UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 0081 (LC)

UTLC Case Number: LREG/67/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – rights of way – whether implied under Wheeldon v Burrows or s 62 LPA 1925 in favour of chargee when landowner charges different parts of estates to different charges and when chargee of one part sells to purchaser under a power of sale. Held easements so implied.

Equitable easement – whether implied by virtue of obligations in 1988 Conveyance – Held no equitable easements created. Decision of First-tier Tribunal upheld on different grounds.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL (LAND REGISTRATION CHAMBER) UNDER S.11 OF THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

BETWEEN:

(1) **TAURUSBUILD LIMITED**

(2) **SHANDAR SALAM**

(3) **WILLIAM HENRY CAMPBELL**

(4) **EDWIN PETER GOLDSBROUGH**

(5) **DAVID IBBETSON** **Appellants**

(6) **JULIE IBBETSON**

(7) **BARRY STIRLING**

(8) **GILLIAN STIRLING**

(9) **ROY HAYTON**

and

(1) **JOHN PAUL MCQUE**

(2) **FIONA CLAIRE MCQUE** **Respondents**

Re: 2 The Hall, Dinsdale Park, Middleton St George, Darlington. DL2 1UB

Title Nos: DU262353, DU342159 and DU262842

Before: **His Honour John Behrens**

Sitting as a Judge of the Upper Tribunal at Leeds Combined Courthouse, Oxford Row, LS1 3BG

on

9-10 January 2019

Richard Selwyn Sharpe, instructed by Taylor Rose for the **First Appellant** and Newbys for the **Second** and **Fourth to Ninth Appellants**. **The Third Appellant** passed away before the Appeal was heard

Christine Goodwin, the Lay Representative on behalf of The Respondents.

The following cases are referred to in this decision:

Milebush v Tameside [2011] EWCA Civ 270

Wheeldon v Burrows [1879] 12 Ch D 31

Borman v Griffith [1930] 1 Ch 493

Birdlip v Hunter [2017] 1 P & C R 1

DECISION

Introduction

1.
This is an appeal against the decision of Judge Hewitt dated 17 April 2018. Mr and Mrs McQue ("the Respondents") are the registered proprietors of property known as 2 The Hall, Dinsdale Park, Middleton St George, Darlington, DL2 1UB under title no DU262353. They also own a small area of garden land under title DU 342159. Taurusbuild Ltd ("Taurusbuild") – the First Appellant is the owner of Dinsdale Hall – Title DU262842. Taurusbuild has applied to be registered as registered proprietor but the application has been held in abeyance pending this decision. The remaining eight Appellants ("the leaseholders") [1] hold long leases of flats in Dinsdale Hall from Taurusbuild and have rights of way and parking over parts of the southern driveway in the front of Dinsdale Hall.

2.
On 9 December 2013 the Respondents applied to the Land Registry to register a right to use 2 parking places (no's 28 and 29) in the East Car Park of Dinsdale Hall together with a right of way with or without vehicles of a private access road to the south of Dinsdale Hall necessary to gain access to the parking spaces. The application was opposed and eventually referred to the First-tier Tribunal ("the F-tT") under s 73 of the Land Registration Act 2002.

3.
In his decision of 17 April 2008 Judge Hewitt substantially upheld the Respondents' claim. In particular, he upheld the claims to the right of way and the right to park in favour of 2 the Hall but not, as I understand his decision, in favour of the garden land. It will, of course, be necessary to look at the decision in detail together with the relevant conveyancing history. For the purpose of this introduction his decision may be summarised.

1)
There was no express grant of either of the rights of way in the Transfer to the Respondents. (para 5.4).

2)
Neither of the rights of way could be implied under s 62 of the Law of Property Act 1925 or under the rule in Wheeldon v Burrows for the following reasons:

i)
There was no common intention to grant the rights (para 5.5)

The sale was a sale by the registered proprietor's mortgagee who did not have the power to grant the rights (para 5.6)

ii)
The evidence was insufficient to enable the Respondents to claim a quasi easement by prescription. (para 5.8)

3)
It was however open to the Respondents to seek and obtain specific performance in their favour for the grant by the freeholder of Dinsdale Hall of the rights claimed, (para 5.7). After receiving further written submissions he dealt with a number of submissions. In particular:

i.
He rejected the claim that the F-tT had no power to grant an order to give effect to an equity (para 5.13)

ii.
He held that the claim was within the scope of the application because the rights derived from both a planning obligation and the rights derived from a 1988 Conveyance. (para 5.13)

iii.
He held that the Respondents did have the right to enforce the planning obligation and planning agreement. Reliance was placed on a Court of Appeal authority Milebush v Tameside [2011] EWCA Civ 270. The benefit and the burdens created by the sale documentation in 1988 should run with and bind the land. (para 5.19)

iv He was satisfied that Taurusbuild as successor in title to the purchasers (the Wards) from the Council was obliged to observe the obligations imposed in the 1988 conveyance; he was also satisfied that the Respondents as successor in title to the Wards were entitled to the benefit of the obligations imposed. He accordingly directed the Registrar to register the right of way and right to park in favour of the Respondents' registered title.

4.
On 5 July 2018 Judge Hewitt granted the Appellants permission to appeal on the 3 grounds contained in Notice of Appeal which may be summarised:

1)
Whether the F-tT had jurisdiction to invoke the equitable jurisdiction of the courts, or to grant equitable relief.

2)
Whether Taurusbuild was obliged to observe the obligations in the 1988 Conveyance and whether the Respondents are entitled to the benefit of them so as to call on Taurusbuild to allow them to have use of parking spaces 28 and 29 together with a right of way to enable them to do so.

3)
Whether the 1988 Conveyance did not create an obligation enforceable by the Respondents against Taurusbuild.

5.
On 20 August 2018 Mrs Goodwin submitted a very detailed Statement of Case in response to Grounds of Appeal. In it she raised many points that are not directly relevant to the issues in the appeal.

However, she sought to support the decision of Judge Hewitt for the reasons he gave. She accordingly relied on the planning permission, the 1988 Conveyance and contended that the Respondents are entitled to the benefit of the obligations and to enforce them against Taurusbuild. I shall not attempt to summarise all the points she made but will refer to them as appropriate when considering the arguments in favour of the appeal.

6.
The appeal was heard in Leeds on 9th and 10th January 2019. The Appellants were represented by Mr Selwyn Sharpe and the Respondents by Mrs Goodwin (the mother of Mrs McQue who plainly has some legal knowledge). Both sides submitted skeleton arguments for which I am grateful. Following the argument I reserved my decision. On the first day of the hearing it emerged that the third Appellant (William Henry Campbell) had died. As a result I requested suggestions as to the appropriate course. On 24 January 2019 the solicitors for the remaining Appellants informed me that his death occurred on 8 December 2017 (i.e. before the Appeal was lodged) and that his estate had not expressed any wish to be involved in the appeal. In those circumstances they suggested that the most convenient course was to remove Mr Campbell as an Appellant. In the absence of any comment from the Respondents I agree with that course.

