[2025] UKFTT 00839 (PC)

REF/2021/0571

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Applicant:	**Mary Edith Jones and Rhoda Margaret Paddick**
First Respondent:	**Roderick Mark Hughes and Helen Patricia Hughes (formerly Upton)**
Second Respondent	**Ms. Mariella Di Marco of Noel Cottage, Grove Lane, Wishaw, Sutton Coldfield Warwickshire B76 9PJ**
Third Respondent	**Mr. Carl Thompson and Ms. Annette Jane Thompson of 3 Rowan Way Hartshill, Nuneaton Warwickshire CV10 0XE**

Property Address: Bethany, Moorwood Lane, Nuneaton CV10 0QH and land at Moor Wood Chapel End
Title Number: WK477596 & WK351351

Made By: Judge Timothy Bowles sitting as Tribunal Judge

Hearing dates 13th to 16th May 2024, 22nd to 25th July 2024 and 5 and 6th September 2024

1. The Applicants, Mary Elizabeth Jones (Mary) and Rhoda Margaret Paddick are the registered proprietors, by way of a first registration, dated 8 April 2015, of land and property at and known as Bethany, Morwood Lane, Nuneaton, Warwickshire CV10 0QH (Bethany

). The property was previously known as Land at Baker's Hill and is registered at HM Land Registry with title number WK477596.

2. Bethany, as first conveyed to George Edward Chilvers *George), in 1947 and as set out in more detail later in this judgment, consisted of an approximately square parcel of land somewhat in excess of five acres. A portion of the land was sold off in May 2020 to a Mr and Mrs Holland, but the site remains substantial. It sits to the north west of Nuneaton. To the east is a steep valley dividing Bethany from a line of properties on Oldbury Road, one of which, the Haven, was, as explained later in this judgment, already in George's ownership at the date of the 1947 conveyance. To the south east the land has been significantly developed. The dwelling house constructed on Bethany, in the early nineteen-sixties was substantially destroyed by fire in 2021 and Bethany is currently unoccupied and derelict.

3. As part of the process of first registration, the Applicants procured the registration, in favour of Bethany, of a right of way (the way) extending, as material to this application, from a gateway in the southern boundary of Bethany, along an unmade track, or roadway , in a south easterly direction until joining Morwood Lane close to Ash Drive.

4. The way, as registered at first registration passes across land owned and registered in favour of the First, Second and Third Respondents.

5. The First Respondents, Roderick Mark Hughes (Mr Hughes) and Helen Patricia Hughes (Mrs Hughes)), have been, since 29 January 1996, the registered proprietors of property adjacent to Bethany and known as Land at Moor Wood, Chapel End, registered at HM Land Registry under title number WK351 35. Mr and Mrs Hughes have constructed a house (5 Rowan Drive) on their property.

6. The Second Respondent, Mariella Di Marco, has, since 21 September 2007, been the registered proprietor of Moor Wood, Chapel End, Nuneaton, registered under title number WK284159.

7. The Third Respondent, Carl Thompson and Annette Jane Thompson, have, since 30 June 2009, been the registered proprietors of 3 Rowan Way, Harshill, Nuneaton, registered under title number WK361371.

8. Although, as set out above, each of the Respondents' registered titles were registered prior to the first registration of Bethany, it emerges, for reasons not material to this application,

that none of the Respondents were notified by the Land Registry prior to the registration of the way.

9. The existence, or otherwise, of the way, registered in favour of the Applicants and traversing the land of the Respondents, is the subject matter of the current application.

10. As registered, the way is said to arise from an express grant contained in a conveyance, dated 12 May 1947 and made between Jee's Hartshill Granite and Brick Company Limited (JHGBC), as vendor, and George, as purchaser, whereby Bethany, then, as already mentioned, known as Land at Baker's Hill, together with a small additional parcel of land, long since sold on, was conveyed to George 'TOGETHER with a right of way in common with the Vendors and all other persons entitled thereto (so far as the vendors have power to grant the same) for the purchaser and his successors in title and his or their tenants servants visitors and workmen and with or without horses carriages carts and other vehicles over and along the roadway coloured purple and yellow on the said plan RESERVING unto all persons entitled thereto such rights of way as now exist over the land hereby conveyed.

11. George, who died in 1977 was the grandfather of the Applicants and the father of Gordon Chilvers (Gordon), who died in 2013. The Applicants (two of Gordon's children) are Gordon's personal representatives and trustees of his estate. George, having purchased Bethany in 1947, conveyed it to Gordon, in two tranches by conveyances dated 8 March 1961 and 19 November 1969. Both conveyances purported to convey to Gordon the rights in respect of the way set out in the 1947 conveyance.

12. The register contains the following note in respect of the way: 'The roadway coloured yellow and purple referred to is the pathway leading from the southern boundary of (Bethany) to Ash Drive and continues from Ash Drive along the path (known as Morwood Lane) through Moor Road and Laurel Drive to Coleshill Road'

13. The provenance of that note, as to the route of the way and as to the roadway coloured purple and yellow on the plan referred to in the 1947 conveyance, is to be found in the Applicants statutory declarations each dated 6 February 2015, coupled with an explanation provided by the Land Registry when the existence and route of the way was first queried by Mr and Mrs Hughes in November 2020.

14. The two statutory declarations aver, correctly, that the original 1947 conveyance could not be found and exhibit a copy, That copy was, however, produced and exhibited without the

plan referred to in the conveyance, with the result that the Land Registry had no documentary material upon which to base the route of the way purportedly granted by the 1947 conveyance and, necessarily, relied upon the averments of the Applicants as to the route of the way, coupled with the Land Registry's own investigation, as explained by the Land Registry in a letter of 2 November 2020; namely that the route averred by the Applicants followed 'the route of a track shown on Ordnance Survey maps' and the route of a private road, as shown by Google maps images. The Land Registry determination was that the route shown was the 'only viable route available' and, thus, must have been the route over which the way was granted.

15. That conclusion of the Land Registry was challenged by Mr and Mrs Hughes. By an application to the Land Registry, dated 1 December 2020 and subsequently referred to this tribunal, Mr and Mrs Hughes applied to alter the register in respect of Bethany, by removing the entry in respect of the way.

16. At that stage, two primary points were advanced on behalf of Mr and Mrs Hughes; firstly, that the way could not have been granted along the route identified in the statutory declarations and adopted by the Land Registry because JHGBC did not, at the date of the 1947 conveyance, or any other date, own the land over which the way was purportedly granted; secondly, that because JHGBC had, in 1947, been the owner of land to the east of Bethany both fronting on to and to the rear of Oldbury Road, the likelihood was that the way had been granted from Bethany across that land and on to Oldbury Road.

17. The application also noted, as was the case, that, as at the date of the 1947 conveyance, George was already the owner of land at and to the rear of 111 Oldbury Road (title numbers WK279763 and WK391904), having purchased those parcels from JHGBC by a conveyance dated 4 August 1936, that those parcels provided a direct connection from Oldbury Road to Bethany (and thus a potential access route to Bethany), but that the sale off, in 1983, by Gordon, by then the owner of Bethany and the other two titles, of 111 Oldbury Road (the Haven) and, subsequently, the land to the rear of the Haven had, subject to the existence of the way, left Bethany landlocked.

18. The case advanced by Mr and Mrs Hughes, at that stage, was that, in the absence of any alternative right of way to Oldbury Road, the claim to the way asserted by the Applicants and previously, as set out later in this judgment, by Gordon was asserted as a means of resolving the problem created by the sale of the Haven and by Bethany becoming landlocked.

19. In the result the case advanced both by the Applicants and by Mr and Mrs Hughes had, by the date of the hearing of this application, taken a different turn.

20. Although, as originally pleaded, the Applicants had based their claim to the way on the express grant said to have been contained in the 1947 conveyance and although, at that stage, they had relied upon a plan, albeit uncoloured, apparently discovered among the very considerable quantity of papers that Gordon had stored at Bethany, which showed the route of the way as being that asserted by the Applicants in their statutory declarations, by the date of the hearing, that case had been abandoned, it being conceded that JHGBC had had no title to the land over which the way had been purportedly granted and had, therefore, been unable to effect that grant.

21. That concession was made at, or shortly before, a hearing before me in May 2023, at which I gave the Applicants permission to amend their application in order to advance a claim to the way based either upon statutory prescription or the doctrine of lost modern grant. At the same hearing and to ensure that all relevant parties were bound by the result, I directed that the Second and Third Respondents be joined to the application. Although Mr Joseph Di Marco, who is the father of the Second Respondent and who lives at the Second Respondent's property, Moor Wood, gave evidence for Mr and Mrs Hughes, neither the Second or the Third Respondent played any further part in these proceedings.

22. The production of the plan, which implicitly, at least, the parties, rightly, accepted as being a marked up but uncoloured copy of the plan referred to in the 1947 conveyance , had the effect that the quest for an alternative route for the way, purportedly granted by the 1947 conveyance, substantially fell away to be replaced by the new question as to whether Bethany had the benefit of a prescriptive right of way along the alleged route of the way either by reason of a prescriptive use of the way in a period of twenty years, or more, prior to action brought, or by way of the application of the doctrine of lost modern grant

23. That question, given, in particular, the possible application of the doctrine of lost modern grant, which, in broad terms and as explained in **Tehidy Minerals Ltd v Norman [1971] 2 QB 538**, requires only the prescriptive use of the way over any twenty year period and which, unlike statutory prescription does not link the relevant user to the period immediately preceding any action, or claim, calling into question the alleged prescriptive right has, in this case, required the tribunal to examine the entirety of the use made of the way to access Bethany, together with the circumstances surrounding that use, throughout the period from George's purchase of Bethany in 1947 (more particularly from the date in 1961/62 when, as set out later in this judgment, the dwelling house which came to be occupied by Gordon

and his family was completed and occupied) up until the date (1 December 2020) when Mr and Mrs Hughes first applied to the Land Registry for the removal of the entry in respect of the way, that being agreed and accepted by the parties and the tribunal as the date when, for purposes of section 4 of the Prescription Act 1832, the prescriptive use of the way as the access to Bethany was put in question.

24. Within and as a part of that overall examination of the user of the way and the circumstances relating to its use, two particular matters have bulked large.

25. Firstly, the extent of the use made by Gordon and his family of the Haven and the land to the rear of the Haven, as providing access to Bethany from Oldbury Road, from 1947, when George purchased Bethany, until 1983, when the Haven was sold by Gordon to a Mr and Mrs Cretney. In this regard, Mr and Mrs Hughes contend that, up until the transfer of the Haven to Mr and Mrs Cretney , in 1983, and additionally to the other reasons and evidence that they have advanced in challenging the Applicants' prescriptive claims, access to Bethany was principally and ordinarily via the Haven, such that any user of the way was insufficient to constitute a qualifying use of the way for purposes of prescription.

26. Secondly, given, as explained later in this judgment, the use that was made of the 1947 conveyance and the right of way purportedly granted by that conveyance, by Gordon, as justifying his use of the way to access Bethany, whether and to what extent Gordon was aware that the conveyance had been ineffective to grant an express right of way in favour of Bethany and, correspondingly, whether and to what extent Gordon may have acted dishonestly in the use that he made of the 1947 conveyance and the purported grant in justifying his use of the way and with what potential legal consequences.

27. In determining these questions, in elucidating the history of the track and its user and, given the case now being advanced by the\applicants, in determining whether to direct the Land Registry to remove the current entry in respect of the way, or alternatively, to replace it with an entry that gives effect to the prescriptive rights now asserted by the Applicants, I have had the benefit of eight days evidence, a site view and two days factual and legal argument. I am grateful for the enormous assistance of counsel both for the Applicants and the First Respondent and, also, for the assistance given by the very many witnesses who gave evidence before me.

28. The starting point is the 1947 conveyance and the negotiations leading to that conveyance and to the purported grant. The available, albeit incomplete, correspondence indicates, unsurprisingly, given the eventual purported grant, that George was seeking to access the

land he was about to purchase was across what was then (and now) known as Moorwood; that is to say, along the route of the way. The correspondence, however, shows, or contains, no assurances, on behalf of JHGBC either that it owned the land over which George sought a right of way, or that it would procure a grant in his favour from the then landowner, which appears, at that stage, to have been the Ansley Hall Coal and Iron Company Limited.

29. In the result, Bethany, together with the small additional parcel referred to in the 1947 conveyance and now sold on, was conveyed to George by way of that conveyance and contained the purported grant of a right of way, over Moor Wood and along the route of the way the subject of this application, that I have already set out, Conspicuously and, as it seems to me, importantly, the grant was explicitly qualified in its terms, as being a grant of the right of way only 'so far as' (JHGBC) had 'power to grant the same'.

30. That formulation was not accidental. At the very least it signified that JHGBC had doubts as to its capacity to grant the right of way and, given that there is no reason to believe that JHGBC was, or would have been, unaware of its landholdings in the vicinity of Bethany, the probability seems to me to be that it was a formulation used by JHGBC in the knowledge that it did not have the capacity to grant the right in question.

31. That, in its turn, raises the question both as to why the conveyance contained a grant known to the grantor to be ineffectual and the extent to which the grantee was aware that the grant was ineffectual.

32. In regard to the former, the only sensible answer is that George wanted, at least in form, a right of way across Morwood (as had been his intention from the outset) and that, while protecting its own legal position by way of the qualified form of grant, JHGBC was prepared to accommodate him.

33. In regard to the latter, it seems to me more probable than not that George was aware that the grant was, in law, ineffectual. It is clear from the correspondence that solicitors were instructed in respect of the conveyance and it is highly unlikely that solicitors, acting for George and investigating title on his behalf were, or would have been unaware, particularly given the form of words used in the grant, that JHGBC lacked the capacity to grant the right of way, or that those solicitors would have failed to inform George of that position. Rather, it seems to me to be more likely than not that JHGBC were perfectly open about their inability to grant the way, but, as set out above, were, nonetheless, prepared to accommodate George by agreeing a form of words in respect of the right of way, which,

while protecting its own position provided him, at least ostensibly, with the grant over Moor Wood which he had wished to achieve.

34. That George was aware of the defect in his grant seems to me to emerge from and be confirmed by correspondence that he had with Warwickshire County Council, in 1957, while Bethany (then Baker's Hill) was still in his ownership and prior to the construction of any dwelling upon the property. At that date, the then owners of Moor Wood, the Nuneaton Timber Company Limited (Nuneaton), were contemplating residential development on Moor Wood. In his letter of 6 September 1957, George, makes reference to a right of way extending through Moor Wood, as shown on the, presumably then current, Ordnance Survey map. He adverts also to the alleged right of way being 'overgrown and not admitted'. What he does not assert, in the place where one would expect such an assertion to be made, if available, is that he had an express right of way, along the route apparently shown on the ordnance survey map, pursuant to the 1947 conveyance. The absence of any mention of the 1947 conveyance, as the source of his right of way, seems to me to point, with some clarity, to George's knowledge of the deficiency in the grant and the reference in the letter to his right not being admitted seems to me to point, also, to his having put the grant to Nuneaton and it having been rejected.

35. In November 1958, George's attention turned to the construction of a dwelling on Bethany. On 7 November 1958, he wrote to Warwickshire County Council, seeking guidance as to the steps to be taken. He adverted to the earlier correspondence, which he described as 'concerning an outlet to the highway' from his property and indicated that 'subject … to being able to overcome this matter of ingress and egress' he had it in mind to erect a dwelling house upon his land. Clearly George understood that the 1947 conveyance had not provided an outlet from Bethany to the highway or resolved the matter of ingress and egress.

36. In response to that letter, the local authority suggested to George that, in making any application for planning permission , where, as in the case of Bethany, the proposed development site was outside the designated development area, he would be well advised to deposit, with his application, a letter setting out his full reasons for the proposed development. It is at that point, as it seems, that Gordon took over the negotiations in respect of Bethany.

37. By letter dated 22 January 1959, which would appear to have accompanied the application for planning permission, Gordon set out his reasons for wishing to build on Bethany. He explained that in due course he expected to take over the smallholding currently worked

by his father on the Bethany land. He explained that the current access from the Haven was unsatisfactory because the Haven was separated from Bethany by a steep valley with a ruling gradient of 1 in 3.5 , rendering the working of the land difficult, especially in bad weather and rendering access by heavy vehicles impossible. The letter, accordingly, went on to state that the efficient working of the holding would require 'new access via Moor wood'.

38. In a note which appears to have formed part of the planning application, Gordon identified the proposed access to Bethany, if permission were granted, as being '… through Moorwood along the line marked on the plan. This is the line of an old track at present disused which it is proposed to clear. Since the track is a continuation of the road from Chapel End, it would appear that no new or altered access to a highway is necessary'. The plan in question, as attached to the planning application, showed the proposed route across Moorwood, substantially along the route of the way the subject of this application and described the 'proposed line of access' as being 'under negotiation'.

