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Judgment: approved by the Court for handing down
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF CRAIGAVON

2008/034127

BETWEEN:

KARIN FINLAY

Plaintiff;

and

PHILLIP CULLEN

First Defendant;

and

RAYMOND CULLEN

Second Defendant.

DEENY J

[1] This judgment addresses the issue of the creation of an easement by right of way by prescription. The plaintiff is the owner of premises at 43 Lambeg Road, Lambeg, County Antrim. She operates the same as an interior design business. She brought proceedings by way of civil bill against the defendants. The first defendant is the son of the second defendant and occupies premises at 53 Lambeg Road, in the same village, which are owned by the second defendant. In that civil bill the plaintiff sought a declaration that her premises at No. 43 enjoyed a right of way at all times and for all purposes over that portion of the defendants' premises shaded yellow on the map attached to the civil bill. She also sought an injunction, damages and such further and other relief as was appropriate including costs and interest.

The attached map asserts a right of way from the rear of the plaintiff's premises passing over land owned by her immediate neighbours, to whom I will turn in a moment, and running over a part of the ground at the rear of No. 53 and across a strip of Housing Executive open ground and thus up to Priory Close. I observe that whatever else is the case in this matter the plaintiff is not entitled to all of the area shown yellow on that map, for the reasons set out below.

[2] In the same year civil bill proceedings were issued by Paul Burns and Elaine Burns, the owner/occupiers of 41 Lambeg Road, Lambeg, County Antrim against the same defendants seeking the same remedies. Proceedings were also issued by way of civil bill by Winterthur Pension Trustees UK Limited, as trustee of the Winterthur Life Self-Administered Personal Pensions Scheme (SAPP680), and by Jim (sic) and Eleanor Murdock of 39 Lambeg Road against the same defendants. The second plaintiff, Mr Murdock, is the beneficiary of the pension scheme which the first plaintiff administers.

[3] These three civil bills came on for hearing before HHJ McReynolds on 15 March 2010 and subsequent days. She gave judgment on 24 June 2010 following the conclusion of the hearing and two visits by her to the *locus.* I should mention that I too visited the *locus* of these proceedings.

[4] The learned County Court Judge found in favour of all three plaintiffs, finding that they did have a right of way for all purposes and granting an injunction and modest damages.

[5] The two defendants appealed against all three of the decrees of HHJ McReynolds. The three cases were heard before me on 19, 20, 21 and 27 May 2014. I gave *ex tempore* judgments finding in favour of Mr and Mrs Burns and also in favour of Winterthur and Mr and Mrs Murdock on 27 May. I was satisfied that they enjoyed a right of way from their properties with or without vehicles over a strip of ground some 2.7 metres wide. This strip of ground extends north-east from the recessed kerb marking the edge of a footpath created by the Northern Ireland Housing Executive beside a dwelling it had built at No. 10 Priory Close to a notional line on the defendants' land. The line had been marked in the past by kerbs but the defendants had removed these in 2007 and constructed a hut on the right of way of the owners of Nos. 39 and 41 Lambeg Road which was only removed after the judgment of HHJ McReynolds in 2010. The right of way runs from the land owned by Winterthur at the rear of No. 39 across the rear of No. 53 to the land owned by the NI Housing Executive adjoining Priory Close. I reserved judgment in the case of Mrs Finlay as the deed on which she relies is different in terms from the deeds on which her neighbours rely and, indeed, the evidence, also, was less unequivocal. If she has a right of way here, not only on foot but with vehicles, it would be coterminous with the right of way of her neighbours, i.e. running from the rear of the property of No. 43 over the right of way of no 41 over the 2.7 metre strip over the rear of No. 53 to the vacant Northern Ireland Housing Executive strip of land

bordering on part of Priory Close. The issue for the court in Mrs Finlay's case is whether on the evidence and in law she enjoys such a vehicular right of way. The owners of No. 41 accept her right of way over their land. The problem is with No. 53.

[6] The court has had written and oral submissions from Mr Keith Gibson for the plaintiff/respondent and Mr John Coyle for the defendants/appellants. I have taken all their submissions into account even if not expressly referred to in this judgment.

