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2017/122481

IN THE COUNTY COURT FOR NORTHERN IRELAND

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BETWEEN:

STUART KNOX, KATY EMMA BEST,

GEMMA LISA SHIELDS AND MICHELLE AIME TURTLE

Plaintiffs;

and

SEYMOUR SWEENEY AND ROSS SWEENEY

Defendants.

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His Honour Judge Gilpin

Introduction

[1] By the late seventeenth century the Strawbridge family had established a settlement close to the foot of the River Bush near Portballintrae, County Antrim, at what is now known as Bushfoot. The settlement consisted of a principal house, Strawbridge House and various other buildings ("the Bushfoot Clachan"). By the nineteenth century the MacNaghten Baronetcy was the principal landowner in the area which included the Bushfoot Clachan.

[2] Over time the MacNaghten family has disposed of all of its lands and properties at the Bushfoot Clachan. With the exception of a former cattle shed and some dilapidated farm buildings, all of the buildings which now comprise the Bushfoot Clachan are private residences. Some of these are permanently occupied while others are used as holiday homes.

[3] Since 1984 the Knox family, the Plaintiffs in these proceedings, have in one way or another, owned various properties which are part of the Bushfoot Clachan. At present their ownership extends to three properties and adjacent garden space being 45, 47 and 53 Bushfoot Road and a hard standing surface on which formerly stood 43 Bushfoot Road.

[4] The former cattle shed ("The Shed") is now owned by the second named Defendant, Ross Sweeney. On 14 March 2018 full planning permission was granted for the development of The Shed in what was described as the "conversion and alteration of historic vernacular building to provide new detached dwelling unit …". The grant of planning permission was unsuccessfully challenged in the High Court by the first named Plaintiff, Stuart Knox [*Re Knox's Application for Judicial Review* (2019) NIQB 34 McCloskey J]. The Shed therefore has the benefit of extant Planning Permission but to date development has not commenced.

[5] Ross Sweeney also owns an apron of land immediately adjacent to the rear and one side of The Shed ("the disputed ground"). He also owns a nearby laneway together with some additional land beyond that again.

[6] At issue in these proceedings is whether the Plaintiffs enjoy two easements over the disputed ground namely:

- The right to park vehicles and
- The right to pass and repass on foot

[7] The two easements contended for are in fact sought over slightly different areas of ground but which to a large degree overlap. The right to park vehicles is sought over a triangular shape of land to the side of The Shed. The right to pass and repass on foot is sought over both the said triangular area to the side of The Shed but also over a smaller area to the rear of The Shed.

[8] While the areas of land in dispute differ to the extent noted, for the purpose of this judgment I intend to refer to them as one and term them collectively "the disputed ground." The disputed ground extends to approximately 0.044 of 1 acre.

[9] These proceedings began life in the High Court of Justice in Northern Ireland by way of a Writ of Summons dated 28 November 2017. Thereafter by a Summons dated 11 December 2017 the Plaintiff sought interim injunctive relief. However, before any substantive hearings took place in the High Court the Defendants issued an application that the proceedings be remitted to the County Court. An Order

remitting these proceedings was thereafter made by the Lord Chief Justice on 16 March 2018.

[10] In these proceedings Mr Keith Gibson BL appeared for the Plaintiffs and Mr Wayne Atchison BL appeared for the Defendants. I am grateful to both of them and to their instructing solicitors for their thoroughness in the conduct of this case.

[11] In Mr Atchison's voluminous written submissions he levels much criticism at what he suggests is the casual and imprecise manner in which the Plaintiffs have pleaded, presented and made submissions about their case. I will make reference to certain specific issues he raises in the course of this judgment. However, by way of a general comment it must be borne in mind that the instant proceedings were hybrid in nature beginning life in the High Court while being heard in the County Court.

[12] In 1953 in a lecture which he delivered at University College London (see 'Law and Practice in Northern Ireland' (1953) 10 NILQ 47), Lord MacDermott LCJ said of County Court practice in Northern Ireland:

> *'In the first place, the procedure is simple and comparatively inexpensive. The civil bill contains a short statement of the relief sought and the nature of the claim. It is served by an official of the Court called a process server, and if the defendant wants to defend he or his solicitor so intimates at the office of the Clerk of the Crown and Peace. There are no interlocutory proceedings and no pleadings (save in a few special cases), and the case is heard in its turn, on the day indicated in the civil bill or as near thereto as the state of the list allows. The procedure on appeal is equally simple and is a complete rehearing. The costs chargeable throughout are on a fixed scale. This, the absence of interlocutory applications, and the fact that the County Court Judge has no discretion to award costs according to the event, enable the litigant to ascertain, in advance and fairly closely, what his commitments will be, win or lose.'*

While proceedings in the County Court have become more complex and formal since the days of which Lord MacDermott spoke they are still of a less prescriptive character than those in the High Court. To some extent Mr Atchison's criticisms are therefore misplaced.

The Plaintiffs' Title

[13] The properties owned by the Plaintiffs at the Bushfoot Clachan are not their primary residences but are for holiday use. The title to what they own is somewhat complex but in general terms is made up of four parts:

(i) The Barn at 53 Bushfoot Road owned solely by Stuart Knox.

(ii) Bush Cottage at 47 Bushfoot Road now owned by the second, third and fourth named Plaintiffs ("the Knox daughters.")

(iii) Wee Bush at 45 Bushfoot Road now owned by the Knox daughters.

(iv) An area of hard standing formerly the site of 43 Bushfoot Road now owned by the Knox daughters. The Plaintiffs do not make the case this hard standing area is a dominant tenement for the purpose of these proceedings.

[14] As noted above historically all of the lands now owned by the Plaintiffs and indeed those owned also by the second named Defendant, had at one time been owned by the MacNaghten family and held in a parent Folio, 15752 County Antrim. These MacNaghten lands were first subject to registration in 1933 under the provisions of the Local Registration of Title (Ireland) Act 1891.

[15] The devolution of title into the names of the present Plaintiffs can be summarised as follows.

No 47 Bushfoot Road ("Bush Cottage")

[16] By a Land Registry Transfer dated 26 January 1982 the MacNaghten family transferred part of its land in Folio 15752 County Antrim to a Colin Kent Bonner Bolton. A new Folio 36900 County Antrim was opened for this transferred part. On 3 February 1982 Colin Kent Bonner Bolton became the registered owner. By Land Registry Transfers of Part dated 4 October 1983 and 24 September 1984 which had a combined date of registration effected on 25 February 1985 Stuart Knox became the registered owner of Folio 36900 County Antrim. By a Transfer of Part registered on 23 October 2013 Stuart Knox transferred part of the lands originally in Folio 36900 County Antrim to Folio AN203186. Stuart Knox's late wife, Rosalind was then the registered owner of this transferred part. Since 23 October 2013 the residue of the lands in Folio 36900 have been registered in the names of the Knox's daughters. It is now commonly known as Bush Cottage. This is Freehold land. The class of title is Absolute.

No 45 Bushfoot Road ("Wee Bush")

[17] On 28 November 1960 the MacNaghten family transferred part of its land in Folio 15752 County Antrim to Colonel Gerald Underwood Finney. A new Folio 25490 County Antrim was opened for this transferred part. Ultimately, on 15 May 1981 Colin Kent Bonner Bolton became the registered owner of Folio 25490 County

Antrim. By Land Registry Transfers dated 4 October 1983 and 24 September 1984 which had a combined date of registration effected on 25 February 1985 Stuart Knox became the registered owner of Folio 25490 County Antrim. On 24 September 2010 Folio 25490 has been registered in the names of the Knox daughters. It is now commonly known as Wee Bush. This is Freehold land. The class of title is Absolute.

No 43 Bushfoot Road ("the hard standing surface")

[18] On 26 March 1986 the MacNaghten family transferred part of its lands on which then stood a property, 43 Bushfoot Road, to Stuart Knox. A new Folio AN6511 was opened for this transferred part. The property that was then situated on these lands was subsequently demolished by Stuart Knox. He obtained planning permission for a replacement dwelling which he renewed on several occasions but which has now lapsed. On 23 October 2013 Folio AN6511 has been registered in the names of the Knox daughters. It is now just a hard standing surface. This is Freehold land. The Class of Title is Absolute.

No 53 Bushfoot Road ("The Barn")

[19] In or about 2003 Stuart Knox and his late wife, Rosalind, purchased certain lands from Winston and Julie Bustard being lands to the rear of the Bustard's home namely Bushfoot House, Bushfoot Road. The Knoxes then constructed a new holiday home on these lands and on others already owned by them. This new property, known as The Barn finds its title in three folios all of which at a point in time were part of the MacNaghten parent folio 15752 County Antrim.

(i) Folio AN32479

[20] On 23 July 1955 the land which now forms Folio AN32479 was transferred out of the parent MacNaghten Folio 15752 County Antrim to a new Folio 23384 County Antrim. The lands in Folio 23384 County Antrim thereafter became known as 52 Bushfoot Road. On 25 January 1977 part of Folio 23384 was transferred into Folio 32102 the registered owner of this Folio being Coleraine Borough Council. On 21 July 1994 part of Folio 32102 was transferred into Folio AN32479 the registered owners being Winston David Bustard and Julie Daphne Bustard. By a Land Registry Transfer dated 2 May 2003 Winston and Daphne Bustard transferred Folio AN32479 to Stuart and Rosalind Knox who became the registered owners of it on 5 December 2003. On 23 October 2013 Rosalind Knox became the sole registered owner. Finally, on 7 October 2016 Stuart Knox became the sole registered owner. This is Freehold land. The Class of Title is Absolute.

