IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
EXPEDITED LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-20-02489

DAVID BRUCE TAYLOR — Plaintiff

v

KATE ELIZABETH HARRISON — Defendant

JUDGE:	HER HONOUR JUDGE MARKS
WHERE HELD:	Melbourne
DATE OF HEARING:	27, 28, 29 and 30 April, 2 and 3 May 2021, 23 July 2021
DATE OF JUDGMENT:	17 December 2021
CASE MAY BE CITED AS:	Taylor v Harrison
MEDIUM NEUTRAL CITATION:	[2021] VCC 2097

REASONS FOR JUDGMENT

REAL PROPERTY – Adverse possession — whether documentary owner consented to the use of the land by his neighbour - whether neighbour in possession had the intention to possess to the exclusion of all others - Section 8 of the *Limitation of Actions Act* 1958 (Vic) - *Whittlesea City Council v Abbatangelo* (2009) 259 ALR 56 - *Ben-Pelech v Royle* [2020] WASCA 168

REAL PROPERTY – doctrine of lost modern grant – whether easement of support – whether easement of drainage - *Sunshine Retail Investments Pty Ltd v Wulff & Ors* (1999) VSC 415 (28 October 1999) - *Laming v Jennings* [2018] VSCA 335

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr Luke Virgona	Fischer McCrae Lawyers
For the Defendant	Mr James McKay	Prior Law

HER HONOUR:

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BACKGROUND

1 When Kate Harrison bought her home in Northcote in 2003, she was welcomed with neighbourhood drinks by her neighbour, David Taylor and his partner. The previous owner of Harrison's property was Bill Patten, who had been there for decades but had died in 2002. Taylor gave evidence that he had enjoyed a good relationship with Patten and hoped for the same with Harrison. Soon though, he saw her taking photos of his backyard, and 'alarm bells' went off for him. Harrison brought an application against him in the Victorian Civil and Administration Tribunal in relation to her concerns that his recent renovations had caused inappropriate overlooking into her backyard. Their relationship went downhill from there, and they have had various disputes relating to their properties, both in the Magistrates' Court and before the Building Appeals Board.

2 This County Court proceeding concerns adverse possession and easement claims Harrison makes over land of which Taylor is the registered proprietor.

3 When Harrison bought her property, its garage sat side by side next to Taylor's garage, at the end of a shared driveway. They had matching facades. The garages shared a single-skin brick wall located between them, which provided physical support to each garage's roof structure (**the Brick Wall**).

4 Taylor gave evidence that this arrangement dated back to 1986, when Taylor and Patten both had construction work done by the same builder. I will refer to this as the **Simultaneous Works** (the phrase used in the Reply and Defence to Counterclaim filed by Taylor). As part of the Simultaneous Works, Taylor had the garage then on his property knocked down. (He gave evidence that he had been told that the old garage had been built by the previous owner of his property, Mr. Lampshire.) The Simultaneous Works involved Taylor having an entirely new garage built, and to the Brick Wall being shared with Patten's garage. The wall of Patten's garage nearest Taylor's property was knocked down, and instead, Patten's garage was extended to the Brick Wall and derived support from it. The matching facades were then built.

5 In 2006, 20 years after the Simultaneous Works were carried out, and 3 years after Harrison moved in, Taylor commissioned a surveyor's report because he suspected that the Brick Wall was not on the property boundary. That report, by surveyors Kearney and Tyrell, showed his suspicion to be correct. The Brick Wall was in fact located 22cm from the boundary, within his property. The effect was that a sliver of land, 22cm wide and 5.06m long, which had sat on his neighbours' side of the Brick Wall since the Simultaneous Works were carried out, was on his title. (That sliver of land was described as **Parcel B** in this proceeding.)

6 In 2010, Taylor started work on demolishing his garage. In 2012, he knocked down the Brick Wall – 26 years after it was built.

7 Before knocking the Brick Wall down, Taylor had what was to be a temporary wooden wall built, to give support to Harrison's garage in place of the Brick Wall. (It was intended to be temporary as Taylor understood Harrison was planning to

knock her garage down eventually, as she had a planning permit for a studio to be built in about that location). The 'temporary' wall is still there, 11 years later.

8 Taylor built the wooden wall on the northern boundary between the two properties, as shown on the certificates of title – not where the Brick Wall had been. This meant that he now has the use of Parcel B on *his* side of the wall between the garages, and Harrison's garage is now 22cm narrower.

9 Taylor's evidence was that he knocked down the Brick Wall because, having seen the 2006 survey, he considered that Parcel B belonged to him, and not to Harrison. Taylor wanted to put up a fence between the two properties, along the boundary line as shown on title, and to lay claim to Parcel B.

10 Harrison claims Parcel B belongs to her under the doctrine of adverse possession. She lodged an application for it on 5 February 2020 under s60 of the *Transfer of Land* Act 1958 (**TLA**).

11 Taylor issued this proceeding on 5 June 2020, seeking declarations that Harrison has not acquired possessory rights over Parcel B.

12 Harrison counterclaimed, making adverse possession claims over both Parcel B and another parcel of land (described in this proceeding as **Parcel C**).

13 In her counterclaim, Harrison also seeks declarations relating to two alleged easements. She claims that she has an easement of support as a result of the support the Brick Wall gave her garage for over 20 years. And she claims an easement of drainage as a result of drainage pipes which ran through Taylor's land for over 20 years, connecting her house to council drainage at the rear of Taylor's property.

14 By close of trial, some issues were no longer pursued. These included a claim by Taylor that Harrison was estopped from making her adverse possession claims, and an adverse possession claim Harrison had made over land which sat *under* the Brick Wall.

15 I now turn to the issues which remained.

ADVERSE POSSESSION CLAIMS

Law - adverse possession

16 The general principles relating to adverse possession are usefully set out in *Whittlesea City Council v Abbatangelo* (2009) 259 ALR 56 at [4]-[6]:

> **Applicable principles**
>
> [4] Section 8 of the Limitation of Actions Act 1958 (Vic) (the Act) provides that no action shall be brought by any person to recover any land after the expiration of 15 years from the date on which the right of action accrued. Section 18 provides that at the expiration of that period, the person's title to the land shall be extinguished. As to when the right of action accrues, s 9(1) refers to the date upon which the person whose title stands to be extinguished "has … been dispossessed or discontinued his possession", while s 14(1) provides that "[n]o right of action to recover land shall be deemed to accrue unless the land is in possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession')".
>
> [5] Before us, the parties agreed that the following comments made by Ashley J (as his Honour then was) in *Bayport Industries Pty Ltd v Watson* aptly summarise the relevant principles:
>
> > The law is clear enough. A number of the basic principles were summarised by Slade J in *Powell v McFarlane*. Thus, pertinently:
> >
> > > "It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:
> > >
> > > (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
> > >
> > > (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (animus possidendi).
> > >
> > > (3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, … The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying

owner might have been expected to deal with it and that no-one else has done so.