[7] The plaintiff's title stems from an Indenture made on 29 November 1967 between the trustees of the late William Belshaw and Samuel Kerr Herron of 5 Priory Place, Lambeg. In consideration of the sum of £500 they assigned the fee simple title in "ALL THAT AND THOSE the hereditaments and premises known as 'Priory Stores' situate in the Townland of Lambeg North in the Barony of Belfast Upper and County of Antrim containing in front or southeast side to Lambeg Road 28 feet 6 inches and in the northeast, southwest and northwest or rere the several admeasurements shown on the map or plan thereto hereon endorsed and thereon edged red. Together with a right of way in common with the Vendors and all other persons entitled thereto on foot from the yard at the rear of the said hereditament and premises to and from Lambeg Road aforesaid …". I pause here to observe that not only have I underlined the words "on foot" as an important distinction between No. 43 and Nos. 39 and 41 which were "with or without vehicles" but also that the reference is to a right of way to Lambeg Road. The conveyance has a map attached and it is clear and agreed that this is referring to No. 43 Lambeg Road although that nomenclature is not actually used. Interestingly the map shows a shop at the forefront of the premises with the stores behind it and a garage behind that i.e. there was a garage there in existence in 1967. There is a shaded area there consistent with an indication of a right of way but ending close to No. 43. Upon it the following words are written: "Common drive to Lambeg Road". Mr Gibson in opening drew attention to the garage, to the use of the word "drive" and to the width of the shaded area at nearly 20 feet as pointing to vehicular access, despite the express words "on foot" in the Indenture.

[8] It is agreed that Mr Sam Herron, the purchaser, operated the Priory Stores at No. 43, although there is a dispute as to the nature of that usage. For the purposes of the title he died on 19 January 1986. His executors under a Will of 23 December 1985, having obtained probate, by Deed of Assent dated 7 August 1986, assented to the vesting in Samuel Kerr Herron's son, Denis Trevor Herron, of the premises to be firstly conveyed. Mr Denis Trevor Herron, by Indenture of 6 January 1990, conveyed the property to Robert George Heron and Elizabeth Grace Jennifer Heron in fee simple. (They were not related.) Mr Robert Heron gave evidence at the hearing before me and I shall turn to his evidence in due course. He sold antique furniture from No. 43 in addition to premises he already owned. On 6 January 1994 he conveyed his interests in 43 Lambeg Road to Michael Davidson. Consistent with the earlier conveyance, save that the property was now referred to expressly as 43 Lambeg Road, he conveyed a right of way in common with all other persons

"entitled thereto on foot from the yard at the rear of the said premises to and from Lambeg Road aforesaid". The same language was used in the Indenture of 15 November 1994 between the said Michael Davidson and Karen Judith Finlay, as she is fully described, i.e. a right of way on foot. However, Mrs Finlay relies on statutory declarations (to be found at pages 82 and 90 of file 3). I shall deal with these in the course of discussing the evidence in the case.

[9] I have had the assistance of counsel in examining a number of maps and photographs dating back to 1967, at least, relating to this property. I had formed a preliminary view about the right of way enjoyed by No. 43. I am happy to say that counsel, in their closing submissions, were of the same mind. Mr Coyle, at one point, raised the possibility that the right of way on foot pertaining to No. 43 went down the side of No. 37 back on to Lambeg Road. It seems to me more likely, and I so find, that it merged with the rights of way of Nos. 41 and 39 and went towards the rear of No. 53 but turned left, just on the boundary of that property, over what is now Northern Ireland Housing Executive property. There is a clear sign of such a turn on a photograph of the period. Helpfully, in the report prepared by Doran Consulting at the request of the defendant/appellants, an overlay of deed maps has been produced and this, no doubt, enabled Mr Coyle and Mr Gibson to agree that the right of way turned there over what would now be the Housing Executive footpath and then across the garden of No. 10 and across No. 12 Priory Close as they now are. Any encroachment on what is now No. 53, and has been No. 53, even after the Vesting Order of 1976 is de minimis, I find. This is important as it means the court is dealing with the creation of a new right of way rather than the expansion of an existing right of way for a different purpose of a broader character. Power: Intangible Property Rights in Ireland (2nd Edition) (2008) Tottel, at [8.06] states the following:

> "A right of way, once established for a particular purpose and of a particular character, cannot be expanded into a different purpose and a broader character. On the purchase of a property stated to be subject to a right of way on foot, an action for interference cannot sustain an additional claim that the disputed obstruction prevents the carriage of burdens and the rolling of trollies along the way."