39. In response to the application, by letter, of 11 February 1959, the Atherstone Rural District council, informed Gordon that the application had been deferred pending further information, specifically as to the outcome of the negotiations in respect of access across Morwood, which, understandably, the Council regarded as having a considerable bearing upon the application. Gordon replied on 21 February 1959, stating that he had made an offer to Nuneaton, still at that date the owners of Moorwood, to purchase 'a piece of land sufficient to give me the access along the line of the line indicated' in the submitted plan. He asked that the continuing negotiations should not delay the decision of the planning committee. In the result on 14 April 1959, outline planning permission was granted in respect of Bethany, there being reserved, however, the 'means of access required'.

40. In regard to the negotiations with Nuneaton there was, among Gordon's papers, disclosed in the course of this application, a draft letter evidently intended to be sent to that company. That draft shows that Gordon was seeking to purchase some 2 ¾ acres of Moorwood, at a price of £100, on the footing that the land, in its present state had no agricultural value. The draft letter explained that the acreage in question was larger than he required for access and that, subject to securing the access he desired, he would be happy to adjust the area of land to be purchased to meet the company's wishes.

41. By November 1959, however, as appears from a letter from Gordon to the Council, dated 21 November 1959, those negotiations had been unsuccessful and it had proved 'impossible to obtain the proposed access through Moorwood'. His suggestion,

accordingly, was that he proceed to the construction of a temporary building of light construction ‘using the existing access to Oldbury Road’ ; that is to say access via the Haven. The erection of a permanent dwelling would follow when once a satisfactory permanent access had been obtained ‘by whatever route’.

42. The inability to secure access through Moorwood is reflected, further, in what appears to be the draft of a letter written to the Council, in respect of the planning application and which, given its content would appear to follow on from the correspondence last set out. That draft reiterated that access through Moorwood was ‘impossible for the time being on account of the attitude of the present owners of Moorwood’ and, for that reason, put forward alternative proposals for the provision of access to Bethany ‘based upon the existing access’ from the Haven which was being improved.

43. Consistently with this draft, the witness statement of Dawn Cretney (one of the eventual purchasers of the Haven and a long-time local resident), a potential but not called witness for the Applicants, whose evidence was, at least in this aspect, relied upon by Mr and Mrs Hughes, described George and Gordon ‘digging out a track into the hillside to make a way over their own land to where’ the dwelling on Bethany was to be built. She went on to say that this was the track used to access Bethany when the building work was in progress and that it remained the access to Bethany ‘for some time thereafter’. Between 1954 and 1962 and, therefore, at the dates relevant to the grant of planning permission in respect of Bethany she was living at 115 Oldbury Road, a property closely adjacent to the Haven.

44. Detailed planning permission was granted in respect of Bethany , by a notice dated 10 November 1960. The approved access, as shown on a site plan, curved south east across Bethany, leaving Bethany close to its south eastern corner and then crossing what was then George’s land to the Haven and to Oldbury Road. The wished for access across Moorwood had, at that point, been abandoned.

45. I have set out the foregoing in some detail because, as it seems to me, it demonstrates, beyond any possible doubt , that, at the time when permission was granted for the construction of the dwelling on Bethany, neither George nor Gordon were asserting any rights over Moorwood in favour of Bethany, pursuant to the 1947 conveyance and, correspondingly, that they must have been fully aware that the 1947 conveyance provided them with no such rights.

46. In this regard, the suggestion, advanced by Mr Howlett, counsel for the Applicants, that George might not have informed Gordon of the terms of the 1947 conveyance and that

that is the explanation for the conveyance not being relied upon in Gordon's negotiations with Nuneaton and the planners, seems to me, with respect, to be entirely fanciful.

47. Father and son were working together to secure both planning permission for Bethany and rights of access across Moorwood. In that context, it is wholly unrealistic to imagine that they would not have pooled their information and that George would not have informed his son as to the terms of the 1947 conveyance, as it related to Moorwood, or of any belief that he might have had as to the validity of the rights granted over Moorwood by that conveyance. It is, likewise, inconceivable, if George had had and had conveyed to Gordon, any such belief, that neither he nor Gordon, would have raised that right both with the then owners of Moorwood and with the planning authorities. Instead, the whole tenor of the correspondence and of George and Gordon's dealings with the planners and with the owners of Moorwood is that they had no such right. The only and irresistible inference is that they well knew that the 1947 conveyance had not granted an effective and actual right of way over Moorwood and along the route shown in the 1947 conveyance plan and now contended for on the basis of prescriptive user.

48. In that context, I turn next to the state .of the way at, prior and in the period following the purchase of Bethany and the construction of a dwelling on Bethany.

49. The starting point here, is the pre-purchase negotiations, in which George described the way that he was seeking over Moorwood as being very badly overgrown. That remained the state of the way into the late nineteen fifties. In his correspondence wth the local authority in connection with Nuneaton's development proposals for Moorwood. George described the way as being overgrown. In his planning application, in January 1959, Gordon described the way as being an old track, currently disused which it was proposed to clear. Mary's evidence, consistent with the foregoing, is that her mother, Edith, had taken a walk with Gordon, across Moorwood, through a very overgrown path with brambles and nettles, and that Gordon had told her that this path would be the driveway to the house that was going to be built on Bethany,

50. Ordnance Survey maps cast a little light upon the matter. The 1938 ordnance survey map shows a single dotted line passing across Moorwood from the southern boundary of Moorwood, somewhat to the north of a row of cottages referred to in this case as the coal board cottages, to the southern boundary of Bethany. A single dotted line ordinarily denotes a track, or footpath wide enough for a couple of people to walk along. By 1972, however, the Ordnance Survey map shows that the single dotted line has become a double dotted line denoting a track wide enough for a vehicle to drive along. The same ordnance survey

sheet, however, identifies the route from Bethany to the Haven, as approved by the Council, by way of continuous black lines, signifying, it would appear, that that route was rather more established, or 'made up' than the track across Moorwood.

51. The Applicants adduced no evidence and provided no recollection, or explanation, as to how, the overgrown and disused path across Moorwood became, as it undoubtedly became by, at latest 1972 a track capable of vehicular use. In particular, it was not suggested that Gordon, or his father, had been responsible for carrying out the work necessary to create the vehicular access and I am satisfied that that was not the case.

52. It is highly unlikely and improbable that, having just been refused rights of access over Moorwood by the owners of Moorwood and having, in consequence, taken steps to improve the access from Oldbury Road and the Haven, Gordon, or his father, would, then, in blatant disregard of the wishes of the owners of Moorwood gone onto Moorwood, as trespassers, in order to improve a path over which they knew that they would have no rights. That did not occur.

53. That, of course, leaves open the question as to how, when and by whom the way was developed. The best available answer lies in the evidence given to the tribunal by one of the First Respondent's witnesses, Harry Bailey.

54. That evidence, was that his family rented Moorwood from a Mr Kenneth Ireland from around 1967 until the eventual sale of Moorwood, by Mr Ireland's executors in about 1984. Harry Bailey's evidence was that, when first rented, the land, which extended both sides of the eventual way, had been overgrown and that, working, from an old quarry area on the west side of Moorwood to the south west of Bethany, his family had gradually cleared the land, which, as appears from the Ordnance Survey maps and as the name suggests, had previously been woodland, in order to graze cattle.

55. His evidence was that when his family rented Moorwood there was already a track in existence running from the southern boundary of Moorwood, north of the coal board cottages, across Moorwood to the southern boundary of Bethany. It was not rutted and had been little used. He described it, though, as not being suitable for a tractor and trailer and, because it was so rough, it was little used by his family. It was, at least in part and until cleared by his family so as to enable access to a water tap, adjacent to the coal board cottages, overgrown with brambles. Mr Bailey described the track as being 'not nice' when it was wet and that it was narrow and would damage a vehicles' paint work.

56. When, over time the land was cleared, it was fenced off with post and wire barbed wire fencing and the track, itself, which had originally served a rarely used water tank, on Moorwood, but close to the southern boundary, of Bethany, was also lined, on each side, with barbed wire post and wire fencing; three strands at the boundary; two strands along the track. To enable cattle to be moved from one side of the fenced track to the other, light gates were fitted in the post and wire fencing along the way. Two other gates were also installed; one, adjacent to the old quarry area, allowing access into that part of Moorwood, to the to the west of the track, from the extension of Moorwood Lane which curves around the western boundary of Moorwood and which was, as Mr Bailey told me, the Bailey family's preferred access to Moorwood, given the poor state of the track; the other at the southern end of the track at a point somewhat to the north of the coal board cottages. Until the Bailey family had rented Moorwood, there had been no gate in this boundary. A roadway ran north from Moorwood Lane to the coal board cottages but did not extend any further

57. I have seen no reason at all to disbelieve any of Harry Bailey's evidence. By the tine he gave evidence before me he was 77 years old and had had and recovered from a stroke. I did not find that this affected his evidence. He was aware of the date of his family's letting of Moorwood, because it had followed shortly upon his wedding in 1966. Thereafter he had worked Moorwood, as an adult for some seventeen years and was, accordingly, in the best possible position to know what had gone on during that period. He showed no signs of any animus towards the Applicants, or the Chilvers family. My very firm impression is that he was an honest and reliable witness.

58. The effect, or result, of the foregoing, as it seems to me, is that, when once Moorwood, including at least part of the track, had been cleared by the Bailey family and when once the old track, originally serving the water tank had been gated and fenced, there was in place a rough, narrow track, passable by vehicles and, as such, capable of being identified on the 1972 Ordnance Survey map in the way that it appears on that map.

59. An important aspect of the foregoing, as it seems to me, is the absence of any gate affording access to the track/way until such time as the gate north of the coal board cottages was installed by the Bailey family; that is to say no earlier than 1967 and, given the time which must have been taken to clear and fence the land and the track, probably somewhat later. Until that date the absence of a gate in the hedgerow, on the southern boundary of Moorwood precluded any vehicular access to the way from Moorwood Lane and the coal board cottages and the way, therefore, could not have afforded vehicular access to Bethany by that route. Correspondingly and consequentially, at least until that date, the day by day access to Bethany must have been via Oldbury Road and the Haven

along the route dug out by George and Gordon for that purpose, as described by Dawn Cretney in her witness statement.

60. This state of affairs, in respect of the way, is supported by other evidence . Stewart Treadwell, another witness called by the First Respondent, had been born in 1961 and had lived in one of the coal board cottages until 1968/9. His evidence, which I found to be authentic and convincing, was that, while he was living in the coal board cottages, there had been a continuous hedgerow to the north of the cottages and preventing, therefore, any vehicular access from Moorwood Lane, past the cottages to Bethany. He described Moorwood, at that date, as being woodland and an overgrown field. Such internal track as there was could only be used by a tractor and, because of the hedgerow, there was no access, even by tractor, from Moorwood past the cottages to Moorwood Lane. He recalled, in oral evidence, the Chilvers family coming across Moorwood, from Bethany, on foot, on the way to church in Chapel End and also to sell eggs. He said that, over the time he was living in the cottages a gap was gradually created in the hedge, to allow access, and that later on a stile was constructed.

61. His evidence was, ostensibly, supported by the evidence of another witness, James Brown, who, from 1966, at the age of eighteen months, lived, adjacently to the Haven, at 109 Oldbury Road. His evidence was that well into the nineteen seventies there was no visible track between what he called the fence line north of the coal board cottages and Bethany and that, until the purchase of the land, in the early eighties, by a Mr Wilkinson and a Mr Temple and until the land was opened up by Mr Wilkinson to create a roadway so as to enable rubble to be brought up from Moorwood Lane to fill in the old quarry workings on the north west side of Moorwood, the land was overgrown young woodland. It was his evidence, also, that the roadway constructed by Mr Wilkinson only extended sone two thirds of the way from the southern edge of Moorwood to Bethany's southern boundary and that it was at that time, that George and Gordon widened the old footpath from their boundary so as to connect it to the roadway constructed by Mr Wilkinson.

62. Whereas I found Mr Treadwell's evidence convincing, I have not found myself able to accept Mr Brown's chronology in respect of these matters. Unlike Mr Treadwell, Mr Brown did not live in the coal board cottages and could not, therefore, have witnessed at first hand the matters last set out. Nor, given the markings on the 1972 Ordnance Survey map, can he be right about the date when vehicular access to Bethany became available. Nor can he be right about George and Gordon widening the old footpath so as to extend the roadway constructed by Mr Wilkinson into Bethany. George had died in 1977 and, as is

clear from the Ordnance Survey map, by 1972, a made up track had been constructed within Bethany so as to join up with the less established way across Moorwood

63. Mr Treadwell's evidence does not suffer from these defects. He lived in the coal board cottages until1969 and, while young, he was of an age when he would have been able to observe and, now, recall, the matters he gave in evidence. As importantly, his evidence seems to me to be all of a piece with that given by Harry Bailey, such that their evidence, taken together, is mutually corroborative.

64. The only aspect of his evidence, as to the way, that I was unable to accept was his evidence as to the date of the installation of the gate which, as Harry Bailey, explained, was constructed to afford access to the way north of the coal board cottages. Mr Treadwell stated that the gate was put in place in around 1976.

65. It is clear, from the 1972 Ordnance Survey map and as already stated, that the way was in existence for vehicular access by 1972 and, therefore, that, by that date and as explained by Harry Bailey, Moorwood had been cleared and its boundary and the track fenced with post and wire fencing, In that context, it seems to me very unlikely that the gate accessing the way from the south had not been installed. The purpose of the gate, as explained by Harry Bailey, was to keep the cattle in, given that they were able, as he told me, to penetrate the two strand wires used to fence the track. Accordingly, the installation of the gate was, as it seems to me, an integral part of the clearing and cattle proofing of Moorwood and would, therefore, have taken place as part of that process.

66. By 1972, Mr Treadwell was no longer living in the coal board cottages, having moved to Oldbury Road in 1969. I do not, in consequence, find it surprising that he is incorrect in his recollection of the date of the installation of the gate. More importantly, I do not think that this mistake impinges upon the validity and the accuracy of those other aspects of his evidence where he has been able to give first hand evidence.

67. The consequence, or effect, of the foregoing and, in particular, the effect of my conclusion, as set out in paragraph 59 of this judgment, that the route through the Haven must have remained the day by day access to Bethany, until, at earliest,1967 and probably somewhat later, is that I am unable to accept a body of evidence called upon behalf of the Applicants as to the use allegedly made of the way, as an access to Bethany prior to 1967.

68. That evidence, emanating both from members of the Chilvers family (Mary, Peter Chilvers, Alice Bickley) and family friends of the Chilvers family (Elizabeth Jones, Anthony and Helen

Love, Andrew and Francis Parnham), was broadly to the effect that from the early nineteen-sixties onward they recall accessing Bethany via the way.

69. The problem with that evidence is that it is wholly inconsistent with the only available and realistic explanation as to the development of the way and the only evidence that bears upon the development of the way and, for that reason, it must be wrong.

70. Over and above the foregoing, there are other reasons to treat the evidence in question with great caution. Of the witnesses in question, Mary was four in 1962; Peter Chilvers (Peter)_ was not born until 1962; Elizabeth Jones was four in 1962; Alice Bickley was born in 1960; Andrew Parnham was born in 1962; and Francis Parnham was born in 1960. None of these witnesses, looking back over sixty years to their early childhood and, in the case of Chilvers family witnesses, with their recollections overlaid by many years of subsequent memories and recollections, , can possibly give reliable and accurate evidence as to the means of access to Bethany in the early nineteen sixties, or the route taken on any particular occasion.

71. . Correspondingly, none of them, as it seems to me and in the absence of external 'landmarks', such as to pinpoint a particular date, or particular dates, can possibly locate, with any accuracy or reliability, the dates when they assert that they either accessed Bethany via Moorwood, or witnessed others doing so. It is, for example, wholly unrealistic for Mary to say with any degree of certainty that she saw, as she says she did, the Betterware van coming to Bethany across Moorwood in 1963 and 1964, as opposed to 1969, or that it was in the period prior to 1969 that the postman used to access Bethany via Moorwood. Similarly, absent documentary, or other external evidence, evidence, I do not see how Elizabeth Jones can say with any degree of reliability that she first visited Bethany via Moorwood and past the coal board cottages, as she says she did, in 1966 as opposed, to 1969, or that Andrew Parnham can say, reliably, that he came to Bethany, via Moorwood in 1964, when he was three, as opposed to 1969, when he was nine.

72. The same, in broad terms, can be said of Helen and Alan Love, who gave evidence before me at the ages of seventy seven and eighty respectively. Helen Love gave evidence of accessing Bethany via Moorwood in the mid nineteen sixties Her husband, Alan, described the period of their visits as being from the late nineteen sixties until the nineteen nineties. Their evidence as to what they termed the earlier years of their visits to Bethany and, in effect, their point of reference, was that, in accessing Bethany, they would pass by the coal board cottages. As already, explained, however, the coal board cottages were still in existence in 1972 so that, as a point of reference, it says nothing as to whether their visits

via Moorwood were in the mid-sixties, or the late-sixties, or and, in particular, whether they visited before or after the date when the Bailey family began to clear Moorwood and, as I find, establish an accessible vehicular way.

