Neutral Citation Number: [2019] EWHC 1964 (Ch)

Case No: PT-2017-000102

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 12/07/2019

Before :

MASTER TEVERSON

- -

Between :

(1) SARAH JANE PEZARO	**Claimants**
(2) CARLTON GAVIN PEZARO	
- and -	
(1) ELIZABETH MARION BOURNE	**Defendants**
(2) RICHARD ROSS BOURNE	

- -
- -

Sarah Jane Pezaro acting as a litigant in person on behalf of herself and the Second Claimant
James Ryan of **Carbon Law Partners** for the Defendants

Hearing date: 13 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER TEVERSON

MASTER TEVERSON :

1. This is my reserved judgment following the trial of a Part 8 claim.

2. The Claimants, Mr and Mrs Pezaro, are applying for "a determination that the right of way in favour of the residential property 147 New Street, Andover, Hampshire, SP10 1DT, HM Land Registry title number HP413576, over residential properties 149 and 151 New Street, Andover, Hampshire SP10 1DT, HM Land Registry title numbers HP642675 and HP689545 respectively (the right of way), was extinguished between 2005 and 2006 due to the actions of the Defendants' predecessor in title, Mr Marc Ayres on the basis of proprietary estoppel on the grounds established in *Lester v Woodgate* [2010] EWCA Civ 199."

3. At trial the Claimants relied on the witness statements of Mrs Pezaro, Mr Pezaro and Mr Ayres. Mrs Pezaro and Mr Ayres were cross-examined on their evidence by Mr Ryan. The Defendants relied on the witness statements of Mr and Mrs Bourne. Mrs Bourne and Mr Bourne were cross-examined on their evidence by Mrs Pezaro.

4. The Claimants are the joint beneficial owners of Numbers 149 and 151 New Street, Andover, Hampshire, SP10 1DT. The Defendants, Mr and Mrs Bourne, are the joint owners of Number 147 New Street.

5. The three properties numbered 147, 149 and 151 New Street form a terrace at right angles to New Street. The properties front onto a roadway known as Cemetery Lane which gives access along the front of the three properties to New Street. Prior to its demolition as part of a road-widening scheme, a fourth property, 145 New Street stood alone facing on to New Street at the point where Cemetery Lane joins New Street. All four properties were built on behalf of a Mr William Bartlett. All four properties were in common ownership until 1960.

6. By a Conveyance dated 6th April 1960 (to which I shall refer as "the 1960 Conveyance"), Miss E.J. Bartlett, the only daughter of Mr William Bartlett, conveyed Number 147 New Street to a Mr Henry Eggleton. The property conveyed is described in the First Schedule as being situate off the West side of New Street and having a frontage to the North side of a trackway leading to the Cemetery adjacent to St Mary's Church.

7. It was conveyed:-

   "TOGETHER with a right of way for the Purchaser and all others authorised by him in common with all other having a like right at all times on foot only over the adjoining property of the Vendor known as Numbers 149 and 151 New Street aforesaid along the pathway coloured brown on said plan"

   I shall refer to this as "the right of way".

8. The conveyance plan shows a gateway from the rear of Number 147 (opening inwards) along a path to the rear of Numbers 149 and 151 which then turns at right angles along the side of Number 151 until running into Cemetery Lane. The path runs immediately to the rear of Numbers 149 and 151 and to the side of Number 151 between the properties and their gardens. The gardens of the three houses are at an angle so that the

garden of Number 147 extends behind Number 149 and that of Number 149 behind Number 151.

9. Mrs Pezaro, known then by her maiden name Sarah Sharpe, purchased Number 151 in October 2001 as a home for herself and her young son to live in. She says that the right of way was at that time used on a daily basis by the owner of Number 149 who would walk around the back and side of Number 151 in order to access refuse bins stored on Cemetery Lane outside the front gardens of Number 149 and 151. It was not used by the owner of Number 147. Number 147 was owned by Mr Ayres. Mr Ayres kept three Staffordshire Terriers. He had erected a number of outbuildings at the rear of Number 147 in which to house his dogs which were in place when Mrs Pezaro bought Number 151. A solid fence had been erected inside the boundary of Number 149 prior to Mrs Pezaro buying Number 151. This was to stop run off entering Number 149 when the area where the dogs were kept was washed down by Mr Ayres.

