REF/ 2017/0075

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

ALEXANDER BRAND

APPLICANT

and

MARIAN WILSDON

RESPONDENT

Property Address: 18 West End, Osmotherley, Northallerton, DL6 3AA and 16 West End, Osmotherley, Northallerton, DL6 3AA

Title Number: NYK419096 and NYK339064

ORDER

The Tribunal orders that the Chief Land Registrar do give effect to the application of the Applicant, Alexander Brand dated 18th October 2016 to register a prescriptive easement as if the objection of the Respondent thereto had not been made.

Dated this 2nd July 2018

Michael Michell

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL

[2018] UKFTT 0450 (PC)

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Title Numbers: NYK419096 and NYK339064

Before: Judge Michell

Sitting at: Leeds Employment Tribunal

On: 10th May 2018

Applicant Representation: Mr Martin Strutt, instructed by Lyons Davidson, solicitors
Respondent Representation: In person

DECISION

Cases referred to

Hollins v. Verney (1884) 13 QBD 304
White v. Taylor (No.2) [1969] 1 Ch. 160
Ironside, Crabb & Crabb v. Cook, Cook & Barefoot (1981) 41 P&CR 326
Barton v. The Church Commissioners [2008] EWHC 3091 (Ch)

1. Mr Brand and Mrs Wilsdon are neighbours in the village of Osmotherley in North Yorkshire, though Mr Brand spends most of his time in Canada. Mr Brand owns 16 West End, Osmotherley ("Number 16") and Mrs Wilsdon owns and lives at 18 West End, Osmotherley ("Number 18"). Mr Brand and his late wife applied to HM Land Registry to register the benefit and note the burden of a right of way to and from Number 16 over the garden of Number 18. They claimed to have acquired a right of way by prescription. Mrs Wilsdon objected to the application, though she has said she is prepared to allow Mr Brand to cross over her garden with her permission. Mr Brand seeks registration of a right to cross over the garden so that he and his successors are not dependant on the goodwill of Mrs Wilsdon or her successors. The matter was referred to the Tribunal for determination. Sadly, Mrs Brand passed away before the proceedings came on for hearing. The proceedings have continued in the sole name of Mr Brand who is now the sole owner of Number 16 by survivorship. The issue for the Tribunal to decide is whether Mr Brand is entitled in law to the right he claims.

2. I inspected the site accompanied by the parties and Mr Strutt, counsel for Mr Brand, on the afternoon before the hearing. Number 16 and Number 18 are attractive adjoining semi-detached cottages. Number 16 was at some time in the past two cottages but they were subsequently knocked into one. There is a photograph in evidence taken when Number 16 was two cottages and showing part of Number 16 was then being used as a branch of Barclays Bank. The front doors of both cottages open directly onto the pavement. Number 18 is on the west side of Number 16. Part of it was formerly used as a shop. On the west side of Number 18 there is a driveway open to the street. This gives access to the rear of both Number 18 and the cottage to the west of Number 18, being 20 West End. The land behind Number 16 and Number 18 rises quite steeply. Number 16 has a rear garden accessed from the back door of Number 16. The garden has been terraced. The back door opens onto a paved yard and from that yard, steps rise to three terraced garden areas. There is a shed at the level of the top terrace. The sides and rear of the garden are bounded by walls. There is a pedestrian gate in

the west corner of the rear wall. That gate opens onto land forming part of the garden of Number 18. That part of the garden of Number 18 that is immediately to the north of the garden of Number 16 is separated by a fence from the part of the garden of Number 18 that is behind the cottage at Number 18. There is a gate near the southern end of the fence. On the west of the gate there is a narrow path. The path runs down through the garden of Number 18 to a tarmacked parking area outside the garage of Number 18. By passing over the tarmacked area, it is possible to get to a vehicular gate that gives access onto the driveway between Number 18 and 20 West End. The path is narrow and includes some steps. It would be possible to take a wheelie bin down over the path, though with some difficulty.

