payment of rent and notwithstanding the absence of any term certain. But the absence of the incidents ordinarily appropriate to the existence of a tenancy or of an easement is, at the least, an important consideration for the determination of the question whether on the true construction of the statute the creation of any such interest was intended. It is indeed somewhat tempting to conclude that some right in the nature of an easement ought to be inferred; and I have in mind the reference to a wayleave in the speech of Lord Atkinson in *New Moss Colliery Co. v. Manchester Corporation*. But in my judgment these considerations are insufficient to give to the language of s. 6 of the Act of 1847 a meaning and intent which that language – particularly in the light of the contrasts to which I have already referred – cannot naturally or properly bear. Reference was made in the course of the argument to that species of property commonly known as flying freeholds. It is sufficient in my view to say that there is no real analogy between flying freeholds and pipes or cables laid under special Acts; and I do not think that any assistance is obtained towards the solution of the problem of the latter by consideration of the former.
>
> It follows that, if I am right so far, the interest of the undertakers must be that of licensees without any title, legal or equitable, in the land itself."

85. The claim succeeded at first instance, but only in nuisance, based on occupation by the plaintiff of the land beneath the pipes. As I have said, the actual decision in the case was reversed by the Court of Appeal, which held that the plaintiff did not occupy the land beneath the pipes. Nevertheless, the passage set out above and relied on by the present Claimants was expressly approved (at 455) by Morton LJ (with whom Cohen LJ agreed). The same passage was also approved in the High Court of Australia's decision in *Commissioner of Main Roads v North Shore Gas Co Ltd* (1967) 120 CLR 118, 133-34. That was a case in which the court considered how far the gas undertaker's statutory rights amounted to an interest in land for the purposes of statutory compensation for the construction of an expressway. It decided that they did not so amount. It may be noted in passing that *Re Salvin's Indenture* was not referred to at either level in *Wolstanton*, nor in the Australian case.

86. In my judgment it is clear that the *dicta* of Evershed J are not directed to the question whether the undertaking of the statutory undertaker can amount to a dominant tenement for the purposes of creating an easement. The judge did not at any point consider that question. Indeed, the argument that *was* put to him was one that the undertaker had a fee simple estate in the land displaced by the pipes, and the argument that the undertaker might have an easement was in fact disclaimed. But what the judge actually decided was that the statute under which the undertaker acted did not *itself* create a property right, whether a fee simple or an easement. He did not decide –

indeed, he was not called upon to decide, because it was never argued – whether an express grant of an easement would fail because there was no dominant tenement identified. Since there was no express agreement or grant, this could not have arisen.

87. In these circumstances, it is not surprising that the decision of Farwell J in *Re Salvin's Indenture* was not cited in the *Wolstanton* case. For myself, I do not consider that *Re Salvin's Indenture* was wrongly decided. Its authority is certainly not impaired by the *dicta* of Eversheed J in *Wolstanton*. I see no reason why, in an appropriate case, the dominant tenement for an easement to lay maintain and use pipes underground could not consist of the undertaking itself, *ie* the corporeal and incorporeal property rights on and with which the business is carried on.

88. The Claimants also referred to *Stockport Waterworks Company v Potter* (1864) 3 Hurl & C 300. They say it was held in that case "that a waterworks could not be a dominant tenement [for the purposes of an easement] to receive a flow of water via pipes from a distant river". The matter was, however, more complicated than that. The plaintiff water company diverted water from the River Mersey by a tunnel into a nearby reservoir, and from the reservoir carried the water to its works, some distance from the river. The defendants carried on business as calico printers some miles upstream on a tributary which flowed into the River Mersey some 9 miles above the plaintiff's works. The plaintiff sued the defendants for discharging the waste materials in their tanks into the stream, which polluted it.

89. The land on which the waterworks stood was not riparian to the River Mersey, although formerly it had belonged to the riparian owners as part of their estate. In 1853 they had granted away to the plaintiff company the non-riparian land on which the waterworks stood, together with a right to take the water. The company had taken the water ever since. Prior to 1853 the riparian owners had themselves taken the water for about 14 years. The plaintiff claimed to be entitled to recover from the defendants for the pollution of the water on two grounds. First of all, it claimed as grantee of the riparian owner (who, it was accepted, had a right *as such* to maintain an action against the polluting defendant upstream) under the deed of 1853. Secondly, it claimed to have established a right in the form of an easement by prescription as against the defendants to take pure water from the River Mersey, such user having taken place as of right for more than 20 years.

90. The Court of Exchequer was divided. Bramwell B would have allowed the claim on the first ground (though he accepted that it could not succeed on the second ground, because the enjoyment of the riparian owner was in that character, and not in the character of one establishing an easement and so 20 years' user as of right could not be shown). The majority of the court, Pollock CB and Channell B (Wilde B having left the court) held that the claim failed on both grounds.

91. On the first ground, the majority held (at 326-327):

> "It seems to us clear that the rights which a riparian proprietor has with respect of the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express

> grant? It seems to us that the true answer to this is that he can have them against the grantor but not so as to sue other persons in his own name for an infringement of them."

92. As to the second ground, the majority held (at 327-328):

> "The dominant and servient tenements have no apparent connexion with one another.
>
> The abstraction of the water from the stream took place at a spot situated on other land than that now called the dominant tenement, and in no sort of way affected the enjoyment of the water at what is now called the servient tenement.
>
> If the waterworks could be considered a dominant tenement every house in Stockport to which the water flowed through pipes might equally be so.
>
> And as in modern times water is often conveyed many miles underground in pipes for the supply of large towns, the dominant and servient tenements might not only be many miles apart, but have no other connexion with each other than the artificial one created by miles of pipes."

93. In my judgment, the majority of the court was not saying that a waterworks can never be a dominant tenement for the purposes of an easement to lay, use and maintain water pipes under the servient tenement. It was simply not that kind of case. This was after all a claim to a non-pollution right. Instead, the court was saying that, on the facts of this case, the waterworks was simply too far away from the servient tenement for the servient tenement to accommodate the supposed dominant tenement by not polluting the river. As it happens, I deal with the accommodation point next.

Accommodation of the dominant tenement

94. The further point taken by the Claimants concerns the accommodation of the dominant tenement by the easement claimed. The Claimants say that the right to lay and use the pipe under the Property does not accommodate the land on which the borehole and pumping equipment are sited. They say that that right may 'accommodate' the thousands of homes in Bishops Stortford that receive their water through that water main, or possibly the reservoir in which water is held pending supply, but that those homes or that reservoir are obviously not the dominant tenement. I agree that the customers' homes are not the dominant tenement, but nevertheless reject this submission. The existence of the borehole and pumping equipment means that a great deal of water is being extracted from the land. That water must be taken away from this land in order to be useful, since it is for distribution to customers. In this respect, it is just like oil extracted from a well, or coal from a mine. Transporting the product of the land away to be processed in order thereafter to be delivered to customers does accommodate the land in its use for the business purpose of supplying water, and is therefore of benefit to the landowner in that capacity. In my judgment the second requirement for the grant of an easement is also satisfied.

