



REF/2009/1299

**THE ADJUDICATOR TO HER MAJESTY'S LAND REGISTRY
LAND REGISTRATION ACT 2002**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) **RICHARD WHARTON**
(2) **JOHN ROBERT WHARTON**

APPLICANTS

and

(1) **WILLIAM GEORGE BERRIE**
(2) **SUSAN BERRIE**

RESPONDENTS

Property Address: land lying to the east of Bagley Lane, Leeds

Title Numbers: WYK843658

Before: Mr Owen Rhys sitting as Deputy Adjudicator to HM Land Registry

Sitting at: Leeds Employment Tribunal, Albion Street, Leeds LS1 5ES

On: 10th and 11th February 2011

Applicant Representation:

Mr John Harrison of Counsel instructed by Crabtree Chadwick Solicitors

Respondent Representation:

Mr Dominic Crossley of Counsel instructed by Morrish Solicitors LLP

DECISION

KEYWORDS – easement – destruction of subject-matter – agreed variation of rights – estoppel - equitable easement – whether maturing into full legal easement through long user

Cases referred to

ER Ives Investment Limited v High [1967] 2 QB 379
Crabb v Arun DC [1975] EWCA Civ 7 (23 July 1975)
R v Sunderland CC (ex parte Beresford) [2004] 1 AC 889

INTRODUCTION

1. Bagley Lane, Rodley, Leeds runs more or less exactly in a north-south alignment, its northern end terminating at the junction between Town Street and Canal Street, close to the Leeds & Liverpool Canal. The properties which are the subject-matter of this reference can be found on the east side of Bagley Lane, not far from the junction I have referred to. At this point, the land slopes quite steeply down to the road, from east to west. Numbers 19 and 19a Bagley Lane (“Number 19” and “Number 19A” respectively) are semi-detached, although originally they formed part of a terrace, consisting of three houses. Number 19a formed the southern end of the terrace. Prior to its demolition, Number 17 Bagley Lane (“Number 17”) formed the northern end of the terrace, with Number 19 in the middle of the three. Now, the northern flank wall of Number 19 forms the northern end of the truncated terrace. The existing houses front onto Bagley Lane. Their front doors are set above street level, and are reached by means of a narrow terrace accessed by a flight of steps from the street. Because of the steep slope to the east of Bagley Lane, the rear entrances to the houses are set at an even higher level than at the front. A wide paved yard or terrace runs along the back of the houses. The rear gardens to the houses run eastwards up the slope, and are retained by a brick wall, which separates the paved yard or terrace from the gardens.
2. As I have said, prior to a date in 1967, Number 17 occupied the northern end of the terrace of houses. In that year, as is common ground between the parties, the house was demolished, although the reasons for the demolition are disputed. At all events, the area formerly occupied by Number 17 is now vacant. It is open to the street, with a stone wall perhaps two metres high situated some two-thirds of the way back into the vacant site. There is a flight of stone steps in the north-eastern corner of the site, which accesses a path above this wall. Behind (to the east of) this raised path is another wall – a very substantial stone wall the top of which is probably some six metres or so above street level. There is a gated arch in the southern end of this wall – immediately adjacent to the northern flank wall of Number 19. This leads into a

derelict building – essentially a shell – that was formerly known as “the Dairy”, which I shall describe in more detail below. The high wall I have described forms the western wall of the Dairy – although due to the topography, it is much higher on its western side than its eastern side. The floor of the former Dairy is at the same level as the paved path or terrace which runs along the rear of Number 19 and Number 19A, and forms the northern end of that feature. To the east of the Dairy, the rear garden of Number 17 runs up the slope alongside the gardens of the adjoining houses.

THE TITLES

3. The Applicants have a paper title to Numbers 17 and 19 – which have for many years formed the same unregistered title. The Respondents are the registered proprietors of Number 19A, which has the Land Registry title WYK2300. On 22nd February 2007 they also registered a Caution against first registration in relation to the former Dairy to Number 17, the caution title being WYK843658. By an application dated 17th August 2007, the Applicants applied to the Land Registry to remove the Caution, so as to allow them to obtain first registration with an absolute title to Numbers 17 and 19. Their application for first registration was dated 26th February 2009, but of course it cannot proceed until the Caution issue has been determined. The Respondents do not claim to have title to Numbers 17 and 19. However, they contend that as proprietors of Number 19a they are entitled to a particular easement over Number 17, and that the easement must be noted as a burden on Number 17’s title as the servient tenement. The Applicants deny the existence of any easement, and require the Caution to be removed. It is this dispute which, on 20th October 2009, was referred to the Adjudicator under section 73(7) of the Land Registration Act 2002.

