IN THE COUNTY COURT AT SHEFFIELD

Case No: F01SE105

The Law Courts
50 West Bar, Sheffield
S3 8PH

Date: 11/03/2022

BEFORE HIS HONOUR JUDGE SADIQ

BETWEEN:

(1) MR GEOFFREY SAVILL

(2) MRS DEBORAH SAVILL

Claimants

-and-

(1) ELKESLEY PARISH COUNCIL

(2) MS KATHLEEN MARY FISH

(3) MS JENNIFER ANN FLEAR

(4) MS SHEILA JOHNSON

(AS TRUSTEES OF THE ELKESLEY MEMORIAL HALL CHARITY)

Defendants

THOMAS ROTHWELL (Instructed by Irwin Mitchell LLP) appeared on behalf of the Claimant

CHRISTOPHER MOSS (Instructed by Jones & Co Solicitors) appeared on behalf of the Defendant

Hearing dates: 10-11 February 2022

APPROVED JUDGMENT

His Honour Judge Sadiq:

Introduction

1. The Claimants, who are the freehold owners of 1 Yew Tree Road, Elkesley, Retford, Nottinghamshire, DN22 8AY, claim a prescriptive right of way over neighbouring land forming part of Elkesley Memorial Hall. They seek a declaration regarding the existence of their rights and injunctive relief to remove a fence panel which obstructs their right of way and to prevent any further interference.

2. Elkesley Memorial Hall consists of the local village hall ("the Hall") and open land surrounding it ("the Hall Land"). It is held by the First Defendant as custodian trustee on behalf of the Elkesley Memorial Hall Charity ("the Charity"). The Second, Third and Fourth Defendants are the managing trustees of the Charity with full legal responsibility for the management of both the Hall and the Hall Land as if it were vested in them. The Second Defendant died in January 2021 and the claim proceeds against the remaining trustees, who were joined to these proceedings as it is they who are responsible for the alleged interference with the Claimant's enjoyment of their right of way. Although the First Defendant is technically the legal owner of the Hall, it has no right of management over it. Accordingly, the claim against the First Defendant was stayed by consent on 24 September 2020. In this judgment, for convenience, the Second, Third and Fourth Defendants will be referred to as "the Defendants".

The pleadings and issues

3. The Claimants' pleaded case in the Particulars of Claim is that at all material times since their acquisition of 1 Yew Tree Road, for more than 40 years prior to these proceedings, the Claimants have accessed by foot from their home on the Claimants' land via the south-western corner and along the boundary edge that runs along the western edge of the Hall Land (as it borders Maple Drive), continuing thereafter to the main entrance to the Hall and onto the playing fields as needed. Accordingly, it is pleaded that they have acquired a prescriptive right of way over the Hall Land under s2 of the Prescription Act 1832 either under (a) a "qualified" 20-year basis of enjoyment, or (b) an "absolute" 40-year basis. Alternatively, it is pleaded that the Claimants have acquired a prescriptive right under the doctrine of lost modern grant since they have exercised the right claimed for a period of at least 20 years.

4. In the Defence, the Defendants put the Claimants to strict proof of continuous use for the applicable prescriptive periods. Further, they claim that the Claimants have not made out the legal requirements for a valid claim to a prescriptive easement because the use of the Hall Land was at all material times permissive, such permission having been orally given by Mr Wagstaff (now deceased) in his capacity as managing trustee of the Charity. The Defence does not dispute the extent of and/or the precise route of the right of way taken by the Claimants. At paragraph 6 of the Defence, it is admitted the route taken by the Claimants in exercising the right of way alleged in the Particulars of Claim has been via the south-western corner of the Claimant's land.

5. The parties agreed the following list of issues:

(1) Have the Claimants acquired a legally enforceable right of way by prescription (whether on the basis of s2 of the Prescription Act 1832 or the doctrine of lost modern grant) enabling them to pass and re-pass through the gate in the south-west corner of the garden at 1 Yew Tree Road, Elkesley, Retford, Nottinghamshire, DN22 8AY, and over neighbouring land forming part of Elkesley Memorial Hall ("the Hall Land") in order to access:

(i) Elkesley Memorial Hall itself ("the Hall");

(ii) The playing fields beyond the Hall.