The authority cited for that is Austin v Scottish Widows Assurance Society (1881) 8 LR Ir 197 and 385. That case does not expressly justify the view that a right of way cannot be expanded for a different purpose and a broader character but it is implicitly supportive of that proposition, as is the following passage from Palles C.B., with whom Deasy and Fitzgibbon, L.JJ., on appeal:

> "This is an appeal from an order of the Court of Common Pleas, directing a new trial. The action was

> brought for obstruction of a right of way. The statement of claim alleges that the plaintiff, as the owner and occupier of the house, 39 Westmoreland Street, had a right of way from College Street through the hall door, hall and yard of the house, 1 College Street, to the back of plaintiff's house, and thence back again to College Street, for himself and his servants, on foot. The third paragraph [of the statement of claim] proceeded to allege that the plaintiff's servants in using the way, frequently carried bales and other heavy goods to and from the workshops of the plaintiff, at the back of his premises, in connection with his business. The fourth paragraph alleged that the defendants wrongfully obstructed, and continued to obstruct, the way. The third paragraph of the statement of claim affords a typical instance of an embarrassing pleading. For all real purposes of pleading it was absolutely useless. It could not extend the right of way alleged; and if intended to be relied upon on the question of obstruction, it was evidence only, and ought not therefore to have been pleaded."

In the events this is not a matter which I have to decide. I was not referred to other authorities. I will content myself with saying that it seems to me a dubious proposition that a dominant tenement enjoying a right of way for one purpose could expand that purpose by unlawfully misusing the right of way, particularly in circumstances that might not have been noticed by the owner of the servient tenement.

Claim to right of way by prescription

[10] The civil bill issued on behalf of Mrs Finlay seeks a declaration that her premises enjoy a right way at all times and for all purposes over that portion of the defendants' premises shaded yellow on the map attached hereto. There was no express pleading that she has obtained such a right of way by prescription. No point was taken to that effect at the hearing of the matter and in the circumstances I shall treat the pleading as encompassing the different ways in which a right of way by prescription can be acquired.

[11] An easement, including a right of way, not by deed, may be acquired by prescription in three ways: (i) by reference to the Prescription Act 1832; (ii) under the doctrine of lost grant; or (iii) at common law. The Prescription Act 1832, c.71, by Section 9 expressly did not extend to Ireland. However the Act was extended to Ireland by An Act for Shortening of Prescription in Certain Cases in Ireland 1858,

c.42. The single clause extends the 1832 Act to Ireland. It remains part of the statute law of Northern Ireland without significant amendment to this day.

[12] Section 2 of the Prescription Act 1832 reads as follows:

> "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water of our said lord the King, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such a claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

The core of the matter for this case is contained in the words "shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years …"

[13] The phrase "claiming right thereto" has been held to be equivalent to "as of right", as found in Section 5 of the Act and "to have the same meaning as the older expression *nec vi, nec clam, nec precario*". Gardner v Hodgson's Brewery Company [1903] AC 229 per Lord Lindley at page 239. The opinions of the other Law Lords are to like effect. Therefore Mrs Finlay would need to show that her right was acquired neither by force nor covertly nor with the permission of the owner of the other property, the putative servient tenement. The requirement "*nec clam*", is relevant to the extent and nature of user by the plaintiff here and her predecessors in title.

[14] It can also be seen that the Act required enjoyment by the person claiming the right "without interruption for the full period of twenty years". That clearly militates against a claim to a right based on interrupted or infrequent user or a user that extended only over part of the period of twenty years.

[15] As Lord Macnaghten observes in Gardner the purpose of the Act was to shorten the time for prescription in certain cases and avoid putting "an intolerable strain on the consciences of judges and jury men" by finding the right of way existed from time immemorial i.e. the reign of King Richard the Lionheart who died in 1199. The Act has been held to have not superseded either of the pre-existing methods of claiming by prescription. *Gale on Easements (*19th Ed.) 4-20.

[16] The second way in which prescription could be claimed at common law was by showing a continuous user as of right from time immemorial i.e. "from time whereof the memory of men runneth not to the contrary". Coke on Littleton (19th Ed., 1832), 170. In fact the date fixed as the limit of legal memory became fixed at 1189, when Rchard became King. In practice the courts, as Professor Wylie has pointed out in *Irish Land Law*, 5th Ed., 7.67, treated twenty years continuous user or sometimes user since living memory sufficient to presume presumption. In the case before me, however, this is of no assistance to Mrs Finlay as such presumption can be defeated by evidence of a break in the user between 1189 and twenty years before the claim is made, which is clearly the case here.

