PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO/2018/0106

BETWEEN

PARATON PROPERTIES LIMITED

Applicant

and

LANDVIEW LIMITED

Respondent

Property address: 69 Katherine Road, London E6 and land at the rear of 113 and 115 Wakefield Street, London E6
Title numbers: TGL454643 and EGL462946

Before: Judge Hargreaves

ORDER

The Chief Land Registrar is directed to give effect to the application made on 22nd June 2017 in Form AP1 dated 29th June 2017.

Dated 3rd June 2019

Sara Hargreaves

BY ORDER OF THE TRIBUNAL

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Before: Judge Hargreaves
Alfred Place, WC1E 7LR
3rd April 2019

Applicant representation: R.W. Stevens, F.R.I.C.S M.C.I.Arb. F.F.P.W.S
Respondent representation: Niraj Modha instructed by Arcadian Law

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DECISION

Keywords- Respondent objected to Applicant's application to note the benefit of a right of way against its title – Respondent challenged whether original grantor was capable – whether there was a legal easement – if there was, Respondent alleged the easement had been

abandoned totally or in part – reliance on conversation with tenant of proprietor of dominant tenement – whether capable of giving rise to abandonment or estoppel as alleged

Authorities cited

Gale on Easements, 20th edition, Gaunt and Morgan, eds.

Snell and Prideaux Ltd v Dutton Mirrors Ltd [1995] 1 EGLR 259

1. For the following reasons I direct the Chief Land Registrar to give effect to the Applicant's application made on 22nd June 2017 in Form AP1 dated 29th June 2017 to note the benefit of an easement against the Respondent's title to an area of land described below as "the passageway". See the plan attached to this decision, which demonstrates the passageway in question, though to its original extent (ie beyond that which is the subject of this application, and for illustrative purposes).

2. References are to pages in the trial bundle unless otherwise made clear.

3. I will start by explaining the lay out and ownership of the various properties, which is required to understand the dispute. I attended a site visit on the afternoon of 2nd April 2019, which was also attended by Mr Stevens on behalf of the Applicant, and Mr Awan, the majority shareholder and director of Landview, the Respondent, and its predecessor in title. The properties are in East Ham. Henry Russell sold the building plot which became 69 Katherine Road ("no. 69") in 1893 together with the now disputed right of way over a defined strip of land to the north of the plot, to which I refer in more detail below (the houses face east/west). In 1895 he sold the adjacent building plots to the north which became 113 and 115 Wakefield Street. Mr and Mrs Pateman began to live at no. 69 as tenants in the 1960s. Katherine Road runs roughly north/south. Wakefield Street runs east/west (see attached plan for orientation).

4. Basically the right of way runs along the north flank wall of no. 69 originally running between Katherine Road and St Bernard's Road, which is parallel to Katherine Road (see p96). A good modern location plan is at p143. No. 69 (TGL454643) is clearly delineated, as it is on the file plan at p140: the office copies are at p139-140. No.69 was first registered in the name of the Applicant on 19th August 2016 with "the benefit

of any legal easements granted by a conveyance of the land in this title dated 17th June 1944 made between (1) Minnie Stevens and (2) Hector Davis."

5. It is not entirely clear when Mr Awan purchased 113 and 115 Wakefield Street because the latest office copy entries for EGL11809 and EGL125341 show him as registered proprietor in his own name as at 6th July 2015 (p128-130 and p132-134). There is no dispute that either he or himself and his wife purchased the Wakefield Street properties in about 1988-1990: they were redeveloped to provide leasehold accommodation above two ground floor shops. The legal rear boundaries of Wakefield Street do not abut the northern flank wall of no.69 because that area is occupied by the small strip of title registered to the Respondent Landview with a possessory title (EGL462946) on 11th November 2003 (p124). I refer to this strip as "the passageway" to ensure that it is clearly identified as this area of land in this decision (it forms part of the yellow strip on the attached plan). Again, there is a clearer outline of the passageway between the properties at p143 (between the road and point A). The Respondent then obtained possessory title to the strip which is the passageway/right of way. His statement in support of that application is dated 8th September 2003 at p63 and rested on the assertion that he incorporated the passageway into the rear of the Wakefield Street properties from about 1989, and controlled access via the double gates across the original access from the street, which were locked. He added that he permitted the owner of no. 69 to park a car there, but this adds little to the application, and it appears that the offer was not taken up.

