[2025] UKFTT 00836 (PC)

REF/2024/0197

FIRST TIER TRIBUNAL (PROPERTY CHAMBER)
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

DYLAN LEWIS WOOLF

APPLICANT

And

GRAHAM BARRY GOLDFINCH (1)
SUSAN MARIA GOLDFINCH (2)

RESPONDENTS

Property Address:	**Land lying to the south and east of 5 Prospect Hill, Herne Bay, Kent**
Title Numbers:	**Title numbers K134086 & K522453**
Before:	**Mr Hansen (Tribunal Judge)**
On:	**9-11 April 2025**
Representation:	**Mr P Tapsell of Counsel for Applicant** **Mr H Engler of Counsel for Respondents**

DECISION

KEYWORDS – Easement – Prescription - Extent of User - Whether Quality and Quantity of User sufficient – Res judicata - Issue Estoppel - Priority

Cases referred to:

Hollins v Verney (1884) 13 QBD 304

R v Oxfordshire County Council ex p Sunningwell Parish Council [2000] 1 AC 335

Sagier v Kaur [2024] UKUT 217 (LC)

Welford v. Graham [2017] UKUT 0297 (TCC)

Reilly v Orange [1955] 2 QB 112

Price v Nunn [2013] EWCA Civ 1002

Fernandes v Bank of Scotland plc [2021] EWHC 1610

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160

Arnold v National Westminster Bank plc [1991] 2 AC 93

The Sennar [1985] 1 WLR 490

New Brunswick Railway Co v British and French Trust Corpn Ltd [199] AC 1

Gray v Chief Constable of Nottinghamshire Police [2018] 1 WLR 1609

Mullen v Conoco [1998] QC 382

Powell v Wiltshire [2005] QB 117

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993

Tehidy Minerals Ltd v Norman [1971] 2 QB 528

Thoday v Thoday [1964] P 181

Macgrath v Hardy (1838) 4 Bing NC 782

Thomas v Clydesdale Bank plc [2010] EWHC 2755 (QB)

Introduction

1. The Applicant is the registered freehold proprietor of 4 Prospect Hill, Herne Bay CT6 5HY registered at HM Land Registry under title number K134086 ("No.4"). He purchased No.4 on 8.11.06 and was registered as proprietor on 1.12.06. The Respondents are the registered freehold proprietors of 5 Prospect Hill ("No.5") registered at HM Land Registry under title number K522453. They purchased No.5 on 16.12.21 and were registered as

proprietors on 16.9.22. The title to No.5 includes a passageway about 4 feet wide that runs east from Prospect Hill alongside the southern flank wall of No.5 before turning north to form an L-shape. At its northern terminus there is gate leading into the rear of No.4. I shall refer to this L-shaped passageway as the Alleyway.

2. This reference arises out of an application by the Applicant on form AP1 and dated 23.12.22 to register the benefit and note the burden of an easement of way on foot over the Alleyway on the respective titles. Although the application is dated 23.12.22, the Land Registry treated it as having been made on 4.1.23 in accordance with the relevant Land Registration Rules 2003 (Rule 15).

3. Panel 5 of the AP1 records that "This is an application to register an implied easement under rule 73A(1)(b) of the Land Registration Rules 2003". Rule 73A of the Land Registration Rules 2003 which provide as follows:

> ***73A.**—(1) A proprietor of a registered estate may apply to be registered as the proprietor of a legal easement or profit a prendre which—*
>
> *…*
>
> *(b) has been acquired otherwise than by express grant or reservation.*

4. In fact, there appear to be two limbs to the application, neither of which involve an implied easement, but Rule 73A also applies to prescriptive easements. In the first instance, the application relies on an Order of the Canterbury County Court dated 28.5.10 ("the 2010 Court Order") obtained by the Applicant and a neighbouring owner at 4 East Street against a predecessor in title of the Respondents in which the Court granted declaratory relief as follows:

> "*The Court declares that as the owners of 4 East Street, Herne Bay and 4 Prospect Hill Herne Bay the Claimants and any lawful invitee of theirs are entitled to use without let or hindrance the passage running from Prospect Hill road to the two properties".*

5. The Applicant submits that the effect of the 2010 Court Order is to create an estoppel, binding on the Respondents as privies, which precludes them from denying that the Applicant is entitled to an easement of way on foot over the Alleyway. Further or alternatively, the Applicant advances a new claim to an easement based on prescription in reliance on 3 statements of truth. The first of those, from Mr Handley, the owner of 4 East Street, deals primarily with Mr Handley's position but the other evidence relates to No.4 and includes a statement of truth from a Katherine Fulford which sets out details of her

alleged user going back to 2002. Those three statements of truth have now been supplemented by a number of witness statements from friends and neighbours of the Applicant.

6. It might be said that there is a degree of ambiguity about how the Applicant was putting his case in the AP1 but this is how the Land Registry appear to have treated the application and I have proceeded to do likewise, without dissent from either Counsel, both of whom have addressed me at length on both potential bases of claim. The position of the Land Registry is apparent from the Case Summary which they prepared which says this:

> *"The Applicant has applied in Form AP1 for registration of the benefit and noting of the burden of an easement being a right of way over the land tinted blue on the plan … on the basis of the terms of an Order of the Canterbury County Court dated 11 June 2010 in case 9CT02685 between Sebastian James Handley and Dylan Lewis Woolf (claimants) and David Hoskins and another (defendants) and that it has been acquired through long use*".

7. The Respondents objected to the application by letter dated 12.6.23 in the following terms:

> *"Our clients object to the Applicant's application to register a right of way based upon a court order of the Canterbury County Court dated 11 June 2020 ("the Order").*
>
> *"… the easement apparently set out in the court order has never been registered and our clients had no knowledge of the easement upon purchase of their property. We are also instructed that the Applicant has not used the easement alleged, which our clients' predecessor in title would attest to.*
>
> *Pursuant to the terms of the Land Registration Act 2002, any such easement must have been registered in order to be binding upon any subsequent purchasers of the land and the application to register an easement must therefore fail".*

8. The parties were unable to resolve their differences and the matter was then referred to this Tribunal for determination on 20 March 2024.

Background to the 2010 Court Order

9. I shall have to explain the history in more detail in due course, including the circumstances that gave rise to the 2010 Court Order. However, it is necessary to set out some brief background about the 2010 Court Order at this stage so as to understand the issues that arise for decision.

10. In the latter part of 2009 the Applicant and a Mr Handley, the then owner of 4 East Street, a neighbouring property with a back gate that opened onto the Alleyway, commenced legal proceedings in Canterbury County Court under case number 9CT02685 against the then owners of No.5, Mr and Mrs Hoskins. Unfortunately, despite efforts to find all the court documents and evidence relating to those proceedings, very little remains. The 2010 Court Order has, however, survived and is in the following terms:

> *"Upon the court reading the claimants' application dated 13 April 2010 enclosing the witness statement of Sebastian Handley and the draft order*
>
> *IT IS ORDERED THAT:*
>
> 1. *The Court declares that as the owners of 4 East Street, Herne Bay and 4 Prospect Hill Herne Bay the Claimants and any lawful invitee of theirs are entitled to use without let or hindrance the passage running from Prospect Hill road to the two properties.*
> 2. *The Defendants be restrained from obstructing that passage including but not limited to, by locked gate, the dumping of rubbish and keeping of dogs in or near the passage.*
> 3. *The Defendants to remove any obstruction to the said passage including but not limited to the locked gate, the rubbish and any dogs from the passage within seven days of the date of the order.*
> 4. *The application for a money claim be adjourned generally with liberty to restore; if no request to restore is made by 4pm on 28/02/11 that part of the claim shall stand struck out.*
> 5. *The Defendants are to pay the costs of today to be assessed on a summary basis in default of agreement either at any adjourned hearing or by separate hearing without an application.*
>
> *Dated 28 May 2010*

11. The 2010 Court Order did not contain any direction to the Chief Land Registrar to alter the affected registers by noting the benefit or burden of the right declared and the Applicant took no steps to note the burden of the order on the title to No.5. He says that he was experiencing financial hardship at the time and his understanding was that he was protected in any event.

12. The 2010 Court Order now forms a central part of the Applicant's case. Mr Tapsell puts his client's case primarily on the basis of issue estoppel. Thus he contends that the Respondents, as privies of Mr and Mrs Hoskins, are estopped, by virtue of the 2010 Court Order, from denying that an easement of way on foot exists for the benefit of No.4 over the Alleyway running from the rear gate of No.4 to Prospect Hill. In terms of priority, he contends that the Respondents are bound by the easement as an overriding interest

pursuant to paragraph 3 of Schedule 3 of the Land Registration Act 2002. That priority point itself involves a number of sub-issues because of the structure of paragraph 3 which has an exception and then a saving to the exception which I shall have to deal with in due course.

13. Additionally, and whatever the legal significance is of the 2010 Court Order, the Applicant contends that he has established a right to an easement of way on foot over the Alleyway on the basis of prescription and reliance is placed on the doctrine of lost modern grant and/or the Prescription Act 1832 ("the 1832 Act").