[17] Confronted with the difficulty of establishing a user from the date of 1189 the courts resorted to a legal fiction i.e. that the prescriptive user pre-supposed that a grant of the right had been made and had existed which was now lost, thus providing a lawful origin for the right in question. This approach pre-dated the 1832 Act. This doctrine was considered exhaustively in the case of Dalton v Angus and Others [1880-1881] 6 App. Cas. 740. Having been appealed from the Queen's Bench Division to the Court of Appeal it then proceeded to the House of Lords. After a four day hearing it was re-heard in the presence of seven judges of the High Court. With what might be thought to be remarkable robustness the majority of their Lordships and of the judges concluded that the presumption of lost grant could not be rebutted by mere proof that no grant had in fact been made. It could be rebutted if it was shown that the donor or owner of the servient tenement was somebody who was legally incompetent to make such a grant at the time envisaged. In that regard see also Section 7 of the Prescription Act 1832. Lord Selborne L.C. in the House of Lords thought that the right was conferred by the Act of 1832. For my own part I agree with the criticism of the use of such fictions in modern times expressed by McMahon J in Walsh v Sligo County Council [2010] IEHC 437. In saying so I might be permitted to quote from Cockburn CJ in Bryant v Foot (1867) L.R. 2 Q.B. 161 at 181, a passage cited by Lord Hoffman in Reg v Oxfordshire CC (2001) A.C. 335 at 350:

> " Juries were first told that from user, during living memory, or even during 20 years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor anyone else, had the shadow of a belief that any such instrument had ever really existed."

[18] Although the doctrine remains part of our law it is obviously to be considered in the light of the Act of 1832. In any event as Lord Hoffman observes what came to matter was "the quality of enjoyment during the 20 year period".

[19] The doctrine applies in Ireland. Timmons v Hewitt (1888) 22 L.R.Ir. 627 is authority of the Exchequer Division per Palles C.B., Dowse B. and Andrews J. to the effect that, as in England, a tenant cannot acquire an easement by prescription against his landlord. Such user and enjoyment as he might have is not "as of right within the meaning of the second section" of the 1832 Act. But at page 637 the Lord Chief Baron also refers to it being "competent for the jury to infer, from 20 years enjoyment, as of right and without interruption, … a grant by deed from one tenant to the other tenant of such easement".

[20] In this case I have to take into account that Mr Raymond Cullen did obstruct the vehicular right of way from 2007 until 2010. While that was unlawful in respect of the owners of Nos. 39 and 41 Lambeg Road I have yet to decide that issue in this case. It is relevant in that it may require the plaintiff to rely not on the Prescription Act but on the doctrine of lost grant.

[21] Further judicial research identified the case of Haley v Hawkins (1968) 1 W.L.R. 1967. In an action by the plaintiff for an injunction restraining the defendant from entering his land, the defendant claimed that he, his predecessors in title and the several occupiers of his own land had, for the full period of twenty years down to the time of the action brought, enjoyed as of right and without interruption a right of way over the plaintiff's drive which was a right within Section 2 of the Prescription Act 1832, or alternatively that user of the right was by virtue of a lost grant. I pause to observe that the plaintiff in this case was an owner in fee simple. As is clear from Timmons and other cases a fee simple is not required for such a right in Ireland but in any event Mrs Finlay does have a fee simple title. In that case the user was extended initially by permission to allow use by a motor vehicle. But the permission was a temporary one during the illness of a previous owner. The judge found as a fact that the subsequent owners used what they contended to be a right of way to drive their car to and from their house which he described as "the continued user of the drive by the Quigleys". It is clear that there was a regular use

of the right of way leading to the garage of the owner of the putative dominant tenement and that lasted so long as their occupation of the property lasted. He found a right had been established.

[22] It is clear that either under the doctrine of lost grant or under the Act the enjoyment of the right of way must be 'as of right'. The enjoyment must be one of which the servient owner has either actual knowledge or the means of knowledge. Timent v Foot (NH) [1974] 1 W.L.R. 1427, 1433. Here the owner of No. 53, the servient owner, would have had the means of knowledge if vehicles to No. 43 were regularly going up and down the right of way enjoyed by co-owners at the rear of his house, although here he may not have known whether they were going to Nos. 39 or 41 or 43.

[23] Among the material in Gale on Easements is a paragraph dealing with the nature of the enjoyment of the putative right of way which I propose to quote in extenso:

> "4-143 The enjoyment must be definite and sufficiently continuous in its character. Thus:
>
> > 'Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of that right under the Act.'
>
> Continuity may be interrupted by the act of the servient owner or by that of the person claiming the prescriptive right. In the first case, s.4 of the Prescription Act 1832 will apply; in the second case it is mainly a question of fact and degree whether the nature of a given enjoyment establishes an easement of an intermittent character or whether the enjoyment is so lacking in continuity as to be otiose. Thus it is not to be understood that the enjoyment of an easement must necessarily be incessant; although, in a great variety of cases, it would obviously be so, such as in the case of windows, or rights to water. In those easements which require the repeated acts of man for their enjoyment, as rights of way, it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him—an indication that would not be afforded by a mere accidental or occasional exercise. On the other hand, the evidence may disclose a casual

> use, dependent for its continuance upon the tolerance and good nature of the servient owner, and not such as to put him on notice that a right is being asserted."