73. In regard, further, to this early period, both the Applicants and Mr and Mrs Hughes placed some reliance upon diary entries in a 1966 diary kept by Edith Chilvers, as demonstrating, or not demonstrating, that Bethany was, in that year, being accessed via Moorwood. The bulk of those entries are, to my mind, equivocal and cannot be said to point definitively in one direction or the other and, certainly, cannot possibly be sufficient to displace the only realistic evidence as to how or when the vehicular way came into being

74. One entry, however, requires more detailed consideration. On 10 February 1966, Edith wrote: ‘ Peter again here. Quite heavy snow in the night. So Gordon has to come round via Moorwood & Ruth bring Peter up our drive’.

75. The First Respondent places reliance upon this passage as demonstrating that accessing the Haven from Bethany via Moorwood was unusual and, hence, worthy of specific mention in her diary. The Applicants rely on the entry as showing that, in 1966, entry to or exit from Bethany was available across Moorwood.

76. I am not persuaded that, from the First Respondent’s point of view, the entry takes matters very far. Given that the route from Bethany to the Haven (two contiguous properties) was very much shorter than the route across Moorwood and thence round to Oldbury Road, it would, on any view, have been unusual for Gordon not to use the direct route.

77. More significant, is the possibility, arising out of the entry, that the way was an available route into and out of Bethany in 1966. For the reasons, however, already set out, I reject that possibility.. In 1966 Moorwood had not been cleared and the old track across Moorwood to Bethany was blocked by a continuous hedgerow, at the southern boundary of Moorwood, such that a vehicle, even a tractor, could not access Bethany from Moorwood Lane and the coal board cottages.

78. What, I think, the entry does demonstrate, however, is that, even prior to the installation of the gate at the southern end of the way and the opening up of the way as an access to Bethany, it was possible, in extremis, to exit Bethany across Moorwood, albeit not via the way.

79. In this regard, the evidence of Mr Treadwell is, again, significant. His evidence was that, in addition to the undoubted access to Bethany, via the Haven, the Chilvers family, in these

early days, also utilised an access on to Moorwood and across to Bethany from the western spur of Moorwood Lane, past the old quarry. The use of this access, which was also adverted to by Harry Bailey, was not fully investigated before me, the focus being on the way and upon the Haven access. Mr Treadwell, however, in what I see as a revealing and realistic piece of his evidence, explained that a Johnny Walters, a haulier who used to maintain Moorwood Lane, including the western spur, at one point placed boulders across that part of Moorwood lane to prevent, or preclude, the Chilvers family's access to Bethany via that route.

80. I found that evidence persuasive and convincing and reflected, therefore a realistic alternative access vis Moorwood to Bethany at a time when, access to Bethany via the way was not yet available.

81. All that said, I am satisfied that, as from the Bailey's installation of the gate in the southern boundary of Moorwood, which, taking Harry Bailey's evidence and Stewart Treadwell's evidence together, I would date at around 1969, the way, even though rough and narrow and potentially damaging to paintwork, existed as an available access from the coal board cottages up to and into Bethany. I am further satisfied that, as from that date, it was Gordon Chilver's aspiration to establish his and his family's user of that access.

82. That aspiration, or intention, is evidenced, firstly, by the fact, already set out , that, by 1972, Gordon, no doubt with the help of his father, had constructed a potential access within Bethany onto the way, of, apparently, a higher quality than the way itself; and, secondly, by the content of negotiations entered into between Gordon and Mr Ireland, in which, as appears from a letter from Mr Ireland's solicitors, dated 25 June 1971, Gordon had been seeking Mr Ireland's agreement to his access to Bethany across Moorwood along what is described in the letter as 'the existing road coloured blue'. The plan which, no doubt, identified the 'road coloured blue' is not available. Given, however, that Gordon had always aspired to an access along the way, given his construction, as last set out, of an access on to the way of and given, also that, in a subsequent letter to George from his then solicitors, dated 29 June 1971, there is reference to Mr Ireland 'widening and resurfacing' what was termed Gordon's right of way, at a time when the way was in the very basic state already discussed, the clear probability is that the reference to the 'road coloured blue' is to the way.

83. The next question for determination, given the availability of access and an evident desire to take advantage of the access, is what use was made by Gordon and his family and visitors of the way, in the period from 1969 and while Moorwood remained in Mr Ireland's

ownership, given that, until 1983 and the sale of the Haven to Mr and Mrs Cretney, there remained the existing access to Bethany from Oldbury Road which had been improved by Gordon and George and approved, as an access to Bethany, when planning permission had been granted in 1960. The supplementary, but equally important, is as to the basis of that user.

84. A very real difficulty, in resolving the first question, has been in evaluating the evidence, as to the user of both the way and the Haven access, given, in particular, by members of the Chilvers family. There was a clear tendency, in much of that evidence to minimise the user made of the Haven access, to emphasise the difficulties involved in the use of that access and, consequentially and correspondingly, to demonstrate that the main access to Bethany must have been across Moorwood. While I hasten to say that I acquit any witness of any intention to mislead and while I well appreciate that family recollections of the use, in particular, of the Haven access will, necessarily, be overlaid by the fact that, as appears later in this judgment, from 1983 onward, I am satisfied that the main, indeed, exclusive access to Bethany was vis the way, this does mean that I have to view the evidence of the user of the way in the period now under discussion with some caution.

85. The most obvious example of this tendency was presented by Peter. Peter's evidence was marked by a propensity to over think, to second guess and to seek to head off questions which he believed might be forthcoming and to indulge in argument and explanation rather than providing a factual response to the questions put. This was particularly marked in respect of the use of the Haven route, in regard to which, rather than providing evidence as to the actual use made of the route, he felt constrained to fall into argument and explanation as to why the route could not have been used by particular vehicles in particular circumstances. I found this, as I told him, in the course of the hearing, unhelpful to my task.

86. A useful starting point, in respect of the user of the Haven access, as from 1969, Is that in 1971, as appears from a notice of refusal, dated 23 November 1971, Gordon had sought planning permission to develop Bethany. The proposed site plan for the development embraced Bethany and the land across to the Haven; the clear implication being that access to the proposed development would be via the Haven and Oldbury Road and, correspondingly that, at that date, Gordon regarded access, albeit, perhaps, further improved, as being adequate to serve the proposed development on Bethany

87. The continued and considerable use of the Haven route to access Bethany, in this period, emerges very clearly from a number of the witnesses called by Mr and Mrs Hughes.

88. Stewart Treadwell, who moved from the Coal Board cottages in 1968/69, lived in Oldbury Road from 1972 until 1986. His evidence, as clarified, subsequently, by the evidence of James Brown, is that in the early part of this period, vehicles accessing Bethany used what was referred to as the quarry gates (referring not to the old quarry area on Moorwood but to a quarry owned by JHGBC to the west of and accessed off Oldbury Road). Through the gates vehicles would turn south west on to what I will call the Chilvers' land at the rear of the Haven and, thence, across that land to Bethany. Later on, rather than using the quarry gates, vehicles used to go directly through the Haven. The reason, allegedly, for this change was that the quarry owners complained about the weight of traffic using their land to access Bethany.

89. Mr Treadwell's evidence was that, In respect of either access, it was possible for vehicles, including vans to access Bethany and that this, as he saw it, was the access used by Gordon and his family and their visitors. He described, in particular, the many occasions he had seen Gordon using the Haven access, in his dormobile, to take passengers to and from Bethany for the various bible camps and prayer meetings held on Bethany. He accepted that the access was steep, that there was a dog leg and a bridge over a stream at the bottom of the valley between the Haven and Bethany, but said that it was perfectly usable, even with an elderly vehicle. His recollection was that the post office van would go up to Bethany, via the Haven and that, in those days, refuse, or rubbish, from Bethany and in respect of events held at Bethany would be brought down by Gordon, in his dormobile, for collection by the refuse lorry. He describes, himself and his friends kicking the rubbish bags brought down from Bethany and awaiting collection. Mr Treadwell was, in this aspect of his evidence, again a convincing witness.

90. James Brown, whose evidence as to Moorwood I have already mentioned, also gave evidence as to the use of the Haven/Oldbury Road access. He it was who was able to explain and clarify the manner in which, he said, access to Bethany had been obtained via the quarry gates. I have already set out my reservations as to his evidence about Moorwood. Subject to one matter, however, I am satisfied that his evidence as to the use of the Oldbury Road/Haven access to Bethany is reliable.

91. As already stated, Mr Brown lived at 109 Oldbury Road (known as Hayes Crest), next door to the Haven, from 1966 until 1992. He was, accordingly, certainly from 1975 onward, of an age and in a position to have a sensible recollection of the use made of the access to Bethany from Oldbury Road. His evidence was that, in the period up to the sale of the Haven to Mr and Mrs Cretney the route via the Haven/Oldbury Road was used daily by the Chilvers family, by their visitors and by persons to whom Gordon had granted grazing rights

on Bethany. He acknowledged the difficult topography of the route across to Bethany, but he maintained that the route was capable of use by and was used by vehicles; his specific recall was of a Hillman saloon a Morris Minor Traveller a Thames minibus and, occasionally, a Land Rover. He explained that the route was used to service the chicken business which George and, latterly, Gordon had run from Bethany. In the nineteen-seventies and eighties (as from 1975) and as is not in dispute, Gordon had run a printing and copying business from Bethany. Mr Brown's recollection was that delivery vehicles, such as TNT, had used the Oldbury Road access for business deliveries to Bethany. His recollection was that drivers were not happy about the access, that some drivers refused and left papers, or pamphlets, at the Haven for Gordon to come down from Bethany to collect and that, on occasion, vehicles got into trouble on the route.

92. Mr Brown's evidence was that this user of the Oldbury Road/Haven access continued informally after the sale of the Haven to Mr and Mrs Cretney. He acknowledged, as is the case, that, on the sale of the Haven, no vehicular right of way was reserved in favour of Bethany and that the only relevant right reserved was a right of access on foot, by way of licence, so as to afford convenient access from Bethany to the Haven to enable the family to visit a relative (Mrs Walton) who lived in what had been an annexe to the Haven, held under a separate title. His contention, however, was that this informal user had, nonetheless continued. It is this contention that I am unable to accept.

93. I did not find this aspect of Mr Brown's evidence convincing. If Gordon had intended to retain significant vehicular access to Bethany via the Haven, after its sale, and if Mr and Mrs Cretney had been willing to afford him that access, then it seems to me that that intention would have been appropriately reflected in the documents of title. The fact that matters were not dealt with in that way suggests very strongly that Gordon had no intention that the Haven route continue as a regular means of access to Bethany after the sale of the Haven and, correspondingly, that it is very unlikely that, contrary to his intention, it continued to be used in that way. Mr Brown's evidence, on this point, also suffered from inconsistency. In one of his witness statements, Mr Brown had stated that he had been told by Mr Stain, who purchased the Haven in 2003, that the Haven access to Bethany had been used right up to that date. Under cross examination, however, he told me that the route had been filled in by Mr and Mrs Cretney, following the death of Mrs Walton. While I can accept the possibility that post-sale and while the route remained passable, there might have been an occasional one-off use of the route, I am not satisfied that any significant user persisted after that date.

94. Further evidence, as to the use of the Haven route, came from Marie Colledge. Mrs Colledge is the sister of James Brown She was born in 1971 and, like him, lived at 109 Oldbury Road (Hayes Crest) until 1992/93. As a girl, at infant and primary school, up to 1983 she had been close friends with one of Gordon's children, Sarah, and, in those years, Mrs Colledge had spent much time with her, both at Bethany and at Hayes Crest. Sarah had spent time at Hayes Crest watching television and listening to the radio because, apparently, there was no television or radio at Bethany. Mrs Colledge described Bethany as not being a usual home and as containing 'musical instruments in abundance and books', but not children's books One of her recollections is of walking down from Bethany to the Haven to pick up Bethany's post, suggesting, therefore, that at some stage in what must have been the later seventies or early eighties, post for Bethany was delivered via the Haven. Her recollection, further, is of persons attending the Haven as, as she put it, a place of worship, and going on to Bethany via the Haven route and of that route being used by the Chilvers family as their regular access to and from Bethany up until the sale of the Haven in 1983. It was her recollection that, following the purchase of the Haven by Mr and Mrs Cretney, the access which had passed between the Haven and Hayes Crest became filled with rubbish and the route became overgrown. She recalled and accepted that the Haven route was not always easy. It was steep and she recalls a number of occasions, in the winter, when Gordon's elderly motor car 'got stuck' and could not get up the hill to Bethany. In confirmation of an aspect of Stewart Treadwell's evidence, she recollected that, prior to the sale to the Cretneys, rubbish was brought down from Bethany to the Haven for collection, suggesting, therefore, that, in this period, refuse vehicles did not directly serve Bethany. Although she had some recollection of Bethany being used for 'scout camps', she was adamant that it had not, as such, been used as a place of worship. She was adamant, also, that, until the sale of the Haven, the Chilvers family did not use the route out of Bethany along the way; a route that she described as having been created by the 'farmers', meaning, as she explained, initially Mr Bailey and, subsequently, Mr Temple and Mr Wilkinson, who, as discussed later in this judgment, purchased Moorwood from the estate of Mr Ireland in 1984.

95. I was not helped by Mrs Colledge's evidence as to the use of the way. There was, I think, a measure of confusion, shared, as already set out, by her brother, James Brown, as to the date when the way became usable as an access to Bethany. I have had little difficulty, however, in accepting her evidence as to the regular usage of the Haven route by the Chilvers family and their visitors, in the period prior to the sale of the Haven.

96. I have not been persuaded, however, that there was no, or no significant, use of the way as a route into and out of Bethany in the period after the way became, as I find, an available route for that purpose in about 1969.

97. I have already set out, in paragraphs 81 and 82 of this judgment, that Gordon's intention and aspiration, when once the way became passable down to the coal board cottages and Moorwood Lane, was that this route should become an established access to Bethany and that, in part fulfilment of that intention, by 1971 he was in negotiation with Mr Ireland, to procure agreement as to use of the way and by 1972 he and his father had established a potential access on to the way on Bethany. Historically, as already set out in this judgment, that had always been the Chilvers family's wished for access. Given the acknowledged, if sometimes overstated, difficulties in accessing Bethany from the Haven, this wish, or aspiration is not at all surprising. Having seen the lie of the land between Bethany and the Haven, it is more than clear that the Haven access could never have been straightforward.

98. Set in this context and, particularly, if, as discussed in the next phase of this judgment, Mr Ireland had given a measure of consent as to the use of the way, it would, as it seems to me, have been unlikely if advantage had not been taken of the availability of access to and egress from Bethany via the way, once that access became available. In this regard, weight must, also, be given to the fact that, as already discussed, the Haven access ceased to be available as of right after 1983. I find it very hard to believe that Gordon would have sold the Haven, without retention of access to Bethany via the Haven if, at the date, of sale he had not believed, rightly or wrongly, that he had an established access across Moorwood to Bethany and if, therefore, there had not been sufficient user across Moorwood to and from Bethany, by that date, to found that belief.

99. In regard to that user, Harry Bailey's evidence was that he saw very little of Gordon, or of the Chilvers family using the Moorwood access along the way during his years working Moorwood. His recollection was that, to his knowledge, the user of the way was only very occasional and certainly not daily. He said that, although his recollection was that Gordon had made some use of the way from the time that it became usable, he only recalled seeing Gordon on some five or so occasions over the entire period of his and his family's occupancy. He said, also, that he had no recollection of the post van using the track or refuse lorries, or the Chilvers family using the way as their main access to school and for work, or the way being used by visitors to Bethany in order to attend what he termed a meeting house.

100. Harry Bailey also told me, however, that he was not always working on Moorwood and that he would normally only be on the land at weekends and in the evenings. While he also told me that his father, fondly referred to locally as 'Bossy' Bailey, was, or would have been, on the land during the day and would have told him what was going on, it seems unlikely to me that his father would have informed his son of any and every use of the way, save and unless the user was in some way unusual. Additionally, given the evidence, set out later in this judgment, as to the issues which arose, from time to time, as between the Bailey family, Mr Ireland and Gordon, in respect of the use and locking of the gate at the southern end of the way, it seems more than likely that the user of the way was significantly greater than suggested by Harry Bailey.

101. In regard to that user, while, as I have already commented, my feeling is that the Chilvers family witnesses tended to underplay the use of the Haven and, correspondingly, overplay the use of the way in the period under discussion, I do not reject all of their evidence as to the use of the way. I am satisfied that there plainly was such use, albeit that it ran alongside the significant use of the Haven access that I have already set out and discussed. I accept, for example, that Peter, despite my overall caution as to his evidence, was probably accurate in his explanation as to his taking a degree of control over George's egg business, in the early nineteen seventies, and that at least some of the deliveries to and from Bethany in respect of that business made use of the way. Nor do I find myself in doubt but that the way was used, as I was told, by undertakers and the doctor at the time of George's death in 1977, or that the way was used on the occasion of Mary's wedding in 1982. Occasions of that nature are unlikely to be the subject of false memories. I accept, also, that, over time and as recollected both by Mary and Andrew Jones, who first visited Bethany in 1975, that attendees for bible studies at Bethany, or at least some of them, will have accessed Bethany via the way, during the nineteen seventies and later.

102. I am, likewise satisfied, that other of the witnesses that I heard and who gave evidence as to their recollections of making use of the way for access to Bethany, during the nineteen seventies, were accurate in their basic recollection, notwithstanding, in a number of cases, the very considerable passage of time between their last visits to Bethany and the giving of their evidence in this case.