(4) The animus possidendi, which is also necessary to constitute possession, … involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow … the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the [requisite] animus possidendi and consequently as not having dispossessed the owner."

To those principles should be added and/or highlighted the following:

- When the law speaks of an intention to exclude the world at large, including the true owner, it does not mean that there must be a conscious intention to exclude the true owner. What is required is an intention to exercise exclusive control: see *Ocean Estates v Pinder* [1969] 2 AC 19. And on that basis an intention to control the land, the adverse possessor actually believing himself or herself to be the true owner, is quite sufficient: see *Bligh v Martin* [1968] 1 WLR 804.

- As a number of authorities indicate, enclosure by itself prima facie indicates the requisite animus possidendi. As Cockburn CJ said in *Seddon v Smith* (1877) 36 LT 168 at 1609: 'Enclosure is the strongest possible evidence of adverse possession'. Russell LJ in *George Wimpey & Co Ltd v Sohn* [1967] Ch 487 at 511A, similarly observed: 'Ordinarily, of course, enclosure is the most cogent evidence of adverse possession and of dispossession of the true owner'.

- It is well established that it is no use for an alleged adverse possessor to rely on acts which are merely equivocal as regards the intention to exclude the true owner: see for example *Tecbild Ltd v Chamberlain* (1969) 20 P & Cr 633 at 642, *per* Sachs LJ

- A person asserting a claim to adverse possession may do so in reliance upon possession and intention to possess on the part of predecessors in title. Periods of possession may be aggregated, so long as there is no gap in possession.

- Acts of possession with respect to only part of land claimed by way of adverse possession may in all the circumstances constitute acts of possession with respect to all the land claimed …

- Where a claimant originally enters upon land as a trespasser, authority and principle are consistent in saying that the claimant should be required to produce compelling evidence of intention to possess; in which circumstances acts said to indicate an intention to possess might readily be regarded as equivocal … Where a claimant originally enters upon land as a trespasser, authority and principle are consistent in saying that the claimant should be required to produce compelling evidence of intention

to possess; in which circumstances acts said to indicate an intention to possess might readily be regarded as equivocal …

- At least probably, once the limitation period has expired the interest of the adverse possessor, or of a person claiming through him, cannot be abandoned.

[6] For the purposes of this appeal, the following additional principles are also relevant:

(a) The reference to "adverse possession" in s 14(1) of the Act is to possession by a person in whose favour time can run and not to the nature of the possession. The question is simply whether the putative adverse possessor has dispossessed the paper owner by going into possession of the land for the requisite period without the consent of the owner, with the word "possession" being given its ordinary meaning. Whether or not the paper owner realises that dispossession has taken place is irrelevant.

(b) Factual possession requires a sufficient degree of physical custody and control. Intention to possess requires an intention to exercise such custody and control on one's own behalf and for one's own benefit. Both elements must be satisfied by a putative adverse possessor, although the intention to possess may be, and frequently is, deduced from the objective acts of physical possession.

(c) In considering whether the putative adverse possessor has factual possession, a court has regard to all the facts and circumstances of the case, including the nature, position and characteristics of the land, the uses that are available and the course of conduct which an owner might be expected to follow. Each case must be decided on its own particular facts. While previous cases can provide guidance as to the relevant principles which are to be applied, they should be treated with caution in terms of seeking factual analogies by reference to particular features of a person's dealings with land. Acts that evidence factual possession in one case may be wholly inadequate to prove it in another. For example, acts done by a putative adverse possessor who lives next to the relevant property may sufficiently evidence a taking of possession, whereas those same acts may be insufficient if done by a person who lives some distance from the property.

(d) The intention required by law is not an intention to own or even an intention to acquire ownership of the land, but an intention to possess it. The putative adverse possessor need not establish that he or she believes himself or herself to be the owner of the land.

(e) A number of acts which, considered separately, might appear equivocal may, considered collectively, unequivocally evidence the requisite intention.

(f) Statements about intention by a putative adverse possessor should be treated cautiously, as they may be self-serving. But while a statement by a person that he or she intended to possess land will not be enough in itself to establish such an intention, it may be relevant when taken in combination with other evidence suggesting an intention to possess.

(g) Mere use falling short of possession will not suffice. In some circumstances, a person's use of land may amount to enjoyment of a special benefit from the land by casual acts of trespass and will neither constitute factual possession nor demonstrate the requisite intention to possess. For example, where vacant land abutted a putative adverse possessor's land, occasional tethering of the claimant's ponies on the vacant land, and grazing them there, and occasional playing on the vacant land by her children were held not to suffice. Use and enjoyment of a special benefit and exclusive possession are not, however, necessarily mutually exclusive, for exclusive possession will usually entail use and special benefit. Use and enjoyment of a special benefit, on the other hand, will not necessarily amount to exclusive possession.

(h) There is no separate requirement that the use to which the land is put by the putative adverse possessor be inconsistent with the paper owner's present or future intended use of the land, as suggested by *Leigh v Jack*. In *Monash City Council v Melville*, Eames J reviewed the history of the rule in *Leigh v Jack* and said the following:

> To the limited extent that the rule still applies its effect, now, is as follows. Where the trespasser's acts had not been inconsistent with the future planned use, not therefore manifesting the requisite intention of dispossessing the owner, one might conclude that the requisite elements for adverse possession had not been established; [l]ikewise it may more readily be concluded that the requisite elements to constitute adverse possession had not been established where the land is waste land and the possessor had not done any acts to manifest an intention to dispossess the owner.
>
> However, where the trespasser had done acts which plainly manifested an intention to dispossess the owner, and where the acts would otherwise lead to the conclusion that adverse possession had been established, the fact that the land was waste land or was set aside for some future public purpose, did not introduce any special rule which gainsaid that conclusion.

It was not suggested before us that Eames J incorrectly stated the law in relation to the present limited effect of the rule in *Leigh*. We would therefore proceed on the basis that his Honour correctly stated the law even if it was not for the subsequent decision of the House of Lords in *Pye*, where Lord Browne-Wilkinson (with whom the other Law Lords agreed) said this in relation to the rule in *Leigh*:

> The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong … The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such an inference could be properly drawn in cases where the title owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases.

(i) While inconsistent use is not required, it may be a factor, where it is present, which is indicative of factual possession and of an intention to possess to the exclusion of the paper owner.

[citations omitted].

Parcel B - adverse possession claim

17 In some adverse possession claims, the length of time a claimant has been using the claimed land is hotly contested. That is not this case. The parties agreed that Parcel B had been on Taylor's neighbours' side of the Brick Wall (first Patten's, then Harrison's, side) for more than the 15 years required to establish adverse possession if the other elements of adverse possession were made out.