3. From 1932 Ernest and Lily Pybus rented Number 16 from the then owner, Mrs Nelson. Mr Brand married the Pybus's daughter, Constance on 4th May 1957. From then Dr Brand and his wife visited Number 16 once a month until November 1967 when Dr and Mrs Brand and their daughters moved to Nova Scotia, Canada. Thereafter, they visited the United Kingdom annually, staying at Number 16 for about three weeks on each occasion.

4. In 1971 Dr Brand and Mr Pybus bought Number 16 from the executor of Mrs Nelson. Mr and Mrs Pybus continued to live at Number 16. Mrs Pybus died in 1979 and Mr Pybus died in 1981. From then on Mr and Mrs Brand continued to stay at Number 16 every year. They would stay there for four weeks in the spring and two weeks in the autumn. Dr Brand retired in 1991 and from then on, he and Mrs Brand spent from mid- January or early February until the end of May at Number 16 and visited again for two weeks in the autumn. In some years they came for a further two to three weeks in the summer. Dr Brand had become the sole owner of Number 16 in 1981 by survivorship on the death of Mr Pybus. Number 16 was at this time unregistered. Number 16 was transferred into the joint names of Dr and Mrs Brand and registered in 2007.

5. In July 1972 Mr and Mrs Arthur Gough purchased Number 18 at auction. The auction particulars stated that the drive at the side of Number 18 was owned by Number 18 but was subject to a right of way in favour of 20 West End. Mr and Mrs Brand lived at Number 18 until 22nd October 2014 when they completed the sale of Number 18 to Mrs Wilsdon.

Evidence as to User

6.(1) Mr Brand gave evidence that for as long as he had been visiting Number 16, there had been a gate between the back garden of Number 16 and Number 18. It was a very old gate and he replaced the gate in 2005. Mr Brand said that he had passed through the gate and into the garden of Number 18 to get to and from the street over the path in the garden of Number 18.

(2) On each visit to Number 16, he had removed garden waste and brought in mulch using the way over Number 18. He had done so about three times per visit.

(3) After about 1983 he had arranged for a local person to look after the garden at Number 16.

(4) In the 1980s when a new roof was put on the back kitchen of Number 16, materials were removed and brought in over the garden of Number 18 and workmen used that route to access Number 16.

(5) In the 1980s the kitchen was renovated and waste materials were removed over Number 18.

(6) In about 1990 Mr Brand and his son-in-law, Peter Wilson built a new shed in the back yard of Number 16. They brought the timber for the shed into the yard over Number 18.

(7) In 1994 the main roof of Number 16 was repaired and the tradesmen used the access over Number 18 to access Number 16 and to remove materials.

(8) On another occasion in the 1990s guttering at Number 16 was repaired. Workmen accessed the rear of Number 16 over the garden of Number 18 and removed materials by that route.

(9) In 2000 the main roof of Number 16 was replaced. Tradesmen accessed Number 16 through the garden of Number 18 and brought in and removed materials by that route.

(10) In 2005 the wall between Number 16 and Number 18 was removed to remove contaminated material beneath the floor of the rear room of Number 16. The tradesmen went through the garden of Number 18 to access Number 16 and to remove material. Mr Brand accepted in cross-examination that the work was necessitated by a leak in the oil tank belonging to Number 18 and was paid for by the insurers of Number 18.

(11) He continued to pass over the garden of Number 18 to and from Number 16 until stopped by Mrs Wilsdon in March 2015.