I pause there to say that Section 4 of the Act provides that each of the respective periods of years "shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made." For the purposes of the Act, therefore, the period will be twenty years leading up to the issuance of the civil bill in 2008. For the purposes of the doctrine of lost grant it appears that an earlier establishment of such a right based on 20 years continuous user would survive the blocking of the road by Mr Cullen.

[24] The evidence of Paul Burns in his affidavit, which was not contested was that the defendants began constructing the hut on his vehicle right of way on 8 February 2007. That obstruction was kept in place until after the decision of Her Honour Judge McReynolds in 2010. However, Karin Finlay's civil bill complaining of the defendants' interference with the right of way is dated 6 October 2008, more than a year after the undisputed interference with any right of way of a vehicular kind she may have had. She is therefore debarred by Section 4 of the Prescription Act 1832 from relying on that statute. Her claim must be under the doctrine of lost grant.

[25] Witchell, *Residential Property Law in Northern Ireland* at 21.25 (b), says the following:

> "The user must be continuous for the claim to succeed. In the case of certain easements, for example a right of way, this has been interpreted as requiring regular user as opposed to intermittent user."

With respect, a user can be regular but still intermittent in the sense of ceasing at intervals. Paragraph 4.143 of *Gale on Easements* is supported by Hollins v Verney (1883-84) 13 QBD 304, C.A. The judgment of the court was delivered by Lindley L.J. and at both pages 305 and 315 he contemplates that an annual user of a putative right of way by prescription to cut and cart timber from a wood belonging to the putative dominant tenement could be enough to comply with the Prescription Act 1832, although the evidence in this case did not establish that. I quote:

> "It is difficult, if not impossible to enunciate a principle which will reconcile all the decisions, and still more all the *dicta* to be found in them; the only

> safe course is to fall back on the language of the statute to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute. Without therefore professing to be able to draw the line sharply between long and short periods of non-user, without holding that non-user for a year or even more is necessarily fatal in all cases, without attempting to define that which the statute has left indefinite, we are of the opinion that no jury can properly find that the right claimed by the defendant in this case has been established by evidence of such limited user as was mainly relied upon, and as was contended by the defendant to be sufficient in the present case."

The user that was satisfactorily proved in this case was a cutting of wood in the year before the action was commenced and previous cuttings but at intervals of some twelve years before. Furthermore the road was occasionally stopped up between those intervals. This was not enough, the court found.

[26] It can be seen that the *obiter dictum* in Hollins v Verney is of assistance to the plaintiff (although not cited on her behalf). But, as always, the case must be looked at on its own facts. The carting away of what seems to have been substantial quantities of timber from the woods would hardly be something that could be overlooked by the owner of the dominant tenement provided they were in residence and *compos mentis*. For my own part I would question whether such a right could be obtained without annual usage, at the very least, and only then if it is of the major kind occurring in Hollins. The circumstances here, of course, are unusual in a different sense where the two neighbours of Mrs Finlay did enjoy a shared vehicular right of way and, as I found, utilised that over the period in question.

[27] The Court of Appeal in England in Ironside & Crabb v Cooke, Cooke and Barefoot (1981) 41 P. & C. R. 32 approved the *dictum* of Buckley J. in White v Taylor (No. 2) [1969] 1 Ch. 150, that "the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and a right of the measure of the right claimed". The user did not succeed there because it pertained to a small strip of land adjoining an admitted right of way which was on the far side of the servient owner's hedge. There was nothing in the circumstances of the case which put the servient owner on notice that such a right of way was being asserted. See also Sara, *Boundaries and Easements* 5th Edition 1516ff and Hearty v Finnegan & Finnegan [2009] NIQB 21.

[28] In Diment v N.H. Foote Limited [1974] 2 All ER 785 Pennycuick V-C held, at page 788E that a user of agricultural land on perhaps 6-10 occasions in a year "was sufficient in extent and regularity to be capable of creating a right of way." But the plaintiff succeeded in defeating the putative right of way because she had no knowledge or means of knowledge, either by herself or through her agents, of the user of the way over the field.

[29] It can be seen therefore that, as Lord Lindley pointed out, there is a wide range of decisions, not all of which are clearly consistent. What is undoubted is that the question of whether there has been sufficient user is a question of fact for the court. It would be strange indeed if in applying the doctrine of lost grant the approach of the court were to deviate in any significant way from the tests laid down under the Act. Indeed the only significant difference of relevance here is that the plaintiff's claim under the doctrine of lost grant is not defeated by the modest delay on her part in issuing proceedings against the defendants.

