

Neutral Citation Number: [2014] EWHC 1358 (Ch)

Case No: 2BS31308

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR
01/05/2014

B e f o r e :

MR JUSTICE MORGAN

Between:

**DAVID WOOD
PHILIPPA WOOD**

Claimants

- and -

EDWARD ALEXANDER WADDINGTON

Defendant

**Mr Martin Hutchings QC and Mr Simon Atkinson (instructed by
Memery Crystal LLP) for the Claimants
Mr Jonathan Gaunt QC (instructed by Michelmores LLP) for the Defendant
Hearing dates: 18, 19, 20 and 21 March 2014**

Mr Justice Morgan:

Introduction

1. This is a dispute between neighbours. Most of the matters in dispute arise out of claims by the Claimants, Mr and Mrs Wood, that they have the benefit of rights of way over land owned by the Defendant, Mr Waddington. There is also a counterclaim by Mr Waddington in which he alleges that Mr and Mrs Wood have built upon a track running across their land, over which Mr Waddington has an admitted right of way, and thereby infringed his right of way. The resolution of that issue depends on the precise boundary between Mr and Mrs Wood's land and Mr Waddington's land.
2. Before 29 September 1998, all of the land now owned by the Claimants and by the Defendant (together with yet further land) was in common ownership, the common owner being a Mr Crook. On 29 September 1998, Mr Crook conveyed part of his land to Mr and Mrs Sharman. Mr Sharman has since been ennobled as Baron Sharman of Redlynch. However, at the time of the division of Mr Crook's land in 1998 he was Mr Sharman and it is more convenient to refer to him throughout this judgement as Mr Sharman. I intend no discourtesy to Lord Sharman in this regard. On 30 July 2009, Mr and Mrs Sharman conveyed most of the land they had

acquired in 1998 to Mr and Mrs Wood. Also on 29 September 1998, Mr Crook conveyed another part of his land to Mr Waddington who has since retained that land.

3. One reason for the disagreement between the parties, and this litigation, is that there is said to be a potential conflict between the equestrian activities which Mr and Mrs Wood wish to carry on upon their land, and on two bridleways which cross Mr Waddington's land, and the shooting business which Mr Waddington wishes to carry on upon his land.
4. Mr Hutchings QC and Mr Atkinson appeared on behalf of Mr and Mrs Wood and Mr Gaunt QC appeared on behalf of Mr Waddington.

A description of the land in 1998

5. Before considering the terms of the transfers to Mr and Mrs Sharman and to Mr Waddington, it is necessary to describe the land originally owned by Mr Crook and the bridleways which crossed it. I will then make some findings of fact as to the use made of that land and of the various accesses and tracks upon that land in the period before 29 September 1998, when the land was divided up.
6. At the beginning of the trial, Mr Hutchings invited me to have a view of the land. I indicated that I would have a view but only if that turned out to be desirable in the light of matters which emerged in the course of the trial. I was provided with a large number of photographs and with films made by each of the parties. The photographs and films were clear and helpful. Having regard to the matters debated at the trial, I considered that I would not be further assisted by having a view of the land.
7. I can take a description of the land owned by Mr Crook in 1998 from the estate agents' particulars which were prepared for him in around 1997. The land comprised a residential, agricultural and sporting estate of about 1392 acres (564 hectares), known as Manor Farm, Teffont Magna, near Salisbury, Wiltshire. The principal buildings were a listed Manor House, 7 cottages, a range of Victorian farm buildings with a dovecote and courtyard. There was also a 250 cow dairy unit on land away from the main farm buildings. The land was used as a mixed arable and dairy farm. There was a pheasant and partridge shoot on the land. The agents' particulars stated that the farm benefitted from good access tracks. The particulars also gave a more detailed description of the land and buildings and the details included reference to the existence of a paddock and a coaching house with stables and a tack room. The land was offered for sale by Mr Crook as a whole or in six principal lots. The land was eventually sold to four sets of purchasers, namely, Mr and Mrs Sharman, Mr Waddington, three purchasers who were referred to as "the Frys" (in relation to Lot 5) and Mr Maitland-Robinson (in relation to Lot 6). The division of the land between these purchasers, broadly speaking, followed the original lotting of the land by the estate agents but there were some differences between the original lotting and the eventual division of the land. This was particularly so in relation to the farm tracks that ran around, or through, the nucleus of farm buildings and was the result of specific negotiation between the surveyors or estate agents acting for the various parties.
8. The original lotting plan showed Lots 1A, 1B, 2, 3, 4, 5 and 6. Lot 1A included the Manor House, known as Manor Farm; it also included a paddock between the house and the public highway (Wylve Road) and some traditional buildings including a coaching house with stables and tack room. Access to Lot 1A was from Wylve Road over a track, the title to which was part of Lot 1A. Lot 1B comprised farm buildings which were described as listed model farm buildings. The buildings had been used as a shoot room with kitchen, a games room and stables, open fronted sheds, a workshop and a farm office. Lot 1B also included a covered yard and a track which ran to and from another access on to Wylve Road.

9. Lot 2 was described as comprising nos. 1 and 2 Manor Farm Cottages and some land; that land appeared to have a frontage to, and therefore direct access to, Wylde Road. Although the cottages were referred to as nos. 1 and 2 Manor Farm Cottages, the later conveyancing documents referred to these cottages as nos. 3 and 4 Manor Farm Cottages. I will therefore adopt the latter description. One of these cottages was let and the other was occupied by the farm's tractor driver.
10. Lot 3 was described as comprising nos. 3 and 4 Manor Farm Cottages. However, the later conveyancing documents referred to these cottages as nos. 1 and 2 Manor Farm Cottages and I will do the same. Both these cottages were let. The lotting plan shows that access to these two cottages must have been intended to be taken off the track from Wylde Road which was included in Lot 1B.
11. Lot 4 was the greater part of the agricultural land extending to about 846 acres. Lot 4 included nos. 1 and 2 Field Barn Cottages and some agricultural buildings near to Field Barn Cottages. One of these cottages was occupied by a gamekeeper and the other was let. Lot 4 also included a large grain store which was located at Manor Farm itself, between Lot 1A and Lot 3. Lot 4 also included a field known as Small Sands and a track which ran between Small Sands (to the south of the track) and Home Ground (to the north of the track). Lot 4 also included a track between Lot 3 and the western side of Home Ground. Lot 4 was crossed by two bridleways to which I will refer in more detail shortly. They were referred to as Teff 5 and Teff 9. The access to Field Barn Cottages and the agricultural buildings near to them appears to have been taken by means of a track which ran from the public highway, Old Dinton Road, in a northerly direction. That track ran past the Field Barn Cottages and on further north to a road or track running in an east-west direction and known as the Ox Drove, a byway open to all traffic, which formed the northern boundary of Lot 4.
12. Lot 5 was the dairy part of the farm. It comprised about 236 acres of land, a dairy unit and a cottage. The western edge of Lot 5 ran along the track from Old Dinton Road, over which bridleway Teff 9 also ran. The main entrance to Lot 5 was over a public highway called Old Wylde Road.
13. Finally, Lot 6 comprised some 292 acres and was known as Rectory Farm. Lot 6 was to the north of the other agricultural land owned by Mr Crook. It was not referred to in the evidence at the trial and does not appear to be relevant to the issues between the parties.
14. The land described above was sold by Mr Crook as follows, but subject to some adjustment to the original lots: Lots 1A and 1B, part of Lot 2, Lot 3 and part of Lot 4 were sold to Mr and Mrs Sharman. The part of Lot 4 which was sold to Mr and Mrs Sharman was the field known as Small Sands, the grain store and certain tracks (described below). Part of Lot 2 was sold to Mr Waddington; this part consisted of the two cottages, 3 and 4 Manor Farm Cottages. The remainder of Lot 4 (which was the vast majority of Lot 4) was sold to Mr Waddington. Lot 5 was sold to the Frys. Lot 6 was sold to Mr Maitland-Robinson.
15. The relevant adjustments to the original lots were as follows: 3 and 4 Manor Farm Cottages (part of Lot 2) were sold to Mr Waddington; the field Small Sands which was part of Lot 4 was sold to Mr and Mrs Sharman and not Mr Waddington. This was obviously because Mr and Mrs Sharman wanted Small Sands. The track which ran the length of Small Sands, separating it from Home Ground, was included in the sale to Mr and Mrs Sharman and Mr Waddington was given a right of way over it. The old grain store which had been part of Lot 4 was also sold to Mr and Mrs Sharman. The track which separated the old grain store from Home Ground to the east was also included in the sale to Mr and Mrs Sharman and Mr Waddington was given a right of way over it. The first part of the track which was intended to be part of Lot 1B was not included in Lot 1B and so was not sold to Mr and Mrs Sharman but was sold to Mr Waddington and Mr and Mrs Sharman were given a right of way over it.

16. In the transfers which were later entered into, the various tracks which are relevant were identified by letters. The lettering system which runs from west to east through the nucleus of farm buildings and cottages was initially marked "A – B – C – D". Then "E" was added between A and B and Point J was identified. Furthermore, at the trial reference was made to Point T which was between C and D. These points are marked on the plan which is attached to this judgement.
17. Point A is at the junction of Wylfe Road and the northern entrance to Mr Crook's land from that road. Between Point A and Point E is a track, the title to which was transferred to Mr Waddington. At Point E, the track turns a right angle between Lot 2 and Lot 3 and proceeds to Point B. After Point B the track proceeds to Point C which is just north of the old grain store. The track then proceeds from Point C to Point T where it turns a right angle to run east between Small Sands and Home Ground. The track then continues from Point T to Point D where the marking of that track ends. Title to the track from Point E to Point D was transferred to Mr and Mrs Sharman and is now owned by Mr and Mrs Wood.
18. With one exception, I was not given evidence as to the negotiations between the parties in 1998 before they contracted to purchase the various parts of Mr Crook's land. With that one exception, it was not suggested that evidence as to the negotiations would have been admissible or helpful for the purpose of construing the contracts and the transfers in this case. The one exception to these general comments is that I was shown a letter from Savills, the agents acting for Mr Crook, to Strutt & Parker, the agents acting for Mr Waddington. This letter contained the following passage:

"We have agreed to alter the boundaries between Lot 4 and the owners of Lots 1, 2 and 3. Ed Waddington will now own the access coming in from the main road at Manor Farm which runs along the line A to E. In return, the track leading north-south from point C, where the Grain Store is, northwards up to the bridleway to the boundary of the area of land that the owners of Lots 1, 2 and 3 are purchasing, will be owned by the owners of Lots 1, 2 and 3. I have marked this on the plan. There will be cross rights for all parties.

My suggestion is that Ed Waddington still has the access as defined in the Heads of Terms along the routes A, B, C, D for a period of say one year or until he has developed a road way to the north of 1 & 2 Manor Farm Buildings and he can then go down along the bridleway towards the Grain Store and then still retain access along points C, D."
19. I was not shown the Heads of Terms referred to in that letter. The letter states that the track in question was marked on an attached plan. I was not shown the attached plan. However, the description of the track "up to the bridleway" is clear enough. It is the track which runs from Point C to Point J. Point J, is at the northern end of the track which runs south from J to C and then to T before turning east towards D. Point J is on the boundary which separates the land transferred to Mr and Mrs Sharman from that transferred to Mr Waddington. The letter also refers to Mr Waddington being able to go down the bridleway towards the grain store. This appears to be a reference to Mr Waddington being able to go along the bridleway on the land which he was to acquire and then to cross over onto the land being bought by Mr and Mrs Sharman, presumably at Point J, in order to get to the grain store just past Point C.

The bridleways

20. The land acquired by Mr Waddington is crossed by two bridleways, Teff 5 and Teff 9. Both are shown on the definitive map prepared by the County Council. As there shown, Teff 5 enters the relevant land at Point A and proceeds to Point E. At point E, the bridleway enters the field known as Horse Ground. As shown on the definitive map, the bridleway does not run along the field boundary towards Point J. Instead it runs at a diagonal across the field until it joins a track which runs north-south. That track runs due north from Point J but the point at which the

diagonal meets that track is about 200 metres north of Point J. Teff 5 then proceeds in a northerly direction along the track up to Ox Drove. The statement which accompanies the definitive map gives a relevant date of 6 April 1993, states that the bridleway is 2 metres wide and that part of it is subject to ploughing. I was also shown a survey dating from 31 January 1951, carried out under the National Parks and Access to the Countryside Act 1949, which gives the width of the bridleway as 6 feet.