7.
Judge Hewitt's decision contains a detailed description of Dinsdale Hall, the terms and history of the relevant conveyances and the user of the right of way and parking places. The decision is reported – [2018] UKFTT 0314 (PC) – and is thus available. In this decision I shall concentrate on the evidence relevant to my decision. A more detailed description is available in Judge Hewitt's decision.

Dinsdale Hall

History

8.
Dinsdale Hall was constructed in 1829 as a spa hotel. It is now a Grade II listed building. Together with some of the surrounding land it is referred to as Dinsdale Park. At some time Dinsdale Hall came into the hands of Durham County Council ("the Council") which used it as a school and for other institutional purposes which came to an end in 1986.

9.
[In 1988 the Council granted itself planning permission to convert Dinsdale Hall to

1)
"a Nursing Home and two private dwellings, together with the change of use of the modern kitchen/ dining block for use in connection with the Nursing Home and for matron's accommodation,

2)
the conversion of four former staff bungalows to two storey houses and

3)
the conversion of the former stable court to ten private dwellings including the erection of a new western wing to enclose the court, together with new garage provision for the dwellings; (b) for Listed Building Consent for the proposed consequential internal and minor external alterations to Dinsdale Hall (Grade II)".

10.

In September 1988 the Council sold two unregistered parcels of Dinsdale Hall and adjacent land to Raymond Ward and Suzanne Mildred Ward (“the Wards”). In November 1988 the Wards were registered at Land Registry as the proprietors of parcels of land which are now registered as follows:

Dinsdale Hall: Title number DU262842

The Hall: Title number DU205825

2 The Hall: Title number DU262353

Land at the east side of 2 The Hall Title number DU342159

11.
The Wards ran a nursing home business from Dinsdale Hall for a number of years. The Wards resided in The Hall as their home and for a number of years until the mid- 2000s. Mr Ward's late mother resided in 2 The Hall until she died.

12.
In 2000 the Wards sought and obtained planning (and other necessary consents) to convert Dinsdale Hall into 16 self-contained apartments plus a conversion inthe west wing to create 5 dwellings.

13.
The Wards implemented the planning consent to a large extent and created a number of apartments which were sold off on long leases between 2005 and 2009. Finance for the project was obtained and secured by way of charges on the three properties owned by the Wards. However, before full completion of the project the Wards ran into financial difficulties. In or about Jan 2011 Mortgage Agency Services Number Six Limited (“MAS”) repossessed 2 The Hall pursuant to the terms of its mortgage. About the same time National Westminster Bank appointed Law of Property Act receivers in respect of the charge of Dinsdale Hall.

14.
On 5 April 2012 MAS as mortgagees in possession with a power of sale, sold 2 The Hall to the Respondents for the price of £119,950.

15.
On 7 August 2013 Northern Rock (Asset Management) Ltd as mortgagees in possession with a power of sale, sold The Hall to Mr and Mrs Thompson who subsequently sold the additional garden land to the Respondents.

16.
The receivers offered Dinsdale Hall for sale at auction in October 2013 as agents for the Wards. It was purchased by Taurusbuild. Taurusbuild made an application to Land Registry to be registered as proprietor. That application awaits the outcome of these proceedings. The Wards remain as the registered proprietors.

Geography

17.
Dinsdale Hall comprises three elements:

1)
The main building referred to as Dinsdale Hall

2)
The southern part of the East Wing (an addition to the main building) referred to as 2 The Hall

3)
The northern part of the East Wing referred to as The Hall.

18.
As an annex to this decision I have included 2 plans. Plan 1 shows the general layout of the site. The roadway over which a right of way is claimed is coloured green. Access to the rear of 2 The Hall can be gained from the roadway coloured brown over which there is a right of way. There is no other way to the front of 2 The Hall. The two parking spaces are shown coloured blue. Plan 2 is one of the plans approved pursuant to the October 2000 planning permission. It shows the area of Dinsdale Hall to be redeveloped into 16 apartments. It shows 2 The Hall (referred to as House B) to the east of the courtyard. It shows 6 parking places to the south east of House B. Nos 28 and 29 were the two eastern most places.

The Conveyancing Documents

The 1988 Conveyance

19.
On 21 September 1988 the Council conveyed Dinsdale Hall to the Wards together with the rights detailed in the First Schedule. The rights granted in the First Schedule included:

"1. The benefit for the Purchaser and his successors in title the owners and occupiers for the time being of the Property and all persons authorised by them and all other persons from time to time entitled to the like rights (in common with the Vendor and all other persons having a like right) of-

(a)
the right of way over the whole of the road shown coloured brown on the said plan as is granted and more particularly described in the Indenture;

(d) Such rights as the Vendor may enjoy in respect of

(iii) the right to carry out works of maintenance and repair to the said road coloured shown coloured brown on the said road.

20.
By clause 4 covenants were imposed on the Wards:

"IN PURSUANCE of Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 the Purchaser for himself and his successors in title hereby covenants with the Vendor and its successors in title to the intent that the burden of this covenant may run with and bind the Property and each and every part thereof and to the intent that the benefit thereof may be annexed to and run with the retained land and each and every part thereof to observe and perform the restrictions and stipulations specified in the Fifth Schedule hereto PROVIDED ALWAYS THAT the neither the Purchaser nor any of his successors in title shall be under any liability in respect of any breach of this covenant occurring after the Purchaser or his successors in title shall have parted with all interest in the Property or such part thereof on or in respect of which such breach shall occur".

21.
The covenants included within the Fifth Schedule included:

1)
Toenable the Vendor to enforce the terms of the planning consent dated fourthday of July [1988] in respect of the Property the Purchaser shall carry out and complete every part of the development in respect of the Property authorised by that consent in strict accordance with the plans submitted with the application or any amended plans which might be approved in writing by the Vendor in pursuance of that consent within a period of five years from the date hereof.

2)
The Purchaser shall until completion of the development authorised by the planning consent or any approved variation to such consent take such steps as are reasonably required by the Vendor and notified in writing to the Purchaser to ensure the proper preservation of those parts of the Property which are listed in accordance with Section 54 of the Town and County Planning Act 1971.

22.
The right of way referred to in the First Schedule is over the road coloured brown in the plan set out above to the north of the property conveyed. The Retained land is defined as the land edged blue on the plan. A plan is attached to the conveyance which shows an area of land to the south west edged blue. To my mind there can be no doubt that this is “the retained land” referred to in clause 4. Mrs Goodwin made the point that the definition section used a capital “R” whereas clause 4 used a small “r”. However there are a number of references to the retained land all of which use a small “r”. To my mind the use of the small “r” does not affect the construction of the conveyance. It is not in dispute that the private roadway and the two parking places are within the property conveyed.

23.
There is nothing on the conveyance plan or in the body of the conveyance to suggest that the land conveyed is to be divided into lots that are subject to reciprocal covenants or that the Council intended that individual occupiers of the land sold should be able to enforce the covenants in the Fifth Schedule. It is important to note that the Property conveyed in this conveyance comprised all three titles that were registered at the Land Registry in November 1988. Thus 2 The Hall was part of the land conveyed. It was thus subject to covenant rather than being entitled to the benefit of it.