18 The two elements of adverse possession which were disputed in relation to Parcel B were:

- *consent*: in 1986 when the Brick Wall was built, did Taylor consent to Patten using Parcel B?
- *possession*: from the time the Brick Wall was built, did Patten have possession of Parcel B with the intention to have exclusive possession of it?

Consent

19 Taylor's case was that he had consented to Patten using Parcel B, and that the Brick Wall had been built following that consent.

20 If Taylor had consented to Patten's use of Parcel B before Patten started using it – back when the Brick Wall was built – a key prerequisite for adverse possession would not be made out. It is not 'adverse possession' if the documentary owner consents to its use or permits the land to be possessed.

21 I am not satisfied that Taylor knew Parcel B was on his title when the Brick Wall was built, or that he consented to Patten using that land .

22 For a documentary owner to consent, or permit, someone else to use his land – such that the consent or permission means that subsequent use is not adverse possession – the owner must first have some *knowledge* that the land belongs to him.

23 *Ben-Pelech v Royle* [2020] WASCA 168 concerned a situation where neighbours had entered an agreement to build a dividing fence between their respective properties, mistakenly thinking the location they agreed to – and built on – sat on the true title boundary. Later, when the mistake came to light, an adverse possession claim was made, and adverse possession was established. In that context, the Western Australian Court of Appeal considered the question of consent:

> [56] The owner's consent to possession by a claimant defeats a claim founded on adverse possession because it means that time did not start to run against the owner - a person who consents to another occupying or possessing land they own has no claim to eject the other, unless and until they withdraw the consent.
>
> [57] Conversely, a person who occupies or is in possession of land owned by another is trespassing unless they can show they entered with the owner's consent or otherwise with lawful authority.
>
> [58] Thus, subject to an immaterial exception, where one person enters or occupies land owned by another, the owner's consent to the other's entry or occupation and the accrual of a cause of action in favour of the owner are opposite sides of the same coin. If consent exists there is no cause of action; if consent does not exist, the owner has a cause of action. As Edelman J has observed in the closely related context of trespass, 'consent is the very antithesis of trespass'.
>
> [59] It is only where the true owner knowingly permits the putative adverse possessor to occupy or exercise rights over land the owner knows to belong to him or her, and not to the possessor, that the owner has consented so as to preclude an action for ejectment by the owner. In other words, in this context, knowledge is an element of consent. The same is true in the analogous context of acquisition of an easement by prescription: see *Maio v City of Stirling [No 2]*. More generally, consent ordinarily requires knowledge because it involves an informed choice by the consenting party.
>
> [citations omitted].

24 Taylor sought to distinguish *Ben-Pelech v Royle* on the basis that, unlike the position in that case, he had consented to the Brick Wall being built on his land, to help Patten out.

25 He submitted that although he did not know the precise location of the title boundary at the time he had the Brick Wall constructed, he knew enough to appreciate that the Brick Wall was being constructed entirely on his property.

26 Taylor gave evidence designed to establish that he consented to the Brick Wall going on his land.

27 He said he did it to be cooperative and neighbourly with Patten, who he got on very well with – 'never a cross word', he said, in 20 years. He said Patten needed more room to get out of his car and was getting elderly and that Taylor was willing to help him out, so Taylor agreed to let Patten rest the roof of his car port on the Brick Wall (which Taylor was having built as part of his new garage) to give Patten a bit more space.

28 As summarised in Harrison's submissions:

> [5] Taylor's evidence was that he approved the location of the single skin brick wall the subject of the proceeding ('Brick Wall') to provide Patten a *'little bit more land for him to open his car door'*. According to Taylor, the location of the Brick Wall had been suggested by the builder. Taylor stated further: *'we invited Mr Patton to rest the roof of his car port on so that that opened up some extra space which has been defined as the 22 centimetres. Around about eight and a half inches. So that Mr Patton could have this additional room'.* Taylor's motivations were described by him in the following terms: *'I didn't see it as a planning issue or a building issue or a legal issue. I saw this as a moral issue you know, an issue of fairness and equity and consideration to Mr Patton.'* …

29 The determination of the issue of consent turned entirely on Taylor's evidence of what he remembered of events that took place over 30 years ago. This was in circumstances where he conceded he did not have a vivid recall and he gave evidence that, at the time, it had not seemed a big deal to him.

30 Taylor is the only person involved in the building of the Brick Wall, or who knows anything of the circumstances of the Simultaneous Works, to give evidence. Patten is dead. The builder was not called to give evidence.

31 Taylor gave evidence that he paid for the construction of his garage, including the Brick Wall. Whilst I accept that he now believes he paid for the Brick Wall, there

are no invoices or other documents to back this up or indicate who paid for which parts of the Simultaneous Works. I am not satisfied on the balance of probabilities that he did pay for the entirety of the Brick Wall. The Simultaneous Works clearly involved more work than just the construction of Taylor's garage. It was not put for Taylor that he had paid for *all* the Simultaneous Works. Work was done to Patten's garage, for example, at the least involving knocking down the previous wall that supported it and affixing its roof instead to the Brick Wall. The façade needed to be built for both garages. I note too that even if Taylor did pay for the entirety of the Brick Wall, that does not shed light on what he knew about its location (in relation to the boundary between the properties) at that time.

32 Taylor agreed in cross-examination that his arrangement with Patten about the location of the garage wall was meant to be a permanent arrangement – 'Well, yes indeed. Putting up a Brick Wall is a pretty permanent statement of things, yes'. He gave evidence that after it was built, he never discussed the location of the Brick Wall with Patten. He said that 'there was never any expectation' of moving the Brick Wall at a later time.

33 I am not satisfied that Taylor knew Parcel B was on his title, when the Brick Wall was built, or at any time until he had the survey done by surveyors Kearney and Tyrell in 2006, two decades after the Brick Wall was built.

34 Taylor gave evidence that one of the key reasons he commissioned the survey in 2006 was because he *suspected* the Brick Wall was not on the title boundary, so he could establish its location in relation to the boundary. He was starting to have discussions with Harrison about putting up a fence between their properties, and in the process of moving towards plans and permits, he wanted to know exactly where the boundary was.

35 Suspecting something and knowing it are two very different things.

36 Taylor's evidence relating to the building of the Brick Wall was vague and speculative, and I consider he was reconstructing what he thought may have

occurred rather than remembering it. It was couched in words such as 'I believe', what 'would have' happened, and what he 'would think' occurred:

> Because Mr Patten had made a request that in the new work that was done, could we provide him a little bit more area for him to open the door of his car. He'd had this very tight circumstance for 20 years because it would seem logical but when the side fence was taken down, and I believe it would have been taken down through the whole property, Mr Patten would have built his car port on that boundary and you know, he didn't probably want to intrude too far into his back yard so it was still I would think hard up against the boundary…
>
> …
>
> Mr Patton had a car port that was abutting the boundary because it was built following the demolition of the side fence to allow a common driveway and therefore there was that reference point that was known about the boundary and Mr Patton would have built up to that…
>
> …
>
> Mr Patton had built up to the boundary. Mr Lampshire had built near the boundary, ah, you know, we had plenty of reference points about where the boundary was and the clear intention and understanding was that this Brick Wall was on my land.