7. Mr Gough gave evidence that Mr and Mrs Pybus used to pass through the garden of Number 18 to and from Number 16. They did so particularly when they needed to carry

larger items or items which it was inconvenient to take through the house. He said that Mr Brand used to go through the garden of Number 18 to and from Number 16 when he was back from Canada. He did so taking larger items to the rear of Number 16 and taking bins out. Mr Gough said that while the Brands were away in Canada, their gardener came once a month to look after the garden of Number 16 and he would also come to pick apples from trees in the garden of Number 16. In cross-examination, he said that there had been gardeners coming to the garden of Number 16 through the garden of Number 18 ever since Mr Pybus died. He would walk through the garden of Number 18. Mr Gough also said that a bee keeper who kept bees in the garden of Number 16 would come to the garden of Number 16 once a fortnight, walking through the garden of Number 18. Mr Gough also recalled a builder, Danny Manging, going through the garden of Number 18 to access the rear of Number 16. Mr Gough had moved the pathway through the garden of Number 16 in 1978/1979 when he built a garage in the rear garden of Number 18 and again in1984/5 when he laid out a parking space by the garage. The path had stayed in the same position since 1984/85. Mr Gough said in cross-examination that with 2 large cars and one small car parked on the drive behind Number 18, it would still be possible to get past with a wheelie bin.

8. Mrs Gough confirmed Mr Gough's evidence as to the user of the garden of Number 18 for access to and egress from Number 16.

9. Mr Danny Manging gave evidence. As a builder, he had been employed on several occasions to do work for Mr Brand at Number 16. Whenever he did work for Mr Brand at Number 16, he would access Number 16 and bring materials through the garden of Number 18.

10. Mr Robert Young has been engaged as a gardener by Mr Brand to look after the garden at Number 16. In his witness statement he said that he had been retained for the last 6 years but in cross-examination, he said it was for longer than that. He thought he had been gardening for Dr Brand for 9 or 10 years. He gained access to the garden of Number 16 through the garden of Number 18 and took garden rubbish out by that route. He came to the garden of Number 16 about 7 or 8 times a year, starting in June and going on to November at the latest.

11. Mrs Wilsdon suggested that the use of the garden to access Number 16 had been with the consent of Mr and Mrs Gough and subsequently of herself. Mr Gough said in his witness statement that he had assumed that Number 16 had a right to walk up the drive between Number 18 and 20 West End and then through the garden of Number 18 to get to the garden of Number 16. As he assumed that there was a right of way, he did not have any discussion with Mr and Mrs Pybus or Mr and Mrs Brand about their use of the garden path. Their use of the pathway was not with the Goughs' permission or other arrangement. In cross-examination, Mr Gough said that he had lived at Number 18 for 42 years and assumed over that time that Dr Brand had a right of way.

12. Mrs Gough said in her witness statement that she remembered saying to Mr Brand that she thought she had seen mention of a right of way for Number 16 in her deeds. She said that when Number 18 was put on the market for sale, she checked the deeds and was surprised to find references to a right of way for 20 and 22 West End only. In cross-examination, Mrs Gough said that she did not think she thought of Dr Brand having a right of way "in a legal sense" but did not want to challenge Dr Brand going through the garden and thought that he probably had the right to do so. She did not recall there being any conversations with Dr Brand in which he was told that he had the Goughs' permission to use the garden path.

13. Dr Brand said that he did not ever ask the Goughs for permission to go through their garden and he told the tradesmen he employed that they could go through the garden of Number 18. He would have told the Goughs when works were being done to Number 16 but did not ask for permission to go through their garden. In cross-examination he said that in mentioning to the Goughs that works were to be done which would involve passing over the garden of Number 18, he was not giving the Goughs the opportunity to say that he could not pass over their garden. He was just being a friendly neighbour.

14. Mr Manging made a witness statement with a statement of truth but did not give oral evidence. He said that he would let the Goughs know as a matter of courtesy when he was going through their garden to access Number 16, by knocking on their door but did not ask permission. Mr Manging's evidence of passing though the garden of Number 18 to get to Number 16 is supported by the evidence of Mr Gough that Mr Manging did so to his knowledge. Mr Gough said that he remembered Mr Manging knocking on his door because Mr Manging liked to have a chat.

15. Mr Young said that Mrs Wilsdon had asked him to inform her when he was going to be going through the garden of Number 18 to get to Number 16. He did so by ringing her the day before or on the morning of his visit. This was a matter of courtesy.

