Case No: A3/2010/3008

Neutral Citation Number: [2011] EWCA Civ 1356
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Roth
Case No HCO7C02530

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2011

Before:
THE MASTER OF THE ROLLS
LORD JUSTICE AIKENS
and
LORD JUSTICE LEWISON

- -

Between:

LONDON TARA HOTEL LIMITED	**Appellant Claimant**
- and -	
KENSINGTON CLOSE HOTEL LIMITED	**Respondent Defendant**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Jonathan Gaunt QC and **Mark Wonnacott** (instructed by **Mishcon de Reya**) for **the Appellant**
Nicholas Dowding QC and **Stephen Jourdan QC** (instructed by **Payne Hicks Beach**) for **the Respondent**

Hearing date: 31 October 2011

- -

Judgment
As Approved by the Court

The Master of the Rolls:

Introductory

1. In a comprehensive judgment handed down on 1 November 2010, Roth J concluded that Kensington Close Hotel Ltd ("KCH"), the owner of the Kensington Close Hotel ("the KC Hotel") had established a right of way by prescription over a private roadway ("the roadway") belonging to London Tara Hotel Ltd ("Tara") - [2010] EWHC 2749 (Ch). This conclusion was based on his finding that KCH (or its predecessors) had used the roadway for twenty years or more without force, openly, and without the permission of the owner of the roadway. In other words, in the time-honoured expression so familiar to property lawyers, he concluded that KCH and its predecessors had used the roadway *nec vi, nec clam, nec precario*.

2. I mention in passing that Tara's skeleton argument on this appeal suggested that Mr Gale imported this expression into English law when he first wrote his treatise on the law of easements in 1839. However, as Lewison LJ pointed out, the ancestry of the phrase can be traced back to Bracton (see *De legibus et consuetudinibus Angliae* lib 4 f 221) and Coke (see Co. Litt 114a), long before Mr Gale put pen to paper.

The background facts

3. The factual background to the issues is very fully set out in the judgment below – [2010] EWHC 2749 (Ch), paras 2-42. For present purposes, the facts can be shortly stated.

4. The KC Hotel was built in the late 1930s; its main entrance is at its northern end, abutting Scarsdale Place, which is accessed from Wright's Lane, which runs south off Kensington High Street, London W8. Roughly to the east of the KC Hotel is the Copthorne Tara Hotel ("the Tara Hotel"), which was constructed in the early 1970s, and is accessed via the roadway from the west along Scarsdale Place. The roadway goes east from Scarsdale Place right round the Tara Hotel and back into Scarsdale Place. Importantly for present purposes, part of the roadway passes between the two hotels, and abuts the KC Hotel on its eastern side.

5. By a written agreement dated 30 January 1973, Tara granted a personal licence ("the Licence") permitting Kensington Close Limited ("KCL"), the then owner of the KC Hotel, to use the roadway "from year to year". The Licence recorded that the roadway was to be used as a one-way system, and it is common ground that the terms of the Licence did not permit KCL to use the roadway with coaches. The Licence provided for payment by KCL to Tara of £1 on 31 January each year, if demanded, "as an acknowledgment that the enjoyment of the [roadway] is had under this [Licence] and not otherwise". In fact, the payment of £1 was never demanded, and thus never made.

6. At the time the Licence was granted, Tara was the owner of the Tara Hotel and KCL was the owner of the KC Hotel. After the grant of the Licence in 1973, no one appears to have given it any thought until 2006. Those managing the Tara Hotel were aware that there was some sort of agreement which permitted use of the roadway for the benefit of the KC Hotel, but they did not appreciate that the Licence was personal to KCL. That appreciation did not come until much later; even after 2006.

7. Following the grant of the Licence there were a number of changes in the ownership of the KC Hotel. Although KCL had become part of the Trust Houses Forte group ("THF") in 1969 (before the grant of the Licence), the ownership and operation of the KC Hotel remained with KCL until 31 October 1978, when KCL ceased trading and the running of KC Hotel was transferred to another THF company, which became the owner in 1980. KCL was eventually dissolved on 14 July 1988. In early 1996, in a hostile takeover that attracted much publicity, Granada Group plc acquired THF. In September 1996 the KC Hotel was transferred to Post Houses Ltd, and in September 2002, the KC Hotel was acquired by its present owner, KCH.

8. The judge found that although some of Tara's employees would have known that the company running the KC Hotel had changed from time to time, their knowledge could not be attributed to senior management, and hence could not be attributed to Tara itself as a corporate entity. However, he concluded that the hostile takeover by Granada Group and the subsequent rebranding of the KC Hotel as a Posthouse in 1996 put Tara on notice that "there was possibly a change in the owner" of the hotel, and that when it was acquired by the Cola group in 2002 Tara had express knowledge of the change in ownership - [2010] EWHC 2749 (Ch), paras 27-28.

The conclusions reached below

9. It is well established that, if the owner of land uses a road as a means of access to, and egress from, his land for more than twenty years "as of right", then, at least in the absence of special circumstances, he will obtain a right of way over the land for the benefit of his land. The main question before the judge was whether the use of the roadway by KCH and its predecessors from 1980 was as of right. The judge approached the question of whether the use was as of right by asking whether it had been *nec vi, nec clam, nec precario*.

10. It was common ground that the use of the roadway by KCH and its predecessors after 1980 was effected without force, i.e. that it was *nec vi*. The judge therefore had to consider whether the use was *nec precario*, i.e. whether the use was without the permission of the owner of the roadway, and whether the use was *nec clam*, i.e. whether the use was open.

11. He dealt first with the question of permission (i.e. whether the use was *precario*).

12. Because the Licence was personal to KCL the judge held that, once KCL had ceased to be the owner of the KC Hotel in 1980, the Licence must, as a matter of law, have lapsed and could no longer govern the use of the roadway. From then on, the use by the owner or operator of the KC Hotel could no longer therefore be permissive. Tara argued that because there was nothing to suggest to it that there had been a change in ownership of the KC Hotel the continuing use should be treated as a continuation of the licensed use, even though in strictly legal terms the Licence had ceased to apply. The judge rejected that argument, saying this at [2010] EWHC 2749 (Ch), para 62:

> "[The] use of the [roadway] by and for the benefit of the [KC Hotel] after May 1980 was either pursuant to permission from [Tara] or it was not. I do not see that a mistaken belief that the use was governed by an express agreement granting a licence when as a matter of fact or law it was not can affect the

> position. That would introduce into the operation of prescription a subjective element which forms no part of this area of the law and would add to its complication."