The requirements for the acquisition of an easement by prescription

95. Next, I consider whether, if an appropriate easement was not expressly granted, a similar easement has nevertheless been acquired by prescription. I should say that the parties originally did not refer to prescriptive easements at all. It was entirely my fault for raising the issue after the end of the first day. The parties referred to it briefly on the second day, but in the interests of concluding the hearing in time, yet with the benefit of appropriate evidence and submissions, I permitted them to put in further factual evidence and written submissions by 25 November 2019 (later extended to 27 November). That evidence and those submissions were filed, and I have taken them into account in considering this part of the case.

96. A prescriptive right can arise (i) at common law, (ii) under the Prescription Act 1832, or (iii) under the doctrine of lost modern grant. All of these require that the putative right be exercised for a period of time "as of right". This expression means that exercise must not be by force, by stealth or by permission of the owner, usually expressed by the convenient Latin expression "*Nec vi, nec clam, nec precario*": see *R (Barkas) v North Yorkshire County Council* [2015] AC 195, [14]-[16], per Lord Neuberger.

97. Prescription at common law arises when the putative right has been exercised since 1189. That cannot apply here, where the mains pipe was laid only in 1948. The Prescription Act 1832 apples only where a putative right has been exercised for the 20 years next before issue of the claim, ignoring any interruption not exceeding one year (see s 4). But the use of the putative right was challenged by the claimants on 22 May 2017, and from that time became 'contentious'. As a result it was no longer within the phrase "*nec vi*" as interpreted in the caselaw: see *eg Winterburn v Bennett* [2017] 1 WLR 646, CA. Yet the claim was not issued until 13 November 2018, over one year later. That length of interruption is fatal to any claim under the 1832 Act. Accordingly, the defendant relies only on the third possibility, the doctrine of lost modern grant.

Lost modern grant

98. That doctrine relies on the fiction of a grant that has been lost: see *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 552, referring to *Angus v Dalton* (1881) 6 App Cas 740. But, in addition to requiring exercise of the putative right that is "as of right", or *nec vi, nec clam, nec precario*, it also requires that any such claimed prescriptive easement have all the characteristics of an easement by express grant, including the need for a dominant tenement. The claimants therefore repeat their argument that in the present case no dominant tenement can be identified. Therefore, they say, there can be no prescriptive easement. I agree that there needs to be a dominant tenement. But in my judgment there is a difference between express and prescriptive easements as to how that tenement is ascertained. In the case of the express easement it is a matter of the construction of the deed, and thus of the intentions of the parties. In the case of the prescriptive easement, there is no need to take the fiction of the grant that has been lost any further than necessary. The dominant tenement can be ascertained by looking to see whether any and if so which land of the party claiming the easement has been accommodated by its exercise during the relevant period. I will return to this later.

"As of right"

99. In addition, the Claimants say that exercise was not "as of right", but on the contrary was by permission. The essence of exercise that is "as of right" is *acquiescence* by the owner of the putative servient tenement. In this respect the claimants rely on the knowledge of Christ's College of the deed of grant of 1947, coupled with the receipt of the acknowledgment rent of one shilling per annum from 1948 to 1961 (during all of which time the College owned the Property). Moreover the owners of the Property from time to time all knew of the deed of grant and, since no doubt was cast upon it until 2017, must have considered that it created an easement, so that the Defendant and its predecessors in title were exercising a legal right binding on them. The argument is that they therefore did not contest the exercise of the putative right, and were not acquiescing in such exercise. It is therefore necessary to consider this more closely.

100. *R (Barkas) v North Yorkshire County Council* [2015] AC 195 was a case about the registration of a public playing field as a "town or village green" under s 15 of the Commons Act 2006. This required the playing of law sport and pastimes on the land "as of right" for more than 20 years. The land was held by the local authority as a public recreation ground under the Housing Act 1985. The claim for such registration failed. In the Supreme Court, Lord Neuberger (with whom the other members of the court agreed) discussed the phrase "as of right" by reference to prescriptive easements. In particular he referred to the discussion of the same point in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, by Lord Hoffmann (with whom the whole House agreed).

101. Lord Neuberger said:

> "15. In his discussion on the point in *Sunningwell*, Lord Hoffmann began by explaining that '[a]ny legal system must have rules of prescription which prevent the disturbance of long-established *de facto* enjoyment', and went on to explain that a combination of statutory and common law had resulted in such enjoyment having to be twenty years '*nec vi*, *nec clam*, *nec precario*; not by force, nor stealth, nor the licence of the owner'. He went on to explain that each of 'these three vitiating circumstances' would amount to 'a reason why it would not have been reasonable to expect the owner to resist the exercise of the right', namely, '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'."

102. Then Lord Neuberger said this:

> "17. In relation to the acquisition of easements by prescription, the law is correctly stated in *Gale on Easements* (19th edition, 2012), para 4-115:
>
> > 'The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is 'as of right'; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not 'as of right.' Permission involves some

> positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence.'
>
> 18. The concept of acquiescence in this context was explained in the opinion delivered by Fry J (with which Lord Penzance expressed himself as being 'in entire accord' at p 803), in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 774, where he said:
>
> > '… I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain…'."

103. Finally, Lord Neuberger went on to make clear that exercise of a putative easement would not be "as of right" (including for the purposes of prescription) unless it amounted to a trespass:

> "20. In the present case, the Council's argument is that it acquired and has always held the Field pursuant to section 12(1) of the 1985 Act and its statutory predecessors, so the Field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the Field for recreational purposes, and, accordingly, there can be no question of any 'inhabitants of the locality' having indulged in 'lawful sports and pastimes' 'as of right', as they have done so 'of right' or 'by right'. In other words, the argument is that members of the public have been using the Field for recreational purposes lawfully or *precario*, and the 20-year period referred to in section 15(2) of the 2006 Act has not even started to run – and indeed it could not do so unless and until the Council lawfully ceased to hold the Field under section 12(1) of the 1985 Act.
>
> 21. In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land 'by right' and not as trespassers, so that no question of user 'as of right' can arise. In *Sunningwell* at pp 352H-353A, Lord Hoffmann indicated that whether user was 'as of right' should be judged by 'how the matter would have appeared to the owner of the land', a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.
>
> 22. It is true that this case does not involve the grant of a right in private law, which is the normal issue where the question whether a use is precario arises.

Indeed, the fact that the right alleged in this case is not a conventional private law right, but a public law right, was rightly acknowledged by Ms Lieven. Thus, it is a right principally enforceable by public rather than by private law proceedings. It is also a right which is clearly conditional on the Council continuing to devote the Field to the purpose identified in section 12(1) of the 1985 Act (and it is unnecessary for present purposes to go into the question of what steps the Council would have to take to remove the Field from the ambit of the section). Accordingly, the right alleged by the Council to be enjoyed by members of the public over the Field is not precisely analogous to a public or private right of way. However, I do not see any reason in terms of legal principle or public policy why that should make a difference. The basic point is that members of the public are entitled to go onto and use the land – provided they use it for the stipulated purpose in section 12(1), namely for recreation, and that they do so in a lawful manner.