[30] It is clear from the case law that the decisions of the courts are fact specific. It seems to me that a person in the position of the plaintiff trying to establish that they have acquired such a right by prescription must demonstrate repeated acts of enjoyment of the right of way for twenty years noticeable by any owner of the servient tenement of full age and reason. While the learned editors of *Gale* say that the enjoyment can be intermittent the period of intermission must be relevant. Clearly in the context of a vehicular right of way it is not going to be continuous in

the sense of a right to light (in daytime). It may not even be daily although that appears to have been the user in Haley v Hawkins. But it must be sufficiently regular and frequent to bring home to the owner of the servient tenement that the owner of No. 43, the putative dominant tenement, is using as of right the right of way enjoyed by the owners of the adjoining dwellings.

Evidence

[31] I shall now turn to consider the evidence that was adduced before the court in the light of the law, bearing in mind that the onus is on the plaintiff to show that she has acquired such a right.

[32] As adverted to above there is evidence for and against Mrs Finlay in the deed of 29 November 1967 to Samuel Kerr Herron. Against her is the clear reference to the right of way in the deed being "on foot" repeated in the subsequent deeds. In her favour is that the map shows a shop with a store behind it and a garage at the rear. The right of way indicated on the map would be nearly 20 feet in width and bears the rubric "Common drive to Lambeg Road".

[33] She also relies on the statutory declaration of Denis Trevor Herron of 23 October 1989 before a solicitor. Paragraph 4 reads as follows:

> "During the period when my father and later I carried on business in the premises he and I brought vehicles to the rear of the premises to deliver goods for the shop over the existing laneway and no one to the best of my knowledge information and belief prevented my father and no one prevented me from doing so save that at one stage about nine years ago an adjoining owner tried to erect a building over part of the laneway but this was successfully resisted."

Mr Herron is there referring to the period from the acquisition by his father Samuel Kerr Herron by deed of 29 November 1967 until he handed over possession in 1989. In the latter part of the hearing evidence was called and a document was introduced in an attempt to discredit the statutory declaration. I will deal with that in due course.

[34] Mrs Finlay relies on a further statutory declaration of 27 December 2001, made before a solicitor, again, by Robert George Heron and Elizabeth Grace Jennifer Heron of Lisburn. (Note that they spell their name with one R and are unrelated to the other Herrons.) This document deals with the rights of the owner of No. 39 principally, but paragraph 4 runs as follows:

> "The said right of way runs through part of the premises and we confirm that during our ownership the owners of No. 41, 43 and 45 have from time to time on foot and with vehicles used that part of the right of way running through the premises and connecting on to the right of way leading to and from New Street for all usual practical purposes including the leaving out and bringing back of bins. The owners of No. 41 have a boat which presently sits at the rear of No. 41 and said right of way through the premises leading to and from New Street is used from time to time to take away and bring back the boat. The right of way does not extend over the premises other than is shown on said map."

[35] Mr Robert Heron gave evidence that he had bought No. 43 in 1990, while already owning No. 39. He sold No. 43 to Mr Davidson in 1994. In between he sold furniture from the premises, which was complementary to his selling of smaller antiques from No. 39. He used the same route i.e. vehicular right of way to the back of No. 43 and no one ever objected. His use of No. 39 was very regular. He was cross-examined by Mr Coyle. I should say that I thought him a palpably honest witness. Unlike most other witnesses he now had no connection with the parties but was merely there as a former owner. He was shown a photograph of the rear of No. 49 looking overgrown but said it was not like that in 1990 and indeed the date on the photograph is 19 March 2010, after three years of obstruction of the right of way by Mr Cullen. As an illustration of why he was confident that he used the vehicular right of way he pointed out that he was selling quite heavy furniture and that that was the way it was brought into the premises. Furthermore his son at this time was French polishing the furniture in the garage which existed then and still exists today, albeit the gable wall of it has been walled up. He could not remember any interference with the access to the property while he was there.

[36] As already indicated the witnesses for the owners of Nos. 39 and 41 satisfied me that there was certainly regular vehicular use by them for more than twenty years.

[37] Mrs Finlay herself gave evidence. She obviously has an interest in the outcome of the case. I have to take into account against her that early in her evidence-in-chief she had complained that because of the defendant's blocking of the right of way in February 2007 she had had to get her central heating oil brought through the house in a pipe from a tanker out on the Lambeg Road. She said she had to "sign a disclaimer to the oil company" before they would agree to do this. It only happened perhaps twice. But later in cross-examination she told Mr Coyle that she had given a <u>verbal</u> indemnity to a representative of the oil company. She said that she had used the rear entrance when she could for maintenance of the property

and for removing rubbish. Neither on some of the more recent photographs nor on inspection by myself did it look as though there was heavy use of the ground at the rear of her property, but nor was it obstructed in any way. She made several references to her husband going out to check on the back of the property on a monthly basis but he was not in fact called to give evidence. She very rarely went to the rear of the premises, which were only business premises, not her dwelling.