21. The evidence shows that members of the public on horseback generally did not follow the diagonal line of the bridleway across Horse Ground. Instead, having travelled from Point A to Point E, they followed the field boundary in the direction of Point J. That part of the field would not always be easy for a horse and rider to cross, if it were ploughed up, but it would not be worse than following the diagonal line shown on the definitive map. When the horse and rider reached the track at, or near to, Point J, they would turn north and follow a hard track until they reached the point where the diagonal line met that track, a distance of 200 metres from J, and they would then proceed along the bridleway as shown on the definitive map.
22. Mr Gaunt submitted that the route of the bridleway was as shown on the definitive map and so that it ran at a diagonal across Horse Ground and did not run up to, or near to, Point J. He relied on the provisions of section 56 of the Wildlife and Countryside Act 1981. Section 56(1)(b) provides that a definitive map and statement are to be conclusive evidence as to the particulars contained therein to the extent that, in the case of a bridleway, the map is conclusive evidence that there was at the relevant date a public right of way on foot and a right of way on horseback or leading a horse, but so that this provision is without prejudice to any question whether the public had at that date any right of way other than those rights. Section 56(1)(e) provides that in a case where a definitive map is conclusive evidence as at any date, any particulars in the statement as to the position of, or width of, the public highway is conclusive evidence as to the position or width at that date. Mr Hutchings agreed that there was indeed a bridleway as shown on the definitive map as Teff 5. He wished to keep open the possibility of a modification of the definitive map in order to show a different line for Teff 5, in particular, a line which ran up to Point J and then turned north. He did not ask me to make any findings of fact or of law as to previous user of Teff 5 with a view to advancing this possibility. Accordingly, I will proceed in this judgement on the basis that Teff 5 does not go to Point J. I note however, that if it were later held that the bridleway does go to Point J and then turns north, then Mr and Mrs Wood would not need a private right of way to get (on horseback or on foot) to a point 200 metres north of Point J as they could get to that point on the new route of the bridleway.
23. The definitive map shows Teff 9 running from Old Dinton Road in a northerly direction. Teff 9 runs on the route of the track which starts at Old Dinton Road runs past Point D and past Field Barn Cottages and on northwards to Ox Drove. The statement which accompanies the definitive map gives the relevant date as 6 April 1993 and states that the width of Teff 9 is 2.5 metres. A survey dated 14 February 1951, under the National Parks and Access to the Countryside Act 1949, gave the width of the bridleway as 8 feet and stated that it was mentioned in the Dinton-Teffont Inclosure Award, a copy of which was not in evidence.
24. As before, Mr Gaunt relied on section 56(1)(b) and (e) of the 1981 Act as conclusive evidence that Teff 9 was 2.5 metres wide. I did not hear any argument as to whether it was open to Mr and Mrs Wood to contend that Teff 9 was wider than 2.5 metres. As before, Mr Hutchings wished to keep open the possibility of a modification of the Definitive Map in order to show a greater width for Teff 9. He did not ask me to make any findings of fact or of law as to previous user of Teff 9 with a view to advancing this possibility. Accordingly, I will proceed in this judgement on the basis that Teff 9 is 2.5 metres wide. The relevance of this width is that the land over which Teff 9 runs is wider than 2.5 metres. There are substantial verges on either side of the track and it is obvious that the conventional use of the track has been between the verges. The possible relevance of this point is that Point D is not a point on or at the edge of a

bridleway which is 2.5 metres wide, as there is an area of land owned by Mr Waddington between Point D and the bridleway.

The use of the various accesses up to 1998

25. For the purpose of deciding whether Mr and Mrs Wood have the rights of way which they claim it is necessary for the court to make findings as to the nature and extent of the use of the various accesses serving the entirety of Mr Crook's land before it was divided up upon the sales in 1998. Notwithstanding the importance of these findings, the evidence as to such use was relatively limited. Conversely, I was given much more evidence, certainly on behalf of Mr and Mrs Wood, as to the use of the various accesses after the land was divided up. It is clear that the use of the various accesses after Mr Crook's land was divided up was different from the use when that land was in common ownership and occupation. Accordingly, save in one or two respects, the use of the accesses after the land was divided up is of no real assistance as to the use at the earlier time.
26. Mr and Mrs Crook could have been expected to be a source of useful evidence as to the use of the various accesses in the period up to 1998. But neither of them was called to give evidence. I was not told of any overriding difficulty in the way of their giving evidence. It seems that Mr Crook was reluctant to get involved although he gave two witness statements, one to each side. The two witness statements do not agree with each other. In the absence of the attendance of Mr Crook for cross-examination, I do not think that I can make findings in favour of Mr and Mrs Wood based on the witness statement of Mr Crook which they have put in, save to the extent that those findings are supported by the witness statement of Mr Crook, put in by Mr Waddington.
27. As to the use of the track from Point D to Old Dinton Road, I also had evidence in the form of a hearsay statement from Mr White who had been a tractor driver on the farm for 23 years before 1998. Further, on the same subject, I also had a statement from Mr Pitcairn who was not required to attend for cross-examination; Mr Pitcairn was the son of the owners of Manor Farm between 1962 to 1991 (when it was sold to Mr Crook) and he lived at Manor Farm from 1962 to 1983.
28. A local resident, Mrs Fisher was called to give evidence and she did have relevant evidence to give as to the use of the land and the accesses in the period up to 1998. I found her to be a completely reliable witness and I accept her evidence. There was also evidence from other local residents who were permitted by the owner of Manor Farm (Mr Crook and his predecessors) to walk across Manor Farm and out on to the public footpaths/bridleways to which I have referred. Their evidence was brief and very general. In so far as their general evidence about use by farm traffic of the track from Point D to Old Dinton Road conflicts with the evidence of Mr Crook, Mr White and Mr Pitcairn, I prefer the evidence of these last three witnesses.
29. I also had evidence from Mr Durtnall as to the condition of the track Old Dinton Road. Mr Durtnall lives at Hillcrest, a property which is accessed from the track near to its junction with Old Dinton Road. It is not necessary to identify other witnesses who provided witness statements which dealt with the condition of the track from Point D to Old Dinton Road.
30. I will now make my findings as to the nature and extent of the use of the various accesses before the transfers of parts of the land in 1998. The land owned by Mr Crook was, in general terms, in single ownership and occupation before the sales in 1998. This is subject to two comments. The first is that the cottages were occupied by tenants and farm workers prior to 1998 and, to that extent, there was some diversity of occupation. However, it was not suggested by Mr Hutchings that the use made by the residential occupiers of cottages on the land transferred to Mr and Mrs Sharman was relevant to the rights of way now claimed by Mr and Mrs Wood. The second comment is that part of the land sold to Mr Waddington was occupied

by Teffont Magna Pigs and, again, to that extent there was diversity of occupation. However, no one suggested at the trial that the occupation of Teffont Magna Pigs was relevant; indeed, their existence was not referred to at all. Accordingly, the land now owned by Mr and Mrs Wood and the land now owned by Mr Waddington were, or can be regarded as having been, in common ownership and occupation.

31. The evidence as to the use of tracks and accesses by Mr Crook and his employees was somewhat general but it is likely that they would have moved freely around all of the land owned by Mr Crook, using such tracks and accesses as were suitable to be used. Mr Crook was the owner and occupier of all of the land now owned by Mr and Mrs Wood and Mr Waddington and he and his employees were free to choose whichever route they wished, using the tracks which ran over all of that land.
32. There was evidence that Mr Crook, and his employees also, would frequently go from Point D to Point T and then straight out on to Wylde Road, rather than turning north and eventually joining Wylde Road at Point A. It is also likely that Mr Crook and his employees would have gone north from Point T or Point C across Point J and up to the track which began at Point J and continued to the line of the bridleway, Teff 5, as shown on the definitive map.
33. There was also evidence that Mr Crook would go along the track from Point T to Point D and then turn left to get to other parts of his farm. Mr Durtnall gave evidence that at Point D there was a clear difference between the track running north from Point D and the track running south from that point. The track running south was narrow and potholed. The track running north was wider and the verges showed that the main traffic route and the main purpose of that track was to be an access from the nucleus of the farm to the Field Barn buildings, the dairy and the rest of the farm. Mr Durtnall's evidence on this point was not challenged.
34. The track over which Teff 9 runs, particularly from Old Dinton Road up to Point D, was in a relatively poor condition in the years running up to 1998. There was some dispute as to how bad the condition of the track was. I find that that stretch of the track was certainly potholed. I expect the condition of Teff 9 became worse as the years went by. Mrs Fisher told me that she rode a bicycle along it and drove a VW car along it. I accept that she did those things at some point in the past. However, in the period immediately following the sale in 1998, Mr Sharman was persuaded by the condition of the track not to drive his car on the track, although he did drive a 4x4 vehicle over it from Point D down to Old Dinton Road. I find that the track from Old Dinton Road to Point D was badly potholed in the period immediately before the sales in 1998.
35. The potholes in the track between Old Dinton Road and Point D must have been caused by some use by some vehicles at some time in the past. That finding does not mean that the potholes were necessarily caused by vehicles driving between Point D and Old Dinton Road for the purpose of gaining access to the main part of Manor Farm. It is likely that there would have been vehicles going from Old Dinton Road to Field Barn Cottages. I was not shown any way for a vehicle to get to Field Barn Cottages and the buildings near to them, save by using the track in question (from Old Dinton Road to the Ox Drove). I can see that it might have been possible to access those cottages and buildings from the north rather than from the south but I was not given any evidence on which to make a finding that a northerly route was the only route which was used.
36. Before Mr Crook's land was divided up in 1998, there was an old sign on the side of the track just past point D. The sign warned drivers of vehicles that the track north of Point D was a bridleway only and was not a through road for vehicles. The sign suggested that vehicles did from time to time come up the track from Old Dinton Road as far as Point D. The sign also suggests that vehicles were allowed to turn left at Point D, at least if they wanted to visit the main part of Manor Farm. All of this evidence shows that the track from Old Dinton Road to

Point D had been used by vehicles going to the main part of Manor Farm at some time in the past before 1998. However, this evidence does not by itself tell one much about the extent of such use in the period just before 1998. In that period, I find that the track would have been very challenging for an ordinary car. In that period, it would have been possible to drive along the track from Old Dinton Road to Point D in a 4x4 vehicle or in a heavy farm vehicle.

37. I was given specific evidence as to just how often in the period before 1998, the part of the track from Old Dinton Road to Point D was used for the purpose of accessing the main part of Manor Farm. In the witness statement of Mr Crook which was put in by Mr Waddington, he said that he went along the track from Point T to Point D and then turned left up the track over which Teff 9 runs; he did that 2 or 3 times every day. As to the track from Point D to Old Dinton Road he said:

“I hardly ever used the lane from the end of Small Sands to the Old Dinton Road. If I did use the lane, it would only be for something out of routine, like coming in from the pub. I think my use would average out at no more than once a month or once every two months. There was no regular pattern to it.

This lane was in very poor condition because the rain water would run down from Teffont Common which had been cleared to build a golf course. There was no vegetation left to hold the water and so I did not regard it as a route for getting to the Farm. It would also have been very inconvenient to get to the lane, as the connecting lane along the top of Small Sands was covered in muck from all the farm traffic. If I wanted to go to the village, it was much easier to drive along the lane in front of Manor Farm House. Why would I use a pot holed track to the Old Dinton Road when I had a perfectly good drive outside my house? I understand that the lane is now tarmacked, which will have changed the look of it a lot, but it was not tarmacked when I owned it.

Whilst I owned Manor Farm the main farm entrance past my house was used for all personal and farm traffic. I had no need to use the track from the end of Small Sands up to the Old Dinton Road.

There is a gate along the lane to Old Dinton Road. I did not use this gate because there was a much better and closer access at the other end of the field much closer to Manor Farm House and the grain store.”

38. Mr Crook’s reference to a gate is to the gate referred to at the trial at Point G. This gate is in the hedge on the eastern side of Small Sands. On the east of the hedge is a wide verge alongside the track over which Teff 9 runs and then there is the track itself. The explanation for the presence of a gate at that point appears to be that Mr Crook’s predecessor in title, many years earlier, had permitted local men and boys to play football on a pitch created on part of Small Sands. The gate appears to have been installed to allow anyone to come up the track and turn across the verge and into Small Sands. However, the pitch ceased to be used in about 1970 and the gate simply remained where it was. There was no evidence of any access being taken at Point G after 1970 and before the sales in 1998 although there was evidence of Point G being used after 1998.
39. I accept the evidence contained in the witness statement of Mr Crook which was put in by Mr Waddington. I also accept the evidence of the tractor driver, Mr White, who said that he used the track from Point D to Old Dinton Road, in connection with Manor Farm, less than once every six months, even in a tractor or landrover. I also accept the evidence of Mr Pitcairn that that part of the track was “rarely used”.
40. Mrs Fisher gave evidence that the postman drove to and from Manor Farm and to and from Field Barn Cottages using part of the track over which Teff 9 runs.

41. The evidence as to the presence of horses at Manor Farm before 1998 was very limited. Mr Crook did not ride but Mrs Crook did. It was suggested that she merely kept 1 or 2 retired horses. However, Mrs Fisher was asked a few questions about Mrs Crook when she was re-examined. She said that Mrs Crook did ride from time to time. She said that Mrs Crook “would have” ridden out at Point D and at Point J. No one asked Mrs Fisher how often Mrs Crook went horseriding. On the limited evidence as to Mrs Crook’s horseriding, and in view of other evidence that she did not ride at all, I do not think that I can make a finding as to the frequency with which Mrs Crook went horseriding and, in particular, how often she crossed over at Points D and/or J.
42. It is useful to stand back at this point to see what this evidence of use amounts to in the context of the claims which are made to rights of way. There was clear evidence that Mr Crook, and also his employees, would frequently go from Point D to Point T and then straight out on to Wylle Road. However, Mr and Mrs Wood contend that that user did not result in Mr Waddington acquiring a right of way to use the track past Manor Farm house to access Wylle Road. There was also evidence that Mr Crook and his employees drove north from Point T or Point C across Point J and up to the track which began at Point J and continued to the line of the bridleway, Teff 5, as shown on the definitive map. Mr and Mrs Wood do not claim a vehicular right of way to cross over at Point J onto Mr Waddington’s land. Further there was evidence that Mr Crook and his employees made frequent and significant use of the track from Point D going northwards towards Field Barn Cottages and the remainder of the farm. Mr and Mrs Wood do not claim any right of way over the track north of Point D.
43. What Mr and Mrs Wood do claim is a vehicular right of way from Point D to Old Dinton Road and a right of way on horseback and on foot at Points D, G and J. However, I find that the use of the track from Point D to Old Dinton Road before the division of Mr Crook’s land was very limited. The evidence as to use on horseback at Points D and J is even more limited. Finally, there was no evidence at all of any use on horseback at Point G.
44. In purported support of their claim, Mr and Mrs Wood called evidence as to the use made of the various accesses after Mr Crook’s land was divided up. However, the present claim is not a claim to prescriptive easements based on user. It is clear that the user since 1998 has been different from the user before the land was divided up. There were two significant changes in particular. The first was that in 2000, Mr Waddington surfaced the track from Old Dinton Road up to Point D and further northwards. Secondly, in 2000, Mr and Mrs Sharman started a livery business at Manor Farm and this business was taken over by Mr and Mrs Wood in 2009. The result has been that since 2000, the amount of horseriding to and from Manor Farm has been significantly more than whatever amount of horseriding was done by Mrs Crook before 1998.

