

[2018] UKFTT 0057 (PC)

**PROPERTY CHAMBER  
FIRST-TIER TRIBUNAL  
LAND REGISTRATION DIVISION**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY  
LAND REGISTRATION ACT 2002**

**REF No 2016/1032/1034**

**BETWEEN**

**ROY STEPHEN FARROW**

**Applicant**

**and**

**(1) NICHOLAS DENNISSON COLE  
(2) DUNCAN BOAG**

**Respondents**

**Property Address: Land to the north side of St Austin's Grove, Sheringham**

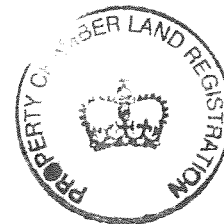
**Title number: NK41877**

**ORDER**

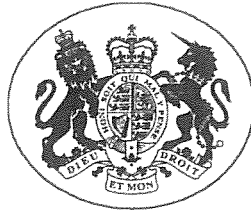
The Chief Land Registrar is ordered to cancel the application dated 19 April 2016

**BY ORDER OF THE TRIBUNAL**  
*Ann McAllister*

**Dated this 11<sup>th</sup> day of December 2017**







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LAND REGISTRATION**

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**ROY STEPHEN FARROW**

**Applicant**

**And**

**(1) NICHOLAS DENNISSON COLE  
(2) DUNCAN BOAG**

**Respondents**

**Before: Judge McAllister  
Great Yarmouth Magistrates Court  
24<sup>th</sup> and 25<sup>th</sup> October 2017**

**Representation: The Applicant was represented by Sebastian Kokelaar of Counsel instructed by Birketts; the Respondents were represented by Graham Sinclair of Counsel.**

**DECISION**

**Introduction**

1. The Applicant, Mr Farrow, is the registered owner of a parcel of land ('the Plot') lying to the north of St Austin's Grove, Sheringham. The Plot formed part of the rear garden (used variously as a tennis court and orchard) of a property known as St Austin's House, occupying the corner plot between Curtis Lane and St Austin's Grove. Mr Farrow purchased the Plot on 27 April 1988.
2. The Plot is rectangular in shape and measures 57ft in width on the southern boundary. To the east of the Plot is No 2 St Austin's Grove, a property purchased by the Second Respondent on 23 June 1995. The First Respondent is the owner, together with his wife, of 44 St Austin's Grove, on the other side of the road from the Plot. He purchased this property on 2 September 1987. Mr and Mrs Cole were registered as owners on 24 November 2006.

3. St Austin's Grove is a private unadopted road accessed from Curtis Lane. It is the access point for a private residential estate which began to be built by Sheringham Estates Ltd shortly before the First World War. The Grove splits into two 'prongs' at the eastern end, both of which are dead-ends. There are a number of properties in each of the two 'prongs'. Up to the point where it splits, it is made up of a tarmaced area and wide grass verges on both sides of the tarmac.
4. The rights of way over the first 85 yards on the north side and 75 yards on the south side of Grove by the various owners fronting the Grove are not straightforward. No 2 benefits from an express right of way over St Austin's Grove to Curtis Lane. No 44 has acquired a right of way by prescription. St Austin's House has no right of way over any part of St Austin's Grove. There is a pedestrian passageway to the north of St Austin's House and to the north of the Plot which leads to Curtis Lane. The Plot has the benefit of an express right of way on foot only over this passageway.
5. Title to the westernmost 85 yards of St Austin's Grove is not registered and the paper title owner is not known. The Respondents are members of an unincorporated association now known as 'St Austin's Street Control' ('SASC') which, they say, confers on them the status of 'street managers' within the meaning of the New Roads and Street Works Act 1991 ('the 1991 Act') and which, relevantly to this application, allows them to prevent Mr Farrow acquiring prescriptive rights over St Austin's Grove as of right.
6. By an application dated 19 April 2016 Mr Farrow applied to Land Registry to register prescriptive vehicular and pedestrian rights of way over both the surface of St Austin's Grove and the grass verge dividing the southern boundary of the Plot from the Grove.
7. Mr Farrow's application was supported by a statutory declaration dated 18 April 2016. In this he stated that he had used St Austin's Grove (both the tarmaced area and a strip of the grass verge at the south eastern end of the Plot) for vehicular purposes since December 1993. He stated that this access was made by knocking down a section of the southern boundary wall to a width of some 14 feet shortly after receiving a letter from North Norfolk District Council informing him that he did not need planning permission to make this access.