16. Mrs Wilsdon's evidence as to user of the right of way was
(1) that Mr Robert Young only come to Number 16 about 3 or 4 times a year and had only once or twice contacted her and said he wanted to cross her garden;
(2) in her first witness statement, Mrs Wilsdon said Dr and Mrs Brand only came to Number 18 "rarely" and had not used the pathway through Number 18 whilst she had been living there. Dr and Mrs Brand took garden refuse and products through their house; and
(3) in her second witness statements Mrs Wilsdon said "throughout her residence" at Number 18 she had "always allowed" Mr and Mrs Brand to move their wheelie bin for garden refuse through her garden.

Sale to Mrs Wilsdon

17. Mr and Mrs Gough put Number 18 on the market for sale in about the beginning of 2013. The estate agents marketing the property were Stanton Mortimer. Stanton Mortimer prepared marketing particulars. The particulars included this note:

> "There is a pedestrian right of way across the rear of the property for the benefit of number 16 West End".

Mrs Wilsdon saw those particulars. In July 2014 Mrs Wilsdon made an offer to buy Number 18 and Mr and Mrs Gough accepted that offer, subject to contract. On 6th August 2014 Mr and Mrs Gough completed the Law Society Property Information Form, providing information about Number 16 to Mrs Wilsdon's conveyancing solicitors. The Form does not ask in terms any question as to whether there is a right of way over Number 18. However, question 8.4 asks if the seller knows of any rights of light, rights of support for adjoining properties, customary rights (e.g. rights deriving from local traditions), other people's rights to mines and minerals under the land, chancel repair liability, other people's rights to take things from the land (such as timber, hay or fish). Mr and Mrs Gough answered that they did know of a customary right and gave the following details

> "No 16 West End carry their refuse through the back garden of No 18. Also used to access their garden for heavy loads. This has been done since before we moved in (1972)".

On 21st August 2014 Mr and Mrs Goughs solicitors wrote a letter to Mrs Wilsdon's conveyancing solicitors stating that 22 West End has

> "a right of access for the delivery of coal, removal of refuse etc. across the garden of number 20 and down the common drive. The vendors always allowed similar access to number 16".

Mr Gough said in his witness statement that he did not recall seeing this letter before it was sent and that he could not recall giving instructions to his solicitors that he always "allowed" Mr and Mrs Brand to have access over his land. He had assumed that Mr and Mrs Brand had a right to go through the garden of Number 16.

18. Mrs Wilsdon said in her witness statement that she asked Mr Gough about the gate at the rear of Number 16 and he told her that there was no documentation or registration of a right of way. She said that Mr Gough told her after her first visit to Number 18 that he had confirmed with Dr and Mrs Brand that there was no documentation or registration of a right of way. In her second witness statement, Mrs Wilsdon said that Mr Gough made it very clear to her that he "allowed" Dr Brand to move his garden waste bin across the garden of Number 18 but this was infrequent. She also said that Mr Gough said he allowed a gardener to access Number 16 a couple of times a year.

19. In cross-examination, Mr Gough accepted that almost each time Mrs Wilsdon came to see Number 18 before she bought it, she asked about the right of way mentioned in the sales particulars. Mr Gough said that he probably told her the right of way would not bother Mrs Wilsdon and that Dr Brand lived in Canada. He did not accept that he told her he "allowed" Mr Brand to go through the garden.

19. The sale of Number 18 to Mrs Wilsdon was completed on 21st October 2014.

20. On 18th May 2015 Mr and Mrs Gough wrote a letter concerning access to Number 16. In their letter they stated that Mr and Mrs Pybus used the gate at the rear of their garden occasionally until their deaths and that Dr and Mrs Brand then continued to use the access, recently to take their wheelie bin to and from the road on refuse collection days and their gardener used it on foot for visits about once a month. They wrote that they had always assumed there was a pedestrian right of way for the benefit of Number 16 as this arrangement was common in Osmotherley. They said that Mrs Wilsdon had seemed concerned about the

right of way in favour of Number 16 but they had told her it had never caused them any problems.