6. What you see now when standing in the rear yard of the Wakefield Street properties is a combination of the original passageway and the rear yard of the Wakefield Street properties merged into one enclosure, roughly concreted and fenced on two sides, with no dividing features. The southern boundary of the merged area is the flank wall of no. 69. The yard is used by the tenants of Wakefield Street for parking and hanging washing among the other usual purposes for yard space. There are vehicular gates approximately 6 feet wide providing access to and from Katherine Road and a pedestrian gate adjacent. The vehicular gates roughly coincide with where the passageway met the Katherine Road pavement: there are still signs of the original cobble sets along the dropped kerb. The pedestrian gate opens onto the Wakefield Street title. A good photograph of the vehicular gate is at p223: no. 69 can be seen to

the left side of the photograph. Other Google street scene photographs for the years 2008, 2012, 2014, 2015, 2016, 2017 are at p106-111, demonstrating that the pedestrian gate is open whereas the vehicular gate is closed. Other photographs were produced by the parties at the hearing. What is absent from the photographs in the bundle but arguably critical to the dispute is a photograph of the side gate at the rear of no. 69 which provides access to and egress between the passageway and no. 69. Photographs were taken of the gate at the site visit and developed for the hearing.

7. The gate predates the acquisition of the Wakefield Street properties or the passageway by Mr Awan. It is wooden, on two hinges, and has two bolts which are operated from the no.69 side. There is a handle on the passageway side which opens and closes the gate. We went through it on the site visit. It is clearly functioning.

8. The case was beset by procedural issues, which I outline at this stage. Mr Stevens had filed an expert report in December 2018, a copy of which is at p161. I am not sure why the Applicant thought this would assist or how it would replace the need for useful factual evidence, but in the event, as the Applicant instructed Mr Stevens to conduct the advocacy, the expert report could not be relied on except as to plans or photographs. Mr Stevens was not ideally placed to deal with an easement case which required him to deal with a number of legal issues as pleaded by Mr Modha, and he frankly indicated as such. He was also not fully aware of the nature of a hearing in this Tribunal. That was clear from his extremely late realisation during the site visit that if he was not going to be able to give evidence himself (much of which would be hearsay) then (ideally) he required more evidence from Mrs Pateman, the surviving tenant at no. 69. She had been present at home during the site visit but is 83 years old, not in good health, and indicated to me that she was unwilling to come to a hearing. Had that been understood in advance, then it might have been possible to take her evidence orally at home, but since Mr Modha was not present, and no application had been made, that was not a viable possibility because it would have been unfair to the Respondent.

9. Given that she had only provided a very short letter containing her evidence (copy at p160), Mr Stevens returned to no. 69 after the site visit and took more detailed notes to prepare a better witness statement. His notes were typed up by the managing agents

the following day and they managed to get Mrs Pateman to sign the revised statement. Finally Mr Stevens was in a position to apply to put the statement in (as hearsay, with consequential limits on its weight) by 3pm. That application was vigorously opposed by Mr Modha who argued, correctly, that the deadline for submitting evidence expired in June 2018, no attempt had been made earlier to extend time limits, and in brief, it was all too late to apply to put in a statement which could have been provided in time or at least well before the hearing, had the Applicant focused on preparing the case properly. The notices of hearing were dated as long ago as 15th August 2018. Mr Modha said he was prejudiced as he would require further time to take instructions from his client, and that, further much of the statement did not assist the Applicant (a somewhat contradictory argument). As he said, it was not a late statement dealing with a new matter: it was required to do something which should have been done months ago. Had Mr Modha not objected, I would have allowed the Applicant to rely on the evidence and considered its weight in the usual way. In view of Mr Modha's objections, I refused the application. Whilst the Tribunal tries to assist parties which miss the point about evidence, there are limits, and I consider that the limits were reached by the Applicant in this case. No real reason was provided as to why Mrs Pateman had not been properly proofed in the first place (though her evidence is enough to support the Applicant's case) and I rejected Mr Stevens' submission that the Respondent had filed late documents at the site visit. As these consisted of more photographs and a copy of the builder's contract in 1990 those documents did not provide sufficient justification to allow the statement of themselves. The Applicant had plenty of time to prepare its case properly and had dis-instructed solicitors of its own choice, probably because it had not really thought through the nature of the Tribunal process in which it was engaged. In the circumstances, the lack of a further statement has not damaged the Applicant's case, though its preparation was not ideal.