103. A few examples will suffice.

104. I have little doubt that Helen and Alan Love, whose evidence I discussed in paragraph 71 of this judgment, accessed Bethany, via the way, and that that user of the way, by them,

will have commenced no later than the early seventies, when, as already stated, the coal board cottages were still standing and had not yet been demolished.

105. Similarly, I have little doubt but that Andrew Jones, who, as already stated, first visited Bethany in the mid-nineteen seventies and who, subsequently, married Mary. was broadly accurate in his recollections of his early visits to Bethany using the way, of using the way while learning to drive and of being a passenger in Gordon's car while being driven home by Gordon along the way. Other witnesses who seemed to me to have a strong and clear recollection of accessing Bethany via the way during the nineteen seventies were Sharon Holland, who assisted at bible weeks held at Bethany from 1977, Andrew Parham, who worked with Gordon, in his printing business, in 1978, and who recalled delivery vehicles in respect of that business using the way (probably, as it seems to me, because of the difficulties in their use of the Haven route, as already set out) and Francis Parham, who recalled using the way when visiting Bethany in the nineteen seventies for bible weeks and other Christian meetings. While I question, for the reasons already given, both Francis and Andrew Parnham's evidence as to their recollections of use of the way in the nineteen sixties, save, perhaps, the very late sixties, I see no reason to query their evidence as to the nineteen seventies.

106. Looked at overall, I think it likely that when once the use of the way commenced and when, in consequence of use, the way became an easier route, that, in itself will have encouraged and did encourage further use.

107. The next question for consideration, in respect of the period of Mr Ireland's ownership, is the basis upon which user of the way for access to Bethany was conducted.

108. As to that, the best evidence and the only direct evidence is, again, that of Harry Bailey. His evidence is that, at the outset of Mr Ireland's ownership, Gordon and Mr Ireland came to a 'gentleman's agreement' as to the use of the way. His recollection, of which he was adamant, was that he had been present when his father had been informed by Mr Ireland that he, Mr Ireland, had come to an agreement with Gordon that Gordon could use the way. The conversation, he said, had taken place near what he called George Bell's cottage, which, as I understand it, then stood somewhere along the western spur of Moorwood Lane south, or south west, of the old quarry workings off Moorwood Lane. Mr Bailey recalled those who had been present, including Mr Ireland's secretary. I have not had any doubt as to this core recollection.

109. In regard to the substance of the agreement, the starting point appears to have been an arrangement whereby Gordon, or his family, could use the way in winter conditions when the steep access to Bethany via the Haven would have been difficult. It appears, however, from Mr Bailey's evidence that things moved on and that the eventual arrangement, or understanding, as transmitted to Mr Bailey by Mr Ireland, was that the Chilvers family could use the way but that if they caused any 'trouble' their access was to be barred. Trouble, in this context, was leaving the gate at the southern end of the way open or unlocked; Mr Ireland having given strict instructions to Gordon to the effect that the gate must always be kept closed and locked. From Mr Ireland's point of view the purpose of this instruction was simply to prevent entry to his land. From Mr Bailey's point of view, it was to stop cattle escaping.

110. Mr Bailey told me that, to give effect to this arrangement, Gordon was given a key to the gate. He told me, also, that if Gordon, or anyone, left the gate open, then Mr Ireland's instruction was to put a second lock on the gate so that the access was barred.

111. Over time and it is to be borne in mind that the evidence under discussion embraces a period well in excess of ten years, there were, apparently and according to Mr Bailey a number of episodes where the gate was left unlocked and where, in accordance with instructions, Chilvers family access was blocked, by the use of a second padlock to which Gordon did not have a key. The pattern, on these occasions, which Mr Bailey put at a couple of times a year, was that Gordon would get in touch with Mr Ireland, who would instruct that the gate be unlocked and access restored.

112. Mr Bailey was able to give one specific example of the process which I have just described, relating to a date in the mid to late nineteen seventies, which Mr Bailey recalled by reference to race riots then taking place in South Africa. On that occasion, the failure to lock the gate had caused disruption, as Mr Bailey, put it, to their livestock. In consequence the second lock was put in place and was only removed when Mr Ireland telephoned to say that access could be restored.

113. I have had no doubt, or difficulty, at all in accepting the substance of this evidence. There is no basis at all for thinking that it was invented and no such suggestion was put. There is a sufficiency of corroborative detail to render the evidence convincing and persuasive. It is also appropriate to the context.

114. That context, as earlier set out is that, in the early nineteen seventies, Gordon was in discussion with Mr Ireland in respect of an agreement with Mr Ireland to allow access to

Bethany along the way and for the way to be improved. The quid pro quo, within those negotiations had been Gordon releasing, or transferring a part of Bethany to Mr Ireland.

115. Although those more formal discussions, in the end, went nowhere, it seems highly likely to me that during the pendency of those discussions a working arrangement of the kind outlined by Mr Bailey would have been entered into. Correspondingly and in the same context, I find it highly unlikely that Gordon, while negotiating with Mr Ireland, in respect of the access, would have chosen to make any significant non-consensual use of the way. That conduct would, almost certainly, have been counter-productive in respect of their negotiations.

116. All that said, it is striking that in none of the Applicants' evidence, in respect of this period is there any clear cut reference to a locked gate, or to the opening of a gate when accessing the way from the south. The likelihood, I think, is that the arrangement was not quite as firmly policed as Mr Bailey may have sought to indicate and that enforcement of the regime only took place from time to time and when, for whatever reason, straying of livestock, or otherwise, matters came to a head, as between the Bailey family and Gordon, or those using the way.

117. The consequence, however, of the foregoing is that I am satisfied that the essential user of the way, during the period of Mr Ireland's ownership and, therefore, up until 1984, was consensual.

118. For clarity, I consider that, certainly by the end of that period, the quality and the extent of the user of the way as an access to Bethany was such that, taken in isolation, it would have been sufficient to constitute a prescriptive user of the way; that is to say user such as to bring home to a reasonable landowner that a right in respect of that user was being asserted. I am satisfied, however, given the arrangements made and existing between Gordon and Mr Ireland as to the use of the way as access to Bethany, during the period of Mr Ireland's ownership, that that user was not user 'as of right' but was a permissive user and, consequently, not a user which would have been capable of giving rise to prescriptive rights, if carried on over the requisite period.

119. By way of further analysis, ir seems to me to be clear that the use of the way in this period was not merely acquiesced in by Mr Ireland but was, subject to his, or the Bailey family's, on his behalf, intervention, as and when the users of the way overstepped the boundaries of his licence, a genuinely permissive user. The provision to Gordon of a key to the southern gate was, manifestly, a grant of permission. The use of a second padlock

to block the use of the way, on those occasions when the licence was deemed, as I see it, to be overstepped, reflected a deliberate, albeit temporary, withdrawal of that permission and the direction by Mr Ireland, to remove the lock and so recommence the Chilvers access to the way, constituted, on each occasion when it occurred, the grant of a new and positive permission.

120. The end result is that by the end of the period of Mr Ireland's ownership and up to the point when, as already foreshadowed, his executors sold Moorwood to Mr Denny Wilkinson and Mr Tony Temple in 1984, there had been no prescriptive user of the way as an access to Bethany.

121. Mr Wilkinson and Mr Temple owned Moorwood from 1984 and into the nineteen nineties. In 1994 the bulk of Moorwood on the east side of the way was sold to a potential developer, Bloors. The way, itself, was retained. At about the same date, the large majority pf Moorwood, on the west side of the way and the largest part of the way, came to be vested in Mr Temple. In 1995, Mr and Mrs Hughes, purchased from Mr Wilkinson a parcel of land on the east side of the way, which had been excluded from the sale to Bloors, together with additional land extending across the way, to the extent of about one acre. They built their current home, 5 Rowan Way, on the part of that plot to the east of the way. At broadly the same date (1995), Mr Rodney Temple, the son of Tony Temple, entered into possession of a plot of land, still then owned by his father, situated largely to the east of the way, but extending across the width of the way. Rodney Temple built a house, now 3 Rowan Way, on that plot. At some point, prior, I think, to May 1997, this property was transferred by Tony Temple to his son and subsequently, in 2009 transferred by Rodney Temple to the Third Respondents..

122. During this period and throughout the entirety of the further period embraced by the current claim, the way, as already stated, was the sole regular access to Bethany. Other, perhaps, than on an occasional one-off basis, the route to and from Bethany from the Haven ceased, on the sale to the Cretney's in 1983.

123. The extent of the use of the way has, however, remained in some dispute. Mr Hughes seem to have noticed little use of the way, at the time when he was building his home adjacent to the way, in the mid to late nineteen nineties Earlier, in 1984, he was working for Denny Wilkinson. His job, or part of it, was to drive a tractor and trailer to the quarry on the western side of Moorwood, on a regular, if not daily, basis, in order to tip rubble and rubbish, makine use of the way in order to access the quarry. He had no recollection of either the Chilvers, or their visitors using the way, although the fact that they did use the

way and were known by Mr Temple and Mr Wilkinson to do so is reflected in the instruction that Mr Hughes told me that he was given, namely not to back up for the Chilvers

124. The fact of their user is reflected, also, in a letter sent by Mr Temple and Mr Wilkinson's solicitors to Gordon, dated 9 August 1990, in which complaint is made as to the use, including commercial use, being made of the way. The likelihood, as it seems to me, is that the commercial use in question would have been use in connection with Gordon's printing business, which was, as I understand it, operating throughout the nineteen eighties and into the nineteen nineties.

125. In regard to other user, by 1984, many if not most of the Chilvers children had left home and, in the main, were only returning on an occasional basis, for visits to their parents and for family events . Anna Turner (nee Chilvers) lived on Bethany with her husband between 1992 and 1994. David Hodges, who married Sarah Chilvers in 1993, first visited Bethany in 1991, using the way, and lived at Bethany for a few months in 1992. Between 1998 and 2003, he and Sarah lived on Bethany and, later on, from 2012 until Sarah's death in 2017, they returned to live on Bethany, David remaining at Bethany, until 2019 Otherwise, until the death of Gordon's wife, Ruth, in 2012, and Gordon's own death, in 2013, the main day by day domestic users of the way must have been Gordon and Ruth.

126. There were, however, I accept, other users. Mr and Mrs Love's evidence is that they continued to visit Bethany, using the way to access Bethany, into the nineteen nineties. Sharon Holland organised annual weekend camps at Bethany from 1985 to 2007, with up to fifty six attendees on each occasion. In similar vein and reflecting, as already foreshadowed, that Bethany was rather more than a domestic residence, a diversity of religious and youth events took place at Bethany in the nineteen eighties, nineteen nineties and well into the two thousands, all of which will, necessarily, have been accessed via the way. On a more occasional basis, there is evidence from, for example, Anne-Kristine Gatfield rented an art studio at Bethany from 1993 to 1994 and accessed Bethany by foot along the way some three times weekly, Jason Arnold was an occasional user of the way, to pay rent to Gordon in respect of the day care centre in Chapel End. Much later on, in 2011 and onward, he kept bees on Bethany and used the way to visit his hives.

127. Rodney Temple, who, as already stated, built 3 Rowan Way in 1995 and lived there until 2009 and who gave evidence for Mr and Mrs Hughes, was explicit that, during his period of occupancy , the way was the sole access for Mr and Mrs Chilvers and their visitors, at any time of the night and day and that those using the way included visitors

attending social gatherings at Bethany connected, as he put it, with the church, as well as deliveries connected with the printing business.

128. I will deal separately with the extent and circumstances relevant the use of the way in the years after Gordon's death, in 2013, but, taking the period up to his death, I am quite satisfied that, standing alone and as with the pre-1984 period, the use of the way by Gordon and Ruth Chilvers and those associated with them, post-1984, was, or would have been, such as to bring home to a reasonable landowner that rights were being asserted over the way.

129. The basis of that use, taking first, the period from 1984, when Mr Wilkinson and Mr Temple became the owners of Moorwood, until 1990, when, as already set out, complaint was made by Mr Wilkinson and Mr Temple as to the use of the way, is in dispute. Mr and Mrs Hughes contend that the use was permissive. The Applicants contend that it was not.

130. What is, I think, clear and what has already been mentioned is that by 1983 Gordon was evidently of the belief that he had established a sufficiently satisfactory user of the way to warrant dispensing with the Haven access. That user, however, as I have found, was a permissive user, which, necessarily, fell away on the death of Mr Ireland and which, necessarily, left the question of access to Bethany across Moorwood in jeopardy.

131. The starting point in determining how Gordon dealt with the situation in which he will have found himself, at least in the 1984 to 1990 period, is that, in contrast with the period, or periods, subsequent to 1990, where, as discussed later in this judgment, issues arise as to the openness of the user, the use of the way to reach Bethany was undoubtedly open and, as already demonstrated, well known to Mr Temple and Mr Wilkinson, given the instruction that they gave to drivers, such as Mr Hughes. The question, then, is whether this was user to which Mr Temple and Mr Wilkinson simply acquiesced, or whether, faced with his use of the way being in jeopardy, Gordon came to some understanding with Mr Temple and Mr Wilkinson, in respect of his continued use of the way, such that, in this period, as with the pre-1984 period, the user of the way to Bethany was permissive and not, therefore, a user 'as of right'.

132. The material available to resolve this question and to satisfy any evidential burden that may rest upon Mr and Mrs Hughes, in respect of the use being permissive is limited. There is, in particular, no direct evidence of any discussion between the two landowners and Gordon in respect of his user of the way.

133. What there is and what is relied upon by Mr and Mrs Hughes, in respect of consent, is the letter of 9 August 1990, to which reference has already been made. In that letter, Mr Temple and r Wilkinson's solicitors, Lester Dixon & Jeffcoate, stated that 'for the last few years' their clients had 'allowed' Gordon to cross Moorwood to gain access to Bethany . The letter went on to say that their clients had anticipated that the access would only be used for personal vehicular movement to Bethany but that over the past year or two increasing commercial traffic had been visiting Bethany, such that traffic movement had increased substantially beyond that which their clients had originally anticipated and that, in consequence, their clients had decided to prohibit further access over Moorwood as from 5 September 1990 and to construct a gate across the accessway. In the view of the solicitors, their clients were being more than reasonable in affording Gordon this period of time before 'terminating' his access across their clients' property.

134. There can be no doubt but that this letter is written in the language of licence. It adverts to Mr Wilkinson and Mr Temple allowing Gordon access across Moorwood. It adverts also to his user having come to exceed the purely personal use of the way which Mr Wilkinson and Mr Temple had anticipated in allowing that access. It adverts also to Gordon being given, at least in the view of the solicitors, a reasonable time to make other arrangements, before his access was terminated.

135. Mr Howlett, for the Applicants, submitted that the language of this letter can equally be seen as the language of acquiesce and that the reference to user being 'allowed' meant no more than that the user had been acquiesced in and did not carry with it, or assert, that positive element of actual permission which is required in order to preclude the user in question from being prescriptive.

136. I cannot agree. It seems to me that the reference in the 9 August 1990 letter to the Chilvers' use exceeding that which had been originally anticipated points strongly towards there having been a specific discussion and a specific and positive grant of a permission to use the way, based upon an anticipation, or expectation, that the user would be personal and not commercial. It further seems to me, albeit with somewhat less force, that the reference in the letter to the termination of Gordon's access to the way is rather more consistent with a positive permission being withdrawn than with a tolerated trespass being brought to an end.

137. That analysis seems to me, also, to accord with what I regard as the general probabilities. It seems to me much more likely than not that when Gordon was confronted with the change of ownership of Moorwood he would, as he had done with Mr Ireland, seek

an accommodation with Mr Wilkinson and Mr Temple, rather than, at that stage, at least, brazening it out.

138. The existence of a consensual user also seems to me to be more consistent with Mr Wilkinson and Mr Temple's approach to their ownership and use of Moorwood than the alternative, posited by Mr Howlett, of their standing by and acquiescing in Gordon's trespass.

139. In this regard, Mr Hughes' evidence was that Mr Wilkinson and Mr Temple gave strict instructions that nobody other than those authorised by them were to use the track and that , to that end, the gates accessing the track were locked morning and evening. I will revert, shortly, to the question of the gates, but, for present purposes, it is the attitude of the landowners to unauthorised use of the way that is of importance. Given that attitude, it seems highly unlikely that Mr Wilkinson and Mr Temple would, at any stage, have simply stood by and allowed the Chilvers family and their visitors an unlimited and unauthorised use of the way. It is much more likely that they and Gordon came to an accommodation along the lines described in the letter of 9 August 1990.

140. Mr Hughes, who I considered to be a very straightforward and reliable witness, was adamant that, when he was working for Mr Temple and Mr Wilkinson the access to Moorwood, which had been gated in the days of Mr Ireland and the Bailey family, remained gated. He gave convincing evidence which I accept, as to driving with tractor and trailer each weekday morning and waiting fro Tony Temple, who lived south of Moorwood, on Church Hill, to come and open the gates. Challenged upon this, by Mr Howlett, he was quite specific; 'the guy stood in front of me and opened the gate'. He stated and seemed to realise, as an afterthought, that this must have meant that the Chilvers family was locked in overnight.