37 In the course of his evidence, Taylor moved between speculating that Patten 'would have built up' to the previous side fence (which it seems Taylor assumed was on the boundary), to referring to Patten's carport being 'presumably on the border', to saying Patten 'had built up to the boundary'. I am satisfied that he did not know where either his own garage was in relation to the boundary, or where Patten's garage was in relation to the boundary.

38 Taylor did not give clear evidence as to where the previous garage on his property had been located, compared to where the new one was built. Nor did he give evidence as to where, in relation to the boundary, the wall of Patten's garage had been before it was knocked down as part of the Simultaneous Works. I am not satisfied that he could remember that. There were no photos in evidence of the previous garages or showing where they were located on the properties. Asked if the two separate garage walls had previously abutted, Taylor said:

> Well I can't be certain of that. You know, what I believe was the case was that, you know, and it, it, it really it's a matter of some speculation but you know, Mr Lampshire moved into number 8 in 1935. You know he built a garage at some stage, possibly in the 1960s. Ah, the fence was in place at

that time. Did he demolish the fence to make sure that his wall abutted the boundary? I don't know.

39 In his evidence, Taylor referred to being willing to let Patten use a 'little bit of land', but he did not give evidence about how much was discussed.

40 Although he referred to having a 'clear understanding' with Patten, it was anything but clear what (if anything) was actually discussed – let alone agreed – with Patten before the Brick Wall was built. Taylor's evidence does not make clear what he discussed with his builder (or agreed with the builder) as opposed to what he discussed or agreed with Patten.

41 Taylor submitted a town planning application to the relevant council in 2002, which included diagrams done by a draftsperson showing both his garage and his neighbour's garage. The Brick Wall was clearly indicated as being on the *boundary* between the two properties. There was nothing on it to indicate that his neighbour's garage impinged on to Taylor's title. Taylor sought to explain this by saying he was not concentrating on this part of the plan when he reviewed it. But these were detailed plans Taylor submitted to the local council, and Taylor presented at trial as someone who shows great attention to detail. I do not accept he simply overlooked the fact the boundary was shown in the wrong place on a document he submitted to council. I am satisfied he did not know that Parcel B was on his title at that time.

42 In the Reply and Defence to Counterclaim he filed in 2020, Taylor pleaded:

> [2(c)] The Roof was constructed so as to rest on the Brick Wall with the permission of the plaintiff.
>
> Particulars
>
> In around the second half of 1986, the plaintiff and the defendant's predecessor-in-title, Mr William Patten, undertook simultaneous works via the same builder contracted by the plaintiff, to demolish and construct a new garage in the case of the plaintiff, and renovate the existing garage in the case of Mr Patten (**Simultaneous Works**).
>
> Prior to the time of the Simultaneous Works, Mr Patten raised with the builder and the plaintiff in conversations difficulties Mr Patten had in exiting his vehicle when parked in his garage. In order to provide Mr Patten with additional space adjacent to his driver's side door when

> parked in the garage, it was agreed that a party wall would be constructed, being the Brick Wall, rather than separate walls for each structure. The plaintiff granted Mr Patten permission for the roof of his garage to rest on the Brick Wall.

43 Taylor pleaded in the Reply that in order to provide the additional parking space (that Patten asked for due to his difficulties exiting his vehicle when parked in his garage) it was agreed that a *party wall* would be constructed 'rather than separate walls for each structure'. There is no mention of Taylor agreeing to Patten using any of Taylor's land in Patten's garage (the case Taylor advanced at trial).

44 Evaluating the evidence carefully, I am satisfied, on the balance of probabilities, that Taylor intended the Brick Wall to be built on the boundary of the properties. He did not consent to the Brick Wall being built entirely on his property and to Patten using Parcel B.

Exclusive possession

45 The next issue in relation to Parcel B was whether, once the Brick Wall had been built, Patten had possession of Parcel B with the intention of possessing it to the exclusion of others. If he did not have that intention, a necessary element of adverse possession would not be satisfied.

46 As stated by Pagone J in *Abbatangelo v Whittlesea City Council* ([2007] VSC 529 at [7]):

> The person claiming title by adverse possession must also show that the possession was with an intention to possess the land to the exclusion of others. A person will not establish the requisite intention merely by proving entry and possession as a trespasser. It is not a necessary ingredient of the requisite intention that the possession be knowingly unlawful as against the true owner. It is also not necessary that the person claiming as adverse possessor show a specific conscious intention to exclude the true owner. What, however, is essential is that the intention be one to exclude others. In short, the person claiming title by adverse possession must show that the possession was held with an intention to assert the fundamental rights of ownership: possession and exclusion.

47 Taylor submitted that:

> [71] In addition to the argument with respect to consent or permission, Taylor also relies on a distinct lack of intention on Patten's behalf to exclude Taylor from accessing his carport which, in turn, had the effect of allowing Taylor 'access' to Parcel 'B'
>
> [72] Taylor's evidence that Patten's carport was never locked, that he would on occasions enter into Patten's carport to collect various items that Patten had left there for him, and that neither he nor Patten ever had any issues or raised any concerns with the other entering into their respective garages whenever the need arose.
>
> [73] While it was suggested to Taylor in cross-examination that he never specifically used the 22cm sliver of land which comprises Parcel B, it would be a somewhat ridiculous proposition given the nature of the enclosure of the land if Taylor's failure to set foot on the disputed land each time he entered into the car port No. 10 meant that he had not, in fact, "accessed" the land.
>
> [74] In any event, the relevant question is not directed towards the actions of the dispossessed owner. The consideration of "access" and the evidence in relation to it is relevant in the context of the issue of Patten's *animus possidendi* – that is, his intention to exclude Taylor from entering his carport whenever Taylor so required.

48 Taylor submitted that Patten did not intend to have exclusive possession of Parcel B because Patten did not intend to exclude Taylor from entering Patten's garage whenever Taylor wanted to. Taylor gave evidence that he was often invited into Patten's garage by Patten to collect tools and so on, that Patten's garage was not fully enclosed until renovations in 2015, that Patten never locked it, and that Patten told him he could go in to collect things even if Patten was not there (which Taylor occasionally did).

49 I am satisfied on the balance of probabilities that Patten possessed Parcel B with the intention of excluding others.

50 The matters referred to by Taylor do not establish an intention by Patten to share possession of the garage with Taylor (or relevantly, of Parcel B). Parcel B was located on Patten's side of the Brick Wall and formed part of his garage. The garage had a roller door at the front which could be closed. Patten parked his car in there. A friendly relationship with a neighbour such that the neighbour was invited

to collect tools and so forth when he needed to does not amount to an intention to share possession.