(ii) Folio AN101614

[21] On 9 January 1976 the land now in Folio AN101614 was transferred from the MacNaghten parent Folio 15752 to Folio 31466. By a Land Registry Transfer dated 2 May 2003 Winston and Julie Bustard, the then registered owners of Folio 31466,

transferred part of the lands contained in it to Stuart and Rosalind Knox. These transferred lands were registered in a new folio, AN101614. Stuart and Rosalind Knox became the first registered owners of this new folio on 5 December 2003. On 23 October 2013 Rosalind Knox became the sole registered owner. Finally, on 7 October 2016 Stuart Knox became the sole registered owner. This is Freehold land. The Class of Title is Deemed Possessory.

(iii) Folio AN203186

[22] As noted above by a mapped Transfer of Part dated 26 January 1982 part of Folio 15752 was transferred by the MacNaghten family to Colin Kent Bonner Bolton. On 3 February 1982 these transferred lands were registered in Folio 36900 County Antrim. Following Land Registry Transfers dated 4 October 1983 and 24 September 1984 which had a combined date of registration effected on 25 February 1985 Stuart Knox became the registered owner of what then remained of Folio 36900 County Antrim. On 23 October 2013 part of Folio 36900 was transferred by Stuart Knox to Rosalind Knox and a new Folio AN203186 was opened. Finally, on 7 October 2016 Stuart Knox became the sole registered owner. This is Freehold land. The Class of Title is Absolute.

The Dominant Tenements

[23] The Plaintiffs' case, if successful, hopes to see the following Folios benefitted from the two easements sought namely:

- The Barn at 53 Bushfoot Road being Folios AN32479, AN101614 and AN203186

- Bush Cottage at 47 Bushfoot Road being Folio 36900 County Antrim

- Wee Bush at 45 Bushfoot Road being Folio 25490 County Antrim

The Defendants' Title

[24] The first named Defendant, Seymour Sweeney does not presently own any land or property at the Bushfoot Clachan. The only property that forms part of these proceedings which he did own was The Shed which he owned between 2008 and 2014. He has never owned the disputed ground, the servient tenement. However, as noted above his son, Ross, the second named Defendant, does own property at the Bushfoot Clachan.

The Shed

[25] Prior to 1989 The Shed was owned by the MacNaghten family. On 16 January 1989 Bushfoot Golf Club Limited was registered as owners of The Shed. Title to The

Shed was registered in Folio AN15691. In 2007 Bushfoot Golf Club placed The Shed on the market for sale with Lindsay Shanks Estate Agents of Bushmills. Stuart Knox made several offers to purchase it seemingly thinking it might make a useful garage. However, he was ultimately outbid when Seymour Sweeney purchased The Shed. On 23 January 2008 Seymour Sweeney was registered as its owner having paid the golf club some £122,000.00. On 30 April 2014 Ross Sweeney became the registered owner of The Shed and remains the sole registered owner of it. This is Freehold Land. The Class of Title is Absolute.

Title to the Disputed Ground

[26] Prior to 2017 the disputed ground was owned by the MacNaghten family being part of Folio 15752 and AN92049 County Antrim. By a Land Registry Transfer dated 15 June 2017 Ross Sweeney purchased the disputed ground from Sir Malcolm MacNaghten for £15,000. This transfer was subsequently registered in the Land Registry in Folio AN233480 County Antrim. Ross Sweeney is now the registered owner of the disputed ground having been registered as such on 26 September 2017. This is Freehold land and the Class of Title is Absolute.

Title to the intervening laneway

[27] To complete the picture of the lands owned by Ross Sweeney in close proximity to the Plaintiffs' properties, Ross Sweeney also owns a laneway which abuts The Barn owned by Stuart Knox on one side and the disputed ground on the other. Ross Sweeney acquired this laneway as part of a purchase of land from Sir Malcolm MacNaghten in 2019 for a total consideration of £50,000.00. These lands which include the laneway had previously been part of Folios 15752 County Antrim and AN92049. On 12 June 2019 a new Folio AN248088 was opened to encompass the laneway bought by Ross Sweeney and on that date he became its first registered owner which is subject to various easements. This is Freehold land and the Class of Title is Absolute.

Relevant Legal Principles

[28] Like all easements, those that the Plaintiffs seek are rights that will benefit land being an incident to the land and not a personal right vested in the owner.

[29] The Plaintiffs do not suggest that the easements they seek have been created by deed. Rather their case is that the easements have been created by means of prescription.

[30] The acquisition of easements by prescription can occur in three ways:
(i) At Common Law
(ii) Under The Prescription Act 1832
(iii) Under the doctrine of Lost Modern Grant

Prescription at Common Law

[31] Initially, the Plaintiffs advanced their case on the basis that all three methods of acquisition could be relied on including prescription at common law.

[32] In *Steele & another v Sweeney & another* [2018] NICty2, Judge Duncan said of prescription at Common Law:

> *"[34] The courts are prepared to presume that a grant of easement had been made if user as of right can be shown from time immemorial. In fact the date fixed as the limit of legal memory was 1189 by the Statute of Westminster I, 1275 c.39. The plaintiffs cite Professor Wylie in support of the proposition that in practice the courts have been prepared to presume continuous use from 1189 on production of evidence showing 20 years continuous user or sometimes user since living memory [Wylie, Irish Land Law, 5th Ed. at 7.67]. However, Wylie [at 7.68] recognises that a claim at common law can be defeated by showing that at some date since 1189 there has been unity of possession….."*

[33] It was only part way through these protracted proceedings that the Plaintiffs conceded that there had at one time been unity of possession of the dominant and servient tenements given their unity within the MacNaghten title in Folio 15752 County Antrim which was opened in 1933 many centuries after the date fixed in law by the Statute of Westminster of 1275 to be the limit of legal memory namely 1189, the date Richard the Lionheart was crowned king. As such the Plaintiffs quite properly, if somewhat belatedly, abandoned their claim that the easements were acquired at Common Law.

[34] The Plaintiffs claim therefore proceeded throughout the remainder of the hearing on the basis of:
(i) The Prescription Act 1832 and on
(ii) The doctrine of Lost Modern Grant.

[35] In his written submissions, Mr Atchison takes issue with the failure of the Plaintiffs to specifically plead the grounds on which they rely. He suggests this omission is fatal to their claim. Mr Atchison is correct that there is no formal expression in the pleadings of the grounds on which the claim is advanced. However, no Statement of Claim was served before the matter was remitted. When the matter was remitted and the Plaintiffs served Replies to Particulars the Defendants seemingly took no issue with the adequacy of these Replies. In any event, at all material times, the Defendants knew the case they had to meet was one

of prescription and in my view were not prejudiced by the failure of the Plaintiffs to particularise it.

The Prescription Act 1832

[36] In 1966, with good reason, the English Law Committee's 14th Report described the 1832 Act as "one of the worst drafted Acts on the Statute Book." However, there exist a number of judicial authorities in this jurisdiction which have helped to cast light on the Act.

[37] In *Finlay v Cullen* [2014] NI Ch17, Deeny J noting the Act's reach to the island of Ireland said that:

> *"[11] ……. The Prescription Act 1832, c.71, by S.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."*

[38] In *Steele*, Judge Duncan said of the Act:

> *"[36] Section 2 of the 1832 Act provides that:*
>
> *"No claim which may be lawfully made at common law, by custom, prescription, or grant to any way or other easement….when such way….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….was first enjoyed at any time prior to such period of twenty years…"*

[39] The 1832 Act thus provides that a plaintiff may establish an easement by showing a period of twenty years user "without interruption." Section 4 of the Act clarifies that the twenty year period:

> *"shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which said 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 written notice thereof, and of the person making or authorising the same to be made."*

[40] One of the purposes of the Act was to facilitate claims based on prescription. However, due to some of the hurdles the Act places in the path of a plaintiff, it can often prove difficult for them to successfully establish easements by reason of it.

[41] In the instant case, one of the difficulties that often confronts a plaintiff seeking to rely on the Act, namely the requirement that user occur immediately before the issue of proceedings, does not arise as proceedings in this case were issued expeditiously.

[42] However, s4 of the Act also means that if there is an interruption in use of the rights claimed for a period of at least a year this is fatal to a claim brought under the Act. If the interruption lasts for more than a year, the Plaintiff is required to prove that he did not acquiesce in it.

