Neutral Citation Number: [2026] EWCA Civ 1377

Case No: CA-2026-000251

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
His Honour Judge Neil Cadwallader
[2025] UKUT 294 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2026

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LORD JUSTICE MILES

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Between :

THE KINGDOM HALL TRUST	**Appellant**
- and -	
PETER ROBERT DAVIES	**Respondent**

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- -

Andrew Williams and James Andrews-Tipler (instructed by **The Kingdom Hall Trust Legal Department**) for the **Appellant**
Duncan Kynoch (instructed through **Public Access**) for the **Respondent**

Hearing date: 21/10/2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 02/11/2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue raised by this appeal is whether a prescriptive right of way can be acquired under the doctrine of lost modern grant where the land over which the right is claimed has belonged to a charity throughout the period of the use relied on, and there has in fact been no court order or permission from the Charity Commission authorising a grant.

2. Both the First-Tier Tribunal (Judge Paton) and the Upper Tribunal (HHJ Cadwallader) held that it was permissible to presume a grant made at a time when the land did not belong to the charity but predating by some 10 years the beginning of the use relied on to support the claim. The decision of the Upper Tribunal is at [2025] UKUT 294 (LC), [2026] 2 P & CR 1.

The essential facts

3. In a detailed and erudite decision the FTT dealt with a number of issues, many of which are not relevant to this appeal. But the essential facts as found can be summarised as follows.

4. Mr Davies claims to have acquired a right of way (both pedestrian and vehicular) over a car park at the rear of the Telford Kingdom Hall of Jehovah's Witnesses for the benefit of his property at Pleasington, Plough Road, Telford.

5. What became Kingdom Hall and Pleasington were in common freehold ownership until 10 February 1958, when Pleasington was sold off. What became Kingdom Hall was at that time in use as a cinema.

6. On 17 July 1967 the freehold of Kingdom Hall was conveyed to four named trustees of the Telford Oakengates Congregation of Jehovah's Witnesses to be used as a hall of worship and held upon express charitable trusts for the Congregation. On 29 May 1997 Kingdom Hall was transferred to the Kingdom Hall Trust Co (a charitable company limited by guarantee) as custodian trustee for the Congregation. Following a merger in 2020 the Kingdom Hall Trust Co has been the sole legal owner of Kingdom Hall. Accordingly, since 17 July 1967 Kingdom Hall has been held on charitable trusts.

7. The FTT found that Mr Davies and his predecessors in title had used the claimed way openly and as of right between 24 August 1977 and 11 February 2021; but rejected the claim to earlier use.

8. Section 29 of the Charities Act 1960 (in force for most of the period) prohibited the disposal of land forming part of the permanent endowment of a charity, or occupied for the purposes of the charity, without an order of the court or the consent of the Charity Commissioners. It is (now) common ground that the grant of an easement, whether actual or fictional, would be caught by that section. These restrictions were modified by the Charities Act 1992. On the one hand they extended to all land held by a charity; but on the other they permitted certain dispositions without the need for a court order or consent of the Charity Commission where the charity trustees had taken advice from

a chartered surveyor, advertised the proposed disposition and satisfied themselves that the disposition was in the best interest of the charity. They are now to be found in the Charities Act 2011 (as amended by the Charities Act 2022). The precise details do not matter.

9. The FTT accepted at [118] that after 17 July 1967 (when the land became charity land) there was no competent grantor. The UT restated and upheld that conclusion at [28]. It was not argued before either tribunal that there should be presumed to have been a lost court order or a lost consent of the Charity Commissioners, which would have validated any presumed grant by the charity. Nor is that argued on this appeal. It is common ground, therefore, that throughout the period of the proven use, there was no competent grantor. That is the assumption on which we have approached this appeal. But the FTT held that it was entitled to presume the existence of a lost modern grant made at some time between 1958 (when the two properties ceased to be in common ownership) and 1967 (when they were acquired for charitable purposes). That was a period some 10 years before the use of the way began. That decision was upheld in an impressive decision of the Upper Tribunal.

The Upper Tribunal's decision

10. There were two issues before the UT. The relevant one for our purposes was labelled "the Date Point". The Date Point was whether private rights can be acquired by prescription against land held by a charity by presuming a fictional grant that pre-dates the land's becoming charity land; and also predates by some 10 years the commencement of the use relied on.

11. The judge first held that acquiescence by a charity in use of a way as of right was capable of founding a claim to have acquired that right by prescription. What was relevant for that purpose was acquiescence in the use, not acquiescence in a grant. But that use could not give rise to the acquisition of a prescriptive right unless there were a competent grantor.

12. In considering whether there was a competent grantor, the judge held that he was not confined to considering the period during which the use took place. Having reviewed a large number of cases, the judge concluded at [63]:

> "On the case law, therefore, there is in the view of this Tribunal nothing to support the idea that the grant can only be presumed to have been made on the date at the commencement of the relevant user, so that if at that date the supposed grantor lacks capacity, a grant cannot be presumed."