THE CONVEYANCING HISTORY

4. The relevant conveyancing history of the properties is as follows. By a Conveyance dated 18th March 1949 and made between Frank Ackroyd (“the Vendor”) (1) Frank Gill (“the Purchaser”) (2) and Gertrude Wharton (“the Sub-Purchaser”) (3) the following property was conveyed to the Sub-Purchaser, namely: “ALL those plots of land situated on the Eastern side of Bagley Lane Rodley in the county of York more particularly delineated on the plan attached hereto and thereon surrounded with a red line TOGETHER with the two stone built dwellinghouses wash-house and dairy known as numbers 17 and 19 Bagley Lane Rodley aforesaid...” The plan shows the three

houses in a terrace. The yard or terrace at the rear is shown, as is the retaining wall between that paved area and the rear gardens. The wash-house to Number 17 is shown as occupying the full width of the house, lying between the rear (eastern) wall (in line with the rear walls of all three houses) and a point approximately one-third of the distance to the front wall. In other words, it formed the back part of Number 17 at ground level. There is a shared wall between the eastern end of the wash-house and the western end of the Dairy – this wall still exists, as I have explained. The Dairy is shown as running westwards from this point, past the line of the retaining wall and encroaching slightly into the rear garden of Number 17. The grant was made subject to various rights, the most material one being as follows: “SUBJECT NEVERTHELESS to the right of the Purchaser or other the owner or owners for the time being of No:19a Bagley Lane to the joint use of the wash-house at the rear of No:17 he or they paying one third of the costs of repair and maintenance thereof...”.

5. It appears from the entries on the Respondent's title that on 18th March 1949 the same vendor sold Number 19a to Frank Gill, who in turn sold it on by way of sub-sale, to Fred Alderson. Although the conveyance has not been produced, and may well have been destroyed by the Land Registry, entry 2 on the Property Register contains an extract from the Conveyance in these terms: “TOGETHER with a right of way over the yard at the rear of the adjoining property of the Vendor No:19 Bagley Lane to the wash-house at the rear of No:17 Bagley Lane AND TOGETHER also with the right to the joint use of the wash-house at the rear of No:17 Bagley Lane aforesaid the Sub-Purchaser paying one-third of the cost of repair and maintenance thereof....”.
6. Accordingly, as a result of the 1949 transaction, the owners and occupiers of Number 19a were granted two separate easements: first, the right to share the use of the wash-house, subject to a contribution to one-third of the costs of repair and maintenance. Secondly, a right of access to and from the wash-house along the paved area at the back of Number 19. In fact, other mutual rights were also granted, but these are not material to this reference and I shall not consider them.
7. That is the underlying legal position. However, as I have already stated, the subject-matter of the easement, the wash-house, was demolished in or about 1967. The wash-house therefore ceased to exist from that time onwards. However, the Respondents

contend that a new easement subsequently came into being. Their case is that Mr Berrie and the former owner of Number 17, Mr John Alexander (or Alec) Wharton, reached an agreement whereby Number 19a's use of the wash-house was replaced by an easement to use the Dairy for the purposes of storage. Mr Alec Wharton was the Applicants' father, who is now deceased. They inherited Number 17 from him. The Respondents allege that a new easement came into being at that time, founded on estoppel. This is the principal factual and legal issue in this case.

THE EVIDENCE

8. I shall now consider the evidence. Both Applicants made witness statements, and were cross-examined. For the Respondents, evidence was given by Mrs Berrie, her son Ian, and a friend of Ian's by the name of David Hopkins. Since Mr Alec Wharton is no longer alive, the only living party to the alleged agreement about the new easement is Mr William Berrie. However, for reasons of serious ill-health, unfortunately Mr Berrie was not able to give live evidence. However, he had made a brief Statutory Declaration in support of the application for a Caution, in 2007, and the Respondents relied on that evidence in addition to their witnesses. However, I need scarcely point out that the Respondents were considerably handicapped by the absence of the most important witness, and the inability to cross-examine Mr Berrie on his Statutory Declaration necessarily reduced the weight that I was able to attach to this evidence.

