[2017] UKFTT 0607

REF/2016/0528

**PROPERTY CHAMBER LAND REGISTRATION**
**FIRST-TIER TRIBUNAL**
**IN THE MATTER OF A REFERENCE**
**UNDER THE LAND REGISTRATION ACT 2002**

**BETWEEN**

**(1) JAMES JOSEPH O'REILLY**
**(2) BRIDGET AGNES O'REILLY**

**APPLICANTS**

**and**

**(1) PETER ANTHONY CLIVE EDWARDES**
**(2) DONALD FARQUHAR MACLEOD**
**(3) RODERICK JOHN SHEEN**
**(4) ADRIAN ALAN MORTIMER**
**(as trustees of the Old Haileyburian and Imperial Service Rugby Football Club)**

**RESPONDENTS**

**Property Address: Land and Buildings at 27 Ruxley Lane, Ewell, Epsom**

**Title Number: SY739129 and SY273878**

**Before: Judge Owen Rhys**

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**O R D E R**

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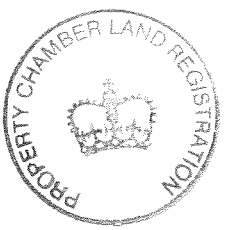
**IT IS ORDERED THAT:**

1. Roderick John Sheen shall be substituted as the 3rd Respondent in place of John Edward Phillips, who has retired as a trustee.
2. The Chief Land Registrar shall give effect to the Applicants' application dated 7th July 2015.

Dated this 7th day of June 2017

*Owen Rhys*

BY ORDER OF THE TRIBUNAL



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**Before: Judge Owen Rhys**

**Sitting at: 10 Alfred Place, London WC1E 7LR**

**On: 17th May 2017**

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| **Applicant representation:** | Ms Evie Barden of Counsel instructed by Squire Patton Boggs (UK) LLP Solicitors |
| **Respondent representation:** | Mr Zachary Bredemear of Counsel instructed by ZGRP Limited Solicitors |

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**D E C I S I O N**

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## THE BACKGROUND TO THE APPLICATION

1. The Applicants are the joint proprietors of the property known as 25 Ruxley Lane, Ewell which is registered under title number SY273878 ("No.25"). No.25 consists of a dwelling-house and front and rear garden on the south-east side of Ruxley Lane. The Respondents, who are the current trustees of the Old Haileyburian and Imperial Service Rugby Football Club ("the Club"), are the proprietors of land and buildings at 27 Ruxley Lane ("No.27"), registered under title number SY739129. I shall refer to the Trustees of the Club from time to time as "the Trustees". No.27 consists primarily of a large sports field which is enclosed on all sides by the houses of Ruxley Lane to the west and north-west, Kingston Road to the north-east, and Court Farm Avenue to the south-east. An area in the north-western corner of the title is leased to a leisure club. Access to the sports field is obtained over an access road ("the Access Road") which enters from Ruxley Lane, immediately to the south of No.25. The southern boundary of No. 25 consists of close-boarded fencing, and there is a grass verge to the Access Road which abuts this fencing. The club house is situated at the eastern end of the Access Road, directly opposite the rear (eastern) boundary of No. 25. This is marked by a set of double wooden gates at the southern end, and a section of close-boarded wooden fencing further north. The gates and fencing are at an angle to each other, with the gates in effect cutting off the right angle formed by the southern and eastern boundary line of No.25.

2. By an application in form AP1 dated 7th July 2015, the Applicants applied to Land Registry to register a prescriptive easement over the Access Road, on the basis of the facts alleged in the ST4. This was their response to the Trustees' installation of electronically controlled gates across the Access Way, which prevented them from using it without express permission. The Trustees objected to the application by letter dated 31st July 2015. There were four stated grounds for the objection. First, a technical point was taken as to the adequacy of the information provided by the Applicants. Second, it was denied that the Applicants have made use of the Access Way as alleged. Third, it was alleged that any such user was interrupted by the installation by the Trustees of a locked gate across the Access Way 2015. Fourth, it was said that any such user was permissive. Since the dispute could not be resolved by agreement, it was referred

to the Tribunal on 14th June 2016. I heard this case on 16th May 2017, both parties being represented by Counsel, Mr Bredemear for the Applicants and Ms Barden for the Respondents. I also had the benefit of a site view prior to the hearing. I should say that I acceded to Ms Barden's application, made at the outset of the hearing, to substitute Roderick John Sheen as the 3rd Respondent in place of John Edward Phillips, who has retired as a trustee.