10. In 2004, Number 149 came on to the market. Mr and Mrs Pezaro who were by then living together at Number 151 saw an opportunity to obtain planning permission for a small block of flats if the rear gardens of Numbers 147, 149 and 151 were packaged together as a building plot. Mr Ayres was approached by Mrs Pezaro and agreed to sell part of the rear garden to Number 147 if Mrs Pezaro could get planning permission for a block of flats on the land that the gardens would make.

11. Mr Pezaro bought number 149 in October 2004 and was registered as proprietor of Number 149 on 24 November 2004. Mr Pezaro was made aware by his solicitor that Number 149 had the benefit of a right of way over 151 New Street and was subject to a right of way in favour of Number 147. He says this did not concern him as it was the intention of Sarah (Mrs Pezaro), Marc (Mr Ayres) and himself to remove most of the rear gardens.

12. Between October 2005 and June 2006 three planning applications were made to Test Valley Borough Council for development of land to the rear of Numbers 147,149 and 151 New Street to permit development of a three storey block of five flats and associated parking. Mr Ayres was not a party to the planning process but was aware that one application was refused.

13. Prior to the third and final application being made to Test Valley Council, Mrs Pezaro says that Mr Ayres asked for a little more garden to be retained by his property as he was concerned that the small amount he would be left with would devalue his property. This request was accommodated in the final application. Planning permission was granted in June 2006 for a development of land to the rear of Numbers 147, 149 and 151 to accommodate a three-storey block of five flats with associated parking.

14. Mrs Pezaro says that at no time was the right of way mentioned. She says it was not mentioned in discussions between the parties or at any time during the planning application process. She says it was her belief at the time that the right of way would be partially removed by the removal of the rear gardens and that the remaining right of way would be given up.

15. Mr Ayres gave evidence on behalf of the Claimants. He confirmed that he had never used the right of way in the 11 or so years he had lived at the property. He said he kept dogs and that he needed to put up a fence to make sure his dogs couldn’t jump over. He

confirmed he had been approached by Mrs Pezaro, whom he knew as Sarah, to see if he would be interested in selling part of his garden. He confirmed he would be willing to sell part of the rear garden of Number 147. He said that before the final application was put in, he asked to retain more of the garden of Number 147 than had been included in the first application. In his oral evidence, but not in his witness statement, he said that he saw this as a quid pro quo for losing the right of way.

16. On this point, I think the recollection of Mrs Pezaro is more likely to be correct. I find that the right of way was not raised or discussed. Mrs Pezaro did not want to raise the issue of the right of way with anyone. She was concerned it might impact on getting planning permission because of the limited amenity land being retained to the rear of Number 149. She did not want Mr Ayres to use it as a bargaining tool. Mr Ayres appears simply to have assumed that after the rear gardens were sold off the right of way would be removed. There was in 2005 and 2006 no communication passing "across the line" about the right of way. Mrs Pezaro was not aware of the line of the right of way and where it entered Number 149 from Number 147. She thought the right of way had been partially removed by the removal of the rear gardens. She thought or assumed the remainder would be given up. Mr Ayres simply assumed the right of way was going by one means or another to be removed.

17. On 18 October 2006 Brookeswood Developments Limited purchased all three parcels of garden land to the rear of Numbers 147-151 New Street. Those parcels were registered under a new title Title number HP682005 at HM Land Registry.

18. In order for the rear gardens of Number 149 and 151 to be removed from the mortgages over 149 and 151 New Street, it was arranged for Mr Pezaro to purchase Number 151 (minus the part of the rear garden sold off) from Mrs Pezaro and re-mortgage Number 149 (again minus the part of the rear garden sold off). As a result, Mr Pezaro became the registered proprietor of Number 151 as well as Number 149 on 15 June 2007.

19. No steps were taken to have the right of way removed from the titles relating to Numbers 147, 149 and 151. Mrs Pezaro said in answer to a question from Mr Ryan that "none of us picked up on it". Mrs Pezaro said that she and Mr Pezaro at that time just wanted to go to New Zealand.

20. Mr and Mrs Pezaro moved to Christchurch in New Zealand. Numbers 149 and 151 were rented out. The benefit of the right of way remained registered in the Property Register to Title number HP413576, the title to Number 147. The burden of the right of way remained registered in the Charges Register to Title Number HP689545, the title to Number 151. The benefit of the right of way remained registered on Title number HP642675, the title to number 149 subject to the right of way in favour of Number 147.