24.
S 33 of the Local Government (Miscellaneous Provisions) Act 1982 is the act which enables local authorities to enforce building or other positive covenants against successors in title to the original covenantor.

The 1988 subsale

25.
Two other Deeds were executed by the Wards on 21 September 1988. One was a subsale between the Council, the Wards and Beckside Properties Ltd of land to the north and east of Dinsdale Hall itself. That conveyance also includes a covenant in similar form to that in the Dinsdale Hall Conveyance.

The 1988 mortgage

26.
The other Deed was a mortgage of the East Wing of Dinsdale Hall by the Wards in favour of Northern Rock Building Society. The property charged is shown on the plan. It thus included both The Hall and 2 The Hall. It is plain that it does not include any part of the road coloured green on the plan or the two parking places.

27.
As Mr Selwyn Sharpe helpfully points out in his further submissions the parcels clause expressly excludes any rights that may be incorporated under s 62 of the Law of Property Act 1925.

The 2012 Transfer

28.
As already noted MAS transferred 2 The Hall to the Respondents on 5 April 2012 between MAS and the Respondents. It was made pursuant to a power of sale contained in a charge dated September 2005 ("the 2005 Charge").

29.
That charge was not in evidence at the hearing but was produced by the parties with their further submissions on 5 February 2019. It is a charge by the Wards of 2 The Hall in favour of Kensington Mortgage Company Ltd. It is not clear how MAS became a beneficiary of the charge. The parcels clause simply refers to the property as "2 The Hall, Dinsdale Park, Darlington, Title DU262353. There is nothing in the Deed which purports to exclude the operation of s 62 of the Law of Property Act 1925.

30.
The Transfer does not contain any express grant of a right of way over the green land, or any right to park in either of spaces 28 or 29. Equally it does not exclude rights that may be incorporated under s 62 of the Law of Property Act 1925.

31.
Although it is not relevant to any matter that I have to decide it is right to note that prior to exchange of contracts the Respondents' then solicitors sent them an advice on their future purchase which included:

There are rights of way over the road coloured brown on the plan.... There is no[t] right of way over the road way leading to the front of the property. We have been advised by Dinsdale Park Management Company that gates will be installed preventing access to the front of the property. ... this may deter future purchasers.

32.
It is therefore clear that the Respondents were warned before the purchase that there was no right of way and no right to park in spaces 28 and 29. In his further submissions Mr Selwyn Sharpe placed some reliance on this advice.

The Planning Permissions

33.
There are two relevant planning permissions – one dated 4 July 1988 and the other dated 9 October 2000. There were a number of variations to 2000 permission. Mrs Goodwin sought to argue that the 2000 was itself a variation of the 1988 permission. I shall deal with this argument below.

The July 1988 permission

34.
In para 9 above I have summarised the effect of the planning permission granted in 1988. I shall not repeat it. A number of points can be noted:

1)
The conversion of the stable block into 10 dwellings was the subject of the subsale to Beckside properties Ltd and is not relevant to the issues before the Tribunal.

2)
The approved plan shows two garages (no’s 2 and 3) one at least of which was designed for 2 The Hall.

3)
The permission incorporated a condition that the development should be carried out only in complete accordance with the permission.

The October 2000 permission

35.
This was a full application by the Wards for the conversion of the main building of Dinsdale Hall from a nursing home into 16 apartments and the conversion of the west wing to form 5 dwellings. The application involved the omission of the two garages referred to in the 1988 permission. Initially it was proposed that the garages were to be placed elsewhere. However later they were replaced by parking spaces.

36.
Planning Permission for the development was granted on 9 October 2000.

37.
Condition 2 required the development to be carried out in all respects in accordance with the approved plans or as have otherwise been agreed in writing by the planning authority.

38.
Condition 7 is as follows:

''The garage or car-parking accommodation shown on drawing no DDH/005 Rev A, shall be provided prior to the dwelling to which it relates being occupied and thereafter it shall be retained permanently available for parking purposes and for no other purpose without the prior written permission of the Local Planning Authority (“the LPA”).

REASON- To safeguard the residential amenities of the neighbourhood and to ensure the provision of adequate off-street parking accommodation to avoid the congestion of surrounding streets by parked vehicles. "

39.
Following the grant of planning permission there were a number of variations in relation to the parking arrangements. In his decision Judge Hewitt set out details of the correspondence with the local planning authority and concluded that the LPA approved the orientation of parking spaces 28 and 29 and imposed a planning obligation on the Wards that the spaces were to be for the use of the owners and occupiers of 2 The Hall. (Appendix 3 paras 12 and 14).

40.
In my view it is quite unarguable that the October 2000 permission was a “variation” of the July 1988 permission. It was a fresh application made 12 years after the first. It involved the creation of some 21 new dwellings and a change of use from Dinsdale Hall’s use as a residential nursing home. To describe it as a “variation” is, to my mind, a misuse of language.

Evidence of Use

41.
Judge Hewitt dealt with the evidence of use in paras 2.6 to 2.28 of his decision. In summary:

1)
There was no direct evidence of the manner in which the Wards operated the nursing home and the parking arrangements. No evidence was adduced as to the route they took to get to and from The Hall. Judge Hewitt inferred that the obvious and natural route would have been via the South or front Drive to a convenient parking area at the front.

2)
He also inferred that when Mr Ward's mother resided at 2 The Hall she and her visitors accessed 2 The Hall in the same way. There was no evidence whether Mr Ward'smother had a car. He also inferred from the position of the postbox that the postman was likely to have accessed 2 The Hall from the South Drive. Judge Hewitt noted that it was possible to get access to 2 The Hall via the North access road to a courtyard and then down the courtyard. However until 2012 Mr Ward kept the gates to the courtyard locked.

3)
It is not clear from Judge Hewitt's decision when Mr Ward's mother died or left 2 The Hall. In his further submissions Mr Selwyn Sharpe referred me to para 6 of Mrs Ibbetson's witness statement. Mrs Ibbetson moved into one of the apartments in January 2006. She says she was told that Mrs Ward had died some 2 years earlier. She also said that 2 The Hall was empty when she moved in. Judge Hewitt accepted Mrs Ibbetson's evidence.

4)
2 The Hall was let out in 2010 for about 6 months to a young couple who parked in spaces 28 and 29. There is no real evidence as to the extent to which it may have been let by the Wards after Mrs Ward's death. 2 The Hall appears to have been on the market from about 2008. According to Mrs Ibbetson it was empty from late 2010 until bought by the Respondents in April 2012. It was, of course owned by the Wards who remained in possession until it was repossessed by MAS prior to sale. It seems likely that when Mr Ward showed prospective purchasers round they would have used the front access. The sales particulars suggested they should.

5)
After MAS repossessed 2 The Hall regular inspections took place by its agents. Those agents would have used the front access and parked at the front.

6)
When the Respondents viewed 2 The Hall they gained access via the southern drive and parked at the front. It seems likely that any other prospective purchaser would have done the same.