The Issues

14. The parties agreed that the issues are as follows:

(1) Issue 1: Ignoring the estoppel issue, has an easement arisen by prescription (under the 1832 Act or lost modern grant)?

(2) Issue 2: If there is no easement by prescription, does an estoppel bind the Respondents to accept or preclude them from denying that the Applicant is entitled to an easement over the Alleyway by virtue of and in accordance with the terms of the 2010 Court Order?

(3) Issue 3: If there was an easement (by prescription or because the Respondents are bound as privies by the terms of the 2010 Court Order), was the unregistered easement an overriding interest at the time of the disposition of No.5?

15. Mr Engler submits that I should determine them in that order. Mr Tapsell invites me to deal with issue 2 first, almost as a preliminary issue. There are advantages and disadvantages whichever suggestion I adopt. I propose to adopt Mr Engler's suggested order, although nothing ultimately turns on the order in which I deal with the issues.

16. During closing submissions, I queried with Counsel whether the present application to the Land Registry is strictly comparable to a successive action in the County Court between the original parties or their privies where issues of estoppel would clearly arise. Both Counsel maintained that the position was analogous and that the estoppel analysis was appropriate. I shall therefore focus primarily on the estoppel issue when I come to consider the effect of the 2010 Court Order but I also propose to consider the position as if I were simply concerned with an application, albeit a very late one, to register the burden of the easement declared in the 2010 Court Order on the title to No.5 (Issue 2A). In both scenarios I will need to determine the priority issue.

The Location

17. I have described the position and orientation of the Alleyway above. Prospect Hill runs south from the Central Parade which is on the sea-front. No.4 and No.5 are part of a terrace of houses on the east side of Prospect Hill. No.5 is the end of terrace house and the Alleyway is immediately adjacent to the southern flank wall of No.5. The next street along moving east from Prospect Hill is East Street which runs down to Central Parade parallel to Prospect Hill. The next street along moving south from Central Parade is Charles Street which runs parallel to Central Parade. No.4 has a gate at the rear of the property which opens onto the Accessway at its northern terminus. No.5 also has a gate at the rear opening onto the Accessway as does 4 East Street and 43 Charles Street. There is also clear evidence of an established opening onto the Accessway at the rear of 2 East Street although this is now filled in with a fence panel.

Conveyancing History

18. Before turning to the factual narrative, I set out what is known about the conveyancing history. Unusually for a case such as this, I have not been provided with any title deeds or other conveyancing documents in relation to No.4, other than an extract from the Property Sellers Information Form at the time in 2006 when No.4 was sold to the Applicant. I am told that despite appropriate searches, no other relevant documents are available. Under the heading "*Arrangements and rights*", the Form asks the question "*Is access obtained to any part of the property over private land, common land or a neighbour's land*". The reply given was - "*Shared back alley with neighbours to back garden*".

19. The Applicant purchased No.4 in 2006. Ms Fulford owned the property between 2002 and 2004 and there is a statement of truth from Ms Fulford. I shall come back to her evidence in due course. Mr and Mrs Cusden owned No.4 from 1997 to 2002 and there is a witness statement from Mr Cusden. I shall come back to his evidence in due course. The only evidence that potentially relates back to any earlier period of user is that of Mr Northwood but even his evidence only goes back to 1995.

20. The relevant history of No.5 is as follows. The Respondents purchased No.5 on 16.12.21 and were registered as proprietors on 16.9.22. They bought from Ms Rose, who bought from Mr Ifill, who was the successor in title to Mr and Mrs Hoskins. The title to No.5 is burdened by an easement contained in a 1947 conveyance as follows:

> *"SUBJECT nevertheless to a right of way and passage of the width of four feet … on the south side of the said property hereby conveyed to or for the owners for the time being of the adjoining property on the East side thereof and their respective tradesmen workmen and friends to and from the said road called Prospect Hill from and to the property on the East side of the property hereby conveyed*".

21. It is common ground that the owner of the dominant tenement therein referred to is the owner for the time being of 4 East Street. There is no evidence of any express grant or reservation in favour of No.4 and there is no evidence of any express grant or reservation in favour of any of the other adjoining properties.

22. There is also a statutory declaration from a Harriet Rapley dated 10.8.07, the daughter of a predecessor in title to Mr Handley, who refers to her mother using the Alleyway or at least that part of which leads from 4 East Street to Prospect Hill, since 1961.

23. The Alleyway is clearly of some antiquity. The Applicant in his evidence said that his research suggested the Alleyway had been in situ for approximately 175 years. That may be right, although I am not in a position to make a finding to that effect as the fruits of the Applicant's research are not before the Tribunal. As noted above, the owners of 4 East Street have enjoyed the benefit of an expressly granted easement over part of the Alleyway since at least 1947. The Respondents concede it is more than 20 years old. It is clearly much older than that based on the evidence I have just referred to and the configuration of the adjoining properties is such that they all have or have had a ready means of accessing the Alleyway from their respective back gardens.

24. In relation to the new claim based on prescription, the period of user relied on is the period of 20 years ending on 4.1.23 for the statutory claim, alternatively, for the lost modern grant claim, any other period of 20 years vouched for by the evidence (see section on law below). However, given the evidence, the period under consideration in relation to the lost modern grant claim is only marginally different, commencing no earlier than 1995.

25. The Applicant purchased No.4 in November 2006. He is therefore reliant, in part at least, on alleged user by his predecessors in title to establish 20 years' user. The Respondents purchased No.5 in December 2021 and are therefore also reliant on evidence from their predecessors in title in their attempts to defeat the claim.

Prescription: The Law

26. I will deal with the law in relation to prescription at this point. I will deal with the law relating to res judicata and priority when I come to deal with those issues.

27. The Applicant relies on the doctrine of lost modern grant or s.2 of the Prescription Act 1832.

28. Lost Modern Grant. Proof of long use, of the required quality and duration, is taken to give rise to a legal presumption that a previous owner of the land must have done something to confer a lawful title on the person who had been making use of the land, including (where the claim is to a right of way) title to a right of way over it. That presumption is referred to as a "lost modern grant".

29. A grant will be presumed where it is proved that the use has been enjoyed for a period of 20 years, provided the use for that period has been of the required quality or character to justify the law treating it as if it had a lawful origin. The doctrine must not be applied blindly or unrealistically. The presumption should only be applied when no other explanation is forthcoming; when another explanation is equally possible, the court should not presume a legal origin: Gale on Easements (22nd Ed.), 4-18.

30. In order for the use in question to be relevant use for the purposes of prescription, it must have certain qualities and have been of a certain character. In particular, the use must be open user as of right and such as to carry to the mind of a reasonable person, in possession of the servient tenement, the fact that a continuous right of enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance to it is intended: see *Hollins v Verney* (1884) 13 QBD 304 at 315.

31. As to the quality of use required, the use must be "as of right". Lord Hoffmann explained the meaning of this requirement in *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335 at 351 as follows:

> *"It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the license of the owner. The unifying element in these three vitiating circumstances was that each constituted a reason why it would not be reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."*

32. The enjoyment must be sufficiently continuous in its character but whether it is, is mainly a question of fact and degree. Clearly, user does not need to be incessant, and the Courts have generally taken a fairly generous approach to continuity and have not required very frequent user in order to satisfy the test of continuity, but casual and occasional use is not generally sufficient to afford an indication to the servient owner that a right is being claimed. In the case of positive easements such as rights of way, it is sufficient if the user

is of such a nature, and takes place at such intervals, as to afford an indication to the servient owner that a right is claimed against him. Occasional user is insufficient but user whenever circumstances require it is generally sufficient, provided the intervals are not excessive: see e.g. Megarry, *Law of Real Property* (10th Ed.), 27-071.

33. Whilst the Applicant bears the legal burden of proving that there was sufficiently continuous user as of right, he may be assisted in discharging that burden by a well-established evidential presumption as follows. The person claiming the right must lead evidence of the use they or their predecessors have made of the claimed right and prove that the way has been used openly for the requisite period and in a way which would bring home to a reasonable owner of the servient tenement that a right was being asserted. Such evidence if accepted gives rise to a presumption that the user has been as of right. The person claiming the right can rely on this evidential presumption and does not have to prove that the use was not contentious and was not with permission. The person in a position to adduce evidence about those matters is the owner of the land, who can say whether they (or their predecessors in title) gave permission for the use or took steps to resist it. As Martin Rodger KC put it in *Sagier v Kaur* [2024] UKUT 217 (LC) at [35], "these evidential realities are reflected in the burden of proof in a claim to a prescriptive right". Thus it is for the Applicant to prove that he and his predecessors have openly used the Alleyway for the requisite period. If he does so, it is then for the Respondents to prove that that the user was contentious or with permission: see e.g. *Welford v Graham* [2017] UKUT 297 (TCC), at [22]-[48].

34. Prescription Act 1832. Section 2 of the Act prevents a claim to the use of a way or other easement from being defeated if the use of the way "*shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years*".