21. Mrs Pezaro pointed out that after the sale off of the rear gardens, the right of way was no longer shown on the filed plans to Numbers 147 and 149. The benefit of the right of way however remained entered on the Property Register to the Title to Number 147. A copy of the plan to the 1960 Conveyance remained filed on the Title to Number 147. The right of way remained entered in the Charges Register on the Title to Number 151. The right of way was shown tinted blue on the filed plan. The Property Register on the Title to Number 149 continued to show Number 149 as having the benefit of the right of way but with the right of way being reserved in favour of Number 147 by the 1960 Conveyance. In view of these entries, it is in my view clear that the right of way was

not removed from the register in consequence of the purchase by Brookeswood Developments Limited of all three parcels of garden land to the rear of Numbers 147-151 New Street in October 2006.

22. At the end of 2009 Mrs Pezaro telephoned Mr Ayres from New Zealand to ask if he would object to Mr and Mrs Pezaro applying for planning permission to build a fourth house to the side of Number 151. Mrs Pezaro says that in that conversation no mention was made of the right of way which she says was consistent with her belief that the right of way had gone or effectively gone with the removal of the rear gardens. Mrs Pezaro says she and Mr Pezaro offered in return at their expense to landscape the remaining section of Cemetery Lane which had been owned by a predecessor in title to Number 151 who had since died.

23. Mrs Pezaro says that after this conversation with Mr Ayres she instructed Paul Jenkins of Place Online to draft drawings for a new two bedroomed house and associated parking. She says that as part of this process, she was contacted by Paul Jenkins to say that there was a right of way over Number 151 in favour of both Numbers 147 and 149 and that it would be incorrect to build over the right of way.

24. Mrs Pezaro says she then telephoned Mr Ayres at the beginning of 2010 and explained that the right of way still existed in favour of his property over Numbers 149 and 151. She asked if he would agree to its removal if she and Mr Pezaro paid his legal costs in that matter. She says Mr Ayres expressed surprise that the right of way still existed saying he thought it had been removed at the time the gardens were sold, but stating that he had no issue with that at all.

25. Mr Ayres said in his oral evidence he had no issue with that at all. He regarded it as something that had been overlooked in the planning process. In his witness statement filed on behalf of the Claimants he said that as far as he was concerned the right of way was removed at the time they all sold their rear gardens, which he confirmed during the call.

26. Mr and Mrs Pezaro did not take any steps at that stage to have the right of way removed from the titles. Mr Jenkins was instructed to proceed with the drawings needed to support a planning application. The first planning application was filed on 26 August 2010 with Test Valley Borough Council under reference number 10/02043/FULLN. I was shown a copy of drawing prepared by Place Online for a two bedroom property on the side of Number 151. This application was refused on 15th December 2010.

27. A second application was filed on 22 March 2011. It was registered on 8th April 2011 under reference number 11/00743.FULLN. The proposal involved the removal of the existing rear extension to Number 151. Full planning permission was granted on 17 June 2011.

28. It was only after obtaining planning permission that Mrs Pezaro attempted to contact Mr Ayres again with a view to having the right of way removed from the titles. Mrs Pezaro said she envisaged that this would be done at the same time as the title to Number 151 was split to allow the land adjacent to Number 151 with planning permission to be removed from the title and given a separate title.

29. Mrs Pezaro discovered through online title investigation that on 20th August 2010 Mr Ayres had sold Number 147 to a property developer, Mr Alan Bradshaw, whose company offered 'cash for your house' quick purchases. Number 147 was registered in the names of Alan Bradshaw and Karen Bradshaw on 22nd September 2010. The title to Number 147 continued to be shown as having the benefit of the right of way.

30. Mrs Pezaro contacted Mr Bradshaw in June 2011. He explained to her that he had sold Number 147 on to the Defendants, Mr and Mrs Bourne on 27th May 2011. He supplied a contact number for Mr and Mrs Bourne.

31. Mrs Pezaro says she called and spoke with Mrs Bourne on or around 24th June 2011. The purpose of the call was to make the same request to Mrs Bourne that had previously been made to Mr Ayres namely that the right of way be formally removed from the title of all three properties at the Claimants' legal expense.

32. Mrs Pezaro said she did not get the response she hoped for from Mrs Bourne. Mrs Pezaro said in cross examination that in her utter naivety she had expected Mrs Bourne to laugh at the "cock up", perhaps share a glass of bubbly, and accept the offer to pay her legal fees. Instead she got the response "how did you get my number".

33. Mrs Pezaro said it became clear the conversation was not going to go as she thought. Mrs Pezaro says that Mrs Bourne did not respond to her request and later sent an email stating that they as the new owners of Number 147 had a legal easement around the side of Number 151 and across the back of Number 151 and 149.