[…]

27. It was suggested by Mr Edwards QC in his argument for Ms Barkas that, even if members of the public were not trespassers, they were nonetheless not licensees or otherwise lawfully present when they were on the Field. I have considerable difficulty with that submission. As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a 'tolerated trespasser' is still a trespasser.

28. Furthermore, the fact that the landowner knows that a trespasser is on the land and does nothing about it does not alter the legal status of the trespasser. As Fry J explained, acquiescence in the trespass, which in this area of law simply means passive toleration as is explained in *Gale* (or, in the language of land covenants, suffering), does not stop it being trespass. This point was well made by Dillon LJ in *Mills v Silver* [1991] Ch 271, 279-280, where he pointed out that 'there cannot be [a] principle of law' that 'no prescriptive right can be acquired if the user … has been tolerated without objection by the servient owner' as it would be 'fundamentally inconsistent with the whole notion of acquisition of rights by prescription.' Accordingly, as he added at p 281, 'mere acquiescence in or tolerance of the user … cannot prevent the user being user as of right for purposes of prescription.'

29. Thus, if a trespass has continued for a number of years, then the fact that it has been acquiesced in (or passively tolerated or suffered) by the landowner will not prevent the landowner claiming that it has been and is unlawful, and seeking damages in respect of it (subject to the constraints of the Limitation Act 1980). For the same reason, if such a trespass has continued for 20 years and was otherwise as of right, it will be capable of giving rise to a prescriptive right. On the other hand, if the landowner has in some way actually communicated agreement to what would otherwise be a trespass, whether or

> not gratuitously, then he cannot claim it has been or is unlawful – at least until he lawfully withdraws his agreement to it. For the same reason, even if such an agreed arrangement had continued for 20 years, there can be no question of it giving rise to a prescriptive right because it would clearly have been *precario*, and therefore 'by right'."

104. The Claimants accept that, where the owner of the putative dominant tenement exercises the putative right mistakenly believing that it already exists, for example under a void grant, this does not prevent the exercise being "as of right". I will come back to that. But they submit that, where the owner of the putative *servient* tenement does not contest the use made because he mistakenly believes that the other has a legal right to do so (whereas in fact that other has none), that is *not* acquiescence making such exercise "as of right".

105. They rely on the statement of principle of Lord Hoffmann in *Sunningwell R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 350-351, cited in part by Lord Neuberger in *Barkas* (at [15]) and set out in full here:

> "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."

106. The Claimants then submit that, in the case where the owner of the putative *servient* tenement does not contest the user made,

> "the reason [such owner] does not contest the use is because he believes that the owner of the dominant tenement has a legal right".

I agree that the servient owner's mistake may be the reason for not contesting the use, but I do not accept *either* that Lord Hoffmann was referring to this case in what he said, *or* that this case is not a case of acquiescence for the purposes of acquiring an easement by prescription. The servient owner has the means – over 20 years – of checking the correctness of the assumption that the dominant owner has the right, by looking at the relevant documents and seeking legal advice, just as he or she can check the circumstances said to amount to consent. If the servient owner does not do so, then he or she must take the consequences. With respect, Lord Hoffmann is not dealing with mistake at all, and does not seek to fit it into his explanatory structure.

107. The Claimants also rely on three earlier decisions, *Campbell v Wilson* (1803) 3 East 294, *Rivers v Adams* (1878) 3 Ex D 361, and *Attorney General v Horner (No 2)* [1913] 2 Ch 140, CA. In my judgment, however, these three cases do not support the proposition either, but illustrate a quite different point. This is that, where the putative dominant owner relies on a title which does not in fact grant that which the owner wants, he or she cannot at the same time prescribe for a right different from that in the title relied on.

108. Thus, in *Campbell v Wilson*, at trial the jury had returned a verdict finding for the putative dominant owner that he had established 20 years' user of a right of way over

the servient owner's land. On a rule to set aside the verdict for misdirection of the judge, the servient owner argued that the claim to a right of way was founded on an inclosure award some 25 years earlier, but that this awarded a right of way over different servient land. The whole court agreed that this argument failed, and the rule was discharged, because the evidence did not show that the parties were mistakenly acting in reliance on the award.

109. However, Lawrence J added this (at 301-302):

> "But it has been said that if the enjoyment were shewn to have originated in mistake, however adverse it may have been, that is against the presumption, and that the learned Judge misled the jury in this respect: but no facts appear to warrant this objection, otherwise it might be very material to be considered. For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time."

110. In *Rivers v Adams*, in the short-lived Exchequer Division of the High Court, owners of particular houses claimed a prescriptive right to cut and take away underwood for fuel from the land of another. But although they could show 20 years' user, the evidence showed that the right was claimed not as owners of particular houses but in common with others *as inhabitants of the parish*. In other words, they claimed in respect of a supposed right belonging to the inhabitants of the parish, which could only arise from a Crown grant incorporating those inhabitants, and this was impossible in the circumstances. Kelly CB for the court cited *Campbell v Wilson*,

> "to shew the necessity of connecting the user with the right claimed,"

and set out the passage from the judgment of Lawrence J above.

111. Then he continued (at 372):

> "It is plain that if we refer the user to any other right than the one in respect of which it was actually exercised, we might be doing the greatest injustice. For the lord might allow the inhabitants of cottages to exercise the right as inhabitants, knowing that it was a right which could not be established in point of law, and which there was no necessity to interrupt; and he might afterwards be bound by his own interruption, because another right was acquired."

112. Finally, in *Attorney General v Horner (No 2)*, the Court of Appeal was concerned with a claim to a prescriptive right to hold a market on certain days of the week (at Spitalfields Market in London). The market holder had a Crown grant for a market on Thursday and Saturdays, under which he had claimed to act, but also claimed a prescriptive right to hold a market on the other weekdays too, by virtue of user on those days. The Court of Appeal held that the prescriptive claim failed.

113. Cozens-Hardy MR said (at 169):

> "I am not prepared to make a presumption not in accordance with rights claimed. Long user not explained may justify the Court, and, indeed, in some circumstances, may almost compel the Court, to presume what is necessary to give validity to the usage. When, however, the right claimed cannot be established on the ground claimed, an incidental portion of the right claimed cannot be established on the mere ground of long usage. In other words, a presumption to support a right claimed may be reasonable, but a presumption to support a mere fragment of a right claimed and never exercised apart from the right claimed is a wholly different proposition."

He then referred with apparent approval to *Campbell v Wilson*, citing the dictum of Lawrence J, and to *Rivers v Adams*, citing that of Kelly CB.