51 As indicated above, I find that:

- Taylor did not consent to Patten using Parcel B in 1986 or at any time.
- From the time the Brick Wall was built, Patten intended to have exclusive possession of Parcel B.

52 It follows that Taylor's title to Parcel B was extinguished 15 years after the Brick Wall was built. I uphold the adverse possession claim over Parcel B.

Parcel C – adverse possession claim

53 Harrison also made an adverse possession claim over another parcel of land within Taylor's registered title boundaries (described as **Parcel C**). She alleged that for at least 15 years, from around the time of the Simultaneous Works, a triangular piece of land on Taylor's title had been enclosed as part of the backyard on Patten's property. Harrison claimed that a galvanised iron fence was in place between the properties for the requisite period, running east from an extension to the Brick Wall to the eastern boundary paling fence at the rear of the properties.

54 The issue which needed to be determined in relation to this claim was whether the area was enclosed or not throughout that period – was there a fence there that enclosed Parcel B on Patten's property?

55 Taylor gave evidence that he could not be at all sure, and was very uncertain that the 'fence' had been in place at any stage from 1986 through to 2010. He was certain, however, that there was *no* fence structure built in 1986, just 'this collection of roofing iron that wasn't affixed to anything'. He said he could recall that in part it was a 'rough and ready arrangement. There was no definitive fencing. I had to put new roofing on in there to create a barrier against which I could store firewood'. He said too that parts of the roofing iron moved when he stacked wood against it

at times in the following years, where pressure was applied from the wood. He said this collection of roofing iron was in very poor repair, and he did not know if the roofing iron was continuous. Although he said that the roofing iron 'sat there' until 'the demolition of the garage was completed in 2012', it was unclear what he meant by 'there', given that he had also said that it moved over time. The most I take from that is that a collection of roofing iron sat in the general area where Harrison claims the 'fence' was situate. But I am not persuaded it stayed in the same position, or that it was affixed at both ends over the relevant period.

56 Harrison's evidence of what she observed about the alleged fence, from when she bought the property in 2003 until when it was taken down in 2010, did not advance matters far. Harrison had no specific knowledge of whether the roofing iron was fastened either at the brick wall end, or at the rear fence. She *believed* it was, because she 'never saw it move', but she never inspected it. She described it as a 'vertical placed galvanised iron sheet', with 'steelwork supporting it from the garage, the end of the brick wall to the rear fence'.

57 Around the time Harrison arrived at her property a photo indicates that a jasmine bush had grown over the area where the galvanised iron sheet met the back fence, – but there is no evidence as to when that occurred or whether the galvanised iron fence was actually affixed underneath that vegetation.

58 In a 2005 survey carried out by surveyors Carson Simpson, a dotted line is shown in the location Harrison claims the 'fence' stood. Samuel Brewin, the expert surveyor called for Harrison, said the Carson Simpson survey was the survey 'we adopted' in making Harrison's adverse possession claim over Parcel C. That survey indicates the fence sat *22 cm* off the title boundary.

59 But in the survey carried out by surveyors Kearney and Tyrell in 2006 – 13 months later – the fence is shown as sitting *33 cm* off the title boundary.

60 Harrison claims the lesser area of land as indicated by where the fence is shown in the 2005 survey.

61 However, the difference between the surveys is itself significant, showing an 11cm shift in where the fence is shown in 13 months. This is in the context that the width of the Parcel C adverse possession claim is 22cm at that point.

62 Counsel for Harrison conceded that the fence may have moved in the 13 months between surveyors. If it moved, it lends credence to Taylor's evidence it was not affixed. In any event, I am not satisfied, without hearing from either surveyor, that either survey accurately showed where the roofing iron was at the dates those surveys were done. And there is nothing to satisfy me as to where it was, or if it was affixed, before 2005.

63 Harrison had the burden of proof in relation to this claim. It was not discharged. The evidence is simply insufficient to establish on the balance of probabilities that the alleged fence was in place enclosing Parcel C for the necessary 15 year period.

64 I will dismiss the claim for adverse possession of Parcel C.

EASEMENT CLAIMS

Law - easements

65 The doctrine of lost modern grant applies where someone can establish that they have enjoyed an easement over someone else's land for a 20 year period. The rationale is that unless a grant had been made, the owner of the servient land would not have allowed a situation of continuous use by the owner of the dominant land.

66 Hedigan J summarised the five elements required for a lost modern grant claim, in *Sunshine Retail Investments Pty Ltd v Wulff & Ors* (1999) VSC 415 (28 October 1999) at [76]:

> The five elements of which the Court must be satisfied, either by direct evidence or by inference, do not seem to be in dispute in this case either, a matter which does not surprise as the principles have been pronounced in countless cases from *Dalton v. Henry Angus & Co.* (1881) 6 App. Cas. 740 at 786. The elements of which the Court must be satisfied are the following:
>
> (1) the doing of an act by a person or persons upon the land of another;

(2) the absence of right to do that act in the person doing it;

(3) the knowledge of the person affected by it that the act is done;

(4) the power of the person affected by the act to prevent it, either by an act on his own part or by action in the courts;

(5) the abstinence by that person from interference of such a length of time which renders it reasonable for the Court to say that it shall not afterwards interfere to stop the act being done.

See *Dalton v Angus* at 774 and 786.

67 As the Victorian Court of Appeal stated in *Laming v Jennings* [2018] VSCA 335:

> [79] The recognition of both adverse possession and an easement by prescription share and an important conceptual underpinning. They reflect the circumstances in which the common law recognises long-established de facto enjoyment of property. Importantly, they focus not just on the conduct of the claimant but on the position of the owner of the land. As explained by Lord Hoffman *in R v Oxfordshire County Council; Ex parte Sunningwell Parish Council*:
>
> > [the common law] did not treat as long enjoyment as being a method of acquiring title. Instead, it approached the question from the other end by treating the lapse of time as either barring former or giving rise to a presumption that he had done some act which conferred a lawful title upon the person in de facto possession or enjoyment.
>
> [80] His Lordship went on to observe that, in the case of rights by prescription, the effluxion of time is not used to bar the remedy but to presume that enjoyment was pursuant to a right having a lawful origin.
>
> [81] Essentially, an easement rising by a presumption lost modern grant will be found where there is an open and uninterrupted enjoyment of land for at least 20 years that is not explained by express grant of an easement or permission to use the land.
>
> [82] The underlying rationale is that the courts presume a long assertion of right as having a proper legal foundation and the owner, by its acquiescence in the face of an assertion of title, must be taken to have conferred the interest grant. As Lord Herschell said in *Phillips v Halliday*, 'the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title.' The legal fiction upon which the precept of lost modern grant depends is that the paper owner has conferred a right by grant but that the grant is lost.
>
> [83] It is necessary to examine both the acts of the claimant (and its predecessors in title) and the response of the owner. From the perspective of the claimant, its acts and conduct must manifest an assertion of right to do the thing claimed. In relation to a prescription by the user, the long enjoyment must have been 'neither by violence, nor by stealth, nor by leave asked from time to time'.
>
> [84] The first of these requirements recognises that the owner should not be required to resist the application of force. The second requirement, that the enjoyment of the claim must not be in secret, means that the

> prescription cannot arise where the acts would not be known to an owner reasonably diligent in protecting its rights. The third requirement allows the owner to consent or give a licence to the use of the land, but not at the cost of having the land burdened by a proprietary interest of the user. [*fn [73]: R v Oxfordshire County Council; Ex parte Sunningwell Parish Council* [2000] 1 AC 335, 351.]
>
> [85] Where these requirements are satisfied, the paper owner would be expected to resist the assertion of right or face the consequences of an easement by prescription arising if it fails to do so. In that context, Fry J said in *Dalton v Angus* that the whole law of prescription rests upon acquiescence of the owner.
>
> [some citations omitted].