141. Although the evidence is not wholly clear, it appears that, at some point after the period when Mr Hughes was working for Mr Wilkinson and Mr Temple, the gates were removed. Rodney Temple's evidence was that Gordon and Rith had caused them to be removed. I did not find that evidence of Rodney Temple to be credible. It seems to me inconceivable that Mr Wilkinson and Mr Temple would not merely stand by while the Chilvers family accessed Bethany vis Moorwood without permission, but also stood by, without protest, when the gates were removed either by Gordon or someone acting on his behalf. Had anything like that happened, I am satisfied that there would have been an immediate response and that, even allowing for the passage of time and, as appeared at trial, the incompleteness of the documentary record, some evidence of that response would have

been available. At the least, if in the mid to late eighties, the Chilvers family had removed the gates at the entrance to the way, as trespassers on Moorwood and without consent, solicitors, acting for Mr Wilkinson and Mr Temple, in 1990, would not have been writing in the way they did.

142. The far greater likelihood, taking all the circumstances together, is that there was the accommodation between Gordon and Mr Temple and Mr Wilkinson, outlined in the 9 August 1990 letter, that, as part of that accommodation, Gordon was given, as he had been by Mr Ireland, a key to the gate, but that, at some point between 1984 and 1990, perhaps associated with the improvement of the way that is agreed to have taken place in the mid-eighties, to enable the better use of the way as access to the quarry area, the gates were removed.

143. Be this last as it may, my conclusion, in relation to the use of the way, in the period now under discussion and terminating with the 9 August 1990 letter and the withdrawal of consent contained in and by that letter, the use of the way to access Bethany was permissive and that any presumption of prescriptive use arising from the open use of the way by the Chilvers family and their visitors, in this period, has, for the reasons set out in the preceding paragraphs of this judgment, been displaced.

144. In so saying, I have not overlooked Gordon's response, or reaction, to the 9 August 1990 letter. That response is to be found in correspondence between himself and his then solicitor, a Mr Archer, of Argyles, and in a draft letter that he had prepared, in answer to the letter of 9 August 1990, prior, it would seem, to his consulting solicitors.

145. It emerges from that correspondence and from a reference in Gordon's proposed draft letter to his having 'over-reacted', when speaking to Tony Temple, that Gordon had had some form of heated exchange with Mr Temple, presumably as to the use of the way and perhaps precipitating the 9 August 1990 letter. Gordon's draft denies that his user was permissive. It asserts that his user is 'as of right', by reason, as I read his letter and the transcript prepared on behalf of Mr and Mrs Hughes, of a right contained in the deeds of Bethany and by reason of his continuous user of the way for over 30 years.

146. Problematically, neither assertion was true and both assertions must have been known to Gordon to be untrue. As already set out, in extenso, in paragraphs 28 to 47 of this judgment, Gordon had been well aware since the nineteen-fifties that he did not have any legal right of way over the way, arising from the deeds of Bethany. He must, also, as I find, have known that, up until the late nineteen-sixties, there had been no access across

Moorwood to Bethany and, also, that from the date that the way became usable as an access to Bethany up until 1984 and, indeed, as I find, until the 9 August 1990 letter, permissive. The unfortunate fact, which pervades all Gordon's dealings with the way from this date until his death, is that his user of the way from 1990 onward was founded and maintained by a continued dishonest assertion that he had, when he did not, a legal right of way emanating from the 1947 conveyance.

147. In making this stark finding, I have, as, rightly, cautioned by Mr Howlett, had to have very serious regard to the fact that Gordon is dead and cannot, therefore, meet and counter the allegation of dishonesty made against him and the finding of dishonesty that I have been constrained to make. Both authority (**Hamilton v Hamilton [2016] EWHC 1132 (Ch);** and **Thomas v Times Book Co. Ltd [1966] 1 WLR 911**) and basic fairness dictate that in such circumstances a court, or tribunal, must carefully sift the evidence and must look upon the allegation in issue with some suspicion. Additionally and as with any allegation of dishonesty, the court, or a tribunal, must reflect the general improbability of dishonest conduct by requiring a high standard of evidence to displace that improbability. In this case, I have, I believe, adopted and applied these precepts but am, nonetheless, constrained to reach the conclusion that I have set out.

148. I do not find it conceivable, or realistic, that Gordon, having acted, both in 1971 and, most clearly, in 1959, on the basis that the 1947 conveyance afforded him no rights over Moorwood, and had, hence, unsuccessfully, sought to acquire such rights, could, by 1990, have forgotten those facts and had, genuinely, come to believe that the 1947 conveyance afforded him legitimate legal rights over Moorwood.

149. Nor can I accept, as submitted, by Mr Howlett, that the fact, as appears later in this judgment, that a number of firms of solicitors have, on Gordon's instruction, proffered the 1947 conveyance, as justifying Gordon's user of the way, in some way warrants, or supports, the conclusion that this could have been Gordon's genuine belief. Save in one instance, the tribunal has no knowledge of the instructions given by Gordon to his solicitors, from time to time, or their advice, or what, if any, investigation they made of the landholdings surrounding Bethany in 1947, such as to test the reality of what was only ever the contingent purported right granted by the conveyance. In the one instance where information is available as to the advice given to Gordon, in a letter dated 5 June 1998, to which I will return later in this judgment, the advice given appears to have been based on no more than the solicitor 'looking through' the 1947 conveyance and not on any wider investigation of the relevant adjacent landholdings at the date of the conveyance.

150. What the tribunal does know is that, in all his dealings with planners, with Nuneaton and with Mr Ireland and whatever he may latterly have said to his solicitors, Gordon acted on the clear footing that he did not have and needed to obtain rights over Moorwood, leading, as I have already stated, to the irresistible conclusion that he knew that the 1947 conveyance did not provide him with such rights.

151. It seems to me, regrettably, but not ununderstandably, that, when, in 1990, Gordon was faced with the loss of his permissive use of the way, having already conveyed away the Haven access, he felt himself to have no option but to take advantage of the apparent, even if contingent, language of the 1947 conveyance, in order to sustain his access to Bethany, and that that is what he did. The remainder of the history of the use of the way, from 1990 until Gordon's death, in 2013, is punctuated, as already stated, by a series of assertions by Gordon, or on his behalf, that he had, when, to his knowledge. he had not, an express legal right to use the way and the regular deployment of the 1947 conveyance, as demonstrating the existence of that right, even while aware that it did no such thing

152. I will deal later in this judgment with the legal consequences of Gordon acting in that way. First, however, it is necessary to set out, in somewhat more detail, the relevant further history of and in respect of the use of the way up to and, to an extent, beyond the date of Gordon's death.

153. Mr Archer's specific response to the 9 August 1990 letter is not available. His indication to Gordon, however, in a letter of 14 August 1990, is that he had written to Lester Dixon & Jeffcoate 'refuting' their claims. Given his instructions from Gordon, I have no doubt but that he did so by reference to the alleged express right of way. In that regard, it is, I think, of note that Mr Archer did not, when writing to Lester Dixon & Jeffcoate, apparently, have a copy of the 1947 conveyance (that document, according to his letter, being with the Midland Bank) and, therefore, that when he asserted the right of way, he will have done so sight unseen.

154. The effect of this exchange of correspondence appears to have been to stall any action by the two landowners in respect of the user of the way and, thereby, to enable the way to continue to be used as the access to Bethany. As is clear, however, from his subsequent conduct, as set out later in this judgment, the assertion of the right of way did not persuade Mr Temple that the right of way existed. Nor, again, as demonstrated by his subsequent conduct, as later set out, was his son, Rodney Temple, who, as already set out, latterly, became the owner of land at 3 Rowan Way, including a portion of the way, so persuaded. His evidence, consistent with that conduct, was that, when once he moved into occupation

of 3 Rowan Way, his practice and that of his wife was to inform users of the way, including Gordon and his wife, Ruth, that they had no entitlement to use the way.

155. Mr Hughes, when he purchased part of the way, was not so vociferous. He describes being visited by Gordon, shortly after he started building 5 Rowan Way and being informed by Gordon that he, Gordon, had a right of way. His response, common to all those against whom the right of way was asserted and one of the foundations of their scepticism as to the existence of the right, was that no such right was disclosed in their deeds. Mr Hughes describes, also, another visit, in the same year, 1997, by Gordon, during which Gordon again asserted his right of way and during which the conversation became 'heated' and culminated in Mr Hughes asserting his ownership of his land and requiring Gordon to provide documentary support, never provided, for his assertion.

156. For all the foregoing, however, and while it is clear that those purportedly affected by the supposed right of way were left (rightly as it has transpired) in serious doubt as to it existence, the fact remains that the assertion of the right of way seems to have created such a sufficient uncertainty as to Gordon's rights in respect of the way as to discourage Mr Temple or Mr Wilkinson from taking the matter any further.

157. Matters, however, re-surfaced in 1997. By letter, dated 7 May 1997, Hale Randle & Stevenson, solicitors acting for Rodney Temple, who had evidently consulted them, in respect of the validity of Gordon's purported right of way, wrote to Gordon, adverting to Gordon's claimed right and to Mr Temple's denial of that right and requesting that Gordon provide documentary evidence in respect of his claimed right.

158. In response, on 12 May 1997, Gordon wrote to Hale Randle & Stevenson, claiming that the 1947 conveyance was 'quite clear in the matter of the right of way' and enclosing copies pf what he described as 'the relevant pages'. He asserted, also, that the way had been used continuously since Bethany had been built in 1960. Hale Randle & Stevenson's replied, on 15 May 1997, asking for a complete copy of the conveyance and stating that, on receipt, they would discuss the matter with their client. A note on the copy of this letter, disclosed from Gordon's papers, indicates that he replied on 19 May 1997, although, in an undated note, which Gordon seems to have kept, in respect of his usage and dealings concerning the way, appears to indicate, erroneously, that no reply was received, following his production of the conveyance. Whether, or not Rodney Temple's solicitors received the complete conveyance, there is no evidence that matters were taken any further.

159. For the reasons already set out, I have no doubt at all that Gordon's response was deliberately misleading and, I fear, dishonest. The assertion that the way had been continuously used since 1960 was, as I have found, untrue and must have been known to Gordon to have been untrue. More significantly, while, in form, the conveyance, taken with the plan, may have purported to grant a right over the way, Gordon well knew that it did not actually do so. To present, as proof of a right, a document, having the appearance of granting that right, while knowing that it did not, was, simply, dishonest.

160. As, however, with the 1990 correspondence, the effect, at least in the short term, of Gordon's misleading use of the 1947 conveyance to assert a right of way that he did not have, was sufficient to discourage, in this instance, Rodney Temple from taking any further action in respect of the use of the way as to access Bethany.

161. In 1998, however, Gordon's rights were again put in question. Mr Hughes recalls an occasion when Rodney Temple and his wife, Sue Temple, blocked the way, where it crossed the rear of their property, with a Ford Transit, in protest at Gordon's continued use of the way. Police were called, presumably by Gordon, and, following discussion, the vehicle be moved. According to Rodney Temple, as told to Mr Hughes, this had not been their first protest.

162. In early June 1998, Tony Temple, too, seems to have decided that Gordon's alleged rights had to be challenged. The particular catalyst for that decision is not known, but, given the contents of a letter written to Gordon, by his then solicitor, Mr Boyt, of Archer Adams, on 5 June 1998, following a meeting between Gordon and Mr Boyt, on 3 June 1998, in which Mr Boyt adverted to the possibility of 'Mr Temple senior' erecting a lockable gate across the way, it would appear that Gordon had been made aware of that possibility and, for that reason, had taken urgent advice..

163. In the event, on 4 June 1998, the day after Gordon's consultation with Mr Boyt, what Ms Meager, counsel for Mr and Mrs Hughes, called a 'confrontation' took place between Gordon and Ruth, and Tony Temple. What occurred was recorded by Gordon, himself, in a handwritten note of what he termed a 'discussion with Mr Temple 4 June 1998'.

164. As noted by Gordon, he and Ruth had come upon Tony Temple and various members of his family erecting a six foot metal gate across the way. Mr Temple had told him that Gordon's purported right of way was not shown in his (Mr Temple's) deeds, that the right was not accepted and that his (Mr Temple's) solicitor had told him to erect the gate for

privacy and security. Mr Temple proposed to keep the gate locked and give him (Gordon) a key, but that if the gate was noy kept locked the lock would be changed.

165. Gordon noted his response as being that he was not prepared to accept a restriction on his right, that he had lived at Bethany since 1962 and always used the access, that he needed the access open at all times for visitors and for emergency services but that he would like matters settled on a friendly basis.. He recorded that Tony Temple was 'hot tempered and full of a sense of grievance' and wouldn't listen to the logic of what he (Gordon) had to say.

166. The so-called discussion did not settle matters and did not prevent the erection of the gates. In further undated handwritten notes, Gordon recorded that, between 13 and 19 June 1998, the gate had, on occasion, been closed and, as he put it in a later note, visitors, including the postman and the dustmen, had been prevented from reaching Bethany. It is not clear, on the evidence, that the gate was locked. It does appear that both the postman and the dustmen thought that it was locked.

167. Following the 'confrontation', Gordon again consulted Mr Boyt, who wrote to Tony Temple (addressed as Mr D Temple), on 8 June 1998, stating that he had inspected Gordon's title deeds and that the 1947 conveyance clearly gave Gordon a right of way over the way. While recording Gordon's wish to deal amicably with the matter, Mr Boyt reserved Gordon's right to take further legal action.

168. Given the matters set out in paragraph 166 of this judgment, it is apparent that the letter of 8 June 1998 did not, in itself, bring matters to a closure. It is also apparent, however, from the evidence of David Hodges that for a period after this episode and lasting for about a year the gate was, at least on occasions, kept closed and, further, that Gordon had informed Mr Hodges and his daughter, Sarah, that the gate was to be kept closed. Gordon was, evidently, trying, at least to an extent, to accommodate Tony Temple. Correspondingly, Tony Temple was evidently not prepared to put Gordon's alleged right way, now advanced under the authority of his solicitor, to the test.

169. It was in this period, by letter to Mr and Mrs Hughes, dated 27 January 1999, that Gordon approached Mr and Mr Hughes with a proposal that they might negotiate an access to Bethany off Rowan Way, thereby, as Gordon explained giving freedom to Mr and Mrs Hughes to develop their back garden and paddock together, unimpeded by the way. It is hard not to think that Gordon, conscious of the precarious nature of his access over the

way, was looking for a safe alternative. His approach, however, was not taken up by Mr and Mrs Hughes.

170. Although, as appears from later correspondence, the gate remained in position well into 2000, on 18 March 2000, as recorded by Gordon, in his undated notes, access to Bethany was blocked, not by means of the gate but by means of a tractor and trailer placed across the way, by Tony Temple and by Les Brown, the father of James Brown, to whose evidence I have already referred. It appears from Gordon's note that tempers, at least on Tony Temple's part, became frayed and that Tony Temple 'in extreme temper used strong abuse' to Gordon and Ruth and 'thumped with his stick' on the bonnet of their car. As with the earlier incident, already described, police were called and Mr Temple and Mr Brown were prevailed upon to remove the obstruction.

171. Following on from this incident, by letter dated 19 May 2000, solicitors, Mander Hadley & Co, for Rodney Temple and his wife, acting, as Rodney Temple told me, under the instruction of his father, Tony Temple, wrote to Gordon. The letter is somewhat confusing, since it seems to conflate the property owned by Rodney Temple and his wife with that part of Moorwood still at that date retained by Tony Temple. The tone of the letter, however, is measured. It recognises the possibility that Gordon had a right of way along the way, the solicitors having, as seems likely, been apprised of Gordon's, now long stated contention that he had such a right, but sought confirmation of that right, together with Gordon's confirmation that, in the interest of the security of Moorwood, he would agree to a new gate being erected at the south eastern end of the way, to which Gordon would be provided with a key.

172. Gordon's then solicitors, Garner Canning & Co, replied, on 16 June 2000. They recorded that Gordon had had, as it was put, 'numerous discussions with (the Temple) family with regards to the right if way' and that those discussions had led to 'intermittent' exchanges of correspondence' going back some ten years. They provided a copy of the 1947 conveyance, 'clearly showing', as they stated, the right of way and pointed out that this had not been the first time that the conveyance had been provided. They explained that the gate was already in place and reiterated Gordon's unwillingness for the gate to be locked and for access to Bethany by its visitors and by emergency services to be restricted, Irrespective of the other contents of the letter, the reference, as I see it, to the 'numerous discussions,' in respect of the right of way, is avert clear reflection of the continued and overt opposition that had been advanced to Gordon's use of the way and to his use of the 1947 conveyance to meet that opposition.

173. Mander Hadley & Co responded, by letter dated 13 July 2000. In essence, they accepted that the 1947 conveyance evidenced the existence of Gordon's purported right of way. In regard to the gate, they confirmed that the proposal was not to replace the existing gate but to lock it and to provide Gordon with as many keys as he needed. Although the suite of correspondence available to the tribunal does not include Garner Canning & Co's response, it is clear, from the papers that are available, that a response was sent on 17 August 2000 and it is clear from a letter of 25 July 2000, sent by Gordon to his solicitors, that Gordon was as adamant as ever as to his requirement of full and unrestricted access.