EVIDENCE - APPLICANTS

9. Mr Richard Wharton was born in 1949, and lived at Number 19 until 1979. As an adult, he worked at the Midland Bank at Bradford. In his witness statement dated 27th September 2010 he says that Number 17 was demolished in 1967 "*with the full knowledge and approval of the then owner of no 19A Bagley Lane, Frederick Alderson.*" He also says that "*.....I can unequivocally state that at no time was any agreement between my father and Mr Berrie regarding either the wash house or any agreement of any substitution as regards the dairy property.*" I think that the word "there" has been missed out of the sentence, but the meaning is clear. He also states that "*At no time during my occupation of the property, and later, had they [i.e the Berrie family] had the use of any property belonging to our family for storage or other purposes.*" Mr Wharton was cross-examined on this statement by Counsel for the Respondents. He was challenged on a number of issues. It became clear during his

cross-examination that he did not have a good recollection of the events and matters upon which he gave definite evidence in his statement. First, it was put to him that Number 17 was demolished, not due to its intrinsic disrepair, but because it had suffered a lightning strike and had become uninhabitable. He was unable to recall the state of repair of Number 17 in 1967, and said he was “not aware” of the lightning strike, or the fact that this had all been reported in the local newspaper at the time. Secondly, he was not present on any occasion when Mr Alderson agreed to the demolition of Number 17. He said that his father had told him that Mr Alderson had agreed to demolition, but was unable to recall the time, or place, or content of any such conversation, Thirdly, although he insisted that his father *“would not have”* made any agreement with Mr Berrie as to the use of the Dairy, he was unable to recall any specific conversation in which his father had told him that. However, he accepted that his father would not have involved him in every decision regarding the house, and clearly he would not have been present at every conversation between his father and his neighbours. Fourthly, he was unaware that Ian Berrie and others authorised by him used to store items in the Dairy for many years, and that Ian Berrie had repaired and replaced the door and lock to the Dairy in the mid-1990s. He himself was not living there at the time, and did not have a key to the dairy, although he was sure that his mother would have done. Overall, I formed the view that although Mr Wharton was honestly trying to recall the events of many years ago, essentially he had little or no recollection of the material conversations and events. Given the passage of time, this is perhaps scarcely surprising. Equally unsurprisingly, I do not think that he took a great deal of interest in his parents’ neighbours, or in the precise arrangements that may have been made with regard to the wash-house and Dairy. This can be demonstrated by other means – for example, he did not recall that Mr Alderson was married, and said that he had never met Mrs Berrie, who had been living at Number 19a since 1974.

10. Mr John Wharton, Richard Wharton’s brother, also made a witness statement, which is dated 28th September 2010. His statement is identical to that of his brother’s, with one exception. Since he ran a milk delivery business between 1972 and 2006, and since the Berries were customers, he does recall meeting them on an almost daily basis. However, he says that he had no conversations with them regarding the Dairy or wash-house. Mr Wharton was born in 1946, and lived at Number 19 until 1971.

Like his brother, under cross-examination he was unable to recall any specific occasion when Mr Alderson agreed to the demolition of the wash-house. Nor could he recall any occasion when his father and Mr Berrie discussed any arrangements with regard to the Dairy, but he accepted that he would not necessarily have known if they had. He was unaware that the Berries had a key for the Dairy, and that Ian Berrie had done repair and maintenance work to it. He had himself been into the Dairy on occasions since the time he left the property, but could not recall if the Dairy was locked. If it was, he said that his father would have given him a key. My comments about his brother's evidence apply equally to John Wharton.