68 *Laming v Jennings* at paragraph [84] cites *R v Oxfordshire County Council; Ex parte Sunningwell Parish Council* [2000] 1 AC 335, 351. In that case, Lord Hoffman states, relevantly, at 350-351:

> …The emphasis was therefore shifted… to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the license of the owner. … 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. …

69 If the true owner gives consent or permission for the use of the land over which a prescriptive easement is claimed, time for the prescriptive easement does not begin to run. As Goff J said in *Healey v Hawkins* [1968] 1 WLR 1967, at 1973:

> In principle it seems to me that once permission has been given, the user must remain permissive and not be capable of ripening into a right save where the permission is oral and the user has continued for 40 or 60 years, unless and until, having been given for a limited period only, it expires, or being general, it is revoked, or there is a change in circumstances from of which revocation may fairly be implied.

Easement of support (Parcel E)

70 Harrison claims she is entitled to an easement of support over an area of land on Taylor's title extending from where the Brick Wall had previously stood to where its concrete footings had been (an area about 60cm by 5.06m).

71 Parcel B is within the claimed area. As Harrison has been successful in her claim for adverse possession of Parcel B, she only seeks the easement of support over the balance of the Parcel E area.

72 As with the adverse possession claims, it was agreed that the necessary *time* for this claim was made out if the other elements were satisfied. The Brick Wall and footings had been in place for more than the 20 years necessary to found an easement claim.

73 It was also agreed that the Brick Wall had provided support to Harrison's garage after the Simultaneous Works were done. The roof structure of Harrison's garage was fastened to the Brick Wall (as was the roof structure of Taylor's garage). Before knocking it down, Taylor built the 'temporary' wooden wall parallel to the Brick Wall, so that Harrison's garage would still have necessary support.

74 The issues in relation to the easement of support claim were consent, and the extent of the claim.

Consent

75 Similarly to the position with adverse possession claims, if the true owner gives permission (or consent) for the use of the land over which a prescriptive easement is claimed, time for the prescriptive easement does not begin to run. As Goff J said in *Healey v Hawkins* [1968] 1 WLR 1967, at 1973:

> In principle it seems to me that once permission has been given, the user must remain permissive and not be capable of ripening into a right … unless and until, having been given for a limited period only, it expires, or being general, it is revoked, or there is a change in circumstances from which revocation may fairly be implied.

76 Taylor denies that the Support was 'without permission'.

77 He submits:

> [151] In order to successfully defend any claim in respect of the easement of support, all that is necessary is for the Court to be satisfied that Taylor knew that the Brick Wall was built on his land. It is not necessary for the

Court to find that Taylor knew that the Brick Wall was actually built in such a position so that he, in effect, granted Patten the right to use a sliver of his land up to 22cm.

[152] Accordingly, the burden of establishing any relevant knowledge is lessened in respect of the easement of support claim. Taylor's evidence that he paid for the construction of the Brick Wall was not challenged, nor was the evidence that he had engaged the builder. The Brick Wall, practically speaking, was his wall.

[153] Even if the Court is not satisfied that Taylor was, effectively, granting Patten a licence to use a sliver of his land 22cm in width, the evidence of Taylor's knowledge of the title boundary more than establishes that Taylor, at the very least, knew the Brick Wall was entirely on his land.

[154] Harrison's claim for a prescriptive easement of support therefore necessarily falls at the first hurdle, as she cannot establish that Patten's use of the Brick Wall to provide structural support was ever 'as of right'.

…

78 Harrison submits:

[77] Taylor and Patten plainly intended to construct the Brick Wall on (or approximately on) the boundary, with each owner deriving support for the garage from one side of the Brick Wall. No knowledge or consent was given by Taylor for the erection of support structures protruding substantially inside his land. Taylor did not consent to the usage of areas 'D' and 'E' for support.

79 As discussed above, I am not satisfied that Taylor knew the Brick Wall was built entirely on his land. On the contrary, I am satisfied that on the balance of probabilities that he intended it to be built on the boundary between the properties and did not know that had not occurred until he saw the 2006 survey he commissioned.

80 It follows that I am not satisfied that Taylor consented (in the necessary sense) to the support being provided from a structure entirely on his land. I am not satisfied that Taylor gave specific permission for Patten's garage to derive support from a wall located entirely on Taylor's land.

Claim over footings

81 The Counterclaim alleged, relevantly:

15. Further, at all times during the Claim Period:

a. The:

i. Roof was supported by the Brick Wall,

ii. the Brick Wall, or such of it as remained, was supported by concrete footings within the plaintiff's land (**Footings**);

(collectively, **Support**);

b. ...

…

17. In the circumstances, a prescriptive easement arose by the doctrine of lost modern grant that burdened the plaintiff's land and benefited the defendant's land, as to:

…

(b) the Support.

18. On or about 22 April 2012, the plaintiff:

a. demolished the remaining part of the Brick Wall in breach of the easement of support…

82 The legal entitlement to an easement of support over footings was not explored at trial.

83 Chapter 7 of *Bradbrook and Neaves' Easements and Restrictive Covenants* (Adrian J Bradbrook and Susan V MacCallum, LexisNexis Butterworths, 3rd edition, 2011) deals with Rights of Support.

84 The learned authors set out at paragraph [7.1]:

> [7.1] There are significant differences existing in the law on support, all depending on the nature of the support required. Therefore it is instructive to examine the relevant laws under four separate headings: support to land by adjoining land; support to buildings by adjoining land; support under strata titles legislation; and support to buildings by buildings on adjoining land.

85 The easement claimed in the current case falls within the fourth of the categories the authors identify: a right to support to a building by a building on adjoining land.

Harrison is claiming that because her garage was supported by a building on Taylor's land (the Brick Wall) for over 15 years, she has an easement of support.