8. The southern boundary was not only bounded by a wall but also by a substantial close boarded fence. There is an issue as to the combined height of these: Mr Farrow says 5 to 6', and the Respondents say 10 feet or so. Either way it is plain that it was never possible to gain access directly over the wall and fence. Mr Farrow, as I will explain further below, claimed that it was always possible to gain access on foot by swinging round over the most easternmost fence post. The ground on the other side of the wall was higher than the road side, making it relatively easy to gain access this way.
9. In his Statement of Case, dated 2 February 2017, Mr Farrow altered his evidence on the question of when the breach made in the wall by saying that it was made '*at some point between 1993 and 1997*' but that he could not recall the precise date. The Respondents' case was that the section of the wall was knocked down on 16 May 1997 and not before. In his witness statement (dated 11 April 2017) Mr Farrow accepted that it was possible that the wall was not knocked down until May 1997 but that it seemed reasonable for him to conclude that the wall would have been knocked down shortly after the December 1993 letter since he would have had no reason to delay the creation of a usable access.
10. By the time of the hearing Mr Farrow accepted that the opening in the wall was made on 16 May 1997. On any basis therefore, vehicular access through the opening in the wall falls short, by some 13 months, of the 20 year period prescribed by the Prescription Act 1832. Mr Farrow's case before me was that he obtained vehicular access before May 1997 by driving along St Austin's Grove, parking on the verge, and then climbing around the post. It was also argued that, as a matter of law, he is entitled to rely on the doctrine of lost modern grant beyond the date of the application to Land Registry.
11. The Respondents' objected to the application made by Mr Farrow on the facts, and argue further that they have been at all material times in possession of St Austin's Grove in its entirety for the first 85 yards on the north side and 75 yards on the south side as street managers under the 1991 Act. Accordingly, they say, they have sufficient title to require trespassers to leave, and to object to the use of access way through the opening in the wall by Mr Farrow. This prevents Mr Farrow's user, in any event, being 'as of right'.

## Issues

12. The issues which arise are the following:

- (1) Can Mr Farrow establish, on a balance of probability, that he used St Austin's Grove (that is, both the road and the verge) to gain access to the Plot by car and/or on foot for a period of 20 years before his application to the Land Registry?
- (2) If he cannot establish 20 years prior to the application, is it open to him to argue that, so far as lost modern grant is concerned, time continues to run after the application, so that if he can establish 20 years prior to the hearing of this case, he can claim rights by prescription?
- (3) If the answer is yes to either question, are the Respondents, or SASC, in possession of St Austin's Grove so that they can prevent Mr Farrow using the Grove as of right?
- (4) If yes, are the actions relied on by them sufficient to prevent user 'as of right'?

## Events up to May 1997

13. Both parties, and particularly the Respondents, have prepared a detailed and helpful chronology of the development of the St Austin's Grove Estate. To a large extent this is relevant only by way of general background but I will nonetheless highlight the key facts.

14. Sheringham Estates Ltd ('the Company') was formed in March 1911 and purchased a 10 acre field in Beeston Regis, Sheringham. The property now known as 47 St Austin's Grove was the first to be sold in March 1913. This property benefited from an express right of way over the newly built road, and was subject to a maintenance and repairing covenant in respect of the road. In July 1913 the Company conveyed 2 St Austin's Grove together with a right of way along both St Austin's Grove and the 'back passage' at the rear of the property leading to Curtis Lane. In November 1919 number 3 St Austin's Grove was sold, again with a right of way over St Austin's Grove and over the 'back passage'.