[43] The hurdles contained within the Act often leave a plaintiff having to proceed by relying on the doctrine of Lost Modern Grant which existed before the Act. As Gillen J put it in *McNulty v Ross* [2015] NIQB 42 para 18:

> *"A claim under the doctrine of lost modern grant has been popular in the last 40 years as a way of getting round the problems caused by the Prescription Act following Tehidy Minerals Limited v Norman (1971) 2QB 528."*

Lost Modern Grant

[44] Again in *Steele*, Judge Duncan succinctly summarised the law on the acquisition of an easement by way of Lost Modern Grant when he said:

> *"[35] Under this doctrine the courts are prepared to indulge in an alleged fiction that the easement…..claimed was the subject of a grant executed since 1189 but before the action brought by the claimant, and that the deed of grant has been lost and so cannot be produced in evidence… [T]he presumption arose that user from living memory or a period of 20 years prior to the action*

established the existence of a lost grant." [Wylie, Irish Land Law 5th Ed. at 7.69]. The fact that there existed unity of title subsequent to 1189 does not assist the first and second defendants under this doctrine. The doctrine was fully considered by the House of Lords in Dalton v Angus (1881) 6 App Cas 740 and a modern statement of the effect of that case was provided by Buckley LJ delivering the judgment of the Court of Appeal in England in Tehidy Minerals Limited v Norman [1971] 2 QB 528 at 552.

> *'In our judgment Angus v Dalton decides that, where there has been upwards of twenty years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the twenty year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made'."*

Conditions that must be met for prescription to be established

[45] However, if a claim for easements is pursued for it to succeed the Plaintiffs must satisfy the court that two conditions have been met namely there must be both 'user as of right' and 'continuous user' of the alleged easements.

User as of Right

[46] In a claim based on prescription the court is being asked to make a presumption that the claim has a lawful origin. The plaintiff invites the court to conclude that they have used the easement over the requisite period of time as if they were entitled to have done so or to put it another way that they exercised 'user as of right.'

[47] The phrase "as of right" was considered by Lord Neuberger in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 at paragraph [15]:

> *"….the legal meaning of the expression 'as of right' is, somewhat counterintuitively, almost the converse of 'of right' or 'by right'. Thus, if a person uses privately owned*

> *land 'of right' or 'by right', the user will have been permitted by the landowner - hence the use is rightful. However, if the use of such land is 'as of right' it is without the permission of the landowner, and therefore is not 'of right' – hence 'as of right'. The significance of the little word 'as' is therefore crucial, and renders the expression 'as of right' effectively the antithesis of 'of right or 'by right'."*

[48] The courts in this jurisdiction have borrowed from the terminology of Roman Law and considered that if you are a user as of right your use must be "nec vi, nec clam and nec pecario" [*Eaton v Swansea Waterworks Co* (1851) 17 QB 275 Erle J]. In other words, use must be without force, secrecy or permission.

[49] In Gale on Easements 20th edition at para 4-102, the learned authors say:

> *"As of right" requires one to look at the quality and character of the user and to ask whether the user is of a kind which would be enjoyed by a person having such a right. The user must be such as to convey the impression that such a right is asserted; it is not relevant to inquire into the subjective beliefs of the persons carrying on the user and, in particular, it is not necessary for such persons to show that they believed that they already possessed the right claimed. If a right is to be claimed by prescription, the persons claiming that right "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off or eventually finding that they have established the asserted right against him". If a person with the benefit of an express grant of a right of way uses the way in a manner which is outside the scope of the express right of way but he tells the servient owner that by his use he does not intend to acquire any prescriptive rights outside the scope of the express right of way, his user will not be of such a character as to bring home to the servient owner that a continuous right of enjoyment, wider than the express right of way, is being asserted."*

Continuous User

[50] In *Wylie*, Irish Law Land 2nd ed at 6.077, the learned author comments that in addition to the user being 'as of right':

> *"It is also a settled principle that the user or enjoyment must be continuous for a claim by prescription to succeed"*

[51] In *Hollins v Verney* (1883-84) 13 QBD 304, a case under the 1832 Act, Lindley LJ said:

> *"No user can be sufficient which does not raise a reasonable inference of such continuous enjoyment."*

He went on to say that no use will suffice unless:

> *"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."*

[52] In *Finlay v Cullen* [2014] NI Ch17 at para 29, Deeny J in addressing the issue of the need for continuous use said:

> *"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."*

[53] One issue of difference between the requirements under the Act and a claim by way of Lost Modern Grant is that the Act requires the 20 years to have been in the 20 year period leading up to the issue of proceedings whereas in a claim by way of Lost Modern Grant the 20 years of continuous user can be accumulated at any stage.

[54] Thus, in *Finlay*, Deeny J said at para 23:

> *"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 modern 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."*

[55] In short compass, as Deeny J put it succinctly in *Finlay* at para 30:

> *"… 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."*

Parking as an easement

[56] In the instant case, the Plaintiffs invite the court not only to conclude they have established a right of way but in addition they claim the right to park vehicles by reason of having done so repeatedly for twenty years to the requisite standard. In seeking to establish an easement to park the Plaintiffs must, just as in their claim for a right of way, establish both user as of right and continuous user. However, a right to park brings with it some additional requirements.

[57] With the proliferation in vehicle ownership in recent times, issues concerning rights to park have come before the courts with increased frequency. This has allowed some specific jurisprudence to be developed. Much of the jurisprudence arising from parking cases is due to their differences with other forms of easement. Traditionally, easements have been considered a non-possessory interest in land. However, the static nature of parking a vehicle on servient land often has the practical effect of taking possession of the land to the exclusion of the servient owner. To this extent, parking cases differ from many other easements other than perhaps those concerning rights to store.

[58] The acquisition of a right to park can, like other easements, arise by prescription. The learned authors of Gale on Easements comment at para 9.134 that:

> *"There is no reason why parking rights cannot be acquired by prescription or under the doctrine of lost modern grant."*

[59] In terms of repeated acts of parking over the 20 year period being capable of constituting an easement, the learned authors of Gale comment at para 9.119 they can, provided two matters concerning the right are satisfied namely:

> *"(a) it is made appurtenant to a dominant tenement; and*

> *(b) the right is not so excessive as to exclude the servient owner and leave him without any use of the area in question for parking or anything else."*

In the instance case, there is no issue that there are nearby dominant tenements to which the right to park sought is appurtenant. However, the issue of the extent of the right sought is a matter which this court will have to address.

[60] The law is well settled that where the right to park sought is not a mere incident but rather effectively amounts to occupation, ousting the servient owner from the servient lands, this cannot amount to an easement. In *Copeland v Greenhalf* [1952] Ch.488, Upjohn J said that in such circumstances a claim *"really amounts to a claim to a joint user of the land…"*

[61] However, where the right to park is only over a portion of the servient lands, an easement to park can exist provided it does not unduly restrict the servient owner's use of their lands. In *London & Blenheim Estates v Ladbrokes Retail Parks* [1992] 1 WLR 1278, Judge Baker QC said, in a comment with which the Court of Appeal subsequently did not take issue:

> *"The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it could not be an easement."*

[62] Subsequently, in *Batchelor v Marlow* [2003] 1 WLR 764, the Court of Appeal adopting the approach of Judge Baker QC in *London & Blenheim Estates* held that an easement to park could not exist if it had the effect of making the servient owner's ownership of their lands *"illusory."*

[63] Despite some trenchant criticism of the approach taken in *Batchelor* by the House of Lords in *Moncrieff v Jamieson* [2007] 1 WLR 2620, their Lordships did not overrule it.

[64] Thus, where the right to park is sought over part of the servient lands, provided the easement to park does not prevent the servient owner from the reasonable use of them a plaintiff will be entitled to such an easement if they can demonstrate continuous acts of enjoyment of the right to park for twenty years noticeable by any owner of the servient tenement of full age and reason.

The Evidence

[65] No expert witnesses were called to give evidence in this case. Rather, over several days at hearing, the court heard from numerous witnesses of fact. All of these witnesses had, before giving evidence, filed affidavits. Several of the witnesses were cross-examined at some length on the veracity of their evidence. I do not intend to unnecessarily burden this judgment by setting out in extenso all of the evidence each witness gave but rather I intend to record the salient issues arising out of their evidence in light of the issues this court has to determine regarding the two easements sought.

Witnesses called by the Plaintiffs

Stuart Knox

[66] Stuart Knox swore two affidavits in connection with these proceedings being affidavits sworn on 11 December 2017 and 8 March 2018. In addition, he gave oral evidence lasting several days.

General credibility challenge to Stuart Knox

[67] Much of the lengthy cross-examination of Stuart Knox involved an extensive challenge to his general credibility as being a witness of truth. This attack by Mr Atchison was launched on several fronts. These included the suggestions that Stuart Knox had:

- Wrongfully applied for rate relief for The Barn.

- Deprived Her Majesty's Revenue & Customs of their full entitlement in respect of Stamp Duty in relation to a Building Agreement he had entered into with the owners of 51 Bushfoot Road as part of his construction of The Barn

- Withheld photographs from the court that would show the disputed lands for the period 1983 to 2007 as presumably they were not supportive of his case.

- Deprived Her Majesty's Revenue & Customs of their full entitlement in respect of his purchase of 45 and 47 Bushfoot Road.

- Misled the court about the extent of business dealings he had with the Bustard family.

[68] In relation to each of the allegations put to Stuart Knox there was a general, steadfast denial of wrongdoing on his part.