10. As the conveyance of 1944 refers to an 1893 conveyance, I start with the conveyance dated 8th September 1893 between Henry Russell and Walter Ford. See p94 of the bundle. The critical words appear to have been inserted by hand between two lines and I required a magnifying glass and a blown up version to work out what it said: on doing so I decided that the Applicant's transcription was inaccurate. Finally, it was agreed at the hearing that the conveyance provides for the conveyance of no. 69 (as a building plot) ie *"ALL that piece of land situate in the Parish of East Ham Essex the*

position and extent of which piece of land are indicated by the plan Together with a right of way and passage over the strip of ground six feet wide on the North side thereof and coloured yellow on the said plan ..." The coloured photocopy of the original plan is clear and shows the passageway running across the northern boundary of no.69 (though not all the way to St Bernard's Road, as per plan attached). The 1944 conveyance (Minnie Stevens to Hector Davis) repeats the grant of the right of way in the same terms by reference to the 1893 conveyance (p90). On 2nd December 1991 Hector Davis gifted no.69 to his daughter Erica Jordan with the same right of way (see p112). The Applicant was registered as proprietor of no. 69 with the right of way when it acquired the property in 2016. It transpired at the hearing that there is a background dispute about the Respondent or Mr Awan's desire to develop Wakefield Street, though I lack the full details, and that has prompted the application to enter notice of the right of way against the title to the passageway, to secure the Applicant's position.

11. The Applicant's statement of case adds very little to the outline facts above (see p28): the critical paragraphs draw attention to the fact that no. 69 has been tenanted since 1966 by Mr and Mrs Pateman who have always had access to the rear gate through the gate described above, used by a director of the Applicant when inspecting the property before purchase and first registration in 2016, and that the right of way must be an overriding interest. Mr Samson, a director of the Applicant, gave oral evidence confirming the statement of case and I accept his evidence that at the time of acquisition he formed an entirely reasonable view as to the existence of the right of way It became clear at the hearing that though the vehicular gates to the rear of Wakefield Street might be locked, there is an adjacent pedestrian gate which has to be unlocked due to fire regulations. See paragraph 7 of Mr Awan's witness statement (p216) which he corrected in giving evidence to accept that the pedestrian gate had been unlocked since the mid 1990s at least, and probably, in my judgment, before that, due to Newham fire regulations for tenanted properties (the gate was a means of escape for the flats above the shops). His oral evidence on the pedestrian gate did not support paragraph 13 of his statement of case. Although the pedestrian gates do not lead directly to the right of way (fronted by the locked vehicular gates) as a matter of fact that is how access is gained. Mrs Pateman's statement is at p160 and describes (albeit briefly) how she succeeded to the tenancy on her husband's death in 2014 and

has lived in no. 69 for over twenty years: *"There has always been a gate to my side of the garden adjacent to the rear of the property. I have always had access and use of this."* This is a legal easement, not a prescriptive easement, and therefore quality and quantity of user is not relevant, subject to Mr Modha's submissions about abandonment (see below).