34. Initially the response of Mrs Pezaro appears to have been to say that the right of way could be accommodated within the development. In an email sent by Mrs Pezaro to Mr or Mrs Bourne on 12 July 2011 Mrs Pezaro apparently said "we have reworked the interior of our new build to accommodate the ROW". The email is not before me. It is however quoted in one letter dated 3 August 2011 sent by Pam Francis a legal executive at Clarke Willmott to Mr and Mrs Bourne and in another letter sent I think by Anna-Maria Lemmer of Clarke Willmott to Mrs Pezaro.

35. Mrs Pezaro responded to Anna-Maria Lemmer's letter by email sent on 4 August 2011 referring to the background history and explaining that the previous owner, Mr Ayres, had agreed to the removal of the right of way. Mrs Pezaro made the point that the outdoor amenity space left to Number 149 was completely inadequate should the right of way go across it and that the right of way was of no benefit to Mr and Mrs Bourne. She also asserted that the owners of Number 147 had no right of access along Cemetery Lane.

36. There matters appear to have rested until in 2014 Mr and Pezaro took steps to implement the planning permission. On 15 May 2014 Mr Bourne sent an email to Mrs Pezaro referring to correspondence with her in 2012 (not before me), and to her email of 12 July 2011 stating she had "reworked" the interior of the new build to accommodate the right of way. Mr Bourne asked for confirmation of that statement and an assurance this meant they would not be building over the right of way.

37. Matters came to life again when Mrs Pezaro wrote to Mr Bourne on 1 May 2017 having just given their tenant at Number 149 notice. Mrs Pezaro explained they were in the process of making that property available for sale and would then either build the new

property to the side of Number 151 or sell Number 151 and the building plot. She said they were prepared to offer the sum of £2500 plus reasonable legal costs to rectify the register of Number 147.

38. Mr and Mrs Pezaro rely on the doctrine of proprietary estoppel. They rely in particular on the decision of the Court of Appeal in *Lester & Another v Woodgate & Another* [2010] EWCA Civ 199. In that case the Claimants had bought a plot of land from a company called Sherwell Developments Limited ("Sherwell") at auction in 2004. The auction particulars mentioned the existence of an easement in favour of the property but stated that it was disputed. The claimants then constructed a house on the site called West View. The easement was a right of way on foot and with wheelbarrows along a path running over the neighbouring property, Copplestone, which the defendants had bought in 2000 from a Mr Mees. It was found at trial that the claimants' predecessor in title had acquiesced in the destruction of the ramp and path that had been constructed in 1980 to enable the right of way to be used and that this made it inequitable for the Claimants now to seek to enforce the right of way. The Court of Appeal held that the effect of the estoppel was to bar not merely the grant of an equitable remedy but the enforcement of the legal right itself.

39. The law concerning proprietary estoppel and estoppel by acquiescence was reviewed in detail by Lord Justice Patten. At paragraph 26 Lord Justice Patten stated:-

"*Proprietary estoppel is conventionally based on representation by words or conduct which amounts objectively to a statement about the future enforcement of legal rights or an intention to confer on the representee an interest in property. The court has to determine whether the words used or acts done would reasonably convey to the other party an assurance which it was reasonable for that party to rely upon. In such a case it is not necessary to prove that the representor intended that his words or conduct would have that effect or was subjectively aware that they did so: see Thorner v Major* [2009] UKHL 18. *But clearly when such evidence does exist the reasonableness of the reliance is likely to be indisputable."*

40. For an equity to arise, the claimant must have been led to believe that he had or would obtain some right or benefit in or over the owner's land. For this purpose, the acquisition of property includes the release or non-enforcement of a right that the owner has over the claimant's land such as a covenant or easement: see Megarry & Wade The Law of Property Ninth Edition 2019 at 15-012 citing *Jackson v Cator* (1800) 5 Ves. 688 in which an owner who had reserved an easement to enter and cut timber was restrained from so doing after he had encouraged the claimant to beautify the land by laying out gardens. At paragraph 43 in *Lester v Woodgate* Lord Justice Patten said:-

"Although proprietary estoppel is (as its name suggests) largely concerned with cases in which the defendant acquires some right over the claimant's property as a result of the latter's conduct towards him, I can see no reason why the principles involved are not capable of equal application to a case in which the defendant is alleged to have committed an act of nuisance by interfering with an easement over his own land. In both cases the claimant's conduct relates to his property interests and the estoppel operates to bar the enforcement of the claimant's rights just as in Shaw v Applegate it would have barred the enforcement of the restrictive covenants which bound the defendant's land. It may be more appropriate to label this estoppel by acquiescence but the principles are the same."