[69] In *Thornton v NIHE* [2010] NIQB 4, Gillen J said of the court's task when assessing credibility that:

> *"[12] Credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.*
>
> *[13] In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:*
>
> *The inherent probability or improbability of representations of fact*
>
> *The presence of independent evidence tending to corroborate or undermine any given statement of fact*
>
> *The presence of contemporaneous records*
>
> *The demeanour of witnesses e.g. does he equivocate in cross examination*
>
> *The frailty of the population at large in accurately recollecting and describing events in the distant past*
>
> *Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication*
>
> *Does the witness have a motive for misleading the court*
>
> *Weigh up one witness against another."*

[70] In relation to Stuart Knox's general credibility, having observed his demeanour as he gave his oral evidence and, having noted the answers he gave, I do not regard him by nature to be a dishonest person. Furthermore, I do not regard him as someone who was seeking to mislead the court. His struggle to provide comprehensive answers to the allegations posed was in my view caused in part by the passage of time, the absence of a comprehensive paper trail to help refresh memory and my perception that he is someone not given over to matters of detail.

Specific credibility challenge to Stuart Knox on the timing of his assertion of the two easements he now contends for

[71] Part of the case advanced by the Defendants was a specific credibility challenge against Stuart Knox in connection with the easements for which he contends. The basis of this challenge was his alleged failure to alert the Defendants to the existent of the easements for which he now contends in a timely fashion. Indeed, the Defendants go further and contend that the failure of Stuart Knox to do so means he is in law estopped from being granted the relief he seeks. This part of the Defendants credibility challenge to Stuart Knox covers the period from early 2017 up to in or around October 2017, shortly before proceedings were issued.

[72] On 24 February 2017, Seymour Sweeney submitted an application for planning permission seeking to convert The Shed into a single dwelling. Ross Sweeney said that in both late February and early March 2017 he made efforts to contact Stuart Knox to discuss the planning application that had been submitted. Stuart Knox in giving evidence was initially uncertain as to precisely when he first became aware of the application for planning permission having been submitted. Ross Sweeney said that he had a telephone conversation with Stuart Knox on 4 March 2017 and agreed to email his plans for the proposed development of The Shed to him. Stuart Knox accepted these plans were indeed sent to him by email on 6 March 2017. In his email of 6 March 2017, Ross Sweeney made mention of a meeting he was expecting to have with Stuart Knox in just over a week's time. It would appear however that the meeting did not take place as Stuart Knox cancelled it.

[73] The Defendants suggest that the next interaction with Stuart Knox occurred later in March 2017 when they happened to meet him at the Bushfoot Clachan and took the opportunity to speak to him about their proposals. They suggest during this conversation Stuart Knox did not seek any further details about the proposals save for an assurance that the footprint of The Shed would not be increased. Stuart Knox did not recall a conversation of this nature occurring in March. Rather he suggested a conversation occurred in May. The Defendants recall that Stuart Knox wished them well with their proposed development. On 10 April 2017, Stuart Knox together with two of the other Plaintiffs, namely Katy Best and Michelle Turtle lodged objections to the application for planning permission. The Defendants claim that they were not aware that the objections had been lodged until late June 2017 due to a delay in them being uploaded onto the Planning Portal website. The print out from the Portal suggests they were uploaded on 30 May 2017.

[74] Seymour Sweeney says that in May 2017 he spoke again to Stuart Knox and told him that Ross Sweeney was in discussions with Sir Malcolm MacNaghten with a view to acquiring the disputed ground and that, if these proved fruitful, a fence would be erected and indicated the likely course it would take. Seymour Sweeney says Stuart Knox did not object to the proposed erection of a fence. Stuart Knox accepts he had a conversation with Seymour Sweeney about the erection of a fence but believes it was in June not May. It is common case that Stuart Knox did not object to the erection of a fence per se. However, Stuart Knox says his assumption

was that it would not affect his ability to park vehicles on the disputed ground. Indeed, he claims his car was parked on the disputed ground while the conversation with Seymour Sweeney took place.

[75] Seymour Sweeney claims that after Ross Sweeney had acquired the disputed ground and the fence was erected, he had a further conversation with Stuart Knox in late June. Seymour Sweeney said that Stuart Knox raised issue with the fence following a different course than he had been led to believe it would, but when Seymour Sweeney explained the reason for this the matter seemingly rested there. However, Seymour Sweeney said that on 8 July 2017 Stuart Knox again said to him about the fence being in the wrong positon and that he would furnish a map to him but this was never done.

[76] It would appear that thereafter Stuart Knox instructed his solicitors, MTB Law, to take matters up on his behalf. MTB's first letter was written on 3 August 2017. The Defendants suggest that the oblique nature of this letter with its reference to the disputed ground simply being *"used by our client"* is a telling omission as it fails to particularise the specific rights now contended for. The Defendants point to the fact that it is not until further correspondence sent by MTB dated 25 October 2017 that a right to park and a right of way were specifically asserted. They are critical of the content of this letter notably in what they correctly suggest is an overstatement that fencing off the disputed ground had left their client Stuart Knox *"nowhere to park his vehicle…"*

[77] In relation to the period of time from February 2017 to October 2017 there is some commonality between the recollections of Stuart Knox and the Defendants: Stuart Knox was made aware of the plans for The Shed; he objected to the application for planning permission; he knew the Defendants were hoping to acquire the disputed ground; if they did so they intended to erect a fence; and that in due course he asserted rights over the disputed ground.

[78] That having been said, the Defendants account is more comprehensive and differs in some respects from that of Stuart Knox. In relation to this aspect of the case, I consider the Defendants to be better historians than Stuart Knox.

[79] As a finding of fact, I find that it was in the letter from MTB dated 3 August 2017 that Stuart Knox first asserted that he made use of the disputed lands to the extent he enjoyed some rights over them. It was not until the letter of 25 October 2017 that these were particularised. In essence. his claim took shape as time progressed.

[80] However, simply by reason of the fact that Stuart Knox did not assert the rights he now claims earlier than he did does not in my view preclude those rights from being in existence. While his reticence to articulate his case clearly at an early date is a factor the court will take account of, in my view it is necessary to examine

the entirety of the evidence in this case before reaching any conclusions on the merits of the Plaintiffs' claims.

Familiarity with the Bushfoot Clachan

[81] Issue was taken as to when the use of the dominant tenements by the Plaintiffs commenced. The Plaintiffs suggest it was in 1984 in respect of Bush Cottage and 1985 for Wee Bush. The Defendants suggest that given the renovations Stuart Knox was undertaking at that time occupation did not start until 1985 for Wee Bush and 1987 for Bush Cottage. While I note that Stuart Knox was undertaking renovation works I am nevertheless satisfied he was regularly present at the Bushfoot Clachan while the works were progressing. I am of the view that Stuart Knox's evidence is correct and that his use of Bush Cottage began in 1984 and of Wee Bush in 1985 albeit that renovation works were taking place which disrupted his occupation for periods of time during those years.

[82] In terms of The Barn, Stuart Knox was not registered as the owner of part of the lands on which it is built, namely Folios AN32479 and Folio AN101614, until 2003, the year the construction of The Barn was completed. His occupation of these lands only commenced then. However, part of The Barn is also situated on Folio AN203186. These lands were originally part of Folio 36900 which was first registered to Stuart Knox in 1985 and was originally part of Bush Cottage. Therefore, in my view, Stuart Knox has been using this part only of the lands now being part of The Barn since the time he first began to use Bush Cottage in 1984.

[83] Stuart Knox's evidence was to the effect that in the 1980s, the Knox family spent the majority of their weekends and summer holidays at the Bushfoot Clachan. While this use declined somewhat in the 1990s, as his children had interests elsewhere, Stuart Knox claimed his family still spent a significant amount of time at the Clachan.

[84] Aside from the specific issues of parking and walking on the disputed ground, Stuart Knox gave evidence that he and his family in a variety of ways tended to the disputed ground including cutting the grass and planting flowers. Other witnesses gave evidence to this as well.

[85] Stuart Knox also owns a number of other holiday homes, namely three in France and one in South Africa. He purchased the first of these in 2000. Since then, both he and his family have made some use of them for holidays. The availability of these alternative holiday venues has to a degree caused the Plaintiffs' use of their properties at the Bushfoot Clachan to decrease.

[86] In relation to their familiarity with the Bushfoot Clachan, I am of the view that since 1984 the Plaintiffs have regularly spent a good deal of their weekend and holiday time there.

Use of the disputed ground for car parking

[87] Stuart Knox claimed that from the time he first acquired property at the Bushfoot Clachan he has parked cars on the disputed ground. He claimed that he continued to do this until it was fenced off in June 2017. A series of family photographs were introduced into evidence which do appear to show, at various times, cars parked on the disputed ground.

[88] In respect of the period from 2001 to 2003, when The Barn was being built, Stuart Knox accepted his builder, Sean Christie, had used the disputed ground for the storage of materials. Minutes, written by Stuart Knox's architects, of what is described as a "Pre-contract meeting" held on 19 April 2001 note that Stuart Knox had indicated the disputed ground could be used by his builder for storage. The photographic evidence before the court supports Stuart Knox's recollection of the disputed ground being used for the storage of builder's materials during construction of The Barn. The said building works lasted from May 2001 until February 2003, a period of some 21 months. During this period, Stuart Knox accepted he would have parked his car in the nearby public car park. Stuart Knox claimed that after the construction works were completed, he had Sean Christie make good the disputed ground which included levelling and reseeding and thereafter he continued to park there.

[89] Stuart Knox recalled that since in or around 1984 he has owned a series of distinctive Morgan sports cars, which were some of the ones he parked on the disputed ground. He suggested the evidence of other witnesses not having seen these cars or indeed any cars parked on the disputed area might be explained by the restricted view there is of the disputed lands.