(2) In particular:

(a) Were the Claimants given permission by the Elkesley Memorial Hall Charity or its agents to use the alleged rights of way?

(b) Alternatively, was the Claimants' use of the alleged right of way pursuant to a tacit understanding with the Charity that the user was permissive?

(c) Did Geoff Wagstaff grant the Claimants permission to use the alleged right of way on behalf of the Elkesley Memorial Charity?

(3) If the answer to (1) is in the affirmative, should an injunction be granted requiring the Defendants to remove the fence panel which they have placed behind the gate in the Claimants' garden. Should ancillary injunctive relief be granted to prevent further interference with the rights of way claimed?

6. At the start of the hearing, Mr Moss, Counsel for the Defendants suggested that a site visit would be helpful. I explained that a site visit could not take place without a risk assessment conducted by court staff. I also highlighted the fact that the Defence did not dispute the extent of and/or the precise route of the right of way taken by the Claimants. Therefore, the options were (a) both parties agreed to proceed without a site visit by me, or (b) I would consider an application for an adjournment of the hearing to enable a risk assessment to take place. Following a short adjournment, both parties agreed to proceed with the hearing without a site visit, and that I should determine the case on the evidence before me.

Background

7. The following background is uncontroversial, save where I indicate to the contrary.

8. The Claimants are the unregistered freehold proprietors of 1 Yew Tree Road, Elkesley, Retford, Nottinghamshire, DN22 8AY, which they acquired from Mr Brian Hibbert by conveyance dated 14 October 1977. 1 Yew Tree Road was a new build when the Claimants acquired it and it has been the Claimants' home ever since.

9. When the Claimants purchased 1 Yew Tree Road, the southern boundary of their property abutted the Hall Land. However, there were no boundary features. Therefore, the Claimants installed a boundary fence to demarcate the land which they had recently purchased. In or around 1978, the Claimants replaced the boundary fence with leylandii trees. The Claimants were unable to complete the original fencing at the south-western

corner of their land because there was a brick wall there marking the boundary with another property, 1 Maple Drive, which belonged to Mr Geoff Wagstaff (now deceased). At the time, the Claimants believed that Mr Wagstaff was the chair of the Charity. In fact, it is now clear that he was not. Recent disclosure by the Defendants of the minutes of the Memorial Hall meetings from 1977 to 1978 confirm that the chair of the Charity was in fact Mr D Gurney. Mr Wagstaff was elected to the Charity Committee on 27 September 1977. Therefore, at the time the Claimants purchased the property in October 1977, Mr Wagstaff was a member of the Charity Committee. Following a discussion with Mr Wagstaff, it was agreed that the Claimants would leave a small gap in the fence. This enabled the Claimants and Mr Wagstaff to pass through the gap and over the Hall Land in order to access both the Hall and the playing fields beyond.

10. By a further conveyance dated 16 August 2002, the Claimants acquired part of the Hall Land adjoining 1 Yew Tree Road in order to enlarge their garden ("the Additional Land") from the First Defendant. The Additional Land was registered in the Claimants' joint names at HM Land Registry. The Additional Land lies immediately to the south of the Claimants' land. The boundary between the Hall Land and 1 Yew Tree Road therefore ran along the southern edge of the Additional Land as shown on the plan at [66]. The Claimants erected a new fence along the southern boundary between the Additional Land and the Hall Land. Because of the mature leylandii trees which had by then been planted along the length of Maple Drive, it was again impossible for the Claimants to build their fence all the way up to the south-western corner of their land. As a result, the Claimants installed a gate (which was kept locked from the Claimants' side of the fence when not in use) to enable continued access from the Claimants' land over and along the Hall Land as before.

11. I accept the unchallenged evidence of the Claimants that at all material times since their acquisition of 1 Yew Tree Road, that is for more than forty years prior to these proceedings, it has been the Claimants' practice to pass on foot through the gate in the south-west corner of their garden and then over the western part of the Hall Land in order to access both the Hall and the playing fields beyond it, whenever it was convenient for them to do so. This was done primarily for the purpose of walking their family dogs, but also for social and recreational purposes, cutting the grass around the Hall, helping to carry out repairs to the Hall, included various plumbing issues, a leaking roof and clearing drains and for maintaining the boules court at the Hall.