EVIDENCE - RESPONDENTS

11. For the Respondents, the evidence was as follows. First, a Statutory Declaration by Mr William Berrie, made in or around February 2007, in support of the Respondents' application to register a Caution against first registration in respect of the Dairy. The material parts are as follows: "*2. I purchased my property in 1974 and in the Spring of 1975 I approached Mr Alec Wharton of 19a Bagley Lane about the use of the wash-house referred to in the title deeds. He indicated that this structure had been removed some time previously. 2. I took legal advice and saw my then solicitor, Leon Collins, who advised me that my neighbour must make "restitution or substitution". 3. This was reported to Mr Alec Wharton and subsequently in 1975 he gave me a key to the Dairy which is shown red on the plan annexed hereto as substitution. 4. The arrangement continued until the death of both Mr and Mrs Wharton and subsequently by their elder son Robert until the Dairy was partly demolished. 6. There has been no effort by the present owners to make repairs and as a result it is proposed that the repairs are carried out by myself and to collect two thirds of the costs from the owners of the property, Messrs Wharton.....*". As I have explained, Mr Berrie was not called to give evidence due to serious ill-health. Accordingly, he could not be cross-examined on this declaration.
12. Mrs Susan Berrie, one of the Respondents, made a witness statement, upon which she was cross-examined. In her statement she said this: "*(3) We have lived at 19A Bagley Lane since we bought the property in 1974 from my mother who herself had inherited the property from her uncle Fred Alderson. (4) I remember Fred very well and often visited him at the property with my family and as a child, I would sometimes play in*

the wash-house, while my aunts (Clara, Fred's sister & Nellie, Fred's wife) washed. (5) I remember number 17 Bagley Lane collapsing and what was left of the buildings, including the washhouse at the back of number 17 being demolished. (6) After that I remember Florence Wharton agreed to do Fred Alderson's washing for free. He only had a small sink and no washing machine. I can't say for certain that he personally used the washhouse although I do remember that his sister Clara used the washhouse before she died in 1966. (7) After we moved in I know that my husband spoke to Alec Wharton about using the dairy, although we always called it the washhouse at that time. I was not present during those conversations but my husband did tell me that he had reached an agreement with Alec Wharton that we could use the dairy for storage purposes. In bad weather I would hang bedding in there to dry, as I had nowhere suitable in the house. At that time we had no outside storage facility. Nothing was ever committed to writing because we were on very good terms with the Wharton's at that time, there was just no need."

13. Under cross-examination, Mrs Berrie confirmed that she was not present when Alec Wharton and her husband made what she described as a "*gentleman's agreement*" regarding the use of the Dairy. However, she said that she had had at least one conversation with Alec Wharton before that time – sometime after she moved into Number 19A in June 1974 – in which she discussed the use of the Dairy. She said that it was she who first raised the issue with him. She explained that she had known Mr Wharton all her life, and got on very well with him. Mr Harrison, Counsel for the Applicants, challenged her on her recollection, on the basis that this alleged conversation was not mentioned in her witness statement. Her answer was that her witness statement was directed primarily to whether or not she was present when Alec Wharton and her husband reached agreement about the use of the Dairy – not whether she had any other conversations with him. She also confirmed that she used the Dairy more or less from the time she bought the house, that she had a key to it (which she still had), and that it was used by the tenants of number 19 as well as by herself and her family.
14. The Respondents' son, Ian Berrie, who was born in 1967, made a witness statement upon which he was cross-examined. This is what he said. "*(2) I am the son of the Respondents and I have lived at 19A Bagley Lane, for almost all my life. I moved here*

with my parents in 1974 and remained until 1990. I then returned in 1994 and have lived here since. (3) it is not strictly accurate to state that the washhouse was demolished by consent. In fact what Alec Wharton told me was that due to a lightning strike number 17 actually collapsed. The building fell into the road and the incident was featured in local media coverage. I have seen an article from the Yorkshire Evening Post about it. Clearly, as a result of this the remainder of the building had to be demolished. The washhouse was situated at the back of number 17. I cannot say whether our predecessor in title Fred Alderson consented to the demolition of what remained, although I suspect he was given little choice in the matter.....(4) I know this to be true from my personal knowledge because I remember as a young boy asking Alec Wharton why there was a big space next to his house. He explained that the house next door had fallen down one day, which is the sort of thing that sticks in a young boy's mind. (5) I would also like to add that the washhouse itself was not completely demolished, it was at the back of number 17 and so the two side walls and the back wall, as well as the floor and rear door, still remained. It could therefore be re-built, as could the dairy which still has the basic structure in place.. There is also a water supply pipe which comes out of the side wall of number 19, which can be seen in the photographs. (6) I was not old enough at the time to understand any agreement or disagreement between my father and Alec Wharton regarding the use of the dairy..... (7) I myself have used the dairy for storage of furniture, tools and scaffolding since 1981 until 2005. I have done a lot of maintenance work to the dairy. In 1995 I re-hung the door and fitted a new lock. I gave a key to Florence Wharton although I think she subsequently lost it. I subsequently replaced the door frame and door. As well as that I repaired the flashing to the roof and boarded up a window. Robert Wharton knew about this and was concerned about costs, but I assured him that I was using surplus materials so there would be no cost to him. I continue to use it for storage up until it partially collapsed and I was never challenged in this by the Applicants. On the contrary they would often ask me if I could let their tenants of number 19 into the dairy to enable the tenants to store things.....". Under cross-examination, he largely confirmed this evidence. He was challenged on his statement that he discussed the use of the Dairy with the Whartons at their mother's funeral – which they had denied – but he did not withdraw or amend this evidence.