35. The same underlying principles apply to a claim under the 1832 Act as to one based on a lost modern grant; thus the required use must have been without force, stealth or permission. However claims under the 1832 Act are subject to additional rules about when the required use must have occurred and about the consequences of any interruption.

36. Thus, in contrast to the doctrine of lost modern grant, for a claim under the 1832 Act, the first limb of section 4 requires that the period of use relied on must be "next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question". This means that the period during which the use must be

demonstrated for a claim under the Act is a period ending on the date on which proceedings are commenced in which the right is claimed or disputed.

37. Section 4 then qualifies the requirement of section 2 that the relevant use must have been "without interruption for the full period of twenty years" by limiting what is to be recognised as amounting to an interruption as follows:

> *"[...] no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."*

38. The effect of sections 2 and 4 in combination was explained by Jenkins LJ in *Reilly v Orange* [1955] 2 QB 112, at 118:

> *"What must be shown is a full 20 years reckoned down to the date of action brought. That must be an uninterrupted period, but in considering whether it is an uninterrupted period or not, interruptions not acquiesced in for at least a year are not to be counted as interruptions."*

39. Applying those provisions to this case, the relevant proceedings were those commenced by the Applicant's application to HM Land Registry dated 4.1.23 to note the right of way on his own and the Respondents' registered title. The period during which use of the claimed route as of right has to be proved for the purposes of the 1832 Act is therefore the period of 20 years ending on 4.1.23, i.e. January 2003 to January 2023

40. A claim founded on the fiction of a lost modern grant can be based on twenty years user of the requisite character *at any time*. However, on the facts of this case, the starting point for any consideration of a claim based on lost modern grant is not before 1995.

The Evidence

41. The hearing was conducted remotely over MS Teams and without a site visit. I heard live evidence from the following witnesses: the Applicant, and the following further witnesses for the Applicant – Mr Marsh, Mr Shrubsall, Mr Wall, Mrs Brown, Mr Johnson and Mr Northwood. I also read statements by Mr Handley, Ms Fulford and Mr Cusden. I then heard evidence from each of the Respondents and Ms Rose, their immediate predecessor in title. I also read the statement of Mr Ifill. I do not propose summarise the evidence at this point but will deal with the relevant parts of the evidence in the course of making my

findings of fact. None of the witnesses were deliberately lying but I have approached the evidence on all sides with a degree of caution, particularly as regards events dating back over very many years in some cases. I have also reminded myself of the importance of contemporaneous documents in testing the evidence of even the most confident and forthright witnesses.

Findings of Fact

42. *1995-2002.* The configuration of the Alleyway and the various adjoining properties suggests that the Alleyway has been in existence for many years. There are gates opening onto the Alleyway from the rear of No.4, the rear of 4 East Street and the rear of 43 Charles Street. There is also clear evidence of an old opening from the rear of 2 East Street onto the Alleyway, although there is now a fence panel blocking that opening. However, there is scant evidence as to the conveyancing history of No.4 and there is no evidence, for example, as to whether the gate at the rear of No.4 giving access to the Alleyway was a feature of the property as built or whether the opening was created at a later date, and if so, when. The evidence before the Tribunal in relation to No.4 is, in fact, quite limited and extends back no further than 1995 so far as user of the Alleyway by the owners of No.4 is concerned. Whilst it might be thought that the existence of an established point of access onto the Alleyway from the rear of No.4 is a promising start for the Applicant in seeking to establish an easement by prescription, it is only a start. I have to act on evidence and the mere fact that there is this gated access from the rear of No.4 onto the Alleyway does not mean that there was necessarily user of the requisite quality and quantity such as is required to establish an easement by prescription. It makes evidence that it was used obviously more credible but the mere fact of such gated access only takes the Applicant so far; ultimately what matters is the actual evidence of user.

43. So far as predecessors in title are concerned, the Applicant's evidence went back no earlier than Mr Cusden. Mr Cusden owned No.4 for approximately 5 years from 1997-2002. In his witness statement he said this: "*I remember that there was a brown gate at the rear garden of 4 Prospect Hill which opened to an 'L' shaped alleyway*". He said that "*the alleyway was there to provide access from the rear of 4 Prospect Hill to Prospect Hill. The gate was secured with a latch from inside of 4 Prospect Hill. My wife and I rarely used the alleyway, but it was there for us to use it whenever we needed to use it. There was no gate, fence, or any kind of obstruction and the alleyway was completely open during the entire five years that we lived at 4 Prospect Hill*".

44. Mr Cusden did not attend to give live evidence. I was told that he was old and infirm but I am not persuaded that there was any particularly good reason for his non-attendance. The result is that his evidence has been untested.

45. Mr Tapsell submitted that I should nonetheless give weight to his evidence on the basis that he had no axe to grind but it is not as simple as that. He was attempting to recall events from more than 20 years ago and did not give a single example of him or his wife actually using the Alleyway, still less an example which might have been consistent with a reasonably continuous pattern of usage, e.g. to take his bins out. Even if I had accepted his evidence to the effect he and his wife used the Alleyway "rarely", I do not accept that such user would have been sufficient to bring home to a reasonable owner of the servient tenement that a right was being asserted. Clearly, user does not need to be incessant, and the Courts have generally taken a fairly generous approach to continuity and have not required very frequent user in order to satisfy the test of continuity, but casual and occasional use is not generally sufficient to afford an indication to the servient owner that a right is being claimed and, even taking Mr Cusden's evidence at its highest, this would be a case in point.

46. Ms Fulford was Mr Cusden's successor in title and lived at No.4 from 2002 to 2004. She made a statement dated 18.8.22 to explain the history of her use of the disputed passageway. She said this:

> *"I used the alleyway regularly. Especially, I used it to get work done in my garden and when delivering larger items to my property.*
>
> *At that time, apart from the gate at my garden, there was no other on any part of the Alleyway and it was always kept clear so I could get access to my garden. Nobody had ever made any objections to my use of the Alleyway. In fact, I had always had the impression that the Alleyway existed to provide access to the rear garden of 4 Prospect Hill which was my property at the time".*

47. Whilst Ms Fulford at least gave some examples of her alleged user, she did not attend to give live evidence and I had no real way of testing her evidence, other than by reference to what other witnesses were able to say and/or the topography as I understand it. Mr Northwood had said in his written evidence that he had seen Ms Fulford using the Accessway but when he was cross-examined, he accepted that he could not claim to have seen her use it. He could provide no evidence as to the frequency, character or intensity of her user or indeed user by anyone else. His written evidence made it clear that he had bought No.2 East Street in 1995 but he accepted he could not see the Alleyway from his

property and he accepted that he was very unlikely to have seen anyone using the Alleyway in the 1990s.

48. Ms Brown described seeing Ms Fulford use the Alleyway but this was only for the purpose of her wheelie bins and she could not give any evidence about frequency. This type of evidence might ordinarily have carried some weight, and in one sense the Alleyway seems to be the most logical route from No.4 to the highway for wheelie bins, but the fact is that Ms Fulford herself did not actually mention using the Alleyway for her wheelie bins. Furthermore, her evidence suggests that there were no other gates providing access onto the Alleyway when there are in fact at least 3. In those circumstances, I decline to place any significance reliance on her untested evidence but even taking it at its highest, it is more consistent with casual and occasional use than user of sufficient continuity to afford an indication to the servient owner that a right is being claimed.

49. Mr Richards owned No.4 from 2004-2006. Whilst we have his PSIF, which suggests user by him, there is no actual evidence that Mr Richards used the Alleyway and none of the witnesses refer to seeing him use the Alleyway. In the circumstances I cannot make a finding that there was any relevant user during this period.

50. Realistically, Mr Tapsell accepted that he could not begin to make out a case based on this evidence for user of the requisite quality in the 1990s. He submitted that the earliest he could start was 2002 with Ms Fulford. However, for the reasons given above, I disagree and am not satisfied that there was sufficiently continuous user of the Alleyway as of right by or behalf of No.4 between 1995-2006. Such user as there was during this period was in my judgment intermittent and occasional and not sufficient to afford an indication to the servient owner that a right was being claimed. Given that this is a significant period of time within the period of 20 years which the Applicant relies on to found his new claim to an easement by prescription, it is fatal to this particular claim.

51. I heard further detailed evidence as to events thereafter, some of which raises potentially interesting issues about interruption and/or "contentious" user (i.e. nec vi) against the background of the 2010 Court Order, but given my clear findings of fact on the period 1995-2006, which are decisive as to the outcome of the new prescriptive claim, whether based on lost modern grant or the 1832 Act, I do not propose to deal with this evidence in any great detail save insofar as it bears on the other issues that arise (res judicata and priority). However, before turning to those issues, I will set out, relatively succinctly, my conclusions on this latter period.

52. *2006-2022.* The Applicant purchased No.4 in November 2006. In his witness statement he says that the accessway was clearly established when he purchased the property. He said it was "*completely open*" and that "*there was an old gate at my rear garden that opened onto the accessway*". He says that he understood that there was a right of way for the benefit of his property and that he actually used the accessway on the day he moved in to bring in large items of furniture. I accept this evidence.