13. He then considered a number of textbooks. At [72] he summarised his ultimate conclusion:

> "Once the distinction is clearly made between the "competent grantor" rule on the one hand, and the "user against the fee simple" rule on the other, there is no reason to suppose that the presumed grant need take place at any particular time (and in particular it need not take place immediately before the commencement of the relevant user), save that it must be since

> 1189 (or it would not be lost modern grant), and before the commencement of the minimum period of prescriptive user relied upon (or it could not justify that user); and it must be possible to identify a time within that period at which such a grant could have been made by a capable grantor (or it does not produce a lawful origin for the user); and the user relied upon must be user as of right by and against the fee simple for the appropriate period. But the user relied upon need not be user against a competent grantor."

14. It is the last sentence of the quoted passage which is at the heart of this appeal. The principal authority which led the judge to that conclusion was the decision of this court in *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, which Mr Kynoch correctly described as the anchor for the decisions of both tribunals. I will return to that decision in due course.

Why do we have prescription?

15. As Lord Hoffmann explained in *R (Sunningwell Parish Council) v Oxfordshire County Council* [2000] 1 AC 335, 349:

> "Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment."

16. Previous distinguished judges have said much the same thing, at least in relation to English law. Thus, in *Phillips v Halliday* [1891] AC 228, 231 Lord Herschell said:

> "Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title."

17. In advising the House of Lords in *Dalton v Angus* (1881) 6 App Cas 740, 773 Fry J said (in a passage to which Lord Hoffmann referred with approval in *Sunningwell*):

> "… in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.
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> …
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> … I cannot imagine any case of acquiescence in which there is not shewn 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, both from reason, from maxim, and from the cases.
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> As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb."

The appeal

18. Mr Williams and Mr Andrews-Tipler advanced two submissions. The first (which they called the broad view) is that use against a servient owner who lacks capacity to grant the claimed easement can never found the presumption of a lost grant. Since the Appellant lacked such capacity (in the absence of an order of the court or the consent of the Charity Commission) during the whole period of use relied on, it is functionally immune from prescription. However, in the course of his oral submissions, as I understood him, Mr Williams explained that the broad view meant that any period of use as of right against an incompetent grantor simply dropped out of the picture. Thus, if there had been say, five years' use as of right against a competent grantor, followed by, say fifteen years' use against an incompetent grantor, only the five years' use counted towards the prescription period.

19. The second (which they called the narrow view) is that the use and the presumption of a lost grant are so intertwined that the date of the presumed grant cannot be earlier than the beginning of the period in which the use took place. The proven use began at a time when the land was held on charitable trusts, with the consequence that no grant could be presumed.

20. Mr Kynoch supported the decisions and reasoning of the tribunals.

Limited interests in land

21. In many of the early cases the lack of capacity in question was the limited nature of the interest in land that the putative servient owner held. In *Daniel v North* (1809) 11 East 372 Daniel owned a house in Stockport. He installed windows in 1787. At that time the building opposite was a low bake-house tenanted by Ashgrove. Daniel's windows received light for over 20 years. Ashgrove's tenancy came to an end in 1806 or thereabouts and the freeholder relet the building to North. Some three years before the action North erected a new building which obstructed Daniel's light. The Court of King's Bench held that no easement had been established. Lord Ellenborough CJ said at 374:

> "The foundation of presuming a grant against any party is, that *the exercise of the adverse right on which such presumption is*

> *founded was against the party capable of making the grant*; and that cannot be presumed against him unless there were some probable means of his knowing what was done against him." (Emphasis added)

22. This statement of principle states that the exercise of the adverse right must be against a person capable of making the grant. It is not, on its face, confined to interests in land less than the freehold.

23. In *Barker v Richardson* (1821) 4 B & Ald 579 Barker owned a house in Norwich which had windows over the adjoining land. They had existed for more than 20 years. The adjoining land had been glebe land but within the last six years it had been conveyed by the rector (who had only the powers of a tenant for life) with the necessary consents to Richardson. Richardson erected a building on the land which obstructed Barker's light. One of the arguments advanced on Barker's behalf was that it could fairly be presumed that the house had been built before the land had been granted to the church. That argument was rejected. Abbott CJ (who in his subsequent incarnation as Lord Tenterden promoted the Prescription Act 1832) held that no easement had been established. It is worth quoting a substantial part of his judgment at 581:

> "The only point reserved for the opinion of this Court is, in effect, whether a licence, if presumed, would be valid in law. There was no evidence, at the trial, from which the jury might presume that this was an ancient house, or built on the site of an ancient house, or that the window was there before the adjoining land had been granted to the church, nor was that point ever made. Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold."

24. Although easements of light have their own peculiarities, it is in my view significant that Abbott CJ concentrated on the date when the windows were installed. If the necessary lost grant could have predated the receipt of light through the window (which was the use on which the claimed easement was founded), it could also have predated the grant of the land to the church.

25. As Parke B put it in *Bright v Walker* (1834) 1 Cr M & R 211:

> "During the period of a tenancy for life, the exercise of an easement will not affect the fee: in order to do that, there must be that period of enjoyment against an owner of the fee."

26. In *Roberts v James* (1903) 89 LT 282 James claimed to be entitled to a prescriptive right of way. The trial judge found (or assumed) that James had established 20 years' use. The land over which the claimed way ran had been held under strict settlements since 1810. The question argued on appeal to this court was whether the right of way

could be established under the doctrine of lost modern grant. Having referred to the trial judge's factual conclusion Williams LJ said at 286 (with emphasis added):

> "[Counsel for the Appellant] is entitled to say that the learned judge does find that there was such user as would have raised a presumption of a lost grant if it had not been for the fact that the state of the title under the settlement was such that *no one during the whole period of user* was in such a position as that his acquiescence would make the user lawful."