41. The fact that nothing expressly was said about the right of way at the time of sale off of the building plot in 2006 was relied upon by Mr Ryan on behalf of the Defendants in support of an argument that the ingredients of estoppel had not been made out in 2005 or 2006. It is clear no estoppel by representation or convention estoppel arose. In the context of the non-user of the right of way by Mr Ayres, I think had Mr Ayres sought (which he did not), to assert the right to use the right of way, the elements of proprietary estoppel would probably have prevented him from doing so. This would have depended on the court being satisfied that Mr and Mrs Pezaro had acted to their detriment and it being found unconscionable for Mr Ayres to assert the right to use the right of way.

42. In any event, matters did not stop there. Mr Ayres was asked by Mrs Pezaro in early 2010 to agree to the right of way being released if his legal fees were covered and he made clear he had no issue with that treating it as something that had been overlooked in the planning process.

43. Had Mr and Mrs Pezaro acted on that agreement on the part of Mr Ayres at that point for the right of way to be removed from the titles, without waiting to see if planning permission would be granted for a property on the side of Number 151, this case would never have arisen.

44. The issue is whether the Claimants equity or equity by estoppel is binding on Mr and Mrs Bourne.

45. Section 116 of the Land Registration Act 2002 ("the Act") provides:-

> "116 Proprietary estoppel and mere equities
>
> It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following-
>
> (a)an equity by estoppel, and
>
> (b) a mere equity
>
> has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)."

46. The reference in section 116 to the equity being "(subject to the rules about the effect of dispositions on priority)" requires the court to look at the rules regarding priority where the title is registered.

47. The rules about the effect of dispositions on priority so far as they apply on a disposition of registered land are set out in section 29 of the Act. Section 29 so far as material provides:-

> "29 Effect of registered dispositions: estates
>
> (1)If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is nor protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected-

(a) in any case, if the interest-

(i) is a registered charge or the subject of a notice on the register,

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate."

The only relevant exception is that in section 29(2)(a)(ii). The relevant paragraph of Schedule 3 is paragraph 2. Paragraph 2 so far as material reads:-

"Interests of persons in actual occupation

2. An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for-

(a)…..

(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;

(c) an interest-

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;

(d)…"

48. The Claimants argue that they were in actual occupation of the right of way at all times. They say that their occupation of the right of way was the trigger that required the Defendants to make enquiries in order to defeat the Claimants' interest. The Claimants argue that actual occupation does not necessarily involve the personal presence of the person claiming to occupy. They say that the right of way was blocked by a fence and two gates and was in the control of their agent, Paul Jenkins of Place Online at all material times. The Claimants were themselves living in New Zealand.

49. These arguments need to be separated out and broken down. The first question is whether the Claimants were in actual occupation or occupation at all of the right of way. They say that they were in actual occupation of the land over which the right of way passed.

50. The Claimants rely on the position on the ground. They say the right of way was blocked by a fence and two gates. They say it was in the control of their agent, Paul Jenkins of Place Online at all times. They further say there was a site notice present

showing that the Claimants had applied for planning permission to build over the right of way.

51. In *Abbey National Building Society v Cann* [1990] UKHL 3 Lord Oliver said:-

"It is, perhaps, dangerous to suggest any test for what is essentially a question of fact, for "occupation" is a concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied."

52. In the case of an easement over the Claimants' own land, the court should be cautious before finding that it is in the actual occupation of the servient owner. The servient tenement is not part of the land that will be inspected or viewed before purchase. It may be apparent from inspection of the dominant tenement that access to the right of way has been blocked off, but unless it is clear that the nature of the obstruction is permanent, as where a building has been constructed over the right of way, I do not think the court should treat the servient owner as being in actual occupation of the easement. The law on abandonment of rights of way is well settled. Abandonment is not to be lightly inferred. Unless a permanent alteration to the servient land has occurred, it would in my view be wrong to treat the servient owner as in actual occupation of the right of way. In this case, had standard enquiries been made by the Defendants' conveyancing solicitors of the vendors, Mr and Mrs Bradshaw, they would not have had any actual knowledge of the executory agreement between the Claimants and Mr Ayres.

