Access law: getting it right

The law concerning right-of-way disputes is in desperate need of an overhaul, but changes have yet to be made despite Law Commission recommendations. The following developments could prove useful explain Julia Stansfield and Helen Evans from Hill Dickinson.

The Court of Appeal handed down its judgment in the case of *Wood v Waddington* on 21 May 2015. Mr and Mrs Wood purchased land in Teffont Magna, near Salisbury and decided to turn the on-site stables, used for domestic purposes only, into a livery business. To run the business successfully they needed easy access to nearby bridleways. The dispute with Mr Waddington, who owned the neighbouring land, was over access to two such bridleways. The Woods' claim fell at the first hurdle and they appealed.

Their first ground of appeal was that the rights of way claimed were expressly granted by the transfer, which claimed that the property had been sold to them "*subject to the benefit of all liberties, privilege and advantages of a continuous nature now used or enjoyed by or over the property."* Their argument was that the rights of way claimed were continuous.

Lord Justice Lewison swiftly trotted through the various authorities that discuss 'continuous' easements, before concluding that the word applied to easements that were enjoyed passively - such as a right to use drains or a right to light - and not to those that allowed parties to go galloping through the countryside.

Having failed to make an impact in the first race of the day (and no doubt losing a considerable sum of money as a result), Mr and Mrs Wood then argued that the rights had been acquired courtesy of section 62 of the Law of Property Act 1925. LJ Lewison cantered through a useful discussion of this section, which states that it operates to convey with land (or buildings) sold *"…all…liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof or at the time of the conveyance…occupied, or enjoyed with…the land."*

How often is 'continuous'?

He helpfully confirmed the law as set out in *Alford v Hannaford* [2011], that in cases where there has been no diversity of occupation prior to sale (of the land retained and the land sold) all it is necessary to establish, for the purposes of section 62 to apply, is that the exercise of the relevant rights have been continuous and apparent (despite having apparently just rendered the use of the word 'continuous' superfluous).

He concluded that the evidence showed the tracks in question had been used once a month, which was sufficient to get Mr and Mrs Wood past the post on this point. As some of the witness evidence that helped convince LJ Lewison was from a man who used one of the routes on his way home from the pub, it is suggested that Mr and Mrs Wood buy him a drink or two if they ever bump into him at their local.

LJ Lewison did, however, add that where there has been no use at all within a reasonable period prior to the date of the transfer, then section 62 cannot operate to create an easement. Of course, had section 62 been expressly excluded from the transfer then this argument could never have arisen in the first place.

Quite often solicitors have to deal with rights-of-way claims arising from access routes used only infrequently. The fact that use once a month was deemed to be sufficient could be very useful, or not, depending upon which horse you are backing.

Having reached this conclusion it was not necessary to then consider the remaining two grounds of appeal: that the rights were created under the rules in *Wheeldon v Burrows* or by consequence of the common intention of the parties. That left LJ Lewison able to gallop through his consideration of the extent of the right claimed. Mr Waddington had argued that Mr and Mrs Wood could not claim use of the rights of way: a) on horseback, as the evidence showed vehicular use and only occasional use on horseback; and b) for commercial use, in view of the routes having only been used for domestic use previously.

There was no need for a photo finish as LJ Lewison quickly concluded that a right to use the tracks with vehicles also allowed use on foot or on horseback. He also dismissed the claim that the change from domestic to commercial use in this instance amounted to use in excess of the right granted. He did not consider the fact that Mr and Mrs Wood's livery business amounted to a radical change in the character of their property.

Consider the alternative

Mr and Mrs Wood are no doubt very relieved by the outcome, particularly as the barrister appointed by Mr Waddington, Mr Jonathan Gaunt QC, is author of the best-known textbook on the law of easements, *Gale on Easement*, and must have been seen as a favourite going into the race. However, the significant costs incurred in this exercise will have impacted both parties, which should serve as a reminder to practitioners – and their clients - of the need to consider alternative dispute resolution at the earliest opportunity, preferably long before the parties' positions become irreversibly entrenched.

The recent case of *Winterburn v Bennett [2015] UKUT 59 (TCC)* provides a useful reminder on the law of prescriptive rights of way, in particular for landowners who believe they have adequately protected their position by placing a sign on their property discouraging use of their land as a means of access.

To recap, prescriptive rights of way can be established in three ways: under section 2 of the Prescription Act 1832, under 'lost modern grant' or by common law. Generally, a prescriptive right of way will arise where one person has exercised rights over another person's land for an uninterrupted period of at least 20 years, without force, secrecy or permission (i.e. as of right).

The case of *Winterburn v Bennett* concerned access to a fish and chip shop over a car park belonging to a Conservative club in Keighley. While everyone loves a shortcut to the 'chippy' (except, it seems, the Conservative Club in this case), the club had placed a sign in its car park that read: "*Private car park. For the use of patrons only. By order of the committee*." A similar sign was placed in the club's window.

Despite the presence of the signs, customers and suppliers used the car park as a means of access to the fish and chip shop openly and without the consent of the club. The club secretary had complained to the fish and chip shop owners on numerous occasions about the continued use of the car park, but did not take their objections any further.

Many years later, the owner of the fish and chip shop claimed that it had acquired prescriptive vehicular and pedestrian rights of way over the club's car park. At first instance, the owner of the fish and chip shop was successful. It was found that there had been continuous use of the car park as a means of access for more than 20 years.

However, this decision was overturned, albeit only partially, on appeal to the Upper Tribunal. It determined in May 2015 that the precise wording of the sign, which had been on site at all times and addressed to the world at large, was significant. It left the reader in no doubt that parking by others was objected to and that any use contrary to the sign was by force. The use of the club's car park by the chip shop's suppliers and customers was therefore contentious and not as of right. The fish and chip shop had not acquired vehicular rights of way.

However, the Upper Tribunal determined that the sign was too brief and insufficient to prohibit pedestrian access. The sign predated the arrival of the fish and chip shop and was not directed specifically at the chip shop's owners and customers. The chip shop, therefore, was entitled to maintain its rights of pedestrian access over the club's car park.

The club was granted permission to appeal the Upper Tribunal's decision, so (unless the parties settle the dispute) we have not heard the last of this case. However, this case serves as a warning to landowners to make sure that any signs they place on their land are sufficiently clear and precise to prohibit all unauthorised uses. They should also consider taking additional steps to prevent unauthorised use such as locking gates, erecting other obstructions or even threatening court action.

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