12. Mr Awan's oral evidence was hard to follow in parts: he was always conscious of a need to provide a supporting answer for his case opposing the entry of an easement against – to put it in context – only the passageway, and that prompted a certain amount of confusion and backtracking, particularly in relation to the straightforward question: was the right of way fenced off and separate to the Wakefield rear yard in 1988 when he first acquired the Wakefield Street properties? It appears that it was used for fly tipping, and that the original wall may or may not have been removed to be replaced by a *"tinpot fence"* or *"in reality there was no real fence"*. Mrs Pateman produced a photograph which shows two men outside no. 68 and she dated it 16th August 1986 (by dint of the usual family photograph method: the two men are clearly dressed for a wedding and the photograph dated by reference to that, which I accept). It is not in the bundle but clearly shows the passageway separated from the rear of Wakefield Street by a solid brick wall. Mr Awan produced a photograph of the rear yard of Wakefield Street around the time of his acquisition, (also not in the bundle), and taking the two photographs together, it looks as though around the time that Mr Awan acquired Wakefield Street as a development project, his predecessor had demolished the brick wall separating the yard from the passageway and erected temporary and rough fencing in its place. The upshot was that once Mr Awan had redeveloped the Wakefield Street properties, it was relatively straightforward to incorporate the passageway into the rear yard, and he did just that. At the same time he blocked off the route to St Bernard's Road and effectively cut the length of the right of way granted to no. 69 (also blocked by local authority housing and gardens extended over the rest of the passageway), but leaving the gate to the rear garden of no. 69 untouched and accessible.

13. Mr Awan asserts in his witness statement that he spoke to Mr Pateman about the time he was redeveloping Wakefield Street and that Mr Pateman (whom he says he thought owned no. 69 rather than occupied as a tenant) said that he *"never used the land and*

that he did not intend to do so". Obviously, that is not the equivalent of an unambiguous statement to the effect: "I do not intend to use the right of way" which is contradicted by Mrs Pateman's brief evidence in any event, which I accept. In cross examination, this belief that Mr Pateman owned no. 69 was expanded by Mr Awan. It was based on Mr Pateman's assertions that he "lived" in no. 69 which Mr Awan knew was the case anyway, and he admitted that he made no inquiries as to his precise status. They had a neighbourly discussion about Mr Awan clearing up the mess in the rear of Wakefield Street, which is unsurprising given its state as depicted in the photograph relied on by Mr Awan: it must have been a complete neighbourhood eyesore. Mr Awan told me when I sought clarification, that Mr Pateman had no objection to Mr Awan's plans to incorporate the passageway into the back yard which he would tidy up and concrete over. At that time of course, Mr Awan had no title to the passageway, he presumably only planned to obtain one by dint of enclosing the strip. Mr Pateman's understanding of his rights in a matter of conjecture. Mr Awan said Mr Pateman said nothing about a right of way and if so I cannot see how Mr Awan can argue that anything Mr Pateman said could reasonably be interpreted as referring to a right of way or abandoning it. Similarly Mr Awan does not say he made any inquiries about the use of the gate or the right of way, which has at all material times been an obvious feature, and must have been so to Mr Awan when he was making his plans.

14. He was at pains to stress that before he applied for possessory title in 2003 he checked whether Mr Pateman would object to that application and he had no objections. He stressed that he (Mr Awan) was an educated man who knew that HMLR would contact Mr Pateman to see if he had any objections to the application (as to which there is no evidence either way). Again, he does not say that conversation dealt with the right of way over the passageway. Listening to Mr Awan's evidence overall, I am satisfied that he had no more than a neighbourly chat with Mr Pateman about his plans to tidy up the back yard in the early 1990s (by which time the passage wall had already been demolished) and that by the time he made the application for possessory title to part of the passageway, the works had been completed for the relevant period of years, the gate to the rear of no. 69 was untouched, and the Patemans came and went as they wished using the pedestrian gate which was unlocked, because they had no keys to the vehicular gates, a small diversion (being technical). Whilst Mr Stevens

failed to make much headway with Mr Awan about whether or not he realised there was a long ladder locked to the rear of no. 69 which must have been brought over the passage (which Mr Awan brushed off as irrelevant), I am also satisfied that Mr Awan was well aware of the gate to no. 69 and I am surprised that no mention of it was made in his application for adverse possession, as it arguably should have been (see for example *s71(a) LRA 2002, LRR 2003, r28).* His evidence simply ignores the gate, focuses more on various offers to allow parking, and he denies ever seeing the Patemans use the right of way, (having only met Mrs Pateman four times including once at the site visit). But he has never lived in the Wakefield Street properties. The failure to deal with the gate in his application or evidence was unhelpful.