53. The position as to user during this period is complicated by the fact that the Applicant appears to have moved in and out of No.4 on a number of occasions and there were times when the property was occupied exclusively by tenants and other times when it was occupied by the Applicant alone or on a sharing basis with lodgers. It is further complicated by the fact that he was sometimes working there but not living there. Clearly a tenant can prescribe for the benefit of his landlord but there were significant periods when the reality is that the Applicant did not know what, if any, use his tenants were making of the Alleyway. Whilst it might be thought obvious and logical that a means of access like this would be used regularly where possible, for things like wheelie bins, the evidence was neither clear nor consistent on the quantity or quality of user.

54. The Applicant lived at No.4 from 2006 to 2009 or 2010. He said he carried on using what he thought was an established accessway and, initially at least, was never challenged by the owners of No.5. I accept this evidence. However, in the latter part of 2009 Mr and Mrs Hoskins purchased No.5 and they immediately took steps to stop the Applicant's use of the Accessway. They placed a gate at the entrance to the Alleyway on Prospect Hill and placed a number of other obstacles along the Accessway. This prompted the Applicant and Mr Handley, the owner of 4 East Street, to take legal proceedings. Mr Handley was in a different position from the Applicant in that the burden of an easement over that part of the Accessway leading to Prospect Hill from 4 East Street was expressly noted on the title to No.5. I shall return to the detail of these proceedings and their outcome in due course, but as I have already explained, the result of these proceedings was the 2010 Court Order by which DJ Jackson, sitting in the Canterbury Court, declared that Mr Handley and the Applicant each enjoyed a right of access over the Alleyway from their respective properties to Prospect Hill and he granted them both injunctive relief prohibiting any further obstructions and requiring Mr and Mrs Hoskins to remove the existing obstructions, including the gate. Clearly, it cannot sensibly be suggested that the Applicant acquiesced or submitted to any interruption caused by the Hoskins.

55. The Applicant said that he was not living at No.4 at the time of the Hoskins litigation and that he had by that time let out the Property to Ms Bellini. In his oral evidence he was

unsure as to when he let the Property out to Ms Bellini. He ultimately opted for 2009 but his "Timeline for 4 Prospect Hill" document suggested that the letting was towards the end of the first quarter of 2010. I have concluded that the latter is more likely to be correct and this fits more naturally with contemporaneous documents from the time which suggest that the Applicant was certainly still living at No.4 in the latter part of 2009 when he and Mr Handley first discussed bringing legal proceedings: see e.g. Mr Handley's letter dated 20.9.09.

56. According to the Applicant's "Timeline" document, Ms Bellini lived at No.4 with her two children from the first quarter of 2010 until the end of 2011 and that is my finding. The Applicant said nothing in his witness statement about her use of the Alleyway. I asked him about her use of the Alleyway and his evidence in response was rather vague. He said that he knew she used the Alleyway but accepted that he could not say how often she used it and never saw himself saw her using it. The high point of his evidence seemed to be the suggestion that when it was particularly windy, she would leave her bin bags in the Alleyway. He could not say how she got there. She could just as well have gone round the front of the property to the Alleyway as accessed it from the rear of No.4.

57. I am bound to say that I found the Applicant's evidence on Ms Bellini's alleged user rather vague and there was something of an evidential void in respect of the period after she left and before the Applicant moved back into No.4 in 2013. However, from 2013 I am prepared to accept that the Applicant used the Accessway on a reasonably regular basis when he was living at No.4 for getting in and out with his bike, and/or after he had been swimming in the nearby sea.

58. In 2015 Mr Ifill bought No.5 and soon afterwards put in a locked gate at the entrance to the Alleyway on Prospect Hill. The Applicant said that this was with his agreement and essentially for security reasons and that he was immediately supplied with a key. Mr Ifill said the Applicant asked for "*permission to obtain a copy of a key to the locked gate that I was erecting closest to the road sometime in 2016 to enable him to get his bike out. I granted him permission for him to copy my key to the black gate*". Mr Ifill did not give live evidence and his evidence on this issue was therefore untested. I prefer the Applicant's evidence and am not persuaded that his user thereafter was permissive. It was still as of right.

59. In 2017 Ms Rose bought No.5 and she lived there from then until 2021 when she sold to the Respondents. Her evidence was difficult to assess. She was being accused by Mr Tapsell of misleading the Respondents by not disclosing what was said to be an obvious dispute with the Applicant about the Alleyway; she was therefore quite defensive. She

clearly had a vested interest in suggesting that she regarded any dispute with the Applicant as settled long before she sold the property on. I have therefore approached her evidence with caution and tested it against the contemporaneous documents. My conclusions as to the facts during the time when she lived at No. 5 are as follows.

60. I accept Ms Rose saw the Applicant using the Alleyway in January 2018 and immediately contacted him by email saying: "*The land is registered to my house and the only right of way granted in the deeds is to the house to the east (which I can think is Steve's?) … I really need to establish who has the right to use the path and also at which point of the path the legal access begins as it would appear to be only the path lying to the south of my house (rather than across the back)*". The Applicant said he could not recall receiving this email but I am satisfied that he did as there is no suggestion that the email address was wrong. I find that his receipt of this email prompted a face-to-face discussion a few days later in which the access was discussed. His evidence was that there was no conflict and no animosity on his part. Ms Rose's recollection is rather different but it matters not. They both accept that there was a discussion in which the Applicant said he had the right to use the Alleyway. He said he told Ms Rose about the 2010 Court case and subsequently (later in 2018) gave her a copy of the 2010 Court Order. I accept that he had a conversation in which he mentioned the court case and asserted his right to use the Alleyway but I have concluded that he is mistaken in saying that he provided her with a copy of the Court Order then or any other time. I very much doubt whether the subsequent events would have panned out as they did if he had provided her with a copy of the 2010 Court Order because I do not think Ms Rose would have been emboldened to act as she did if she had actually seen a copy of the 2010 Court Order.

61. What happened subsequently was this. Ms Rose sent a chaser email on 24.1.18 in which she asked the Applicant: "*Do you have any info or are you able to find your deeds*?" There was no response to that email. There was then a further email sent by Ms Rose to the Applicant on 12.7.18 again asking the Applicant whether there was any paperwork. The Applicant replied on 17.7.18, saying that the Alleyway had been used "*going past living memory*" and that he would see what he could do with "*retrieving the paperwork from the case*". However, he then did nothing further and did not in fact send Ms Rose the 2010 Court Order.

62. In early 2019 Ms Rose then installed a second gate to control access to that part of the Alleyway which lay directly behind No.5 as well as cameras to monitor any comings and goings in the Alleyway. She did not provide the Applicant with a key and he was unaware that the gate had even been installed until 2021. At this time, i.e. 2019-2021, the

Donoghues were in occupation of No.4 as tenants and they did not use the Alleyway, save on one occasion for moving out (with the permission of Ms Rose): see email dated 7.5.22. This was what Ms Rose said. The Donoghues themselves said the same in an email dated 14.5.24 and the Applicant's own evidence was that he respected the privacy of his tenants and that he did not know whether they used the Alleyway or not. The Donoghues also refuted any suggestion in their email that they handed over a key to the Alleyway to the Applicant when they left. Whilst the evidence contained in their email was not tested, no one suggested they had a motive for lying about this and I accept the contents of their email as accurate, save that they used the Alleyway once with permission when moving out.

63. The next occasion when there is any evidence of the Applicant (or anyone on his behalf) using the Alleyway is 15.6.21. Mr Rose said in her statement that on 15.6.21 she became aware via her cameras that the Applicant was "*in the entrance to the alley, standing in the threshold of his gate*". There is no captured image of the Applicant in the Alleyway but he clearly was present and he himself took a photo of the Alleyway and the new, 2nd gate on that date. Ms Rose says that this was the one and only occasion on which the Applicant used the Alleyway after she put in the 2nd gate. By contrast, the Applicant said in evidence that he did use the Alleyway thereafter, particularly in the context of renovation work being undertaken to No.4 in the summer of 2021. Whilst I have found that he was not given a key by his outgoing tenants, I accept that he was able to open the 2nd gate and pass through it because the key was either left in the lock (see photo at page 76) or was hanging alongside the gate as explained by Ms Rose in her witness statement. It is important to bear in mind that throughout the whole of the period following the 2010 Court Order, the Applicant believed that he was entitled to a right of way over the Alleyway. He may not have provided the 2010 Court Order to Ms Rose, but I am satisfied that he always believed that he had the right to use the Alleyway because of the historic nature of the Alleyway, the configuration of his property with ready access onto the Alleyway and by virtue of the 2010 Court Order.