7)
Until about late 2012 Mr Ward would park all over the place including from time to time in spaces 28 and 29. However from late 2012 the main gates were locked and a secured gated entry system provided. Mr Ward left and ceased to use the South Drive from that time. As the Respondents have not been provided with a key they have been unable to access the front of 2 The Hall by car since late 2012.

Mrs Goodwin's submissions

42.
Mrs Goodwin was highly critical of the Appellants' behaviour in flagrantly breaching the terms of the planning permission by denying the Respondents to exercise the right of way over the green road and to park in spaces 28 and 29. However these criticisms depend on the assumption that the Respondents have the rights that they claim. If they can establish the rights she is correct that there has been a breach. On the other hand, if they cannot establish the rights the Appellants' behaviour cannot be criticised. Thus, these arguments do not advance the Respondents' case.

43.
Mrs Goodwin seeks to support Judge Hewitt's decision largely for the reasons he gave. In essence she submits that the Respondents are entitled to enforce the covenants in the 1988 conveyance either by way of a scheme of covenants or as persons entitled to the benefit of the covenants. She submits that the 1988 planning permission, as varied in 2000, envisaged that the occupier of 2 The Hall would be able park in places 28 and 29. Accordingly there came into existence an easement permitting the Respondents as registered proprietors and occupiers of 2 The Hall to gain access to the parking places over the road coloured green and to park there. As a result Judge Hewitt was right to direct the Chief Land Registrar to give effect to the easements.

Express or Implied Easement

44.
Before considering the grounds upon which Judge Hewitt upheld the Respondents' claim it is worth considering the arguments he rejected. Whilst Mrs Goodwin has not formally sought to challenge Judge Hewitt's findings the detailed statements she submitted do, at least in part appear to challenge the findings. If permission to amend the Respondent's Notice were needed I would unhesitatingly grant that permission. The Respondents are litigants in person. As the Law Commission has pointed out the law relating to the granting of easements – especially implied easements – is extremely (some might say unnecessarily) complex. It is not an area of law that a lay person can be expected to understand in detail. The question of whether there was an express or implied grant was plainly before Judge Hewitt and were dealt with in his decision. Judge Hewitt's findings of fact are sufficient to enable the matter to be reviewed. The justice of the case plainly demands that if the Respondents are entitled to an easement either by way of express or implied grant they should not be defeated simply because of a defect in the Respondent's Notice that was filed on their behalf.

Express Grant

45.
The question of whether there is an express grant is a matter of construction of the Transfer [2] between MAS and the Respondents. It is plain that there was no express grant of an easement either over the roadway coloured green or of a right to park. Neither are mentioned in the Deed. Mrs Goodwin sought to argue that there was an express grant by virtue of a clause in the 1988 conveyance to the Wards. With respect this cannot assist. The Wards were purchasing the whole of the land in question and thus there could be no question of an express easement to get from one part their land to another.

Implied Grant

46.
The principal reason that Judge Hewitt dismissed the claim based on implied grant appears to be that the mortgagee in possession had no power to create the easements. When this point was discussed

with Mr Selwyn Sharpe at the hearing I expressed the provisional view that Judge Hewitt was correct. The crucial feature of the reasoning is that the land charged to MAS did not include any part of the Southern Drive or parking places 28 and 29. It had no legal or equitable interest in either. It seemed to follow that MAS had no power to create an easement over either the Southern Drive or the parking places.

47.
When I reconsidered the point whilst preparing this judgment it seemed to me that this view might be too simplistic. The 1988 and 2005 charges were conveyances within the meaning of s 205 of the Law of Property Act 1925 and it seemed to me arguable that the easements might have been impliedly reserved over the Southern Drive. Thus MAS might have had power to pass then on to the Respondents via s 62 of 192 Act. I accordingly sent a note to the parties inviting further submissions on this point.

48.
Both parties accepted my invitation. On 4 and 5 February 2019 I received detailed further submissions from the parties. On 21 February 2019 I received further submissions from Mrs Goodwin in reply to those I had received from Mr Selwyn Sharpe.

Mr Selwyn Sharpe's submissions

49.
Mr Selwyn Sharpe helpfully set out the characteristics of grants under s 62 and Wheeldon v Burrows. I shall refer to these in more detail in the discussion below. He made no detailed submissions as to whether such rights can arise on the creation of a mortgage or charge on part of the property owned by the mortgagor.

50.
In para 18 he drew my attention to Sch 3 of the Land Registration Act 2002. He submitted that any implied easement interest would only bind a purchaser of an interest for value if it satisfied the requirements of the Schedule. He submitted that the requirements were not satisfied.

51.
He submitted that there could be no implied right of way or parking under the 1988 Charge for the following reasons

1)
there was no evidence of any user at the time of the 1988 Mortgage of the south drive/parking spaces for the benefit of and by occupants of 2 The Hall so that s 62 and/or the rule in Wheeldon v Burrows cannot apply;

2)
at the time of the 1988 mortgage the whole property including Dinsdale Hall and 2 The Hall was in common ownership;

3)
Rights under s 62 were expressly excluded by the words of the 1988 Charge;

4)
There were alternative means of access to 2 The Hall (via the back) so that the rule in Wheeldon v Burrows could not apply

52.
He submitted that there could be no right of way implied under the 2005 charge for the following reasons:

1.
the only evidence of any user of the south drive for the benefit of and by occupants of 2 The Hall was evidence of user by Mr Ward's mother from 1988 to the mid-2000s, probably until 2004 when it is thought she died, but only on foot. Such user was clearly only temporary and under a family arrangement as Mr Ward's mother was living in part of the whole of the Ward property. There is no evidence that user continued up until the date of the 2005 Mortgage. Therefore s62 and the rule in Wheeldon v Burrows do not apply ;

2.
There were alternative means of access to 2 The Hall submits (via the back) so that the rule in Wheeldon v Burrows could not apply.

3.
At the time of the 2005 mortgage the whole property including Dinsdale Hall and 2 The Hall was in common ownership;

53.
He submitted that MAS did not transfer any rights of parking in the 2012 Transfer for the following reasons:

1)
There was no evidence that MAS intended or had the power to grant any such rights. He submits that the exclusion clause in the contract had the effect of excluding s 62 of the Law of Property Act 1925.

2)
The only evidence of parking was by licence, and temporary up to November 2010.

3)
The alternative means of access means that the rights were not necessary for the reasonable enjoyment of 2 The Hall

4)
The advice from the Respondents' solicitors is to be construed evidence of a contrary intention.

5)
There was unity of ownership in 2011 so that there were no existing rights to transfer.

6)
The Respondents cannot satisfy Schedule 3 of the Land Registration Act 2002.

Mrs Goodwin's submissions

54.
Mrs Goodwin produced a 43 page further document setting out her submissions in detail. She started by repeating some of the submissions made at the hearing in relation to matters relating to questions upon which I did not invite further submissions. I regret it is not possible to consider these submissions.

55.