13. The judge also considered whether, on the facts, it would be right to imply a licence. His conclusion on that question, at [2010] EWHC 2749 (Ch), para 72, was:

> "… that for a licence to be implied there must be some positive, overt act by the servient owner; mere inactivity will not do. In my view, the fact that a carefully drafted personal licence was granted to a particular licensee in 1973 cannot be regarded as a positive act evidencing an implied licence from a different servient owner in 1978 or 1980 (or any time thereafter) for use by a party not within the terms of the earlier licence. And there was no other positive act on which the claimant could rely."

14. The judge then considered whether the use of the roadway was open (i.e. not *clam*) in the relevant sense. He said this at [2010] EWHC 2749 (Ch), para 79:

> "In the direct meaning of the term, the use by the [KC Hotel] was self-evidently not [secret]. It was open and frequent use, for all at the Tara Hotel to see. It is not in issue that the management of the Tara Hotel was well aware that the [roadway] was being used by service vehicles supplying the [KC Hotel] and I find that it also had actual knowledge that the [roadway] was being used from at least 1980 by coaches serving the [KC Hotel]. No objection to this use was taken until the events giving rise to this claim."

15. He accepted that, if a change of ownership was itself surreptitious, that might mean that use after the change was also surreptitious in the relevant legal sense. But he said this at [2010] EWHC 2749 (Ch), para 81:

> "Not only was there nothing surreptitious in the fact that ownership of the [KC Hotel], and thus use of the [roadway], passed away from KCL but I find that such a corporate transfer at some time within at the very least a 20 year period was something that should reasonably have been in the contemplation of the claimant and which, if it had been diligent in the protection of its interests, it would have checked. As Mr David Cook, the former finance director of Millenium & Copthorne group, who had some 40 years experience in the hotel industry, acknowledged, when hotels are owned by a group there are sometimes transfers from one company to another, and the actual operating company of a hotel may change over time. He accepted that these are things which would be readily appreciated and understood by anyone in the hotel industry. As I have already observed, all that the claimant had to do to establish the position was to make inquiry of the management of the [KC Hotel]. Of course, if it had not been given a true answer or the [KC Hotel] management had engaged in deception, very different considerations would arise: see per Lord Selborne LC in *Dalton v Angus* (1881) 6 App Cas 740 at 802. There was naturally no suggestion of that here."

The issues on this appeal

16. On this appeal, the primary contention advanced by Mr Gaunt QC, who appears for Tara with Mr Wonnacott, is that the judge was wrong to find that a right of way was acquired along the roadway in favour of KCH through more than twenty years' use since 1980. He puts his case in two alternative ways. First, he says, that the judge was wrong to conclude that there was use of the roadway for more than twenty years after 1980 "as of right", given that Tara did not know, or have reason to believe, that the ownership of the KC Hotel had changed in 1980, and that the Licence had therefore determined then. Secondly, he says that, in all the circumstances, the correct inference to make is that a fresh licence was granted on the change of ownership in 1980, and that that licence only expired in 1996 on the next change of ownership.

17. Mr Gaunt also raises two further arguments, which arise if he loses on the two points which I have just mentioned. He contends that, even if a right of way by prescription has been obtained by KCH, it does not extend to coaches. Finally, he contends that such a right of way would not extend to construction vehicles.

18. I shall consider those arguments in turn.

The argument that the use of the roadway was not "as if of right"

19. As just explained, the judge concluded that (i) the use of the roadway by the owners and operators of the KC Hotel after 1980 could not have been pursuant to the Licence, (ii) there was no question of a fresh licence having been expressly negotiated or impliedly granted by Tara, and (iii) the use was plainly not by force, nor was it in any way secret. Accordingly, he held that KCH and its predecessors had enjoyed more than twenty years of use *nec vi, nec clam, nec precario*, and KCH had therefore acquired, through the doctrine of lost modern grant, a right of way over the roadway.

20. The law pursuant to which easements can be acquired through long use has been bedevilled with artificial doctrines developed by judges over many centuries, and the law has been complicated rather than assisted by the notoriously ill-drafted Prescription Act 1832, whose survival on the statute book for over 175 years provides some support for the adage that only the good die young.

21. In its recent report, *Making Land Work: Easements, Covenants, and Profits à Prendre* (2011, Law Com 327), the Law Commission describes at para 3.72 the law of prescription as "complex and consist[ing] of a number of different sets of rules, some statutory and some arising from the case law". The report then quotes Mummery LJ's mention of "the need for a simpler set of principles" in *Housden v Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200, [2008] 1 WLR 1172 at para 72. The present case is yet another example which justifies the Law Commission's view that the law in this area requires urgent attention, and I would add that it appears to me that the proposals contained in the Report appear well thought out and beneficial.

22. However, we have to consider the issues on this appeal by reference to the law as it stands at the moment. KCH's case is that it and its predecessors had no right to use the roadway after 1980, when, as a matter of law, the Licence expired, and that accordingly the continued uninterrupted use of the roadway thereafter for 20 years

gave rise to an easement through the doctrine of lost modern grant. As explained by Buckley LJ in *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 552, "where there has been upwards of twenty years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then … the law will adopt a legal fiction that such a grant was made… ." Accordingly, the use of the roadway which KCH has to establish since 1980 is of such a nature as would give rise to a prescriptive right for more than twenty years. To use the language in many of the cases, and adopted in the 1832 Act, KCH contends that it and its predecessors used the roadway "as of right" for more than 20 years.