27. He added:

> "I think that the conclusion of Walton J is absolutely untouched – namely that *during the whole of the period of user* there was no one whose acquiescence would make the user lawful."

28. It is clear that what was important was the state of the title during the period of use. There was no suggestion that a grant could have been inferred at a date preceding the beginning of the use and before the land became held under the settlement. Moreover, it is also plain that, as tenant for life, the putative servient owner could have put an end to the use by a simple action in trespass.

29. These are all cases in which the only proven use was use which began during a time at which there was no competent grantor. Although in *Barker* there was eventually a competent grantor, the proven period of use against him was too short to found a claim to an easement.

30. In *Pugh v Savage* [1970] 2 QB 373, however, this court distinguished the position where the use in question had begun against a competent grantor. In that case use of a way had begun in 1932 and continued until 1963. But in 1940 the freeholder granted what was described as a "rather nebulous" tenancy of the land over which the way ran. This court held that the grant of that tenancy did not prevent the acquisition of an easement. Following the earlier decision in *Cross v Lewis* (1824) 2 B & C 686, Cross LJ said at 383:

> "That a distinction can properly be drawn between cases where the tenancy was in existence at the beginning of the period of user and cases where the tenancy came into existence in the course of the period of user, is surely only common sense. If a tenancy is in existence at the beginning of a period of user, it may well be unreasonable to imply a lost grant by the owner at the beginning of the user. He might not have been able to stop the user, even if he knew about it. If, on the other hand, you get a period of user against an owner or owners without any evidence that they did not know about it when they were in possession, and then afterwards the grant of a tenancy, though undoubtedly such a tenancy during the period of user is a matter to be considered, it would be quite wrong to hold that it is a fatal objection to presuming a grant, or to a claim under the Prescription Act, 1832."

31. Again, what Cross LJ was concentrating on was a period of use against a competent grantor at the beginning of the use. The principle stated in *Pugh v Savage* was, to some extent, refined in *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738, [2007] 1 P & CR 27 but not in a way that directly impinges on the issue in this case.

32. These are cases in which the nature of the legal interest held by the putative servient owner gave rise to the lack of a competent grantor. The judge considered that these cases concerned what he described as the "user against the fee simple" rule, rather than the "competent grantor" rule. But the limited nature of the interest held by the person against whom the use had been established was in itself the very reason why he was not a competent grantor. I do not consider that the two rules which the judge identified can be so sharply differentiated. Other cases show that the incompetence may arise from other binding restrictions on the putative servient owner which preclude the presumption of a grant.

Legal restrictions

33. In *Rochdale Canal Co v Radcliffe* (1852) 18 QB 287 the canal company was established by statute with limited powers. Radcliffe established all the ingredients of a valid claim to an easement to draw water from the canal, except that he had been using it for purposes that went beyond the canal company's powers. It was held that the grant of an easement in the terms claimed would have been outside the company's powers (ultra vires) and hence the claim failed. Lord Campbell CJ said at 314:

> "If they had made a grant of the water in the terms of this plea, such a grant would have been ultra vires, and bad; their successors would not have been bound by it; and it could not have been effectually pleaded in bar to the present declaration."

34. Coleridge J said at 314:

> "The foundation of the fourth plea is a supposed grant, the existence of which is to be shewn by acts of user. But, if the acts of user would not be legal, the grant cannot be inferred from them."

35. Erle J said at 314:

> "This is a claim to impose a servitude upon the canal by virtue of a twenty years' user. The party seeking to establish such a claim must shew a grant by a person capable of making the grant relied upon. Now the grant here is by persons having no distinct ownership of the water, but entitled only to the flow of it for the purposes of the navigation, and having no right to the surplus. If it had appeared, by direct evidence, that the company had made a grant to the purport now supposed, setting out their title, that grant would have appeared to be against the right of the public, and void upon the face of it. The twenty years' user, therefore, could establish no right."

36. *Staffordshire and Worcestershire Canal Navigation v Birmingham Canal Navigations* (1866) LR 1 HL 254 was another canal case. Both canals were built under powers conferred by Acts of Parliament. The dispute between the two canal companies related to a proposal by the respondent to construct machinery to pump back water which would affect water flowing to the appellant's canal. The appellant claimed that the proposed works would interfere with an easement vested in it by prescription. Lord Chelmsford LC said at 268:

> "To impose such a servitude upon the water in their canal as that contended for by the Appellants would have been *ultra vires* of the Respondents, and consequently length of user could never confer an indefeasible claim upon the Appellants under the Prescription Act, as no grant of the use of the water could have been lawfully made by the Respondents."

37. Lord Westbury said at 278:

> "But if the Prescription Act had been at all applicable it would be incumbent on the Appellants to prove that the right founded on the claim by user might, at the beginning of, or during that user, have been lawfully granted to them by the Respondents' company. No such proposition can be maintained. Had any grant been made at any time by the Respondents' company of the right, now alleged by the Appellants to have been acquired against them by user, such grant would have been *ultra vires* and void, as amounting to a contract by the Respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy and prudence."