114. Buckley LJ said (at 179):

> "A man cannot prescribe contrary to, or in manner inconsistent with, the title which he produces, and on which he relies: *Labrador Co v Reg.*(1) If his enjoyment originated in mistake and he asserted his right to be grounded, say, on an award which did not support it, then however adversely the right may have been exercised, it cannot for purposes of presumption be referred to any other ground than what he himself insisted on at the time: *Campbell v Wilson.*(2) The passage quoted in the judgment in *Lord Rivers v Adams* (3) from the judgment of Lawrence J. in *Campbell v Wilson* (4) is, I think, directly in point."

115. Hamilton LJ (later Lord Sumner) also refers (at 188) to *Campbell v Wilson* and *Lord Rivers v Adams*. He then continues:

> "This is no question of estoppel. Part of the evidence of the user consists of the title asserted throughout by those who benefited by the user, and that part is enough to preclude any presumption."

116. As I have said, the Claimants accept that a mistake by the putative *dominant* owner as to his or her rights is not a bar to exercise of the easement claimed being "as of right". They refer to *Bridle v Ruby* [1989] QB 169, CA. In that case a builder in 1956 constructed a number of houses. Of these, nos 12 and 13, next to each other, were sold off nine days apart, no 12 first, and then no 13. In each case the draft transfer sought to reserve to the builder and its successors in title a right of way over the land conveyed, but in each case the reservation was deleted and initialled by the parties. No attempt was made by the builder in either transfer to grant a right of way over the land of the other. The owner of no 13 built a garage on his land, to which the only access was via the driveway to no 12. The owner of no 12 did not object to such use. In 1958, the owner of no 13 transferred the property to a purchaser, who in turn transferred it to the plaintiff in 1962. The owner of no 12 thereafter died (but it is not stated when), leaving the property to his widow. She transferred it to the defendants in 1977.

117. In 1981 a dispute arose between the plaintiff and the defendants as to whether the plaintiff was entitled to a right of way over the driveway of no 12. In 1982 the plaintiff started proceedings in the county court. In 1985 the plaintiff succeeded at trial after amending his claim to plead lost modern grant, based on user of 22 years as

of right, between 1959 and 1981. The trial judge specifically found that the original purchaser of neither no 12 nor no 13 was acting under any mistake, though the successors in title to no 13 were mistaken as to their rights. The defendants appealed, arguing that the *plaintiff's* user was based on a mistaken view of his rights and therefore could not be "as of right". The appeal failed.

118. Parker LJ said (at 177B-E):

> "Reliance was also placed on behalf of the defendants on certain authorities, namely, *Attorney-General v. Horner (No. 2)* [1913] 2 Ch. 140; *Campbell v. Wilson* (1803) 3 East 294 and *Rivers v. Adams* (1878) 3 Ex.D. 361. These cases appear to me to establish that, where a right has been asserted and acquiesced in on a particular basis, the claimant cannot thereafter set up his claim on any other ground. They do not however establish that, where a claimant asserts a right in the mere belief (mistaken) that such right has been conferred when it has not, this negatives any claim by prescription, be it by common law, the Act of 1832 or lost modern grant. There are certain passages in the judgments in such cases which suggest that a user cannot be adverse if it is believed mistakenly to be rightful, but this cannot be right. The true position, as exemplified in the *Chamber Colliery* case, 32 Ch.D. 549, is that user in an asserted but mistaken belief that it is justified on a right of limited duration, which belief is acquiesced in, cannot be made the foundation of a grant of unlimited duration. To go as far as saying that no user based on a mistaken belief in a right could found a claim to prescription would be to say that the law will only presume a grant or allow a claim to prescription at common law in favour of someone who is aware that he is a wrongdoer."

119. Ralph Gibson LJ said (at 178E-G):

> "For mistake as to the origin of the right asserted by the user to be relevant, it seems to me that it must be such as to be capable of affecting the way in which the user of the right is conducted by the claimant or in which that user is seen by the owner of the land over which the right is asserted. The requirement that user be 'as of right' means that the owner of the land, over which the right is exercised, is given sufficient opportunity of knowing that the claimant by his conduct is asserting the right to do what he is doing without the owner's permission. If the owner is not going to submit to the claim, he has the opportunity to take advice and to decide whether to question the asserted right. The fact that the claimant mistakenly thinks that he derived the right, which he is openly asserting, from a particular source, such as the conveyance to him of his property, does not by itself show that the nature of the user was materially different or would be seen by the owner of the land as other than user as of right."

(I interpolate that the second and third sentences of this passage were cited with apparent approval by Lord Walker in *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70, [84], as well as by Lewison LJ in *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2012] 1 P &CR 271, [65].)

120. The third member of the court, Caulfield J, agreed with both judgments. It is worth noting that although the trial judge found that the original owners of the two

properties were not mistaken as to their respective rights, no such finding was made as to their successors. Yet the court did not investigate the period during which the owner of no 12 (the servient tenement) survived before the property passed to his widow, and later to the defendants. So it cannot have mattered whether the successors were mistaken or not.

121. In my judgment this decision, which is binding upon me, fully justifies the view that a mistake by the putative *dominant* owner as to the existence of the right claimed does not prevent user from being "as of right" for prescriptive purposes. But in addition the statement by Ralph Gibson LJ, in which Caulfield J concurred, that user "as of right" is user giving the putative servient owner sufficient opportunity to know that the other is asserting the right to use without the owner's permission, and also the opportunity to take advice and to decide whether to question the asserted right, applies just as much where the *servient* owner is mistaken. The servient owner can check the relevant documents and take legal advice.

122. In the subsequent case of *Bosomworth v Faber* (1992) 69 P & CR 288, an indenture of 1858 had been thought by the original parties to confer a valid right to take water from the servient tenement for the benefit of the dominant. By the time of these proceedings, however, it was agreed between the current owners of the two properties that the purported grant of the easement was void for perpetuity, something which no layman involved in the transaction would have known at the time. So both original parties must have been mistaken. The dominant owner nevertheless claimed a prescriptive easement, and succeeded at trial.

123. In the Court of Appeal, it was common ground (as recorded by Dillon LJ, with whom Farquharson and Simon Brown LJJ agreed, referring to *Bridle v Ruby*) that prescriptive user was not prevented by the mistake as to the validity of the 1858 grant. However, the servient owner succeeded on appeal, because of a licence agreement entered into between the parties' predecessors in title in 1948, which was held to have abandoned the prescriptive easement achieved earlier. That argument would not have needed to be dealt with unless the Court of Appeal had first been satisfied that the easement claimed had been established. And that Court evidently saw nothing odd in a prescriptive easement which involved the mistaken belief of *both* parties that the original grant was valid.