[90] Stuart Knox said that at the time he bought his first property at the Bushfoot Clachan, the nearby golf club had not yet constructed its car park and thus the public car park close to the Bushfoot Clachan was often used both by golfers and members of the public leaving him little room to park his cars there.

[91] When pressed on whether he parked cars on his own lands to the rear of Bush Cottage and Wee Bush, Stuart Knox was adamant that these lands were principally a garden for his family to enjoy and not a car park. He claimed cars were really only on that land for short periods when loading and unloading was taking place.

[92] It was suggested to Stuart Knox that when he demolished 43 Bushfoot Road and it became a hard standing surface he had available to him yet more car parking space. He was, however, adamant this newly created space provided parking for his tenants in Wee Bush and thus did not provide him with any additional space to park his vehicles. Stuart Knox did concede that on occasions before 2001 he parked cars in an old covered outhouse that was situated where The Barn now sits.

[93] In June 2000, when planning permission was granted for what became The Barn at 53 Bushfoot Road, the approved drawings suggest that at that stage provision was to be made for three parking spaces on what would have previously formed the garden of 45 and 47 Bushfoot Road. However, Stuart Knox suggested this garden area has continued to be used as a garden and is not for the parking of cars. That said, a series of photographs were put to Stuart Knox that do show cars parked in the garden area.

[94] Stuart Knox claimed in his affidavit evidence that he had nowhere to park his car securely with the implication being he parked on the disputed ground. While I find that on occasions he did park on the disputed ground, I am satisfied that he also parked in a variety of places at the Bushfoot Clachan including his garage, his back garden, the hard standing area and the public car park.

Use of the disputed ground as a right of way

[95] Stuart Knox claimed that throughout his ownership of properties at the Bushfoot Clachan, both he and his family regularly walked over the disputed ground as they headed towards a laneway that leads to the part of the route formerly operated by the Giant's Causeway, Portrush and Bush Valley Railway & Tramway Company Limited ("the tramway.")

[96] He described the alleged right of way as the easy, safe, convenient and direct route from his properties in the Bushfoot Clachan. In terms of safety, he suggested it avoided coming close to cars in the nearby public car park.

Dr Neville Hicks

[97] Dr Hicks gave evidence to the court both by way of an Affidavit sworn on 26 April 2018 and in addition by way of oral evidence.

Familiarity with the Bushfoot Clachan

[98] Since 1988, he has owned a holiday home at 41A Bushfoot Road, being part of the Bushfoot Clachan. He and his wife have used their holiday home as such on a regular basis over the years. In relation to the disputed ground, he said he had witnessed Stuart Knox both cutting the grass and planting flowers on it.

Use of the disputed ground by the Plaintiffs for parking cars

[99] In relation to the parking of cars on the disputed ground, the evidence of Dr Hicks was that he had seen cars parked there. His assumption was that the cars were those of the Knox family but he accepted it was only an assumption.

Use of the disputed ground as a right of way

[100] In relation to the alleged right of way, Dr Hicks said he and his wife walked across the land to the rear of The Shed in the same way as others did as it was the most direct route to the tramway. However, candidly, Dr Hicks said he could not recall seeing the Plaintiffs walking over the disputed ground.

The Bonnars

[101] Dr and Mrs Bonnar both gave evidence to the court both by way of Affidavits sworn on 26 April 2018 and in addition by way of oral evidence.

Familiarity with the Bushfoot Clachan

[102] Dr Bonnar and his wife Shirley purchased Strawbridge House, 39 Bushfoot Road in 2010. Following the purchase, they carried out extensive renovation works to it and then rented it out for a period of time. As such, their period of regular and significant occupation of it began in late 2016.

Use of the disputed ground by the Plaintiffs for parking cars

[103] In relation to parking on the disputed ground, Dr Bonnar said that he observed Stuart Knox's car being parked on it at least once a month but that at certain times of the year he would have observed it more than this. He recalled the Plaintiffs' cars also being parked at other locations in the vicinity.

[104] Shirley Bonnar's evidence, like that of her husband, was that she too had observed Stuart Knox having parked his car on the disputed ground.

Daphne Bustard

[105] Daphne Bustard gave evidence to the court both by way of an Affidavit sworn on 24 April 2018 and in addition by way of oral evidence.

[106] In the same way that Stuart Knox's general credibility as a witness of truth was attacked, so was Daphne Bustard's. This attack by Mr Atchison was launched on several fronts. These included the suggestions that Daphne Bustard had:

- deprived Her Majesty's Revenue & Customs of their full entitlement in respect of Stamp Duty in relation to a Building Agreement she and her late husband Winston had entered into with Stuart Knox, as part of his construction of The Barn.

- was motivated in giving her evidence by ill-will she bore towards Seymour Sweeney arising out of his employment of her late husband.

[107] Daphne Bustard did not accept there was foundation to any of the challenges made to her credibility. In assessing the credibility of Daphne Bustard, I bear in mind my earlier comments on how the court approaches this task.

[108] I find there is no merit whatsoever in the credibility challenge to Daphne Bustard. I found her to be someone who was doing her best at all times to assist the court by giving a truthful account of what she could recall.

Familiarity with the Bushfoot Clachan

[109] Daphne Bustard has resided at Bushfoot House, 51 Bushfoot Road, being a property in close proximity to the disputed ground, since 1975. In relation to the use made of the disputed ground, she gave evidence of the use over the years for a variety of matters including the storage of goods and materials; for children to play on; for the planting of flowers and even for the burial of a hamster.

Use of the disputed ground by the Plaintiffs for parking cars

[110] In terms of the Plaintiffs' use of the disputed ground for parking, her evidence was that they did park vehicles on it. However, she accepted that they also parked elsewhere.

[111] She conceded that when The Barn was being constructed between 2001 and 2003, Stuart Knox would have parked in the public car park.

[112] In terms of the frequency with which she observed Stuart Knox parking on the disputed ground, while in her affidavit she had stated he had parked there "on almost every occasion" he had been at the Bushfoot Clachan, she accepted in cross-examination that comment was overstated.

[113] She gave evidence of a conversation in 2001 she had had with Sir Patrick MacNaghten, the then owner of the disputed lands, when she said that Sir Patrick on observing Stuart Knox's car parked on the disputed ground, joked that perhaps he should be charging Stuart Knox rent.

Use of the disputed ground as a right of way

[114] She did not give evidence of having seen the Plaintiffs using the disputed ground as a right of way.

Alistair John Rankin

[115] Alistair Rankin gave evidence on behalf of the Plaintiffs. In addition to his oral evidence, he had also sworn an affidavit on 15 November 2017.

[116] A two pronged credibility challenge was launched against Mr Rankin arising from what was suggested as his opposition to the development of The Shed.

- Firstly, it was suggested to him that he had prompted Stuart Knox to stake a claim for the easements which if successful would sterilise the disputed ground and thus restrict the development of The Shed. Mr Rankin denied that he was the instigator of the claim for easements and recalled that it was a son in law of Stuart Knox, who like Mr Rankin is a solicitor, who had initially raised this issue.

- Secondly, it was suggested to Mr Rankin that he had an established history of objecting to planning applications made by Seymour Sweeney elsewhere and that he carried on this pattern in the instant case by encouraging Stuart Knox to object alongside him. Mr Rankin denied acting with an improper motive and said all he did was to discuss his genuine planning concerns with his neighbour who would be similarly affected.

[117] While it seems to me Mr Rankin would much prefer that The Shed not be developed in the way that is proposed, I find there to be no merit in the challenge to his credibility.

Familiarity with the Bushfoot Clachan

[118] Mr Rankin and his wife Gillian have owned a property at the Bushfoot Clachan, namely 'The Barn at The Back,' 41C Bushfoot Road, since 1988. The Rankins have used this property as a holiday home on a regular basis over the years.

Use of the disputed ground by the Plaintiffs for parking cars

[119] Mr Rankin's evidence on the issue of Stuart Knox parking cars on the disputed ground was stated succinctly in his affidavit when he said "*It was utilised to park at least one, if not more vehicles. I regularly noticed vehicles being parked there.*"

Use of the disputed ground as a right of way

[120] In relation to the use of the disputed ground as a right of way, Mr Rankin gave evidence that he and his family walked across the area when heading in the direction of the tramway.

Michelle Turtle

[121] Michelle Turtle, the fourth named Plaintiff, gave oral evidence to the court in addition to the evidence given in an affidavit she had sworn on 19 April 2018.

Familiarity with the Bushfoot Clachan

[122] Her evidence was that her earliest memories of the Bushfoot Clachan are from the mid-1980s when she was of primary school age. The account she gave of the fluctuating nature of the use of the various properties the family owned at the Bushfoot Clachan accords with the account given by her father. I do not find the suggestion made to her by Mr Atchison that she had exaggerated the family's use of their properties to be well founded. Aside from her evidence about the easements that are claimed, she recalled helping her late mother tend the disputed ground which included cutting the grass and planting flowers.

Use of the disputed ground for car parking

[123] Michelle Turtle's evidence was that the disputed ground was regularly used by the Plaintiffs for parking cars.

[124] She was taken through a series of photographs which I am satisfied do show cars on a variety of occasions being parked on the disputed ground.