23. The essence of Mr Gaunt's primary argument is that, given that Tara did not know of the change of ownership of the KC Hotel in 1980 and the consequent determination of the Licence, the judge was wrong in effectively attributing to Tara such knowledge at least until it had sufficient information to put it on inquiry. In effect, his case is that, in those circumstances, viewed from the perspective of Tara, it cannot be said that the use of the roadway by KCH and its predecessors after 1980 was "as of right" – or, as Lord Walker in *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889, para 72 has said it could perhaps be more accurately characterised, "as if of right". Mr Gaunt's case is that, from the viewpoint of Tara, the use from 1980 to 1996 appeared to be actually "of right".

24. As the judge said, the law on the acquisition of a right by prescription has been authoritatively considered at the highest level in three recent cases concerned with village greens, namely *R v Oxfordshire CC, ex p Sunningwell Parish Council* [2000] 1 AC 335; *Beresford* [2004] 1 AC 889; and *R (Lewis) v Redcar & Cleveland Borough Council (No 2)* [2010] UKSC 11, [2010] 2 AC 70. In each of those cases, the main issue was the nature and quality of the use (or, to use a traditional word, which Lewison LJ rightly deprecates as it sows confusion, user) which had to be demonstrated in order for a right by prescription to be established.

25. It is clear from Lord Hoffmann's speech in *Sunningwell* [2000] 1 AC 335, 350H-351A, 351G, 355H-356A, that it is "established that such user ha[s] to be … *nec vi, nec clam, nec precario*", and that the expression "as of right", used in the Prescription Act 1832 (and in some of the cases), had the same meaning as the Latin expression - see e.g. per Lord Lindley in *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 239. It is also clear from Lord Hoffmann's speech that the subjective understanding and intention of the person or persons when enjoying the amenity now claimed to have been acquired by prescription is irrelevant – see [2000] 1 AC 335, 356A-D.

26. In *Beresford* [2004] 1 AC 889, para 3, Lord Bingham said that it was "clear law" that "'as of right' means *nec vi, nec clam, nec precario*", and Lord Rodger said much the same thing at [2004] 1 AC 889, para 55. In the same case, Lord Bingham at [2004] 1 AC 889, para 6, cited with approval the proposition that "[t]he true approach is to determine the character of the acts of user or enjoyment relied on" and that those acts have to be "sufficient to amount to an assertion of a continuous right, continue for the requisite period, [and] are actually or presumptively known to the owner of the servient tenement" (as stated by Parker LJ in *Mills v Silver* [1991] Ch 271, 290).

27. *Beresford* [2004] 1 AC 889 is also important because Lord Rodger and Lord Walker both emphasised that toleration on the part of the owner of the putative servient land,

in the sense of knowing about the use and bearing it in silence, would not be sufficient to found an argument that the use was *precario*: to found such an argument the toleration would have to amount to a communicated permission – [2004] 1 AC 889, paras 65 and 77. When describing what constituted permission, Lord Rodger said at [2004] 1 AC 889, para 57, that "the paradigm case is of a grant in response to a request" and that such an "arrangement lasts for only so long as the grantor allows". At [2004] 1 AC 889, para 75, Lord Walker explained that, while consent could be given "by non-verbal means, what was required was "a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass."

28. In *Redcar* [2010] 2 AC 70, Lord Walker gave the leading judgment, with which three of the other four Justices expressly agreed. He said that "[t]he proposition that 'as of right' is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner)" was "established by high authority" – see at [2010] 2 AC 70, para 20, citing, *inter alia*, observations of Lord Davey and Lord Lindley in *Gardner* [1903] AC 229, and of Lord Bingham and Lord Rodger in *Beresford* [2004] 1 AC 889. Lord Hope reached the same conclusion at [2010] 2 AC 70, para 67, when he said that "the owner will be taken to have acquiesced in [a use] - unless he can claim that one of the three vitiating circumstances applied in his case". Lord Brown and Lord Kerr also expressed the same view at [2010] 2 AC 70, paras 107 and 116 respectively. Lord Rodger said at [2010] 2 AC 70, para 87, that, "the basic meaning of ['as of right'] is … *nec vi, nec clam, nec precario*".

29. So, in order to succeed on this appeal, it seems to me clear that Tara would have to show that the use of the roadway from 1980 by KCH and its predecessors was *vi*, *clam*, or *precario*, when judged by the actual use as viewed from the perspective of a reasonable person in the position of Tara. There is no question here of *vis*. However, the argument that, viewed from the perspective of Tara, the use of the roadway from 1980 was *precario* or *clam* is not without its attraction. Tara assumed that things had not changed in 1980, and therefore, although as a matter of fact it gave no thought to the Licence, it could be said to have proceeded on the assumption that things were continuing as they had before 1980, and so, implicitly, that the Licence still applied, and the use was with permission, or *precario.* Another way of putting it is that KCH's predecessors did not inform Tara of the change in the KC Hotel's ownership, which meant that the subsequent use of the roadway was, from the perspective of Tara, secret or *clam*, in the sense of the identity of the person for whose benefit the use was enjoyed.

30. Although these arguments have their attraction, I cannot accept them.

31. As Lord Rodger explained in *Beresford* [2004] 1 AC 889, para 57, where a licence is granted, the "arrangement lasts for only so long as the grantor allows". In this case, the grantor, Tara, chose to grant a licence which, by definition, only lasted so long as the KC Hotel and the Tara Hotel remained in the respective ownerships of the parties to the Licence, KCL and Tara. Tara thus chose to enter into an arrangement in January 1973, under which the right to use the roadway would automatically end on KCL transferring away the KC Hotel (if it had not been determined earlier). The Licence therefore ended in 1980, because that is what Tara had agreed; to use Lord Rodger's expression, Tara was not prepared to allow, or permit, the arrangement to

continue thereafter. It is true that any such agreement or withdrawal of permission was, in a sense, implied (as the Licence did not expressly provide for its determination on KCL transferring the KC Hotel), but that was the undoubted effect in law of the arrangement in question. It is also true that the withdrawal of permission was proleptic, in the sense that it was the effect of the Licence from its inception, but I do not see how that makes any difference to the aptness of Lord Rodger's analysis.

32. Given the judge's finding that, after the Licence expired, there was no grant of a subsequent licence, it seems to me that the use of the roadway by KCH and its predecessors cannot be said to have been *precario*, and therefore, subject to any other argument, as a result of more than twenty years' such use, a prescriptive right of way arose.