124. In *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2012] 1 P &CR 271, CA, in 1973 the owner of one hotel, A, had granted to the owner of an adjacent hotel, B, a licence in writing personal to B to use a private service road on A's land. In 1980, B ceased to own the adjacent hotel, but the hotel's use of the roadway continued. In 2002, C bought the hotel. The judge at first instance held that C had established a right of way by prescription over the roadway belonging to A, on the basis that, once B had ceased to own the adjacent hotel the licence came to an end, and user of the roadway thereafter was "as of right" for the requisite period. A (as "servient" owner) argued that it did not know that B had ceased to be the owner of the adjacent hotel, and was therefore mistaken in believing that the licence still applied, even though it had come to an end. It was held that this made no difference, and the Court of Appeal dismissed A's appeal.

125. I conclude that there is no authority binding me to hold that a mistaken belief by the putative servient owner as to the rights of the putative dominant owner must prevent

the user of the latter being user "as of right" for the purpose of acquiring a prescriptive easement, and that, if anything, the authorities are to the effect that such user may indeed be "as of right" for that purpose. At all events, that seems to me to be the current law.

126. I accept, of course, that, if the deed of 1947 did not create a valid easement, it must at least have granted a licence to the UDC to carry out the laying of the water main underground and to use it thereafter. But the owners at the time of the deed of grant were not the owners of the Property at the time of the laying of the main. I must therefore look to see whether the UDC's actions in 1948 were at the licence of the then owner, Christ's College Cambridge. The College bought the Property with knowledge of the deed of grant, and their tenants and other occupiers would have been well aware of the works being carried out, and of course they did not object. On the contrary, they welcomed these works. In addition, and significantly, the College received the acknowledgement rent for 1948. So it is not hard, in these circumstances, to infer the existence of an informal licence by the College to the doing of the works and the use of the water main thereafter, thus preventing these from being wrongful acts: *cf R (Beresford) v Sunderland City Council* [2004] 1 AC 889, [75], per Lord Walker. The acknowledgement rents were paid from 1948 to 1961, and then appeared to have stopped. If they had been demanded by or paid to the College's *successor*, Footwear Trustees Ltd, that may well have made a difference: *cf London Tara Hotel Ltd v Kensington Court Hotel Ltd* [2012] 1 P & CR 271, [34].

127. As is well-known, a licence in relation to land is not an estate in the land, but simply that permission which prevents an act done by a particular person in relation to the land from being a wrong. Accordingly, it is not usually transferable from one person as licensee to another as successor in title (though of course by it its terms it may be). However, the transfers of the UDC's water undertaking, first to the Hertfordshire and Essex Water Company in 1958, and then to the Lee Valley Water Company in 1960, were each effected by legislation, and in each case a specific statutory provision ensured that the benefit of any licence was transferred to the successor (see the Herts and Essex Water (No 2) Order, Articles 2, 3, and the Lee Valley Water Act 1959, section 15). So, if there were a licence granted by Christ's College Cambridge in 1947, its benefit passed to the successors of the UDC as water undertakers, and those successors could not prescribe against the College.

128. However, it is also necessary to consider the devolution of the putative servient tenement. Once the College sold the Property to Footwear Trustees Ltd in 1969, years after the last acknowledgement rents had been paid, the licence of the College could no longer prevent the user of the water main from being trespassory as against the new owner, even if the new owner knew about it. It is not a question of whether the licence was intended to be *personal* to the grantee. It is that the servient owner cannot grant a licence binding on his successor: *Ashburn Anstalt v Arnold* [1989] Ch 1, 15H, 21F. Mere acquiescence in the situation by Footwear Trustees Ltd and its successors does not amount to an (new) implied licence: *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, [5]-[6], [79]. This means that user thereafter was capable of being "as of right", and therefore prescriptive (see *London Tara Hotel Ltd v Kensington Court Hotel Ltd* [2012] 1 P & CR 271, CA), and 20 years' user would have been completed by 1989. In fact such user continued beyond 1989, and it was not until 2017 that an attempt was made to complain about user of the water main.

Without force, and openly

129. As for the other elements of the concept of user "as of right", there is no evidence that any force was used at the time of the laying of the water main or thereafter. As I have said, the position was quite the contrary. Plainly the works themselves and user immediately thereafter were not done in secret. But, with the passage of time, it might be said that continued user of the main after some years would not have been obvious to the then owners from time to time. Yet new owners when they acquired would be referred to (and have notice of) various documents of title, including the deed of grant of 1947, which clearly showed the water main passing through the Property. Moreover, there were and still are two manhole covers on the Property along the route of the main, in order to allow access for maintenance and repair, and these undoubtedly operate to inform owners and occupiers of the passage of a water main beneath: *cf Stanning v Baldwin* [2019] EWHC 1350 (Ch), [132] ff. Subject therefore to the question of the statutory powers to lay and maintain a water main, I am satisfied that, from 1969 at least, user of the water main was *nec vi, nec clam, nec precario*, and therefore "as of right", so that a prescriptive right to the use of the main was established by 1989.

130. So far as concerns the identification of the dominant tenement for the purposes of the prescriptive easement, I am satisfied that the exercise of that easement accommodated the nearby land on which the pumping station stood, for all the reasons given earlier in relation to express easements. Accordingly, in my judgment, if there were no express easement, and no statutory powers to consider, the Defendant would have established a prescriptive easement to the same effect by virtue of the doctrine of lost modern grant.

The relevant statutory powers to lay a water main

The powers in 1947

131. I turn now to the third issue, namely, was the water main laid in the exercise of statutory powers? I have already set out above the relevant provisions of sections 1 (in Part I) and 111 (in Part IV) of the Public Health Act 1936. In addition, Part II of that Act (dealing with sanitation and buildings) formerly provided, so far as material,

> "15.-(1) A local authority may within their district and also, subject to the provisions of the next succeeding section, without their district
>
> (i) construct a public sewer –
>
> (a) in, under or over any street, or under any cellar or vault below any street, subject, however, to the provisions of Part XII of this Act with respect to the breaking open of streets; and
>
> (b) in, on or over any land not forming part of a street, after giving reasonable notice to every owner and occupier of that land;
>
> (ii) construct sewage disposal works on any land acquired, or lawfully appropriated, for the purpose ;

> (iii) by agreement acquire, whether by way of purchase, lease or otherwise, any sewer or sewage disposal works, or the right to use any sewer or sewage disposal works."

132. This provision concerned sewerage and sewers, not water supplies. But it was applied to water supply by section 119 in Part IV of the Public Health Act 1936, which formerly provided:

> "119. A local authority who supply, or are about to supply, water under this Act shall have the like powers and duties and be subject to the like restrictions in respect of the laying and maintenance of water mains of within or without their district, as, under the provisions of Part II of this Act, they have and are subject to in respect of the construction and maintenance of public sewers within or without their district, as the case may be."