12. On 7 September 2018, the Defendants installed a fence panel behind the Claimants' gate, which has prevented the Claimants from accessing the Hall Land via the route which they have used for over forty years. On 4 September 2019, the Claimants issued this claim in order to continue to exercise their rights.

<u>The Evidence</u>

13. I heard evidence from the Claimants and the Fourth Defendant who gave evidence on behalf of all the trustee Defendants.

14. I do not intend to set out all of the oral evidence since it is not necessary to do so.

15. The Second Claimant outlined the route the Claimants had taken through their gate and onto the Hall Land and the playing fields beyond by reference to the plan at [66]. She confirmed on the plan that the Claimants' Additional Land was represented by a red striped

rectangular area towards the south of their property. The Second Claimant drew a small circle representing the gap in the north-western corner of the Claimants' property and the Additional Land. She also drew a small circle representing the gate in the south-western corner of the Additional Land. Mr Wagstaff's property was identified as being on the left-hand side of the Claimants' Additional Land. The Second Claimant wrote a handwritten route on the plan at [66] describing the route the Claimants had taken. The first route was from the gate at the south-western corner of the Additional Land across the Hall Land to the front of the Hall, which was a grassy area. She confirmed that the Claimants did not deviate from this route. The second route was from the gate at the south-western corner of the Additional Land in a southerly direction to the playing fields. She confirmed that the Claimants did not deviate from this route. The Second Claimant's evidence regarding the route taken was not challenged.

16. The Second Claimant confirmed that the gap had been left at the suggestion of Mr Wagstaff. The Claimants had thought he was the Chair of the Charity Committee at the time the gap had been created. However, they had recently found out from the Defendant's recent disclosure of the minutes of the Charity Committee for 1977-1978 that Mr Gurney was in fact the Chair, not Mr Wagstaff. The Claimants had not had any conversations with Mr Gurney regarding the gap. The Second Claimant had been the Treasurer of the Charity Committee and had attended two to three meetings per year regarding the running of the Hall. She said that Committee members could not decide things by themselves and it was up to the whole Committee to decide. Regarding the recording made by Defendants on 31 January 2019 of the meeting between the Claimants and the Defendants, she was unaware that the meeting was being recorded. The purpose of the meeting was to try to reach an agreement regarding the legal dispute in order to save costs. The Claimants had never been given a reasonable reason for the Defendant shutting up the gap.

17. In cross-examination, the Second Claimant said that in 1977 she believed that Mr Wagstaff was Chair of the Parish Council. She accepted that there was an alternative route of access to the playing fields from the high street which went down a track to the playing fields which did not involve going over Hall Land. The Claimants' property had a boundary adjacent to the track. The Claimants had explored putting a gateway there onto the track, which had not been pursued.

18. The discussion in 1977 about the gap had been between the First Claimant and Mr Wagstaff. The gap had enabled the Claimants and Mr Wagstaff to access the Hall Land. Mr Wagstaff had to go through the Claimants' property and then through the gap to access the Hall Land and the Claimants allowed him to do this. There were no discussions with the Charity about access and permission. The right of way had been used by the Claimants, along with Mr Wagstaff and other members of the Charity Committee. It had also occasionally been used by children who went through the gap to access the Hall and then to go onto the playing fields. The Claimants had reminded the children it was private land and not public access. There was no discussion with the Charity about who was going through the gap and the Charity had not given the Claimants permission. It had never been discussed with them. In reply to the question after the discussion with Mr Wagstaff what had given the Claimants the right to us the gap to access Hall Land, the Second Claimant said that she "did not know and nothing gave us the right". She denied that permission had been given to go through the gap to access Hall Land. "It was a gap which gave access. We never thought about permission". She said that the Claimants were walking on land everyone in the village was walking on. She denied that the use from 1977 onwards was

on the basis that the Claimants had been given permission. No one had given them permission and permission had never been discussed. Permission was never mentioned at all until the gap was closed.