38. I note that Lord Westbury contemplated that a lost grant might have taken place either at the beginning of or during the period of use. In other words, there was no necessity for the fictional grant to have preceded the beginning of the use.

39. In *Neaverson v Peterborough Rural District Council* [1902] 1 Ch 557 a private Act provided for draining, enclosing and improving a fen which was common land. Under the Act the grass growing on various roadways was vested in the surveyor of highways, who had power to let it for the pasturage of "sound and healthy sheep" but with an express prohibition of other animals. Nevertheless, the land was in the event used, for over 60 years, for the pasturage of horses and cattle, despite the fact that this involved a danger of damage to the drainage system. Sir Richard Henn Collins MR said at 563:

> "There is evidence, no doubt, in this case of a long-continued practice of letting the herbage on the road for the pasturage, not of sheep exclusively, but also of a limited number of horses and cattle. The question is whether that ought to be treated as evidence of a lost grant, which might have had a legal origin. If such a grant could not have had a legal origin, then it is not competent for us to presume its existence. On the other hand, if it could have had a legal origin, then we ought to presume the existence of such a grant, when there is evidence of user for such a long period."

40. The difficulty in that case was that the pasturing of animals other than sheep was absolutely prohibited by statute. So, the claim to an easement failed.

41. *Oakley v Boston* [1976] QB 270 concerned a claim to a right of way over land which until 1952 had been glebe land. In that year it ceased to be glebe land. Use of the way was established between 1914 and 1962. After 1962 the use of the way had been of a minor nature. The action was begun in 1973. This court held that the rector (in whom the glebe land was vested) had the power to grant the claimed easement, but only with the consent of the Ecclesiastical Commissioners who were the forerunners of the Church Commissioners. It was submitted that from long use the court could and should presume that the Ecclesiastical Commissioners had given consent which had been lost. But the court held that no such consent had been given, and no such consent could be inferred to have been given such as to allow a lost modern grant to be presumed.

42. Megaw LJ summarised the successful submission as follows at 276:

> "The second, alternative, ground, on which I have come to the conclusion that the plaintiffs' submission is right, so that the appeal should succeed, is that, assuming against the plaintiffs that there is a statutory power to grant an easement in fee simple, that power can only be exercised subject to specified consents or approval and the court cannot properly presume that such consents or approval had been given; yet, without them, any purported grant would be invalid."

43. In accepting that argument, Megaw LJ said at 280:

> "As I understand it, the basis on which the court is entitled to make the presumption of the lost modern grant, in what I may call the normal case where there arises no question of glebe land or complexities such as have arisen in this case, is that the owner of the allegedly servient tenement or a predecessor in title has, with knowledge of acts which would otherwise be acts of trespass, acquiesced in those acts and, therefore, it must be assumed that the owner of the servient tenement or some predecessor in title of his has given his consent in the proper way, namely, by a deed of grant of that easement. Why, however, should the court make that assumption, or how can the court fairly and properly make that assumption, in respect of the Ecclesiastical Commissioners who, by statute, before the deed can be valid, have got to be parties to it? There is no evidence produced of any knowledge on the part of the Ecclesiastical Commissioners of any of the acts in which the incumbent acquiesced. There is, as I see it, no basis on which the court could, judicially, make the assumption that they must have known of those acts or that the incumbent for the time being told them that those acts were taking place and of his attitude thereto."

44. It is, in my view, clear that the factual situation that Megaw LJ was contemplating was one in which the notional grantor (whether the current owner of the servient tenement

or a predecessor of his) both had knowledge of the acts of use relied on and also was competent to make the grant. It is another case in which the limited owner (the incumbent) could have put a stop to the use by an action in trespass. Yet despite the acquiescence of the incumbent, no easement was established. It was on the basis of the decision in that case that it was accepted in the present case that the existence of a lost court order or consent of the Charity Commission could not be presumed, in consequence of which there was no competent grantor during the whole period of proven use.

45. Mr Kynoch argued that *Oakley v Boston* (the correctness of which he did not challenge) was distinguishable, because on the facts of this case there was a "window" between 1958 and 1967 when there was a competent grantor. But since there was no relevant use taking place during that window, I do not consider that *Oakley v Boston* can be distinguished on that basis.

46. In *Housden v Conservators of Wimbledon Common* [2008] EWCA Civ 200, [2008] 1 WLR 1172 this court decided that the Conservators did have statutory power to grant the claimed easement, but went on to consider what the position would have been if they had had no such power. The court held that it was bound by the *Staffordshire* case to hold that if it would have been beyond the statutory powers of the Conservators to grant the claimed easement expressly, no fictional grant could be presumed against them.

Angus & Co v Dalton

47. Both the FTT and the UT based their decision on the judgments of this court in *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528. In turn, this court in *Tehidy Minerals* based their decision on what they considered *Angus v Dalton* decided. So it is necessary to look at *Angus v Dalton.* As the court said in *Tehidy Minerals* at 547:

> "This celebrated case, which in the course of its history enjoyed the attention of no less than 18 judges and members of the House of Lords, perhaps embodies a greater variety of judicial opinion than any other leading case."