53. No specific authority was cited to me on this point. From my own researches I have found that in *Chaudhary v Yavuz* [2011] EWCA Civ 1314 it was held that the enjoyment by the dominant owner of an equitable easement did not amount to actual occupation of the land for that purpose as opposed to actual use. Lord Justice Lloyd commented at paragraph 28 that at first sight it seemed counter-intuitive, to say the least, to assert that the owner of the dominant tenement is in occupation of other land over which he asserts an easement.

54. The situation before me is the reverse one. The Claimants are arguing that they as servient owners were in actual occupation of the right of way.

55. One difficulty with the argument is that it requires a distinction to be made between the Claimants' actual occupation of Numbers 149 and 151 which is not in dispute and their alleged actual occupation of the right of way.

56. In a case where the right of way has been built over and the servient owner is in effect living on it, one might say as a matter of plain English that the servient owner was in "actual occupation". Where the right of way has not been built over or the servient tenement permanently altered, it is more accurate in my view to refer to the right of way having been obstructed rather than being in the actual occupation of the servient owner.

57. In addition to the obstruction of the right of way, the Claimants rely on the fact that they were in the process of obtaining planning permission for the erection of a dwelling on land adjacent to Number 151 and that a site notice was displayed outside the properties giving notice of the planning applications.

58. The first planning application was filed on 26 August 2010. It was refused on 15 December 2010. A second planning application was filed under reference number 11/00743/FULLNN on 22 March 2011. It was registered on 8 April 2011. A site notice was put on the telegraph post at the end of Cemetery Lane in front of the garden entrance to Number 147 on 12 April 2011 and remained on site for a minimum of 21 days until 5 May 2011. Planning permission was granted on 17 June 2011.

59. The Claimants argue that the presence of site notices showing their intention to build over the right of way is evidence or further evidence of their actual occupation of the right of way. The site notices give notice of a planning application. They do not in my view amount to actual occupation. At most it seems to me they give notice of an intention to build and hence to occupy if planning permission is granted. The grant of planning permission does not of itself destroy or alter private property rights.

60. An issue arose at trial as to whether Mr and Mrs Bourne had been aware of the second planning application made by the Claimants prior to their purchase of Number 147.

61. Mrs Bourne made a witness statement on 6 March 2019 one week before the start of the trial. The statement had exhibits EMB1 to EMB15 attached to it. Exhibits EMB1 to EMB9 inclusive had been disclosed to solicitors who were for a short time on the record as acting for the Claimants on or about 7 December 2018. It appears they were intended to be attached to a witness statement of Mrs Bourne which was never served. The Claimants did not object to the witness statement of Mrs Bourne on the grounds of lateness.

62. Mrs Bourne says that on or about 14th February 2011, they [she and Mr Bourne] saw a local newspaper advertisement which advertised that Number 147 was for sale. She says they were looking for a residential investment property at the time. She says they telephoned the local selling agent and arranged to view on the same day.

63. Mrs Bourne says that after viewing Number 147, they contacted the Selling Agents later the same day and made an offer to purchase it. She says that offer was accepted on the same day, or no later than a day or so later.

64. Mrs Bourne says they viewed Number 147 a second time, in late February or early March and noticed that a significant concrete slab was present in the rear garden of Number 147. They asked for the slab to be removed prior to completion.

65. Mrs Bourne says about this time they instructed Messrs Clarke Willmott to act for them although they instructed them not to push for early exchange or completion.

66. Mrs Bourne says they did not return to Number 147 either for formal or informal viewings after the second viewing until legal completion of the purchase. Completion took place on 27 May 2011.

67. Mrs Bourne says that on or about 1 March 2011 they received from the Seller's selling agents a copy of the Sellers' Property Information Form. The Form signed by Mr and Mrs Bradshaw is dated 27 February 2011. Question 4.3 'Have you received notification or are you aware of c) Proposals to carry out any building work or development upon any adjoining or neighbouring properties?' was answered: 'Yes. Unsubstantiated that the far end of the terrace may build another property on its side garden.'

68. Mrs Bourne says having seen that answer they looked at the local planning authority's website on the same day and saw that a planning application had been made by the Claimants and that it had been refused by a decision notice dated 15 December 2010.

69. Mrs Bourne says they were not aware that a second planning application was made on or about 21 March 2011. They do not dispute that neighbour notification notices or site notices were displayed on or near Number 151 but say that they did not access Number 147 in the period from the submission of the second planning application until legal completion.