15. Above all, as Mr Awan's defence is based on the fundamental point that no valid easement was granted by the 1893 conveyance, it is pretty hard to stretch his evidence of conversations with Mr Pateman into conversations about not using a right of way which Mr Awan's/the Respondent's own pleadings suggest he challenged in any event (save as to the evidence of the gate and the obvious inference that any bystander would have reasonably drawn about that). Indeed Arcadian Law's response dated 24th July 2017 (p11) to the HMLR notice letter goes notably further than Mr Awan's actual evidence in my judgment, insofar as it states: *"The purported right of way has not been exercised in over 30 years. Furthermore, in 1990 our client installed metal gates ... which sealed off access to the right of way* [this glosses over the evidence about the pedestrian gate]. *No objections were raised by the then owners of no. 69, or indeed any other neighbours. The previous owners of Katherine Road confirmed that they had (i) never used the right of way (ii) never intended on using it and (iii) consented to our client resurfacing the affected land and sealing it off for his own use and restricting any access to it at his discretion."* That is not what Mr Awan says in paragraph 8 of his witness statement (p216). It does not support the way in which his case on this point was pleaded in paragraph 14 of his statement of case (p33). It does not reflect what Mr Awan said in oral evidence.

16. I repeat, there is in my judgment, having heard Mr Awan give evidence, no way in which any of the steps he took in relation to incorporating the strip into the rear yard of the Wakefield Road properties had anything remotely to do with relying on

anything Mr Pateman may have said whether about use of the yard or the passageway, and to that extent the pleadings overstated Mr Awan's actual evidence.

17. When I refer to the use of the right of way since about 2003, I mean its use as diverted through the pedestrian gate, but that was brought on by Mr Awan installing gates as he did, and the remedy if he wishes to limit the occupiers of no. 69 to the six foot strip from the road, is to provide a key to the vehicular gates, if it is an issue.

18. On the facts therefore there is nothing in Mr Awan's oral evidence to support one of his submissions (to which I return below), that Mr Pateman either abandoned the right of way, or would be estopped from denying that he had indicated to Mr Awan that he would do so: there is simply no credible evidence of a sufficiently clear statement, reliance or detriment. Given the state of the rear yard when Mr Awan acquired the Wakefield Street properties for development, he simply could not have spent time and money clearing it up and occupying it in reliance on anything Mr Pateman said as he appears to suggest in paragraph 10 of his witness statement or paragraph 14 of his statement of case. He applied for planning permission and implemented the permission he obtained: that had nothing to do with the Patemans. The properties would have been unlettable without clearing the yard. The Patemans did not own the strip: they could not stop him from doing anything apart from preventing their access. The wall had already been demolished (it appears). Mr Awan was at pains throughout the site visit to stress his acumen as a businessman in the locality: I am entirely satisfied that his redevelopment of the rear of the Wakefield Street properties was carried out for his own purposes, and if he spoke to Mr Pateman (never Mrs Pateman) it was purely to ease out any problems on a neighbourly basis.

19. I put a debate between Mr Stevens and Mr Awan about whether or not the Patemans ever parked a caravan to the rear of Wakefield Street to one side because I could not follow the assertions or the evidence about this, and it was in the end irrelevant to the question I have to determine.