The contracts of sale

45. On 14 January 1998, Mr Crook contracted to sell all of his land at Manor Farm (some 1393.14 acres) to a Mr Boord. There appear to have been supplemental agreements thereafter between Mr Crook and Mr Boord but it was not suggested that the terms of any supplemental agreement were material. The contract of sale to Mr Boord was not completed in the sense that title was never transferred to Mr Boord.
46. On 23 September 1998, Mr Boord contracted to sell to Mr and Mrs Sharman the land which was later transferred to them. On 23 September 1998, Mr Boord contracted to sell to Mr Waddington the land which was later transferred to him. Apart from the identification of the land to be transferred and the price, these two contracts were in the same terms.
47. The contracts dated 23 September 1998 provided:
 - (1) the contracts incorporated the 3rd edition of the Standard Conditions of Sale;

- (2) condition 3.4 of the Standard Conditions was to apply in a case where after the transfer the seller would be retaining land near to the property to be transferred; where condition 3.4 applied, the seller and the buyer would each have the rights over the land of the others which they would have had if there were two separate buyers to whom the seller had made simultaneous transfers of the property and the retained land;
- (3) the contracts were to be completed by way of a transfer of title directly from Mr Crook;
- (4) the contracts provided for the grant and reservation of easements in the same terms as were later set out in the relevant transfers.

The transfers

- 48. On 29 September 1998, the part of Manor Farm being acquired by Mr and Mrs Sharman was transferred to them by a transfer in form TR1. The parties to the transfer were Mr Crook as the Transferor, Mr Boord described as “the Purchaser” and Mr and Mrs Sharman as the Transferee.
- 49. Also on 29 September 1998, the part of Manor Farm being acquired by Mr Waddington was transferred to him by a transfer in form TR1. The parties to the transfer were Mr Crook as the Transferor, Mr Boord described as “the Purchaser” and Mr Waddington as the Transferee.
- 50. Also on 29 September 1998, the part of Manor Farm being acquired by the Frys was transferred to them by a transfer in form TR1. The parties to the transfer were Mr Crook as the Transferor, Mr Boord described as “the Purchaser” and the Frys as the Transferee.

The transfer to Mr and Mrs Sharman

- 51. The property transferred to Mr and Mrs Sharman was described as “Part Manor Farm Teffont Magna Salisbury Wiltshire being all that land more particularly delineated and shown coloured pink on the annexed plan (“the Plan”) comprising Lot 1A being Manor Farmhouse, Lot 1B being the farm buildings, Part Lot 2 being a paddock, Lot 3 being 1 and 2 Manor Farm Cottages and Part Lot 4 being Small Sands Field”. There were two plans annexed to the transfer but only one of them had land shown coloured pink and that one was “the Plan” as defined above.
- 52. Clause 12 of the transfer was a very detailed provision dealing with the grant and reservation of rights. It is not necessary to set out the provisions of clause 12 in full in this judgement but it is necessary for me to describe the nature of the provisions.
- 53. Clause 12.1 was headed “Access”. Clause 12.1.1 stated that the property transferred was subject to a right for the Transferor and his successors in title for the benefit of Lot 4. Lot 4 was defined later in the transfer by reference to the second plan annexed to the transfer. Clause 12.1.1 was divided into three sub-paragraphs. Sub-paragraph (i) was a vehicular right of way at all times and for all purposes to pass and repass over the road from Point E to Point B, for the benefit of 3 and 4 Manor Farm Cottages. Sub-paragraph (ii) was a right, for the benefit of the remainder of Lot 4, at all times and for agricultural and sporting purposes to pass and repass with or without horses and with vehicles and to drive horses sheep cattle and other animals along the road from Point E to Point B to Point C to Point D or over an alternative route pursuant to clause 12.1.2. Sub-paragraph (iii) was a right expressed in similar terms to those of sub-paragraph (ii) over the road between Point C and Point J; this right was not subject to the provision for an alternative route. Clause 12.1.2 gave the Transferee the right to divert the right granted by clause 12.1.1 (ii) and laid down criteria as to what would be an acceptable alternative. Those criteria make it plain that the right granted by clause 12.1.1 (ii) could be used by large agricultural vehicles. These rights would also suggest that the parties contemplated that large agricultural vehicles could travel to Point D and then, presumably, turn on to the track at that point. Clause 12.1.4 stated that the land transferred was subject to the right of the transferor

(the transfer said “transferee” but that was an obvious mistake) to widen the accessway at Point E.

54. Clause 12.1.5 stated that the land was transferred together with a right of way for the transferee at all times and for all purposes to pass and repass over the road at Point A to Point E. The detailed provisions of clause 12.1.5 permitted the transferee to enjoy the right of way with or without horses and to drive horses and various other animals. The wording of clause 12.1.5 in relation to horses repeated the wording of clause 12.1.1 in that respect.
55. Clause 12.1.3 provided that the grantees of the rights referred to in clause 12.1.1 and 12.1.5 were to share the costs of maintenance of the accessways over which the rights were granted.
56. Clause 12.2 had the heading “Water supply to the Property and 3 & 4 Manor Farm Cottages”. Clause 12.2 was a detailed provision dealing with a supply for water from Lot 4 to Lot 1. Some of the provisions of clause 12.2 dealt with the question of access for the purposes of the clause 12.2 rights.
57. Clause 12.3 was headed “General Rights and Reservations”. Clause 12.3.1 granted rights in relation to items collectively defined as “Conducting Media” under Lot 4. These media included matters such as tanks, sewers, drains, watercourses, pipes, wires, cables and channels or conduits. Clause 12.3.1 ended with the words: “PROVIDED THAT any rights relating to any water supply shall be defined only by clause 12.2 hereof”. This indicated that the more general words did not confer rights in relation to any water supply as these were to be dealt with by clause 12.2 alone.
58. Clause 12.3.2 reserved out of the transfer of the property the same rights as were granted by clause 12.3.1. Clause 12.3.2 was subject to the same proviso as appeared in clause 12.3.1.
59. Clause 12.3.3 is relied upon by Mr and Mrs Wood and I will set it out in full. It provided:

“Save as varied by the preceding subclauses of this clause 12 the Property is sold subject to and with the benefit of all liberties privileges and advantages of a continuous nature now used or enjoyed by or over the Property or Lot 4 and without any liability on the Transferor to define the same”.
60. Clause 12.3.3 potentially operated both to grant rights and to reserve rights. It potentially granted rights over the part of Lot 4 which was not transferred by this transfer and it potentially reserved rights out of the property transferred in favour of the remainder of Lot 4.

The transfer to Mr Waddington

61. The property transferred to Mr Waddington was described as “Part Manor Farm Teffont Magna Salisbury Wiltshire being all that land more particularly delineated and shown edged red on the plan annexed hereto and marked “A” (“the Plan”) comprising part Lot 4 including 3 and 4 Manor Farm Cottages [the wording thereafter is obscured by the multiple stamps on the transfer]”.
62. The transfer to Mr Waddington followed very much the same format as the transfer to Mr and Mrs Sharman. Rights which were expressly granted to Mr and Mrs Sharman by the transfer to them were expressly reserved out of the transfer to Mr Waddington. Rights which were reserved out of the transfer to Mr and Mrs Sharman for the benefit of the land to be transferred to Mr Waddington were expressly granted to Mr Waddington. The transfer to Mr Waddington was slightly more complex than the transfer to Mr and Mrs Sharman because it also dealt with rights granted and reserved in relation to Lot 5. Thus, clause 12.1.1 dealt with rights of access for Lot 5 and provided for Lot 5 to share the cost of maintenance of the relevant access way. By

clause 12.1.2, Mr Waddington covenanted to keep the access way referred to in clause 12.1.1 in a reasonably fit condition. Clause 12.1.3 defined “Lot 5”. Clause 12.2 dealt with the supply of water from Lot 4 to Lot 1; this provision mirrored the water supply provisions in the transfer to Mr and Mrs Sharman. Clause 12.3 dealt with the supply of water as between Lot 4 and Lot 5. Clauses 12.4.1 to 12.4.5 dealt with access as between the land acquired by Mr and Mrs Sharman and the land acquired by Mr Waddington. These provisions mirrored the provisions of clauses 12.1.1 to 12.1.5 of the transfer to Mr and Mrs Sharman.

63. Clause 12.5 of the transfer to Mr Waddington was the mirror image of clause 12.3 of the transfer to Mr and Mrs Sharman. In particular clause 12.5.3 provided:

“Save as varied by the preceding subclauses of this clause 12 the Property is sold subject to and with the benefit of all liberties privileges and advantages of a continuous nature now used or enjoyed by or over the Property or Lot 1 and without any liability on the Transferor to define the same”.

64. By clause 12.6, Mr Waddington covenanted for the benefit of Lot 1 not to build on Home Ground field, one of the fields being transferred to him.
65. The trial bundle contains a transfer to the Frys which is dated 29 September 1998. This appears to be a transfer of only some 25 acres and not the whole of Lot 5. It does not therefore have all the provisions dealing with Lot 5 which are contained in the transfer to Mr Waddington. However, the transfer does have similar general provisions to those contained in clause 12.3 of the transfer to Mr and Mrs Sharman and clause 12.5 of the transfer to Mr Waddington.

The Deed of Variation

66. On 8 June 2009, Mr and Mrs Sharman and Mr Waddington entered into a Deed of Variation of the transfer dated 29 September 1998 to Mr and Mrs Sharman. By this Deed Mr Waddington gave up the rights granted to him by clause 12.1.1 (ii) and (iii) of that transfer and was granted new rights of way over a new route. The new route followed a similar path from Point E to Point D save that the route was realigned between Point E and Point C. The new route involved less interference with the operation of the Sharmans’ land by Mr Waddington’s vehicles. The Deed of Variation was made as contemplated by clause 12.1.2 of the original transfer. It was not suggested that the terms of the Deed assisted with the construction of the original transfers in relation to the issues which have now arisen between the parties. I understand that this revised route had been created and was being used prior to June 2009 but the purpose of the Deed was to regularise the legal position in advance of an intended sale by Mr and Mrs Sharman.

The transfer to Mr and Mrs Wood

67. On 30 July 2009, Mr and Mrs Sharman transferred the land they had acquired in 1998, except for 1 and 2 Manor Farm Cottages, to Mr and Mrs Wood.

Other matters

68. In July 2000, Mr Waddington re-surfaced the track from Old Dinton Road, running past Points G and D and up to Field Barn Cottages.
69. In around 2000, Mr and Mrs Sharman started a business of livery stables at Manor Farm. They carried out certain works of conversion to the buildings and they employed a yard manager or groom, Ms Zoe Gregory, who lived in the groom’s flat.

70. Following their purchase in July 2009, Mr and Mrs Wood have continued the livery stables business started by Mr and Mrs Sharman. In the period from 2011 to 2012, Mr and Mrs Wood carried out extensive works on their land. They demolished the pre-existing grain store and adjoining grain separator and erected a substantial indoor riding arena. The new building measures some 20 metres by 60 metres. I was told that the new building was to competition standard. I will refer later to the precise location of the new building and the points which arise as to the narrowing of the track past the pre-existing grain store when discussing the counterclaim made by Mr Waddington.
71. Mr Wood explained to me that it was now a considerable advantage for the owners of Manor Farm and family and friends and the clients of the livery stables to be able to ride out from Manor Farm onto Teff 5 (in particular, using Point J), to go from there to the Ox Drove and to return to Manor Farm on the bridleway, Teff 9 (using Point D). From Point J up to the Ox Drove was about 2 miles and the complete circuit was about 5 miles.
72. It is not necessary for me to make findings as to the precise nature of the equestrian business operated by Mr and Mrs Wood on their land. Nor need I decide what plans (if any) they may have for the expansion of that business following the construction of the indoor riding arena.
73. In 2012, Mr Waddington erected a gate at Point D and another gate at Point J. There had not been any gate at these points at any time before 2012. Mr Waddington also erected a fence at Point G so that it was no longer possible to go through the gate which had been, and remained, at Point G.
74. These proceedings were brought on 15 October 2012.

The rights claimed by Mr and Mrs Wood

75. Mr and Mrs Wood claim the following rights of way:
- (1) A right of way with or without vehicles from Point D over a bellmouth at Point D and then on to the track from Point D to Old Dinton Road; their pleaded case claimed a right at all times and for all purposes; in his closing submissions, Mr Hutchings contended for a right for all domestic purposes;
 - (2) A right of way on foot and on horseback and leading a horse over the bellmouth at Point D to the bridleway Teff 9;
 - (3) A right of way on foot and on horseback and leading a horse over the verge at Point G to the bridleway Teff 9;
 - (4) A right of way on foot and on horseback and leading a horse from Point J over a track in Horse Ground for some 200 metres until the track reaches the bridleway Teff 5.
76. I referred earlier to the precise location of Teff 5 and Teff 9 and also to the fact that Mr and Mrs Wood have reserved their position as to whether there is a bridleway which runs up to Point J and a bridleway which runs past Point D (so that it directly connects with Point D). If Mr and Mrs Wood were able to establish those matters, then there would be a public right of way from Point J for 200 metres along the track in Horse Ground and for all practical purposes, Mr and Mrs Wood would not need to have the private right of way which they claim. The same reasoning would apply to the non-vehicular rights claimed at Point D if they could establish that they were able to move from their freehold land at Point D straight onto a bridleway at that point. However, in this action, I am asked to proceed on the basis that the public rights of way do not extend to Point J and do not connect directly with Point D.