[125] Like her father, she gave evidence that on occasions when the family arrived at the Bushfoot Clachan they would park vehicles within the curtilage of their lands to unload but would thereafter park them on the disputed ground.

[126] Michelle Turtle did accept that both within the curtilage of the Knox properties and outside them there are other places that parking can occur at the Bushfoot Clachan.

Use of the disputed ground as a right of way

[127] In terms of the use of the disputed ground as a right of way, Michelle Turtle's evidence was that she and her sisters always traversed it as they made their way towards the tramline. She put it as they were going over a well-trodden path.

Katy Emma Best and Gemma Shields

[128] On 18 April 2018, the second and third named Plaintiffs, Katy Best and Gemma Shields, swore affidavits in these proceedings. However, when the time came when they might have been called to give oral evidence, Mr Gibson explained to the court that neither deponent was in a position to give oral evidence to the court.

[129] In relation to Katy Best, the reason proffered for her non-attendance was that her work commitments at Belfast City Airport in the context of particular issues the airport was confronting precluded her from attending.

[130] In relation to Gemma Shields the reasons advanced were on the basis of her living in England with certain child care commitments to undertake there.

[131] Despite their failure to give evidence, Mr Gibson urged me to have regard to the averments made in their affidavits in any event by reason of the provisions of the Civil Evidence (NI) Order 1997. Mr Atchison in his written submissions argues the affidavits are inadmissible.

[132] In Equity cases in the County Court, the Consolidated County Court Practice Direction No 1 of 2003 provides that:

> *"(1) The plaintiff must lodge an affidavit setting out the particulars of the claim and the grounds therefor and proper maps and/or photographs showing the area in dispute must be exhibited to the affidavit. The affidavit must be delivered to the court office and to the defendant(s) at least four weeks prior to the date fixed for hearing of the case….."*

[133] Indeed, it has become common practice in cases like this for the court to invite all witnesses not just the parties to provide evidence by way of affidavit. Indeed, all the witnesses who had been expected to give evidence in this case swore affidavits.

[134] The difficulty with the court having recourse to the affidavits of Katy Best and Gemma Shields without them also giving oral evidence is that what is left before the court is evidence that is essentially hearsay in nature in that what is said therein is not being given in court and thus the makers cannot be subject to cross-examination.

[135] The admission of hearsay evidence in civil proceedings in Northern Ireland is now subject to the provisions of the Civil Evidence (Northern Ireland) Order 1997 ("the 1997 Order").

[136] In *Breslin & others v Murphy & another* [2013] NIQB 35, Gillen J said:

> *"[60] Much of the evidence in this case was hearsay evidence. The 1997 Order was considered in the CA and from that judgment I derived the following principles relevant to the Order:*
>
> *The central principle is that in civil law hearsay evidence is no longer inadmissible. The Order recognises the evidential problems created by such evidence the central weakness of which is that the opposing party is deprived of the benefit of cross-examination to test the correctness of evidence and the court is deprived of seeing and hearing the witness, to*

observe his demeanour and assess his veracity. It is essential to remember that although hearsay is thereby made admissible in more circumstances than it previously was, this does not make it the same as first-hand evidence. It is not. It is necessarily second-hand and for that reason very often second best. Because it is second-hand, it is that much more difficult to test and assess. Those very real risks of hearsay evidence, which under lay the common law rule generally excluding it, remain critical to its management and the weight to be given to it. There will be of course many cases where the evidence will not suffer from the risks of unreliability which often attend such evidence and where its reliability can be realistically assessed. (See in the criminal law context R v Riat (2013) 1 All ER 349 at [3]).

Provision is made for a party to call, if possible, the witness whose hearsay evidence has been adduced by another party (Articles 4-6).

Article 4(2) directs the court to consider whether the party concerned has been given a proper opportunity to investigate the credibility of the witness and to investigate his statement.

The Order at Article 5 sets out the factors to be taken into account when weighing the evidence which are as follows:

> *'(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.*
>
> *(2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of notice given.*
>
> *(3) Regard may also be had, in particular, to the following:*

(a) Whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;

(b) Whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) Whether the evidence involves multiple hearsay;

(d) Whether any person involved had a motive to conceal or misrepresent matters;

(e) Whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) Whether the circumstances on which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight'."

[137] Having applied the provisions of the 1997 Order in the way that I must, I intend to give no weight to the averments made by Ms Best in her affidavit. I note in particular that no notice that she would not be attending was afforded to the Defendants thus depriving them of the opportunity to have her evidence tested by cross-examination. Furthermore, with certain adjustments either to the court timetable or by the use of live link, it would have been possible for her to give oral evidence.

[138] However, Ms Shields made it clear in paragraph 11 of her Affidavit of April 2018 that she would not be attending court. Despite this early indication it would seem no steps were taken by the Defendants to have her made available for cross-examination. That having been said I do of course note that what she says in her affidavit has not been tested by cross-examination. I therefore intend to give what she says some, but that said, limited weight. The gist of what Ms Shields says is that her recollection is of the family using the disputed ground for parking vehicles and that they both played and walked across it.

The Defendants' case

[139] Both of the Defendants in this case gave evidence and in addition they called a number of witnesses.

Sean Christie

[140] Sean Christie gave oral evidence to the court in addition to the evidence given in an affidavit he had sworn on 13 March 2018. Sean Christie has been in the building trade for many years. While his work has ebbed and flowed over the years, it would appear that Seymour Sweeney has been his main source of business.

Familiarity with the Bushfoot Clachan

[141] In relation to the Bushfoot Clachan, it would appear that Sean Christie has carried out work there for both the Plaintiffs and the Defendants.

[142] In relation to the Plaintiffs, Sean Christie was the Project Manager from 2001 to 2003 for the construction of The Barn at 53 Bushfoot Road. It was during this period that he established a builder's compound on the disputed ground.

[143] In relation to working for the Defendants, Sean Christie said that he was at the Bushfoot Clachan in 2008/2009 to carry out work to The Shed and in 2017 to erect and then repair the fence on the disputed ground.

Use of the disputed ground for car parking

[144] Sean Christie's evidence was that at no time when he was at the Bushfoot Clachan, whether working for Stuart Knox or for the Defendants, did he see cars parked on the disputed ground save for one occasion in 2017 when the driver moved it without issue at his request.

[145] Of course, it is no surprise that when he was project managing the construction of The Barn no cars were parked on the disputed ground since during this construction it was used as a builder's compound.

[146] Sean Christie's evidence was that prior to using the disputed ground for his compound it was in such a state that it could not have been used for parking cars nor for walking on. Surprisingly, no reference to this state of the disputed ground before works were commenced in 2001 is to be found in Sean Christie's affidavit.

Ian Chapman

[147] Ian Chapman gave oral evidence to the court in addition to the evidence given in an affidavit he had sworn on 12 April 2018.

Familiarity with the Bushfoot Clachan

[148] Ian Chapman worked for the MacNaghten family from 1987 to 2015 in various roles including as a Game Keeper and the Estate Manager. In his initial role as a Game Keeper it would seem he had little, if any, need to be in the vicinity of the disputed ground. However, in more recent times when he became the Estate Manager, Ian Chapman said he would regularly have been in the vicinity of the disputed ground in connection with that role.

Use of the disputed ground for parking cars

[149] Ian Chapman's evidence was that he never observed vehicles parked on the disputed ground.

Use of the disputed ground as a right of way

[150] Similarly, Ian Chapman said that when he was in the vicinity of the disputed ground he did not observe anyone walking across the disputed ground.

Ian Blair

[151] Ian Blair gave oral evidence to the court in addition to the evidence given in an affidavit he had sworn on 11 April 2018.

Familiarity with the Bushfoot Clachan

[152] Since 2014 he has been the Secretary Manager of Bushfoot Golf Club which is located in close proximity to the disputed ground. In addition to being present at the Club in connection with his employment, he is also a playing member.

Use of the disputed ground for parking cars

[153] Ian Blair's evidence was that he never observed vehicles parked on the disputed ground. However, he was able to recall Stuart Knox's distinctive Morgan car being parked on the Bushfoot Road.

Use of the disputed ground as a right of way

[154] Similarly, Ian Blair said that he had not observed anyone walking across the disputed ground.

Leonard McIlroy

[155] Leonard McIlroy gave oral evidence to the court in addition to the evidence given in an affidavit he had sworn on 13 April 2018.

Familiarity with the Bushfoot Clachan

[156] Leonard McIlroy is the President of Bushfoot Golf Club and has been associated with it for in or around 50 years. He also lives nearby and thus would regularly be in the vicinity of the disputed ground. His evidence was that the 9th/18th Green and the 17th Tee of Bushfoot Golf Club provides a "fairly uninterrupted view" of the disputed ground. Having visited the site at the request of the parties, I am of the view Mr McIlroy has overstated the extent of the view these locations afford of the disputed ground. However, I do accept that an area close to the 9th/18th Green and the 17th Tee affords some view of the disputed ground.

Use of the disputed ground to park cars

[157] Leonard McIlroy's evidence was that he has never seen a vehicle parked on the disputed ground. However, he gave evidence that he has seen Stuart Knox's Morgan parked both on the Bushfoot Road and on the hard standing where 43 used to be.