133. Finally, Part XII of the Public Health Act 1936 (dealing with general matters) formerly provided, so far as material,

> "278.-(1) Subject to the provisions of this section, a local authority shall make full compensation to any person who has sustained damage by reason of the exercise by the authority of any of their powers under this Act in relation to a matter as to which he has not himself been in default.
>
> (2) Any dispute arising under this section as to the fact of damage, or as to the amount of compensation, shall be determined by arbitration;
>
> Provided that, if the compensation claimed does not exceed fifty pounds, all questions as to the fact of damage, liability to pay compensation and the amount of compensation may on the application of either party be determined by, and any compensation awarded may be recovered before, a court of summary jurisdiction.
>
> (3) No person shall be entitled by virtue of this section to claim compensation on the ground that a local authority have in the exercise of their powers under this Act declared any sewer or sewage disposal works, whether belonging to him or not, to be vested in them, or on the ground that he has sustained damage by reason of any action of a local authority in respect of which the authority are by this Act authorised to pay compensation if they think fit.
>
> (4) Where an owner of land claims compensation in respect of damage sustained by reason of a local authority having, in the exercise of their powers under this Act, constructed a sewer or laid a water main in, on or over his land, the tribunal determining the amount of the compensation shall determine also by what amount, if any, the value to the claimant of any land belonging to him has been enhanced by the construction of the sewer or the laying of the water main, and the local authority shall be entitled to set off that amount against the amount of any compensation awarded."
>
> […]
>
> 343.-(1) In this Act, unless the context otherwise requires, the following expressions have the meanings respectively assigned to them –

> […]
>
> 'local authority' has the meaning assigned to it in section one of this Act;
>
> […]
>
> 'street' includes any highway, including a highway over any bridge, and any road, lane, footway, square, court, alley and passage, whether a thoroughfare or not;
>
> […]."

The powers in 2005

134. The relevant provisions are contained in the Water Industry Act 1991:

> "158.-(1) Subject to the following provisions of this section, to section 162(9) below and to the provisions of Chapter III of this Part, every relevant undertaker shall, for the purpose of carrying out its functions, have power—
>
> (a) to lay a relevant pipe in, under or over any street and to keep that pipe there;
>
> (b) to inspect, maintain, adjust, repair or alter any relevant pipe which is in, under or over any street; and
>
> (c) to carry out any works requisite for, or incidental to, the purposes of any works falling within paragraph (a) or (b) above, including for those purposes the following kinds of works, that is to say—
>
> (i) breaking up or opening a street;
>
> (ii) tunnelling or boring under a street;
>
> (iii) breaking up or opening a sewer, drain or tunnel;
>
> (iv) moving or removing earth and other materials.
>
> […]
>
> (4) A stopcock fitted to any service pipe in a street shall be situated as near as reasonably practicable to the boundary of the street; and a water undertaker shall consult with the highway authority concerned before determining in accordance with this subsection where to fit a stopcock in a highway.
>
> (5) Where a water undertaker exercises its powers under this section for the purpose of carrying out works of maintenance, repair or renewal in relation to a service pipe belonging to a person other than the undertaker, the undertaker shall be entitled to recover from the occupier of the premises supplied by means of that pipe the expenses reasonably incurred by that undertaker in so exercising that power.

[…]

(7) Subject to section 161(7) below, in this section references to a relevant pipe shall be construed—

(a) in relation to a water undertaker, as references to a water main (including a trunk main […]), resource main, discharge pipe or service pipe; and

[…].

159.-(1) Subject to the following provisions of this section, to section 162(9) below and to the provisions of Chapter III of this Part, every relevant undertaker shall, for the purpose of carrying out its functions, have power—

(a) to lay a relevant pipe (whether above or below the surface) in any land which is not in, under or over a street and to keep that pipe there;

(b) to inspect, maintain, adjust, repair or alter any relevant pipe which is in any such land;

(c) to carry out any works requisite for, or incidental to, the purposes of any works falling within paragraph (a) or (b) above.

(2) Nothing in subsection (1) above shall authorise a water undertaker to lay a service pipe in, on or over any land except where—

(a) there is already a service pipe where that pipe is to be laid; or

(b) the undertaker is required to lay the pipe in, on or over that land by virtue of any of subsections (3) to (5) of section 46 above.

(3) The power conferred by virtue of paragraph (b) of subsection (1) above, and the power conferred in relation to that paragraph by virtue of paragraph (c) of that subsection shall be exercisable in relation to a service pipe irrespective of the person to whom the pipe belongs; but expenses incurred in exercising those powers in relation to any pipe shall be recoverable from the person to whom the pipe belongs only if and to the extent that that person has agreed to pay them.

(4) The powers conferred by this section shall be exercisable only after reasonable notice of the proposed exercise of the power has been given to the owner and to the occupier of the land where the power is to be exercised.

(5) Subject to subsection (6) below, in relation to any exercise of the powers conferred by this section for the purpose of laying or altering a relevant pipe, the minimum period that is capable of constituting reasonable notice for the purposes of subsection (4) above shall be deemed—

(a) where the power is exercised for the purpose of laying a relevant pipe otherwise than in substitution for an existing pipe of the same description, to be three months; and

(b) where the power is exercised for the purpose of altering an existing pipe, to be forty-two days.

(6) Subsection (5) above shall not apply in the case of any notice given with respect to the exercise of any power in an emergency or for the purpose of—

(a) laying or altering a service pipe; or

(b) complying with a duty imposed under section 41 or 98 above.

(7) Subject to subsection (2) above, in this section "relevant pipe" has the same meaning as in section 158 above [(reading references there to subsection (1) as references to subsection (1) of this section)].

[…]

185.-(1) Where any relevant pipe or other apparatus is for the time being kept installed by a relevant undertaker on, under or over any land, any person with an interest in that land or in adjacent land may by notice to the undertaker require the undertaker to alter or remove that pipe or apparatus on the ground that the alteration or removal of that pipe or apparatus is necessary to enable that person to carry out a proposed improvement of the land in which he has an interest.

(2) Subject to subsections (3) and (4) below, where a notice is served on a relevant undertaker under subsection (1) above, it shall be the duty of the undertaker to comply with the requirement contained in the notice except to the extent that that requirement is unreasonable.

(3) Nothing in this section shall require a relevant undertaker to alter or remove any pipe or apparatus which is kept installed in, under or over any street.

[…]

(5) Where a relevant undertaker carries out any works under this section by virtue of a notice having been served by any person under subsection (1) above, [the person serving the notice is liable to pay to the undertaker such charges as the undertaker may impose in accordance with charging rules].

[…]

(9) In this section— […] "relevant pipe" has the same meaning as in section 158 above.

[…]

219.-(1) In this Act, except in so far as the context otherwise requires—

[…]

"street" has […] the same meaning as in Part III of the New Roads and Street Works 1991;

[…]."

135. New Roads and Street Works Act 1991, Part III

"48.-(1) In this Part a 'street' means the whole or any part of any of the following, irrespective of whether it is a thoroughfare—

(a) any highway, road, lane, footway, alley or passage,

(b) any square or court, and

(c) any land laid out as a way whether it is for the time being formed as a way or not.

Where a street passes over a bridge or through a tunnel, references in this Part to the street include that bridge or tunnel.