48. The case concerned a claim to a right of support enjoyed by one building against another. Both buildings had been erected at the same time and were about 100 years old. The plaintiff's building was in use as a factory. It gained support from the adjoining building. The defendants demolished the adjoining building and dug new cellars, thus withdrawing support from the plaintiff's factory. As a result, the plaintiff's factory collapsed. The issue was whether the plaintiff had established a right of support and, if so, what the nature of that right was. There was no question of an incompetent grantor at any time during which the two buildings stood.

49. I have already quoted the advice given by Fry J to the House of Lords.

50. On its way to the House of Lords the case passed through this court: (1878) 4 QBD 162. Two passages from the judgment of Thesiger LJ need to be quoted. Having referred to the presumption of a lost modern grant, he said at 172:

> "… the presumption cannot be rebutted by mere proof by the owner of the servient tenement, that no grant was in fact made *either at the commencement or during the continuance of the enjoyment*. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to suppose that among the numerous cases in which easements have been held by the courts to have been acquired by uninterrupted user for 20 years only, there must not have been many in which the owner of the servient tenement at the time when the period commenced was alive when the action was tried to contradict, if such evidence had been admissible, the fact of a grant; and if such evidence were admissible, it is almost inconceivable that in the numerous cases, in which questions of easements have been discussed, no trace of an opinion to that effect should be found in the observations of the judges."

51. It is, in my view, clear from this passage that the relevant time for the purposes of the presumption is at the beginning of or during the continuation of the use relied on. In the second passage, he said:

> "These cases, therefore, as direct authorities go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant…"

52. Coupled with the first quoted passage, I consider that what Thesiger LJ was discussing was the legal incompetence of the servient owner during the period of use relied on. Cotton LJ said at 186:

> "The presumption may be rebutted by shewing that the owner of the servient tenement was not capable of making a grant, as for instance, that he was tenant for life, or of unsound mind; and the principal case… where the presumption arising from twenty years' enjoyment was rebutted, is *Barker v. Richardson*, where the owner of the alleged servient tenement was incapable of making a grant. …
>
> An admission, therefore, or evidence, that in fact there was no grant, would not, in my opinion, rebut the presumption, and notwithstanding such evidence or admission, unless there was any other evidence to rebut the presumption (as for instance, evidence that the adjoining owner was incapable of making a grant), the jury ought to be directed to find that there had been a grant which has been lost."

53. In context, I consider that "the adjoining owner" to whom Cotton LJ referred was the servient owner against whom the use had been established.

54. The House of Lords decisively validated the principle of lost modern grant; but none of the speeches in the House of Lords addressed the question of an incompetent grantor during the period in which the use was established. Lord Blackburn made that clear at 827:

> "No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title."

55. Nor did they contemplate a fictional grant before the use relied on (i.e. a fictional grant before the factory was even built). On the facts of course it was the simultaneous erection of both buildings which gave rise to the use relied on; and before their construction there was clearly no qualifying use.

The pleading cases

56. The UT found support for its conclusion in two cases about the extent to which a lost modern grant had to be pleaded. But in my judgment, they provide no support at all. Indeed, if anything, they point against the UT's conclusion.

57. The first of the two is *Palmer v Guadagni* [1906] 2 Ch 494. The defendants in that case claimed a right of way over Nazeing Wood under the doctrine of lost modern grant. The plaintiffs asked for particulars of the grant. In particular they wished to know whether the grant was alleged to have been made before or after the grant of a lease of the land in 1775 or before or after the coming into force of a private Act of Parliament which regulated the use of the land. Swinfen Eady J ordered the particulars to be given. If (as the UT held) proof of twenty years' use justified the presumption of a grant at some time between 1190 and the beginning of the use, the requested particulars would have been entirely useless. The only utility of the requested particulars would have been to try to show that there was no competent grantor during the period of proven use.

58. The same is true of the second case, *Tremayne v English Clays Lovering Pochin & Co Ltd* [1972] 1 WLR 657. The defendant in that case claimed a right to discharge effluent into a river under the doctrine of lost modern grant. The plaintiffs sought particulars of whether the grant was before or after 1609; if after 1609 whether it was before 1814; and if after 1814 whether it was before 1874. The significance of those dates was that they were dates on which Acts of Parliament came into force and which, it was said, might affect any right to discharge effluent. Whitford J ordered the particulars to be given. The reason for his order was that the facts on which the presumption of a grant is based might be different before or after the specified dates. Again, if proof of twenty years use justified the presumption of a grant at some time between 1190 and 1609, the particulars would have been useless. Their only utility could have been to show that during the period of proven use there was no capable grantor.

Tehidy Minerals v Norman

59. The UT regarded *Tehidy Minerals* as formulating "the definitive statement of the doctrine" so it is to that case that I now turn. In *Tehidy Minerals* the owner of a number of farms adjoining a down claimed to be entitled to rights of common over it. The farms and the down had been in common ownership until 19 January 1920. The down had been requisitioned by the government on 6 October 1941. During the requisition the

owners of the surrounding farms grazed cattle on the down by arrangement with the relevant Ministry. On 31 December 1960, the down was derequisitioned, but the association of farmers which had been responsible for the arrangements with the Ministry made an arrangement with the owner of the down for the maintenance of certain fences erected by the Ministry and continued to supervise the exercise of grazing rights. The action for trespass was begun in 1966. A claim under the Prescription Act 1832 could not succeed because there had not been sufficient use "next before action brought". The only possible route was through the doctrine of lost modern grant. The factual basis of the claim was that use for grazing had been established between January 1920 (when the land ceased to be in common ownership) and December 1941 (when the down was requisitioned). As Buckley LJ put it, giving the judgment of the court at 547:

> "The question is whether on the facts of this case enjoyment of this grazing for a period of upwards of 20 years preceding October 6, 1941, permits or requires us to presume that such enjoyment was had by virtue of grants made after January 19, 1920, but before October 6, 1921 (being 20 years before October 6, 1941), and subsequently lost, and whether we ought to act on such a presumption."