Use of the disputed ground as a right of way

[158] Leonard McIlroy said that he never seen anyone walking over the disputed ground.

Terence Dobbin

[159] Terence Dobbin gave oral evidence to the court in addition to the evidence given in an affidavit he had sworn on 14 March 2018.

Familiarity with the Bushfoot Clachan

[160] For almost 40 years until 2018, Terence Dobbin was a member of Bushfoot Golf Club and was regularly in the vicinity of the disputed ground. For a period of time, Terence Dobbin also worked as an Estate Agent with the firm of Lindsay Shanks. During the course of his employment with that firm, he acted as one of the selling agents when the Golf Club placed The Shed on the market for sale.

Use of the disputed ground for parking cars

[161] Terence Dobbin's evidence was that he never saw any vehicles parked on the disputed ground. He said that on occasions he did observe Stuart Knox's Morgan parked on the Bushfoot Road.

Use of the disputed ground as a right of way

[162] Terence Dobbin's evidence is that he never saw anyone walk across the disputed ground.

Ross Sweeney

[163] Ross Sweeney, the second named defendant, gave oral evidence to the court in addition to the evidence given in an affidavit he had sworn on 29 January 2018. He also adopted the evidence contained in his father's affidavits sworn on 29 January 2018 and 14 March 2018 as his evidence also.

Familiarity with the Bushfoot Clachan

[164] Ross Sweeney grew up initially in Portballintrae and then nearby at Runkerry. In 2007, his father purchased The Shed and from then on they together made use of it primarily as a boat store. This caused him to be in the vicinity of the disputed ground.

Use of the disputed ground to park cars

[165] Ross Sweeney said that he never saw vehicles parked on the disputed area.

Use of the disputed ground as a right of way

[166] Ross Sweeney said that he never saw anyone walking over the disputed ground. He also said that in the course of completing his purchase of the disputed ground neither he nor his solicitors were made aware of anyone claiming to enjoy easements over it.

Sir Malcolm MacNaghten

[167] Sir Malcom MacNaghten gave oral evidence to the court in addition to the evidence given in an affidavit he had sworn on 19 April 2018.

Familiarity with the Bushfoot Clachan

[168] Sir Malcolm is a member of the MacNaghten family who, for many years, were the principal landowners in the area. Sir Malcolm succeeded to the lands then forming the MacNaghten estate following the death of his father, Sir Patrick, in 2007.

[169] In relation to the Bushfoot Clachan, Sir Malcom lived there permanently at Strawbridge House, 39 Bushfoot Road from 1997 until 2001 with his family. Between 2001 and 2003, Sir Malcolm split his time between living in England and at Strawbridge House. From 2003 to 2006, Sir Malcom moved to live permanently in

England but made use of Strawbridge House as a holiday home. Thereafter, he has rarely been at the Bushfoot Clachan.

[170] In relation to the disputed ground being previously owned by the MacNaghten family, Sir Malcolm said his knowledge of this "emerged" over time but he certainly knew it by 2002.

[171] Sir Malcolm's said that in general if he noticed someone using MacNaghten lands on a one off basis he would let that go but he would object if he was aware of regular use. Sir Malcolm said that that both he and his father took the view that provided a regular user acknowledged the MacNaghten title they would generally not take issue with continued use.

Use of the disputed ground for parking cars

[172] Sir Malcom's evidence was that he has no recollection of ever having seen vehicles parked on the disputed ground other than an occasional golf course vehicle.

Use of the disputed ground as a right of way

[173] Sir Malcom's evidence was that he had no specific recollection of people using the disputed ground to walk across. He said that due to the nature of the ground to the rear of The Shed to walk there would be hazardous. Given his understanding that no-one enjoyed any rights over the disputed ground, Sir Malcolm said he was quite content to confirm this to Ross Sweeney as part of the conveyancing process when he sold the disputed ground to him in 2017.

Seymour Sweeney

[174] Seymour Sweeney, the first named defendant, was the last witness to give evidence. He gave oral evidence to the court in addition to the evidence given in affidavits he had sworn on 29 January 2018 and 14 March 2018.

Familiarity with the Bushfoot Clachan

[175] He has lived most of his life in the Portballintrae area. In relation to being in the vicinity of the Bushfoot Clachan, he said that from 1963 until 2010 he was a member of the nearby Bushfoot Golf Club.

[176] In 2007, he purchased The Shed from the golf club. After he acquired The Shed he attended at it on a regular basis given he used it as a store. His evidence was that The Shed was sold as having development potential and that while his son, Ross, who now owns it, intends to develop it he does not expect it to be sold thereafter.

Use of the disputed ground for car parking

[177] Seymour Sweeney denied ever having seen anyone parking on the disputed ground. On being taken through a series of photographs which, in my view, did show vehicles parked on the disputed ground, he demonstrated a curious reluctance to accept that was what they showed.

Use of the disputed ground as a right of way

[178] Seymour Sweeney said he never saw anyone walking over that part of the disputed ground at the back of The Shed save that on one occasion in September 2017 when he saw Stuart Knox with another person walking there.

Discussion

[179] At the heart of this case is a claim by the Plaintiffs that their dominant lands now benefit from two easements which they claim to have acquired by exercising them in a sufficient manner on the disputed ground for at least the requisite period of 20 years.

[180] In such a claim, proof of such enjoyment can be evidenced both by acts of use on the part of the persons claiming the easements or of their predecessors in title.

[181] In the instant case two of the folios, namely AN32479 and AN101614, which comprise the lands on which The Barn is partly situated have only been owned by Stuart Knox since 2003. He has not laid before this court evidence to suggest that before he acquired them his predecessors in title enjoyed the easements in respect of the disputed grounds he now contends for. Therefore, in respect of these two Folios, whatever I make of the use of the disputed ground since 2003, insufficient time has accrued to allow these Folios to have either easement sought by prescription.

[182] However, the position is different for all of the remaining Folios making up the dominant tenements. Stuart Knox was first registered as owner of the lands that now form Bush Cottage and Wee Bush on 25 February 1985. In addition, on that day he was also registered as owner of the lands that are now to be found in AN203186 which form part of his title to The Barn.

[183] Since that date in 1985, the said lands have either been registered in the names of Stuart Knox, his late wife or his three daughters, the other Plaintiffs to these proceedings.

[184] In respect of these Folios, it is for the Plaintiffs to satisfy the court that since that day there has been a period of at least twenty years when those Folios benefitted from the easements claimed in the requisite manner the law requires.

[185] On behalf of the Defendants, Mr Atchison submitted that easements acquired by prescription can only exist in respect of Freehold and not Leasehold land. While this has long been the position in England, the courts on this island have taken a different approach and permitted prescriptive easements to be acquired over leasehold land. Wylie, Irish Land Law 2nd edition para 6.079, suggests the reason for the different approach is that historically much land on this island was held by way of leasehold. Even if I am wrong that on this island prescriptive easements can exist on leasehold land, when one examines the legal estates in the various folios in this case they are freehold in nature in any event.

Interruption

[186] From May 2001 until February 2003, a period of some 21 months, while what became The Barn was being built, Sean Christie used the disputed ground as a builder's compound. I have seen both aerial and ground level photographs of the extent to which this compound extended over the disputed ground. Having done so, I am satisfied that during this period of time the disputed ground was not capable of being used for the easements now sought.

[187] There was therefore a period of interruption of some 21 months between May 2001 and February 2003 in whatever use the Plaintiffs and their predecessors in title were making of the disputed ground.

[188] In respect of a claim advanced under the Prescription Act 1832, as I have set out above, if there is an interruption in the use of the rights claimed for a period of at least a year this is fatal to a claim unless the plaintiff can prove they did not acquiesce to it. With the compound gone by February 2003 and the proceedings now before this court issued in November 2017 insufficient time has passed to allow the Plaintiffs to have acquired the easements sought under the 1832 Act. There is no evidence that the Plaintiffs did not acquiesce to the interruption. In fact the evidence, notably the Architects' minute of 19 April 2001, suggests Stuart Knox was the proponent of the use of the disputed ground as a builder's compound. Thus, the Plaintiffs' claim under the Prescription Act 1832 fails.

[189] In respect of their claim by way of Lost Modern Grant, the twenty year period can accumulate at an earlier period. However, with the interruption beginning in May 2001 and the Plaintiffs earliest occupation of the dominant tenements beginning in 1985 they again have insufficient time to establish the easements they seek. Thus, the Plaintiffs claim by way of Lost Modern Grant fails too.

[190] Therefore, on the basis of the interruption that was occasioned by the presence of the builder's compound between 2001 and 2003, the Plaintiffs must fail.

[191] However, if I am wrong on the issue of interruption I would nevertheless have refused to grant the relief sought for the reasons set out below.

Right to park

[192] As noted above, where the right to park sought on the servient lands is so extensive that it effectively ousts the servient owner from their land, what is sought cannot amount to an easement.

[193] In the instant case, the disputed ground in its entirety amounts to approximately 0.044 of 1 acre. The right to park is sought over the triangular shaped portion of this land which lies to one side of The Shed. The right is not sought on the much smaller portion to the rear of it.

[194] However, the portion of the disputed ground over which the right to park is sought is the vast majority of it. There is little left beyond it over which the Plaintiffs do not seek a right to park.