64. Mr Engler submitted that the only evidence of the Applicant using the Alleyway in the year prior to the sale of No.5 to the Respondents was this single occasion on 15.6.21 and possibly one other occasion in connection with renovation work at No.4 but that this was not evidence of the easement being exercised. He accepted that the photos taken of the Alleyway by the Applicant on 21.6.21 showed that he opened his gate and took photographs of the Alleyway but he submitted that this was not user qua easement; he was there to take photographs and there is no evidence that he actually passed back and forth over the Alleyway. This is certainly Ms Rose's evidence. However, the Applicant was

very clear in his evidence that he started using the Alleyway again in June 2021 and that it was specifically used in connection with the renovation work to No.4 undertaken over the summer of 2021. I accept his evidence. There is clear photographic evidence to support his account (see photos at pages 75 and 84). These photographs show clearly that there was renovation work to No.4 going on during the first 3 weeks of July, including exterior painting. There are clear photos to this effect dated 2.7.21 and 19.7.21 and I am satisfied from the totality of the evidence that there was ongoing renovation work at No.4 between at least June 2021 and August 2021, as recalled by Mr Marsh. More importantly, the Applicant's evidence was corroborated by evidence which I considered entirely reliable from Mr Marsh, Mr Shrubsall and Mr Wall. They described helping the Applicant with the renovation work and using the Alleyway on at least one occasion in the summer of 2021. Mr Marsh specifically recalled in his statement using the Alleyway for long ladders to paint the rear of No.4. It was put to Mr Marsh that this had only been on one occasion in June 2021 but his response was it was "more often, half a dozen times, as needed". I accept this evidence. Mr Shrubsall also recalled using the Alleyway at least once in connection with the renovation work and produced an extract from his diary which showed that he was working at No.4 on the exterior decoration of No.4 on 22.7.21. This evidence is obviously difficult to reconcile with Ms Rose's evidence, if her cameras captured every visitor to the Alleyway and if she kept a record of every visit. But I am satisfied that they did not and she did not. I prefer the evidence of the Applicant and his witnesses on this issue. Mr Engler's final point was that this evidence was inconsistent with the image of the plant pot blocking the Applicant's gate on 30.7.21 but it is not given my findings above about the likely timing of the user for the purposes of the renovation work. In the circumstances I am satisfied that the Applicant exercised his right of way over the Alleyway on more than one occasion in the summer of 2021.

65. The Respondents purchased No.5 from Ms Rose on 16.12.21 as an investment property. Matters quickly came to a head between the Applicant and the Respondents when the Respondents locked the second gate that had been installed by Ms Rose. The Applicant wrote to complain about this on 4.1.22 and the Respondents say that this is the first they knew of any adverse claim by the Applicant in relation to the Alleyway. The ensuing dispute remained unresolved and resulted in the present application by the Applicant to the Land Registry which has in turn been referred to me to resolve. I will deal below with what the Respondents knew when I come to deal the issue of priority. However, I will first set out my conclusions on Issues 1 (prescription) and 2 (estoppel).

Issue (1): Prescription

66. I have set out above my findings of fact for the whole of the period in issue in these proceedings, i.e. 1995-2023. On the basis of those findings, any "new" claim based on prescription must fail. This might be thought to be a surprising outcome, given the layout of the properties and the long-established existence of this Alleyway, apparently serving No.4 as well as other adjoining properties. However, I have to act on evidence and on the evidence before me I am not satisfied that there was any sufficiently continuous user of the Alleyway as of right by or behalf of the Applicant for any continuous period of 20 years, whether next before some suit or action or otherwise. Whether the claim is put on the basis of lost modern grant or as a statutory claim, the Applicant has not proved that he and his predecessors have used the Accessway as of right for the requisite period and in a way which would bring home to a reasonable owner of the servient tenement that a right was being asserted. I therefore reject the "new" prescriptive claim. However, that is not the end of the matter. I now turn to deal with res judicata and, if it arises, priority.

Issue (2): Res Judicata

67. The law in relation to res judicata, which term includes cause of action estoppel and issue estoppel, was summarized by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 as follows.

68. Cause of action estoppel is a form of estoppel precluding a party from challenging the existence or non-existence of a cause of action where that has already been decided in earlier proceedings. It arises where the cause of action in the later proceedings is *identical* to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, unless fraud or collusion is alleged such as to justify setting aside the earlier judgment, the bar is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of the cause of action. Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

69. Issue estoppel is a form of estoppel precluding a party from disputing the decision on an issue reached in earlier proceedings even though the cause of action in the subsequent proceedings is different. It may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties or their privies to which the same issue is relevant one of the parties seeks to re-open that issue. In such a situation, and except in special circumstances where this would cause injustice, issue estoppel bars the re-opening of the same issue in the subsequent proceedings. The estoppel also applies to points which were not raised if they could with reasonable diligence and should in all the circumstances have been raised, but again subject to special circumstances where injustice would otherwise be caused: see *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 105E-109F.

70. A res judicata is a final decision on the merits pronounced by a tribunal which is judicial in the relevant sense. This has generally been held to include final judgments by consent or default (see further below) but excludes decisions on procedural grounds and decisions which are not final.

71. A judicial decision must be on the merits before it can create a res judicata. In *The Sennar* [1985] 1 WLR 490, HL, Lord Brandon said this:

> *"… a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts, and expresses a conclusion with regard to the effect of applying those principles to the factual situation".*

72. A final decision on the merits, even by the lowest judicial tribunal, is final and conclusive in the highest except on appeal and/or unless set aside. There must be both a tribunal of the necessary kind and a decision or adjudication by that tribunal; this includes judgments, orders, decrees and declarations.

73. Default judgments have historically been treated as capable of founding an estoppel: see e.g. *New Brunswick Railway Co v British and French Trust Corpn Ltd* [199] AC 1. However, in *Gray v Chief Constable of Nottinghamshire Police* [2018] 1 WLR 1609 at [52] Sir Terence Etherton MR said that statements in *New Brunswick* to that effect should

be treated with caution because of the need for "a judicial assessment or evaluation of the facts constituting the cause of action in the light of the applicable principles". However, as noted by Sir Terence Etherton MR in Gray, "there are different types of default judgments" and he gives the example of an application under CPR 12.4 for default judgment in a non-money claim and says of such an application that "there is no difficulty in regarding a judgment in those circumstances as 'on the merits'". The position is the same for a successful application for summary judgment: see e.g. *Mullen v Conoco* [1998] QC 382 where Hobhouse LJ said this: "A successful application for summary judgment under Order 14 has to establish and confirm the plaintiff's cause of action and the absence of any defence to that claim. Therefore, Order 14 does require, before judgment can be entered, a determination of the merits of the case and the existence of causes of action if the application for summary judgment is to be successful".

74. Res judicata principles operate for and against privies of the parties in blood, estate or interest: Spencer Bower & Handley, *Res Judicata*, para. 9.37. The Respondents acquired title to No.5 after the 2010 Order but may still be burdened by the estoppel (if there is one) as privies in estate or interest, subject to special circumstances (in the case of issue estoppel) and subject to the issue of priority: see e.g. *Powell v Wiltshire* [2005] QB 117 at [15]-[25].

75. If the Hoskins had brought a successive action to the 2010 action, seeking to put in issue the Applicant's entitlement to a right of way over the Alleyway, I am satisfied that they would have been prevented from doing so by the principle of res judicata and/or issue estoppel and/or potentially by reason of abuse of process in the *Henderson v Henderson* sense. The question is whether the Respondents, who are successors in title, are in the same position or substantially the same position. As against the Respondents, Mr Tapsell relies only on cause of action estoppel and issue estoppel.

The 2010 Proceedings

76. Before considering the issue of law that arises, it is necessary to set out the history of the County Court proceedings in rather more detail and to make findings of fact as to what happened. As previously noted, the title to No.5 notes the burden of a right of way over part of the disputed passageway for the benefit of the owners of 4 East Street, which runs parallel to Prospect Hill to the east. The owner of 4 East Street in 2009 was a Mr Handley.

In or about 2009 the then owners of No.5, a Mr and Mrs Hoskins, placed a number of obstructions along the disputed passageway, including a locked gate. Mr Handley and the Applicant commenced legal proceedings in Canterbury County Court under case number 9CT02685. Unfortunately, despite efforts to find all the court documents and evidence relating to those proceedings, very little remains.

77. There is no Claim Form and there are no Particulars of Claim.

78. There is, however, a Defence drafted by Mrs Hoskins and dated 6.12.09.

79. Next in time is the 2010 Court Order to which I have already referred.

80. There is then a General Form of Judgment dated 25.3.11 ordering the Defendants to pay Mr Handley damages of £19,688.

81. On the same date Mr Hoskins issued an application to set aside judgment and he appears to have prepared a statement dated 8.4.11 in support of that application, specifically contesting the Applicant's claim to a right of way.

82. That application was dismissed with costs by DDJ Gore on 7.7.11.

83. The further court documents that exist appear to relate entirely to enforcement action by Mr Handley.

84. To that body of material must be added my findings on the evidence, including such inferences as I can permissibly draw from the evidence.