60. The window during which the fictional grant was made was within the period for which the use was established. After a lengthy examination of *Angus v Dalton* the court said at 552:

> "In our judgment *Angus v Dalton* … decides that, where there has been upwards of 20 years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might *at some time before* the commencement of the 20-year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made." (Emphasis added)

61. It was the italicised part of that statement that led both the FTT and the UT to conclude that they were entitled to presume a deed of grant before the use actually began. This court's actual decision in *Tehidy Minerals* was that grants of grazing rights must be presumed to have been made between January 1920 and October 1921. That conclusion was, therefore, that the presumed grants took place at the beginning of or during the period in respect of which use for grazing had been established (but before the minimum period required to support the claim). In other words, the fictional grant could have been made after the use began. In addition, the context in which Buckley LJ formulated the principle was one in which *upwards* of 20 years' use as of right had been established. He was not, in my view, saying that once 20 years' use as of right had been established the court had a roving commission to find a time, perhaps decades or even centuries earlier, at which a grant could have been made even though there was no use at that time to which the then owner could have objected or stopped or to which the fictional grant would have attached. Like any judgment, it must be read in the context of the facts upon which the case was decided. A general summary of principle in a

judgment is not a statute, and should not be interpreted as if it were: *Receiver for the Metropolitan Police District v Croydon Corporation* [1957] 2 QB 154. Lord Halsbury LC explained in *Quinn v Leathem* [1901] AC 495:

> "… every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

62. I also note in passing that when quoting *Tehidy Minerals* in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519 at [29] Lord Scott omitted that part of the judgment of Buckley LJ on which both tribunals relied.

63. In my judgment, therefore, that part of the formulation on which both the FTT and the UT relied, if taken literally, was not necessary for the court's decision and was therefore *obiter*. Nor was it a point that arose in *Angus v Dalton* which cannot, therefore, be taken to have "decided" it. In addition, *Roberts v James* was not cited to the court in *Tehidy Minerals*.

Is the obiter dictum correct?

64. Megarry & Wade: The Law of Real Property (10th ed) puts the point at paragraph 27-065 as follows:

> "It is now settled that the presumption cannot be rebutted by evidence that no grant was in fact made.[342] But it is a good defence that during the entire period when the grant could have been made, there was nobody who could lawfully have made it.[343] Thus the court has refused to presume a lost grant of a way where the land had been in strict settlement (under which there was no power to grant in fee simple) from the time when the user began, down to the time of action.[344] When no grant could be made without some authority's consent, the court has refused to presume that consent without evidence of the authority's acquiescence in the user.[345] The court has refused to presume a lost grant which would be contrary to statute[346] or custom.[347] However, although the law in England is now firmly settled to the contrary,[348] there seems nothing in principle that necessarily excludes a lost modern grant by or to a person owning less than a fee simple."

65. Footnote 343 cites *Neaverson* and *Tehidy Minerals*; and footnote 344 cites *Roberts v James*, *Barker v Richardson*, *Rochdale Canal* and *Daniel v North*. But with respect to the learned editors of Megarry & Wade the second sentence of the quoted passage begs the question: what is "the entire period when the grant could have been made"? Because the third sentence begins with "Thus" it seems probable that the editors take the view that the example referred to in that sentence (where there was no competent grantor during the period of use) is an illustration of the principle stated in the second sentence.

66. In *Roberts v James*, as we have seen, the court did not presume a lost grant at a date before the servient land was settled under a strict settlement. Rather the court looked at the facts during the period of proven use. In *Barker v Richardson* Abbott CJ also concentrated on the period of actual use. In *Daniel v North* no consideration was given to the possibility of a lost grant before the servient land was let. That was also the basis on which Pumfrey J approached the question in *Smith v Brudenell-Bruce* [2002] 2 P & CR 4 at [22]. And in *Pugh v Savage* a clear distinction was drawn between a case in which the use started while the freehold was unencumbered and a use that started after it became tenanted.

67. Footnote 345 cites *Oakley v Boston* but accompanies the citation with the annotation "Sed quaere". We have not been asked to consider whether the doubt expressed by the editors of Megarry & Wade is well-founded.