33. This does not strike me a particularly unjust or surprising result. As already explained, before any prescriptive right can be acquired by use, there has to have been twenty years' uninterrupted use "as of right". Accordingly, where a landowner has granted a personal right to a licensee to pass over his land, all that is required of that landowner, if he wishes to ensure that a prescriptive right is not acquired, is to check every eighteen years or so that the licensee remains the owner of the putative dominant land. That is not onerous, and it chimes with what Romer LJ said in *Union Lighterage Company v London Graving Dock Company* [1902] 2 Ch 557, 571, namely that, in order to found a prescriptive claim, the use had to be "of such a character that an ordinary owner of land, diligent in the protection of his own interests, would have, or must be taken to have, a reasonable opportunity of becoming aware". That observation was directed towards a contention that the use in question was *clam*, but it seems to be equally applicable to Tara's argument in this case on *precario*.

34. On the facts of this case, this conclusion is reinforced by two further factors. First, there is the fact that the Licence provided for a payment of £1 a year if demanded, and it is worth mentioning that this payment was specifically stated to be an acknowledgment that the use of the roadway was under the Licence. There was no reason why Tara should not have protected its position as a landowner by enforcing its contractual right to this payment – even if only once every eighteen (or even nineteen) years. Secondly, given that the Licence did not extend to coaches, Tara, as a reasonably vigilant landowner, could and should have appreciated that the terms of the Licence were not even being adhered to on the ground.

35. I turn to the other way Mr Gaunt puts the case for Tara, namely that the use of the roadway after 1980 was *clam*. As the judge said, there was nothing secret about the way in which KCH and its predecessors used the roadway after 1980. At least in the ordinary sense of the word, the use of the roadway was plainly not secret. To succeed on the issue, therefore, Tara needs to establish that, as a matter of principle, a use can be *clam* simply if the identity of the person enjoying the use is unknown to the owner of the putative servient land. I am prepared to assume that that may be so, but I do not consider that the argument can succeed on the facts in this case.

36. It was inherent in the Licence that it would determine on a change in the ownership of the KC Hotel, and that should have been (and maybe was) appreciated by Tara when the Licence was granted. When the change of ownership of the KC Hotel occurred in 1980, there was no question of any secrecy, or even of a deliberate intention to keep quiet, on the part of KCL or THF, as is shown by the fact that the change was known

to junior employees at the KC Hotel. Accordingly, it appears to me that Tara's case on *clam* fails for very much the same reasons as Tara's case on *precario* fails.

37. Of course, whether the case is put on *clam* or *precario*, very different considerations would apply if it could have been shown that KCL or THF had deliberately concealed the change of ownership of the KC Hotel from Tara, or, *a fortiori*, if it could have been shown that KCL or THF had deliberately misled Tara about the change of ownership. But there is no such suggestion in this case.

The argument that a licence to use the roadway should be inferred by words or conduct

38. Given that the use of the roadway was not *clam* or *precario* simply because Tara was unaware of the change in ownership of the KC Hotel in 1980, Mr Gaunt argues that, in all the circumstances, the right inference to make is that a fresh licence was granted to KCH's predecessor owners of the KC Hotel when they acquired it from KCL in 1980. There is no question of there having been an express agreement for a new licence, but, as Lord Walker made clear in *Beresford* [2004] 1 AC 889, para 75, it is clear as a matter of principle that a fresh licence could be inferred from words and/or conduct, in the same way that any other agreement or arrangement.

39. Tara's argument on this point relies on the judge's findings at [2010] EWHC 2749 (Ch), paras 12, 21 and 31 that "there were very good and cooperative relations between the managements of the two neighbouring hotels", and that, when one hotel was overbooked, guests were accommodated in the other. In these circumstances, it is said that, rather than concluding that those who obtained access to the KC Hotel along the roadway (especially coaches) were trespassing from 1980 (as must be the effect of the judge's conclusion), he should have found an implied licence for those who used the roadway to obtain access to the KC Hotel.

40. Mr Dowding QC, who appears for KCH with Mr Jourdan QC, contends that this argument is not open to Tara as it was not taken in Tara's pleaded case or in argument before the judge; he also submits that, if the argument is open to Tara, it is nonetheless a bad one.

41. In my judgment, it is not open to Tara to take this point. Having referred to the Licence in its pleaded case, Tara contended that it ended when KCL was dissolved in 1988, and, while it was not suggested that use of the roadway was permitted thereafter, it was alleged in further information provided by Tara that KCL began trespassing on the roadway not later than September 2002. We were provided with a transcript of the oral argument before the judge, which showed that Mr Gaunt had disclaimed any reliance on tacit licence, over and above the sort of argument discussed in the previous section of this judgment.

42. This is not merely a pleading or technical point. If the argument had been raised, I have no doubt that the various former employees of KCH and its predecessors, and (perhaps even more) those of Tara, who gave evidence, would have been asked many more questions than they were asked about what was said and understood as between the two sets of employees about the use of the roadway between 1980 and 1996. Furthermore, it is very likely that there would have been an inquiry as to the extent to which any such employees of Tara had actual or ostensible authority to agree a fresh licence.

43. I should add that it also appears to me that the argument is one which is most unlikely to have succeeded on the facts as set out in the judgment below. As mentioned above, the judge did address the possibility of a new licence having been granted after 1980, and he observed that "for a licence to be implied there must be some positive, overt act by the servient owner; mere inactivity will not do", and then concluded that "there was no … positive act on which [Tara] could rely" - at [2010] EWHC 2749 (Ch), para 72. In that passage, the judge correctly directed himself that acquiescence or toleration was not sufficient, and then found there was nothing more than that in the evidence. In those circumstances, it seems to me unlikely that the judge would have changed his view if Tara had contended that a licence should be inferred from the existence of good relations between the employees at the two hotels, given that the judge had that fact well in mind.

The argument that the right of way does not apply to coaches

44. Tara's next point is that KCH has in any event failed to establish a prescriptive right of way along the roadway for coaches, because the evidence established that the use of the roadway by the coach drivers was for their benefit, and not for the benefit of the putative dominant land, the KC Hotel.