77. Mr and Mrs Wood put their claims on various grounds. First, they say that the rights claimed were expressly granted to their predecessors in title, Mr and Mrs Sharman by clause 12.3.3 of the transfer to them and reserved out of the transfer to Mr Waddington by clause 12.5.3 of that transfer. Secondly, Mr and Mrs Wood say that the rights claimed were advantages enjoyed with the land transferred to their predecessors in title and became easements pursuant to section 62 of the Law of Property Act 1925. Thirdly, Mr and Mrs Wood say that the rights claimed are to be implied into the transfer to their predecessors either under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31, or to give effect to the way in which the land transferred was intended to be used, or on some other basis. I will deal separately with these various ways of putting the claims.

Express grant

78. As explained, Mr and Mrs Wood say that all of the rights which they claim were expressly granted to their predecessors in title, Mr and Mrs Sharman, by clause 12.3.3 of the transfer to them and reserved out of the transfer to Mr Waddington, by clause 12.5.3 of that transfer. I have set out these provisions earlier in this judgement.
79. Mr Hutchings submits that there is no difficulty in bringing the rights which are claimed at Points D, G and J within the words of clause 12.3.3 in the transfer to Mr and Mrs Sharman. He says that the rights of way claimed are “liberties, privileges and advantages” and they are “of a continuous nature”. He accepts that the rights are not in continuous use but they are continuous and apparent rights in that there are clear signs on the ground of the user in question. He also says that the rights claimed were used and enjoyed over a period of time including the period before the date of the transfers. Finally, he says that clause 12.3.3 of the transfer to Mr and Mrs Sharman can operate to grant all of the rights claimed because there was not an earlier provision in that transfer which “varies” the operation of clause 12.3.3 in relation to those rights. All that the earlier provisions of that transfer relevantly do is to confer other rights but not rights which are incompatible with the rights claimed. He submits that the rights claimed under clause 12.3.3 can happily co-exist with the express rights granted to Mr and Mrs Sharman in that transfer.
80. One of Mr Gaunt’s challenges to this line of argument is to ask rhetorically why Mr and Mrs Wood do not claim a vehicular right of way to cross at Point D onto the track and to turn left. The evidence shows that it was much more common for vehicles to proceed in that direction as compared with turning right towards Old Dinton Road. Mr Gaunt adds to that challenge the question why Mr Waddington would not be able, under the equivalent provisions, to claim a right for the benefit of his land to drive on the track in front of the Manor House to travel to and from Wyllye Road. Indeed, in his pleadings Mr Waddington claims such a right. At the trial, Mr Gaunt stated that this claim was not pressed but nonetheless the point was made that Mr and Mrs Wood could not have it both ways by claiming certain rights but resisting such a claim by Mr Waddington.
81. Mr Hutchings submits that Mr and Mrs Wood are entitled to have it both ways in this respect. He explained how he put their case as to the claimed rights. He then suggested that the position would be quite different in relation to the right suggested by Mr Waddington to pass in front of Manor Farm House. He appeared to me to accept that the reference to liberties of a continuous nature and the reference to “used or enjoyed” would appear to support Mr Waddington’s suggested right but he said that the right suggested was not granted by the general words, if one read the transfers as a whole. Those transfers gave Mr Waddington highly specific rights of way and gave Mr and Mrs Sharman a right to divert some of those rights of way. It could not have been intended that the general words in clauses 12.3.3 and 12.5.3 could have been intended to give Mr Waddington a further unspecified right of way to drive in front of the Manor Farm House. It was submitted that the answer to Mr Waddington’s suggestion was that in his case (but not in the case of the rights claimed by Mr and Mrs Wood) the general words

were varied by what went before in the transfers so that it could be seen that the parties did not intend Mr Waddington to have any rights of access which were not there specified. Alternatively, simply reading the transfers as a whole, it could not have been intended that the general words in clauses 12.3.3 and 12.5.3 could have that effect in favour of Mr Waddington.

82. I did not find the suggested distinction between the position of Mr Waddington and the position of Mr and Mrs Sharman entirely convincing. I accept the broad thrust of Mr Hutchings' submission that it would be surprising if the general words in the transfers were intended to confer on Mr Waddington unspecified rights of access in view of the obvious care which had been taken in specifying in detail the rights of access which were to be granted to him. But this comment should not be confined to Mr Waddington's position. The transfers obviously were intended to specify in detail the rights of access for both purchasers. Although Mr Waddington needed more express rights of access than Mr and Mrs Sharman did, that does not affect the point which applies to both purchasers that the detailed provisions of the transfers strongly suggest that the rights of access for both purchasers were specified in detail and were not left to be dealt with by the general words now prayed in aid by Mr and Mrs Wood.
83. Mr Hutchings, as I understood him, did not explain why Mr and Mrs Wood would not be entitled to a vehicular right of way after a left turn out on to the track at Point D. A similar point could be made as to the previous vehicular use across Point J. It may simply be that Mr and Mrs Wood do not feel that they need to have such rights and therefore do not claim them. Or it may be that there is some difficulty in proving that Mr Crook used the access at Point D in order to drive to land which was outside his ownership, such as Ox Drove. At any rate, the matter was left unexplained.
84. I consider that I need to look carefully at the wording of clause 12.3.3 and 12.5.3 (in the respective transfers) to see if all of the steps in Mr Hutchings' submissions are sound. Looking again at the wording of the relevant clauses in the context of all of the provisions of the transfers, there are a number of points that strike me.
85. First, the rights claimed by Mr and Mrs Wood are all rights of access to and from their land. In 1998, the common owner was dividing up his land between a number of purchasers and it was obviously essential that he and they should give detailed thought to the rights of access to be granted and reserved in the various transfers of parts of the land. It can be seen that the transfers spelt out in detail a number of matters as to such access. It is also the case that the rights of access were specifically negotiated because there was a change in this respect between the initial lotting plan and the final arrangements.
86. Secondly, the clauses in question indicate fairly clearly why the parties felt it appropriate to include the general provisions as to grants and reservations of rights. Starting with clauses 12.3.1 and 12.3.2 of the transfer to Mr and Mrs Sharman, those clauses dealt with matters such as pipes, wires and drains. It is always difficult, and perhaps even impossible, to identify all such matters and draft specific provisions to deal with them. Even if that task were attempted it would be very time consuming and one would still not be confident that all relevant matters had been identified. That explains the general words in clauses 12.3.1 and 12.3.2. The explanation for clause 12.3.3 is provided by the closing words of the clause, which provide that the transferor is not under any liability to define the same. That indicates to me that it was thought that there would be difficulty in defining the matters which would come within the clause. If that is the explanation, it does not fit very well with the suggestion that clause 12.3.3 deals with rights of access, amongst other things. In relation to the rights of access which are now claimed, it would not have been difficult to write in express provisions dealing with those matters. It is clear from the transfers that the parties did spell out detailed provisions as to the rights of access which they intended to grant and to reserve. It might be said that the rights now claimed by Mr and Mrs Wood would have been considered to be unimportant in 1998 and so it might be said that the parties did not bother to specify in detail these unimportant matters. But if that

comment were justified, it supports the idea that the parties did not intend to grant rights in relation to these unimportant matters rather than the idea that the parties did intend to grant such rights but decided not to bother defining the same.

87. Thirdly, the inclusion in the transfers of express obligations to contribute to the cost of maintenance of the shared access ways also tells against the arguments for Mr and Mrs Wood. The transfer to Mr and Mrs Sharman expressly grants or reserves rights of way in clauses 12.1.1 and 12.1.5. Clause 12.1.3 imposes a shared liability as to costs in connection with the accessways within clause 12.1.1 and 12.1.5 but no other accessways. If clause 12.3.3 is held to create further rights of way, there is no obligation on the dominant owner to contribute to the cost of maintaining the relevant accessways. Mr Hutchings submits that this will not create a difficulty in practice because the extent of the rights of way on horseback are very limited. However, his argument ignores his claim to vehicular rights of way from Point D; in relation to that right, I would not regard the burden of maintenance as *de minimis*. The limitation in clause 12.1.3 on the liability to contribute to the cost of maintenance is a significant argument in favour of a construction, if one is readily available, whereby clauses 12.3.3 and 12.5.3 do not deal with rights of access.
88. As against these arguments, it can be said on behalf of Mr and Mrs Wood that the general provisions dealing with Conducting Media were subject to a proviso which meant that the general provisions did not deal with the question of water which had been the subject of earlier detailed provisions but yet there is no such proviso in clause 12.3.3 and 12.5.3 which prevents those clauses dealing further with questions of access, even though access had already been dealt with in detail in the transfers. This point would be answered if it were held that it was, in any event, fairly clear that clauses 12.3.3 and 12.5.3 did not deal with questions of access.
89. It is also appropriate to examine the wording of the clauses against the background of the general law. The general law relevantly includes section 62 of the Law of Property Act 1925. I will discuss that section in more detail below. Section 62 refers to liberties privileges and advantages; so too do clauses 12.3.3 and 12.5.3. Section 62 refers to advantages etc “enjoyed with” the land conveyed; clauses 12.3.3 and 12.5.3 refer to advantages etc “now used and enjoyed” with the relevant property. The clauses introduce a limitation which does not appear in section 62. The limitation is that the advantages etc must be “of a continuous nature”. The well-known phrase in the law relating to quasi-easements is “continuous and apparent” and, in clauses 12.3.3 and 12.5.3, the word “apparent” is not used. This suggests that it is not sufficient for the purposes of these clauses that the advantage is apparent. There is a well-established difference between “continuous” and “apparent”. A right of way is not a continuous right although it can be an apparent right: see *Suffield v Brown* (1864) 4 De G J & S 185 at 199, *Polden v Bastard* (1865) 1 QB 156 at 161, *Watts v Kelson* (1870) 6 Ch App 166, *Borman v Griffith* [1930] 1 Ch 493 at 499 and Megarry & Wade, *The Law of Real Property*, 8th ed., para. 28-022. That suggests that the clauses are not dealing with rights of way. This is of course strongly supported by the fact that the transfers make detailed provision in other clauses for such rights.
90. Mr Hutchings submitted that I should be assisted in interpreting the word “continuous” in clauses 12.3.3 and 12.5.3 by what had been said in *Ward v Kirkland* [1967] Ch 194 at 225A-B. In that case, the right which was claimed was a right to enter land adjoining a cottage to repair the wall of the cottage. The judge in fact held that such a right was not continuous and apparent but it passed under section 62 of the Law of Property Act 1925. At page 225, when referring to the requirement that a quasi-easement be “continuous and apparent” for the purposes of the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 (which I consider later in this judgement), the judge said that in relation to the facts of that case that there had been continuous user “in the sense that the right has been in fact used whenever the need arose”. As I read the judgement, that did not satisfy the requirement of “continuous” in the phrase “continuous and apparent” and, further, the right was not “apparent”. I do not think that the judge intended to define the

meaning of “continuous” in any context and I do not derive any help from the judge’s comment when construing “of a continuous nature” in the relevant clauses in the present case. Further, I am not able to accept Mr Hutchings’ submission that the rights claimed in the present case satisfied the suggested test of “exercisable whenever the need arose”. First, there is no question of “need” in relation to the rights claimed. The suggested rights were dependent on someone deciding that it would be convenient to ride a horse out at Points D or G or J or that it would be convenient to drive to or from Point D to Old Dinton Road. Secondly, if Mr Hutchings were right, it would mean that clauses 12.3.3 and 12.5.3 dealt with rights which were not apparent (as the clauses do not use that word) and which were not used in any regular way in a reasonable period of time before the transfers. I consider that it is extremely improbable that the clauses were designed to produce that result.