19. When the minutes of the 28 March 1989 Committee Meeting were read out to the Second Claimant, she denied that the minutes confirmed that the First Claimant was using the Hall Land and the minutes did not say that the Claimants had been given permission. She confirmed that the Claimants never had permission to use the land.

20. The First Claimant confirmed that in October 1977 both the Claimant and Mr Wagstaff were new to the village. They had a casual, social relationship. At the time he was unaware that Mr Wagstaff had a role in the village Charity. The First Claimant had put a fence on the southern side to butt up to Mr Wagstaff's boundary wall. This had left a gap to squeeze through. There was a conversation with Mr Wagstaff about the creation of the gap. It had been a neighbourly conversation.

21. Regarding the minutes of the 28 March 1989 Committee Meeting and the reference to "Mr Byard to have a word with Mr Savill", the First Claimant confirmed that Mr Byard did not have words with him.

22. In cross-examination, the First Claimant confirmed that the Claimants had moved to the property in 1977 and a conversation had taken place with Mr Wagstaff after their move as neighbours. At the time he thought that Mr Wagstaff was the chair of the Parish Council and chair of the Charity Hall. This was not based on any conversation he had had with Mr Wagstaff. He had formed this view from conversations with others in the village. Initially, the First Claimant said that there had been no conversation with Mr Wagstaff regarding the gap. The Defendants' recording of the 31 January 2019 meeting between the Claimant's and the trustees was then played. The transcript of the recording stated that the First Claimant had said "..now Geoff said to me well why don't you leave that little gap there so that we could freely use his access down to the hall…". The First Claimant confirmed that that part of the transcript which states "..now Geoff said to me well why don't you leave that little gap there…" was accurate and that Mr Wagstaff had said this. The gap was for Mr Wagstaff to use in order to get to the Hall. The Claimants had used the gap too. The First Claimant said that he could not discern from the recording whether it was "we" or "he". At the time, it was more accessible for Mr Wagstaff, rather than for him. He said that the gap had been used by other members of the committee and by members of the public, including children. Mr Wagstaff had been allowed access through the gap because he was the Claimants' neighbour. The First Claimant denied that the Charity had allowed the Claimants to access the gap onto Hall Land. He said that everyone in the village could use the Hall Land and that this had led the Claimants to believe that they could use it too. He denied that Mr Wagstaff as chair of the Hall and/or Council had given permission for the Claimants to go through the gap onto Hall Land.

23. The First Claimant said that the Claimants had used the access for a variety of activities in relation to the Hall including cutting grass around the Hall. There had been no discussions with the Committee Members in order to do this. The Claimants had also used the access to the Hall to help carry out repairs to the Hall when, for example, the Hall was frozen in 2010. There was no invitation to do this by the Committee Members of the Hall. The First Claimant's wife had been a trustee of the Charity. Regarding access to maintain the boules court, there was no invitation from the Committee Members either.

24. In re-examination, the First Claimant confirmed that the first time he was aware of any suggestion that Mr Wagstaff had given the Claimants permission was in 2018 when the present trustees had closed the access. Around the same time they had erected the fence. The 8 March 2019 letter from the Elkesley Memorial Hall to the Claimant's solicitors was the first time it had been confirmed in writing that the Claimants had used the access by invitation of the then chairman of the trustees and the Parish Council and that they had been given permission.

25. The Fourth Defendant confirmed in cross-examination that she had no knowledge of the events in the 1970s since she had not been living in the village at that time. She did not know who was chair in 1977 but she now accepts that Mr Wagstaff was not chair of the Charity in 1977 and that her statement saying he was, was incorrect. The 1977 minutes confirmed that he was not. Paragraph 17 of the voting section of the Constitution of the Charity was put to the Fourth Defendant, which states that all matters regarding charity business should be dealt with by way of a majority vote. The Fourth Defendant accepted that individual committee members could not go off on their own and make decisions on behalf of the Charity Committee. If Mr Wagstaff had given permission on behalf of the Charity for the Claimants to access the right of way, the Fourth Defendant would not have necessarily expected the Charity Committee to have been informed. She accepted that there was no note before 1989 showing that this matter had been discussed by the Charity. The Fourth Defendant also accepted that there was nothing in the 1977 minutes where this matter had been discussed. She had expected the Charity Committee in 1977 to follow the same rules as she did.