The Respondent's case

20. The Respondent opposed the application on several grounds. The first point pleaded was that the Applicant had failed to identify the precise scope of the easement or its extent, or that it was a legal easement at all. By the time we had agreed what the 1893 conveyance actually stated (the Respondent having failed to deal with the miniscule print before the hearing), however, Mr Modha accepted that on its face the 1893 conveyance granted a legal easement of a right of way which extended to six feet wide. He was right to agree that. The argument that it could not be a legal easement because it was not registered simply failed to deal with the point that it was granted in 1893, or consider the provisions of *s70(1)(g) LRA 1925*. On the first registration of the passageway under title number EGL462946 with a possessory title, the strip was subject to the unregistered easement in any event: see *s11(4)(b)(7), Schedule 1 paragraph 3, LRA 2002*. See also *Gale on Easements*, 20th edition, at 5-15. The argument based on *paragraph 2, Schedule 1* is misconceived and paragraph 10 of the Respondent's statement of case is rejected.

21. So far as the Respondent complained that he could not read the 1893 conveyance and that the Applicant had failed to provide a legible copy, that was a bad point to take. No competent litigator should think of heading to a hearing without having got to grips with the conveyance at the root of the dispute: the Respondent's solicitors should have been far more proactive in obtaining and reading a legible copy before leaving it to the trial. There was no evidence before me to suggest that the Applicant had failed to co-operate with any relevant request for clarity.

22. Notwithstanding the above, Mr Modha still asserted that the Applicant had to prove that the easement was created by a competent grantor. I was surprised, given the context of the 1893 conveyance, but if pressed the obvious answer is that since Henry Russell sold the Wakefield Street plots in 1895, the weight of the evidence above and beyond the fact of the 1893 conveyance itself is that he owned the strip in 1893 and was therefore competent to grant the easement. Further, there is no evidence to the contrary to undermine the clear impact of the 1893 conveyance, and Mr Modha had no alternative suggestion to support an alternative case. In my judgment Henry Russell

was a competent grantor on the balance of probabilities and that and the 1893 conveyance is enough.

23. Mr Modha's alternative attack, having failed to persuade me that he can succeed on any of the "technical" grounds he advanced as to the status of the legal easement pursuant to the 1893 conveyance, is that the application should be refused because the easement was *"abandoned or partially abandoned. The Respondent relies upon the principles of implied release and proprietary estoppel"* (Respondent's statement of case paragraph 11, skeleton argument paragraphs 21-27). Mr Modha accepted that abandonment is hard to prove. In my judgment the facts would require more certainty and clarity than those available to the Respondent in this case.

24. Although I have already indicated above that in my judgment there is no credible evidence to support this line of argument on the facts, which means I can reject it on those grounds alone, I will deal with Mr Modha's submissions in more detail, as he expanded these at length in both his written and oral submissions.

25. His starting position is that Mr Pateman represented himself as the owner of no. 69 and agreed with Mr Awan (as the Respondent's predecessor) that the easement was extinguished. Alternatively Mr Pateman agreed that Mr Awan could carry out works which prevented his future user of the easement, and that extinguished the easement, or estopped Mr Pateman from denying that the easement was extinguished. Mr Modha cites *Gale* at 12-25 as follows, in support: *"If the owner of the dominant tenement authorises an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent his future enjoyment of the easement, it is thereby extinguished. Provided that the authority is exercised, it is immaterial whether it was given by writing or by parol."* See also Gale at 12-72 as to the role of estoppel in this context. In this case the owner of the dominant tenement did not authorise anything to be done on the strip of land which excluded future use of the easement: at its highest Mr Awan's evidence is that Mr Pateman, a tenant, indicated he could go ahead with incorporating the strip and concreting the yard, the type of neighbourly conduct that can or should be indulged in without *"fear of losing those rights for all time"*: see *Gale 12-71.* See for example Hoffmann LJ in *Snell and Pridcaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259.

26. However, in my judgment the fact that Mr Pateman was a tenant is fatal to this submission, even if I were persuaded on the required facts (which I am not) that Mr Awan was persuaded that he thought Mr Pateman was the owner or making clear representations that he was not relying on his legal easement (if in fact he knew one existed, as to which there is no evidence apart from the factual position relating to the gate and the passageway). In reality, I suspect (without having to find) that Mr Awan was at the time wholly indifferent to the question of Mr Pateman's status and only really came up with the whole defence of abandonment or estoppel on receipt of the AP1 application.