15. The Respondents' final witness was a Mr David Hopkins, a friend of Ian Berrie. In his witness statement he stated that he stored a number of items – including furniture and his bicycle – in the Dairy, between approximately 1996 and 2000. The Dairy was kept locked, but Ian Berrie had a key. Other people also stored items – “stuff”, in his words – in the Dairy, but he did not know who they were. He too was cross-examined, but his evidence was not challenged to any degree.

16. Just as I believe that the Applicants were honestly trying to recall the events of many years ago, so too in my view were the Respondents. However, the Respondents, and their witnesses, were much closer to the events. Since number 17 was uninhabitable after 1967, and the Dairy was not an integral part of number 19, the Whartons understandably had little interest in or knowledge of its use. On the other hand, the Berrie family lived at number 19A and, as I shall find, did have the use of the Dairy after 1974. It seems to me that their recollection of the material events is, and is likely to be, stronger than that of the Applicants.

MY FINDINGS OF FACT

17. In the light of the evidence which I heard, including the Statutory Declaration of Mr William Berrie, I make the following findings of fact. First, there is no sufficient evidence that Mr Alderson specifically agreed to the demolition of number 17, including the wash-house, to the extent that this may be material. Mr Ian Berrie's recollection of what he was told as to the circumstances of the demolition of number 17 have the ring of truth. I do not see that he could have invented this story. The building was therefore demolished and it is unlikely that Mr Alderson would have been in a position to agree or not agree to the demolition of the wash-house. Secondly, I find that Mr Alderson and his family used the wash-house from time to time before it was demolished, and that after demolition Mrs Wharton took in Mr Alderson's washing. Thirdly, I find that there was a discussion between Mr Alec Wharton and Mr William Berrie regarding the use of the Dairy, in or around 1974. Fourthly, I find that from that time onwards the Berries had free and unrestricted use of the Dairy for the purposes of storage. Fifthly, I find that Ian Berrie carried out works of repair and maintenance to the Dairy over the years, including the fitting of a new door and lock. Sixthly, I find that the door to the Dairy was locked, and keys were held by the Berries, among others. As to the exact terms of the discussion

between Mr Wharton and Mr Berrie, I find that agreement was reached that the owners of Number 19A were thenceforth allowed to use the Dairy for storage and associated purposes, such as the drying of washing, in substitution for the easement relating to the wash-house. The agreement was reached against the background of the demolition of the wash-house, and the advice given to Mr Berrie by his solicitor which I have referred to above. I have no doubt that, having regard to the relationship between the two gentlemen, the arrangement was an informal one, and neither party thought it necessary to write down its terms or obtain a formal legal document. As neighbours, whose families had known each other for many years, they no doubt trusted each other to give effect to the agreement. Given the pre-existing legal easement, for the benefit of successive owners of Number 19A, I find on the balance of probabilities that the parties intended the substituted rights to be for the benefit of successive owners, and not merely a personal licence to Mr Berrie and his family. I should say that my findings as to what was agreed between Mr Wharton and Mr Berrie was not merely based upon the terms of the Statutory Declaration, and the “live” evidence of Mrs Berrie and her son, but also upon inferences which I have drawn from the fact that the Berries began freely to use the Dairy from this time onwards, even to the extent of repairing and maintaining the building.