70. Mrs Bourne says that on 4th May 2011 Messrs Clarke Willmott sent them their initial title report. This enclosed office copy entries for Title Number HP413576 and a copy of the 1960 Conveyance. The report stated in paragraph 3 under the heading 'Conveyance' that under the first schedule of the Conveyance, the property had been granted the benefit of a right of way, by foot only, over the neighbouring properties Numbers 149 and 151 New Street. Mrs Bourne says this was the time at which they first became aware of the existence of the right of way. The right of way was recorded in the Property Register. The title plan showed the land edged and numbered in green that had been removed from the title in 2007.

71. Mrs Bourne says that their solicitors then obtained a copy of a report dated 9th May 2011 carried out by an organisation called Plansearch. She says they reviewed it a few days after receiving it. She says they saw the reference to an application to build alongside Number 151 but did not realise that it was a new application. The relevant schedule of applications for small developments lists both the first and second applications relating to land adjacent to Number 151 with the same ID number. It does however give them different references and dates. The first application is dated 14th September 2010. The second application is dated 8th April 2011.

72. Mrs Bourne was cross examined by Mrs Pezaro about the timing of events. It was pointed out that the Estate Agents Memorandum of Sale was dated 26 April 2011 some two and a half months after Mrs Bourne says their offer was accepted. It was pointed out that two days later on 28 April 2011 Clarke Willmott had written to Mr Bourne thanking him for instructing them. On 4th May 2011 Clarke Willmott wrote again to Mr Bourne saying they had received a draft contract and various other documents from the sellers' solicitors. These included the Sellers' Property Information signed by the Bradshaws on 27 February 2011. Mrs Bourne's evidence was that this document had been sent to them on or about 1st March 2011 from the Sellers' agents and was sent to them again by Clarke Willmott under cover of that firm's letter dated 4th May 2011.

73. Mrs Bourne explained the delay of some two and a half months by the fact that Clarke Willmott were dealing with another matter for them. She said they gave informal instructions to Clarke Willmott in late February or early March and asked them to take their time as there was an issue over money. She said that by 26 April they had the money and were ready to go ahead. She said that by then the Bradshaws wanted a quick sale.

74. The witness statement made by Mr Bourne on 14th December 2017 makes no reference to the timetable set out by Mrs Bourne in her evidence. In paragraph 5 of his statement Mr Bourne says:-

"My wife and I purchased 147 in May 2011. As the RoW was noted on the Land Register, we purchased the property in reliance on the Register and we had no reason to suspect that the owners of the servient tenements would seek to deny us the right to use the RoW. On inspection of the Property before the purchase was completed, we saw there was a gate (albeit a dilapidated one) in the fence on what would become our side of the boundary to 149 if we completed the purchase, which we duly did."

75. Mr Bourne in his oral evidence did however confirm what his wife said about the timing of their inspections of the property and confirmed they had never seen anything to do with a further planning application.

76. The purpose of the late witness statement of Mrs Bourne appeared to be to demonstrate that she and her husband had not seen the site notices or been aware of the second planning application. Like Mrs Pezaro, I was initially concerned that the timing of events given by Mrs Bourne was at odds with the documentation. I have considered carefully whether or not I should accept this evidence.

77. My initial view was that the evidence was surprising in view of the fact that the Memorandum of Sale is dated 26 April 2011 and Clarke Willmott Solicitors wrote to Mr Bourne on 28 May 2011 thanking him for instructing them. The Seller's Property Information Form is however dated 27 February 2011. Mrs Bourne was adamant in her evidence that they had been provided with a copy at that time by the Seller's agents.

78. As Mrs Pezaro pointed out, the Seller's Property Information Form would more usually be provided via solicitors. On Mrs Bourne's evidence, they had put in an offer which had been accepted around the end of February 2011. It is in my view credible that Mr and Mrs Bourne were provided with the Seller's Property Information at that point by the Seller's agents. This was in the context of a buy to let property being sold by a professional property dealer.

79. On the balance of probabilities, I accept the evidence of Mrs Bourne and find in particular that the Defendants were not aware that a further planning application had been made. It was not drawn expressly to their attention by their solicitors. Mrs Bourne said she did not appreciate that it was possible to make a further application after one had been refused. Mr Bourne when referred to the Plansearch report said he was not in the habit of reading books let alone material of that sort. It is I think fair to say a lay person has to read the Plansearch report closely to appreciate that there were two separate applications and might not appreciate that one application was still pending.

80. Planning permission was not granted to the Claimants until after completion by Mr and Mrs Bourne of the purchase of Number 147. It was only after the grant of planning permission was brought to their attention by their tenant that Mr and Mrs Bourne raised with their solicitors concerns they had regarding the planning application.