91. Having considered all of the provisions of the transfers and the particular wording of clauses 12.3.3 and 12.5.3, I reach the conclusion that for the purposes of the general words in those clauses, a right of way is not a liberty, privilege or advantage “of a continuous nature”. I would give those words their established conveyancing meaning. That meaning is well understood and there are clear signs in the transfers that the parties were adopting the established meaning and were not intending to deal with rights of way at all. I acknowledge that in a different context, it might be appropriate to give the word “continuous” a much looser meaning although I still think that I would not construe it in the way specifically contended for by Mr Hutchings.
92. I consider that my conclusion as to the meaning of the clauses is a better reason for rejecting the argument put forward by Mr Waddington as to the possibility of a right of way in his favour in front of the farm house and on to Wylde Road than the reasoning put forward by Mr Hutchings for rejecting that argument. My conclusion means that the general words in the transfer to Mr and Mrs Sharman did not grant to them rights of way as claimed at Points D, G and J.
93. In any event, if I had held that the phrase “of a continuous nature” was to be given some looser meaning such as used regularly and frequently, I would not have been able to hold that the limited use made by Mr Crook of the track from Point D to Old Dinton Road amounted to regular and frequent use. Similarly, I would not have been able to hold that the use made by Mrs Crook of Points D and J on horseback was regular and frequent. Further, there was no evidence of any use of Point G on horseback, or at all.
94. Before turning to consider the submissions as to whether the rights of way claimed were granted pursuant to section 62 or are to be implied into the transfer to Mr and Mrs Sharman, I need to refer briefly to the submissions made in relation to the relevance of subsequent conduct by the parties.
95. The Claimants say that following the transfers in 1998, and until around 2012 when the parties came into conflict over the question of rights of way and other matters, Mr and Mrs Sharman and then the Claimants made use of the accesses which they now say are the subject of rights of way. The Claimants submit that this subsequent conduct is admissible for the purpose of construing the general words in the transfers. In particular, the Claimants rely upon the reasoning of Carnwath LJ in *Ali v Lane* [2007] 1 P&CR 26 at [36] – [37] where he stated that he would be inclined to conclude that, within narrow limits, evidence of subsequent conduct could be admissible where the conveyance was unclear or ambiguous and the subsequent evidence was of probative value in determining what the parties intended. On the facts of that case, most of the subsequent conduct was not probative of the intention of the parties to the conveyance. Carnwath LJ’s reasoning has been adopted in later cases: see, in particular, *Haycocks v Neville* [2007] 1 EGLR 78, *Piper v Wakeford* [2008] EWCA Civ 1378 and *Armbrister v Lightbourn* [2013] 1 P&CR 248 at [46].
96. I do not think that the use made of the various accesses after the land was divided up is of any real assistance in construing the transfers in the present case. First of all, the relevant clauses

refer to easements “of a continuous nature now used and enjoyed”. That phrase focuses on the mode of use and enjoyment prior to, and at the date of, the division of the land. Therefore, the clause has to be applied to the facts as to use and enjoyment prior to and at the date of the division of the land and not to the different facts as to use and enjoyment after the date of the division of the land.

97. Secondly, in any event, I do not consider that the subsequent use of the various accesses is in any way probative of the intentions of the parties when the land was divided. It is open to argument as to how widely the dicta in *Ali v Lane* apply. That case (and the others which have applied the dicta) concerned a dispute as to the position of a boundary. Carnwath LJ suggested that a different approach would be adopted in relation to disputes as to the extent of a contractual obligation. It might be argued that the obligation of a landowner to allow another to pass and repass over the landowner’s property is more akin to a case of an obligation than to a case about the position of a boundary line.
98. In a case of a dispute as to the extent of a contractual obligation, the following remarks of Megarry J in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No. 2)* [1973] 1 WLR 1572 are relevant:
- “However, I think it important to consider what is the proper ambit of the doctrine. One may accept to the full that it does not apply to commercial contracts or, for that matter, to any language of obligation, whatever the document. If the question is what one party is obliged to do under some document, the effect of measuring the obligation by what in fact that person has done under the document is to convert into a binding obligation what may have been done as of grace or to promote good relations or to avoid argument. If a contracting party wishes to avoid being held liable to do more than he has agreed to do, he must therefore abstain from doing anything more than he can be required to do; he must be churlish and insistent upon his rights. Life would become intolerable if everyone insisted to the ultimate upon the strict letter of his rights; and the danger of applying the doctrine to cases of obligation is that it would encourage such an insistence.”
99. Although that passage deals with construing the language in which an obligation is expressed, it seems to me that much the same considerations apply when one is considering the present case where a landowner has not relied on what he may or may not have understood the strict legal position to be when he did not object to his neighbour using a point of access. In the present case, even if the decision in *Ali v Lane* applies to a dispute about the existence of a right of way, I regard the subsequent conduct of the parties as not probative of anything relevant to the interpretation of the transfers.
100. Further, it may be necessary in another case to consider how the dicta in *Ali v Lane* can be reconciled with the strict approach to reliance on extrinsic evidence, advocated by Lewison LJ in *Cherry Tree Investments Ltd v Landmain* [2013] Ch 305, in particular at [129] – [130], which is to be adopted when construing an instrument which creates a right which is to be registered under the Land Registration Act 2002.

Section 62 of the Law of Property Act 1925

101. Mr and Mrs Wood contend that the rights claimed were granted pursuant to the general words which were read into the transfer to Mr and Mrs Sharman pursuant to section 62 of the Law of Property Act 1925. (In the remainder of this judgement I will refer to this section simply as “section 62”.)
102. The relevant provisions of section 62 are as follows:

- “(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.
- (2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.
- ...
- (4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.”

- 103. These provisions were previously contained in section 6 of the Conveyancing Act 1881 (“the 1881 Act”), to which many of the relevant decided cases refer. Further, I will refer to some cases concerning conveyances containing express general words even before the 1881 Act.
- 104. The heading to section 62 is: “General words implied in conveyances”. The way in which section 62 operates is that the statute implies, that is, it reads words, into a conveyance. The process is therefore not one where the court implies words into a conveyance to give effect to the presumed intention of the parties. When the words have been added to the conveyance in this way, one is dealing with an express grant of the rights in question: see *Broomfield v Williams* [1897] 1 Ch 602 at 610 and 615 and *Gregg v Richards* [1926] 1 Ch 521 at 534.
- 105. Section 62 operates to grant rights. It can never operate to reserve rights. It is well established, in relation to the law as to the implication of easements, that although there are different rules for an implied grant and an implied reservation of an easement, where there are “simultaneous dispositions”, the rule as to implied grants is applied to both dispositions: see *White v Taylor (No 2)* [1969] 1 Ch 160 at 181D – 183C, citing earlier authority. The contracts to transfer, and the transfers, in this case would be regarded in law as “simultaneous dispositions”. I have therefore considered whether this approach in relation to simultaneous dispositions applies for the purposes of section 62 in the same way as it applies in relation to the implication of easements. I could see a possible argument for a different approach in the case of section 62. However, Mr Gaunt on behalf of Mr Waddington accepted that the same approach did apply and that it was not necessary to inquire whether the transfer to Mr and Mrs Sharman was executed before the transfer to Mr Waddington. Mr Gaunt cited *Selby DC v Samuel Smith Old Brewery (Tadcaster) Ltd* (2000) 80 P&CR 466 where the Court of Appeal proceeded on that basis. In that case, there were not in fact simultaneous dispositions but there was a contractual provision which directed that the position as to grants and reservations would be the same as if there had been simultaneous dispositions. The Court of Appeal proceeded on the basis that the established approach in relation to implied grants in a case of simultaneous dispositions applied also to grants pursuant to section 62. I will, accordingly, proceed on the same basis. In this case, because the dispositions were simultaneous, it is not necessary to rely upon condition 3.4 of the Standard Conditions of Sale which only applies where there are not in fact simultaneous dispositions.

106. Section 62(4) provides that section 62 applies only “if and as far as a contrary intention is not expressed in the conveyance” and, further, section 62 has effect subject to the terms and provisions of the conveyance. This provision would seem to say that a contrary intention is only relevant if it is expressed in the conveyance although there are cases, not relied upon in the present case, which suggest that it is relevant to have regard to any background circumstances which reveal the intentions of the parties: see the cases cited in *Selby DC*, referred to above.
107. There is no doubt that a right of way is capable of being granted pursuant to section 62. The Claimants say that the rights which they claim were, prior to the transfer to Mr and Mrs Sharman, “enjoyed with” the land so transferred. The Claimants do not rely on the other wording of section 62, which refers to rights appertaining or reputed to appertain to the land conveyed or reputed or known as part or parcel or appurtenant to the land conveyed. In any event, I do not think that those words would produce a different result in this case. It is common ground that in considering whether an advantage was “enjoyed with” the land conveyed, one considers a reasonable period of time before the conveyance in order to see whether there was, over that period, a pattern of regular user in any particular way: see per Cross J in *Green v Ashco Horticulturist Ltd* [1966] 1 WLR 889 at 898.
108. One type of case in which section 62 can be invoked is where the land conveyed, and the other land over which a right is claimed pursuant to section 62, are in the occupation of different persons at the time of the conveyance. A fairly typical example of this is where the land conveyed is sold to a person who has previously been the tenant of that land and who under his tenancy enjoyed rights over adjoining land owned by the same freehold owner. In such a case, it is a matter of fact whether the rights claimed were “enjoyed with” the land conveyed. Difficulty does arise however, where the land conveyed and the land retained by the common owner were occupied by the same person at all relevant times, i.e. where there is no “diversity of occupation”, the phrase which is used in the authorities. The text books do not agree as to what the law is, or should be, in such a case and this disagreement is particularly acute where section 62 is relied upon in relation to a claim to a right of way. Cheshire and Burn’s *Modern Law of Real Property* 18th ed. at page 657 states that section 62 will not operate unless there has been diversity of ownership or occupation prior to the conveyance. Megarry & Wade on *The Law of Real Property* 8th ed. at para. 28-033 states that there need not have been diversity of occupation if the right claimed was continuous and apparent. In the present case, Mr Waddington’s Defence pleads that Mr and Mrs Wood cannot rely on section 62 to claim rights of way because there was no relevant diversity of occupation prior to the transfer to Mr and Mrs Sharman.
109. In order to resolve the question as to the suggested need for diversity of occupation prior to the relevant conveyance, particularly in relation to a claim to a right of way, I consider that it is helpful to approach this question (and the remaining matters arising in relation to section 62) by examining the following topics:
- (1) the wording of section 62;
 - (2) the cases involving easements other than rights of way;
 - (3) the cases on the general words before the 1881 Act;
 - (4) the decision in *Long v Gowlett* [1923] 2 Ch 177;
 - (5) the decision in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144 and cases which have applied that decision;
 - (6) more recent decisions of the Court of Appeal;

- (7) “continuous and apparent” in the context of section 62;
- (8) conclusions as to the operation of section 62;
- (9) the law applied to the facts;
- (10) contrary intention and other matters.

(1) *The wording of section 62*

110. Section 62 relevantly refers to “easements, rights, and advantages ... enjoyed with ... the land”. It is clear that section 62 can operate to create an easement or a right which did not exist, because of unity of ownership, before the relevant conveyance. So the reference in section 62 to “easements” and “rights” is not necessarily to pre-existing easements and rights. In explaining the operation of section 62 in a case where it is claimed that the section has converted something which was not a pre-existing easement or right into an easement or right, I find it easier to concentrate on the word “advantage” and to consider what is meant by an “advantage enjoyed with” the land conveyed. The use of the word “enjoyed” imposes a requirement that the advantage in question has actually been enjoyed within a reasonable period of time before the conveyance. The word “with” is important. It shows that the advantage must have been enjoyed with the land conveyed. This word must be considered in its context. The effect of section 62, where it operates, is to create an easement for the benefit of a dominant tenement and which is a burden on a servient tenement. The land conveyed will be the dominant tenement and the land retained will be the servient tenement. The use of the word “with” suggests that before the conveyance, there must have been a relationship between the land to be conveyed and the land to be retained so that it can properly be said that the advantage in question was enjoyed with the land to be conveyed.

(2) *The cases involving easements other than rights of way*

111. There are cases where the courts have held that rights have been created pursuant to section 62, even where there was no diversity of occupation prior to the conveyance. One well-known example is *Broomfield v Williams* [1897] 1 Ch 602. That case concerned a right to light. Two members of the court (Lindley and Rigby LJ) seemingly had no difficulty in holding that the light passing over the land retained had been “enjoyed with” the land conveyed. The land benefitted by the advantage was the building which had the windows which admitted the light. The land over which the light passed was not benefitted by the right claimed as the right imposed a restriction on the use of that land. Although some later cases have referred to this decision as being an exceptional case dealing with a right of light, my reaction is to regard it as a relatively straightforward application of the statutory words, referring to “an advantage enjoyed with” the land conveyed, rather than an exception to any general rule.
112. Another example is *Scouton & Co (Builders) Ltd v Gilyott & Scott Ltd* (1971) 221 EG 1499 which concerned a right of support. The reasoning in the judgement in that case is very brief but the result seems to me to be entirely correct. As with the case concerning light, the land which had the benefit of the advantage was the building which enjoyed the support. The land which was subject to the right of support did not benefit from that right as the right was a burden on that land.
113. A third example is *Watts v Kelson* (1871) 6 Ch App 166, which concerned general words in a conveyance before the 1881 Act. The general words included a reference to rights and advantages enjoyed with the land conveyed. The advantage in question was an artificial watercourse which had been made for the express purpose of supplying cattle sheds: see at page 168. By the conveyance, the land which included the cattle sheds was conveyed to the plaintiff and part of the watercourse was on the land retained by the vendor. It appears that all of the

land was in the occupation of a common owner before the conveyance. It was held that there would have been an implied grant of a right to use the watercourse but, in any event, such a right was granted by the general words as the advantage was enjoyed with the land conveyed, even though there had been no prior diversity of occupation. As with the cases of light and support referred to in the first two examples, it was relatively easy to see that the land conveyed was benefited by the advantage and the land retained was subject to a burden in that respect.

(3) The cases on the general words before the 1881 Act

114. The three examples given above did not directly concern rights of way. Before considering cases concerning rights of way after the 1881 Act, it is useful to refer to some of the cases before the 1881 Act which considered the application of the general words, then customarily used, to a claim to a right of way. I have selected the following cases which assist in identifying the principle to apply where the right claimed is a right of way and where there had no diversity of occupation prior to the relevant conveyance.

115. In *Watts v Kelson*, Mellish LJ made the following obiter comment at page 172:

“When a man walks over his own land in a particular direction he is not using anything, he is merely going where he pleases on his own property; but when there is a structure erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that if a man construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field.”

Mellish LJ also referred to the application of general words to a claimed right of way in his judgement at page 174.

