

Chip off! Preventing prescriptive rights

The Court of Appeal has handed down a judgment that will be helpful to developers wishing to protect their land holdings from third party rights being acquired over time.

Where a person uses another person's land, such as for a right of way, for 20 years or more, they may acquire the right to register that right of way for the benefit of their land. This is known as a prescriptive right. Depending on the right acquired, developments may be jeopardised and/or housebuilders ransomed.

To acquire a prescriptive right, the use must be 'as of right'. This means using the land without force, without secrecy and without permission. However, it is possible to prevent the right crystallising by:

1. obstructing it (meaning that the right can no longer be exercised without force) for one year; or
2. issuing court proceedings in order to obtain an injunction preventing the trespass.

However, establishing an obstruction can give rise to a dispute, lead to expense in maintaining the obstruction and, of course, court proceedings can incur significant costs.

The good news for developers is that the recent Court of Appeal case of *Winterburn -v- Bennett* [2016] EWCA Civ 482, has made protecting land easier.

Mr and Mrs Bennett owned a car park, which they acquired from the Conservative Club Association in 2010. They obstructed it to prevent vehicles entering, but access was still possible on foot. Near to the entrance to the car park was a fish and chip shop owned by Mr and Mrs Winterburn. They leased the shop from the eighties to 2007, when they purchased the freehold. During that period and up to 2012, when Mr and Mrs Bennett

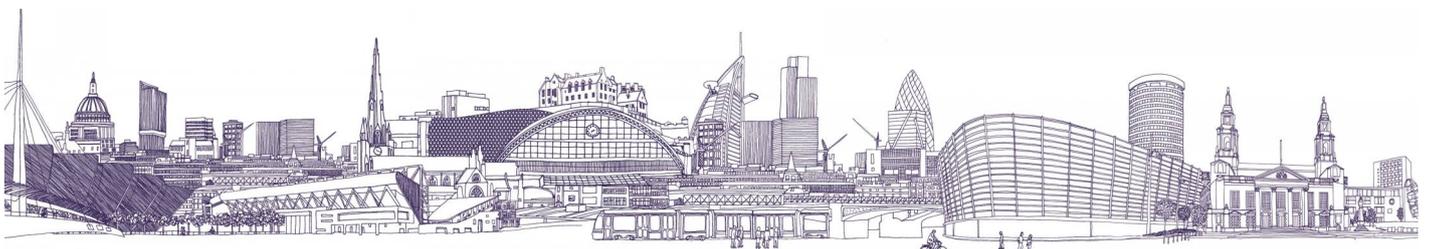
obstructed access, customers of the fish and chip shop parked in the car park and the shop's suppliers used it for deliveries.

On many occasions whilst the Conservative Club Association owned the car park, it had asserted its ownership and maintained that Mr and Mrs Winterburn's customers and suppliers were not entitled to park on it. Of note was the fact that during this time, a sign was erected at the entrance of the car park stating 'Private Car Park: For the use of Club patrons only'. Another sign was put up in the windows of the club.

Mr and Mrs Winterburn claimed that they, their customers and their suppliers had acquired a right to park cars by prescription. At first instance, the First-tier Tribunal (Property Chamber) found in favour of Mrs and Mrs Winterburn. Mr and Mrs Bennett appealed.

The Court of Appeal held that the effect of the signs meant the use by Mr and Mrs Winterburn could not be as of right. The signs rendered the use of the car park as no longer 'without force', as this phrase did not just mean that a claimant had to show they had not used violence; they had to show that the use was not contentious. The presence of the signs and the assertions made by the Club meant that Mr and Mrs Winterburn were not able to do this. As a practical point, the court noted that for the signs to be effective, they had to be clear.

The judgment is useful in establishing a relatively inexpensive means for landowners to protect their interests and avoid third parties acquiring potentially inconvenient rights over their land.



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If you would like to discuss any of the issues raised in this update, please contact:



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