26. The 28 March 1989 Committee Meeting minutes were put to the Fourth Defendant. She said that the real issue was that members of the public were approaching the Hall, not whether the Claimants or Mr Wagstaff had been given permission. She accepted that there was nothing in these minutes about the Charity giving permission. The last few words of the minutes referred to "access to the hall." This was about access to the Hall, and not the playing fields. The minutes also referred to a Mr Byard having words with Mr Savill. She had looked for a follow up note to see if this had happened and she had found nothing in the charity minutes about this. She accepted it probably did not happen.

28. Regarding the recording of the 31 January 2019 meeting, the meeting was trying to come to some kind of accommodation outside of the court process. The Claimants had made offers to compromise, for example taking a licence for life. The purpose of the meeting was to settle the claim. The Fourth Defendant accepted that the meeting had been recorded without the Claimant's consent and knowledge. She alleged that the recording had been done without her knowledge as well. She confirmed that the Third Defendant had recorded the meeting. It was only after the meeting had been closed that the Fourth Defendant became aware that the meeting had been recorded. She suggested that the secret recording was justified because of the 'concession' made by the First Claimant at the meeting. The Fourth Defendant confirmed that she had prepared the transcript of the 31 January 2019 meeting. The recording was played again in court. The Fourth Defendant denied that the transcript was wrong when it said "so that we could freely use..". She accepted that if in fact it was "he" that had been said then this changed the transcript's meaning entirely. The transcript referred to access down to the hall, and not the playing fields which belonged to the Parish Council and not the Charity.

29. In response to my question about when she first become aware that permission had been granted to the Claimants, the Fourth Defendant said it was when the First Claimant had told her at the meeting on 31 January 2019. That is when she had started her research. She had Googled on her computer and found "prescriptive footpaths". There had been children playing inside the Hall and there had been disruption to psychic meetings in the Hall. This had resulted in the Charity objecting to the Claimants' continued use of the access. The psychics and the children's parents used the Hall once a week. There had been no written complaints from them, but there had been verbal complaints.

The Law

30. Section 2 of the Prescription Act 1832 ("the 1832 Act") provides as follows:

> "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, or being parcel of the duchy of Lancaster or the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter is herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

31. Accordingly, there are two ways a claimant can acquire a prescriptive right under section 2 of the Prescription Act 1832: (i) 20 years or more use "as of right" which means the use must be *nec vi, nec clam, nec precario* (without force, without secrecy, without permission), and (ii) 40 years or more use "as of right" in which case the right shall be deemed "absolute and indefeasible", unless it can be shown that the right was enjoyed by consent given by a deed or in writing.

32. *Megarry & Wade* at [27-048] regarding "User as of right" states as follows:

> **"2. User as of right.** The claimant must show that he has used the right as if he were entitled to it, for otherwise there is no grounds for presuming that he enjoys it under a grant. The phrase "user as of right" is employed not only in the context of prescriptive acquisition of easements and profits, but also by the legislation concerning highways and town or village greens. In *R. (Barkas) v North Yorkshire CC,* one of a number of recent decisions concerning town or village greens, the Supreme Court made the important point that this phrase does not mean "user of right"; its meaning is closer to "user as if of right":
>
> > "[I]f a person uses privately owned land 'of right' or 'by right' the use will have been permitted by the landowner- hence the right is rightful. However, if the

> use of such land is 'as of right', it is without permission of the landowner, and therefore is not 'of right' or 'by right', it is actually carried on as if it were by right- hence 'as of right'. The significance of the little word 'as' is therefore crucial, and renders the expression 'as of right' effectively the antithesis of 'of right' or 'by right'.

From early times English authorities, in defining "user as of right" and followed the tripartite test derived from the Roman law. The user which will support a prescriptive claim must be user *nec vi, nec clam, nec precario* (without force, without secrecy, without permission).

> "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not be reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."