116. In *Kay v Oxley* (1875) LR 10 QB 360 there was diversity of occupation before the conveyance but Blackburn J considered the position where there had not been and said at page 365:

“... yet if there be acts of ownership and user of a road by a man across land for the enjoyment and exclusive convenience of himself as occupier of the adjoining lands, notwithstanding the cases cited, I do not think, in point of law, we can say that the fact of the road having been so enjoyed and occupied only during the time he had unity of possession or unity of seisin prevents it being, enjoyed as appurtenant.”

117. In *Bolton v Bolton* (1879) 11 Ch D 968 (cited by Lord Wilberforce in *Sovmots* to which I refer below) Fry J said at pages 970 – 971:

“When a man who is owner of two fields walks over one to get to the other, that walking is attributable to the ownership of the land over which he is walking, and not necessarily to the ownership of the land to which he is walking.”

118. In *Barkshire v Grubb* (1881) 18 Ch D 616 Fry J said at pages 622-623:

“I think that when there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the general words “together with all ways now used or enjoyed therewith,” a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously.”

119. These authorities on general words in conveyances before the 1881 Act do not support the proposition that there is an absolute rule that section 62 can never apply to a claimed right of way unless there has been diversity of occupation before the relevant conveyance. They do

support an approach, to be derived from the wording of section 62 itself, to the effect that, before the relevant conveyance, the advantage must have been enjoyed “with” the land to be conveyed rather than as part of the rights of ownership of all of the land then in common ownership so that it can be, after the conveyance, an easement appurtenant to the land conveyed as the dominant tenement.

(4) *The decision in Long v Gowlett [1923] 2 Ch 177*

120. *Long v Gowlett* is an important decision for present purposes. That case was expressly approved in *Sovmots* and in *Payne v Inwood* (to which I will later refer). In *Long v Gowlett*, Sargant J had to consider the application of section 6 of the 1881 Act in relation to a claim by the defendant to a right to go onto the land of the plaintiff to repair the bank of a river and to cut weeds from the bank. While the land of the plaintiff (referred to as “Lot 2”) and the land of the defendant (referred to as “Lot 1”) were in common ownership and occupation, the owner and occupier did work to repair the bank and to cut the weeds. The defendant alleged that the works benefitted Lot 1 as well as Lot 2 so that the right claimed had been “enjoyed with” Lot 1 at the time of the conveyance of Lot 1 to the defendant. The judge dealt with this claim in some detail at pages 198 to 204. The passage needs to be read as a whole but I will confine myself to quotations from part only of it.

121. In *Long v Gowlett*, the judge said (at page 199) that the claim was not based on the existence of any continuous and apparent easement over Lot 2 in favour of Lot 1 as there was no defined way over Lot 2. The judge then said that the user relied upon as an advantage enjoyed with Lot 1 was user in the course of occupation and enjoyment of Lot 2 even though the user benefitted Lot 1 also and possibly benefitted Lot 1 to a greater extent than it benefitted Lot 2. The judge added at page 200:

“But it has never been held, and would I think be contrary to principle to hold, that **(in default of there being a made road over Blackacre forming a continuous and apparent means of communication)** a sale and conveyance of Whiteacre alone would carry a right to pass over Blackacre in the same way in which the common owner had been accustomed to pass. As it seems to me, in order that there may be a “privilege, easement or advantage” enjoyed with Whiteacre over Blackacre so as to pass under the statute, **there must be something done on Blackacre not due to or comprehended within the general rights of an occupying owner of Blackacre, but of such a nature that it is attributable to a privilege, easement, right or advantage, however precarious, which arises out of the ownership or occupation of Whiteacre, altogether apart from the ownership or occupation of Blackacre.** And it is difficult to see how, when there is a common ownership of both Whiteacre and Blackacre, there can be any such relationship between the two closes as (apart from the case of continuous and apparent easements or that of a way of necessity) would be necessary to create a “privilege, easement, right or advantage” within the words of s. 6, sub-s. 2, of the statute. For this purpose it would seem that there must be some diversity of ownership or occupation of the two closes **sufficient to refer the act or acts relied on not to mere occupying ownership, but to some advantage or privilege (however far short of a legal right) attaching to the owner or occupier of Whiteacre as such and de facto exercised over Blackacre.**” [My emphasis]

122. I note that, in the passage quoted above, the judge stated that he was not dealing with a continuous and apparent means of communication, suggesting that such a case might produce a different result. He then discussed *White v Williams* [1922] 1 KB 727 and considered the case of a common owner of two farms who took his sheep from the first farm to depasture them on the second farm during certain months of the year and then sold the first farm, retaining the second farm. The judge said that the purchaser of the first farm would not obtain a right to depasture sheep on the second farm under the statutory provision. The reason was that the common owner had been enjoying the advantage of depasturing sheep on the second farm as

the owner and occupier of the second farm and not as an advantage enjoyed with or as an incident of his ownership and possession of the first farm.

123. The judge in *Long v Gowlett* then considered *Broomfield v Williams* and said that the access of light to a window was a physical fact plainly visible to anyone buying a house and it was extremely similar to a continuous and apparent easement. That decision in relation to light did not justify the application of the section to cases of intermittent practice or non-apparent user. The judge then added:

“The importance of such a distinction is specially obvious in a case like the present, where there is a contemporaneous sale by a common owner to two separate purchasers of adjoining lots completely divided by a physical boundary. If the contention of the defendant is correct, it would be necessary in any such case for the purchaser to inquire how the common owner and occupier had been accustomed to make use of each close in connection with the other. Would the plaintiff, for instance, in this case be entitled, as against the defendant, to an alternative way over Lot 1 to reach Lot 2, because while both lots were in common ownership and occupation, it was the practice of Mr. and Mrs. Nichols by way of Lot 1 to repair the south bank of Lot 2? Any number of similar puzzles would arise, if the law were as the defendant would have it. **The fact that the common owner and occupier sells two adjoining closes separately is, in my mind, a negation of the intention to preserve access between them:** compare such a case as *Midland Ry. Co. v Gribble* [1895] 2 Ch 827. The only two exceptions to this rule appear to be those of ways of necessity and of continuous and apparent easements.”

- (5) *The decision in Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144 and cases which have applied that decision

124. The suggestion that there is an absolute rule that section 62 cannot operate to create a right of way where there was not diversity of occupation before the relevant conveyance appears to be supported by statements of considerable authority. I refer to the statements of Lord Wilberforce and Lord Edmund-Davies in *Sovmots* at 169B and 176C-D, respectively. Lord Wilberforce said:

“Equally, section 62 does not fit this case. The reason is that when land is under one ownership one cannot speak in any intelligible sense of rights, or privileges, or easements being exercised over one part for the benefit of another. Whatever the owner does, he does as owner and, until a separation occurs, of ownership or at least of occupation, the condition for the existence of rights, etc., does not exist: see *Bolton v. Bolton* (1879) 11 Ch.D. 968, 970 *per* Fry J. and *Long v Gowlett* [1923] 2 Ch 177, 189, 198, in my opinion a correct decision”

Lord Edmund-Davies added:

“But the section cannot operate unless there has been some diversity of ownership or occupation of the quasi-dominant and quasi-servient tenements prior to the conveyance: see *Long v Gowlett* [1923] 2 Ch 177. It is true that in *Broomfield v Williams* [1897] 1 Ch 602 the contrary was held in the case of a claim to light, but, as Megarry and Wade, *The Law of Real Property*, 4th ed. (1975), p. 838, points out “this easement is an exception to many rules.” ”

125. The suggestion of an absolute rule also appears to derive support from *Payne v Inwood* (1996) 74 P&CR 42, where a claim to a right of way pursuant to section 62 failed. It was held that the purchaser of a terraced house in October 1971 was not granted a right of way, pursuant to section 62, over the back yard of the adjoining terraced house retained by the vendor, when the right claimed had not been used for the benefit of the land sold to the purchaser in the period from June 1969 to October 1971. The Court of Appeal went on to hold that the right claimed was not granted under section 62 because there was no diversity of occupation of the two properties in the period prior to the sale. Roch LJ (with whom the other members of the court

agreed) said at page 51 that “the general rule” was that stated in *Long v Gowlett* and accepted by Lords Wilberforce and Edmund Davies in *Sovmots*. The case of *Broomfield v Williams* was to be confined to cases dealing with “such advantages as light to buildings”.

126. In *Robinson (Webster) Holdings Ltd v Agombar* [2002] 1 P&CR 20 at [80], Etherton J, relying on *Payne v Inwood*, held that a right of way would not be granted under section 62 where there had not been prior diversity of occupation. However, this reason was one of several reasons for rejecting the right claimed and it was not necessary for the judge to consider the point in detail.
127. I note that the decision in *Long v Gowlett* [1923] 2 Ch 177 was expressly approved in *Sovmots* and in *Payne v Inwood*. As I read *Long v Gowlett*, it did not lay down an absolute rule that a right such as a right of way could not be granted under section 62 (or section 6 of the 1881 Act) where there had not been prior diversity of occupation.

(6) More recent decisions of the Court of Appeal

128. There are difficulties in the way of my holding that there is an absolute rule that it is not possible for a right to way to be granted under section 62 when there has not been diversity of occupation before the transfer. Quite apart from the cases on the general words before the 1881 Act, there are now the decisions of the Court of Appeal in *P & S Platt Ltd v Crouch* [2004] 1 P&CR 18 and in *Alford v Hannaford* [2011] EWCA Civ 1099, both of which proceeded on the basis that there was no such absolute rule.
129. In *P & S Platt Ltd v Crouch* [2004] 1 P&CR 18, there was no diversity of occupation prior to the conveyance. The trial judge held that the right claimed (a right to moor boats) passed under section 62 and his decision was upheld by the Court of Appeal. Neither at first instance ([2002] EWHC 2195 (Ch)), nor on appeal, was there any argument that the lack of diversity of occupation was fatal to reliance on section 62. The judgements of the Court of Appeal do not contain any detailed discussion as to the circumstances in which a right can be “enjoyed with” the land transferred when there has not been prior diversity of occupation. The subject is mentioned briefly by Peter Gibson LJ at [42] where he held that the rights in question appertained to and were reputed to appertain to the hotel and that because the rights were continuous and apparent it did not matter that there had not been prior diversity of occupation.
130. In *Alford v Hannaford* [2011] EWCA Civ 1099, Patten LJ summarised the law in this way, at [36]:

“But where there has not been diversity of occupation prior to the sale, the generally held view is that s.62 can only operate to grant easements over the land retained by the vendor where the exercise of the relevant rights has been continuous and apparent in the sense described in *Wheeldon v Burrows*. There are dicta to this effect in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144 at pages 169 and 176 and the existence of continuous and apparent easements or quasi-easements as an exception to the requirement for diversity of occupation has been recognised in the decision of this court in *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110 at paragraph 42.”
131. Thus, the approach taken in these two decisions of the Court of Appeal is that a right, such as a right of way, can pass under section 62 even where there has been no diversity of occupation, provided always that the right was continuous and apparent. I think it is likely that the courts in these cases were influenced by the way the law has been described, to that effect, in Megarry & Wade, *The Law of Real Property*; the current edition (the 8th) states the law in this way at paras. 28-033 to 28-035. That passage also refers to a scholarly article by Mr Harpum at [1979] Conv. 113.

(7) “Continuous and apparent” in the context of section 62

132. The cases before the 1881 Act concerning the general words and claims to rights of way gave examples of facts which would allow the court to hold that the advantage claimed was “enjoyed with” the land conveyed. The language used in those cases varied as to the necessary connection between the advantage claimed and the land conveyed. In *Long v Gowlett*, Sargant J commented that the case before him did not involve a continuous and apparent means of communication. Megarry & Wade at para. 28-033 uses the test of “continuous and apparent” to determine whether the advantage is “enjoyed with” the land conveyed. This approach has been adopted in the more recent decisions of the Court of Appeal to which I have referred. It may be that a test of “continuous and apparent” is not an improvement on the statutory wording of “enjoyed with”. The reference to an easement being “continuous and apparent” appears to be taken from the case law dealing with the implication of easements: see *Wheeldon v Burrows* (1879) 12 Ch D 31 (to which I refer below). However, in that context, the phrase “continuous and apparent” does not stand alone as it operates in conjunction with a requirement that the right claimed is necessary for the reasonable enjoyment of the land conveyed. This further requirement helps to identify the relationship of dominance and servience between the land conveyed and the land retained. Further, the phrase “continuous and apparent” on its own has been considered to be lacking in clarity: see *Dalton v Angus* (1881) 6 App Cas 740 at 821 per Lord Blackburn. If the phrase “continuous and apparent” is to be used as a proxy for the statutory words “enjoyed with”, then (in the context of section 62) what must be apparent is that the advantage claimed is enjoyed with the land to be conveyed rather than enjoyed as part of the common ownership of both the land to be conveyed and the land to be retained.

(8) Conclusions as to the operation of section 62

133. I will now summarise my understanding of the legal position. There is no absolute rule that a right of way cannot be claimed under section 62 where there has not been diversity of occupation before the relevant conveyance. The ultimate question is whether the advantage in question was, on the facts, “enjoyed with” the land conveyed. Those words require two things to be shown. The advantage must have been “enjoyed” in the period before the conveyance. Further, the advantage must have been enjoyed “with” the land conveyed so that, after the conveyance, it will be appurtenant to the land conveyed as the dominant tenement. For these purposes, a consideration of how the advantage was actually used and whether it was apparently for the benefit of the land conveyed and apparently a burden on the land retained will be of great importance. The cases on the general words before the 1881 Act show, for example, that where there was a driveway leading across the land retained to serve the land conveyed it is possible to hold that the advantage of the use of the driveway was enjoyed with the land conveyed. I do not suggest that this example is the only possible case where a right of way would pass under the general words.