Mrs Goodwin referred me to a number of general principles relating to Wheeldon v Burrows citing from the judgment of Thesiger LJ in that case. She also referred me to a passage from the judgment of Maugham J in Borman v Griffith [1930] 1 Ch

where, as in the present case, two properties belonging to a single owner and about to be granted are separated by a common road, or where a plainly visible road exists over the one for the apparent use of the other, and that road is necessary for the reasonable enjoyment of the property, a right to use the road will pass with the quasi-dominant tenement, unless by the terms of the contract that right is excluded: and in my opinion, if the present position were that the plaintiff was claiming against the lessor specific performance of the agreement of October 10, 1923, he would be entitled to be given a right of way for all reasonable purposes along the drive, including the part that passes the farm on the way to the orchard.

It is true that the easement, or, rather, quasi-easement, is not continuous. But the authorities are sufficient to show that a grantor of property, in circumstances where an obvious, i.e., visible and made road is necessary for the reasonable enjoyment of the property by the grantee, must be taken prima facie to have intended to grant a right to use it.

56.
She submitted that it was the common intention of the 1988 parties that the main entrance gates and the vehicular internal access was intended to serve the properties in the East Wing. Such an intention can be inferred from the 1998 planning consent and covenant to build in accordance with that consent.

57.
She submitted that vehicular rights of access and parking over the Southern driveway were exercised by Mrs Ward senior (as occupier of 2 The Hall) from 1988 to her death. She pointed out that the Wards continued to use the Southern driveway for parking and access thereafter. She reminded me that after MAS took possession of 2 The Hall in 2011 there were regular inspections by their agents. As the rear entrance via the Courtyard was kept locked the inference must be that the agent gained access via the Southern Driveway and parked at the front.

58.
In summary she submitted that easements were implied into the 1988 mortgage, the 2005 mortgage both under s62 of the Law of Property Act 1925 and Wheeldon v Burrows and that those rights were passed on in the 2012 Transfer by MAS to the Respondents.

Discussion

59.
I agree with Mr Selwyn Sharpe that the 1988 charge does not assist the Respondents. There are two reasons for this. First, as Mr Selwyn Sharpe pointed out, the parcels clause of the mortgage expressly excluded s 62 of the Law of Property Act 1925. This would amount to a contrary intention within the meaning of s 62 so as to exclude its operation. Second, it is now plain that the property mortgaged in the 1988 mortgage was different from that mortgaged in 2005. The 1988 charge was a charge of both The Hall and 2 The Hall, whereas the 2005 charge was only a charge of 2 The Hall. It follows that the 1988 charge must have been discharged prior to September 2005. Any implied easements incorporated into the 1988 mortgage would have lapsed when it was discharged. It follows that the Respondents can only rely on easements implied into the September 2005 mortgage of 2 The Hall.

60.
I do, however, disagree with a number of Mr Selwyn Sharpe's submissions:

1)
I do not accept that the existence of an alternative access through the courtyard is in any way fatal to an implied easement under Wheeldon v Burrows. The question is whether the easement is reasonably necessary for the enjoyment of the dominant tenement. It is not the same test as an easement of necessity. The access through the courtyard at the back is plainly less convenient. It is not vehicular access. The access to the front via the southern driveway is the obvious access to 2 The Hall and is the access which was being used. It is clear from the 2000 planning permission that the Wards intended there to be a vehicular access via the southern driveway for the owners or occupiers of 2 The Hall. To my mind vehicular access via the southern driveway together with a right of parking (not necessarily in places 28 and 29) were reasonably necessary to the enjoyment of 2 The Hall.

2)
I do not accept that the fact that Dinsdale Hall and 2 The Hall were in common ownership is fatal to the claim. Wheeldon v Burrows is based on non-derogation from grant. As already noted it was the intention of the Wards (as evidenced by the planning permission, the geography, the letter box at the front of 2 The Hall) that 2 The Hall should enjoy vehicular access and parking to the front. The absence of an easement entitling such access and/or parking would make the mortgaged property significantly less valuable as a security. It seems to me that it would be a derogation from grant to deny the mortgagee the easements as appurtenant to the mortgaged property.

3)
I do not accept that there was unity of ownership and/or possession when the receivers were appointed in 2011. The mortgagees of Dinsdale Hall and 2 The Hall were different. After they obtained possession of their respective parts, the Receivers part included the southern driveway and the area at the front, MAS's part comprised 2 The Hall. Thus, there was no unity of possession.

4)
I do not accept that Schedule 3 of the Land Registration Act 2002 assists Mr Selwyn Sharpe. To my mind the easements would have been obvious on a reasonably careful inspection of the land over which the easement is exercisable. A reasonable careful inspection would have revealed the southern driveway, the parking places, the front of 2 The Hall, the letterbox at the front. Furthermore, Taurusbuild Ltd are not registered proprietors of any interest yet. Their application for registration is pending the outcome of these proceedings. No submissions on the question of priority have been addressed to me but the Respondents' interest is plainly earlier in time than that of Taurusbuild Ltd.

61.
As already noted Judge Hewitt found that the southern access road was the obvious and natural route to the front of Dinsdale Hall. That would have been the position when Mrs Ward senior was alive, when the September 2005 mortgage was granted and thereafter. Mr Selwyn Sharpe suggests that Mrs Ward senior was gaining access as licencee. Even if this is correct, she was a licencee of her son. Thus, the rights would have been exercised by her as licencee of Mr Ward in his capacity as owner of 2 The Hall. A similar point can be made about the use by the tenant in 2010. In addition to the use identified by Mr Selwyn Sharpe there will have been use by visitors and licencees of Mrs Ward senior, the postman, and other tradesman who were visiting 2 The Hall. After MAS took possession there was use by MAS's agents who visited regularly, potential purchasers including the Respondents who gave

unchallenged evidence that when they viewed 2 The Hall they used the southern driveway and parked in front of Dinsdale Hall.

62.
I do not accept that there was a contrary intention when MAS transferred 2 The Hall to the Respondents. The advice given to the Respondents by their solicitors is plainly not evidence of such an intention. There is nothing in the 2012 Transfer which constitutes a contrary intention and it is clear from s 62(4) that the contrary intention must be expressed in the conveyance.

63.
I have therefore come to the conclusion that the right to use the southern driveway together with a right to park at the front of Dinsdale Hall (not necessarily in places 28 and 29) was implied into the 2005 Mortgage in favour of MAS under the rule in Wheeldon v Burrows. I am equally satisfied that these rights would have been transferred to the Respondents in the 2012 Transfer under s 62 of the Law of Property Act 1925. Mr Selwyn Sharpe submitted that there was no evidence that MAS intended to transfer such rights. Such evidence is unnecessary. S62 applies in the absence of a contrary intention in the conveyance itself. There was no such contrary intention in the 2012 Transfer.

Equitable Easement

64.
In my view there are a number of insuperable difficulties with Judge Hewitt's analysis and Mrs Goodwin's submissions with the result that his decision that there is an equitable easement cannot stand.

65.
First, there is nothing in the 1988 Conveyance which creates or purports to create any easement in favour of 2 The Hall over the southern drive. Nor could there be. As pointed out above 2 The Hall was within the property conveyed to the Wards and thus there could not be a dominant and servient tenement. Thus there was no agreement to create an easement.