## THE LEGAL FRAMEWORK

3. There is no real controversy between the parties as to the facts that need to be proved to establish a prescriptive easement. Ms Barden has helpfully summarised the principal requirements at paragraphs 19 to 24 of her Skeleton Argument and I am content to adopt this summary. In essence, the Applicants must establish at least 20 years' user "as of right" – namely, without force, concealment or permission. There must also be sufficient continuity of user – see paragraph 21 of Ms Barden's Skeleton. The only real point of contention between the parties, in regard to legal issues, relates to the Applicants' reliance on the Prescription Act 1832, in addition to lost modern grant. It is common ground that the Applicants' use of the Access Road was barred in May 2015, by the Trustees' erection of an electronically controlled gate. A party may not rely on the 1832 Act unless the period of user continues until not less than 12 months before "*some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question*" –see section 4. Mr Bredemear for the Applicants submits (a) that both periods under section 2 (of 20 and 40 years) are applicable, and (b) the relevant "*suit or action*" was the lodging of the application to Land Registry on 9th July 2015. Ms Barden denies that the making of the application is the relevant date, contending that the date of the reference to the Tribunal – 14th June 2016 – is the correct date. On this basis, there had been an interruption more than 12 months before and the Applicants would be unable to rely on the 1832 Act. The significance of the 40-year period is that, if established, an easement will be presumed in the absence of some express written permission. In order to rely on the longer period, it would be necessary to establish proof of long user commencing no later than May 1975. There is also another point of law at issue. It is common ground that the Applicants were given a key to the gates which were originally installed across the Access Way in the early 1990s. Ms Barden

contends that this renders any subsequent use of the Access Road, if proved, permissive.

**THE APPLICANT'S CASE**

4. The Applicants' case is straightforward. These are the relevant passages in their Statement of Case: *" 9. The Applicants have used the access way as of right since their purchase of the property at 25 Ruxley Lane on 29th January 1983, over 33 years ago on the basis that the access road provided a means of access to gates at the erar of 25 Ruxley Lane and a garage in the rear garden both of which had clearly been in existence for many years prior to purchase. 10. The Applicants rely upon the following evidence of user: They have used the access road at all times for both vehicle and pedestrian access on a regular basis and without force, secrecy or permission..... 12. The Applicants have used the access road on a continuous and regular basis since their purchase of the property on 29 January 1983 until approximately May 2015 when the Respondent began constructing a barrier/gate across the access way...."*

5. In his witness statement dated 7th April 2014, Mr O'Reilly gave some further details. At paragraph 4 he says that when the house was purchased in 1983, the rear gates were in situ, but the garage was in a dilapidated state. The Applicants therefore replaced it with the present pre-cast concrete structure. Between the gates and the garage there is concrete hard standing which was used at various times for the parking of cars by friends and family. Frequency of access has varied throughout the period since 1983 from daily use to monthly use but never less than once per month. There have been gates across the access road, but these have never been locked. When they were first installed he was given a key by the contractor but it was not necessary to use it.

6. The final piece of evidence was contained in the ST4 (statement of truth) lodged in support of the application. Under the heading "Other relevant details" Mr O'Reilly stated as follows: "*When we purchased the property in 1983 from the previous owner, a Mrs Hurley, she informed us that she gave to the freeholder a piece of land from the upper south-west end of the garden to facilitate ease of access to the club premises. According to Mrs Hurley she gave the land (approximately 364 square metres) as a gesture of goodwill to the freeholders. In*

*return she also saw the benefit to her in that it made vehicle access easier to her garage and garden. We will add that the alteration does not appear on the current title deeds as outlined in Title Deeds SY 273878."* This is a reference to the filed plan of the Applicants' title which shows a right angle at the south-western corner of the plot, as opposed to the gentler angle created by the garden gates which cut off the corner.

7. In addition to the evidence of Mr O'Reilly, his son Declan made a statement on which he was cross-examined, as did a neighbour, Mrs Maureen Morris, and a family friend, Mr Mark McGaugh. A statement was also made by other neighbours, Mr and Mrs Skipp, but they were unavailable abroad and their statement was admitted as hearsay, subject to the usual qualification as to weight.

8. Declan O'Reilly stated that he lived at No.25 until the age of 28 (in 2002). From mid-1995 he was employed as an electrician and had the use of a company-owned van, in which he kept tools and other valuable items. For security reasons he regularly parked the vehicle on the hardstanding within the rear gates of No.25, accessed via the Access Road. He also says that he saw his parents regularly using "the facilities" (the garage and hard standing) since they moved to No.25 in 1983. In cross-examination it was put to him that it was untrue that he parked his van at the back of No.25, and that he actually left it between the entrance to the Access Road and the wooden gates. He denied this, pointing out that there was a no parking sign there. The alternative was Ruxley Lane itself where it would be difficult to find a nearby parking space. It was also put to him that the width of the gates – 9 feet – would make it difficult to manoeuvre his van (7 feet wide) between them. He did not agree.