[195] In my view, what the Plaintiffs seek is so extensive it would, if granted, amount in the words of Upjohn J, in *Copeland*, a claim to a joint user of the land. For this reason, I am of the view that the Plaintiffs' claim for an easement to park must fail.

[196] However, if I am wrong and the claim advanced by the Plaintiffs does not amount to joint user, I would nevertheless have refused to grant the relief sought as I am not satisfied on the evidence before me that the Plaintiffs parked on the disputed ground with sufficient quality and character to constitute user as of right. Having heard the evidence of the Plaintiffs and their witnesses, I am quite satisfied that over the years since the Plaintiffs were first at the Bushfoot Clachan they have on occasions used the disputed grounds to park vehicles. The Plaintiffs who gave evidence spoke of using the disputed ground for parking. The witnesses they called on their behalf did so as well. The photographic evidence before the court confirmed this to be so. On the basis of this evidence, which I accept, I have no difficulty in finding that, on occasions, the Plaintiffs did park vehicles on the disputed ground. However, in my view, the parking they engaged in on the disputed ground was occasional in nature. It was used as something akin to an overflow car park used at peak times.

[197] The properties owned by the Plaintiffs at the Bushfoot Clachan are not, of course, their primary residences. They are holiday homes and as such are used some weekends and for parts of holiday periods. This limited use of course restricts the number of occasions when parking is required.

[198] The reality is that within the curtilage of the Plaintiffs' own lands there is adequate and secure parking in close proximity to their properties. There is open parking in the back garden area. The entrance to this garden area is made up of grass-crete to facilitate the passage of vehicles. The Barn has its own garage which displays a sign that it is for the exclusive use of Stuart Knox's Morgan car. There is also the hard standing area towards the Bushfoot Road where number 43 used to sit.

[199] I am of the view that the Plaintiffs' primary location for parking vehicles was within the curtilage of the lands owned by them. The Plaintiffs themselves conceded that they did use their own lands for parking and indeed a number of photographs before the court confirmed that to be the case.

[200] I am also satisfied that outside the curtilage of their properties on occasions the Plaintiffs used areas to park other than the disputed ground. These other areas included the Bushfoot Road where Ian Blair, Leonard McIlroy and Terence Dobbin all gave evidence of having seen Stuart Knox's distinctive Morgan car parked. They also included the nearby public car park. Stuart Knox himself accepted he parked there on occasions.

[201] The fact that the Defendants' witnesses did not observe vehicles parked on the disputed ground is in my view in part due to the slightly obscured location of the ground which is hidden in part by The Shed. However, I am satisfied it also arises because of the occasional nature of the use the Plaintiffs made of it. I note that Sir Malcolm MacNaghten lived in close proximity to the disputed ground for a period of time and despite being someone who would have challenged persistent users of his MacNaghten lands, he did not see any vehicles on the disputed ground other than an occasional one owned by the Golf Club.

[202] Therefore, even if I am wrong that the easement to park vehicles is so extensive as to deprive the owner of the disputed ground from the use of them the Plaintiffs have failed to satisfy me they have used the disputed ground 'as of right.' Their use of the disputed ground lacks the character, degree and frequency that would be required for a claim to succeed. I am not satisfied their use was anything more than occasional.

Right of way

[203] The second easement sought by the Plaintiffs is a right of way. The right is sought over the entirety of the disputed ground both to rear and to the side of The Shed.

[204] On behalf of the Defendants, Mr Atchison argues that what the Plaintiffs have in fact claimed amounts not to a right of way from one fixed point to another but rather the right to wander over the disputed lands.

[205] The Writ of Summons does speak in general terms of the right sought. However, in their Replies to Particulars dated 20 April 2018, the Plaintiffs say of the right of way aspect of their case:

> *"Since in or about 1984 … the Plaintiffs crossed over the servient tenements in order to access the golf course, pathways surrounding the golf course and surrounding environs generally."*

[206] Mr Gibson clarified the issue further when in opening the case he made it clear the Plaintiffs case was that they crossed over the disputed ground in particular the land to the rear of The Shed.

[207] I am satisfied the Plaintiffs claim does not amount to a right to wander but rather they seek a right of way from their dominant tenements across the disputed ground in the direction of the former tramline thus necessitating them traversing that portion of the disputed ground to the rear of The Shed.

[208] Just as in their claim for an easement to park in seeking a right of way the Plaintiffs must satisfy me that they have exercised the right they claim with sufficient quality and character to constitute being users as of right.

[209] The evidence before the court as to the use the Plaintiffs made of the disputed ground as a right of way, however, falls short of what is required to establish such a right.

[210] The evidence of the three Plaintiffs whose evidence is before the court all suggested in a most general way that the Plaintiffs over the years did walk over the disputed ground on occasions when they were headed in the direction of the tramway. I do accept that on occasions the Plaintiffs would have walked over the disputed ground in this way. Indeed, it would seem that others who own properties at the Bushfoot Clachan including the Rankins and the Hicks have done likewise.

[211] However, what was absent from the evidence given by the Plaintiffs was the sufficiency of detail of user that would be necessary to allow the court to conduce their use of it was so extensive that it might be considered to have been 'as of right.'

[212] Just as was relevant for their claim to park, I remind myself that the properties owned by the Plaintiffs at the Bushfoot Clachan are not of course their primary residences. The time spent there is not unsurprisingly of a limited nature.

[213] I note that neither the Defendants, save on one occasion, nor perhaps more tellingly none of their numerous witnesses, including Sir Malcolm MacNaghten, who all, to different degrees, had some familiarity with the disputed ground were able to recall seeing the Plaintiffs walking over it.

[214] The evidence of use the Plaintiffs made of the disputed lands by walking across them is in my view insufficient to suggest to a reasonable servient owner that a continuous right to enjoy them was being asserted.

Estoppel

[215] In this case, the Defendants submit that if the court was to find that the Plaintiffs had acquired the easements they seek, the court should nevertheless hold

that they have been subsequently extinguished by reason of the doctrine of estoppel per rem judicatem.

[216] Specifically, the Defendants submit that in 2017 Stuart Knox was made aware of their intention to acquire the disputed ground and fence it off and yet on knowing this he failed to assert the easements he now seeks and instead acquiesced in the Defendants' acquisition and fencing off.

[217] Sara on Boundaries and Easements 7th edition at para 17-013 notes that the loss of an easement by reason of estoppel by acquiescence is based on the same principles as a claim for rights asserted over property by way of proprietary estoppel. Therefore a party wishing to rely on estoppel by acquiescence must satisfy the court that:

- An assurance giving rise to an expectation has been made.

- They have relied on that assurance.

- They have acted to their detriment as a result of the assurance.

[218] In *Lester v Woodgate* [2010] EWCA Civ 199, the Court of Appeal held that where a defendant seeks to rely on estoppel by acquiescence there is a need to conduct a fact sensitive enquiry to determine if it would be unconscionable to allow an easement to continue to give rise to an actionable right.

[219] I am satisfied that, in May 2017, Stuart Knox was informed by Seymour Sweeney that the Defendants were in discussions to acquire the disputed ground and that if successful a fence would be erected. Stuart Knox's evidence was that he did not object to the erection of a fence per se as he assumed that it would not affect his ability to park cars on the disputed ground.

[220] Given the size and layout of the disputed ground, I do not accept Stuart Knox did in fact make such an assumption. Rather, in my view, Stuart Knox's passive response was the result of the limited frequency with which he parked on the disputed ground and thus he was not greatly troubled by the possibility of not being able to do so in the future.

[221] The first time Stuart Knox intimated to the Defendants that he made use of the disputed lands to the extent he enjoyed some rights over them was not until MTB's letter of 3 August 2017. Furthermore, it was not until the letter of 25 October 2017 that these were particularised.

[222] Between the time in May 2017 that Stuart Knox first became aware the Defendants were hopeful of purchasing the disputed ground and when he began to express that he believed he enjoyed rights over the disputed lands in August it

would appear that Ross Sweeney had proceeded to purchase the disputed ground for £15,000 presumably together with certain professional fees and outlay.

[223] I am of the view that in the particular circumstances of this case, Stuart Knox's conduct in not asserting his belief he enjoyed rights over the disputed ground when he became aware of the Defendants' intention to purchase it is sufficient to allow estoppel by acquiescence to be made out.

[224] The only Plaintiff to engage in this acquiescence was Stuart Knox and therefore if, contrary to what I have found, the Plaintiffs did enjoy the easements they seek it would in any event only be in respect of Folio AN203186 that the easements would have been extinguished.

Conclusions

[225] In respect of the Plaintiffs' claims against Seymour Sweeney that he is not, nor has he ever been, the Registered Owner of the disputed ground, the claims against him will be dismissed.

[226] In respect of the Plaintiffs' claims against Ross Sweeney, their claims under both the Prescription Act 1832 and by way of Lost Modern Grant fail as there has not been the 20 years' uninterrupted use of the disputed ground required.

[227] Furthermore, their claim for an easement to park vehicles fails as their claim amounts to excessive user and they have failed to prove user as of right.

[228] Additionally, their claim for a right of way fails as they have failed to prove user as of right.

[229] If I had found Stuart Knox did enjoy either or both of the two easements he seeks, I would nevertheless have extinguished them in respect of Folio AN203186 on the basis of estoppel by acquiescence.