21. On 5th January 2016 Mr and Mrs Gough sent an email to Dr and Mrs Brand saying that they had received a visit from Mrs Wilsdon who was accompanied by her solicitor. They said that Mrs Wilsdon wanted them to say that the access was permissive but they had told her they had no recollection of any discussions about a right of way.

The Application

21. On 9th June 2015 Dr Brand's current solicitors wrote to Mrs Wilsdon asserting that Dr Gough had a right of way through the garden of Number 18, that Dr Brand had used the right of way to transport refuse, coal and heavy materials from the rear of Number 16 to and from the road and to enable a gardener to access the rear garden. Mrs Wilsdon had taken steps to block the access and that if she continued to do so, they would apply to the court for an injunction. The application to register a prescriptive easement over Number 18 for the benefit of Number 16 was made on 18th October 2016. Mrs Wilsdon objected by letter from her then solicitors, the Endeavour Partnership, dated 9th November 2016. After some further correspondence, the Endeavour Partnership, wrote to Dr Brand's solicitors on 9th January 2017 stating that Mrs Wilsdon's view was that Dr Brand would not be able to establish evidentially that there is a right of way by prescription and that she did not wish to grant a right of way. The matter was referred to the Tribunal on 19th January 2017.

Evidence of Dr Hannah Wilsdon and Mrs Lynn Scates

22. Mrs Wilsdon produced a witness statement made by her daughter, Dr Hannah Wilsdon. In that statement, Dr Wilsdon gave evidence of an occasion on which Mr Robert Young had knocked on the front door of Number 18. She had answered and Mr Young had asked for permission to go through the garden of Number 18 to work in the garden of Number 16. Counsel for Dr Brand did not require Dr Wilsdon to be cross-examined.

23. Mrs Scates made a witness statement about a conversation she overheard between Dr Brand and Mrs Wilsdon. It is not relevant to the issues to be decided.

The Law

24. The judgment of Morgan J. in *Barton v. The Church Commissioners* [2008] EWHC 3091 (Ch) contains a helpful exposition of the law of prescription:

"36. The doctrine of prescription at common law, and as to lost modern grant, is based upon the presumption of a grant, in that prescription presupposes that a grant was once made and validly subsisting, but has since been lost or destroyed. The presumption of a grant is derived from proof of enjoyment of the right which is claimed....

37. The presumption of a grant is raised by proof of long enjoyment evidenced by acts of user on the part of the person claiming the right, or his predecessors in title. The reason for the doctrine of prescription is that it is the policy of the law to do all that it can to quiet titles so as to avoid litigation and preserve the security of property. When open and uninterrupted enjoyment, of what appears to be an incorporeal right, has continued for a long time the court will, where such enjoyment is wholly unexplained, presume, if it is reasonably possible, that the enjoyment is referable to a right which had a lawful origin. Every presumption is made in favour of long user. Not only ought the court to be slow to draw an inference of fact which would defeat a right that has been exercised during a long period, unless such inference is irresistible, but it ought to presume everything that it is reasonably possible to presume in favour of such a right....

38. Prescription at common law is based upon a presumed grant which the law assumes to have been made prior to 1189, the first year of the reign of Richard I. Enjoyment of the right must be proved from a time "whereof the memory of man runneth not to the contrary" that is to say during legal memory and the period of legal memory runs from 1189. As it is usually impossible to prove user or enjoyment any further back than the memory of living persons, proof of enjoyment as far back as living witnesses can speak raises a prima facie presumption of an enjoyment from an earlier time. Where evidence is given of the long enjoyment of a right to the exclusion of others, the enjoyment being as of a right in a manner referable to a possible legal origin, it is presumed that the enjoyment in that manner was in pursuance of a legal origin and in the absence of proof that the commencement of the user was modern, the user is deemed to have arisen beyond legal memory. Unexplained user of an incorporeal right for a period of twenty years is held to be presumptive evidence of the existence of the right from time immemorial but the rule is not inflexible, the period of twenty years being fixed as a convenient guide. In a claim to prescription at common law, it is not necessary to prove user during the specific period of twenty years before the commencement of the proceedings in which the claim is made. ...