9. Mrs Morris's statement was brief to say the least. It says this: "*I have lived at 23 Ruxley Lane since 1984 and there has always been access to the garage at number 25. From a selfish point of view, my neighbour often takes garden refuse from both our gardens from his back garden gate.*" In cross-examination, she explained that a section of the fence between her garden and No. 25 folded back to give access. She would bag up her garden waste and take it to the back of No.25's garden. Either she would load the bags into Mr O'Reilly's car or he would. This was a regular routine.

10. Mr McGaugh and his family have known the Applicants for over 40 years. He lives in Ashstead but is a regular visitor to No.25 and has been since the O'reillys moved there in 1983. He confirmed that he has used the Access Road over the years to access the rear of No. 25 – he has seen the Applicants doing so – and that it never occurred to him that there was any reason why they should not do so. Mr O'Reilly took him to look at No.25 when they first bought it and showed him the garage and hard standing at the rear. He recalled occasion when he helped Mr O'Reilly remove garden waste – such as hedge clippings – from the rear of No.25.

11. The Skipps made a statement confirming that the Applicants regularly used the Access Road as pedestrian and vehicular access to the garage at the rear of No.25.

**THE RESPONDENTS' EVIDENCE**

12. Evidence on behalf of the Respondent was given by Mr Tom Huckin, the Club Chairman, and Mr Christopher Booth, its groundsman. Mr Huckin is evidently a stalwart of the Club, having been a player, then Club captain and finally Chairman. At paragraph 18 of his witness statement he says this: "*Over the 45 years in which I have been involved in the Rugby Club, until September 2015, I have never seen a vehicle parked at the rear of the Applicant's property. I had only ever seen the Applicants' park any vehicle in the driveway at the front of their property. In any event, the gates in the Applicants' boundary fence between the Access Road and the fence at the rear of the Applicants' property were not accessible until after September 2015, as prior to this there was significant overgrowth and rubbish which prevented the gates from being used.*" In cross-examination, Mr Huckin was asked about this evidcnce, which he clarified. He accepted that he had paid no attention to the rear access to No.25 until relatively recently. There were drainage issues in 2010 and trees had to be removed by the Club close to the rear of No.25. He accepted that he had only ever tried to look into the rear of No.25 on one occasion. He was unaware that the gates at No.25 opened inwards, and was unable to say whether the presence of overgrowth on the outside of the gates would have prevented the gates frim being opened. Otherwise he was unaware whether any vehicle was parked inside the gates. He candidly accepted that he could neither recall when the Access Road gates were

installed, nor any occasion when those gates were locked. He could find no record or paperwork in the Club's archive relating to the Applicants or any permission to the owners of No.25 to use the Access Road. At paragraph 19 of his witness statement he referred to an occasion in February 2016 when Mr O'Reilly is alleged to have caused a traffic queue on the Access Road whilst reversing into the double gates. In cross-examination he was shown a copy of Mr O'Reilly's passport entries, and readily accepted that Mr O'Reilly had in fact been in New Zealand at that time, and therefore the driver could not have been him.

13. Mr Booth, the Club's groundsman, stated in terms that he had never seen the Applicants using the rear access, other than for maintaining their boundary fence. He never saw a vehicle parked in the rear garden until November 2016. His evidence was that Declan O'Reilly's van was generally parked at the entrance to the Access Road and not at the rear of No.25.

**CONCLUSIONS ON THE EVIDENCE**

14. It must be said at the outset that the quality of the written evidence lodged by the Applicants in support of their claim is poor. Whilst the Applicants and their witnesses cannot be expected to itemise every single instance of alleged use of the Access Road, the statements submitted by and on behalf of the Applicants are little more than pro forma and fall far short of the level of detail that would normally be required. This perhaps caused the Respondents to treat the claim with greater scepticism than might otherwise have been the case, and was unfortunate. I have no idea why this strategy was adopted but the Applicants no doubt relied on their legal advisers as they were entitled to do. However, the great advantage of holding an oral hearing is that the Tribunal has the opportunity to hear the evidence direct from the witnesses, and form a view as to its adequacy.