Since the necessary conditions are negative, it is usually the servient owner who alleges that the user was either forcible, secret or permissive. The legal burden of proof in a prescriptive claim rests on the claimant. However once it is once it has been established that the easement claim was used for the necessary period of time openly, and so as to bring home to the owner of the servient land the right is being asserted, it is presumed that the easement had been enjoyed as of right. It is and for the serving owner to rebut that presumption by calling evidence to the fact that the user was either by permission or contentious (*precario* or *vi*).

33. Whether the use is based on use for a period of 20 years or a 40-year period, the user must have been exercised "without interruption" in the period. Under s4 of the 1832 Act, the exercise of the right claimed will not be taken to have been "interrupted" unless the claimant has acquiesced in the interruption for a year or more. In this case, the interruption was on 7 September 2018 and proceedings were issued on 4 September 2019, within the limitation period of 12 months. No issue is taken by the Defendants regarding the limitation point.

34. Regarding the absolute right under the second limb of section 2 the 1832 Act, the use must be "as of right", which necessarily means the use must have been without permission (*nec precario*). However, the words of the Act expressly state that if 40 years use can be shown, an oral permission cannot be used to defeat the right; only permission given by deed or in writing will suffice. The courts have resolved this inconsistency by holding that, if oral permission was given prior to the commencement of the 40-year prescriptive period, this will <u>not</u> prevent a prescriptive easement arising based on 40 years' use. However, if that consent is renewed throughout the period, the user will not have been "as of right" throughout the period and therefore no prescriptive rights will arise: see *Gardner v Hodgson's Kingston Brewery Ltd* [1901] 2 Ch 198 at 215. That was a case in which there was no easement by prescription where the right of way was used for at least 70 years, 15 shillings being paid annually for the user. Payment was evidence of the servient owner's consent. *Gardner* was followed by the Court of Appeal in *Jones v Price* [1992] 64 P&CR 404 at 407:

"That matter was considered in *Healey v Hawkins*. In that case Goff J (as he then was) said:

> Of course, when the user has continued for 40 or 60 years a prior parole consent affords no answer, because it is excluded by the express terms of section 2 of the Prescription Act, but, even so, permission given during that the period will defeat the claimant because it negatives user as of right. That is, in my judgment, the explanation of the distinction drawn by the House of Lords in *Gardner v Hodgson's Kingston Brewery* between antecedent and current parole consents."

35. On the other hand, oral permission given prior to the user would defeat a claim based on the 20-year period and under the doctrine of modern grant because under both these doctrines it does not matter when permission was given.

36. Further, oral permission given prior to the 40-year period and where that permission continues pursuant to a common tacit understanding that the use was permissive, would also defeat a right arising under the 40-year rule: see again *Jones v Price* [1992] 64 P&CR 404 at 407 where Parker LJ said:

> "Oral permission given within the period will of course negative user as of right or any claim to use as of right, but so also, in my view, will a user which continues on a common understanding that the user is and continues to be permissive. If both parties have such a common understanding it cannot be, in my judgment, that there is an assertion to a claim as of right, nor could any such user bring home to the mind of the alleged servient owner that a claim of right was being asserted. This common understanding had been found by the judge, and there was ample evidence on which he could so find."

37. That was case where the owners of Tybrych Farm had used a track on a neighbouring farm for driving sheep to and from the Black Mountains. Permission to use the track was withdrawn by the neighbouring farm, and the owners of Tybrych Farm claimed a right of way over the track. On the facts, the common tacit understanding that the use was permissive was based on the facts that (i) the user started with permission and continued on the assumption that permission was still in force, and (ii) this was reinforced by the fact that other farmers who could not, because of their locality, have been prescribing for an easement or purporting to use the track as of right, also used the track by permission. At 408, Parker LJ said:

> "As the judge pointed out, the track was used by other farmers who, by reason of the location of their farms, could not have been prescribing for an easement, or purporting to use the track as of right, or claiming to use the track as of right, and there was no difference in character between their use of the track and the use of the track by Tybrych.

38. There is a crucial legal distinction between permission and acquiescence. Acquiescence is "as of right" but permission is not. Therefore, passive toleration of a particular use is not enough. In *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31 at [17] Lord Neuberger said the following about the distinction:

"17. In relation to the acquisition of easements by prescription, the law is correctly stated in *Gale on Easements*, 19th ed (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 of right for acquiescence."