27. I pressed Mr Modha to provide authority for the submission that even if on the facts Mr Pateman's representations amounted to an abandonment of the easement, that would bind his landlord in such a way that I would be compelled to cancel this application. He was frank enough to admit that he had no supporting authority. He submitted that the acts of a tenant can bind his landlord, citing (as examples) the principle that a tenant can encroach on land for the benefit of his landlord, and a prescriptive user can be acquired by a tenant for the benefit of his landlord. But these are positive acts, not acts negative of the landlord's rights: they are simply not the tenant's to abandon. Mr Modha's submission that Mr Pateman's alleged abandonment of the owner of no. 69's rights which were not his to abandon must fail in this case. At the very least there is no basis on the facts on which I can reasonably determine that Mr Pateman had authority, express or implied, to bind his landlord.

28. Moreover, the occupiers of no. 69 continued to access their rear gate by using the pedestrian gate adjacent to the original access, which is inconsistent on the facts with Mr Awan's assertions, and so I also reject the Respondent's submissions on abandonment by non-user for over twenty years (citing *Gale* paragraphs 12-73-78). Nothing in Mr Awan's oral evidence suggests that he prevented them from doing so or they agreed not do so. Even if they did, they might be barred for the period of their tenancy, but not the Applicant or its predecessor. As *Gale* is clear, *"The true rule would appear to be that mere non-user without more, however long, cannot amount to abandonment. Such non-user is evidence from which abandonment may be inferred but must be regarded in the context of the circumstances as a whole"* (12-71). So even

if there has been non-user by the Patemans, which I reject, it was not coupled with anything to indicate that it is safe to infer abandonment.

29. As an alternative Mr Modha submitted in oral submissions that access via the pedestrian gate was not user in accordance with the easement, and that the Applicant (in effect) had to apply for a new prescriptive easement. On the grounds that the 1893 easement has not been abandoned and that the deviation in user is minor, and seems to me to avoid an unnecessary confrontation about having a key to the vehicular gates or suing the Respondent for interference with the right of way, I reject this submission (which was not pleaded). This is a case about the existence of the easement, not an action to restrain user in a particular way, and I think it important to keep the two separate. I observe, thought the point was not fully explored in submissions, that it might be hard to conclude that user via the pedestrian gates rather than the vehicular gates amounted to a substantial and therefore actionable interference with the right of way in any event. If not actionable then the reverse would arguably apply: I do not see how the deviation equates to abandonment or other evidence of non-user.

30. As to Mr Modha's further submission that there has been partial abandonment because there is no evidence that the occupiers of no. 69 have used the full six feet width since around 1988 (when the area was fly-tipped and the new gates were installed), that is to misread the paragraph in *Gale* at 105 on which he relies. That states that *"user to something less than the full extent does not prejudice the full right ...[though] there is no logical or legal reason why there cannot be a partial abandonment of the full extent of the easement."* Further, in relying on *Snell & Prideaux v Dutton Mirrors Limited* [1995] 1 EGLR 259, Mr Modha emphasises yet another authority which deals with abandonment by the *owner* of the dominant tenement. In other words, there still has to be an act of abandonment on the facts, contrary to my findings. Of course, I am not dealing with the right of way beyond the point it has actually been fenced off, but that point does not arise for decision in this case.