68. I have already mentioned the statement of principle in *Halliday v Phillips*. It is, however, instructive to see how the case was dealt with in this court, before it reached the House of Lords. The right claimed was the right to a pew in the parish church appurtenant to a mansion house. In 1680 the claimant's predecessor in title had built a pew for which he paid the churchwardens 5 shillings. Thereafter, for some 200 years, he and his successors had enjoyed the pew, carried out repairs to it, had a key to it and so on. The churchwardens in fact had no right to grant the right to a pew in the absence of a faculty. The vicar and churchwardens relied on that illegality as a defence to the claimant's claim. That defence failed; and both this court and the House of Lords held that a lost faculty could be presumed. In this court (1883) 23 QBD 48 Lord Esher MR said at 52:

> "But then it is said that if it can be shown that the original possession arose under circumstances which would not support a legal right that is sufficient to negative the claim. I agree that if the case were founded on common law prescription such an objection would be fatal, but the case is different where the claim is based on the presumption of a lost faculty, for it is consistent with the facts that, *after the supposed illegal origin of the right*, the persons interested may have procured that which would give them a good title." (Emphasis added)

69. Bowen LJ said at 56:

> "But it is consistent with the facts in this case that although the churchwardens in the first instance had no right to give the pew away as they did for 5s., *yet the very next day, or the next week, or the next month, the plaintiff's predecessors in title got a faculty which made that valid which was otherwise invalid*. The law in the case of such a lost deed does not seem to me to require that you should go back to the very earliest trace of user and see whether at that earliest moment you can find a complete legal title to the pew, or find acts, which will at all events prevent you from saying that the first act of enjoyment was not invalid." (Emphasis added)

70. Again, this plainly contemplates a grant after the use has begun. Fry LJ said at 56:

> "…the Courts are under an obligation, which has been insisted upon over and over again, wherever they can, to clothe with legal right long continued and undisputed enjoyment; and in my judgment that obligation rests upon the Court although enjoyment may be shewn to have had de facto an invalid or illegal or insufficient origin. I think where there has been long usage, long possession, or long enjoyment, even although there may be an original infirmity in the de facto commencement, the Court is bound to presume, if it can, *that that illegal origin has been altered by something which has occurred in the course of time*." (Emphasis added)

71. The tenor of this passage, too, suggests that what is to be presumed is something that happens after the use has begun. In a lengthy speech in the House of Lords Lord Herschell affirmed the proposition that if the claimed right could have been granted by a faculty, it would be legitimate and proper to presume a faculty. Lord Watson put the point more succinctly at 238:

> "I think the recent and better authorities are clear to the effect that a pew may be annexed to a dwelling-house within the parish either by a faculty or by prescription, which supposes a faculty; and I am satisfied that the possession of the pew in question, which has been had by the respondent and his predecessors in the ownership and occupancy of the mansion, is sufficient both in its character and duration to raise the presumption of a lost faculty."

72. As Hamilton LJ put it in *A-G v Horner (No 2)* [1913] 2 Ch 140:

> "Now, the basis of the presumption is the proved usage. The appellant must take all its essential features and postulate their existence at least at the time of the presumed legal origin. He cannot select those that suit his case and reject the rest. "The question in this case," says Lord Selborne in *Goodman v Saltash Corporation*, "being altogether one as to the true nature, character, and conditions of a prescriptive title, established by evidence of user and enjoyment only, the whole user which has prevailed from time immemorial until now, and not only that part of it which is in favour of the respondents, may be, and ought to be, taken into account." It is from the usage proved that the appellant has to reconstruct the origin of the usage in fact: it is to that usage that he must fit his presumed origin in law."

73. This is, in my judgment, consistent with the explanation of the basis of prescription given by Fry J in *Dalton v Angus*. The effect of the decision of the UT is that a grant is presumed to have been made by the owner of the servient land at a time when there was no activity to which he could have objected; and no activity in which he acquiesced. It is also consistent with the decisions of Kekewich J and this court in *Wheaton v Maple & Co* [1893] 3 Ch 48. That case concerned a claimed right of light to houses built in 1852. The defendants acquired the residue of a 99 year Crown lease which had been granted in 1826. But in 1892 they surrendered it and took a new lease under which they

erected a new building that interfered with the plaintiff's light. The claim to an easement of light under the doctrine of lost modern grant failed. At first instance Kekewich J said at 56:

> "What has happened, if it has happened at all, took place since 1852. Before that *there could not have been a grant, because there were no lights to be protected*. It must date from 1852. There is no reason why one should not, in 1893, presume a grant in 1852, or later than that if the facts allowed it; but here I am dealing with the Crown acting under certain statutes, and through the Commissioners of Woods and Forests, who possess statutory powers; and I cannot regard the Crown for this purpose as an ordinary reversioner, or an ordinary owner of land, competent to do whatever that owner pleases." (Emphasis added)

74. Again, there is a clear link between the date of the fictional grant and the use relied on. On appeal, Lindley LJ said at 62:

> "A grant from the Crown, as distinguished from its tenant, cannot be presumed, for *there has been no enjoyment against the Crown itself*; and without it there is no foundation for such a presumption." (Emphasis added)

75. In *Barton v Church Commissioners for England* [2008] EWHC 3091 (Ch) Morgan J (one of the editors of Gale on Easements) said at [40]:

> "Acquiescence *on the part of the owner capable of making the grant* lies at the root of prescription…. An owner capable of making the grant claimed needs to have, at least, the means of knowledge of the user relied on in support of the grant." (Emphasis added)

76. In other words, the acquiescence and the capacity to grant are intertwined. If there is no use during a period in which there was a capable grantor, the requirements for acquiring a prescriptive easement are not satisfied.