174. At this stage, again, no further action was taken by those who had questioned the existence of Gordon's alleged right of way Given the acceptance by Mander Hadley & Co, that the 1947 conveyance confirmed the existence of the right of way and given, therefore, the advice, which, consequently, will have been given to the Temple family , this is hardly surprising. The reality, as it seems to me, is that, following this exchange of correspondence, Gordon was enabled to carry on his use of the way under the colour and with the purported authority of the 1947 conveyance and of the express grant apparently contained within that conveyance.

175. That state of affairs would appear, on the available evidence, to have existed up until 2007. In 2007, however, the residual part of Moorwood. Including the majority of the way, other than that part which had already vested in Mr and Mrs Hughes and in Mr and Mrs Rodney Temple, was transferred to the Second Respondent, Mariella Di Marco, at which date her father, Joseph Di Marco, and her mother moved into a caravan upon Moorwood. Since that date Mr Di Marco has managed his daughter's affairs in respect of Moorwood and, specifically, in respect of the use of the way across Moorwood to Bethany.

176. Mr Di Marco gave evidence before me. He was not a good witness, but he was not an inherently dishonest witness. Although he was aggressive and argumentative, fuelled, I think, by a genuine sense of grievance at the way that the 1947 conveyance had been deployed to assert a right that did not exist, I had no sense that he was not trying to tell me the truth. That said his evidence did not readily produce a coherent picture of his dealings either with Gordon, or, subsequently, with Gordon's children.

177. What, I think, can be safely collected from his evidence and what I accept is that, relatively early on in his occupation of Moorwood, Mr Di Marco became aware of Gordon's use of the way, that he made enquiries of the Land Registry as to Gordon's entitlement to that use and that, as would have been the case, at that date, he was told that there was no indication on his daughter's title of the existence of any such entitlement. His written

evidence, not formally challenged, and the entire tenor of his oral evidence was to the effect that, throughout the period he has lived on Moorwood, he has verbally protested to the Chilvers family as to their use of the way. That evidence is corroborated by Mr Hughes, who, in his own written evidence, recorded that Mr Di Marco has remained in ongoing dispute with the Chilvers family and others using the way, as to their use of the way.

178. That dispute and the fact, that Gordon, when challenged as to his user, must have asserted his right of way over the way to Mr Di Marco, is reflected in a letter to Gordon, written by Maria Di Marco's solicitors, Alsters Kelley, dated 28 February 2008, in which those solicitors stated their instruction that Gordon had alleged that he had a right of way over the way, requested Gordon to provide evidence of his alleged right and indicated that, absent such evidence, access would be stopped.

179. On the very next day, 29 February 2008, Alsters Kelley wrote again to Gordon, having, already, it would seem, been provided by Gordon with a cop[y of the 1947 conveyance, thanking Gordon for the conveyance but requesting a coloured copy of the plan referred to in the conveyance, so that they could advise their client of its implications. It is not clear from the incomplete documentation available as to whether such a plan and, specifically, a plan marking up the way in yellow and green was then provided. The probability, I think, given that, despite what are said by the Applicants to have been lengthy researches of their father's papers, they have not, either in these proceedings, or, as set out in the following paragraphs of this judgment, in 2014, when once again a coloured copy of the plan was requested, been able to produce a plan with the way marked up in yellow and green, is that such a plan was not provided.

180. Be that as it may, once again, no steps were taken, this time by the Second Respondent, or her father, to put the averred right of way to the test and, once again Gordon and those associated him were, in consequence, enabled to continue their use of the way.

181. That is not to say, however, that the Second Respondent, or Mr Di Marco, or Mr Hughes, ever fully accepted the existence of Gordon's right of way.

182. Mr Di Marco continued, as I understood his evidence and that of Mr Hughes, to protest Gordon's user and, while evidence of his blocking of the way, in protest, is limited, his continued disbelief in the validity of Gordon's right of way and his consequent and continuing opposition to the continued use of the way as access Bethany is made clear in a further letter written by his solicitors, Alsters Kelley, to Peter, on 7 April 2014.

183. That letter was written in response to a so-called ‘open’ letter, dated 25 March 2014, written by Peter, on behalf of all the Chilvers children and addressed to each of the landowners adjoining Bethany, with the intention of generating a discussion as to the development of Moorwood. In that letter, Peter referred to what he called the track to Bethany and to his family’s rights of access over the track. The context of this ‘open’ letter is that Ruth Chilvers had died in 2012 and Gordon, unexpectedly, in September 2013. Letters of administration, in respect of his estate had been granted to the Applicants on 14 January 2014 and the letter, evidently, had been written as part of the process of determining how best to deal with Bethany as the main asset of Gordon’s estate.

184. Alsters Kelley’s letter, however, re-opened, yet again the provenance of the alleged right of way and the absence of any reference to the right in the title deeds to Moorwood, or on the register. It informed Peter that the matter had been raised with Ruth and Gordon, referring to the 2008 correspondence, and, materially, it reiterated the fact that, absent evidence proving a legal right of way, the access would be closed to vehicles.

185. Peter replied to that letter on 22 April 2014. The 1947 conveyance was again deployed, together with Peter’s explanation that the ‘roadway’, referred to in the conveyance was the way and, erroneously, that the way had previously been owned by JHGBC. He trusted that the evidence would now be sufficient to prove the right of way.

186. That letter, in its turn, was responded to by Alsters Kelley with the, again, familiar refrain that they required sight of a coloured copy of the conveyance plan, in order that they could ‘denote the access way coloured yellow and purple. The letter is unhelpfully and oddly dated 2013, so that, while it apologises for delay, the date of sending is not known.

187. Peter does not appear to have responded immediately to the request for a coloured plan and ,on 31 July Alsters Kelley wrote again. It would appear that, for some reason, both Peter’s reply to their initial letter and their own response to that letter had been overlooked and, thus, that they were now saying that, in view of Peter’s want of a response to the 7 April letter, Peter had advanced insufficient evidence to support the existence of a right of way and, therefore, that access for vehicles would be ‘restricted’ from 29 August 2014.

188. Unsurprisingly, that letter did reap a reply. On 14 August 2014, Peter wrote to Alsters Kelley pointing out that he had responded to the 7 April 2014 letter and explaining that the family was in process of going through his father and mother’s paperwork and possessions but was unable, at that stage, to provide a coloured plan. He suggested that the coloured

plan was largely irrelevant, because there was only one roadway or track on the plan capable of being delineated. He made reference, also, to what he alleged to be the use of the way with vehicles for upward of fifty years and the potential prescriptive rights arising from that user. He expressed concern that, if the access was restricted, it could affect access to Bethany by the emergency services, given that there was an elderly and unwell relative living at Bethany. His suggestion, was that if their client remained unsatisfied as to the right of way, then any restriction on access should be delayed until the matter could be legally resolved.

189. The invitation to take proceedings, if that is what it was, was not taken up. Mr Di Marco was asked about this in cross examination and he explained that he had decided to take no steps at that stage out of the 'goodness of his heart' having been told about what he termed the 'dying' relative. Whether or not that is true, or whether, as Mr Howlett would have me find, this was a form of ex post facto justification for his inaction, it remains perfectly clear that his opposition to the right of way, which was now being asserted by Gordon's family, persisted and that his expression of that continued opposition was such that, by 2016, the Applicants felt the necessity of instructing solicitors. By that date, of course, the title to Bethany had been registered and the entry underlying these proceedings had been made on the register.

190. By letter of 17 May 2016, the Applicants' solicitors, Rothera Dawson, wrote to Mr Di Marco, asserting the right said to have been contained in the 1947 conveyance and now noted on the register and warning him of the legal consequences that would result were he to impede or challenge the Applicants', or their visitors' right to use the way.

191. While the letter was, I think, primarily instigated by an incident in which Mr Di Marco confronted David Hodges, who was using a mini-digger to maintain the way, in circumstances where, again, police had to be called, the letter also refers to Mr Di Marco blocking the way, by parking, and to his stating that he (in fact his daughter) owned the way and that he did not recognise any rights of access to Bethany across Moorwood.

192. In regard to those matters, there was some suggestion, at the hearing, that what I will call the digger incident took place in 2012. The greater likelihood, consistent with the date of Rothera Dawson's letter, is that the incident took place, as recalled by David Hodges in 2015/2016. Correspondingly, the reference to obstruction by parking is likely, I think, to relate to an earlier incident, in 2013, as recollected by Mr Hughes, or 2015, as recollected by Mr Di Marco, when Mr Di Marco had blocked the way with a van. If that be right, however, it would seem that the blockage was only temporary (Mr Hughes refers to a weekend) and,

having regard to Mr Di Marco's evidence under cross examination, that, at least at its inception, the blockage may have been inadvertent and consequent upon a vehicle breakdown.

193. Although, as indicated, at paragraph 128 of this judgment I propose to deal separately with the extent and circumstances relevant the user of the way after Gordon's death, it is convenient, at this stage, to complete the factual picture, such as it is, in respect of any further overt opposition to the use of the way up to the point when, in December 2020, Mr and Mrs Hughes launched the current application and formally challenged the existence of any right of way in favour of Bethany.

194. Shortly stated, two matters are worthy of mention, although some discrepancy exists as to dates.

195. Firstly, in what Mr Di Marco stated to be early 2020, prior to the coronavirus pandemic, he dug irrigation trenches across the way, later partially filled in by David Hodges. In cross examination Mr Di Marco was equivocal as to whether this wark was carried out for genuine drainage purposes, or whether they were an intended obstruction. His written evidence asserted the latter and David Hodges' evidence was that, given the alignment of the ditches, they must have been intended to obstruct.

196. Secondly, in what Mr Di Marco said to be June 2020, Mr Di Marco erected brick pillars at the southern end of the way. In his written evidence he asserted that this was intended to obstruct the way. In reality, as explained by David Hodges, the pillars did not affect access by ordinary vehicles. Subsequent to the initiation of these proceedings, gates have been hung on the pillars and vehicular access to Bethany, via the way, is now completely and effectively obstructed.

197. Reverting to Mr Hughes, although in his second witness statement, he describes himself as having been 'duped' by Gordon, my very clear impression, taking his evidence as a whole, is that he was never wholly persuaded as to the existence of the alleged right of way. His position, as he explained both in oral evidence and in his written evidence was that, while aware of the opposition by others of the use of the way for access to Bethany and while, himself, unpersuaded that that right existed, referring to it as a 'myth' he took no personal steps to signify his opposition to the use of the way, other than, as already stated, to call upon Gordon to produce documentary evidence of the way, when, early on in his occupation of 5 Rowan Way, Gordon had sought to assert his right. His understandable, although now regretted position, was that the use of the way did not cause him any such

significant interference as to warrant, or require, him to take action. What eventually, however, persuaded him and his wife to bring the current application was his wife's discovery, when checking the register for other purposes that the way had been, without their knowledge, entered on the register following Bethany's first registration.

198. Against the factual backdrop that I have set out from paragraph 153 onward, Ms Meager, counsel for Mr and Mrs Hughes, submits, in respect of the period between 1990 and Gordon's death in 2013 and, as will be separately discussed, the period from that date until the initiation of these proceedings, in December 2020, that no prescriptive user has been established, any evidential burden falling upon her clients, in respect of that user has been met and the ultimate legal burden resting on the Applicants to prove their alleged prescriptive rights has not been met.

199. That evidential burden arises out of my finding at paragraph 128 of this judgment, in respect of the extent of user of the way.

200. In regard to the period until 1990, I have already determined that the presumption of prescriptive user, arising from that user has been displaced and that I am satisfied that user in that period was permissive and consensual ('precario', in the familiar language of easements).

201. In regard to the period now under discussion, Ms Meager's submission is that the evidence establishes that throughout the period the user of the way was known by Gordon to be contentious and, further, that Gordon had dishonestly used the 1947 conveyance, to provide a false justification for his and his family's use of the way and as a 'cloak' or 'cover' for that use. Her contention is that user, in those circumstances, has rendered, again, using the familiar language of easements, the user both 'vi' and 'clam' and, therefore, not capable of giving rise to prescriptive rights.

202. In regard to 'vi' there was some debate between counsel as to the circumstances which needed to be established in order for otherwise prescriptive user to be displaced on that ground.

203. Mr Howlett founded himself upon a dictum of Pumfrey J, in **Smith v Brudenell-Bruce [2002] P & CR 4,** at **paragraph 12**, to the effect that user ceased to be 'as of right', on the grounds of 'vi' where 'the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either

by physical obstruction or by legal action' and that 'user is contentious when the servient owner is doing everything consistent with his means and proportionately to the user, to contest and endeavour to interrupt that use'.

204. Mr Howlett accepted, however, that, in certain respects, Pumfrey J's dictum had been criticised and disapproved in the Court of Appeal, in **Winterburn v Bennett [2017] 1 WLR 646.** He accepted, in line with concessions made by counsel, in **Winterburn,** as set out in paragraph 34 of the judgment of David Richards LJ, as he then was**,** that the references to the servient owner having to back his objection with physical obstruction or legal proceedings was overstated and that the reference, to the servient owner having to do everything consistent with his means to contest and interrupt the user, also went too far. He submitted, however , that, subject to those two modifications, Pumfrey J's dictum remained good law.

205. On that footing and backed, accordingly, by the amended dictum, he submitted that none of the conduct, by any of the servient owners of the way, from time to time; Mr Wilkinson, Tony Temple, Rodney Temple, Mr Di Marco, Mr Hughes; had so acted as to render Gordon's user contentious, such that that user ceased to be 'as of right'. They had not, he submitted, separately, or collectively, done everything that they could have done proportionately to the user to contest and to endeavour to interrupt the user . Single or isolated incidents of objection, or obstruction, over a long period of time, as Mr Howlett submitted were the facts of this case, were insufficient to render the user of the way contentious and to preclude the user of the way from being 'as of right'.

206. I am not persuaded that the decision in **Winterburn** is quite as limited as Mr Howlett contends. At paragraph 36, in **Winterburn**, David Richards LJ, with whose judgment the two other members of the court agreed, specifically rejected the proposition that the servient owner had to do everything proportionately to the user to contest and endeavour to interrupt the user. The question, rather, as he explained, in paragraph 37, was whether the circumstances indicate to the persons using the land (here, the way) that the owner objects and continues to object. The issue is whether the owner has taken sufficient steps so as to effectively indicate that the unlawful user is not acquiesced in. If, as explained in paragraph 40 of the judgment, the owner has made his protest clear, by whatever means, then the unauthorised use of the land cannot be 'as of right'.

207. The decision in **Winterburn** reflected and endorsed the broad view as to the type of conduct by a landowner which is to be considered 'forceful' and 'vi', as established by recent authority. In **R (Lewis) v Redcar and Cleveland Borough Council (No. 2) [2010]**

2 AC 70, Lord Rodger of Earlsferry explained how in Roman Law (the source of the phrase 'nec vi, nec clam, nec precario') user was 'vi' if the person concerned had done something he was not entitled to do after the owner had told him not to do it. At **paragraph 89**, he indicated that English law interpreted 'vi' in much the same way. Correspondingly, Kerr LJ, in **Newnham v Willison (1987) P & CR 8**, at **paragraph 18**, summarised the effect of the authorities as showing that conduct might be 'vi' and a forceful exercise of the user , in contrast to user 'as of right' 'once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious'.

208. What I collect from the foregoing is twofold; firstly, that the key question, in determining whether user is 'vi' is whether the user knows that his, or her, use is opposed, or objected to; secondly that the process whereby the user comes to know that his user is opposed is immaterial, provided that the end result is that the court can be satisfied that the user was carried on in the knowledge of the landowner's continued opposition, or objection. The idea of a formulaic approach to establishing that user is 'vi', by proof of physical obstruction, or litigation, or by any other of particular, or specific, mode of objection, or that there is an obligation on a landowner to do all that is possible to make clear the objection, or opposition, no longer exists, if it ever did. The ultimate sole question is whether user has been knowingly carried on in the face of continued objection.

209. There can be no question, given the history set out in this judgment, that, prior to Gordon's death, in 2013, written objection was taken to the use of the way by Gordon and those associated with him in 1990, in 1997 and in 2008 and that objection, or opposition to that use, by means of the obstruction of the way, occurred, also, in 1998 and 2000 and that, in each instance, Gordon, dishonestly met the objection and stalled further action in respect of the objection by his deployment of the 1947 conveyance, notwithstanding his knowledge, as already discussed, that that conveyance afforded him no legal rights.