86 In relation to the right to support to buildings by buildings on adjoining land, the learned authors set out at paragraph [7.30] – [7.31]:

> [7.30] In respect of all interests in real property other than those involving strata titles, the same principles apply to the support of buildings by buildings on adjoining land as to the support of buildings by adjoining land. Thus, in this context there is no natural right to support, and the right to support must be created by easement. Accordingly, in the absence of an easement, there is no reason why one party cannot remove his or her portion of a party wall, even if the other party's house might collapse. There is no obligation on either party to shore up or underpin, or to notify the other party of an intention to remove part of the wall.
>
> [7.31] Fortunately, in situations where one building relies on another for support it is in practice a comparatively rare case where the easement of support would not exist. In *Peyton v Mayor of etc of London* at the time the two buildings concerned were erected, the freehold estate was in different hands. However, in the majority of cases involving this type of support, the freehold would originally have been in one person. This situation would lead to the creation by implied grant or reservation of an easement of support which would enure to the benefit of all subsequent purchasers. …
>
> [citations omitted].

87 It was the Brick Wall that was the 'building' that supported Harrison's garage. Whilst as a matter of fact for the period that it stood the Brick Wall was itself supported by the footings, I am not satisfied that the easement of support extends to footings. No authority was provided for this aspect of the claim.

88 As well as seeking an easement over the land on which the footings stood, as shown in an expert report provided by Samuel Brewin, Harrison sought an easement over an additional 'buffer' of about 6 cm. She submitted that the footings in fact extended about that much further than Brewin's report showed (before Taylor removed part of them after he removed the Brick Wall).

89 Taylor submits:

> [155] Even if it is the case that the Court finds that Harrison has established her right to a prescriptive easement of support, the area of land which is sought is clearly an overreach, and is not supported by the evidence adduced by Harrison.

[156] The area of the footings which is set out in the expert report of Samuel Brewin dated 11 December 2020 (**Brewin Report**) extended only to a width of 0.54 metres at the western end, and to 0.55 metres at the eastern end.

[157] In the Diagrams, the area now claimed by way of the support easement is extended to 0.6 metres with additional area mostly being added to the north side of the footing to match into the title boundary. Mr Brewin's explanation of the increased are was that he simply decided to apply a "buffer to the measurement of the footings." While he denied the buffer was created at the behest of Harrison, that evidence is questionable when one considers Harrison's views of the matter.

[158] After suggesting that her own expert's evidence "was not representative of the extent of the width of the concrete footings", Harrison confirmed that she had elected to increase the area of the support easement beyond the measurements set out in the Brewin Report.

[159] The increase in the claimed area appears now to be made by Harrison on the basis of a photograph in which Harrison is holding a tape measure extended to 60cm to the edge of a ply retainer installed near the title boundary by contractors engaged by Harrison. That photograph does not, in fact, even depict the concrete footings.

[160] While it is suggested in the Defendant's Outline that Taylor accepted that the photographs established that the ply retainer did abut the Footings, no such concession was made, with Taylor enquiring of Harrison's counsel "why would the plyboard sit at – abutting the concrete footing when it's not shown in that photo?"

[161] Rather, what the photographs do tend to establish is that the ply retainers did not sit flush with the concrete footings, while it also could not be established on the evidence whether the ply retainer even ran at an equal width from the title boundary.

[162] No evidentiary basis has been put forward by the purported 'grab' of an extra six centimetres from the surveyed measurements set out in Harrison's own expert's report.

[163] While the claim for an easement of support should fail for the reasons outlined above, in the event that the Court is against Taylor on this point, any easement of support must be limited to the surveyed measurements Brewin first included in his original support.

90 As indicated above, I consider the easement of support was only over the Wall. If I were wrong about that, I would only have considered it extended to the footings as shown on Brewin's report. The evidence of any 'buffer' area was too unclear to satisfy me of the extent of any further area.

Relief sought

91 I am satisfied that by removing the Brick Wall, Taylor breached the easement of support.

92 The Counterclaim seeks the following:

> B. A declaration that the defendant's land has the benefit of an easement of support over the land occupied by the Brick Wall and under the Roof
>
> C. A declaration that the plaintiff breached the easement of support by the removal of the Brick Wall
>
> D. A declaration that the defendant is at liberty under the easement of support to construct a wall on the Footings to support the Roof in the area of the easement of support.

93 Harrison has not claimed damages for the breach of easement, nor any injunctive relief. (Although the Counterclaim included claims for loss and damage suffered by reason of Taylor's alleged breaches of easements, no loss and damage claim was pursued at trial. Rather, Counsel for Harrison submitted that the Court should uphold Harrison's claims for easements and make declarations).

94 The real gravamen of what is sought is at declaration 'D'. (There is no point making Declarations B and C on their own).

95 I have already indicated that I do not consider any easement of support extends to the footings, so the issue is whether a declaration should be made entitling the defendant to construct a wall on Taylor's land where the Brick Wall used to be.

96 If Declaration D were made, it would entitle Harrison to be able to enter Taylor's property to build a wall that would not be connected to any structure he wants on his property, purely to provide support to a building on Harrison's land. And this entry would be in circumstances where support for Harrison's garage was provided on Harrison's land (then owned by Patten) *before* the Brick Wall was built, support for the garage is *now* provided on her land, and support for it *can* continue to be

provided on her land. This is a very different situation to usual easement of support claims relating to one building supporting another.

97 When the Building Appeals Board provided compensation to Harrison regarding the Brick Wall being knocked down it stated:

> 158. Accordingly, the Board finds that pursuant to s. 98 of the Act, the Applicant is entitled to compensation. Given the acrimonious relationship between the parties, the Board does not consider making orders requiring the Respondents to undertake the reconstruction of the garage wall is appropriate. The Board is also of the opinion that agreement between the parties will not be reached with regards to permitting access to [Taylor's land] to facilitate the reconstruction of the wall by the Applicant. Therefore, the Board finds that the second of Mr Atchison's options (being a wall to be constructed solely from within the property at [Harrison's land]) is the appropriate resolution of this issue, and as such the compensation for this option is $39,310.

98 I agree with what the Board had to say about the acrimonious nature of the relationship between the parties, and the difficulties of arranging access to facilitate reconstruction of a wall where the Brick Wall previously was. This adds to the reasons the declarations sought are inappropriate.

99 I will not exercise my discretion to make the declarations sought.

Easement of drainage (Parcel F)

100 Harrison claims an easement of drainage over an area 1m wide and 12m long (called **Parcel F** in this proceeding).

101 The evidence was that underground piping which connected Patten's house and drainage to the council storm water system via Taylor's land had been in place for over 20 years.

102 Taylor gave evidence that some of the piping had sat to the immediate right of the concrete footings of the Brick Wall (that is, to the south of the footing), and that the pipes were laid in 1986.

103 In 2012, Taylor removed the piping as part of the works he was doing on his property. Flooding then occurred in the excavated areas. About a year later Taylor laid *new* PVC piping which again connected Harrison's house and drainage to the council storm water system via his land. He gave evidence that this was after the Building Appeals Board 'strenuously advised' him to replace the piping.