40. For a claim to prescription at common law or under the doctrine of lost modern grant, the user must have been "as of right", having been enjoyed neither as the result of force, secrecy or permission, nec vi, nec clam, nec precario. Acquiescence on the part of the owner capable of making the grant lies at the root of prescription. A grant cannot be presumed from long user without the owner having had knowledge or the means of knowledge of the user. The owner cannot be said to acquiesce in an act enforced by violence or an act which fear on his part hinders him from preventing, or an act of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he sanctions only for temporary purposes or in return for recurrent consideration....

41. In general, what must be shown is continuous user. Unless satisfactorily explained long intervals between acts of user will go some way to defeat the right claimed. The period of non-user of an alleged right which will operate to defeat a prescriptive claim has no fixed length. The user need not be constant; where the user has not been constant the evidence should show that the gaps in the user were not due to interference by the owner against whom the prescriptive right is claimed..."

25. The amount or regularity of use that must be shown to give rise to a prescriptive claim to an easement is a question of fact. Guidance as to the amount or regularity of use that must be shown can be found in *Hollins v. Verney* (1884) 13 QBD 304 at 315 in which it was said that the user must be user which is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance to it is intended. In *White v. Taylor (No.2)* [1969] 1 Ch. 160 at 192-195, Buckley J., dealing with a prescriptive claim to a *profit a prendre* for grazing, said

> "User must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right and of a right of the measure of the right claimed".

This statement was approved by the Court of Appeal in *Ironside, Crabb & Crabb v. Cook, Cook & Barefoot* (1981) 41 P&CR 326. If long user of sufficient character, degree and frequency is shown then the burden is on the owner of the servient tenement to prove that he did not in fact know of the user – *Ironside & Crabb v. Cook & Barefoot* at 1434, 1435.

Findings

26. I am satisfied that Dr Brand passed over the garden of Number 18 to remove garden refuse from Number 16 at least about 6 times a year (being 3 times on each of his two annual visits to Number 16) between 1981 and 2014 (while Mr and Mrs Gough owned Number 18). That was his evidence on oath and there is no evidence to contradict what he said. It is supported by the evidence of Mr and Mrs Gough. I am also satisfied that, as Mrs Wilsdon said in her second witness statement, he continued to take his garden refuse out through the garden of Number 18 until March 2015. Mrs Wilsdon accepted in her closing submissions that garden waste had been taken out from Number 16 through the garden of Number 18 6 times a year.

27. I am also satisfied that access to Number 16 was gained over the garden of Number 18 on several occasions between 1981 and 2005 for the purpose of carrying out works to Number 16. This happened on 7 occasions, being the repair of the roof in the 1980s, the replacement of the kitchen in the 1980s, the building of a shed in 1990, works to the roof in 1994, works to gutters in the 1990s, re-roofing the house in 2000 and works to the backroom of Number 16 in 2005. This was Dr Brand's evidence and there is nothing to contradict that evidence. His evidence is in part supported by the evidence of Mr Gough that workmen, including Mr Manging passed through the garden of Number 18 to get to Number 16 and by the untested evidence in the witness statement of Mr Manging.

28. I am satisfied that from about 2007 Mr Young accessed the garden of Number 16 by going through the garden of Number 18 about 7 or 8 times a year. That was his evidence and I see no reason not to accept it.