15. In June 1921 St Austin's House was sold by the Company with an express right of way over the passageway to the north. As mentioned above, no express right of way was

granted over St Austin's Grove. The purchaser was however made subject to a covenant to repair and maintain ' *the road upon which his plot abuts* ' until the road was taken over by the local authority.

16. In November 1921 the Company resolved to enter into voluntary liquidation. Number 44 St Austin's Grove, now owned by Mr Cole, was the last property on the Grove to be sold by the liquidator. The property, known as Rainbow End, was sold on 15 May 1922 to Cynthia Pelham Browne, once a well known author. The conveyance provided that 'each purchaser' would pay a proportion according to the extent of his frontage of the expense incurred by the vendor in repairing, keeping in repair and cleaning the roads, footpaths, passages, sewers etc until the same were taken over or vested in the local authority, but no express right of way over St Austin's Grove was granted. As mentioned above, Mr Cole and his wife purchased this property on 2 September 1987. On registration of their title, they also registered a prescriptive right of way over St Austin's Grove.

17. In March 1924 all the unsold land belonging to the Company was sold, and, it seems, all the plots sold after this date included one half of the width of St Austin's Grove. It is clear that the Company intended that St Austin's Grove would at some point be adopted by the local authority. For whatever reason, this has not occurred, and the various owners of properties along the westernmost section of the Grove either have express rights of way over the Grove or have acquired them by prescription.

18. Mr Cole was visited the day after he moved in by an elderly neighbour who explained the history of St Austin's Grove to him and invited him to become a member of SAGRA (St Austin's Grove Residents' Association). Since that time Mr Cole has been involved in the association in its various guises, and, on his evidence, in numerous instances of control and possession over the whole of the western end of St Austin's Grove. In 1993 SAGRA became SAPRA (St Austin's Private Road Association) representing those 6 properties (Nos 2, 3, 44, 45, 46, and 47) at the western end which did not own any part of St Austin's Grove. In 2012 SAPRA was re-named SASC (St Austin's Street Control). There are 3 Street Managers (pursuant to section 49(4) of the 1991 Act) and they are Mr Cole, Mr Boag and Mr Blogg (at number 45). I will consider the status and role of SASC in more detail below.

19. In March 1959 Mr Blois-Brookes bought St Austin's House. In May 1986 he obtained outline planning permission for the erection of a 2 bedroomed dwelling, preferably a bungalow, on that part of his property which became the Plot. On 27 April 1988 Mr Blois-Brookes conveyed the Plot to Mr Farrow. The solicitors acting for Mr Farrow were a firm called Hunt & Co. The price paid by Mr Farrow was £35,000. The Plot was sold with the benefit of a right of way on foot only over the rear passageway. The conveyance also contained a restrictive covenant limiting any building on the Plot to a single storey.
20. On 15 May 1989 Mr Farrow submitted a planning application for the erection of a bungalow on the Plot. The means of access is shown from St Austin's Grove. For various reasons Mr Farrow decided to withdraw this application on 16 January 1990.
21. On 19 November 1993 Mr Farrow wrote to the Council to ask whether it would be possible to create an access from St Austin's Grove onto the Property. The Council replied that the proposed access would not constitute permitted development and therefore did not require an application for planning permission.
22. As mentioned above, the southern boundary of the Plot was, until May 1997, bounded by an unbroken wall, above which was a fence.

*Pedestrian access to the Plot*

23. Mr Farrow's case is that access was sometimes gained by either driving or walking along St Austin's Grove, parking along the stone wall and then reaching the Plot on foot by climbing onto the wall and then swinging round over the last, most easternmost, post fence. He stated that there was a 12 inch gap at that point in the boundary with Mr Boag's property. On other occasions he and his family walked along the back passageway at the top of the Plot. But he said that this access was sometimes blocked by cars (St Austin's House was used for a number of holiday lets), or that there were too many nettles, and there was a steep slope at the top end of the Plot. His evidence was supported by his former wife, Susan Farrow, and his son, Benjamin Farrow, who was born in 1988. Ben specifically recalled his brother pulling him up the wall and swinging him around the fence, as did his grandfather.
24. The Respondents pointed out that the easiest route, coming from the Farrow family home nearby (where they lived until 1999), was to park along Curtis Lane and walk along the