45. It is true that there was evidence given to the judge that it was effectively a matter for the coach drivers whether or not to use the roadway when dropping off people at, or collecting people from, the KC Hotel. However, I am quite unpersuaded that this disentitles KCH as the owner of the KC Hotel from relying on that use of the roadway to found a prescriptive right of way along the roadway.

46. It seems to me important for present purposes that the evidence established that, when they used the roadway, the coach drivers were doing so in order to enable guests of the KC Hotel to be conveniently and safely delivered to, or collected from, the hotel. The fact that it was also beneficial to a coach driver or his employer to deliver or collect in this way does not alter the fact that the hotel benefited from the arrangement. As the judge said, "it is sufficient that the use accommodates, or benefits, the dominant land, in the sense of being closely connected with the normal enjoyment of the dominant land" – [2010] EWHC 2749 (Ch), para 88.

47. Furthermore, those people who managed the KC Hotel plainly knew that coach drivers dropping off and picking up hotel guests frequently used the roadway in order to carry out these functions. It seems clear therefore that, by knowing of this use, by benefiting from this use, and no doubt by organising for coaches to come and collect or deliver guests, KCH and its predecessors were, as it were, parties to the use of the roadway by coaches. This is not a case therefore where the owner of the putative dominant land had no knowledge of, or interest in, the use of the way.

48. Mr Gaunt was realistically inclined to accept that, if the only means of access to property is over a neighbour's land, then the fact that only independent contractors (such as service providers and tradesmen) use that means of access to the property would not prevent their use giving rise to a prescriptive right. It appears to me that the fact that the access in question is a secondary means, as in this case, should not alter the conclusion, particularly where the owner of the putative dominant land knows of, and, perhaps only indirectly, benefits from the use of that access.

The argument that the right of way does not apply to construction vehicles

49. Mr Gaunt's final point is that, if, as I have concluded in agreement with the judge, KCH has acquired a right of way along the roadway, the right does not extend to "construction vehicles". That expression is intended to refer to large vehicles bringing machinery and building materials to enable substantial work of redevelopment to be carried out to the KC Hotel. This point was not raised by Tara until after the judge had given his main judgment, so it was dealt with in a later *ex tempore* judgment dealing with the form of order which should be made – [2010] EWHC 3346 (Ch).

50. The judge seems to have found against Tara's case on this point on two separate grounds. The first was that it was too late for Tara to raise the point; the second was that it was in any event a bad point – see [2010] EWHC 3346 (Ch), paras 4 and 5 respectively. In my view, the judge was right on the first ground, and probably right on the second.

51. So far as the first ground is concerned, it appears to me important that the trial was conducted before the judge on the basis that KCH was claiming a general vehicular and pedestrian right of way along the roadway, and, subject to an issue about coaches (the point just considered in the preceding section of this judgment), Tara did not suggest in its written case or in oral argument that, if there was a vehicular right, it was limited to certain types of vehicle, or, to put the point conversely, it did not extend to certain types of vehicle. Again, this is not a mere technical concern. A number of witnesses gave evidence about the use of the roadway since 1980 by various different types of vehicle and for various different types of purpose, and, although many of them were asked about the use by small vans and coaches, there was no cross-examination relating to the evidence given as to plant vehicles.

52. Quite apart from this, it appears to me that, as Lewison LJ said in argument, the roadway was presumably used by vehicles which needed access to KCH for substantial repair work over the period between 1980 and 2007 (e.g. repairs and refurbishment of lifts, air-conditioning and the like), and Mr Gaunt sensibly accepted that the prescriptive right of way extended to such vehicles. In those circumstances, it seems to me artificial and unrealistic to conclude that the right does not extend to vehicles which need access for what may be classified as more extensive work: it would be at least very hard, and probably not sensibly possible, either as a matter of language or as a matter of practicality, to identify what types of vehicle should be excluded.

53. I also consider that KCH's case on the substance of this point is supported by what was said by Bovill CJ in *Williams v James* (1867) LR 2 CP 577, 580, namely that "where a [prescriptive] right of way … is proved", then "unless something appears to the contrary". the right acquired is "a right of way for all purposes according to the ordinary and reasonable use to which the land might be applied at the time of the supposed grant".

Conclusion

54. For these reasons, I would dismiss Tara's appeal.

Lord Justice Aikens:

55. For the reasons given by the Master of the Rolls and Lewison LJ, I, too, would dismiss this appeal.

Lord Justice Lewison:

56. I gratefully adopt the Master of the Rolls' account of the facts.

57. In order for long use to support a claim to have acquired an easement by prescription it is necessary for the use in question to have a certain quality. The requisite quality of use is usually described as being without force, without secrecy and without permission (*nec vi nec clam nec precario*). As Lord Hoffmann explained in *R v Oxfordshire CC ex p Sunningwell PC* [2000] 1 AC 335, 350-1:

> "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user, and in the third, because he had consented to the user, but for a limited period."

58. In *R v Redcar & Cleveland BC (No 2)* [2010] UKSC 11 [2010] 2 AC 70 Lord Rodger of Earlsferry JSC glossed this to some extent by saying (§ 91):

> "Assuming therefore, that there can be *vis* where the use is contentious, a perfectly adequate unifying element in the three vitiating circumstances is that they are all situations where it would be unacceptable for someone to acquire rights against the owner."

59. In the course of his excellent submissions Mr Gaunt QC said that the law of prescription was founded on acquiescence. A landowner could not acquiesce in something of which he was ignorant. Thus the use relied on to support a claim to have acquired an easement by prescription entails assertion, appearance and acquiescence. The assertion in question is an assertion to exercise a right without the landowner's permission. The appearance is how it would appear to a reasonable landowner. The use relied on must be such as to cause the reasonable landowner to appreciate that the assertion is being made by conduct; or at least put him on inquiry that such an assertion is being made. If thereafter he takes no action to prevent the use, he can fairly be said to have acquiesced in it. But unless he knows or ought to know that he can object to the use he cannot be said to have acquiesced in it. Thus the first ground of appeal is that the use relied on did not have the requisite quality to support a claim to have acquired an easement by prescription.