[38] She relied on an affidavit of Simon Morrow who is an accounts manager with a home heating oil delivery company who averred that from 1995 onwards they delivered oil to the oil storage tank at the rear of No. 43 and that "we have always used the roadway beside No. 39 Lambeg Road as means of access".

[39] I turn to the defendants'evidence against Mrs Finlay's claim. Firstly they sought to undermine the statutory declaration by adducing a sheet of paper apparently from Mr Denis Herron, or "D.T. Herron" as it is put in the document. Mr Coyle was instructed that this document had been e-mailed on 16 April 2009 but I pointed out that it looked like a biro signature on it and a different explanation of its arrival was subsequently given. It purports to contradict the statutory declaration of the same man of 1989. It reads as follows:

> "As owner of the premises at 47 Lambeg Road, Lambeg, formerly known as Priory Cash Stores (over 30 years in business), I can confirm that the 'right of way' at the rear of said premises was off limits to any vehicles. My deed stated that the only way to use this 'right of way' was on foot. It also stated that even on foot people were not to walk two abreast, single file only."

[40] Mr Gibson drew attention to a number of frailties in this document from the defendants'point of view. First of all Priory Cash Stores were at No. 43 not No. 47. Secondly his deeds did not say, nor would one ever expect a deed to say, that "even on foot people were not to walk two abreast, single file only".

[41] It later emerged that Mr Herron is in fact a cousin of the Cullens. His son James K Herron gave evidence, the grandson of Samuel Kerr Herron whose death certificate he had with him. He said he was 42 years of age having been born on 22 June 1972. While he was brought up in the Maze in his early teens he spent quite a lot of time in and about No. 43. He said he was groomed to take over the shop which his father did run following his grandfather's death. He helped quite a lot in his grandfather's last year and when his father owned the shop. He spoke with great confidence but I did not find his demeanour altogether persuasive. He was cross-examined as to why he had not appeared at the County Court and said that he had only been involved about this matter two weeks ago i.e. in early May 2014. Cross-examination by Mr Gibson required him to say that when he said that he only

meant 'this particular time' because he agreed he had facilitated the obtaining of the letter of 16 April 2009 from his father. This letter was elicited by an e-mail to his father who now lives in Canada. He did not know why he was not called in the lower court. He admitted that the second defendant was a first cousin of the witness's grandfather. Therefore Denis Herron is a second cousin of the first defendant herein. I have to take into account that this witness is therefore both a relative and, on his own evidence, a relative on friendly terms with the defendants.

[42] Mr Gibson cross-examined about his father acquiring a large silver Mercedes saloon in or about 1984 which he remembered. He said the existing garage was in ruins and his father built a new one of block. His account of this is difficult to follow, even with the assistance of the digital recording. At first he appeared to say, when asked whether anyone had objected to this, that he had no knowledge of that. But then he said that it was not long after the garage was built before there were objections. He then said there was a feud with Mr Dougan the neighbouring owner. This followed Mr Gibson asking him was he seriously suggesting that another land owner and Dougan had stood by while his grandfather built a garage and then only objected after it was constructed. He said this was the case. He was vague about dates but when I brought him back to this for the purposes of clarification at the conclusion of his evidence he said to me that it was no more than two months before there was objection to his grandfather parking there. This is all very unsatisfactory. It is more unsatisfactory still in as much as Mr Robert Herron was an occupier of No. 39 at the time in question and bought these premises about six years later but none of this was put to him. For these reasons I find it difficult to place reliance on the evidence of this witness. I place no reliance on the letter from Denis T Herron. It is not an affidavit or similar statutory declaration before a lawyer in Canada. It is five years old. It is indisputable that the defendants feel strongly about this matter and I find it puzzling that nothing more convincing was elicited if, in reality, Mr Denis Herron wanted to resile from the statutory declaration he had made in 1989.

[43] The court also heard evidence from Mr Raymond Cullen, the second defendant, on 21 May. It was a striking feature of his evidence that while three affidavits which he had sworn in the three civil bills all asserted that he had obstructed the use of the right of way by vehicles on frequent occasions before he built the hut in 2007, he himself never at any stage said that in his oral evidence, although given the opportunity to do so.

