RadcliffesLeBrasseur

BRIEFING

Number 6

Private Rights of Way for Vehicles

PROPERTY

This article is one to read if you are concerned with any properties which depend on private rights of way for vehicular access. Pedestrian rights are not a problem.

Usual and slightly less usual ways of acquiring rights of way

The usual way of acquiring a right of way which one land owner may exercise over the land of their neighbour is by deed of grant. However rights of way can be created by statute; by express grant or reservation; by implied grant; and by presumed grant. This article focuses on the fourth point, in particular the operation of prescription and the legal fiction of lost modern grant.

Many properties, both residential and commercial, depend upon a vehicular right of way based on long user evidenced by a statutory declaration from someone who has known the property for many years

Section 2 of the Prescription Act 1832 and the legal fiction of lost modern grant may protect a right of way which has been used for more than 20 years. The doctrine of lost modern grant is an assumption by the court that there has been a grant of the right of way by the owner benefiting the land relying on the right but that the document creating the right has been lost. The law will only refuse to adopt the legal fiction that there was a lawful grant where the existence of such a grant is impossible.

Both the defence of prescription and the claim of right arising from the loss of modern grant rests upon a notion of acquiescence by the true owner in the infringement of his right. Both require the person claiming the right to have acted for a continuous period of 20 years as of right, openly and in the manner that a person rightly entitled would have used that right. As of right means not by force, nor by stealth, nor by licence of the owner. The difference between prescription and the lost modern grant is that, for the former, the user is to be for a continuous period of 20 years before the action is brought, whereas for the latter, any 20 year period will suffice.

So that is all right then.

A Criminal Problem

Well no, actually. The problem with vehicular rights of way was first identified in relation to common land.

According to the Court of Appeal judgement in the case of Hanning v Top Deck Travel Group Limited (1994) 68 P&CR 14 such vehicular access is unlawful. This case confirmed that an easement or other legal right could not be established through an illegal act. Section 193 of the Law of Property Act 1925 made it a crime to drive vehicles on common land without the Lord of the Manor's specific authority. The very acts that give rise to long user depend on there being no such authority and are, therefore, by definition criminal. Accordingly it is not possible to establish a right of way for vehicles over common land by long user.

In two recent cases, the decision in *Hanning* was upheld. Both cases were heard in the Court of Appeal: *Massey and Naveur v Boulden and Another* (2002) 11 EG 154 was heard in November 2002 and *Brandwood and Other v Bakewell Management Limited* (2003) 09 EG 198 in January 2003. The

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Massey case, although relating to rights over a village green, a form of common land, was argued by reference to Section 34(1) of the Road Traffic Act 1988 rather than Section 193 of the Law of Property Act. Section 34 was originally introduced in the early 1930s to deal with motorists driving cross country without the landowner's authority. The section makes it a criminal offence to drive over land which is not a road. A road is defined as a road over which the public has access. The effect of this decision is to make the act of use of the track or drive without lawful authority an illegal act and therefore not capable of basing a claim for either a prescriptive right of way or a right of way through lost modern grant.

In other words the court has discovered that many, if not all, vehicular, but not pedestrian, rights of way dependent on long user are not rights of way at all and the owner of the land the alleged right of way crosses is entitled to an injunction preventing the use of the access.

Luckily, just before the courts made this discovery which would otherwise leave many properties round the country landlocked and subject to ransom, the Countryside and Rights of Way Act was passed.

Saving the Day? Countryside and Rights of Way Act 2000 ("CROW 2000")

Section 68 of CROW 2000 and the Vehicular Access Across Common and Other Land (England) Regulation 2002, which came into force on 3 July 2002, gives a property owner who would have a right of way for vehicles by long use, but for the illegality, the right to acquire legal rights of way across land, including common land, whether or not the owner of the land is in agreement. Compensation is payable to the owner of the land over which the right of way goes, the amount depending on the value of the property which will enjoy the right of way and how long the right has been exercised – the compensation varying between 0.5% and 2% of the value of the property.

Property owners can now apply for a legal right of vehicular access over common or other land, but the drafting of the relevant section and the regulations seem to suggest that the application must be done must be made before 4 July 2003.

What can be applied for is the legal grant of the right of way that would have been established by prescription or the doctrine of lost modern grant. CROW 2000 does not help the property owner enlarge the right of way for other purposes. If there is a track to a field that has been used for many years for agricultural purposes the property owner cannot use the Act to acquire a right of way to allow the field to be accessed as an industrial estate or a caravan park.

Section 68 of CROW 2000 and the regulations have only recently come into operation and it remains to be seen how well it will work in practice. It also remains to be established whether the apparent deadline for making an application under the Act needs to be made by 4th July this year – almost certainly a drafting error if it does. Nevertheless the advice must be, if in doubt about rights of way for vehicles, make an application.

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