rear passageway. If they did use St Austin's Grove then, it was said, the easiest route was simply to walk up the drive to Number 2 and walk across into the Plot. No 2 had been empty for a number of years before Mr Boag purchased the property in 1995. Mrs Farrow accepted that on occasion they did walk up Mr Boag's drive and turn into the Plot, although she stated that her two young boys liked to climb over the wall at its eastern end and swing round. Mr Boag recalls seeing Mr Farrow use his drive to gain access to the Plot on one occasion in 1995. Mr Farrow stated that he had no recollection to using this drive, and would have felt uncomfortable doing so.

25. The evidence of the Farrow family was that the Plot was used, in the period 1988 to 1997, for a variety of activities; as a playground for the children (there was an old swing on the Plot, and the Plot was also used for riding bicycles and scooters) for pruning the fruit trees, harvesting fruit and plants, burning rubbish, and practising golf. A boat was placed on the Plot, using the back passageway, although, as I understand it, it was then moved to the lower level of the Plot by means of the new access way made in 1997. (I should also add that the back passageway is wide enough for Mr Boag to have driven a small van from Curtis Lane to the back of his property). Mrs Farrow's evidence was that her two sons used the scooters after the breach in the wall had been made.

26. Neither Mr Cole nor Mr Boag (apart from the one occasion mentioned above) saw any member of the Farrow family gain access by foot or by car to the Plot, before the access was created in 1997. It is right to note, however, that Mr Boag was living in Norwich until 1998/9, coming to his property to do work on it whenever he could. Mr Cole, on the other hand, worked from home, and, I have no doubt, kept a weather eye on St Austin's Grove in his capacity as an officer of the residents' association. He worked from home in the period 1990 to 2004, and regularly walked along St Austin's Grove to shop or walk his dog twice a day.

27. Both Mr Boag and Mr Cole pointed out that the eastern end of the boundary was totally inaccessible due to a mass of undergrowth. This evidence is borne out by photographs taken on 1 March 1995 by a surveyor employed by Anglian Water, which show the wall entirely obscured by dense vegetation. These photographs also show a mound on the grass verge by the southern boundary of the Plot which would, it is said, make parking difficult. An aerial photograph taken by Historic England in August 1995 also shows the very dense

vegetation at the south eastern corner of the Plot. Some of the vegetation was cleared by Mr Boag in 1996/1997, when he also straightened his drive. Mr Farrow's response to these photographs was to say that the vegetation was far less dense in the years before 1995.

28. I have seen a statement from Ken and Sue McVeigh, who lived at 47 St Austin's Grove between 1993 and 2009. Their house is almost opposite the Plot. They worked from home, and specifically from the upstairs bedroom, in the early years. Their evidence was that they never saw any activity on the Plot, and never saw anyone parking on the grass verge, as the mound would have made this difficult. Their evidence was not tested in cross examination. Nonetheless I attach some weight to it, as it is all of a piece with the evidence of Mr Cole and Mr Boag.
29. A right of way by prescription arises, as is well known, if during the statutory period, or the period required to establish lost modern grant, the user is such that it can carry to the mind of a reasonable person in possession of the servient tenement that a continuous right is being asserted and ought to be resisted if resistance is intended. Whether the actual user is sufficient is a question of fact in each case. In *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70 Lord Walker said that the person claiming the right '*must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off or eventually finding that they have established the asserted right against them*'.
30. In short, in order to succeed in his claim Mr Farrow must establish that he gained access to the Plot from St Austin's Grove sufficiently frequently and sufficiently regularly that, if the true owner had been there, he would have been aware that a right was being asserted against him.

#### *Vehicular access to the Plot*

31. The opening in the boundary wall was made on 16 May 1997. It is submitted on Mr Farrow's behalf, however, that vehicular access was gained to the Plot before that date. It is said that by parking on the verge, and then gaining access on foot as described above, vehicular access was obtained. The purpose was to cross the servient tenement to reach

the dominant tenement. To the extent that part of the route was by car and part on foot does not prevent a right with vehicles being acquired. The point, it was submitted, is not one of principle, but of fact.