Discussion and conclusion

39. I start with my assessment of the witnesses.

40. I found the First Claimant to be an honest and reliable witness. He conceded that a conversation had taken place with Mr Wagstaff in 1977 and I find that he was doing his best to recall precisely what was said in a casual conversation over 40 years ago. I accept his evidence regarding the contents of that conversation which is consistent with what he said at the meeting on 31 January 2019 between the Claimants and the trustees of the Charity. Mr Wagstaff had said "Why not leave the gap there?" and there was no discussion about permission.

41. As regards the Second Claimant, I found her to be an honest and reliable witness. She properly conceded that the conversation about the gap and access to Hall Land had been between Mr Wagstaff and her husband, the First Claimant. I do not accept the Second Claimant was "working from a script" in her replies in cross-examination. She was giving honest evidence. I also accept the Second Claimant's evidence that permission was not given.

42. The Fourth Defendant's evidence was of limited assistance in determining the issues in dispute. She was not in the village at the time of the conversation in 1977. The Fourth Defendant was only aware of permission being given following the meeting with the Claimants in January 2019. She was unaware permission had been given before. That points away from the suggestion that permission had been given since 1977. Further, I find that the Fourth Defendant transcribed the conversation on the 31 January 2019 incorrectly – see below. Her reasons for the trustees objecting to the Claimant's use of the Hall Land in January 2019, namely children playing inside the Hall and the disruption to psychic meetings there, were unconvincing. Plainly, it was not acceptable to have recorded the January 2019 meeting without the Claimant's consent. She suggested that it was justified because of the apparent concession made by the First Claimant.

43. Much was made by Mr Moss, Counsel for the Defendants, in his closing submissions about the lack of a clear route regarding the Claimant's right of way. However, no point had been raised in the Defence regarding the extent and precise route of the right of way claimed. In fact, at paragraph 6 of the Defence, there was a partial admission. In any event, I am satisfied on the basis of the Second Claimant's unchallenged evidence that a clear route has been proven by virtue of the handwritten route she provided on the map at [66].

44. The main issue in this claim is whether the use over the period was "as of right" which means the use must be *nec vi, nec dam, nec precario* namely without force, without secrecy and without permission. There is no challenge to the period of use or regarding the limitation period.

45. The Defendants have put forward no direct evidence regarding the discussions that took place between the Claimants and Mr Wagstaff in 1977, more than 40 years ago. The best evidence is from the First Claimant who was present at those discussions. He accepted that a conversation did take place between him and Mr Wagstaff regarding the gap created to access the Hall Land. I accept the First Claimant's evidence that the conversation was limited to Mr Wagstaff saying "Why not leave the gap there?" and there was no discussions about permission. This conversation was of benefit to Mr Wagstaff and the Claimants and was consistent with a neighbourly discussion between the parties, both having recently arrived in the village. I also find that here was no positive act of permission in the active sense. There was passive toleration or acquiescence by the Charity, which does not amount to permission.

46. I accept the Second Claimant's evidence that in allowing Mr Wagstaff to go over the Claimant's property to access the Hall Land "that's what neighbours did" and that there was no discussion regarding permission. She also said, which I accept, that she did not know what right the Claimants had to go on to the Hall Land and that "the land was just there". That was a reasonable and honest reply to the question. The Claimants had no legal right to use the land. They used it because it was convenient to them. That is the nature of a prescriptive right. Both Claimants said, and I accept, that it was not in their minds that they were permitted to use the Hall Land.

47. Mr Wagstaff was not in fact chair of the Charity; the chair was Mr D Gurney. Mr Wagstaff was elected to the Charity Committee on 27 September 1977. Under the Charity's Constitution, Mr Wagstaff had no authority to grant permission on behalf of the Charity to the Claimants to access the Hall Land. Had permission being given on such an important matter which was binding on the Charity, I would have expected this to have been relayed to the Charity Committee in 1977 or 1978, but it was not.

