

Through the gateway – prescriptive easements

In the recent High Court case of *Bradley and another v Heslin and another [2014] EWHC 3267 (Ch)* it was held by the High Court that it is possible to acquire a prescriptive easement to hang a gate over a driveway by occupying airspace.

The Law

Prescription is defined as ‘a method of establishing a right, based upon the continued enjoyment of the right claimed for a prescribed period of time.’ In order to establish a prescriptive easement a claimant must show the following:

- 20 years of uninterrupted and continuous use. The same type of use must be demonstrated for the whole 20 years.
- There is a dominant tenement which benefits from the easement and a servient tenement over which the easement is exercised.
- The easement has been exercised without force, secrecy or permission.
- The easement is capable of being granted legally.

There are three ways in which a prescriptive easement can be acquired - under common law, the Prescription Act 1832 or the doctrine of lost modern grant.

The Facts

Two neighbours shared the use of a driveway. One owned the driveway and was the servient landowner (S). The other had an express right of way over the driveway and was the dominant landowner (D).

The gate posts were built on D's land, but the gates closed over the driveway owned by S. D and S did not agree on how often the gates should be closed. D wished the gates to be closed to a much greater extent than S.

D claimed a right to close the gates at all times and for all purposes connected with the enjoyment of its home.

The Decision

The court held that it was possible to acquire a prescriptive easement to hang a gate over a driveway (by occupying the airspace), but on the facts D had failed to show a continuous 20 year period of use.

If D had shown continuous use for 20 years it would have a right to open and close the gates for all purposes connected with the reasonable enjoyment of its home, on the basis that the use did not substantially interfere with the reasonable enjoyment by S of its home.

The Court held it would not amount to substantial interference for the gates to be closed as follows:

- daily from 11 pm to 7:30 am,
- on days when S was absent from home and
- on additional days when there was a greater likelihood of intrusion from revellers.

Commentary

This case highlights the need to clearly document such arrangements at the outset to avoid disputes. If this is not done and a dispute does arise, parties should look to settling the matter through Alternative Dispute Resolution rather than issuing proceedings.

If you require advice on any of the issues raised above or wish to have such an arrangement documented please contact Philip Roberts.

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