

Two cases were decided earlier this year which have both demonstrated the increasing difficulties applicants are facing in establishing that they have acquired rights over land through continuous use as of right and without interruption, i.e. by prescription.

To acquire a right by prescription, you need to prove the following:

- Right capable of existing as an easement
- At least 20 years' continuous use
- Use of the right without force, without secrecy and without permission
- The landowner and claimant were both competent
- If there had been an express grant, that grant would have been lawful
- No obvious explanation for the use other than a presumed grant

The first case, *Welford v Graham*, was a failed claim for a right of way for access/egress over the rear of a neighbouring property which was allegedly acquired by prescription. There were two issues relating to the right of way in *Welford*.

- The applicants were no longer using the right of way. As a result, 20 years continuous use could not be shown, as this must be a continuous period "next to" (i.e. just before) the legal claim relating to the right.
- The Tribunal appeared to require the applicants to provide evidence demonstrating that no permission had in fact been given by the neighbours, i.e. to prove a negative – this is a very difficult task!

The second case, *Winterburn v Bennett*, concerned a right of way claimed by the owners of a fish and chip shop across, and use of, a car park which formed part of the local Conservative Club. The inability to prove use "as of right" was again a determinative factor against the grant of the right of way. In this case, the Conservative Club had erected clear signs stating "Private car park. For the use of club patrons only", which were visible to anyone entering the car park.

The presence of the signs made it clear to the car park users that their use was permitted by the Conservative Club under protest. This prevented them from arguing that they used the right of way "as of right," as their use was by force and not peaceful. Ignorance of the signs by the fish and chip shop and its customers did not require the Conservative Club to take any further steps, e.g. legal proceedings or confronting the users orally or in writing, as any reasonable person was said to be able to understand the meaning and effect of the signs.

Whilst both cases reassert established principles, they serve as an important reminder of the high threshold an applicant for a perspective right must meet to be successful. Equally, they usefully highlight practical considerations for a landowner in order to prevent a claim of a prescriptive right over their land, such as displaying clearly visible and unambiguously worded signage.

If you would like to discuss any issues relating to prescriptive rights, or otherwise, please do not hesitate to contact a member of our Real Estate Litigation team.

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