[…]."

136. In broad summary, therefore, the water undertaker has power to lay and maintain a pipe (including a water main and a service pipe) under any "street" without first giving notice to the owners and occupiers, or under any other land after giving reasonable notice to the owners and occupiers. For this purpose, "street" includes courts and non-thoroughfares, and land laid out as a way.

Issues arising

Statutory right and private law easement

137. A number of points arise in relation to these statutory powers. The first is whether it is possible for a statutory right to lay maintain and use a water main to arise and be used at the same time as a private law easement is granted. Is the choice between them binary, *ie* it must be one or the other, or can the same actions generate both rights? Counsel were unable to find any authorities which bore directly on this question. The Claimants cited the decision in *Newcastle-under-Lyme Corporation v Wolstanton Ltd* [1947] Ch 92, where the judge at first instance (Evershed J) decided that the language of section 6 of the Gas Works Clauses Act 1847, to lay, maintain and use gas pipes under the streets of a local authority, was inappropriate to create an easement in favour of the gas undertakers. On appeal this part of his decision was endorsed by Morton and Cohen LJJ, though another part of his decision was reversed. But all that this demonstrates is that the nature of the right created by the statute need not be the same as by private law grant, and in the case of that legislation it was not. It does not show that there cannot be two rights at the same time with the same or overlapping content. For this reason I do not accept that the local authority had to elect whether to proceed under either the statutory power or a private law grant. In my judgment there was no election to make. (As I say below, the position is different in relation to a prescriptive easement.)

Exercise of statutory right

138. The second point is whether, on the facts found, the statutory right was exercised at all. Here the question is, What is it necessary for the water undertaker to do in order

for the right to be exercised? Is it necessary that the undertaker should *intend* to exercise the right? Is it necessary that the undertaker should *know* that it is exercising the right? Is it necessary that the undertaker should *express* some intention to exercise the right? Again, no authorities were cited to me on these questions. I must therefore deal with them on principle, taking account of the statutory wording.

139. If this were the case of an individual with full legal capacity to act, who decided deliberately to walk across the land of another, or to take water from the land of another, not knowing or caring whether he or she had any right to do so, whereas in fact that individual, unknown to him or her, enjoyed that very right, whether conferred by statute or by private grant, I cannot see that that would amount to a trespass on the part of the individual. Although the individual may have had what might perhaps (but ineptly) be called *mens rea*, there is in fact no unlawful act, no *actus reus*, because in the particular circumstances the consent of the landowner is not required: compare Lord Neuberger's judgment in *Barkas*, [20], set out above, in relation to members of the public using a public recreation ground.

140. I ask myself therefore whether it would make a difference if it were not the case of an individual, but of a corporation, whether incorporated under the Companies Acts or in some other way (such as a local government body). With such a corporation, of course, there is an additional question as to the powers which are conferred upon it, but I am assuming for present purposes that, whatever the corporation does in the particular case, it has the capacity in law to do it. I am also assuming that any preconditions to the arising of the right, such as giving notice, have been satisfied, or any limits as to the extent of the right, such as temporal or geographical limits, have been observed. In my judgment there is no reason why the answer should be different. The act is not an unlawful act (in the present case, a trespass) because in all the circumstances the consent of the landowner is not required.

141. The Claimants say that the word "may" in section 15 (as also in section 137 of the Local Government Act 1933) implies a conscious decision. Plainly, digging trenches and laying pipes require a conscious decision. But I do not agree that the UDC was required *to decide* consciously to exercise the power conferred on it by statute. In this context, "may" means that, if the UDC does act, the owners and occupiers cannot complain. The Claimants also say that there is no evidence of any statutory claim for damages (under section 278 of the 1936 Act) being made. Accepting that this is so, in my judgment it is scarcely probative of anything. On the facts, in 1947-48, it is not likely that this work would cause any significant damage to any of the owners or occupiers. Indeed, the occupiers were clear that it was a benefit to them, because it removed the nuisance of the water main lying above ground. But in any event a claim for compensation would only come later, well after the works had been done. It would not demonstrate what was in the parties' minds at the time that the works were done.

142. Following on from this, the Claimants say that, if the UDC exercised its section 15 power, there would be no need for a deed of grant. However, the deed was entered into in order to provide protection for the grantees which would not be available under section 15 (in particular the covenants in clause 2). Conversely, the UDC might wish to avoid the statutory regime, and thus avoid paying compensation (under section 278). These are good reasons, say the Claimants, why the parties might wish to use the private grant route, and not the statutory one. For myself, I cannot see why

wishing to obtain the advantages of the private law route should of itself exclude the possibility of using the statutory one too.

143. So, in my judgment, if the UDC had the statutory power in 1947 to lay, maintain and use the water main under the Property (satisfying all necessary preconditions), the question whether it *intended* to exercise the right, or even knew of it, is irrelevant. The acts would not amount to an actionable trespass at that time (and of course that also means that there could be no user "as of right" for the purposes of prescription). The same reasoning applies to the installation of the service pipe, stop tap and meter in 2005.

Was the UDC entitled to use the statutory power in 1948?

144. Accordingly, the next question is whether the UDC in 1948, and the defendant in 2005, *had* the statutory power to enter on the Property and do the relevant works. The Public Health Act 1936, section 15(1)(i), as applied to water supply by section 119, confers upon a local authority (by section 1, including a UDC) power to enter on and lay and maintain water mains in any land. There are two limbs to this provision. If the land is not a "street" (as defined) then the power arises only on the giving of reasonable notice to the owners and occupiers of the land. If on the other hand it is a "street", then the power exists without the need for notice to be given.

145. The word "street" and its wide definition have been used in a number of similar pieces of legislation since the 19th century, dealing with water and gas undertakings. I set out earlier in this judgment the versions in force in 1948 and in 2005. I was referred in particular to four authorities on the meaning of the word "street", as defined in some of this legislation. These were: *Taylor v Oldham Corporation* (1876) 4 Ch D 396; *R v Local Board of Goole* [1891] 2 QB 212; *Hill v Wallasey Local Board* [1894] 1 Ch 133; and *Warwickshire County Council v Atherstone Common Right Proprietors* (1964) 65 LGR 439. It is clear from these authorities that a road or other way which is entirely in private ownership, and over which there is no public right of way, can still be a "street" within the meaning of this definition.

146. So far as concerns the Property in 1947-48, the passageway from Potter Street alongside number 27 was used by several occupiers, and there is no evidence that public visitors to those occupiers were forbidden to use the passageway. There is, for example, no evidence of a locked gate or other barrier at the street end. In my judgment, this passageway, although privately owned, was therefore a "street" within the meaning of the Public Health Act 1936.