60. It is clear on high authority that the subjective state of mind of the person exercising the claimed right is irrelevant. The subjective state of mind of the owner is equally irrelevant. In *Sunningwell* Lord Hoffmann (p. 352) cited with approval the statement by Lord Blackburn in *Mann v Brodie* (1885) 10 App Cas 378, 386 that:

> "..where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was."

61. As Lord Hoffmann went on to explain, Lord Blackburn was:

> "concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land."

62. He went on to say (p. 354) that:

> "I rather doubt whether, in explaining this term parenthetically as involving a belief that they were exercising a public right, Tomlin J meant to say more than Lord Blackburn had said in *Mann v Brodie*, 10 App.Cas. 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication."

63. In my judgment the key question is this: must the use in question bring it home to such a person that the person using the roadway is asserting a right to do so *without permission*? There is support in the authorities for Mr Gaunt's proposition that the answer is "Yes". In *Earl de la Warr v Miles* (1881) 17 Ch D 535, 591 Brett LJ (with whom Cotton LJ agreed) said:

> "The true interpretation of those words "as of right" seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, *and* that he has so done it without that permission." (Emphasis added)

64. This suggests that the nature of the use must be such as to make it appear to the reasonable landowner that the use is taking place on the basis that it is carried on in the exercise of a right to use without permission, as well as there being no permission in fact. In *Gardner v Kingston Brewery Co Ltd* [1903] AC 229, 231 Lord Halsbury LC said:

> "In a certain sense a man has a right to enjoy what he has paid for, and, therefore, if the appellant here at any time during the year when she had paid for the right to use this way had been hindered, she would have had a right to complain that what I will call her contract had been broken, and that during the year

> she had a right to use the way. I do not think that this would have established a right in the proper sense, because, being but a parol licence, it might be withdrawn, and her action would be for damages, but she would have no *right* to the way. And in no sense could the right be the right contemplated by the Act. *That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised.* It does not and cannot mean an user enjoyed from time to time at the will and pleasure of the owner of the property over which the user is sought." (Emphasis added)

65. In *Bridle v Ruby* [1989] 1 QB 169, 178 Ralph Gibson LJ said:

> "The requirement that user be "as of right" means that the owner of the land, over which the right is exercised, is given sufficient opportunity of knowing *that the claimant by his conduct is asserting the right to do what he is doing without the owner's permission.* If the owner is not going to submit to the claim, he has the opportunity to take advice and to decide whether to question the asserted right."

66. Although the law could have developed in the way that Mr Gaunt says that it has (and perhaps it would have been a rational development), in my judgment the decision of the Supreme Court in *Redcar* is clear authority that it has not. The issue before the court in that case was whether use was "as of right" for the purposes of section 15 of the Commons Act 2006 which lays down the test that has to be satisfied for the registration of a town or village green. No one suggests that a different test applies to the question whether a person has acquired an easement by prescription. The point that divided the parties before the Supreme Court is encapsulated in two extracts from the arguments. Mr George QC for the appellants submitted (p. 73) that:

> "Where land has been extensively used by local inhabitants for lawful sports and pastimes for 20 years and the tripartite test is satisfied, it is not necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that the users were asserting a right to use the land for that purpose. It would be wrong to add a further test."

67. Mr Lawrence QC for the respondents submitted (p. 74) that:

> "In order to be "as of right" the user must be nec vi nec clam nec precario and in many situations user which meets those negative conditions will, without more, be "as of right". However those conditions, while always necessary, will not always be sufficient. It is also necessary to prove that there were circumstances which showed that the landowner acquiesced in the user as in an established right. In order to establish for the purposes of section 15(4) of the 2006 Act that use of the land for lawful sports and pastimes was as of right, it had also to be shown that it would have appeared to a

> reasonable landowner that the local inhabitants were asserting a right to use the land for the lawful sports and pastimes in which they were indulging.
>
> It is a question of fact and degree whether the local inhabitants did sufficient to bring home to the reasonable landowner that they were asserting a right to use the land."

68. In the Court of Appeal Dyson LJ (with whom Rix and Laws LJJ agreed) had posed the question thus ([2009] EWCA Civ 3 [2009] 1 WLR 1461 (§ 40)):

> "In principle, however, the question remains the same: has the user been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land?"

69. This, as it seems to me, is precisely the question that Mr Gaunt says is the real question. However, the decision of the Court of Appeal was unanimously reversed by the Supreme Court. Although Lord Walker of Gestingthorpe JSC quoted Ralph Gibson LJ's observations in *Bridle v Ruby* with apparent approval in *Redcar* (§ 34), his actual conclusion was (§ 20) that:

> "The proposition that "as of right" is sufficiently described by the tripartite test nec vi, nec clam, nec precario (not by force, nor stealth, nor the licence of the owner) is established by high authority."

70. Lord Hope of Craighead DPSC said (§ 67):

> "The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. …And they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right…, the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the owner—that is an end of the matter. There is no third question."

71. Lord Brown of Eaton-Under-Heywood JSC said (§ 100):

> "… were it the law that, upon registration, the owner's continuing right to use his land as he has been doing becomes subordinated to the locals' rights to use the entirety of the land

> for whatever lawful sports and pastimes they wish, however incompatibly with the owner continuing in his, I would hold that more is required to be established by the locals merely than use of the land for the stipulated period nec vi nec clam nec precario. If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing, then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case."

72. He concluded (§ 107):

> "… I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by local inhabitants for recreational purposes a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker of Gestingthorpe JSC has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test. Rather, as Lord Hope of Craighead DPSC, Lord Walker and Lord Kerr of Tonaghmore JJSC make plain, the focus must always be on the way the land has been used by the locals and, above all, the quality of that user."

73. Finally Lord Kerr of Tonaghmore JSC said (§ 116):

> "I am content to accept and agree with the judgments of Lord Hope DPSC, Lord Walker and Lord Brown JJSC that no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test. The inhabitants must have used it as if of right but that requirement is satisfied if the use has been open in the sense that they have used it as one would expect those who had the right to do so would have used it; that the use of the lands did not take place in secret; and that it was not on foot of permission from the owner. If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants' use of the lands. Put simply, if confronted by such use over a period of 20 years, it is ipso facto reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration."

