# EASY EASEMENTS - PART 2

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**UK Real Estate Alert**

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This two-part series is about four important cases that have been decided over the past year relating to the acquisition of easements. Part 1 highlighted two cases explaining key principles that can dictate whether or not an easement exists.

This Part 2 highlights two cases that provide guidance on how to obtain (or prevent a neighbour obtaining) easements by prescription, which can result from the continued exercise by an occupier of land of a right over neighbouring land for twenty consecutive years.

## *WINTERBURN V BENNETT [2016] EWCA CIV 482*

It is a principle familiar to those in the property industry that where no legal right of way exists at the outset, the continuous use by a neighbour of, for example, a path as a means of access to and egress from a property for twenty consecutive years, can result in the acquisition of a legal right of way over that path.

However, where a landowner "protests" against such use over its land, even if the use has continued regardless, the acquisition of an easement can be prevented. What is often unclear is the extent of the protest that is necessary to thwart the neighbour. For example, what if a neighbour had used a path over a landowner's property to get to the neighbour's own property for twenty years:

and it was proven that during a conversation sixteen years ago the landowner had said "Would you mind not walking across my path from now on?"

but the landowner did and said nothing else for the next sixteen years whilst the neighbour continued to march regularly, freely and happily across the path to and from his property?

Was the landowner's one-off polite non-threatening "protest" sufficient to prevent the neighbour from being able to claim an easement at the end of the twenty year period?

The *Winterburn v Bennett* case involved a car park which was owned by a club and had been regularly been used by suppliers and customers of a neighbouring fish and chip shop since 1988. From 1988 until 2007 the club had attached a sign at the entrance to the car park reading "*Private car park. For the use of club patrons only. By order of the committee.*" However, the signs did not seem to provide much of a deterrent and the customers of the fish and chip shop continued to use the car park. Were the signs a sufficient enough "protest" to prevent the fish and chip shop owners from acquiring an easement for themselves, their customers and their suppliers to park cars in the car park?

The shop's lawyers had argued that to prevent the right to park from arising, the protests needed to go further, particularly once it became clear that the signs were being ignored and where there were other proportionate

means of protest available (for example, they could have threatened legal proceedings or erected a chain across the entrance). However, the Court of Appeal unanimously held that the erection of the sign was sufficient to prevent the acquisition of an easement. Richards LJ stated in summary:

> *"I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings… There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs… I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land".*

I expect that the majority of people will be sympathetic to the court's approach here and will agree with Richard LJ's concluding remarks.

There was another important point to come out of this case however which should serve as a warning. Although it did not form part of the proceedings in the Court of Appeal, the customers of the fish and chop shop had for more than twenty years, in addition to having parked in the car park, passed on foot over the car park to reach the fish and chip shop. The judge in the Upper Tier Tribunal held that the sign's wording was not sufficient to prevent the acquisition of a permanent right to do this. Although this point was not revisited in the appeal in the Court of Appeal, it nevertheless remains an important proviso that, whilst a visible sign of objection may be theoretically capable of preventing the acquisition of an easement, it is essential that the wording of the sign is sufficiently wide and precise.

## *WELFORD V GRAHAM [2017] UKUT 297*

One of the stumbling blocks to claiming an easement by prescription has been the difficulty in providing evidence showing that the exercise has been "without permission". This is a requirement borne out of a general principle that to claim an easement by prescription, for example, of a right of way, a neighbour must show that it has been passing over the land "as of right". If a neighbour obtains a landowner's permission to pass over the landowner's land, that permission demonstrates that the neighbour was not passing over the land "as of right" so any claim that it has acquired an easement by prescription will fail. Furthermore, even if a landowner has never granted permission, the difficulty for a neighbour is in proving the absence of permission. (By definition, it is very difficult to prove that something has not happened.)

In *Welford v Graham*, a neighbour had used a right of way over a strip of land for more than twenty years and the court accepted that the right had been used "without permission" for the first ten years (from 1978 until 1988) on the basis that the owner did not realise that he owned the strip of land in question and so could not have granted permission for the neighbour to pass through the strip of land. However, the land was sold in 1988 to a new owner who would have almost certainly been aware of the extent of land it had acquired. In respect of the period from 1988 onwards, the neighbour was unable to provide suitable evidence that the new owner of the land had not consented to the use of the right of way so the First Tier Tribunal ("**FTT**") rejected the claim for an easement.

 

On appeal, the Upper Tier Tribunal ("**UTT**") recognised that it would often be impossible to prove that permission had never been granted during the whole period of use. Therefore, a presumption that such use was "as of right" unless rebutted by the landowner made very good practical sense. Accordingly, the UTT reversed the First Tier Tribunal's decision and held that the neighbour had acquired an easement.

## IMPLICATIONS

Part 1 highlighted some of the difficulties that can arise when negotiating new easements or investigating easements that have been previously agreed (or purported to have been agreed). The cases in this part 2 show how informal arrangements between neighbouring owners can have significant implications.

If a neighbour is passing over or otherwise using a landowner's land, even if the landowner does not care and is not adversely affected by the use, it should nevertheless consider the legal implications of neglecting to act. Of course, neighbourly relationships are important and it may often be unwise and short-sighted to cause a dispute over something that is entirely unobjectionable but in the vast majority of cases there will be a suitable solution which could allow the neighbour to continue to do what it is doing without acquiring a permanent right to do the same and affecting the land values.

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