48. The minutes of the Charity meeting on 28 March 1989 do not assist the Defendants. The relevant passage of the minutes read as follows:

> "Mr Wagstaff told the committee people were approaching the hall from his path and Mr Saville's. Mr Byard to have a word with Mr Saville, Yew Tree Road about his fence, and the pathway along the grass made by people using this as an access to the hall."

49. The Fourth Defendant agreed in cross-examination that the passage referred to people using the pathway, namely members of the public, and not specifically the Claimants. She also accepted but it made no reference to permission and only referred to the hall, not the playing fields.

50. As regards the recording of the meeting on 31 January 2019 between the Claimants and the trustees of the Charity, the Fourth Defendant confirmed that she had prepared the transcript of that meeting which appears at [107] of the bundle. The transcript suggests that in the course of the conversation, the First Claimant had said:

> "… now Geoff just said to me well why don't you leave that little gap there so that you know we could freely use his access down to the hall, so which there was always only just enough room to get your legs through that's all but all the time he was chair, "can you see that Kath", all the time he was chair he freely used it you see. As we did also." [My underlining].

51. Mr Rothwell, Counsel for the Claimants, suggested in his closing submission that the recording was inadmissible since the conversation related to discussions about the prospects of settlement and therefore was a without prejudice conversation. However, no objection had been raised at the outset of the hearing to me listening to the audio recording of this conversation and the Claimants had encouraged me to listen to it. As a result, Mr Rothwell withdrew his reliance on the inadmissibility point.

52. Having listened to the recording in court several times, I find that the First Claimant actually said "he" not "we". The Fourth Defendant transcribed the conversation incorrectly. That, the Defendants accept, changes the meaning of the conversation since the term "he" in the sentence supports the Claimants' case that Mr Wagstaff was, in effect, acting in his own personal capacity and interests and not in his capacity as an officer of the Charity.

53. That leaves the Defendant's submission that on the basis of the authority of *Jones v Price*, there was a tacit understanding that the user continued to be permissive which, if accepted, would defeat the claim. I reject that submission. First, I find that Mr Wagstaff did not give permission to the Claimants to access the Hall Land. Second, in any event, there is no evidence he was acting on behalf of the Charity or ever informed the Charity of his conversation with the Claimants. I find that he was acting in a personal capacity only. Third, the case of *Jones v Price* is clearly distinguishable on the facts. In that case, the user started with permission and continued on the assumption that permission was still in force, which was reinforced by the fact that other users also used the track by permission. Here, I have found that the user did not start with permission and there is no evidence that other users also used the track by permission.

54. In summary, for the reasons given above, I find:

    (a) Mr Wagstaff did not give permission to the Claimants to use the Hall Land. If he did purport to grant permission, he had no authority to do so.

    (b) The Claimant's use of the Hall Land was not pursuant to a tacit understanding with the Charity that the use was permissive.

    (c) The Claimant's claim succeeds on the basis of the 20 year 'qualified' rule and/or the 40 year 'absolute rule'. The claim also succeeds under the doctrine of modern grant.

Remedy

55. It follows from my judgment, that the Claimants have a legally enforceable right of way over the Hall Land to access the Hall and the playing fields beyond. Therefore, the Defendants have no lawful entitlement to continue to obstruct the Claimant's exercise of their lawful right of way.

56. The Claimant seek a mandatory injunction (i) requiring the Defendants to remove the panel installed behind the Claimant's garden, and (ii) a prohibitory order restraining the Defendants from obstructing or otherwise interfering with the Claimants' right of way in the future. I would have exercised my discretion to grant the mandatory injunction claimed. However, at the end of the Claimant's closing submissions, Mr Moss Counsel for the Defendants suggested that the Defendants were willing to offer undertakings in relation to these matters. It is well established that undertakings are also enforceable if breached in the same manner as an injunction. Mr Rothwell, Counsel for the Claimant, agreed that the matter could be dealt with by way of undertakings, instead of injunctive relief. Therefore, I will leave it to Counsel to draft the necessary undertakings.

Conclusion

57. For all these reasons, the claim succeeds.

58. I invite Counsel to agree an order which reflects my judgment. I will deal with any submissions and any parts which remain in dispute regarding the form of the order, and any other issues including costs, when judgment is handed down.