104 The claim is not put as an easement of necessity (there is still stormwater drainage at Harrison's place at the rear). It is a claim relying on the doctrine of lost modern grant: on the basis the pipes were in place for 20 years so a prescriptive easement arose.

Consent

105 In his Reply and Defence to Counterclaim, Taylor denies that the piping was laid 'without permission'. If he had consented to it, then no easement would arise.

106 As Harrison submitted:

> 11. … Taylor's evidence was ambiguous as to whether he had expressly agreed with Patten to run the pipe through [Taylor's property]: *'I believe and I recall this, that Mr Patton raised it with myself and the builder that he had a ceramic pipe conveyance in his storm water at the rear of the property and that that was not in good condition and therefore the decision was taken to provide him a new section of storm water pipe and we took it through my property.'* Taylor did not specify who had made the decision in question. When Taylor's counsel sought to bolster this evidence by asking a follow-up question that presupposed that Taylor had expressly permitted the Drainage Pipe to be constructed through his land, he received an answer deriving from Taylor's beliefs rather than his recollections: *'Why did you decide to take it through your property?---I believe the storm water pipe, the ceramic pipe in Mr Patton's property was, you know through his back garden, it was a means to limit the disturbance within Mr Patton's property'.* …

107 Taylor was cross-examined about whether Patten had asked him to let the drainage run through his property:

> Did he ask you to do that?---Ah, I don't have a recall of whether he asked me. He raised it as an issue, um, and we decided to do something about it.
>
> How did he raise it as an issue?---Well I, you know, it's difficult to recall precisely from 34 years ago but, um, he must have made mention that his storm water was in ceramic pipe and you know, he may have been having problems with discharging the storm water through the ceramic pipe

> because they were notorious for being invaded by tree routes. They shifted in the reactive basalt soils. They cracked. So, you know, they just weren't a reliable form of piping and in these circumstances where there was an opportunity to give him some new piping this was the solution we came up with.
>
> You and he came up with that solution?---Yeah, it would have been a consensual thing. You know, there would have been discussion between Mr Patton, myself and the builder and we would have, you know, pretty readily arrived at the solution.
>
> Who ultimately arranged for or commissioned the works?---They were part of the works that I was primarily commissioning. Mr Patton had a very small role in it because we were only doing the façade of his garage. You know, the total responsibility and project management was with me.

108 As with other matters that occurred back in 1986, Taylor's evidence about the drainage is peppered with words indicating he did not remember, such as what 'would have' occurred; how Patten 'must have made mention'; what problems Patten 'may have been having', and what he 'believed' occurred. It did not persuade me he remembered relevant details, as opposed to being engaged in a process of reconstruction.

109 In a letter he wrote to Harrison in December 2012, after she wrote complaining that he had removed the Piping, Taylor said (underlining added for emphasis):

> We wish to inform you that we have <u>recently discovered</u> that stormwater runoff from your roof is entering our property. In our estimation the runoff may come from perhaps the rear 35% of your house, so therefore it can be a considerable amount of water in more intense rain falls.
>
> There was <u>obviously some previous arrangement</u> that permitted the storm water to come onto our land so it could connect to Council's storm water drains at the rear of the properties. This, like the pipe (which needed to be removed for the works on the footing) no longer exists.

110 As Harrison submitted:

> [35] Taylor accepted that the underlined passage suggested he could not recall the details of any consent arrangement at the time the letter was sent in 2012: *(Counsel) 'But you can recall when you sent this letter that you in fact had had a firm agreement with Mr Patton that the pipes could drain through that location, could you?'---(Taylor) 'No, I didn't recall that but, um, you know, when I thought about it, ah, I came to the conclusion that yes, that arrangement had been made.'* Taylor then backed away from this concession, attempting to suggest that his memory of the supposed consent agreement had been refreshed <u>before</u> the letter was sent, with the paragraph in the letter that suggested to the contrary being explained away: *'I'm saying that when we disturbed the pipe, initially, I didn't know where it had come from.*

> *Then when we got to the western end of the footing and I could see that the pipe went over there. That started prompting my memory of what the arrangement had been with Mr Pattern and then when I wrote this letter, my intention was to encourage Ms Harrison to take care of her own storm water so I chose to use those words, ah, you know, it may not have been a strict representation of what I had recalled but you know, the intention of the letter was to get that, ah, action from Ms Harrison to take care of her own storm water.'*

111 I am satisfied, from that letter, that in 2012 Taylor did not know how the drainage pipes came to be on his land. He did not remember anything about it. He just assumed there was 'obviously' some previous arrangement (between who was not stated).

112 I do not accept that Taylor's recollection was prompted, either in 2012 or subsequently, such that he actually recalled consenting to the piping being laid. I am not satisfied he consented to the piping being laid.

Relief sought

113 Harrison sought the following about the drainage easement, in the prayer for relief in the Counterclaim:

> E. A declaration that the defendant's land has the benefit of an easement of drainage over the land occupied by the Piping.
>
> F. A declaration that the plaintiff breached the easement of drainage by the removal of the Piping.
>
> G. A declaration that the defendant is at liberty under the easement of drainage to install piping in the area of the easement of drainage to connect the House to the council storm water system

114 Harrison has established that she is entitled to an easement of drainage. She is entitled to have drainage piping running through Taylor's property, as it presently does. I will make the declaration at E so there can be no future dispute about that entitlement

115 However, I will not make the other declarations.

116 No damages were sought (despite being mentioned in the Counterclaim).

117 The piping has been replaced, and although there was some dispute as to precisely where the new pipes sit compared to when the original ones were, I am satisfied that little turns on the point of difference.

118 I am not satisfied from the evidence as to precisely where the old pipes sat. Harrison drew a line on a map in court as to her estimate as to where she thought they had run, and a ruler was held up in a photo to indicate where one part of the earlier piping had in comparison to the footings. This was not persuasive of where the pipes had been in position previously.

119 It is now nine years since the pipes were removed, and new ones replaced them within about a year. To the extent that by taking the pipes out, Taylor breached a drainage easement, it was temporary – and it was remedied. Harrison's pipes continue to run through Taylor's backyard, albeit in a slightly different location. To the extent a declaration is sought to give Harrison the right to remove the current pipes and run pipes where they were nine years and more ago, I am not satisfied there is any point in this disruption to Taylor's land given the lack of benefit to Harrison.

120 I will not exercise my discretion to make declarations F and G.

ORDERS

121 I direct the parties to consider the orders (including as to costs) that should be made as a result of these reasons and provide my chambers with proposed orders by 4pm on 31 January 2022. If the parties cannot agree on those orders, a hearing will be listed.

Certificate

I certify that these 33 pages are a true copy of the reasons for judgment of Her Honour Judge Marks, delivered on 17 December 2021, revised on 17 December 2021.

Dated: 17 December 2021.

Jack Rudman

Associate to Her Honour Judge Marks