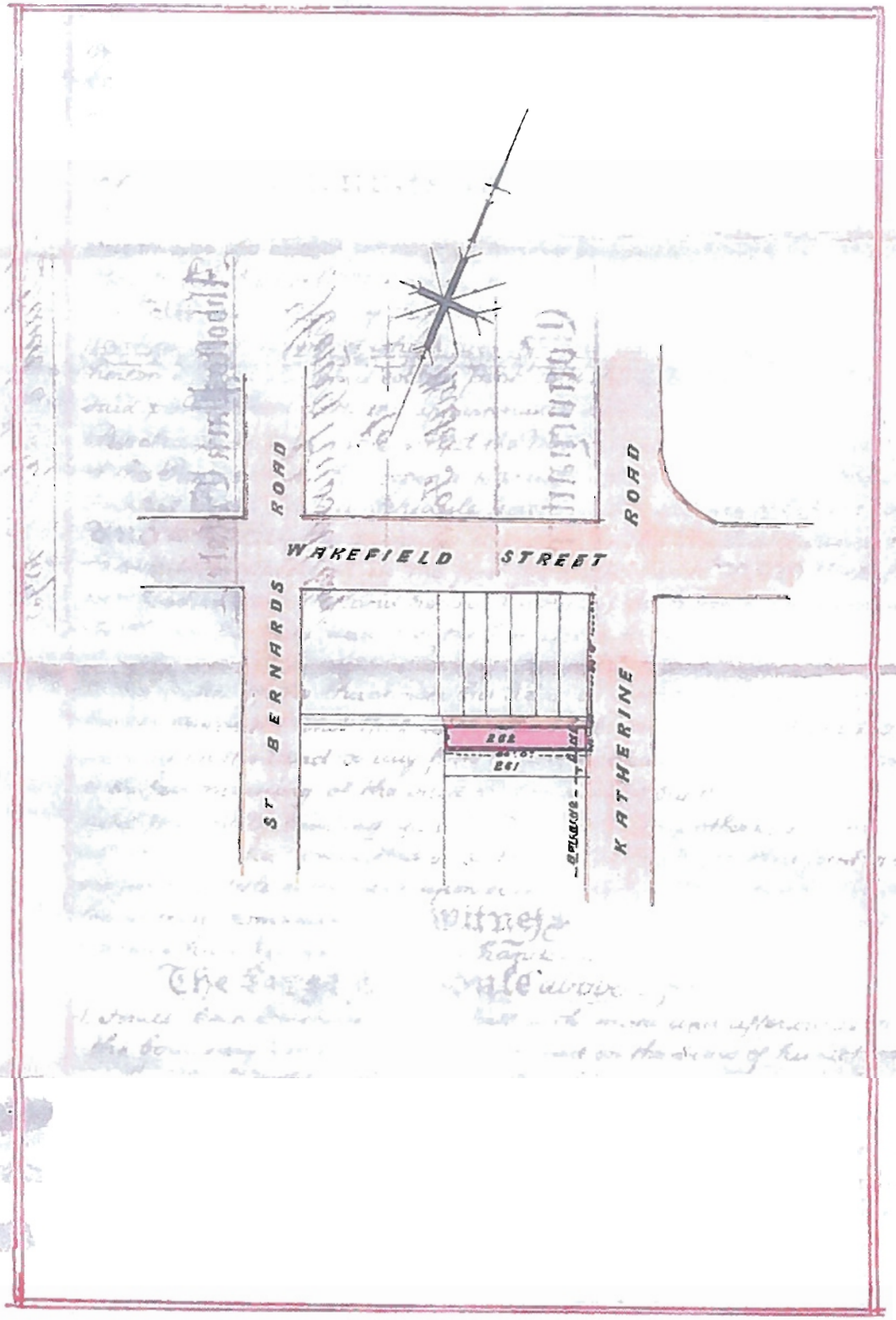
31. In the circumstances the Applicant has been successful on both facts and law. The usual principle in this Tribunal is that costs follow the event. If the Applicant wishes to apply for costs then it must file and serve an application with an appropriate schedule of costs incurred in relation to the costs of the reference from 30th January

2018 by no later than 5pm 20th June 2019. The Respondent has permission to file and serve a response dealing with both liability and quantum no later than 5pm 4th July and I will deal with costs after that.

Dated 3rd June 2019

Sara Hargreaves

BY ORDER OF THE TRIBUNAL


WAKEFIELD STREET
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