THE LEGAL ISSUES

18. The next question, therefore, is whether or not this relatively informal arrangement has any legal effect? Mr Crossley, for the Respondent, puts it this way. First, he submits that Mr Alec Wharton made a representation to the Respondents that they would acquire a right in respect of the Dairy. Secondly, in reliance on that representation, the Respondents acted to their detriment by agreeing to relinquish their rights in respect of the wash-house and expending money on maintenance and repairs to the Dairy. Thirdly, it would be unconscionable for the Applicants to resile from the representation by alleging that the Respondents had, at best, a licence to use the Dairy, which has now been revoked. Fourthly, by this means the Respondents acquired an easement by means of proprietary estoppel – see *R v Sunderland CC (ex parte Beresford) [2004] 1 AC 889 (at para 37)* and *ER Ives Investment Limited v High [1967] 2 QB 379*. Fifthly, this easement, created in equity in about 1975, was used for a period in excess of 20 years, which has created a legal easement under the doctrine of prescription – see dicta of Lord Scott in *R v Sunderland CC (ex parte Beresford) at para 38*.

19. Mr Harrison, on behalf of the Applicants, offers a completely different analysis of the dealings between the parties and their predecessors. First, he says that the right to use the wash-house – granted in and reserved by the Conveyances of 18th March 1949 – amount to no more than a personal licence, and not an easement. I am afraid I cannot accept this argument. The right is granted in favour of “.....*the Purchaser or other the owner or owners for the time being of No:19a Bagley Lane.....*” – which makes it entirely clear that the right to use the wash-house is intended to enure through successive ownerships of Number 19A. The terms of the grant and reservation cannot, in my view, be limited to a personal licence to the Sub-Purchaser.

20. Secondly, he argues that the right to use the wash-house – if properly regarded as an easement – was extinguished as soon as the building was demolished. I did ask Mr Harrison if he was able to provide any authority which might assist him, but he was not able to do so. Accordingly, whether or not the easement had been released or abandoned by the owner of Number 19A must be decided by the general law on the subject. My understanding is that an easement will be released in circumstances where the dominant owner evinces an unequivocal intention no longer to use the right in question. Crucially, the inference is generally drawn from the actions of the dominant owner, not the servient owner, although there will no doubt be cases where the dominant owner may by acquiescence be treated as abandoning his rights. In the present case, the wash-house was demolished by the servient owner, and, should this be relevant, without the agreement of the dominant owner. There is no evidence as to the attitude of Mr Alderson. All that we know is that the wash-house had not been re-built when the Respondents acquired Number 19A in 1974. Mr Alderson’s washing was, it seems, taken in by Mrs Wharton. I cannot see that the mere non-user of the wash-house easement for a period of seven years, in these circumstances, leads to the conclusion that the easement had been abandoned once and for all. It was at least theoretically possible that the dominant owner could himself have re-built the wash-house, and continued to use it. Whether or not he could have compelled the other users to have contributed to the cost of re-instatement is a moot point, but it is not one I have to decide. All that matters is that, in my judgment, the legal right to use the wash-house survived its destruction.

21. Accordingly, in 1974, when Mr Berrie and Mr Wharton had their discussion about the Dairy, the underlying legal reality was that the Respondents had a subsisting legal

easement over Mr Wharton's property, Numbers 17 and 19 Bagley Lane. It could not, of course, be exercised at this time, since the wash-house did not exist. However, if and when it was re-built, the easement would continue to be exercisable. The evidence from Mr and Mrs Berrie, which I accept, is that they had been advised that they could insist on "*restitution or substitution*". Whether or not that advice was correct – and I am of course mindful that a servient owner cannot in general be required to spend money on the repair of the subject-matter of an easement – the fact is that the Respondents believed that they had a right to this remedy. That was the background to the conversation with their neighbour. It is perfectly plausible that between them they worked out a reasonable compromise, namely that instead of retaining a right to use the wash-house, a new right would come into being, namely the right to use the Dairy. I cannot imagine that this would have caused Mr Wharton any difficulty, since Number 17 was a vacant lot, and the Dairy was easily accessible from the pathway behind the houses. Use of the Dairy would not therefore inconvenience Mr Wharton in any way.