66.
Second, the right to the two parking places arises under the October 2000 planning permission not the July 1988 planning permission. For reasons given above the October 2000 permission cannot be regarded as a variation of the 1988 permission. Thus, the obligation in the Fifth Schedule to comply with the July 1988 permission, even if enforceable by the Respondents, would not, as a matter of construction, be wide enough to grant the Respondents the right to park in the two places.

67.
Third, the Respondents are not, as a matter of law entitled to the benefit of the covenants in the Fifth Schedule of the 1988 Conveyance. There are a number of reasons for this:

1)
The Respondents derive their title from the Wards who were subject to the burden of the covenants and not to the benefit of the covenants. They are not successors in title to the Council and do not own any part of the retained land.

2)
Covenant 1 in the Fifth Schedule of the 1988 Conveyance is a covenant to build in accordance with the 1988 planning permission. It is a positive covenant to build. It is enforceable by the Council as the LPA under s 33 Local Government (Miscellaneous Provisions) Act 1982. It is not enforceable by the

Respondents under this Act. Positive covenants are not enforceable against successors in title of the original covenantor. [See for example para 1.24 of Restrictive Covenants and Freehold Land : A Practitioner's Guide by Andrew Francis].

3)
This case does not come within a measurable distance of the cases where schemes of development have been established. As Mr Selwyn Sharpe pointed out the characteristics of such a scheme have been set out by Lewison LJ in Birdlip v Hunter [2017] 1 P & C R 1

i.
It applies to a defined area.

ii.
Owners of properties within that area have purchased their properties from a common owner.

iii.
Each of the properties is burdened by covenants which were intended to be mutually enforceable as between the several owners.

iv.
The limits of that defined area are known to each of the purchasers.

v.
The common owner is himself bound by the scheme, which crystallises on the occasion of the first sale of a plot within the defined area, with the consequence that he is not entitled to dispose of plots within that area otherwise than on the terms of the scheme.

vi.
The effect of the scheme will bind future purchasers of land falling within the area, potentially for ever.

The July 1988 permission was for the conversion of the school to a nursing home. There was no intention to sell off the individual parts of the nursing home or that that the individual parts would be able to enforce the covenant against the Wards.

68.
Fourth the Respondents cannot enforce the obligations in the October 2000 planning consent in the absence of a contract to which they are a party. [See for example Milebush Properties v Thameside [2011] EWCA Civ 270 at paras 51 and 69].

69.
It follows that I do not think the Respondents acquired any rights by virtue of the 1988 Conveyance and I am satisfied that there was no equitable easement. It follows that I do not need to consider the question of the jurisdiction of the F-tT to give effect to the equitable easement. In circumstances where the Respondents are not legally represented I prefer not to do so.

Conclusion

70.
For the reasons set out above I would dismiss this appeal on the basis that the Respondents are entitled to an implied right of way over the southern driveway and a right to park at the front of Dinsdale Hall (not necessarily in parking places 28 and 29). My reasons differ from those of Judge

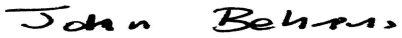
Hewitt but the result is substantially the same. It may be that the parties can agree that the parking should be in places 28 and 29. However in the absence of agreement I shall direct the Chief Registrar to register the easements as I have found them to be.

71.
Before leaving this appeal I must make 3 general observations:

1)
I am extremely grateful to Mr Selwyn Sharpe and Mrs Goodwin for their considerable assistance in this by no means straightforward case. Their detailed submissions were very helpful in clarifying my thoughts.

2)
I would wish to echo the general observations of Judge Hewitt. It is, to my mind, a great pity that this application could not have been settled amicably between the parties. A great deal of money has spent on a matter which should have been capable of resolution.

3)
I am not sorry to have reached the conclusion I have. It was plainly the intention of the Wards and the planning authority that the owners of 2 The Hall should be entitled to use the southern driveway and park at the front. 2 The Hall is an integral part of Dinsdale Hall and I cannot really see what rational objection the owners and other tenants at Dinsdale Hall can have to the Respondents, as owners and occupiers of 2 The Hall, using the southern driveway and parking at the front.



John Behrens

Upper Tribunal Judge

18 March 2019

ADDENDUM ON COSTS AND FORM OF ORDER

72.
I have now received submissions on costs and the form of order.

The Form of Order

73.
I have looked at the rival submissions in relation to the form of order. There seems little between them. In so far as there is a difference it relates to the persons who can exercise the easement. The easement as drafted by Mrs Goodwin includes licencees, tradesman etc; that drafted by Mr Selwyn Sharpe does not. I unhesitatingly prefer the submissions of Mrs Goodwin. The user of the easement plainly included use by licencees etc in the past and there is no reason to exclude them now.

74.
I accordingly Direct

That the Chief Land Registrar enters the benefits and burden on the respective registers of title of the parties "a right of way in favour of the owners occupiers or tenants of Number 2 The Hall or anyone authorised by them, at all times and for all purposes with or without vehicles to pass and repass over

the southern driveway of Dinsdale Hall (as shown on the plan attached to the judgment) to and from the public highway from the main gate to the open gate being the boundary of Number 2 The Hall together with a right to access therefrom the two parking spaces marked 28 and 29 on the plan and a right to park upon such parking spaces

Costs

75.
Judge Hewitt has directed that the Appellants pay the Respondents costs in the F-tT. He rejected a suggestion that there should be an issue based order for costs. In his view the Respondents succeeded and there was no reason to deprive them of their costs. He directed an assessment of their costs by the Registrar.

76.
The First Respondent has made no submissions on costs before me. Mr Selwyn Sharpe on behalf of the 2nd -9th Respondents [3] has argued that there should be an issue based order for costs in this Tribunal. He points out that the Appellants were successful on the arguments raised in the grounds of appeal, and that there was no cross appeal. Almost the whole of the argument in open court was devoted to points on which he succeeded. He lost because I revived a point on which he had succeeded before Judge Hewitt. In the alternative he submits there should be no order as to costs.

77.
A number of factors seem to me to be relevant on the question of costs:

1)
The issue in the case was whether the Respondents had an easement entitling them to access the front of 2 The Hall, and to park. As a result of the proceedings they have established those easements. Accordingly they have succeeded completely in their claim. They are the successful party.

2)
In law there are a number of different ways of establishing an easement. Judge Hewitt thought that there was no implied easement (under s 62 LPA or Wheeldon v Burrows) but held there was an equitable easement. For the reasons set out in the decision I disagreed with Judge Hewitt on both points. Thus the decision was upheld on different grounds.

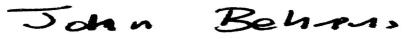
3)
The Respondents were acting as litigants in person but were assisted by Mrs Goodwin who clearly has some legal knowledge. Mrs Goodwin did not specifically seek to cross appeal on the question of whether there was an implied easement. Instead she made detailed submissions designed to support Judge Hewitt's reasoning. She repeated these submissions at the hearing in Leeds. Thus practically the whole of the hearing was devoted to points on which the Appellants have succeeded. The argument on the implied easement was contained in the parties written submissions submitted pursuant to a request by me after the oral hearing.