85. The Applicant's written evidence did not address in any detail how the legal proceedings in 2010 unfolded. He was therefore asked a series of questions by Counsel and by me in an effort to establish what happened. I am bound to say that I found the Applicant's evidence on this topic difficult to follow and difficult to square with the contemporaneous documents. He was clearly straining to remember and he was mistaken in a number of respects. In those circumstances I have carefully considered how I should approach his evidence and what reliance (if any) I can place on what he said. On reflection, I have come to the firm conclusion that he was not telling lies and that he *was* trying his best to recall what had happened. However, the overall view I formed was that he had genuinely thought that the 2010 Court Order had resolved for all time the issue of his right to use the Alleyway. Thereafter he had no reason to remember the detail of the court proceedings and for that reason, coupled with the passage of time, it was difficult to have confidence in his recollection of what precisely happened in 2010. In those circumstances, I prefer to

rely largely on the contemporaneous documents in coming to my conclusions, subject to two notable exceptions as follows.

86. The Applicant was vigorously cross-examined by Mr Engler. It was suggested to him by Mr Engler that there was no hearing on the occasion of the 2010 Court Order and that it was essentially an order made in boxwork or a procedural decision on the papers. The Applicant was firm in rejecting this suggestion. He said that he was present in court on the occasion that DJ Jackson made the 2010 Court Order, as was Mrs Hoskins. It was put to him that his evidence was inconsistent with the recitals to the 2010 Court Order (which it is) and that he was referring to a later hearing at which Mrs Hoskins was present (see Order dated 7.7.11). I have considered this evidence very carefully, particularly in the light of the contemporaneous documents, but on reflection I accept this part of the Applicant's evidence to this extent. I am satisfied that there was a hearing on 28 May 2010, that the Applicant was in attendance, as was Mrs Hoskins, and that the Judge gave a reasoned judgment at the conclusion of the hearing. To the extent that the recitals to the 2010 Court Order do not reflect this, they are wrong. I have come to this conclusion for the following reasons. Firstly, I found the Applicant's evidence on this particular issue persuasive. There seemed to be a genuine recollection on his part of the occasion which gave rise to the 2010 Court Order, if not the fine detail. Secondly, the relief granted is not the type of relief that I would expect to be granted without a hearing and without a reasoned judgment. Thirdly, paragraph 5 of the order ordered the Defendants to pay "the costs of today"; that is not determinative but it does clearly suggest that there was a hearing on that day. Otherwise the order would have said that the Defendants were to pay the costs of the application. The fact that the Court did not there and then assess those costs does not, in my judgment, militate against this conclusion. Fourthly, Mrs Hoskins had prepared a Defence and was clearly taking an active part in the proceedings.

87. The other point where the record is unclear and where the Applicant's evidence might be important concerns the nature of his claim to a right of way over the Alleyway. In the absence of any pleadings, I asked him how he put his case in those proceedings and it was clear from his answers that his case was advanced on the basis of long user, not express grant. I accept this evidence. I think it more likely than not that Mr Handley also relied on long user (see e.g. statutory declaration of Harriet Caroline Rapley dated 10 August 2007) as well as on the 1947 Conveyance referred to above.

88. My further conclusions as to what happened with those earlier proceedings, based largely on the documents, are as follows. The proceedings were commenced in 2009. The Applicant and Mr Handley instructed Messrs Gardner Croft solicitors. The Applicant and

Mr Handley both sought declaratory relief as to the existence of a right of way over the Alleyway as appurtenant to their respective properties together with injunctive and other relief. The Applicant put his case on the basis of long user; Mr Handley put his case on the basis of long user and express grant/reservation. Mr Handley made most of the running because the obstructions had interfered with an ongoing building project at 4 East Street. The proceedings were served on the Hoskins and Mrs Hoskins prepared a Defence which is dated 6.12.09. Mr Engler noted that there was no visible Court stamp on the Defence and in those circumstances invited me to find that it had not been filed and/or served. I think it more likely than not that it was both filed and served. It has after all been produced by the Applicant in these proceedings which suggests that it had come into the possession of the Applicant and/or Mr Handley and Mrs Hoskins appears to have taken an active part in defending the claim. On balance I find that it was filed and served but whether it was or not makes no difference to my ultimate conclusions because I am satisfied, for the reasons that follow, that the 2010 Court Order derived from a decision on the merits.

89. It is clear from the record that the Applicant and Mr Handley then made an application of some kind dated 13.4.10. That is most likely to have been an application for summary judgment but it may have been an application for default judgment under CPR 12.4, if the Defence had not been filed or served. Either way, I am satisfied that that application led to a hearing before DJ Jackson on 28.5.10, in the presence of the parties, and at the conclusion of that hearing he gave judgment for the Claimants in the terms of the 2010 Court Order. I am satisfied that this was a judgment or decision on the merits.

90. Mr Engler strongly resisted any conclusion to this effect. He submitted that without all the pleadings, witness statements and other material from the County Court proceedings, I could not make any reliable findings as to the course of those proceedings, still less uphold any estoppel, for lack of evidence, a fortiori given that the burden is on the Applicant, and he contrasted the present case with *Price v Nunn* [2013] EWCA Civ 1002 where it appears that all the previous documents from the two prior sets of court proceedings were available to the Court for the third action. Mr Engler submitted that the 2010 Court proceedings were shrouded in mystery and that I could not make any reliable findings either way.

91. I reject this submission. In my judgment, *Price v Nunn* actually lends support to the Applicant's position. In that case Mr Close and his wife brought proceedings against the Prices claiming a right of way over the Lower Track for the benefit of themselves as

owners of Woodside Bungalow on the basis of express grant. That claim was dismissed by the Circuit Judge and an appeal to the Court of Appeal was dismissed. That was in 1976. In 1980 Mr Close brought further proceedings against the Prices claiming a right of way over the Lower Track on the basis of prescription and/or implied grant. That claim was struck out as an abuse of process by the Registrar and an appeal against that decision was dismissed by the Circuit Judge. In 1991 the Closes transferred the bungalow to Mr Nunn. In 2011 the Prices brought proceedings against Mr Nunn in relation to the Upper Track and Mr Nunn counterclaimed for, inter alia, a declaration that a private right of way over the Lower Track attached to the bungalow. There were other issues in that litigation but for present purposes those are the relevant facts. The Prices applied to strike out the counterclaim relating to the Lower Track on the grounds of estoppel and/or abuse of process. Morgan J held that Mr Nunn was bound by an issue estoppel which precluded him from asserting a private right of way over the Lower Track on the basis of prescription. There was an appeal and a cross-appeal. Mr Close cross-appealed to the Court of Appeal in relation to the striking out of his claim to a private right of way over the Lower Track but his appeal was dismissed, albeit primarily on the grounds of cause of action estoppel, rather than issue estoppel. In dismissing the appeal, the Chancellor said this:

> *97. I would dismiss the cross-appeal in relation to those parts of the Judge's order dealing with the allegations and relief claimed in Mr Nunn's Defence and Counterclaim based on prescriptive use of a private right of way. Those allegations and that relief fall plainly within the principles of res judicata and abuse of the process of the court.*
>
> *98. It is not in dispute that Mr Nunn is the privy of Mr and Mrs Close for the purpose of any estoppel by way of res judicata relating to the claim to, and interference with, a private right of way over the Lower Track for the benefit of Woodside Bungalow.*
>
> *99. Contrary to the view of the Judge and Mr Adams, I would regard the relevant estoppel as cause of action estoppel. As I have said earlier, the cause of action in the 1976 Proceedings by Mr and Mrs Close was for, among other things, damages and other relief for, or arising out of, nuisance caused by wrongful interference with a private right of way appurtenant to Woodside Bungalow. That is the same cause of action as is now advanced by Mr Nunn in his Defence and Counterclaim. Proof of the existence of a private right of way is a necessary ingredient of that cause of action.*
>
> *100. The injunction granted in the 1976 Proceedings is a reflection of the finality of the decision that there was no private right of way over the Lower Track save for the benefit of the Paddock. […]*
>
> *101. That is in itself sufficient to bar Mr Nunn's allegation in the present proceedings of a private right of way over the Lower Track for the benefit of Woodside Bungalow. Even if that were not correct, cause of action estoppel also bars the raising in these proceedings of points essential to the existence or non-existence of the cause of action for nuisance for wrongful interference with any such private right of way if they could*

with reasonable diligence and should in all the circumstances have been raised in the 1976 Proceedings. It is not in dispute that the claim to such a private right of way appurtenant to Woodside Bungalow based on prescription could with reasonable diligence have been raised in the 1976 Proceedings. It seems to me clear that it should in all the circumstances have been raised.

…

103. If, as the Judge considered in the present case, the relevant estoppel is not cause of action estoppel but issue estoppel, then I agree with the Judge that Mr Nunn's allegation in the present proceedings of a private right of way over the Lower Track for the benefit of Woodside Bungalow established by use is barred by issue estoppel. In the absence of an express grant of a right of way or a right based on section 62 of the Law of Property Act 1925, establishment of a right of way by use would be a necessary ingredient of the cause of action both in the 1976 Proceedings and the present proceedings. […].