29. I do not accept Mrs Wilsdon's submission that the erection of a garage at the rear of Number 18 in 1979 prevented or stopped use of the garden of Number 18 to take out the garden waste bin from Number 16 or to take materials in or out of Number 18. Neither Dr Brand nor Mr Gough said that it did so. Having visited the site, whilst I can see that it would be possible to park a car by the garage of Number 18 in a way which made it difficult to get past with a wheelie bin, it does not follow that if any car was parked outside the garage, access with a wheelie bin would be impossible. There is in fact no evidence that Mr Gough did ever park his car in a way that obstructed the passage of a wheelie bin.

30. I am satisfied that the use of the garden of Number 18 to access the rear of Number 16 was of a sufficiently character, degree and frequency to give rise to a right of way by prescription. It was used to remove garden waste, by tradesmen when carrying out building works to Number 16 and by a gardener about 7 or 8 times a year from 2007. Taken together, it was in totality user which satisfied the test in *Hollins v. Verney* . Mr and Mrs Gough's evidence is that they thought Dr Brand had a right of way through their garden. Had they not thought so, the use of the character, degree and frequency made by Dr Brand would have indicated to them that Dr Brand was asserting a right of way through their garden with garden waste. It was user which was obvious to Mr and Mrs Gough. They saw it and knew about it. It was user of a character and degree to be expected of someone asserting a right of way. It was a passing over a clear path through the garden of Number 18 from an established and obvious gate way in the rear wall of the garden of Number 16. The frequency was sufficient to indicate that a right of way was being asserted.

28. I do not accept Mrs Wilsdon's assertion that the passing through the garden of Number 18 was with the permission of Mr and Mrs Gough. It is clear from their evidence that they thought Dr Brand had a right to pass through the garden of Number 18. It does not appear from the evidence to have ever occurred to them that they could stop Dr Brand from doing so if they wished. The letter from Mr and Mrs Gough's solicitors dated 21st August 2014 does not lead me to conclude that Mr and Mrs Gough thought Dr Brand passed through their garden only with their permission. Had they so thought, they would not have allowed estate agents particulars to be sent out with a statement that Number 16 had a right of way through the garden of Number 18. Such a statement could not have enhanced the marketability of Number 16 and would not have been made unless Mr and Mrs Gough had told the estate agents there was a right of way through their garden for Number 16. Mr and Mrs Gough told Mrs Wilsdon's solicitors by completing the Property Information Form that there was a right of way through the garden of Number 18 for the benefit of Number 16. It does not matter that they chose to call this a "customary right". What is significant is that they considered it was a right belonging to Number 16. As Mr and Mrs Gough stated in the sales particulars and in the Property Information Form that there was a right of way in favour of Number 16, it cannot sensibly be the case that when Dr Brand was going through the garden, Mr and Mrs Gough thought he was doing so with their permission.

31. Dr Brand has shown over a period from 1981 to October 2014 use of sufficient character, degree and frequency to give rise to a right of way and that the user was not with

permission. That period of user is sufficient to give rise to a right of way under the doctrine of lost modern grant, without the need to consider the basis of user after Mrs Wilsdon became the owner.

32. The right of way was an overriding interest within paragraph 3 of Schedule 3 to the Land Registration Act 2002. It was a right that had been exercised within a year before the registration of the transfer to Mrs Wilsdon in October 2014, since it is accepted that Dr Brand used the right of way 6 times a year. The effect of section 30 of the Land Registration act 2002 is that Mrs Wilsdon took subject to the right of way.

Conclusion

33. I shall direct the Chief Land Registrar to give effect to Dr Brand's application as if the objection of Mrs Wilsdon had not been made.

34. My preliminary view is that Mrs Wilsdon must be ordered to pay the costs of Dr Brand. The normal order in land registration proceedings before the Tribunal is that the losing party do pay the costs of the winning party. I know of no reason in this case why the usual rule should not apply. Any party who wishes to submit that some different order should be made as to costs should serve written submissions on the Tribunal and on the other party by 4pm on 16th July 2018.

BY ORDER OF THE TRIBUNAL

Michael Michell

DATED THIS 2ND JULY 2018