15. Having heard the evidence, my findings of fact are as follows:

    a. The garage, hard standing and double gates at the rear of No. 25 were in place prior to the Applicants' purchase of the Property in 1983.

    b. The Applicants subsequently replaced the original garage with the existing concrete structure and slightly enlarged the hard standing.

c. Since their purchase of No.25 in 1983, the Applicants, members of their family and friends have parked their vehicles on the hardstanding at the rear of No.25 and accessed the hard standing through the double gates and over the Access Road. For a lengthy period a caravan was parked in the rear garden of No.25, access having been obtained through the double gates.

d. The Applicants have used the rear access for other purposes, such as the removal of garden waste by vehicle. Their builders regularly used the rear access with their vehicles, when carrying out the extensive building works to No.25 for a period of approximately 9 months in the 1990s.

e. On occasions the Applicants used the Access Road on foot but their primary use was as a vehicular access to the double gates.

f. When they first arrived in 1983, there were no gates across the Access Road. However, due to local concerns about the activities of Travellers, and the vulnerability of the Club's sports ground, gates were installed at a later date. The contractor installing the gate and lock gave the Applicants a key, but they were never aware of the gate having been locked and never needed to use the key to unlock them.

g. Their use of the Access Road was never challenged or questioned until the Club installed the electronic gates in 2015. Prior to that time the Applicants had used the Access Road openly, without force and without asking for or receiving permission from the Club or anyone else.

h. Their use of the Access Road was regular throughout the period since 1983, not less than once per month and usually more frequently. When Declan lived at home, he parked his work van on the hard standing at the rear of No. 25 on a regular basis.

i. The Applicants' predecessor in title, Mrs Hurley, had told them that she had given a small corner of her land to the Club, and had erected the double gates across the angle, which facilitated her parking.

j. Parking on Ruxley Lane is difficult, and for periods of the Applicant's ownership of No. 25 there were more than two cars in the family (and

Declan's van), since their adult children owned cars. These could not all be parked on the forecourt at the front.

k. Mr O'Reilly was not present on the Access Road on 17th February 2016. he was in New Zealand.

16. In reaching these conclusions, I have accepted the evidence given by and on behalf of the Applicants more or less in its entirety. Ms Barden, for the Respondents, submitted with some justification that Mr O'Reilly and his witnesses had added substantially to their evidence in the course of cross-examination and pointed to the lack of detail in their statements. She also drew attention to certain alleged inconsistencies – for example, whether the caravan was parked on the grass or on the hard standing, and Mr O'Reilly's failure to mention in his statement that fact that his son's van was parked at the rear. As I have said, I understand the criticism of the written statements and agree with it. However, having heard the witnesses give live evidence, I am entirely satisfied that they are honest and credible and are telling the truth. It is quite understandable that the finer details of their user, enjoyed over a period of some 30 years, cannot be precisely recalled at this remove. All the witnesses seemed baffled as to why the right to access the rear of No.25 through the double gates should now be challenged. This is a case where a set of double gates, 9 feet in width, have been in position directly opposite the entrance to the Club House, in plain sight, for in excess of 30 years. The only means of accessing those double gates – clearly designed for vehicles – is by use of the Access Road. The Applicants went to the trouble of rebuilding the garage, and enlarging the hard standing, both of which are accessed from the double gates to the rear. It is inherently improbable that they would have done this if they had been unable to access the rear of No.25 through the double gates, and did not have a belief that they had a right to do so, founded on Mrs Hurley's statement and the physical fact that the gates were in place.

17. This brings me to my assessment of the Respondents' witnesses. Mr Huckin was manifestly an honest and credible witness. He was entirely frank in accepting that he paid no attention to the gates at the rear of No.25 and any use of the access Way until very recently. He had no reason to take any interest, having more

important matters to attend to, such as his playing and captaincy duties. Just as he took no interest in, and had little recollection of, the installation of the gates on the Access Road, so he had no reason to investigate the purpose of the double gates at the rear of No.25, a purpose which was obvious. The fact that he did not recall seeing the gates in use, or the Applicants actually present on the Access Road, does not of course mean that they were not in use. He would not have known if a vehicle or vehicles were parked inside the gates and only actually looked over the gates on one occasion. He readily accepted that Mr O'Reilly could not have been the driver of a vehicle on the Access Road on 17th February 2017 in the light of the passport evidence.