[44] Mr Cullen is 76 years of age. I do not think it necessary to go into his evidence in detail. It must be acknowledged that he was discursive and wandering in his testimony and seemed quite confused at times as to what his role was, referring to himself as the landlord for the whole location. His family had certainly owned one or other properties there for a long while and it may be that he thought this gave him rights that he did not in fact enjoy. I reject his evidence, as I did in my *ex tempore* judgment, regarding the user of the right of way behind Nos. 39 and 41. In those circumstances what he has to say is not of assistance to me in regard to Mrs

Finlay's claim to a right from the rear of No. 43. He too claimed that the late Samuel Kerr Herron had stopped using the rear entrance but his evidence in any event differed from that of James Herron in as much as he said that the late Mr Herron had used the vehicular right of way at the back until 'the court case about No. 51' and the use of the garage. In cross-examination, when pressed on certain points, he sought to blame his former solicitors.

[45] The defendants also called Dr Philip Blackstock who has a doctorate of philosophy in forestry from the University of Ulster. He gave certain evidence about plant growth based on his examination of hedges and trees still on the location. I am entirely satisfied having heard him give evidence that he was not making the case that the route for vehicles was in any way meaningfully obstructed at any relevant time.

[46] On 27 May 2014 the defendant sought an adjournment of this matter because a witness from Dornan's Consulting ad an accident the previous week and was unable to attend, although his employers had been told that a witness was essential. Mr Gibson sensibly agreed to the admission of the original report, by another member of the staff of Dornan Consulting, to allow the case to finish. I have taken that report into account. I cannot see that oral evidence from a non-author would have added anything of substance.

[47] An important part of Mr Coyle's case was that, in reality, vehicles entering the area behind these four houses, Nos. 37-43 would drive over the footpath provided by the Northern Ireland Housing Executive and adopted by the Road Service of the Department of the Environment by 1981. I believe he is right in this. But it is by no means inevitable that they should do so, nor necessary, at least for a motor car as opposed to a larger vehicle. The fact that some of them do so I take into account. It is arguable that by deliberately recessing the kerb the Executive was giving an implied licence to vehicles to drive over this part of the space between No. 10 and No. 53, provided no pedestrian was using it at the time. It is not, however, either necessary or appropriate for me to conclude that because there is sufficient space for a right of way i.e. 2.7 metres between the recessed kerb of the Housing Executive footpath and the line, now notional, previously marked by kerbstones showing the limit of the right of way closer to No. 53.

Conclusions

[48] The cases of both parties here are finally balanced. At an initial glance the fact that the deeds to No. 43 expressly limited a right of way to one on foot from the rear of the premises sounded strongly against the plaintiff, Mrs Finlay. However, as stated above, I am satisfied and it is agreed that that right of way is distinct from the vehicular right of way that she is now asserting. Once this is clear the resolution of the matter is easier, particularly in the light of <u>Hollins v Verney</u> clarifying that a right of way by prescription can be continuous although intermittent. In my view if

user is intermittent it has to be noticeable and visible to the owner of a servient tenement and it has to be regular and reasonably frequent. I consider here that the evidence does meet that requirement. That is the physical appearance on the ground. That is the evidence of the entirely reliable Mr Robert Heron. That is what Mr Denis T Herron averred to in his statutory declaration before a solicitor and Commissioner of Oaths in 1989. That is what one would expect i.e. that convenience stores would get at least some of their larger deliveries at the rear of the premises. This is particularly so when, from at least 1967, there was some kind of garage at the back and, indisputably, between it and the shop, a store. Mr James Herron asserted that in his boyhood even bags of coal and the like were brought through the front of the shop. While this is possible I find it inherently unlikely that use was not made by whoever was operating the shop of a rear entrance which was physically available to them. It is also right to take into account the evidence of Mrs Finlay herself that she continued this use. I also take into account the affidavit of Clifton McLaughlin, a friend of Mr Paul Burns. He seemed a reliable witness when he gave oral evidence before me. In his affidavit of 6 October 2008 he swore that No. 43 Lambeg Road was a shop which he regularly used and he was aware that vehicles were parked at the rear of these premises. I am satisfied therefore, on the balance of probabilities, that there has been continuous use of sufficient visibility and regularity by the owners of No. 43 Lambeg Road since the building of No. 10 Priory Close to establish a right of way not only on foot but for vehicles. That right of way will be coterminous with that of the owners of Nos. 39 and 41.

[49] I consider that Mrs Finlay's use of the rear access from No. 43 for vehicles is at a lower level than that of her two neighbours. It seems to me that she is not entitled to the same level of damages as they received for the interruption to that user. One also has to acknowledge that the matter was not clear cut in her case, at least initially. I will therefore content myself with ordering the same level of damages as the learned County Court Judge i.e. £1200. She is entitled to an injunction which her counsel should draft in the same terms as that awarded to Paul Burns and Elaine Burns in their proceedings.