210. The question, for current purposes, however, is whether, in respect of each instance and having, in each instance, stalled, or quelled, opposition to his user by means of and as a result of what I have found to be a dishonest deployment of the conveyance, opposition to his use of the way still persisted and, if so, whether Gordon remained aware that his subsequent user of the way was still the subject of opposition, or objection, or whether the consequence of his deployment of the 1947 conveyance was either to wholly dispel that opposition, such that, thereafter, his use of the way was unopposed, or, even if that were not the case, his belief was that his deployment of the conveyance, at least until the next objection came to be taken had so dispelled any opposition, or objection, to his

use of the way, that that use of the way was no longer the subject of objection. If the former, then that user would, as it seems to me, have been 'vi', contentious and not 'as of right'. If the latter, then subject to the separate question as to the legal effect of sustaining his use of the way under the cover of his dishonest use of the 1947 conveyance, Gordon's user, however unmeritorious, would have been user 'as of right' and capable, potentially, therefore, of giving rise to prescriptive rights.

211. The starting point. in answering the question just posed, is and has to be the fact that the sole purpose of Gordon's repeated deployment of the 1947 conveyance was to counter the several challenges made to his right to use the way. The very fact that the conveyance had to be deployed, in the way it was and when it was, demonstrates, as it seems to me, conclusively, both that Gordon's right to use the way was challenged and that he was completely aware of that challenge. If his user had been unopposed and if this had simply been a case of acquiescence, or tolerated trespass, then the need to deploy the conveyance would, simply, never have arisen.

212. The outstanding question, however, given this over-arching fact, is whether Gordon's use of the conveyance to resist the objections taken to his use of the way was so effective, in any given period between 1990 and 2013, as to dispel, rather than supress, opposition to his use of the way, or, even if that were not the case, to lead Gordon to believe that his use was no longer opposed.

213. In regard to the first aspect of the question, namely whether the use of the conveyance dispelled, rather than merely suppressed opposition to the use of the way, it seems clear to me that the pattern of repeated objection to Gordon's use of the way, even after the conveyance had been deployed on more than one occasion, demonstrates that that deployment did not, in itself, dispel opposition to the use of the way.

214. Correspondingly in regard to the second aspect of the question, the fact that opposition to Gordon's user was not curtailed, or concluded, by the deployment of the conveyance must have demonstrated to Gordon that the deployment, even the repeated deployment, of the conveyance, had not, at least in isolation. brought opposition to his user to an end.

215. This last consideration cannot, of course, be applicable in the period from 1990 to1997, following his first deployment of the 1947 conveyance, since, at least at its outset, the subsequent objections to his user of the way had, necessarily, not yet emerged. Notwithstanding this, I find it highly unlikely that Gordon would have genuinely believed that his use of the way was no longer opposed and no longer subject to objection. He would

have known from the lack of further action, at that stage, from the then landowners, Mr Wilkinson and Mr Temple, that he had sown sufficient uncertainty as to enable his continued use of the way. He would also, however, have known that the right that he was asserting was false and had been advanced, specifically, to stave off opposition to his user of the way, that the objections to his use of the way were legitimate and that, in consequence and as was the case, those objections, while largely supressed, remained in being and would undoubtedly resurface, in the future, as they duly did.

216. It is striking, in this context, that Gordon was at such pains, in 1997, to seek to impress upon Mr Hughes that he had a right of way over the way, as set out in paragraph 155 of this judgment. It seems to me that the reason underlying this conduct was Gordon's own knowledge of the weakness of his position, that objections to his use of the way remained and that it was necessary, therefore, to re-assert and, so, reinforce his right whenever the opportunity arose. In the result, after a heated exchange, Mr Hughes did not accept his right, absent documentary proof, and, thereby, confirmed and made clear his objection to Gordon's use of the way, reinforcing, as it seems to me, the oral objections made by Rodney Temple and his wife to Gordon's use of the way, as set out in paragraph 154 of this judgment.

217. The consequence of the foregoing is that I am not satisfied that, in the period 1990 to 1997, Gordon; s use of the way was prescriptive. It seems to me that it was carried in by him and those associated with him, in circumstances where, to his knowledge, reinforced towards the end of the period by the overt objections of Rodney Temple and Mr Hughes, the use was subject to opposition and that, for that reason, his user and that of those claiming through him was not 'as of right'.

218. In 1997, as set out in paragraphs 157 of this judgment, Rodney Temple's solicitors wrote to Gordon denying his entitlement to use the way. What precisely precipitated this correspondence is not in evidence, but the obvious inference is that, challenged by Rodney Temple, Gordon had re-asserted his purported right of way.

219. Gordon's response to the solicitor's letter, as set out at paragraph 158 of this judgment was to deploy what he termed 'relevant' pages of the 1947 conveyance and, possibly, on request, a complete copy of the conveyance. The result, in the short term, was to dissuade, or discourage, Rodney Temple from taking further action, but not, as demonstrated by the events of 1998 to persuade Rodney Temple that Gordon's right had been established. Rather, the challenge to Gordon's entitlement must, as it seems to me, have served to reinforce Gordon's understanding that his purported right was not accepted, that his

deployment of the 1947 conveyance had not 'put to bed' the objections as to his use of the way and to reinforce Gordon's appreciation that his user was opposed. It follows that I am not satisfied that Gordon's continued user of the way, after this 1997 exchange, was non-contentious and 'as of right'.

220. A year later, in 1998, as set out in paragraph 161 of this judgment, Rodney Temple and his wife obstructed the way , in protest at Gordon's user, and police were called. This may not have been their first such protest. It served to confirm to Gordon their continued objection to the use of the way, that his deployment of the 1947 conveyance had not eradicated the objections to his use of the way and, therefore, that, standing alone, his subsequent user would not have been 'as of right'

221. In the event, however, any consequences, or implications, as to the status of Gordon's user of the way, following from this obstruction, were overtaken, or superceded, by the 'confrontation' between Tony Temple and Gordon and Ruth, which took place on 4 June 1998 and, in particular, by the sequelae of that 'confrontation', as set out in paragraphs 163 to 168 of this judgment.

222. What emerges from those paragraphs is that, while challenging Gordon's entitlement to use the way, as being a right not appearing in his deeds, and having erected a gate across the way, with the intention that they be locked, Tony Temple had been prepared to provide Gordon with a key to the gate and, thereby, consensually, or permissively, allow Gordon the use the way, or, at least, those parts of the way which were, on Tony Temple's land. Gordon's reaction, however, had been to reject the restrictions implicit in that permission and to hold out for an unrestricted user.

223. Thereafter, following a period of some days, where the gates were either locked, or appeared to be locked, and following, an intervention by Mr Boyt, Gordon's solicitor, by letter of 8 June 2008, asserting, erroneously, the validity of Gordon's right of way, a period of about a year elapsed during which the gate remained in place, during which it remained unlocked and, in respect of which, Gordon's request to his son in law David Hodges and his daughter, Sarah, who moved to Bethany, for a period, at about that time, was that they should comply with Tony Temple's wishes, to the extent of keeping the gate closed.

224. The question, here, is whether, at least in this period, during which I am not aware of any explicit evidence of objection to Gordon's use of the way, that user is properly to be regarded as a tolerated trespass, acquiesced in by Tony Temple and, implicitly the other

owners of the way, or whether, to Gordon's knowledge, the user continued to be subject to objection and, although not actively contested, contentious.

225. It seems to me to be clear, from the matters set out in paragraph 170 of this judgment, that Tony Temple had not been persuaded either by Gordon, or by Mr Boyt, on Gordon's behalf, that Gordon had the right he contended for and that, although Tony Temple's objection to Gordon's use of the way was not, in this period, overt, it was nonetheless persisted in. It further seems to me that the clear likelihood is that Gordon remained aware that Tony Temple's objection to his use of the way, although, for the moment, subdued, had not been removed. He will continue to have been aware that his deployment of the 1947 conveyance had not served to satisfy those objecting to his use of the way of his right to that use. He will continue to have been aware that his position was a false one and, by now, that the opposition to his use of the way was deep rooted.

226. It was, I think, because of his consciousness of the weakness of his position and the persistence of the opposition to his use that he, at least, attempted, to accommodate Tony Temple's desire that the gate to the way be closed. Put shortly, he did not wish to re-activate overt opposition. Correspondingly and as set out in paragraph 169 of this judgment, his approach to Mr Hughes, in respect of the negotiation of an alternative access, reflects, as I see it, his understanding of the precarious nature of his position in respect of the use of the way, by reason, of the continued opposition to that use.

227. Taking all things together, I am satisfied that, in the period following the rection of the 1998 gate and into 2000, Gordon's use of the way remained opposed and subject to contest and objection. I am satisfied, also, that Gordon was well aware that his use of the way continued to be opposed and that, for that reason, his user, in this period was not 'as of right' and prescriptive.

228. In March 2000, as set out in paragraph 170 of this judgment, Tony Temple and Les Brown blocked the way with a tractor and trailer, tempers became frayed and police were called. The overt continued objection to Gordon's use of the way could not have been made more clear and, standing alone, it could not have been made any mote plain that Gordon's use of the way was challenged and that the past deployment of the 1947 conveyance had not dispelled objection.

229. As set out, however, in paragraph 171 to 173 of this judgment, that challenge was not pursued. Instead, solicitors acting foe Rodney Temple, at the behest of Tony Temple, first, acknowledged the possibility that Gordon's alleged right of way was valid and effective and,

then, latterly, endorsed the existence and validity of that right. Thereafter, as set out in paragraph 174 of this judgment and reflecting, as I infer, the advice that would have been given to the Temple family, Gordon's use of the way seems to have been effectively unopposed until Tony Temple parted with his interest in Moorwood in 2007.

230. The reality, as it seems to me, is that, faced with their own legal advice that Gordon had the right that he had long alleged, the Temple family were forced, in this period, whatever their inward reservations, into a reluctant acquiescence in respect of Gordon's user of the way. Correspondingly, given his knowledge, via his solicitors, that his right had been accepted and given the want of any continued opposition to his use of the way and even if, inwardly Gordon's user remained opposed, the high likelihood is that, over this period, Gordon will have believed that, at last, his user was no longer the subject of objection. The necessary conclusion, arising from this analysis, is that during this period Gordon's user ceased to be contentious, or 'vi', and, subject to the fact that the want of objection stemmed from Gordon's dishonest deployment of the 1947 conveyance and the legal consequences flowing from that fact, is properly to be regarded as user 'as of right'.

231. That state of affairs, however, did not survive the transfer of Tony Temple's interest in Moorwood to the Second Respondent and the subsequent intervention of Mr Di Marco on his daughter's behalf.

232. As is set out in paragraphs 176 to 192 of this judgment. I am satisfied that throughout the period from, at latest 2008, when solicitors for the Di Marcos, wrote to Gordon, challenging his right to use the way, until and beyond Gordon's death, in 2013, that right has been overtly and continuously opposed. As such, the user of the way has not been 'as of right' and has not been capable of giving rise to prescriptive rights.

233. The result, or conclusion, arising from the foregoing, is that, in the period from 1990 until 2013, the only period where the use of the way was not contentious and 'vi' is the period from 2000 until, at latest, 2008 and , therefore, that that is the only period where there has been user of the way potentially capable of giving rise to prescriptive rights.

234. There remains to consider, in respect of this period and as foreshadowed in paragraph 153 of this judgment, the legal consequences, if any, of Gordon's deployment of the 1947 conveyance, as justification for his user of the way, in circumstances where, as I have found, he was well aware that the conveyance afforded him no rights. The particular question is whether any user of the way enabled by this conduct can, or ought to be, regarded as capable of giving rise to prescriptive rights.

235. Ms Meager's submission, as set out in paragraph 201 of this judgment, is that the deployment by Gordon of the 1947 conveyance, in the circumstances just outlined, had the effect that his user of the way under the 'cover' of the 1947 conveyance was not an open user and was properly to be regarded, in the language of easements , as 'clam' . Her submission, in consequence, is that none of Gordon's user of the way from 1990 onward and until the death of Gordon. In 2013, was prescriptive, since all of that user, including, perhaps most specifically, the user between 2000 and 2008, was carried on by Gordon dishonestly under the 'cloak' of the 1947 conveyance.

236. As Mr Howlett observed, the point is a novel one and is one where the researches of counsel have found no authority directly in point.

237. My instinctive starting position is that the dishonest use of the 1947 conveyance to suppress opposition to Gordon's use of the way and , thereby, enable that user, should not be conduct out of which prescriptive rights can be derived. There is a strong sense that the approach to be adopted should be one that would have found favour, a generation ago, with Lord Denning MR, that fraud should unravel all and, therefore, that user procured by the dishonest use of the conveyance should not be regarded as prescriptive.

238. All that said, I am not persuaded that there is, in this case, scope for such a free standing approach as is contemplated in the previous paragraph. The axiom that fraud unravels all is an explanation not a doctrine. It explains why, in a particular fact situation, an existing legal principle will be applied in a particular way. The question, therefore, as rightly identified by Ms Meager, is whether, applying existing legal principles in respect of prescriptive easements, Gordon's dishonest use of the 1947 conveyance to justify and facilitate his user of the way has the effect of rendering his use of the way under the 'cloak' or 'cover' of the 1947 conveyance, user, which is not properly to be regarded as prescriptive, because it falls within that category of 'clam', or secret, user which does not give rise to prescriptive rights.

239. There is no doubt at all that such an approach to 'clam' user is a long way from the norm. The usual and well understood element of secrecy attaching to 'clam' user is user which is out of sight of, or obscured from, the relevant servient owner. The issue has most often arisen in cases relating to rights of support in respect of buildings and to the question as to whether particular circumstances have put the servient owner on notice, or on enquiry, as to whether the putative dominant owner's land afforded support to the building owned by the servient owner.

240. It is clear, however, from the decision of the Court of Appeal, in **London Tara Hotel Ltd v Kensington Close Hotel Ltd [2012] 1 P &CR 13**, that, at least in principle, 'clam' is not confined, solely, to secrecy as to use but can, in appropriate circumstances, extend to secrecy as to the user (i.e. the person using) the servient land.

241. In that case, the contention was that because the servient owner was unaware that the user of the alleged right of way in question was not the person licenced to use the way, but a new owner of the dominant land to whom no licence had been given and because there had been insufficient material as to put the servient owner on enquiry as to the change in the identity of the user of the servient land , that user by the new owner of the dominant land was, as against the servient owner, secret and 'clam' such that no prescriptive rights should arise.

242. Both at first instance, before Roth J { **[2010] EWHC 2749 Ch**), and in the Court of Appeal that argument failed, the court, in each instance, determining that the servient owner had been sufficiently put on enquiry as to the change in the identity of the use, such that the use was not secret, or 'clam'

243. . In both courts, however, it was accepted that if the change in the identity of the user of the way, or of the ownership of the dominant land had been surreptitious, or if steps had been taken to deliberately hide, or conceal, the change of identity, or, a fortiori, to deliberately mislead, or deceive the servient owner as to the change in the user of the way then, as it was put, very different considerations would have arisen (see **paragraph 81** of Roth J's first instance judgment and **paragraph 37**, in the judgment of Lord Neuberger MR, in the Court of Appeal).

244. Both Roth J's view and that of the Master of the Rolls was founded on dicta of Lord Selborne LC, in the seminal decision of the House of Lords, in **Dalton v Angus (1881) 6 App. Cas. 740 at 802.**

245. As is well known, **Dalton v Angus** was concerned with the question as to whether rights of support, in respect of a building, could be created by prescriptive user and with the knowledge, required by, or to be imputed to, a servient owner, that his property was affording support to an adjoining property, such as rebut the argument that the support provided by the servient owner's property was secret and, therefore, not capable of giving rise to prescriptive rights.

246. In regard to that knowledge, Lord Selborne's opinion was that all that was required was that the enjoyment of the support be enjoyed without deception or concealment and be so sufficiently open as to make it known that some support was being provided by the servient property. If, however, anything bearing on the putative easement had been carried out secretly or surreptitiously, in order to hide material facts, or, if, in answer to any questions bearing upon the putative easement, information had been improperly withheld, or if the servient owner had received false or misleading information, as to the putative easement, then the 'case would be different' and, correspondingly and as I understand Lord Selborne's speech, the easement of support, which would otherwise have arisen, from long user, had matters been openly carried on without deception or concealment, would, on grounds of 'clam', not come into being.

247. Lord Selborne's dicta in **Dalton v Angus**, as discussed and adopted in **London Tara Hotel,** provide, as it seems to me, a principled basis**,** falling within **t**he proper ambit of 'clam', upon which the issues arising out of Gordon's dishonest deployment of the 1947 conveyance can be resolved.

248. The principle to be applied is that a deliberate concealment of the basis upon which a potentially prescriptive use is carried on, or a deliberate deception as to the basis upon which that use is carried on, will disentitle the person who has perpetrated the deception, or concealment, from relying upon that user as establishing prescriptive rights. The rationale underlying the principle, as it seems to me, is that the concealment of, or deception as to, the true basis, upon which the user said to give rise to the prescriptive right in question has been carried on, will have had the effect of precluding the servient owner from challenging that user and bringing it to an end in the way that he would have done if the true basis of the relevant user had not been obscured and that, for that reason, it would be wrong for that user to give rise to prescriptive rights.

249. In a case such as **Dalton v Angus**, itself, a concealment, or deception, as to the support provided to the dominant tenement by the servient tenement, would have resulted in any easement of support arising on a false basis. The putative servient tenement would have provided the support required by the dominant tenement, but, because of the concealment, or deception, as to the support provided to the dominant tenement by the servient tenement, the servient owner's right to challenge the provision of that support would have been concealed and the servient owner would have been left in no position to challenge the use being made of his land to support the adjoining building and to bring that user to a close.