22. Although normally an easement must be created by express or implied grant, or by long user, I do not see why it should not also come into being by means of a proprietary estoppel. The decisions in *ER Ives Investment Limited v High [1967] 2 QB 379*, and *Crabb v Arun DC [1975] EWCA Civ 7 (23 July 1975)* have been cited in support of this proposition. In my judgment, the Respondents have proved, on the facts, that Mr Berrie agreed with Mr Wharton that from that time onwards the right to use the wash-house would be transformed into a right to use the Dairy – for the purposes of storage but also (see Mrs Berrie's evidence) for drying washing. The fact that the purpose of the two easements is not identical does not, in my judgment, make any difference to the establishment of the new right. The parties have subsequently acted on the basis of the new arrangement. The Respondents have used the Dairy for at least 20 years, Ian Berrie has carried out work to it, and Mr Wharton has permitted them to do so. It seems to me (a) that Mr Wharton and his successors in title cannot resile from the new arrangement, which confers an equitable easement on the Respondents, but just as importantly (b) that the Respondents and their successors in title cannot resile from it, and re-assert their right to use the wash-house.

23. In origin, this is an equitable easement. However, Mr Crossley relies on certain dicta of Lord Scott in the *Beresford* case, in which he suggests that such a right might mature into a full legal easement after long user. These are the paragraphs he relies upon:

- “ 37. *Where private easements are concerned there are, however, two exceptions to the requirement that the right must be granted by a deed. First, if permission to enjoy a right, capable of constituting an easement, is given by the landowner in terms likely to lead, and that do lead, the beneficiary of the permission to believe he is entitled on a permanent basis to enjoy the right and in that belief he sufficiently alters his position to his detriment, by expenditure of money or otherwise, he may become entitled in equity to the easement by proprietary estoppel (see E R Ives Investment Ltd v High [1967] 2 QB 379). The landowner would not be able to withdraw the permission he had given. 20 years' enjoyment of the equitable right would surely enable the beneficiary of the permission to claim a legal easement under the 1832 Act. In such a case it is easy to regard the enjoyment of the right pursuant to the original permission as enjoyment by a person "claiming right thereto". In such a case the original permission would be the foundation of the claim of right but the enjoyment would not have been precario.*
38. *Second, if an agreement to grant an easement were entered into for good consideration and the consideration were fully paid, the purchaser of the easement would at once become absolutely entitled in equity to the easement and would become entitled at law after 20 years' use. His enjoyment of the easement, although deriving from permission, would not have been precario and, in my opinion, would have been enjoyment by a person "claiming right thereto" (c/f Bridges v Mees [1957] Ch 475, 484-485). It follows that the proposition that use pursuant to permission given by the landowner is always precario and cannot ever be as of right for prescription purposes is not correct.”*

24. It seems to me that this analysis, although it does not form part of the decision and is therefore obiter, is nevertheless very persuasive. It does seem to accord with common sense, and with the underlying purpose of the law of prescription. Although the Prescription Act 1832 itself may not apply in this case – because there has been an interruption to the enjoyment for a period exceeding one year – nevertheless the principle will apply, and therefore the Respondents' right to use the Dairy has matured into a full legal easement by virtue of the doctrine of lost modern grant. The easement will have been acquired by 1994 or 1995. It follows that the Applicants' title was already subject to this easement when the Respondents entered the caution against first registration of Number 17 and Number 19 in 2007. When the title is registered, a note should be entered to the effect that it is subject to the easement.

25. Since the Respondent do not claim to be the owners of the Dairy, it follows that the Caution should be removed to enable the title to become registered in the Applicants' names. This registration is of course conditional upon the appropriate entry being made on the title of the servient land pursuant to the Applicants' application for first registration dated 26th February 2009, referred to in the Case Summary. On this conditional basis, therefore, I shall direct the Chief Land Registrar to give effect to the Applicants' application (dated 20th November 2007) by way of Form CCD dated 17th August 2007. In the circumstances, I am minded to award the Respondents their costs of the reference, and I direct them to file and serve a detailed breakdown of their costs on or before 18th March 2011. I shall give the Applicants an opportunity to make submissions on costs, both as to the incidence, and the quantum, within 7 days of receiving the Respondents' breakdown of costs.

Dated this 10th day of March 2011

BY ORDER OF THE ADJUDICATOR TO HM LAND REGISTRY