104. I do not consider there is any basis for excepting Mr Nunn's claims based on a private right of way from the bar of res judicata on the ground of special circumstances. […]

…

107. As I have explained above when summarising the applicable legal principles, the substantive law of res judicata is not to be confused with the court's broad discretionary procedural or management powers to prevent abuse of its process. I do not accept Mr Stenhouse's submissions insofar as they conflated them and criticised the Judge for failing to apply a broad merits-based approach. For the reasons I have given, I agree with the Judge that Mr Nunn is precluded by the substantive law of res judicata in the present case from re-opening the issue of a private right of way over the Lower Track for the benefit of Woodside Bungalow. The exercise of the court's discretionary power to control abuse of its process does not arise.

92. I accept that the task of applying the law of res judicata is marginally more difficult in the present circumstances, without access to all the old Court papers, but I have concluded that there is more than sufficient material in the papers available, supplemented by those parts of the Applicant's evidence which I accept, for me to conclude that the 2010 Court Order derives from a decision on the merits. Mr Engler further submitted that "*the only evidence before the court was of Mr Handley, who had the benefit of a registered easement over the passageway. Rs' position is that the CC order is not confirmation in law of any easement claimed by A*". I disagree. The declaration is clearly in favour of the Applicant as the owner of No.4. Insofar as it is necessary to make a finding to this effect, I am satisfied that I can safely infer (even without sight of the evidence that was before the Court in 2010) that the evidence must have distinguished between and dealt separately with the position of Mr Handley *and* the Applicant. It would be highly surprising, in my judgment, if DJ Jackson had simply lumped the Applicant and Mr Handley together and decided the case without being satisfied by evidence that *each* was entitled to the easement they claimed. I am satisfied on the balance of probabilities that the evidence

before the Court in 2010 was material different from the evidence before me and was sufficient to satisfy DJ Jackson that the Applicant was entitled to the relief which he claimed as the owner of No.4 on the merits, independently of Mr Handley.

93. In any event, I do not accept Mr Engler's submission that I must be in a position to spell out in precise terms by reference to pleadings, evidence and other court documents exactly what happened in 2010. As Falk J (as she then was) said in *Fernandes v Bank of Scotland plc* [2021] EWHC 1610 at [35]: "I also do not accept that issue estoppel could only apply where, for example, there are formal pleadings. It must be the substance that matters, in other words, has there been a relevant adjudication, not precisely how the matter came before the court procedurally". The all-important document for present purposes is the 2010 Court Order coupled with my finding that that order was final and made consequent to a decision on the merits. Thereafter 2010 Court Order speaks for itself, its meaning is clear and I consider it wrong to go behind its clear terms. I am not hearing an appeal against that Order or conducting a re-trial.

94. I shall now complete the factual narrative in relation to the 2010 proceedings. The Hoskins then applied to set aside that judgment by written application dated 25.3.11. That application was supported by a statement from Mr Hoskins dated 8.4.11 which asked the Court "to withdraw [the] right of way for 4 Prospect Hill as [a] right of way was never given; there is no evidence that 4 Prospect Hill has [a] right of way over 5 Prospect Hill". That application was dismissed with costs by DDJ Gore on 7.7.11. I am satisfied on the balance of probabilities that that decision was also a decision on the merits and that the matter was from that date finalised vis-à-vis the Applicant. The subsequent hearings and orders relate only to Mr Handley who was ultimately awarded damages.

Res Judicata: Conclusions

95. Against that factual background, the issue of law that arises is whether the effect of the 2010 Court Order is to estop the Respondents from disputing that the Applicant is entitled to a right of way on foot over the Alleyway. If there is an estoppel, depending on the type, there may be an absolute bar (cause of action estoppel) or there may be a bar save in special circumstances (issue estoppel). In either case, both parties agree that I would still need to decide the priority point in favour of the Applicant before I could give effect to the application.

96. I turn therefore to consider whether the Applicant has proved, the burden being on him, that the Respondents are barred by cause of action estoppel or issue estoppel from denying his claim to an easement of way on foot over the Alleyway.

97. Mr Engler maintained that no estoppel could arise unless I could analyse with "complete precision" what was litigated and decided. That language derives from the speech of Lord Maugham LC in *New Brunswick* and was applied by the Privy Council in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 where Viscount Radcliffe said this:

> *"… default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided, and to use the words of Lord Maugham, they can estop only for must 'necessarily and with complete precision' have thereby been determined".*

98. Whether the 2010 Court Order followed from an application for default judgment under CPR 12.4 or an application for summary judgment, and I am satisfied it was one or the other and more likely the latter, what matters, in my judgment, was that there was a final determination on the merits of the Applicant's claim to an easement of way over the Alleyway; that claim was necessarily and with complete precision determined by DJ Jackson. Otherwise, the Court would not have granted the declaratory and injunctive relief that it did for the benefit of the Applicant as the then owner of No. 4. Insofar as it is necessary to make a finding as to the basis upon which his claim was upheld, I consider that I can do so on the basis of the Applicant's evidence and I conclude that it is more likely than not that he put his case on long use and relied on other and different evidence from that which is now before this Tribunal. Contrary to Mr Engler's submission, the fact that the evidence and other court documents from those proceedings no longer survive is not fatal to the Applicant's attempt to rely on res judicata. It is easy to imagine much older cases where nothing survives except the court order and there is no reason in principle why this should matter, if the court order is clear on its face, as the 2010 Court Order is, and followed a decision on the merits. Indeed, what is arguably more relevant and important is what has happened since the 2010 Court Order, and in particular whether there is any evidence to suggest that the easement declared in the 2010 Court Order no longer subsists, whether by reason of abandonment or otherwise. Reminding myself that abandonment of an easement is not lightly to be inferred (see e.g. *Tehidy Minerals Ltd v*

Norman [1971] 2 QB 528), there is, in my judgment, no evidence to suggest that the easement declared by the 2010 Court Order has been abandoned or released in any way.

99. As noted above, Mr Tapsell put his case for the Applicant on the basis of cause of action estoppel, alternatively issue estopped and I must now determine whether the Applicant has proved his case on either basis, the burden being on him.

100. Cause of action estoppel arises where the cause of action in the later proceedings is *identical* to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Given that requirement, I am highly sceptical about the existence of a cause of action estoppel on the present facts. A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The cause of action in 2009-2010 related to the facts up to the time that the cause of action was asserted. Whilst I do not have the pleadings, I infer that the cause of action would have been in nuisance for disturbance of an easement arising out of the obstructions created by the Hoskins. Whilst a necessary ingredient in that cause of action would have been proof of the underlying right to an easement, the focus of that earlier action was on the obstructions caused by the Hoskins and whether they were substantial so as to amount to an interference with the Applicant's use of the Alleyway, justifying injunctive relief. The present application to the Land Registry raises some of the same facts but relies on additional facts, different evidence and is different in kind from the County Court action in 2010. Whilst some interesting questions arise, I struggle to see how it can be said that the present application involves an identical cause of action. However, I do not need to decide this issue because I am satisfied that there is an issue estoppel and in those circumstances I propose to say no more about cause of action estoppel.

101. I turn then to issue estoppel. Diplock LJ defined it in *Thoday v Thoday* [1964] P 181 as follows at [198]:

> *"There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff to … establish his causes of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission … neither party can, in subsequent litigation between one another upon any cause of action which*

depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

102. A decision will create an issue estoppel if it determined an issue in a cause of action as an essential step in the reasoning; it thus applies to fundamental issues determined in earlier proceedings which formed the basis of the judgment.

103. Applying the law to the facts as found, I am satisfied that there is an issue estoppel for the following reasons.

104. Firstly, the existence of a private right of way over the Alleyway on foot for the benefit of No.4 was an indispensable pre-requisite to the Applicant establishing his cause of action in the County Court proceedings. In order to establish a cause of action for disturbance, the Applicant would have been required to prove as a condition of success that he had a right of way over the Alleyway and there being no suggestion of any express grant or reservation to him or his predecessors in title, he must have put his case on the basis of long user and persuaded the Judge that he was so entitled. The declaration and orders granting injunctive relief in his favour must be taken as having determined the issue of whether the Applicant was entitled to a private right of way over the Alleyway. The issue of whether he did or did not have that right was fundamental to his cause of action and was necessarily determined in his favour by reason of the terms of the 2010 Court Order. That declaration and the orders granting injunctive relief were made and can only have been made on the basis that the Applicant had a right of way over the Alleyway.

105. The relevant part (paragraph 1) of the 2010 Court Order is a declaratory order which finally declares the Applicant's right to use the Alleyway as appurtenant to No.4. There is no uncertainty as to its terms. The Hoskins tried to set it aside but failed. It is a final decision. The fact that it was not final as to costs does not matter: Spencer Bower & Handley, para 5.02 (fn5). The Order is the official record and is the best evidence of the terms of the decision. The authors of Spencer Bower & Handley say this at para 3.03:

"The record is conclusive as to the fact of adjudication, the matters adjudicated, and the terms of the decision …"

106. They cite *Macgrath v Hardy* (1838) 4 Bing NC 782 where Tindal CJ said this at 796: "as a general rule … no man can take any averment contrary to a record … not only parties and privies but even strangers … are estopped to aver anything to the contrary".