250. Correspondingly, in **Tara Hotel**, had the new owner of the dominant tenement concealed, or deceived, the servient owner as to its ownership of the dominant tenement, or as to its use of the way in question, leaving the servient owner to believe that the use of the way was still being carried on by the original owner under the agreed licence, then the otherwise open user of the way by the new owner, would have been carried on on the false basis that the way was still being used under the original licence and would have concealed the unlawful user of the way by the new owner and, thereby, prevented, or precluded the servient owner from challenging that user and bringing the unlawful use to an end.

251. In both of these instances, having concealed the true basis of the user said to give rise to a prescriptive right and having, thereby, in each instance, deprived the servient owner of the opportunity to challenge the user in question, the user which would otherwise give rise to prescriptive rights, would not, on the 'clam' principle, generate such rights.

252. Applying this principle to the facts of this case, Gordon's deliberate and dishonest deployment of the 1947 conveyance, as justifying his user of the way, from 1990 until his death in 2013, had the effect of concealing, or disguising the true nature of his unlawful use of the way and enabled him, on the false basis that he had the legal right said to have been granted by the 1947 conveyance, to continue to use the way, when be well knew that he had no such right. The clear effect, on the facts of this case, of the deception that he perpetrated as to his right to use the way and of his concealment, thereby, of the unlawful basis of his user was to preclude challenges which would, otherwise, undoubtedly, have been made as to his use of the way.

253. In these circumstances and over and above the application of the 'vi' principle, as already fully discussed,, the 'clam' principle, as I have set it out in paragraph 248 of this judgment, precluded Gordon's user of the way, as from 1990, from giving rise to any prescriptive rights.

254. By his use of the 1947 conveyance he deliberately concealed the basis upon which his potentially prescriptive use of the way was carried on and deliberately perpetrated a deception as to the basis of that user. His user of the way, upon the false basis created by his deception as to the basis of his user and his concealment, by his deception, of the true basis of his user, had the effect of preventing challenges to his use of the way which would otherwise have been pursued, with the consequence that that user was not prescriptive user and did not and could not afford him prescriptive rights.

255. In the result, my clear conclusion is that, notwithstanding Gordon's long user of the way, from the late nineteen sixties, through until 2013, no prescriptive user has been established.

256. In the light of that conclusion, it is not strictly necessary to go on to consider the nature, quality and basis of the use of the way following Gordon's death and until, in December 2020, the current challenge to that user was commenced. Even if that user was prescriptive it would have been carried on over an insufficient length of time to establish prescriptive rights.

257. I will, however, as already foreshadowed and for completeness, deal, albeit, in relatively short order, with this final period.

258. Despite the death of Ruth Chilvers, in 2012 ,and Gordon's death, in 2013, Bethany remained in occupation. David Hodges and his wife, Sarah, together with their children, had moved back to Bethany in 2012 and, following Sarah's death, in 2017, David Hodges and the children remained in occupation until February 2019. Additionally and notwithstanding Gordon and Ruth's deaths, Bethany continued to be used for a variety of youth group and Girls Brigade events up to and including 2017. Family meetings of Gordon and Ruth's children continued at Bethany in 2016 and 2017 and family members and medical professionals visited Sarah at Bethany in the course of her illness and prior to her death. Even after 2019, David Hodges was in the habit of visiting Bethany to maintain the property and, apparently, to charge his electric vehicle. Jason Arnold, a bee keeper who was allowed to keep his hives at Bethany, continued to service his hives at Bethany righ up until 2023. All access relevant to the occupation of Bethany and to activities still carried on at Bethany will have been via the way.

259. I am satisfied that the user of the way generated by the foregoing, whether looked at as an isolated period, or as part of the overall pattern of the user of the way, extending over many years, continued to be of a sufficient extent and nature as to bring home to a reasonable landowner that rights over the way were being asserted. The fact that, as set out in paragraphs 176 to 192 of this judgment and as summarised in paragraph 232 of this judgment, overt opposition to the use of the way continued to be expressed during this period, is, in itself, evidence that the user of he way remained sufficient in extent and quantity as to warrant objection by the principal servient owner and to demonstrate that the continuing use of the way was seen as potentially carried on in assertion of a right..

260. While it is clear that user tailed off after Bethany ceased to be occupied, from February 2019, it seems to me that, even in this last period, prior to Mr and Mrs Hughes commencing their current challenge to the registration of the way, the residual user of the way, looked at in the overall context of the user of the way, over time, is sufficient to render that use prospectively prescriptive. As is clear, from Lord Neuberger's judgment, in **Lawrence v Fen Tigers Ltd [2014] AC 822,** at paragraphs **141 and 142** and from the decision in **Carr v Foster 3 QB 581**, where, looked at overall, the user is, or has been, of a prescriptive quality, the fact that there have been interruptions in user, even of some length, will not disqualify that user; a fortiori where there has simply been a diminution in that use over part of a potentially prescriptive period.

261. All that said, I am not persuaded that the user of the way, in this period, was prescriptive in nature. As already stated, paragraphs 176 to 192 and paragraph 232, demonstrate that the post-2013 user, by, or under the authority of the Applicants, as the new owners of Bethany, was, to their knowledge subject to overt and continuing opposition. As such , the user was not 'vi' and was not not prescriptive.

262. In relation to this period, however, it is important to say that the strictures and criticisms that I have made as to Gordon's use of the 1947 conveyance as purportedly justifying his user of the way are not applicable to the Applicants or to any of the Chilvers family witnesses.

263. Ms Meager was critical of the Applicants and their evidence, on the footing that, having had sight of their father's documents, including those challenging his use of the way and including those demonstrating, as discussed in this judgment, his knowledge of his lack of rights over Moorwood, pursuant to the 1947 conveyance, they would, or, at least, should have been aware that the 1947 conveyance did not grant effective rights and, therefore, should not have advanced that conveyance, as affording rights over Moorwood, either in the post-2013 period, or in these proceedings.

264. I do not regard that criticism as wholly fair. The evidence I heard indicated that, to a very large extent, Gordon kept his own counsel in respect of his problems regarding the use of the way. Mary was the only person in whom he confided at all and then, largely, to indicate where documents pertaining to the use of the way might be found. It is profoundly unlikely that she, or any of her siblings, were let into the secret that Gordon was deliberately using the 1947 conveyance to assert rights that he did not have. They were left, on Gordon's death, with the fact that, for very many years, the way had been the main access to Bethany and with a conveyance, which seemed to support that user. While, to a lawyer's

eye, the contingent language of the grant might, indeed should, have raised warnings, it would be unfair to expect that aspect of the matter to impinge on the Applicants. Nor, realistically, as non-lawyers, could they be expected to tease out and appreciate, from their father's substantial papers, those few, but important, documents, which gave the lie to the position that he had, for so long, advanced.

265. I have no doubt at all that, until very late in the day, eight up to and beyond the inception of this application, the Applicants and their siblings believed, in good faith, that the 1947 conveyance afforded them valid and effective rights over the way. I do not consider them to have engaged in any concealment, or deception, as to the true basis of their user of the way, or any conduct such as to render their use of the way, in the belief that the 1947 conveyance afforded them effective rights, 'clam'. Their user of the way was comparable to the user that took place in **Bridle v Ruby [1989] 1QB 169**, where those asserting and establishing a prescriptive right of way had acted, in good faith, in the honest but incorrect belief that their user of the way in question fell within the reservation of a right of way in a particular conveyance. Subject, therefore, to the fact that their user was 'vi', the Applicants use of the way, in the belief that it was justified by the 1947 conveyance, would have amounted to a prescriptive use of the way capable of giving rise to prescriptive rights.

266. In the ultimate result, however, and for the reasons set out at length in this judgment, I am satisfied that the Applicants have failed to establish any prescriptive use of the way and Any prescriptive rights over the way. I propose, accordingly, to direct the Chief Land Registrar to give effect to Mr and Mrs Hughes' 1st December 2020 application and to delete from the register the entry pertaining to the alleged right of way.

267. Following the circulation of this judgment in draft and pursuant to my directions written representations have been made by the parties as to the costs of this application.

268. On behalf of the Applicants, Mr Howlett sensibly and properly conceded that Mr and Mrs Hughes, as the successful party in these proceedings, are entitled to their costs, His submission, however, is that this has been a hard, but fairly, fought dispute and that, in that context, costs should be awarded only on the standard basis.

269. In opposition to that contention, Ms Meager submits that, in respect of the early part of these proceedings, that is to say up until the Applicants' amendment of their statement of case, in the circumstances explained in paragraph 20 of this judgment, that her clients should have their costs on the indemnity basis and without the limitations on recovery which are reflected in a costs order made on the standard basis.

270. Ms Meager's submission is that the conduct of the Applicants and their advisers in advancing and then, in effect, abandoning the claim that they had the benefit of an express right of way granted by the 1947 conveyance was so unreasonable as to warrant the tribunal in directing that the costs incurred by her clients in resisting the Applicants' claim, as so advanced, should be assessed on the indemnity basis.

271. In this regard, Ms Meager points to the fact that, from the very outset and as set out in paragraph 16 of this judgment, Mr and Mrs Hughes' had challenged the validity of the purported express right of way on the basis, eventually conceded by the Applicants, that the purported grantor, JHGBC, had never owned the allegedly servient land and had never, therefore, had the capacity to validly grant a right of way over that land.

272. Ms Meager relies, further, upon the failure, in particular, of the Applicants' advisers to appreciate the implications and the effect of what I have described, in paragraph 264 of this judgment, as the small number of important documents which, collectively and as analysed in this judgment, demonstrate both the absence of the alleged express grant and, also, Gordon's knowledge that no such right had ever been granted. These documents, as she rightly submits, were available to the Applicants' advisers from an early stage and should, she submits, have alerted those advisers, at that early stage, to the fact that the claim to an express grant was unviable, such that such a claim should never have been pursued.

273. The circumstances in which it is appropriate for a court or tribunal to order, or direct, indemnity costs are well understood. The conduct of the party said to be liable to pay indemnity costs must have been outside the normal range of conduct to be expected of a party in prosecuting, or defending, the proceedings in question. Even where there has been such conduct, the court, or tribunal, retains a discretion whether or not to order indemnity costs, having regard to all the circumstances of the case. In determining whether to order indemnity costs the court, or tribunal must be careful not to act with hindsight and in determining whether unreasonable conduct warrants an order for indemnity costs the court, or tribunal, will be looking for unreasonable conduct of a high degree.

274. In regard to the Applicants themselves, I have already set out , in paragraphs 264 and 265 of this judgment, that I am entirely satisfied that they acted in good faith and in a genuine belief that Bethany had the benefit of the right of way that their father had so strenuously asserted over many years. I see no reason to believe that the Applicants' advisers were not, also and at all times, acting in good faith. The question, then, is whether,

notwithstanding their good faith, the Applicants, by their advisers, have been unreasonable in their conduct of this ;litigation to such a high degree as to fall outside the ordinary norms of litigation of this kind as to warrant the tribunal's exercise of its jurisdiction to order indemnity costs.

275. I am not persuaded.

276. In this case, like many, and as set out in paragraph 273 of this judgment, the tribunal must be careful not to act under the influence of hindsight. Matters which under the scrutiny and spotlight of a trial become obvious are often not so when viewed in the context that existed when a particular decision was made, or a course of action adopted.

277. At the time when the Applicants chose to oppose Mr and Mrs Hughes' application to alter the register, by deleting the entry in respect of the right of way, and at the rime when they pleaded their original statement of case, the Applicants, themselves, were of the clear belief, inculcated by their father, that they had the benefit of a right of way. They were in possession of the 1947 conveyance and of a plan which, although uncoloured, appeared to evidence the line of the right of way along the route that the family had long used as their access to Bethany. It is hardly surprising, and, as it seems to me, not wholly unreasonable that, in that context, they and their advisers considered that they had sufficient material available to properly advance a claim based upon the purported express right created by the 1947 conveyance, read with the plan.

278. In so saying, I do not overlook the contingent language of the grant, nor the fact that, by their application, Mr and Mrs Hughes had already cast doubt upon JHGBC's capacity to make the grant, nor that, consequently, there were grounds for putting the Applicants and their advisers on enquiry. The fact remain, however, that, as demonstrated in the body of this judgment, a number of solicitors, over the years, have had cause to consider the 1947 conveyance and the validity of the purported grant, that none of them felt sufficiently confident in the invalidity of the grant as to challenge is validity in court and that at least one of the solicitors instructed by those opposing that validity had positively advised that the grant was valid.

279. Set in that context and having regard to the fact that the definitive answer as to the question of validity could only be resolved by a consideration of the various landholdings along the route of the way as they existed some seventy years in the past, I cannot consider that the conduct of the Applicant's advisers in advising their client to oppose Mr and Mrs Hughes' application was so unreasonable as to warrant the tribunal in ordering indemnity

costs to be paid in respect of the period within which the erroneous claim to an express grant was being advanced.

280. Nor do I think that that the failure of the Applicants and their advisers to appreciate, at an early stage, the significance of the small clutch of documents, emanating from Gordon's papers, which, in the event, went to demonstrate both the absence of an express grant over the way and Gordon's knowledge of that fact, should, in this case, alter that conclusion.

281. As I set out in paragraph 264 of this judgment, it would have been unrealistic to expect the Applicants to tease out from their father's substantial papers those that, when organised and analysed at trial served to prove their father's lie, as to the existence of the express giant over the way. The same cannot be said, in the same terms, in respect of the failure of the Applicants' advisers either to identify, early on, the relevant documents, or to appreciate their significance, Their job, after all, was to identify any pitfalls which might have presented themselves in respect of the Applicants' case.

282. That said, however, I do not consider that the failure of the Applicants' advisers to identify and appreciate, at an early stage, the significance of those documents, even when coupled ,as was the case, with their late disclosure, can properly be said to amount to unreasonable conduct of such a high order as to warrant indemnity costs.

283. While, in retrospect, those failings appear to be glaring and obvious and while the significance of the clutch of documents, which, taken together, evidence the fact that, to Gordon's knowledge, the 1947 conveyance had not granted an express right of way, is now, following the scrutiny of a trial and following the detailed analysis that took place at trial, plain to see, it would be unfair to attribute that post-trial state of knowledge and understanding to solicitors, at the outset of this matter, confronted with a disorganised weight of documentary material dealing with matters and events extending over many decades. As is so often the case, it has been the process of pleading out the case and the structuring of the material, in the context of the pleadings, which has brought the relevant material into focus and while the Applicants' advisers cannot be said to have covered themselves in glory in their dealings with this matter, in its early stages, it would be wrong to judge their conduct against the background of a post-trial clarity which did not exist at the time when they were first dealing with this matter.

284. What would have been unreasonable conduct of a high order and what would have warranted indemnity costs, in respect of the express grant claim, would have been any

attempt to pursue that claim after matters had been brought fully into focus. That, however, was not the case and appropriate credit should be given to the decision of the Applicants', on advice, to abandon the express grant claim, as they did at, or immediately prior to the May 2023 hearing.

285. In the result I am not prepared to make any order for indemnity costs in this case. Mr and Mrs Hughes will have their costs on the standard basis. Those costs will need to be assessed, if not agreed, by a costs judge sitting as a judge of this tribunal.

286. I will, however, make a direction as to the payment of costs on account. The costs schedule lodged on behalf of Mr and Mrs Hughes totals £133,227, plus VAT, of which £13,281, plus VAT, has already been paid, pursuant to my order made at the hearing in May 2023, when the express grant claim was abandoned. That leaves a residual figure of £119,946, plus VAT, of which Ms Meager submits that 75%, £89, 959.50, plus VAT, should be paid on account.

287. I have considered the schedule lodged on behalf of Mr and Mrs Hughes and I have given the Applicants the opportunity to comment. The point is made that the schedule is unsigned. I have seen nothing, however, to suggest that the schedule has not been put forward in good faith and as an accurate assessment of the liabilities, in respect of costs, that Mr and Mrs Hughes have incurred, or, therefore, that the schedule does not provide a proper basis for me to determine the amount that it would be right that I should order to be paid on account.

288. In regard to the schedule, itself, I am satisfied that, adopting the 'broad brush' approach appropriate to a determination of an amount of costs to be paid on account, the figures advanced on behalf of Mr and Mrs Hughes are, in broad terms, reasonable and proportionate to what was, for these parties, a very important piece of litigation. In this regard, taking up another of the comments made on behalf of the Applicants, I think that there was, in this case, very good reason for the principal fee earner, Ms Stanton, to have been present, as she was, at trial. This was the kind of case where it was likely that issues would arise requiring the attendance of a solicitor properly conversant with the file and, on that footing, she was right to attend.

289. In the result, I have not seen fit to make any significantly more substantial a discount between the costs claimed and the costs ordered on account than is ordinarily the case where costs are to be assessed, as here, on the standard basis. The order I make is that the Applicants pay £90,000, inclusive of VAT, on account of costs.

Dated this 12th June 2025

Judge Timothy Bowles

BY ORDER OF THE TRIBUNAL