81. In my view the Claimants' informal or executory agreement with Mr Ayres for the right of way to be removed from the title at their expense was not binding on the Defendants. There was no notice of the Claimants' agreement with Mr Ayres on the title. In those circumstances, the Claimants are forced to fall back on the provisions of paragraph 2 of Schedule 3 to the 2002 Act. In my view that does not work. The Claimants were not in actual occupation of the right of way. They had not built across it. They were planning to do so but they had not done so.

82. A further hurdle for the Claimants is the exception in paragraph 2(c):-

"except for-

(c) an interest-

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;"

83. On my view, there was no actual occupation of the right of way. If there was, it was not "occupation" as opposed to obstruction which was obvious on a reasonable careful inspection of Number 147. The right of way had not at the time been built over. The Claimants had applied for planning permission to build over the side of Number 151. That is notice of intention to build if planning permission is granted and if private rights such as covenants and easements are released. The Defendants had no actual knowledge of the informal agreement with Mr Ayres that the right of way be removed at the expense of the Claimants at some future date. Nor in my view were they aware there was a second pending planning application.

84. As I have mentioned, the Claimants placed reliance on the decision of the Court of Appeal in *Lester v Woodgate*. It is not clear from the report whether that case concerned registered land. No reference is made to section 29 or 116 of the Land Registration Act 2002. The basis of the decision was that the claimant's predecessor in title had acquiesced in the destruction of the ramp and path and in the extension and re-surfacing of a parking space, making it inequitable for the Claimants to seek to enforce the right of way.

85. In the present case, the right of way remained on the registered titles. A reasonably careful inspection would have revealed that the right of way was blocked off by fencing and had almost certainly not been used for some time. It would not have revealed more than that.

86. In these circumstances I conclude that the claim to have the right of way removed on the grounds of proprietary estoppel fails as against the Defendants. In my view the Claimants by waiting until after they had been granted planning permission to take steps to have the right of way removed from the title exposed themselves to the risk that their unprotected and unimplemented agreement with Mr Ayres would cease to be enforceable.

87. In my earlier judgment when declining to grant summary judgment in favour of the Defendants, I raised with the parties the court's power to order alteration of the register. I heard no separate argument on this point.

88. Paragraph 2(1) of Schedule 4 to the 2002 Act provides that:-

"The court may make an order for alteration of the register for the purpose of-

(a)correcting a mistake,

(b) bringing the register up to date, or

(c) giving effect to any estate, right or interest excepted from the effect of registration."

Paragraph 1 provides that:-

"In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which-

(a)involves the correction of a mistake, and

(b) prejudicially affects the title of a registered proprietor.

Paragraph 3(2) provides

"If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless-

(a)he has by fraud or lack of proper care caused or substantially contributed to the mistake, or

(b)it would for any other reason be unjust for the alteration not to be made."

89. The Court has power to order the alteration of the register to correct a mistake. What constitutes a mistake has been widely interpreted and is not confined to any particular type of mistake. Here however, I can see no basis for ordering the register to be altered in order to correct a mistake. The right of way was properly registered. The removal of the rear gardens was not accompanied by an application to remove the right of way. Had it been the matter could then have been properly investigated.

90. Additionally, there is power to order alteration to the register for the purpose of bringing it up to date. That is the power that could have been used had an application to alter the register been made either when the rear gardens were sold off or following the agreement with Mr Ayres early in 2010. The position has in my view changed as a result of the subsequent registered dispositions for value of Number 147.

91. For those reasons I dismiss the claim. The effect of my judgment is that the right remains on the title unless and until some agreement is reached for the right to be removed.

92. The Claimants rely on the fact that since some point after the demolition of Number 145 and the road widening scheme relating to New Street, Number 147 has had a side access via a gate in a fence on the New Street side. They take the view that in those circumstances it is unnecessary and unreasonable for the Defendants to maintain that they have the right of way which has remained obstructed and unused.

93. The side access via a gate on to New Street is not a right registered on the title to Number 147. It may be open to challenge by third parties in the future. It may explain non-use of the right of way. It does not in my view alter the effect of registration of the right of way.

94. The Defendants were not in my view bound by the executory and unimplemented agreement between the Claimants and Mr Ayres. The benefit of the right of way remained registered on their title at the time of purchase. The unimplemented agreement with Mr Ayres in my view ceased to be enforceable against successors in title once Number 147 was subject to a registered disposition at a time when the benefit of the right of way remained registered on the title to Number 147.

95. I would hope that following this judgment the parties will be able to reach an overall and fair and proportionate resolution of this matter.