77. This is consistent with the observation of Lord Millett NPJ (sitting in the Hong Kong Court of Final Appeal) in *China Field Ltd v Appeal Tribunal (Buildings)* [2009] 5 HKC 231 at [48]:

> "The presumption cannot be rebutted even by an admission by the claimant that there was no grant. It can be rebutted only by proof that *throughout the period of user relied* on the servient owner was incapable of making the grant…" (Emphasis added)

78. In the present case there had been no enjoyment against the owners of the servient land before it became charitable land, and without such use, there was no foundation for the presumption that any previous owner had made the grant.

79. In my judgment the part of the formulation in *Tehidy Minerals* on which both the FTT and the UT relied was (a) obiter (b) not supported by any previous authority (c)

inconsistent with previous cases, notably *Roberts v James* which was not cited and (d) inconsistent with the principle of acquiescence in use by a competent grantor upon which the doctrine of lost modern grant rests.

80. I would hold, therefore, that the part of the formulation of principle in *Tehidy Minerals*, if taken literally as both the FTT and the UT did, was expressed too widely. On the other hand, if understood as suggested by the Appellant, i.e. as referring to a time when there was use, in accordance with the facts of *Tehidy Minerals*, the dictum is correct.

81. The presumption of a lost modern grant is a retrospective exercise arising out of use as of right as against a competent grantor. Its underlying purpose is not, in my view, to rewrite history but to provide a justification for the continuation of long use as of right. Where such use has been established the court will presume that the use may lawfully continue. If there is no competent grantor during the whole period in which use as of right is established, a fictional grant of the right cannot be presumed.

82. I may also add that this is the view taken by Professor Martin Dixon (one of the editors of Megarry & Wade) in his own text Principles of Land Law (4th ed) at para 7.11.2. In my judgment, he is correct. This is, I think, what was described as the narrow view.

83. To return briefly to the broad view as Mr Williams explained it in oral submissions, I am not convinced that use as of right against an incompetent grantor simply drops out of the picture.

84. Mr Williams relied on the (obiter) statement in the joint judgment of Lords Neuberger and Hodge in *R (Newhaven Port & Properties Ltd) v East Sussex CC* [2015] UKSC 7, [2015] AC 1547 at [79]. Their Lordships said:

> "Similarly, in the English law of private easements (other than access of light) the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition. As prescription is based on the fiction of a grant, a landowner who could not have granted the claimed easement cannot suffer prescription: see *Sunningwell*, per Lord Hoffmann at pp 349G-351C in relation to the common law; *Housden v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172, paras 43 and 76, per Mummery and Carnwath LJJ respectively, in relation to the 1832 Act; *Megarry & Wade op cit* at para 28-065; *Gale on Easements*, 19th ed (2012), paras 4.88-4.91. The Law Commission in its 2011 report, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327) (HC 1067) while advocating the removal of the fiction of grant, recommended (at para 3.168) that the use of land cannot be qualifying use, for the purposes of prescription, at any time when the land is in the freehold ownership of a person or body who is not competent to grant an easement over it."

85. None of the cases or textbooks to which their Lordships referred squarely address the position where use as of right begins against a competent grantor but continues against an incompetent grantor. There does not, to my mind, appear to be any theoretical objection to a presumed grant by the competent grantor at or after the beginning of the

use but at a time before the incompetent grantor arrived on the scene. That would be consistent with the many statements that the court should (if possible) find that long use has ripened into a right to continue that use. It is true, however, that the Law Commission report seems to have taken a different view; and the recommendation in paragraph 3.168 (embodied in clause 17 (3) of the draft bill attached to the report) does envisage that use as of right against an incompetent grantor does not count towards the prescriptive period. But it, too, does not squarely address a situation in which the use began at a time when there was a competent grantor.

86. Nevertheless, I find that proposition difficult to reconcile with *Cross v Lewis* and *Pugh v Savage*. But it is not necessary to decide that point; and I would prefer to leave it open for a case in which it matters.

Result

87. On the basis of the arguments presented to us, I would allow the appeal.

Lord Justice Males:

88. I agree that this appeal should be allowed for the reasons given by Lord Justice Lewison.

89. It seems harsh that a right of way which has been used openly and as of right for almost half a century should now be found not to exist. After all, the principle of lost modern grant is merely a device (or "expedient", as Mr Justice Fry described it in *Dalton v Angus* (1881) 6 App Cas 740, 773). It was devised by the judges to "prevent the disturbance of long-established *de facto* enjoyment" of land, as Lord Hoffmann explained in *R (Sunningwell Parish Council) v Oxfordshire County Council* [2000] 1 AC 335, 349. But it is a legal fiction. Nobody is so foolish as to believe that there was actually such a grant on some unknown date since the death of King Henry II, or in this case since 10th February 1958 when Pleasington was separated from what was previously common freehold ownership, or even since 24th August 1977 when the use of the right of way began.

90. In that sense the lost modern grant principle and the qualification that it does not apply if the notional grantor would not have been competent to make the notional grant can be viewed as historical anomalies which have survived from another age. Nevertheless, they have survived and are firmly embedded in our law. Any modernisation of that law must be for Parliament.

Lord Justice Miles:

91. I agree that the appeal should be allowed for the reasons given by Lord Justice Lewison.