18. Mr Booth insisted that he had never seen the Applicants using the Access Road, and had never seen cars parked at the rear of the garden of No. 25. He accepted that he was not on site 7 days a week, and of course his primary function was to maintain the 11-acre sport field that lay behind the Club House. I had the sense that he had something of a hostile attitude towards the Applicants, which led him to tailor his evidence. By way of example, he was very reluctant indeed to accept the very obvious point, that the presence of the double gates would indicate that there was an established vehicular access to the garage at the rear of No.25. In cross-examination he had to be dragged to this concession by Mr Bredemear. Ultimately, however, his evidence - like that of Mr Huckin – was of only limited effect. Unless he had been monitoring the Applicants' use of the Access Road at all times of day and night, seven days per week, the fact that he had not observed their use would not be in any way critical to their case.

**THE LEGAL ISSUES**

19. Overall, nothing in the Respondents' evidence has caused me to doubt the evidence given by and for the Applicants. I must now consider the outstanding legal issues in the light of the findings of fact that I have made. First, I am in no doubt that the Applicants' user was of a sufficient character, degree and frequency to indicate to the Trustees, over the years, that the Applicants were claiming an easement. This is manifestly not a case of accidental or occasional exercise. In this respect, the test set out in Ironside, Crabb and Crabb v Cook & Ors (1981) 41 P & CR 326 (at 334) – citing Gale on Easements and White v

Taylor (No 2) [1969] 1 Ch. 150 – is more than satisfied. Second, the servient owners, namely the Trustees, have always been in a position to object to the user by the owners from time to time of No.25. As the evidence demonstrates, the Applicants have consistently and openly used the Access Road for many years. Furthermore, whatever gloss Ms Barden seeks to place on this fact, the mere existence of double gates at the rear of No.25, and the presence of a (visible) garage on the other side, must bring to the mind of any reasonable landowner the fact that his land is being used or may potentially be used for the purposes of the dominant owner's vehicular access. In this respect the decision in Williams v Sandy Lane (Chester) Limited [2006] EWCA Civ. 1738 is in point. The double gates are in the most prominent position, opposite the entrance to the Club House and at the point where the Access Road ends. Third, there is no evidence of permission – as opposed to acquiescence – in this case. The only conceivable basis for this allegation is the fact – derived from Mr O'Reilly's own evidence – that a key was given to him by the contractor when the original gates were installed across the Access Road in the early 1990s. It was Mr O'Reilly's unchallenged evidence that the gates were installed as a security measure, to prevent Travellers from entering the Club's sports ground. It seems that Travellers had entered a local park and residents were very concerned. Although the gates were capable of being locked, it was Mr O'Reilly's evidence that he was never aware of them being locked, and had never had to use the key. Eventually, the gates fell into disrepair and could not have been locked. Mr Huckin thought that the gates were only shut when Travellers were in the area, and could not actually recall any occasion when they had been locked. As I have said, there are no documents in the Trustees' possession which indicate that any permission was given to the Applicants to use the Access Road. In these circumstances, I regard it as impossible to infer that permission was given to the Applicants merely by virtue of the key having been given to them for these reasons. First, it was the contractor who gave him the key. There is no evidence that the Trustees were consulted about this or even that they authorised it. Second, it is clear that the gates and lock were installed for a specific purpose, namely to protect against an incursion by Travellers. There is no suggestion that the servient owners were asserting that the Applicants had no right to use the Access Road. They had no discussion with the Applicants and no permission was asked for or given. On the

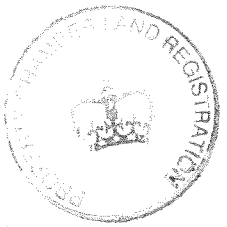
contrary, the Applicants continued to behave as if they already had a right to use the Access Road. Third, the Applicants never actually used the key since the gates were never locked as far as they were aware.

20. The final point of law relates to the application of the Prescription Act 1832. This is a somewhat academic point, given my findings. Clearly, the doctrine of lost modern grant, as explained in Dalton v Angus (1881) 6 App.Cas. 740, is applicable. It is not strictly necessary to consider whether a prescriptive right can be established under either period allowed by section 2. I am prepared to say, however, that the Applicants cannot establish a 40-year period of user. There is no actual evidence of user prior to 1983.

21. I shall therefore direct the Chief Land Registrar to give effect to the Applicants' application dated 7th July 2015. As to costs, these normally follow the event and I am therefore minded to award the Applicants their costs on the standard basis. I am prepared to assess the costs summarily if they do not exceed £25,000. I direct the Applicants to file and serve a Statement of Costs by 4 pm on Friday 16th June 2017. The Respondents may file written submissions 7 days thereafter, if they wish to object to the proposed order, to include any dispute as to quantum.

Dated this 7th day of June 2017

*Owen Rhys*



BY ORDER OF THE TRIBUNAL