(9) The law applied to the facts

134. I find that the first right claimed by Mr and Mrs Wood, a right of way with or without vehicles from Point D over the bellmouth at Point D and then on to the track from Point D to Old Dinton Road was not enjoyed with the land conveyed. On the facts, access in that way was used rarely, at the very most once a month by Mr Crook. Mr Crook’s evidence was that he “did not regard it as a route for getting to the farm”; although his subjective belief is not directly relevant, it does support the evidence that this access was hardly ever used for the benefit of the land conveyed. I do not consider that it was apparent that the track from Point D to Old Dinton Road was an advantage enjoyed with the land transferred to Mr and Mrs Sharman. The markings at Point D described by Mr Durnall showed that generally the traffic turned left at Point D to go northwards up the track rather than south to Old Dinton Road. Mr Hutchings relied upon the presence of the old sign near to Point D. In the context of the very limited, indeed rare, user in the reasonable period of time prior to the division of the land, I would not give such weight to

the possible implications to be derived from the old sign so as to hold that it was apparent that there was an advantage of using the track from Old Dinton Road to Point D for the benefit of the land to be conveyed. The use certainly did not satisfy the test in *Long v Gowlett*, which I have emphasised in bold in the passages quoted above.

135. I find that the second right claimed by Mr and Mrs Wood, a right of way on foot and on horseback and leading a horse over the bellmouth at Point D to the bridleway Teff 9 was not enjoyed with the land conveyed. I have found that there were occasions when Mrs Crook did cross over at Point D on horseback. However, on the evidence, I am not able to make any finding as to how often this occurred nor whether it occurred within a reasonable period of time before the transfer to Mr and Mrs Sharman. All that I can find is that it happened at some time or times during Mr Crook's ownership of Manor Farm between 1991 and 1998. Further, even if there had been such enjoyment, the advantage was not enjoyed "with" the land conveyed. On whatever occasions there might have been when Mrs Crook crossed over Point D on horseback she was using land which was owned by Mr Crook and which gave access to various parts of the farm and so that it was not apparent that the existence of the crossing point or its use was only or even principally or even to an important extent for the purpose of gaining access to the land later transferred to Mr and Mrs Sharman. When Mrs Crook was riding along the track over which Teff 9 ran, she was not exercising a public right of way; she was simply riding on her husband's land. This is a classic case of land being used by the wife of the common owner but not so as to make one part of the land subject to a potential burden for the benefit of another part of the land. Whatever the extent of the use was, it would not satisfy the test in *Long v Gowlett* as emphasised in bold in the passages quoted earlier.
136. The position in relation to the third right claimed, by reference to Point G, is straightforward. There was no evidence that such a right was enjoyed with the land conveyed in any period of time of a reasonable length prior to the transfer. On the evidence, there was no pattern of regular user of the advantage claimed.
137. I find that the fourth right claimed by Mr and Mrs Wood, a right of way on foot and on horseback and leading a horse from Point J over a track in Horse Ground for some 200 metres until the track reaches the bridleway Teff 5, was not enjoyed with the land conveyed. My reasoning is the same as my reasoning in relation to the second right which was claimed.
138. I conclude, therefore, that Mr and Mrs Wood are not able successfully to rely on section 62 to assert any one of the rights of way which they have claimed.

(10) Contrary intention and other matters

139. Mr Gaunt submitted that if I had held that the rights claimed, or some of them, came within section 62 (1) or (2), then the rights claimed were not granted by section 62 because the transfer to Mr and Mrs Sharman showed a contrary intention. Mr Gaunt did not argue that there was anything else in the surrounding circumstances which showed such a contrary intention. He relied only upon section 62(4). In view of my earlier conclusion, I will attempt to deal with this point shortly.
140. The effect of section 62(4) is best explained by Sargant LJ in *Gregg v Richards* [1926] 1 Ch 521 at 534 – 535 where he said:

"It is a little difficult to see how that is to be dealt with in practice, but I think perhaps the way to regard it may be this, to consider that in such a conveyance there is added to the parcels a printed form of words such as you find in the common form printed forms of clause, and that then if the conveyance expresses an intention to exclude, you may consider that printed form of words struck out in ink and removed from the conveyance in that way; while, if an intention is shown to limit or alter the form, the limitation or alteration being introduced in the particular

conveyance would of course prevail, according to the ordinary rules of construction of such documents, over the common form which you find in the print. It may be that that would practically give effect to the provisions of the statute, but it is to be noticed that it is by way of express grant that it operates and not by way of implied grant, and that it is for the grantor who seeks to show that that express grant is limited to prove affirmatively that there is some limitation of that express grant.”

141. The Court of Appeal in *Gregg v Richards* approved the earlier decision in *Hansford v Jago* [1921] 1 Ch 322. In that case, the conveyance expressly included one or two of the matters provided for in section 62 but did not include all of those matters. It was held that the express inclusion of one or two matters did not indicate an intention that the remaining matters mentioned in section 62 should not be included: see at page 332.
142. Following the approach identified by Sargant LJ in *Gregg v Richards*, I approach the matter on the basis that the words of section 62 were set out expressly in the transfer to Mr and Mrs Sharman. I also proceed on the basis of an assumed finding that the rights claimed, or some of them, come within those words as advantages enjoyed with the land conveyed. I then have to ask whether there is something in the transfer which shows an intention that the words were not to operate to grant an easement to the extent of the advantages enjoyed with the land conveyed. Mr Gaunt relies on the terms in which the express rights are granted and the fact that clause 12.3.3 of the transfer contains general words which overlap with section 62 but which are narrower than section 62. Adopting the approach required by the authorities, my conclusion is (with some hesitation) that these considerations are not strong and clear enough to evince a contrary intention in relation to words which are treated as having been expressed in the transfer. However, that conclusion does not affect the result of this case in view of my earlier findings as to the application of section 62.
143. In view of my conclusions as to the operation of section 62, I will not go on to consider what the scope of any rights would have been if I had reached the contrary conclusion. In particular, I will not consider whether a right of way at Point D or Point J to cross on horseback would have been confined to use in connection with the residential use of Manor Farm or would have extended to use in connection with an equestrian business at Manor Farm. As I did not receive detailed submissions on that point, it would be unhelpful to consider it further.

Implied grant: *Wheeldon v Burrows*

144. Mr and Mrs Wood put forward two distinct arguments for the implication of rights of way. The first way the case was put was by relying on the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31. This rule is very well known. For present purposes, I can summarise matters by saying that Mr and Mrs Wood must show that, at the date of the transfer to Mr and Mrs Sharman, the rights claimed were:
 - (1) continuous and apparent in that they were used and enjoyed for the benefit of the land conveyed;
 - (2) necessary for the reasonable and convenient enjoyment of the property conveyed; and
 - (3) not inconsistent with the express terms of the conveyance.
145. These requirements appear from *Wheeldon v Burrows* itself, in particular per Thesiger LJ at 49), from the summaries of the rule given by Lord Wilberforce and Lord Edmund Davies in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144 at 168 – 169 and 175, and from many other cases which have applied the rule, examples of which include *Borman v Griffith* [1930] 1 Ch 493 at 499, *Ward v Kirkland* [1967] 1 Ch 194 at 224 – 226, *Millman v Ellis* (1995) 71 P&CR 158 and *Wheeler v Saunders* [1996] Ch 19, to which my

attention was drawn. The rule is a rule of intention based on the proposition that a grantor may not derogate from his grant. The same rule means that it is much more difficult for a grantor of land to contend that he has impliedly reserved an easement over the land granted; it is the duty of the grantor to reserve the easement expressly out of the grant.

146. In the present case, Mr and Mrs Wood contend that, by implication, the rights which were claimed were impliedly granted to Mr and Mrs Sharman and the transfer to Mr Waddington was subject to such rights. As explained earlier, although there are different rules for an implied grant and an implied reservation, because this is a case of simultaneous dispositions, the rule as to implied grants is applied to both dispositions. Thus, Mr and Mrs Wood can invoke the rule as to implied grants without the court having to inquire into the precise sequence as to the making of the contracts of sale.
147. As to the meaning of “continuous and apparent” in this context, it has been said that there must be some sign on the land of the enjoyment of the quasi-easement, which sign is discoverable on a careful inspection. In *Sovmots* at 169, Lord Wilberforce said that there must be actual, and apparent, use at the relevant time.
148. The requirement that the right claimed must be necessary for the reasonable and convenient enjoyment of the property conveyed is an important qualification of the principle. This requirement was referred to by Lord Neuberger of Abbotsbury in *Moncrieff v Jamieson* [2007] 1 WLR 2620 at [112]. He emphasised the importance of both the necessity and the reasonableness in the formulation which refers to “necessary for the reasonable enjoyment” of the property conveyed. The requirement also has a further important function; it serves to connect the right claimed with the land conveyed which, after the conveyance, will be the dominant tenement with the benefit of the right. Whether that connection is something which is independently necessary pursuant to the requirement that the use is continuous and apparent is less clear.
149. On the question as to the extent of the user of the various accesses prior to and at the date of the conveyance to Mr and Mrs Sharman, I have made my findings on those matters. The use by vehicles of the track from Point D to Old Dinton Road was very limited. The crossing at Points D and J on horseback was even more limited. There was no relevant crossing of the verge at Point G on horseback.
150. As to whether the rights now claimed were “apparent” at the time of the transfer to Mr and Mrs Sharman, it can be said that it was apparent that there was a means of crossing from Point D to the track from Old Dinton Road and the bridleway at Teff 9; conversely, I have already held that it was not apparent that there were advantages thereby which were used for the benefit of the land transferred. The same applies to the track leading from Point J to the bridleway at Teff 5 and with greater force to the verge at Point G. On the authorities, it is not clear to me whether it is sufficient for it to be apparent that there is a physical connection which would permit access to be taken or whether it must also be apparent that the access is being used “for the benefit of the land conveyed”. I will not attempt to resolve that question as, in my judgement, this case can be decided without difficulty by reference to the second requirement that the rights claimed must be necessary for the reasonable and convenient enjoyment of the property transferred to Mr and Mrs Sharman.
151. I will therefore proceed to apply my findings of fact to this second requirement. I find that the first right claimed by Mr and Mrs Wood, a right of way with or without vehicles from Point D over the bellmouth at Point D and then on to the track from Point D to Old Dinton Road was not necessary for the reasonable and convenient enjoyment of the land conveyed. This is indicated by the very limited use which was made of it before the transfer to Mr and Mrs Sharman. This finding is assisted by the evidence that there was only limited use made of it after that transfer before the track was surfaced. The track was potholed and in practice not

navigable by an ordinary car. It was not a convenient access to Manor Farm although it was a possible access. It was not necessary, in any sense, to use this access as Manor Farm was well served by its main access to Wylve Road.

152. I find that the second right claimed by Mr and Mrs Wood, a right of way on foot and on horseback and leading a horse over the bellmouth at Point D to the bridleway Teff 9 was not necessary for the reasonable and convenient enjoyment of the land conveyed. I can see that the ability to cross over at Point D to access Teff 9 allowed a horserider to benefit from Teff 9. It is arguable that the right claimed was beneficial for the purpose of enjoying Teff 9 but I do not see how it can be said that such an advantage was necessary for the reasonable and convenient enjoyment of the land conveyed.
153. As there was no relevant use of Point G on horseback, I do not need to consider the second requirement in relation to the right claimed in relation to Point G.
154. I find that the fourth right claimed by Mr and Mrs Wood, a right of way on foot and on horseback and leading a horse from Point J over a track in Horse Ground for some 200 metres until the track reaches the bridleway Teff 5, was not necessary for the reasonable and convenient enjoyment of the land conveyed. In part, the reasoning is the same as my reasoning for the second right claimed. But the matter goes further in relation to this fourth right which is claimed. The convenience to a horse rider of crossing over at point J and joining Teff 5 further along the track is to be assessed by considering that a horse rider coming from Manor Farm is in any event entitled to join the bridleway at Point E and then proceed through Horse Ground, just like any other member of the public. The transfer to Mr and Mrs Sharman expressly permitted them to use the track from A to E with horses. For this further reason, I cannot say that the differences between the two methods of leaving Manor Farm to join Teff 5 means that the right claimed is necessary for the reasonable and convenient enjoyment of Manor Farm.
155. In view of the above conclusions, I consider that there is no advantage in discussing whether the rights claimed by implication would be contrary to the intentions of the parties as disclosed by the detailed express terms of the transfers in this case, save to say that the suggestion that the implication is inconsistent with the clear express words in the transfers is stronger than the argument based on section 62(4). Further, I do not need to consider the scope of the rights claimed, in particular the scope of any right on horseback to cross over at Point D and/or Point J.