### **Conclusion on user of St Austin's Grove prior to May 1997**

32. In my judgment Mr Farrow has failed to establish a putative right of way either on foot or with vehicles in the period between 1988 and 1997. I do not doubt that the Plot was used (perhaps less frequently than suggested) for some or all of the activities mentioned above. I also accept that, on a rare occasions, he, his children and his wife (and his father) might have gained access from St Austin's Grove, by swinging over the furthest post and breaking through the bushes and undergrowth. But I have no doubt that the passageway at the north end of the Plot was used far more frequently. It would allow access with buggies when the children were small, and allow access with anything else, such as golf clubs, which might be used on the Plot.
33. I do not accept that, even if cars were sometimes parked at the back of St Austin's House, access would not have been possible or event particularly difficult. If there were nettles, no doubt they could have been cut back and removed. And whilst there is a slope, it seems to me much easier to navigate the slope than to attempt to gain access from St Austin's Grove. It is inherently improbable that access would have been gained at the end of wall and fence. It may be that up to and beyond 1995, the family would sometimes walk up the drive of No 2: again, it is far more likely that this route would have been used. The least likely route is one now being claimed.
34. It is also to be noted that in his statutory declaration (dated April 2016) Mr Farrow stated he approached the Council in November 1993 about creating an access in the boundary wall because *'I also wanted pedestrian access via St Austin's Grove'* and then added: *'Opening the wall in this way would mean that I could access the Red Land [the Plot] with vehicles from St Austin's Grove, both on foot and with vehicles.'*
35. As for vehicular access, if I had to decide the point, it seems to me that vehicular access to the dominant tenement means being able to gain access to and egress from the Plot with a vehicle, and does not mean gaining access over part of the servient tenement and

completing the journey on foot. But the claim fails on the facts, for the reasons set out above. I do not accept that, prior to May 1997, access was gained either on foot or with a car to the Plot along St Austin's Grove such as to give rise to a putative prescriptive claim. User by car seems all the more unlikely since Mr Farrow and his family lived half a mile away until 1999. I have no doubt too that Mr Cole and Mr Boag, and maybe others, would have objected in the strongest terms had they seen any car parked on the grass verge by the boundary wall.

### Events after May 1997

36. The opening in the wall made in May 1997 clearly allowed vehicular access to the Plot. This was a significant event. It led to SAPRA ordering a notice saying 'PRIVATE ROAD: NO PRIVATE ACCESS.' The sign was located on the first lamp post on the northern side of the Grove and was erected on 1 July 1997. The first notice was vandalised in the mid 1980s, and replaced.
37. On the 20 June 1997 Mr Farrow submitted a further planning application to erect a two storey dwelling and garage on the Plot. The application was objected to by a number of residents on the grounds, amongst other things, that there was no right of access to or from St Austin's Grove. On the plans prepared for the planning application, the newly created access was referred to as 'existing access'. The Council wrote to Mr Farrow's architect about this, and the architect replied enclosing a letter from Mr Hunt, Mr Farrow's solicitor, which stated confidently that the access shown on the plan (the grass verge on the south eastern corner of the Plot) was land over which rights of way existed and there was no difficulty on that point. Mr Hunt went on to say '*It has been dedicated to the use of St Austin's Grove since as far as I can see the earliest conveyancing documents – and indeed I enclose a copy of the estate details which shows that the layout of the estate was considered and dealt with many years ago.*'
38. The Council appears to have taken Counsel's advice on the question of access. On 18 October 1999 planning permission was granted. The letter granting consent stated that the decision was not to be taken as evidence of ownership of, or any rights of way over, any land in the application title. This is somewhat oddly phrased, but the meaning is clear.