147. However, the position is not necessarily the same once the outbuildings to which the passageway leads are passed. The land then opens out into a space which at the time of the laying of the water main ran down to the river. The water main ran through this area too. The definition of "street" includes a "court" or "square". This space might well be described as a "court" in popular language. The problem is that it cannot be said that there was any public resort to it. There is no suggestion, for example, that any of the occupiers of premises at numbers 25 and 27 had the right to go down over this space to the river, and no evidence that members of the public did so either. Accordingly, I hold that this part of the Property was not a "street" within the meaning of the legislation in force in 1948.

148. That means that the UDC had power to carry out the works under section 15 (as applied by section 119) in this part of the Property only upon giving reasonable notice to the owners (and any occupiers). No particular form of notice was prescribed. It is clear from the materials before me that the occupiers of the premises were informed by the UDC in early 1947 of their intention to lay the water main underground prior to the work being done, and, indeed, they welcomed it (they may not, of course, have been occupiers of the "court" at the back). It is also clear that there were discussions between the UDC and the owners of the Property, which indeed led to the deed of grant of March 1947. There is also a manuscript file note (undated) which refers to agreements with various persons (including the owners) concerning the laying of the water main underground. The works were done in late 1948. In these circumstances, it cannot possibly be said that the owners did not have reasonable notice of the UDC's intention to do these works.

149. Accordingly, in my judgment the UDC had power in 1948 to enter upon both the passageway beside no 27 *and* the rear court of the Property, and to lay the water main. It then enjoyed statutory power to use and maintain it. If I were wrong about this, and the statutory power did not apply in 1948, then, subject to the question of permission, the acts of laying and using the pipe underground would be "as of right" and therefore potentially prescriptive.

Was the Defendant entitled to use the statutory power in 2005?

150. I turn now to consider what happened in 2005. The issue is whether the service pipe, stop tap and meter were installed in the subsoil of the Property in 2005 in the exercise of statutory powers. The relevant powers are contained in the Water Industry Act 1991. I have set them out above. The power is somewhat similar to and based on that in the 1936 Act, but is drafted more widely, although nothing turns on that. It is clear from the photographs that the relevant works were done, not in the passageway to the side of no 27, but in the open area behind the buildings, which I have referred to as a "court". However, by this time the river had been filled in and there was also access from the new road, Riverside, to the rear of the Property.

151. The evidence which I have seen satisfies me that there were gates installed at the rear of the Property at some time after the river was filled in, in particular, during the 1990s. But I am also satisfied from the series of 'Google Street View' photographs that were handed up to me that from 2009 through to 2017 there were no such gates (there clearly are such gates now). There is no evidence before me as to the point in time when the gates that were there in the 1990s disappeared. On this evidence I am not satisfied that there were any gates in 2005 when these works were done.

152. So far as concerns the exit from the passageway into Potter Street, it is clear on the evidence that there *now* is a locked metal gate across that exit. But the question is, What was the position in 2005? As to that, there is no evidence, although I note that in the defendant's skeleton argument at [46] it is stated that "By 2005, the Defendant accepts that the passageway had been gated at each end." It is not clear to me what that statement is based on. A photograph of the shopfronts of numbers 25 and 27, taken for the purposes of an auction sale in 1969, shows no gate across the passageway at the side of number 27. But that was many years before.

153. On this material I cannot be satisfied that *in 2005* there was a gate, much less a *locked* gate across the passageway at the junction with Potter Street. If there was a locked gate at *neither* end of the Property, with a more or less straight line between the two ends, I cannot doubt that it would have been known to the public that here was a shortcut that they might take from Riverside to Potter Street, or vice versa. Indeed, there is a photograph apparently from the 1990s showing a sign on the back of the holdings on the Property, facing Riverside, saying "NO PUBLIC RIGHT OF WAY". To my mind that rather suggests that members of the public *were* in the habit of using it. Accordingly, on this evidence, I hold that, although it was private land, and there was no public right of way, it nevertheless fulfilled the definition of "street" for the purposes of the 1991 Act, and accordingly the defendant had the power to do the works in question without having to give any notice.

154. If I were wrong about this, and there were locked gates at both ends, so that the public could not have resort to this shortcut, the court at the rear of the Property would not have constituted a "street" within the meaning of the legislation, and it would then have been necessary for the Defendant to give reasonable notice before having the power to do the works. But the works were in fact done. So, if there were gates, and they were in fact locked, as the Claimants submit, the Defendant would have had to give notice in order to have access to do the works. If necessary therefore, I would find that on the balance of probabilities the Defendant gave reasonable notice.

155. The Defendant also argued that, given the lack of evidence as to exactly what happened, the maxim *omnia praesumuntur rite esse acta* applied to this case. It cited the statement of Lindley LJ in *Harris v Knight* (1890) 15 PD 170, 179-80:

> "The maxim, *Omnia praesumuntur rite esse acta*, is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observances proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probably that which was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect."

156. I am not sure that in the circumstances of the present case that maxim adds anything. First of all, the maxim applies only where (1) the intention to do a thing is established, but (2) the evidence is insufficient to show whether or not the requisite formality was observed. Here the intention to do the work is established, but the intention *to give notice* is not established. You cannot pull yourself up by your own bootstraps. Second, where it operates, the maxim operates in the same way as does the standard of proof in civil cases, *ie* on the balance of probability. So in effect the answer would be the same as that which I have already reached.

Summary of conclusions

157. The result of my findings of fact and my decisions on the law is that I hold as follows:

1. The deed of grant of March 1947 created a valid express easement for the Defendant's predecessor in title to lay maintain and use the water main under the Property in accordance with its terms.

2. At the same time, there was also a valid exercise of the statutory rights available to the Defendant's predecessor in title to carry out the same acts.

3. Similarly, the Defendant was entitled under statutory powers to install the supply pipe, stopcock and meter in 2005.

4. If I were wrong about *both* 1 and 2 above, then I would hold that there was a prescriptive easement to the same effect in relation to the water main, taking effect in 1989.

Remedy

158. In light of the conclusions to which I have come above, the question of remedy for trespass does not arise. The details of claim served with the claim form seek a declaration, an order for the removal of the water main and the making good the Claimants' land, damages and interest. However, there is no pleading as to what loss has been suffered, and there was no valuation evidence tendered at trial, for example as to the value of the property with and without any redevelopment. The Claimants' skeleton argument seeks to get over these problems by asking for an order for damages to be assessed. Obviously, given my decision, that does not now arise.

159. However, in case the matter goes further, I will say this. I was not persuaded that the Claimants have suffered any but nominal loss through any trespass that might have been held to have occurred. The only loss even hinted at in evidence related to an inability (not proved by any expert evidence) to redevelop the property, once planning permission was obtained. Of course, the Claimants do not currently have planning permission for the land, but even if they had it I was not persuaded that the presence of the water main would prevent their taking up that planning permission. Since the running of the water main does not interfere with the letting of the Property as it stands, I cannot see any other basis for the Claimants to show that they have suffered a loss, and that therefore they would be entitled to substantial damages.

Disposal

160. In accordance with the conclusions reached and the reasons given, I dismiss the claim.