4)
On any view the law relating to the establishment of easements is complex and not straightforward. Thus the fact Mrs Goodwin may not have realised the need to challenge Judge Hewitt's finding that there was no implied easement is not a matter which weighs very strongly with me.

5)

As I pointed out in para 71(3) above, it was plainly the intention of the Wards and the planning authority that the owners of 2 The Hall should be entitled to use the southern driveway and park at the front. 2 The Hall is an integral part of Dinsdale Hall and I cannot really see what rational objection the owners and other tenants at Dinsdale Hall can have to the Respondents, as owners and occupiers of 2 The Hall, using the southern driveway and parking at the front. To my mind these observations are relevant to the question of costs.

78.
When I take these factors into account I am quite satisfied that the Respondents should be entitled to the bulk of their costs of the Appeal. However, I think there is some limited force in Mr Selwyn Sharpe's points. A significant amount of time was spent on the equitable easement point. Mrs Goodwin did seek to uphold the decision on that basis. In my view the fair order is that the 1st, 2nd, and 4th to 9th Appellants pay the Respondents 2/3 of their costs of the Appeal such costs to be assessed on the standard basis if not agreed.



Dated 17 June 2019 John Behrens Upper Tribunal Judge

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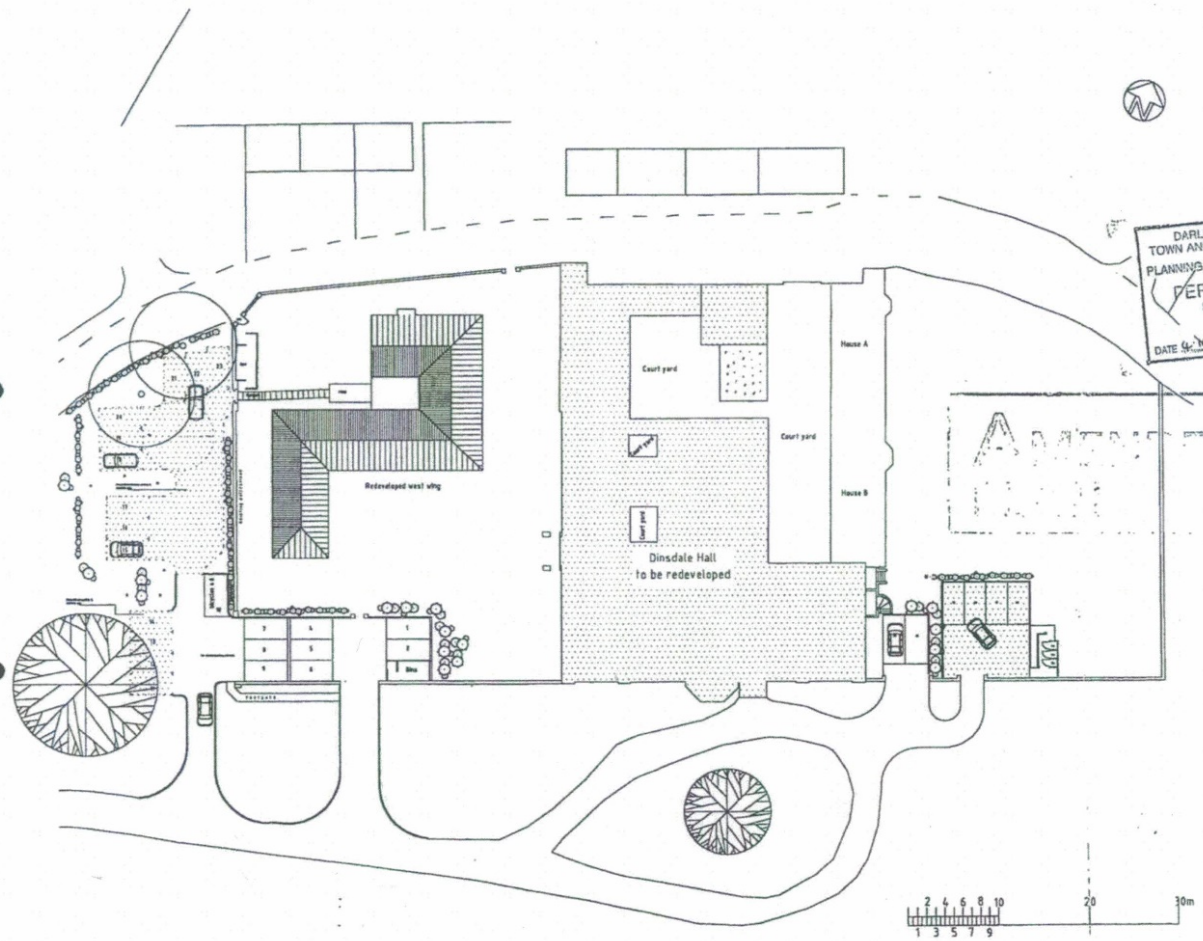


DARLINGTON BOROUGH COUNCIL
TOWN AND COUNTRY PLANNING ACT, 1990
PLANNING REF. No. 00/00297/FUL
PERMISSION GRANTED
SUBJECT TO CONDITIONS
J. D. BUXTON
DATE 4.10.00 Director of Development and Environment

DEPARTMENT OF DEVELOPMENT
Rec'd 24 AUG 2000

Rev. A 17/08/00 Car parking bay, apartment 5 revised.
Double garage for houses A & B detailed.

Scale at size A3 is 1:400

Client
Mr. R. Ward.