39. Mrs Blois-Brooke (who had become the owner of St Austin's House in August 1992), relying on the restrictive covenant in the conveyance of the Plot, refused consent for the implementation of the 1999 planning permission. On 2 February 1990 Mr Farrow applied to the Land Tribunal for a modification of the covenant. The application was dismissed on 21 March 2001. The judgment noted that the Plot was unsightly and that a caravan was stationed on the land. In his witness statement Mr Farrow states that he was badly affected by the outcome of this case, and wondered whether he would ever be able to develop the Plot. He visited it less frequently, but continued to store material there.
40. The Plot had clearly been used for storing waste and building materials in 1999. Mr Boag stated that he saw Mr Farrow regularly drive a car with a trailer along St Austin's Grove onto the Plot to deposit various objects. I have seen a letter to Mr Boag from the Council stating that Mr Farrow had been asked to remove these materials. As stated above, Mr Farrow kept a boat there, and his evidence at the hearing was that he used the boat 6 to 10 times approximately every summer. Ben and his brother Tom had small motorised bikes which they used on the Plot between 1997 and 2000.
41. In March 2000 Mr Farrow allowed a local builder, Mr Massingham, to put a caravan on the Plot and live in it. He did so until July 2001 when the planning authority required Mr Farrow to remove the caravan after having received complaints from local residents. Mr Massingham's statement is to the effect that he drove to and from the Plot every day using the newly created access, and that he helped with the creation of the access way. He also acted as a security man for the site. I accept Mr Massingham's evidence, which is supported by the evidence of Mr O'Regan, as set out below.
42. There is evidence of other activities on the Plot in the period 1997 to 2007. Mr Lawson accompanied Mr Farrow to the Plot to get bricks and tiles which had been stored there. On 7 December 2000 solicitors acting for Mr Cole wrote to Mr Farrow's solicitors stating that he had no right to use St Austin's Grove and threatening injunctive proceedings. The reply was to the effect that Mr Cole had no standing to bring proceedings as he did not own any part of St Austin's Grove. There was no further correspondence on the point.
43. On 13 December 2005 the Council inspected the Plot to determine whether any building work had been carried out in accordance with the 1999 consent. A handwritten note states:

*‘Site overgrown and not accessible so unable to determine whether any work had been carried out to commence the development ...?’*

44. A Google earth photograph taken in the summer of 2006 appears to show that the southern boundary of the Plot is heavily overgrown. The entrance is not visible. Ben Farrow was 18 in 2006, and on his gap year. His evidence was that he developed an interest in the Plot and visited often, using both the northern access and the access from St Austin’s Grove.
45. I accept the evidence regarding the use of the Plot as set out above, and it seems to me inherently probable that access would have been obtained through the new gap in the boundary wall, even if this might have involved dealing with shrubs and other vegetation. The use may have been infrequent, and the access way may have been neglected but it was not, in judgment, so overgrown that it was not possible to get through, even if a Council officer might have been deterred from trying.
46. On 24 December 2007 a Renault van was parked just inside the new entrance to the Plot by Mr Farrow. The van remained parked in the same position until August 2014. It blocked the access to the remainder of the Plot. There is an issue as to the extent to which it was used in any way. Mr Farrow’s case is that the van was kitted out for storage (and indeed there is a photograph showing the interior of the van), and used to store discontinued stock. The van was parked just inside the entrance drive because it was the flattest part of the Plot and because it would prevent anyone else gaining access to the Plot. He stated that the van remained accessible to him at all times and that he was able to gain access to the Plot by pushing his way through the bushes and got into the van at the side. Photographs taken in June 2014 show how densely overgrown the access way had become.
47. I heard evidence from Mr O’Regan on behalf of Mr Farrow. He lived at 43 St Austin’s Grove between 2004 and 2016. He stated in his witness statement that he saw Mr Farrow and others drive along the road and into the Plot up to the time when the van was parked at the entrance. When the van was there, he said, Mr Farrow parked on the verge. In oral evidence he stated that he never saw anyone enter the Plot on foot once the van had been parked, and seemed to accept that the Plot had become inaccessible. I accept the evidence

of Mr Farrow that he occasionally visited the van and that he kept material there. It also seems to me likely that the van made access to the Plot from St Austin's Grove more difficult, but not impossible.