107. Mr Engler submitted that the 2010 Order did not, on its true construction, declare that the Applicant was entitled to an easement but was concerned with a more limited right in the nature of a license, which would not be binding on successors in title of the Hoskins. When I pressed him on this point, his main argument seemed to be that because the 2010 did not actually refer expressly to a "right of way", the Order could not be construed as declaratory of the fact that the Applicant had established a right of way for the benefit of No.4. I reject this submission. There is no magic in the words "right of way" and I note that the precedent in Atkin's Court Forms (Volume 15(1), Form 45, does not in fact use these words – it refers to an appurtenant right to pass and repass. It is the substance that matters. It is, in my judgment, clear from the terms of the Order, in particular the words "as the owner of … 4 Prospect Hill…", that the Court was declaring that there was a right of way over the Alleyway appurtenant to No.4 as the dominant tenement. It is not a model of draftsmanship but it is more than sufficient to amount to a declaration of a right of way.

108. Secondly, for the reasons I have already given, I am satisfied that the 2010 Court Order followed a judicial decision on the merits and if it was not final before, it became a final order once the application to set it aside was dismissed. Insofar as this is relevant, it is clear from the documentation that Mr and Mr Hoskins were specifically disputing that the Applicant was entitled to any right of way over the Alleyway: see e.g. the evidence dated 8.4.11 filed in support of the set-aside application in which the Hoskins alleged that the Applicant "*don't have [a] right of way, only 4 east street Herne bay does*" and in which they invited the court "*to withdraw [the] right of way for 4 prospect hill as [a] right of way was never given there is no evidence that 4 prospect hill has [a] right of way over 5 prospect hill*". The dismissal of that application brought finality to the proceedings so far as the Applicant was concerned and left him as the owner of No.4 with the benefit of a final judicial decision on the merits.

109. Thus the position is that there was litigation between the Applicant and the Respondents' predecessors in title in which the Applicant sought declaratory and injunctive relief for disturbance of his right of way over the Alleyway and succeeded. The result of the County Court litigation and the effect of the 2010 Court Order was to determine that the Applicant as the owner of No.4 was entitled to a legal easement of way over the Alleyway. That determination created a clear issue estoppel which bound the Hoskins and now binds the Respondents as their privies subject to any exception for special circumstances and subject to priority.

110. There is an exception for special circumstances but it must be kept within relatively narrow limits to avoid undermining the general rule and because of the importance of finality in litigation. It is clearly not enough that the decision is arguably wrong or even plainly wrong as the remedy for such errors is the appellate process. Likewise, the discovery of fresh evidence is not sufficient because other remedies exist. There have been very few cases where exceptional circumstances have been established but it has generally been where there has been no effective right of appeal: see Spencer Bower & Handley, 8.31 to 8.35.

111. In *Arnold* Lord Keith identified the exception in the following terms:

> *"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result…"*

112. Lord Keith then posited the question whether the further relevant material which a party might be permitted to bring forward in the later proceedings should be confined to matters of fact but concluded that it should extend to a change in the law subsequent to the first decision.

113. Mr Engler submitted that there were here special circumstances arising by virtue of the Applicant's previous failure to register the benefit of the 2010 Court Order and the (alleged) facts that (i) no clear basis emerges from the surviving paperwork for declaring the easement in 2010 and (ii) the Hoskins had effectively let the judgment go by default. He also made the point that as the custodian of the register I should be reluctant to give effect to the application on the basis of an alleged estoppel when there was a lack of clarity as to the basis upon which the Court had granted relief in 2010. I have carefully reflected upon Mr Engler's submissions but I reject them. If I were to accept Mr Engler's submissions, I would be taking an unduly expansive view of the exception which would, in my judgment, be contrary to authority. I consider that I should keep any exception within narrow limits, in particular because of the importance of finality in litigation. I am

not persuaded that any of the matters relied on by Mr Engler constitute special circumstances.

114. For completeness I would add the following. Firstly, insofar as there were intermediate successors in title prior to the Respondents, I am satisfied that they were bound by the estoppel as a matter of law as privies and that the priority of the Applicant's interest was protected because the easement had been exercised in the period of one year ending with each relevant disposition. I will deal separately with the priority point insofar as it affects the Respondents. Secondly, insofar as Issue 2A arises, I would resolve that issue in favour of the Applicant, subject of course to the priority point that I now turn to.

Issue (3): Priority

115. Sections 28-29 of the Land Registration Act 2002 provide as follows:

> ***28 Basic rule***
>
> *(1)Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.*
>
> *(2)It makes no difference for the purposes of this section whether the interest or disposition is registered.*
>
> ***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 not 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 in 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.*
>
> *(3)Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.*

116. The material part of Schedule 3, LRA 2002 provides as follows:

SCHEDULE 3

UNREGISTERED INTERESTS WHICH OVERRIDE REGISTERED DISPOSITIONS

Easements and profits a prendre

3 (1) A legal easement or profit a prendre, except for an easement, or a profit a prendre which is not registered under Part 1 of the Commons Act 2006, which at the time of the disposition—

(a) is not within the actual knowledge of the person to whom the disposition is made, and

(b) would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable.

(2) The exception in sub-paragraph (1) does not apply if the person entitled to the easement or profit proves that it has been exercised in the period of one year ending with the day of the disposition.

117. The issue that arises is whether the Applicant's unregistered legal easement overrides the disposition of No.5 to the Respondents on 16.12.21. The resolution of that issue turns on the application of para. 3 of Schedule 3 to my findings of fact. The proper application of para.3 involves a number of considerations as explained in Megarry & Wade, *Law of Real Property*, 10th Ed., at 6-099 and following:

(1) Only an unregistered legal easement can override a registered disposition; and

(2) A legal easement will only override a registered disposition if it falls within one of four categories. The first category is a legal easement or profit which is registered as a right of common under Pt 1 of the Commons Act 2006. The second category is a legal easement which is within the actual knowledge of the disponee. The third category is a legal easement which would have been obvious on a reasonably careful inspection of the land over which the easement is exercisable. The fourth category, which will only be relevant in cases where none of the other three categories is applicable, is where the person entitled to the easement proves that it has been exercised in the period of one year ending with the day of disposition.

118. The Respondents were each cross-examined on the basis that that the Applicant's legal easement was within their actual knowledge or would have been obvious on a reasonably careful inspection of the land over which the easement was exercisable. Having listened carefully to their evidence, I do not accept that the easement was within their actual knowledge or that it would have been obvious on a reasonably careful inspection of the land over which the easement was exercisable. I am satisfied that the Applicant had not provided a copy of the 2010 Court Order to Ms Rose and that she therefore could not have

provided a copy to the Respondents. Her Property Information Form did not disclose any rights of way over the Alleyway other than that which existed for the benefit of 4 East Street and she did not disclose any disputes. Further, by the time that the Respondents first visited No.5 in September 2021, I am satisfied that the external decoration work to No.4 was complete and that there was nothing visible on the ground such as would have made the existence of the Applicant's easement obvious on a reasonably careful inspection. The only real clue was the gate at the rear of No.4 but the other features on the ground meant that the position was far from obvious. Mr Tapsell in his questioning of the Respondents and in his submissions appeared to be pursuing a case on the basis that it would have been obvious if the Respondents had made further enquiries but that is not what the Act says: see e.g. *Thomas v Clydesdale Bank plc* [2010] EWHC 2755 (QB) at [40]. That leaves only the fourth category referred to above. Here I repeat my findings at paragraphs 63-64 above wherein I found that the Applicant had exercised his right of way over the Alleyway on more than one occasion in the summer of 2021 (i.e. within a year of the disposition to the Respondents) in connection with his renovation and decoration work at No.4. On that basis, the legal easement declared by the 2010 Court Order retains its overriding status. Further it is binding on the Respondents as privies of Mr and Mrs Hoskins and they are barred by an issue estoppel from contending otherwise.

119. In view of my conclusions above, I shall order the Chief Land Registrar to give effect to the application dated 4.1.23 by noting on the affected titles the benefit and burden of a right of way on foot over the Alleyway as shown tinted blue on the plan attached to the Applicant's Statement of Truth dated 14 May 2022. In principle, the successful party is entitled to his costs since the date of the reference (20.3.24). However, there may be reasons that I am unaware of that justify a different order. Any application for costs should be filed and served on the other party by 4pm on 2 July 2025 and I will make provision in the order that accompanies this Decision for submissions in response to any such application and for a reply to those submissions. I will then decide any disputes as to the incidence of costs, or the basis of assessment, but I may or may not deal with the assessment of costs itself. I may summarily determine the costs; alternatively I may refer the matter to a costs judge for a detailed assessment, absent agreement.

BY ORDER OF THE TRIBUNAL (JUDGE HANSEN)

Dated this 4th day of June 2025