Project
Proposed alterations to Dinsdale Hall, Dinsdale, Co. Durham. DL

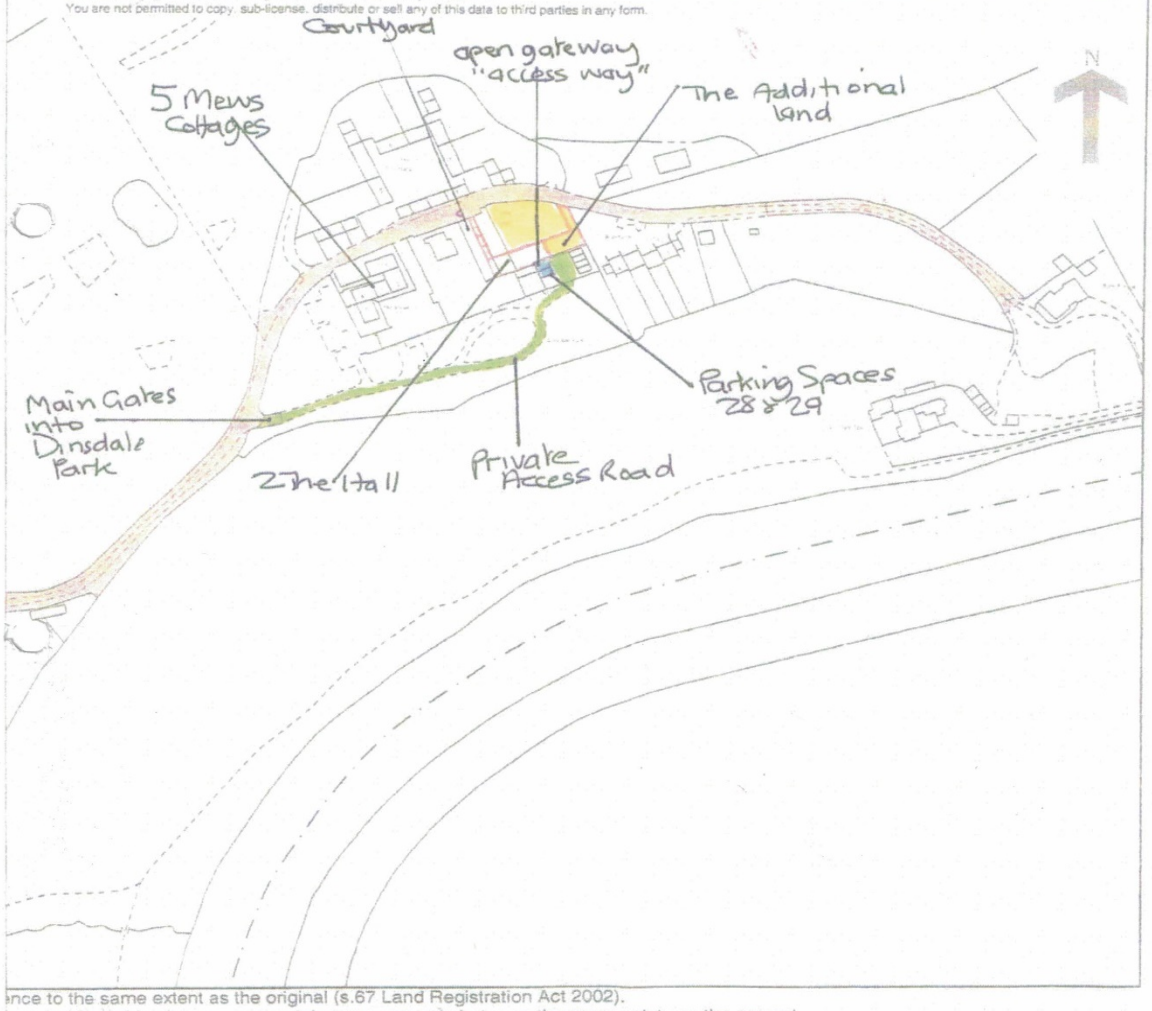
Drawing title
Site plan
As proposed.

Drawing number	Revision
DDH / 005	A
Date	Scale
February 2000	1 : 200

Doc 1

Land Registry
Official copy of title plan

Title number **DU342159**
Ordnance Survey map reference **NZ3312SE**
Scale **1:2500**
Administrative area **Darlington**



ence to the same extent as the original (s.67 Land Registration Act 2002).
s scaled from this plan may not match measurements between the same points on the ground.

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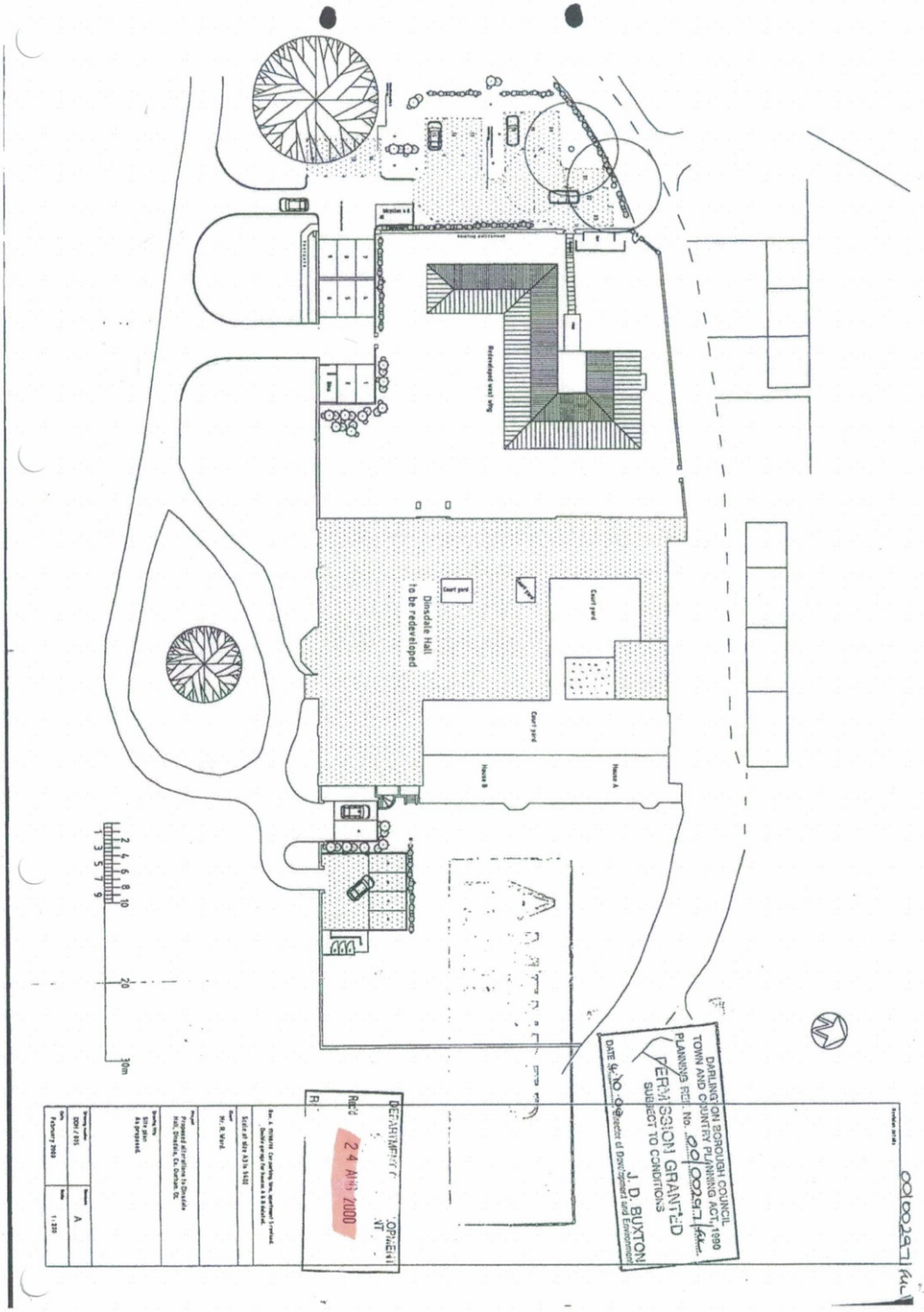

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[1] As will appear below William Henry Campbell died after the hearing before Judge Hewitt and before the hearing of the appeal.

[2] I am aware that some text books treat the grant of an easement by virtue of s 62 of the Law of Property Act 1925 as an express grant. Without going into the merits of that terminology for the purpose of this decision I am treating such an easement as an implied grant.

[3] Although his submissions do not make this clear, I assume that he is not in fact making submissions on behalf of the deceased Third Respondent.