Implied grant: common intention as to some definite and particular use

156. The Claimants also submitted that they could bring the facts of the present case within the class of implication which was described by Lord Parker in *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 646 which was applied by the Court of Appeal in *Stafford v Lee* (1992) 65 P&CR 172 and *Donovan v Rana* [2014] EWCA Civ 99. In this class of case, two things must be shown: first, there must have been a common intention as to some definite and particular user; and secondly, the right claimed must be necessary to give effect to that common intention.
157. I am not able to find that the parties to the transfer to Mr and Mrs Sharman had a common intention as to a definite and particular use of the land conveyed which made it necessary for Mr and Mrs Sharman to have any of the rights now claimed. As to the intentions of Mr and Mrs Sharman at the time of the transfer as to the user of Manor Farm, there was no relevant evidence apart from the nature of the land, the terms of the transfer and the estate agents' description of the position in their particulars. Originally, some of the Claimants' witness statements contained passages which purported to describe the subjective intentions of the parties to the transfers in 1998 but, by agreement between counsel, those passages were redacted. Based on the admissible material, the intention was to occupy a farm house, for residential purposes, and to have the use of farm buildings which included stables which had

been used in the past for the purposes of recreational riding in connection with that residential use. There was no evidence at the time of the transfer that it was within the contemplation of the parties that Mr and Mrs Sharman would start up a livery business from the property. I know that they subsequently did start up a livery business but in the absence of evidence from Mr Sharman, who was a witness at the trial, that that was the intention behind acquiring Manor Farm I do not feel I would be justified in assuming or even inferring that fact. Further, there was no evidence as to any communication of such an intention to the transferor, Mr Crook, or even the other purchaser, Mr Waddington, which would allow me to find there was any relevant common intention.

158. Even if there was a common intention that the land should be used for the purposes of some equestrian business, I do not see why it is necessary for that purpose to have the rights claimed. Horses can leave Manor Farm at Point E and can use the bridleway at Teff 5, which is some 2 miles long. Horses can be ridden further along the Ox Drove and even down Teff 9. It is not necessary for the purposes of an equestrian business on Manor Farm for the horse riders to go in a circuit which ends back at the farm at Point D. I do not see why the riders should not go as far as they please on the route described above and then double back to Manor Farm re-entering it at Point E. I can see the attractions of riding a circuit back to Point D but those attractions do not amount to necessity, nor anything like it.
159. Mr Hutchings stressed that the whole of the track running along Small Sands (between Points T and D) had been included in the transfer to Mr and Mrs Sharman. He said that the inclusion of that track was not for the purpose of accessing Small Sands but must have been for the purpose of giving Mr and Mrs Sharman access to the track at Point D. He pointed out that the track between Points T and D was not wide enough to allow a vehicle to turn around so that if a vehicle drove from Point T to D, it would then have to reverse back to T. Mr Waddington pointed out that a vehicle could turn in Small Sands. He also suggested that someone had to own the track between T and D and the decision was made to lot it together with Small Sands rather than with the field to the north, Home Ground, as it then would provide access to Small Sands at any point along its length.
160. I can see that the parties might have thought that it was desirable that a vehicle using the track from Points T to D could turn at Point D. However, I do not see that the desirability of turning at Point D supports the suggestion that it is therefore necessary to imply a right to go from Point D to Old Dinton Road. A right limited to a right to turn at Point D is not claimed in these proceedings.
161. As before, in view of the above conclusions, I consider that there is no advantage in discussing whether the rights claimed by implication would be contrary to the intentions of the parties as disclosed by the detailed express terms of the transfers in this case; nor need I consider the scope of the rights claimed, in particular the scope of any right on horseback to cross over at Point D and/or Point J.

Further observations

162. The result of the above reasoning is that the rights claimed by Mr and Mrs Wood were not granted to them expressly, nor pursuant to section 62, nor by any process of implication. Before leaving this part of the case, I will make some further observations as to a different approach which might have been justified but which (I assume for very good reason) was not contended for by Mr and Mrs Wood.
163. Point D is shown on the plans annexed to the transfers in 1998 as a point where the track from Points T to D appears to meet the track over which there is the bridleway, Teff 9. It might therefore have been thought in 1998, by reference to those plans, that the owner of the track from Points T to D could simply cross over on horseback from Point D to that bridleway. As to

the position at point J, if one assumed that the bridleway, Teff 5, came up to Point J, it might therefore have been thought in 1998 that the owner of the track from Points C to J could simply cross over on horseback from Point J to that bridleway. It is conceivable that in 1998 everyone assumed that the freeholder of Manor Farm could simply step off, or ride off, his freehold land at Points D and J and find himself on a public right of way. If that had been the assumption, then it has since been shown to be incorrect for two reasons. The first reason is that Teff 5 does not run from Point J. The second reason is that the width of Teff 9 is such that there is an area of land (owned by Mr Waddington) between the freehold of Manor Farm and Teff 9. In a case where there has been an earlier assumption which turns out to be false, the ensuing difficulty can sometimes be cured by an estoppel. However, Mr and Mrs Wood do not claim that as successors in title to Mr and Mrs Sharman they are entitled to the benefit of any estoppel to which Mr and Mrs Sharman might have been entitled as against Mr Waddington. There was no evidence that Mr Crook or Mr Waddington said or promised anything relevant. There was no attempt to prove a common assumption of the kind I have speculated about. In particular, passages in the witness statements about the subjective states of mind of some of the witnesses were redacted. Further, there was no attempt to suggest that anything had “crossed the line” from Mr Crook or Mr Waddington so as to give rise to an estoppel by convention. Accordingly, I need not further consider any question of an estoppel based upon an alleged common assumption.

164. The other matter on which I wish to comment briefly is the subject of reasonable co-operation between neighbours. If a reasonable person was told that Mrs Wood wished to ride her horse across Point D and onto Teff 9 and that Mr Waddington had erected a gate to prevent her doing so, I could understand a reasonable person regarding that as unneighbourly. However, I would be less clear as to what a reasonable person would think if Mr Waddington’s objection was not to Mrs Wood riding her horse but to several clients of an equestrian business riding their horses across Point D and onto Teff 9. Further, I suspect that a reasonable person would be more sympathetic to Mr Waddington if Mr Waddington were attempting to run a commercial shoot on his land (a use which was contemplated at the time of the sales in 1998) and he had to suspend his shoot because of the presence of clients of such equestrian business crossing over at Point D. In the end, these matters are irrelevant to my task and I make no findings about them. My task is to determine what, in law, are the legal rights of the parties. Having determined that, the result is that the parties have whatever are their legal rights but not other rights that they would now very much like to have.

The boundary dispute

165. In his Counterclaim, Mr Waddington has claimed that Mr and Mrs Wood have substantially interfered with a right of way expressly granted to him by the transfer to him and expressly reserved out of the transfer to Mr and Mrs Sharman. Before the alleged acts of interference, there was an area of concrete between the old grain store and grain separator on one side and a bank and ditch on the other side. When Mr and Mrs Wood demolished the grain store and grain separator and constructed the indoor riding school and another building, the new buildings protruded on to the area which had formerly been concrete. The concrete area was taken up and replaced with stones. Because of the position of the new buildings, the width of the area which had formerly been concrete and is now covered with stones is less than before. However, simply to narrow an area over which there is a right of way will not necessarily involve an actionable interference with the right of way. The question is how much width is left, rather than how much width has been taken away. There is no dispute in this case that if all of the area which was formerly concrete and is now stones is owned by Mr and Mrs Wood (and is therefore subject to the right of way) then there is sufficient width left for the uses permitted under the right of way.
166. Mr Waddington contends that there has been a substantial interference with his right of way because not all of the width of the area which was formerly concrete, and is now covered with

stones, is owned by Mr and Mrs Wood. He says that part of that area was owned by him. Therefore the right of way is over a lesser width of the area which was formerly concrete. Assuming that to be established, the consequence of erecting the new buildings will be that there will not be enough width of the track which is the subject of the right of way and there will have been a substantial interference with the right of way.

167. In view of the way in which Mr Waddington puts his case for an infringement of the right of way, the first (and perhaps the only) question is whether he is right as to the location of the boundary between the land owned by Mr and Mrs Wood and his land. The answer to this question depends upon the true construction of the transfer to Mr Waddington and of the transfer to Mr and Mrs Sharman.
168. The transfer to Mr Waddington describes the land transferred as more particularly delineated and shown red on an attached plan. The plan is A4 in size and shows a large area of land. In relation to the area which is now in dispute, the scale of the plan is very small. The line in that area is not straight. It runs from north to south, from Point J to Point T, although those points are not marked on the plan. Along the length of that line, at about Point C, the plan shows a curve, referred to at the trial as “the bulge”. There is a second plan attached to the transfer to Mr Waddington. It is also A4 in size and is similar to the plan attached to this judgement. Point C is marked on that plan but not Points J and T. On that second plan it is easier to see the line of the track in question. Clause 12.4.2 of the transfer, as already explained, granted to Mr Waddington a right of way over “the road dashed brown between the points marked EBCD”. That description does not suggest that the right of way is only over part of the width of the road which existed on the ground in the vicinity of Point C.
169. The transfer to Mr and Mrs Sharman transferred land which was said to be more particularly delineated on an attached plan. That plan was similar to the second plan attached to the transfer to Mr Waddington. The transfer to Mr and Mrs Sharman reserved the right of way over the road between Points EBCD which had been granted to Mr Waddington. If part of the track had been transferred to Mr Waddington and so was not transferred to Mr and Mrs Sharman, it was accepted on behalf of Mr Waddington that there was nothing in the transfer to Mr and Mrs Sharman which would give them a right of way over the part of the track transferred to Mr Waddington.
170. The land transferred to Mr Waddington and the land transferred to Mr and Mrs Sharman were both said to be more particularly delineated on the relevant plans. There is guidance in the authorities as to the admissibility and use of evidence as to the topography at the time of the transfers, as an aid to the construction of the transfers. Speaking generally, when construing the transfer one takes account of what would be seen by the purchaser looking at the land with the plan in his hand: *Eastwood v Ashton* [1915] AC 900 at 912 per Lord Parker and *Pennock v Hodgson* [2010] EWCA Civ 873 at [12]. It has been said in a number of cases that the question is: what would the reasonable layman think he was buying? Evidence as to the physical features on the ground at the relevant time is not only admissible where the plan is for the purposes of identification only; such evidence is also admissible where the plan is referred to in order to define the land transferred. However, care must be taken when assessing the overall result when one has a plan for the purposes of defining the land and physical features on the ground which are at variance with what appears to be shown on the plan: compare *Dixon v Hodgson* [2011] EWCA Civ 1612 and *Cameron v Boggiano* [2012] EWCA Civ 157.
171. By the Deed of Variation dated 8 June 2009, Mr and Mrs Sharman granted to Mr Waddington a right of way over a revised route. The principal, if not the only, intention behind the Deed of Variation was to alter the route of the right of way in an area which did not impact on the position of the track along what is now the disputed boundary. The plan attached to the Deed of Variation shows the route of the way past the disputed boundary but it is not of much, if any, assistance as to where the parties then believed the disputed boundary was.

172. The land owned by Mr and Mrs Wood and by Mr Waddington respectively has been registered at the Land Registry. In view of the general boundaries rule, it was not suggested that the Land Registry plans were of direct assistance in resolving the current dispute as to the precise boundary.
173. I will now describe the position on the ground at the date of the transfers in 1998. There was an area of concrete in front of the grain store and the grain separator. That concrete extended from the front of the buildings until it reached a bank, on the other side of which there was a ditch. The area of concrete ran past Point C and down to Point T. There was a bulge opposite the buildings and the area of the bulge was laid to concrete. In general, this concrete was not in particularly good condition. Some of the concrete was old and had been repaired over the years. Some of the concrete looked more recent. The area laid to concrete had been widened at Point T to form a curve on each side of the track; this curve was meant to facilitate vehicles turning left or right at that point. Mr Gaunt suggested that there was a clear demarcation between the older and the newer concrete so that one could detect the line of separation.
174. Looking at a larger copy of the plans which were attached to the transfers, it seems that in the past that the track from Point C to Point T was narrower than it was in 1998. It therefore would seem to follow that the track had been widened before 1998 and it is likely that the track was widened by laying new concrete alongside the older concrete. It may therefore be the case that a careful examination of the age of the concrete in that area would have allowed one to detect where the original track had stopped and where the new concrete had been laid. However, on all of the evidence before me as to how matters would have appeared in 1998, I am not persuaded that it was at all obvious that there was a line which separated the original width of the track from the new concrete. I find that the condition of the concrete was too varied to bring home to the onlooker that there was a clear line in the way that has been suggested.
175. If an objective observer had gone to the land in 1998 with the plans attached to the transfers in his hand, I consider that he would have concluded that the boundary was along the edge of the concrete track as it then was. I consider that an objective observer would have rejected the idea that the parties intended to create a boundary which was hardly clear on the ground and which ran on a line so that one part of the width of the track was conveyed to one transferee and the other part to the other transferee. That clear reaction would only have been strengthened if he had considered that the grant of the right of way to Mr Waddington over the track contained no suggestion that the right of way extended to only part of the width of the track and that there was no grant of a right of way to Mr and Mrs Sharman over the part of the track supposedly transferred to Mr Waddington.
176. Accordingly, I find that the boundary between the two ownerships was, in and since 1998, along the line of the edge of the concrete track as it existed at the date of the transfers. On this basis, notwithstanding the construction of the new buildings, there remains available to Mr Waddington a sufficient width of track over which he has a right of way so that his right has not been substantially interfered with.

The result

177. I hold that Mr and Mrs Wood have not established that they have the rights of way which they have claimed. I will therefore not grant them the relief which they have claimed.
178. I hold that Mr and Mrs Wood have not substantially interfered with Mr Waddington's right of way. The other matters which have been raised in the counterclaim have not been pursued. I will therefore not grant the relief which Mr Waddington has counterclaimed.
179. Although I will not grant the relief which is claimed and counterclaimed, it is likely to be helpful to the parties if the conclusions in this judgement were expressed in appropriate

declarations. I will ask counsel for the parties to attempt to agree a suitable minute of order to that end.

180. As agreed with the parties, I will now adjourn all consequential matters. If such matters cannot be agreed promptly then they can be dealt with at a further short hearing or even, if appropriate, on the basis of written submissions.