74. In my judgment this is clear authority at the highest level that if a use satisfies the tripartite test (not by force, nor stealth, nor the licence of the owner) then a prescriptive right will be established. There is no further criterion that must be

satisfied. As Lord Kerr put it, once those three criteria are established it is *ipso facto* reasonable to expect the landowner to challenge the use. In other words, once these three criteria are established the owner is taken to have acquiesced in the use. It follows, in my judgment that unless the use by KCL was forcible, stealthy or permissive a right of way will have been established.

75. It is common ground that the use was not forcible. It is also common ground that the use was not covered by the written licence. But Mr Gaunt argues that in the present case Tara did not know that circumstances had changed such that the licence no longer covered the actual use. Mr Gaunt's point is not that Tara were unaware of the *use*; but that Tara were unaware of the *user*. (It does not help that in the older cases the words "user" and "use" are deployed interchangeably. It would aid clarity if the activity in question were described by the word "use" and the person carrying on the use were described as the "user". That is what I mean by the two words). He accepts, as the judge found, that if Tara had made periodic inquiries and had received truthful answers, it could have found out the true position. But, he asks, what would have triggered such an enquiry? It is important not to conflate a finding that Tara *could* have discovered the true position with a conclusion that Tara *should* have discovered the true position. The law of prescription does not require a land owner to be a sleuth.

76. In *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 tie rods were installed to provide support for a graving dock. The rods were fastened to a wharf by nuts. The nuts were always visible, but were not of such a nature as to attract attention. The owner of the wharf did not notice them. The trial judge found that although a skilled expert informed of the nature of the dock might have concluded that these nuts had to do with the support of the dock, no ordinary person conversant with riverside property would necessarily have arrived at this conclusion, for they might very probably have served to support the camp-sheathing and the wharf behind it. The Court of Appeal held by a majority that knowledge of the use was not to be attributed to the owner. Romer LJ said (p. 570):

> "Now, on principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment. And I think on the balance of authority that this principle has been recognised as the law, and ought to be followed by us."

77. He continued (p. 571):

> "It is not established on behalf of the defendants that the plaintiffs were informed by their vendors at the time of the conveyance, or ever ascertained in fact by any of their agents until quite recently, that the defendants' dock was being supported by the plaintiffs' land. Nor can I see any circumstances in this case sufficient to justify the Court in holding that the plaintiffs ought to have such knowledge attributed to them, or were put on inquiry. And in particular it

> does not appear to me that the existence of the two nuts on the plaintiffs' premises, about which so much has been said, gave the plaintiffs or their agents a reasonable opportunity of becoming aware of the enjoyment by the defendants of the support of their dock by the plaintiffs' land, or put the plaintiffs on inquiry."

78. Stirling LJ (p. 573) referred to the trial judge's decision that:

> "the enjoyment of the defendants had not been open—in this sense, that it had not come to the plaintiffs' knowledge, and was not of such a nature that their attention ought reasonably to have been drawn to it."

79. He concluded (p. 574):

> "The ties and rods are between twenty and thirty in number, and there are only two of which any visible signs appear upon an inspection of the exterior of the plaintiffs' property. Even as regards these two, the traces might, as it seems to me, be reasonably regarded as forming merely part of the camp-sheathing of the plaintiffs' own property. There are, no doubt, cases in which the owners of property have been held to be affected with notice of that which might have been discovered by the exercise of reasonable diligence…; but the learned judge came to the conclusion that in this case such a notice ought not to be attributed to the plaintiffs; and I am unable to differ."

80. The gravamen of the decision in my judgment was that knowledge should not be imputed to the land owner unless the use itself gave him a reasonable opportunity of becoming aware of it, or he was put on inquiry. That case was of course concerned with use which was itself secret use in the relevant sense. But what it also shows is that the mere fact that an expert might have guessed what the nuts were for was not enough for that knowledge to be attributed to the land owner. Mr Gaunt also relied on *McInroy's Trustees v. Duke of Athole* (1891) 18 R (HL) 46, in which Lord Watson said (48):

> "I do not doubt that, in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted and the nature of the right. The proprietor who seeks to establish the right cannot, in my opinion, avail himself of any acts of possession *in alieno solo*, unless he is able to show that they were either known, or ought to have been known, to the owner or to the persons to whom he entrusted the charge of his property."

81. I do not consider that this carries the case much further, because Lord Watson recognises that there may be cases in which the land owner did not know of the

activities in question, yet ought to have known. In such cases the activities will be sufficient to support a claim to have acquired a servitude.

82. The judge said that anyone in the hotel industry would have appreciated that when hotels are owned by a group there are sometimes transfers from one company to another, and the actual operating company of a hotel may change over time. However, the test is not how the use would appear to someone in the hotel industry, but how it would appear to a reasonable land owner, in Lord Blackburn's phrase: "whoever he was". But the judge's point was that hotels change hands from time to time. That is, of course right; but so do dwelling houses, shops, factories and farms. So it is entirely fair to attribute to the reasonable land owner knowledge that properties change hands from time to time.

83. That still does not answer the question posed by Mr Gaunt: what would have triggered an inquiry by Tara? If Tara were entitled to assume that the use was being carried on in accordance with the licence, why should Tara have inquired about the identity of the user? If the use had been carried on exactly in accordance with the licence the question might have been a difficult one to answer. But in this case the use went beyond the scope of the permission; not least because of the use of the roadway by coaches, which was not permitted by the licence. The judge found that this use had begun by the late 1970s and continued without objection until at least September 2007. On any view that use satisfied the tripartite test. An "ordinary owner of the land, diligent in the protection of his interests" seeing open use of the roadway in a manner not permitted by the licence would, in my judgment, have made inquiries about what was going on. Of course, if Tara had made inquiries before May 1980 it would have done so while KCL was still the freeholder of the Kensington Court Hotel; but if it had made inquiries at any other time over the period of twenty years it would have discovered the true position. And whenever Tara might have made the inquiries it would have been able to demand the annual payment, which would have put the permissive nature of the use beyond doubt. In my judgment that was enough to put Tara on inquiry.