48. The residents were concerned about the eyesore created by the van, and Mr Cole offered to buy the Plot with a view to selling it back, as a garden, to the next owners of St Austin's House. These discussions came to nothing.

49. In September 2015 Ben Farrow made a fresh application for planning permission to build a one storey dwelling. Access was to be through a driveway to a parking and turning area at the south of the site. In oral evidence he stated that he had not realised that a right of way could not be granted by the planning authorities. Ben had begun to clear vegetation and repair fences on the Plot in 2014. There were site visits to the Plot by planning consultants and surveyors, and by a tree surgeon. From 2016 onwards the visits were more frequent, and work was done on site to clear it, to remove material stored there, and to level the site.

#### **Conclusion on user of St Austin's Grove after May 1997**

50. As I have already stated, I am not satisfied that there was sufficiently continuous use either on foot or with vehicles prior to the making of the breach in the wall in May 1997. But in my judgment, the creation of the opening in the wall changed the situation. Although I have not found this altogether easy, the conclusion I have reached is that Mr Farrow, his family and others, used the new access way sufficiently frequently to put the nominal servient owner on notice that a right of way was being claimed. It is true that the first period (1997 to 2001) saw far greater activity than the period which followed. But I agree with Mr Kokelaar that the period from 1997 must be looked at as a whole. I accept the evidence set out above, and, as I have said, that access was often through the new opening in the wall. Once this had been created, it seems to me that use would have been made of it, even if this meant grappling with the undergrowth.

51. The presence of the van, in my judgment, can only be seen as an assertion of a right to use the access way with vehicles. The question is not whether it made access to the Plot

difficult or impossible: the question, it seems to me, is whether the very presence of the van would have indicated to the servient owner that Mr Farrow considered himself entitled to use the access way with vehicles, whether to park the van there, or to move it at his convenience. Leaving a van, even for a number of years, is wholly consistent with the assertion of a claim to be entitled to drive in and out of the Plot. I do not therefore accept Mr Sinclair's submission that the presence of the van effectively re-instated the wall, by preventing access.

52. The question whether the user was sufficient to put the servient owner on notice that a right was being asserted is a question of fact and degree, and it seems to me, taken as a whole, that the user in this case falls on the right side of the line. In so far as a claim based on prescription is concerned, however, Mr Farrow cannot establish 20 years user. The decision in *Wilkin & Son v Agricultural Facilities Ltd* (REF 2011/0420) is that, in the context of proceedings before the Adjudicator (the predecessor to the Tribunal) 'the period next before some suit or action' (as provided for by section 4 of the Prescription Act 1832) means the period prior to the date on which the application was made.

#### **Lost modern grant.**

53. The question remains whether it is open to Mr Farrow to argue that time continues to run in his favour after the date of the application to Land Registry so as to allow him to claim 20 years under the doctrine of lost modern grant. In my judgment the answer is clearly no. A period of 20 years (at least) is necessary to found a claim. It cannot be right, as a matter of general principle, that time continues to run beyond the claim itself being issued. In this case, an application to Land Registry based on lost modern grant must necessarily require proof of at least 20 years before the application is made (even though it need not run up to the date of the application).
54. There are a number of authorities which lend support to this unsurprising conclusion, even though none deal specifically with the point now raised. ( see *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, *Begley v Taylor* [2014] EWHC 1180 and *McNulty v Ross* [2015] NIQB 42). There is no decision which supports the submission that time runs beyond the issue of proceedings or, as in this case, the making of an application to the Land Registry. The flexibility provided by the doctrine of lost modern grant is that an



easement can arise so long as it can be shown to have been used for any period of at least 20 year, even if this ceased before the issue of proceedings or the making of an application. I do not accept Mr Kokelaar's submission that if the Respondents are not in a position to object to the user by Mr Farrow, there is no reason in principle why recent user should not be taken into account. This seems to me to conflate the question whether user was of right, with the question whether a cause of action had arisen at the time the application was made. The question is a simpler one: at the date of the application to the Land Registry was Mr Farrow able to establish a right of way by prescription or lost modern grant? If the answer is no, his current application must be cancelled.

