

Roads less travelled

Natasha Rees studies two new cases that explore rights of way in residential developments



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'In construing the scope of the easement it is necessary to look at the "matrix of fact", or relevant background circumstances, at the time that the right of way was granted. In every case it is also necessary to consider whether there is excessive use which would cause a nuisance or render the use of the right of way unlawful.'

Developers are often faced with the problem of easements, or rights granted for the benefit of neighbouring property. One such example is a right of way. Where an easement is expressly granted it is usual for it to be set out in the deed of grant or conveyance. If there is no express deed, it may be implied. In either case the exact nature of the right of way can lead to disputes. In 2009 there were two Court of Appeal decisions that considered the interpretation of a right of way. The first, *Thompson v Bee & anor* [2009], decided in October, concerned the construction of a right of way and whether it should be limited to a right of way for agricultural purposes. The second, *Davill v Pull & anor* [2009], decided in December, considered whether a right of way that was granted for 'all usual and reasonable purposes' could be restricted, according to what it had originally been granted for, which in this instance was to 'garden' land.

Thompson v Bee

This case concerned a proposed residential development on agricultural land, and whether an existing right of way to agricultural land could be used to access the newly constructed housing. It highlights a common problem that arises where the use of land changes, leading to an increase in traffic over existing rights of way. The dispute arose between family members who owned land in a village in County Durham. Mr and Mrs Bee were the owners of Pear Tree House, which fronted onto the main village street and had a garden at the rear. Mr Thompson owned a piece of enclosed land close to the house known as 'the Garth'. A garth is a

small piece of land like a paddock or a yard. Alongside Pear Tree House was a rough hard-core track, which passed over Mr and Mrs Bee's land and accessed their garage. The track also served as an access way to the Garth. It was accepted by Mr and Mrs Bee that there was a right of way over the track to and from the Garth.

The right of way to the Garth arose in 1977, on the separation of ownership of Pear Tree House and the Garth following the death of the owner, Mrs Thompson. In her will she left Pear Tree House to her daughter, who later married Mr Bee. She stated in her will that she left Pear Tree House:

... subject to a right of way as existing at the date of my death to the Garth at the rear thereof. [Emphasis added.]

She left the Garth to her son, Mr Thompson, stating in her will:

I give the Garth containing one acre together with the piggery and slaughterhouse erected thereon and together with the right of way from Hamsterley main street across the rear of Pear Tree House at all times and for all purposes connected with the said Garth. [Emphasis added.]

Since Mrs Thompson owned both properties at the date of her death no right of way existed, since landowners cannot enjoy rights of way across their own property. Her executors completed two assents to give effect to the dispositions in the will, although the assent failed to reserve a right of way to the Garth.

In 2007 Mr Thompson obtained planning permission to build three houses on part of the Garth. Mr and

Mrs Bee objected to the development. They claimed that the right of way was limited to agricultural use and that to use the current right of way to access three houses was excessive. The judge at first instance decided that the will and the assents should be construed as one document which created an express right of way. He agreed that the right of way was restricted to agricultural use, on the basis that this was what was contemplated by Mrs Thompson when she made her will. The use was limited to all purposes connected with the Garth. He noted the lack of any reference to a wider right. He also stated that even if he was wrong about the permitted use, he would have granted an injunction, since the use was so excessive it was likely to cause a nuisance.

The Court of Appeal agreed that it could interpret the assents by reference to Mrs Thompson's will. It concluded that the words 'at all times and for all purposes' were plain words which should be taken to mean what they say, unless the clause when read as a whole, or the context, clearly reduced the words 'all purposes' to 'agricultural purposes'. It felt that there was insufficient justification in either the will or the context to alter the written meaning. However, the court agreed with the first instance judge that the owner of the Garth was not entitled to make excessive use of the track that would interfere with the rights of the owners of the neighbouring land. On this basis it ruled that the owner of the Garth was not entitled to use the track to access the proposed houses.

Davill v Pull

Here the Court of Appeal had to consider the construction of an express right of way created by a conveyance. Again the case concerned a situation where the use of the dominant land had changed from agricultural to residential. The court, therefore, had to decide whether the right of way was restricted to the original use of the dominant land.

Mr Davill owned three plots of land. He derived title to the land from conveyances granted in 1919 and 1920, which referred to the plots as 'garden' ground. He accessed the ground via a track, which was also subject to rights of way that benefited his neighbours,

Mr Pull and Ms Sanderson. In the conveyances, the description of the plot and the right of way was:

... the right for the Purchaser his heirs and assigns to use *for all reasonable and usual purposes* such part of the cart or roadway on the west side of the adjoining messuages and such part of the garden path as are necessary to give access to and from the hereditaments hereby conveyed. [Emphasis added.]

Mr Davill obtained planning permission to build a house on each

to limit the use of the right of way to access garden land, alternative wording would have been used, and that the description of the land as 'garden' land was for identification purposes only. On this basis he concluded that the right of way could lawfully be used in connection with the residential development of the land.

Conclusion

A right of way can either be limited in scope or it can allow the user to access land at all times and for all purposes. These recent decisions show that a deed

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of his three plots. His neighbours objected to his right to use the track to access the plots for construction work, saying that use of the track was limited to use of the plots as garden ground. The judge at first instance stated that the issue depended on the words of the grant, read in the light of the surrounding circumstances. The right of way was expressed to be for 'all usual and reasonable purposes', rather than 'all usual purposes'. The judge felt that this extra wording and the context at the time of the grant meant that the right of way was for 'all reasonable and usual purposes associated with gardening'.

The Court of Appeal agreed that it is necessary to look at the words of the grant in the light of background circumstances. Wilson LJ, who gave the leading judgment, referred to Lord Hoffman's five principles of interpretation in *Investors Compensation Scheme Ltd v West Bromwich Society* [1997]. From this, he decided that the question he had to determine was whether the phrase 'for all reasonable and usual purposes', when interpreted against the background in which the conveyances were executed, was different from 'for all purposes' and therefore limited the use of the right of way. He concluded that it did not. He felt that if the parties had intended

of grant of easement that expressly grants rights to use a right of way 'for all purposes' or 'for all reasonable and usual purposes' is, on the face of it, sufficiently wide to cover subsequent changes in use of the dominant land. In construing the scope of the easement it is necessary to look at the 'matrix of fact', or relevant background circumstances, at the time that the right of way was granted. In every case it is also necessary to consider whether there is excessive use which would cause a nuisance or render the use of the right of way unlawful. This will be a question of fact and degree.

When granting an easement, careful drafting is required to cover future changes in the use of the land benefiting from the right of way. Conversely, when purchasing land that is subject to a right of way, it is important to consider the drafting and the context in which the right of way was granted, in order to advise properly on its potential scope. ■

Davill v Pull & anor
[2009] EWCA Civ 1309

Investors Compensation Scheme Ltd v West Bromwich Society
[1997] UKHL 28

Thompson v Bee & anor
[2009] EWCA Civ 1212