84. Accordingly I reject the contention that the use of the roadway was secret in the relevant sense. Although during the course of the hearing I was very attracted by Mr Gaunt's powerful argument, Mr Dowding QC has persuaded me that it is simply not open to us on the present state of the law. I might also add that if Mr Gaunt's argument were right it is very difficult to see how the acquisition of a right to light would fit within his framework. I would therefore reject the first ground of appeal.

85. The second string to Mr Gaunt's bow was the argument that the continued use of the roadway after the change of ownership of the Kensington Court Hotel should be attributed to implied or tacit permission. Mr Dowding's first response to this argument was that it was not open to Mr Gaunt on the pleadings, and that if it had been pleaded the course of evidence might well have been different. In the Amended Particulars of Claim Tara pleaded the personal licence and asserted that the licence terminated on the dissolution of KCL in 1988. It was not alleged that use of the roadway was permitted informally thereafter. The Amended Particulars of Claim had also asserted that any licence that KCL had was terminated by a letter dated 10 August 2007. Tara pleaded Further Information which asserted that the trespass on the roadway began not later than September 2002. That plea was inconsistent with any argument that an informal licence had been created and had survived until August

2007. No further pleading by Tara positively asserted that an informal or tacit licence had been granted. By reference to the transcript Mr Dowding demonstrated that Mr Gaunt had disclaimed any reliance on tacit licence; and that this argument was really a facet of the argument that if the landowner had no reason to challenge the continuation of the use it should be inferred that the use continued with the tacit permission of the landowner. In my judgment Mr Dowding's objection is well taken. In so far as the argument is a facet of the first ground of appeal, for the reasons I have given it is precluded by the decision of the Supreme Court in *Redcar*. In so far as it is anything else, it is not an argument open to Mr Gaunt on the pleadings.

86. But in any event, whether a licence should be implied is a question of fact: *R (Beresford) v Sunderland City Council* [2003] UKHL 60 [2004] 1 AC 889 § 5, per Lord Bingham of Cornhill. An implied licence must be distinguished from mere inaction by the land owner with knowledge of the use relied on: *Beresford* § 6, per Lord Bingham of Cornhill). It is quite wrong to treat a land owner's silent acquiescence in persons using his land as having the same effect as permission communicated to those persons: *Beresford* § 79 per Lord Walker of Gestingthorpe. Even encouragement of the activity by the land owner will not necessarily amount to an implied licence: *Beresford* § 60 per Lord Rodger of Earlsferry. But there must be some overt act (which may be a non-verbal communication) which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass (*Beresford* § 75 per Lord Walker of Gestingthorpe).

87. The judge correctly directed himself by reference to *Beresford* and found, on the facts, that there was no overt act upon which Tara could rely. He put his conclusion thus (§ 72):

> "In my view, the fact that a carefully drafted personal licence was granted to a particular licensee in 1973 cannot be regarded as a positive act evidencing an implied licence from a different servient owner in 1978 or 1980 (or any time thereafter) for use by a party not within the terms of the earlier licence. And there was no other positive act on which the claimant could rely."

88. He then considered whether there was an implicit assertion by KCL that the use was use pursuant to the 1973 licence. He concluded (§ 75):

> "Here, there is nothing to suggest an assertion by the owners of the KCH land after 1980 that they were using the [roadway] pursuant to the 1973 Licence, or indeed some other licence granted by the claimant, in which assertion the claimant could therefore acquiesce. Instead, the claimant simply believed, insofar as it gave the matter any thought at all, that the use by the KCH of the [roadway] was pursuant to an earlier express licence, without regard to any assumption on the part of the owners of the KCH. … And of course there was nothing in the conduct of the owner of the KCH, as regards the manner in which it used the TRR, which showed that it believed that it was doing so only by reason of the 1973 Licence. On the contrary, the use of the TRR by KCH coaches and small vans

> would have shown, if anyone had troubled to consider the matter, that the use was not confined to the terms of the 1973 Licence."

89. He also rejected an argument that there was a common understanding between Tara and KCL (or subsequent owners of the Kensington Court Hotel). To put it no higher, these were conclusions of fact which the judge was fully entitled to reach. He applied the correct legal test. In those circumstances Mr Gaunt was unable to persuade me that the judge's conclusion was wrong. I would therefore reject the second ground of appeal.

90. The third ground of appeal is that use of the roadway by coach drivers was not use by or on behalf of KCL such as would have enabled Tara to bring an action in trespass against KCL. This, it was argued, meant that the use did not count for the purposes of supporting a claim to have acquired a right of way by prescription. There is no trace in the authorities of a requirement that the use relied on must have been such as to enable the servient owner to sue the dominant owner in trespass. What the authorities establish is that the servient owner must have been in a position to challenge or stop the use. As Mr Dowding pointed out, one way in which Tara could have done that would have been by erecting a gate or barrier across the roadway. That would not have required any court proceedings at all. In addition, as the judge said (§ 88) it is enough that the use in question accommodates the dominant tenement. I would reject the third ground of appeal.

91. The final ground of appeal is that the judge declared that the right of way extended to "construction vehicles". Mr Gaunt accepted that the right (if established) extended to vehicles needed for repairs to the Kensington Court Hotel. But he said that it ought not to extend to heavy construction vehicles such as cranes. But what if the lift at the Kensington Court Hotel needed to be renewed at the end of its life; and a crane was needed to lift winding gear up to the roof? Or what if Kensington Court Hotel decided to refurbish all the bathrooms and lorries brought loads of sanitary fittings? This point only arose when the form of the order was discussed when the judgment was handed down. It was not a point that was investigated at trial. At trial the argument was over the question whether KCL had established a vehicular right of way. The judge held that it had. If Tara wanted to argue that particular types of vehicle fell outside the scope of the right, that should have been properly put in issue. In addition the scope of the exclusion would be very difficult to define. I would therefore reject the fourth ground of appeal.

92. Accordingly, I agree with the Master of the Rolls that the appeal must be dismissed.