### **Status of the residents' association**

55. For an easement to be acquired the user must be by or on behalf of a fee simple owner against a fee simple owner. An easement is a right in perpetuity. It is for that reason that a claim for a prescriptive easement must fail if the user began against the occupier of the servient land who was not entitled to a fee simple (for example a tenant for years). Again this is because, as a matter of principle, it would be unreasonable to hold the fee simple owner bound a prescriptive user which was he was powerless to prevent. If the land is let, therefore, the question becomes whether the freehold owner of the land acquiesced in the relevant user.
56. It follows from this fundamental principle that it is only the servient owner who can prevent the user being 'as of right' even if, as here, the true servient owner is not known. The only way the Respondents could establish title to St Austin's Grove is if they could show that they have acquired the road by adverse possession.
57. Whatever the precise status of SASC, and the role of Mr Cole and Boag as 'street managers' under section 49(4) of the 1991 Act, or whether they constitute the 'street authority' as defined in section 49(1) it seems to me that the argument that they have obtained title to the western end of St Austin's Grove by adverse possession is simply unsustainable. In fairness to Mr Sinclair, I did not understand him to press this point too forcefully.

58. I have no doubt that the Respondents, and other members of the unincorporated association, have carried out various acts of control over St Austin's Grove, including insuring that works done by statutory undertakers leave the road in a good condition, preventing unauthorised parking, excluding people who have no right to use the road, keeping the kerbstones free from grass, clearing out kerb channels, reporting any defective street lights, tree management, and so on.

59. In short, SASC looks after St Austin's Grove in the way a local highways authority would if the road had been adopted, whilst treating it as a private road. But none of this confers ownership of the road. St Austin's Grove is an open road leading to a number of properties. Even if adverse possession could be established on the facts, there is also of course the difficulty of establishing who has such possession. SASC, as Mr Boag stated, is an informal coalition of the willing, with no constitution or structure, no fees, and no regular meetings. I note that, when pressed on the question of his role, he stated that he felt he was entitled to police the area for the common good. He accepted that he could not grant Mr Farrow a right of way, and if the true owner was willing to grant such a right he could not prevent this. This seems to me a realistic and sensible description of his role.

60. The Respondents were, however, entitled to object to the application for the registration of a right of way (see section 73(1) of the Land Registration Act 2003). They are entitled to seek to put the Applicant to proof that he has indeed acquired the right claimed.

61. In the light of this, it becomes unnecessary to decide whether the actions taken by SASC or individual members would have been sufficient to prevent the user by Mr Farrow and his family being as 'of right'.

### **Overall conclusion**

62. In conclusion, therefore, my findings are:

- (i) I am not satisfied that, prior to May 1997, any or sufficient use was made on foot or by car of St Austin's Grove by Mr Farrow or anyone else to gain access to the Plot such as to give rise to a prescriptive easement;

- (ii) the position changed when access was made in the boundary wall in May 1991 2007. From that date, albeit with some interruptions, sufficient user was made of the access way to give rise to such an easement but;
- (iii) the right had not been exercised for a period of 20 years prior to the application to the Land Registry and therefore fails both under the Prescription Act and under the doctrine of lost modern grant;
- (iv) neither the Respondents, nor SASC, are in a position to prevent user being 'as of right' as they are not the servient owners of St Austin's Grove, and nothing less than ownership in fee simple is sufficient. Their status as 'street managers' is not sufficient to prevent user being as of right. Neither they, nor any other member of the association, or the association itself, have acquired title to the land by adverse possession.

63. Accordingly I will order the Chief Land Registrar to cancel the application dated 19 April 2016.

#### Costs

64. In the light of my conclusions it seems to me that this is a case where the appropriate order might be no order as to costs, but I am willing to receive written submissions on this point if either side disagree by 5 January 2017.

**BY ORDER OF THE TRIBUNAL**

*John McAllister*

**Dated this 11<sup>th</sup> day of December 2017.**



