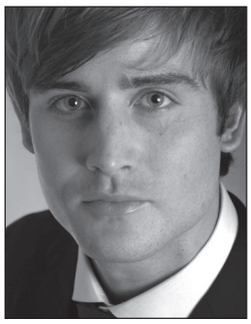
Just what the doctrine ordered

European Urban St Pancras 2 Ltd v Glynn *confirms that a right to park cars on land can be a legal easement. Nikolas Ireland examines the case.*



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The county court judgment in the case of *European Urban St Pancras 2 Ltd v Glynn* [2013] provides important confirmation that a right to park cars on land can constitute a legal easement, even where the use is extensive, and that such easements can be acquired through the prescriptive doctrine of lost modern grant.

This case should also serve to remind landowners, or more importantly their solicitors, that even where land has been occupied with consent for a number of years immediately prior to the issue of any prescriptive claim, there is still the danger that a claim under lost modern grant can be made out if it can be shown that the land has been used without permission for over 20 years prior to any permissive period.

The facts of this case illustrate how important it is for purchasers, especially those with redevelopment intentions, to inspect fully the land they are buying and raise all necessary enquiries to establish there are no adverse rights that may affect their intentions and devalue the land.

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Case facts

The claimant was the owner of the servient land – a former petrol station in London – having purchased the land in May 2008 for £3m for residential development. The defendant was the owner of the neighbouring dominant land from which a garage business has been conducted since at least 1970.

The dispute was primarily concerned with the defendant's prescriptive right to an easement to park cars on the claimant's land under the doctrine of lost modern grant. The claimant argued that the extent and nature of the right claimed could not be an easement and that the use by the defendant was permissive in any event.

The defendant's garage business was such that it required additional space to park customers' cars. Given the location of the site on a busy junction in London, it was the defendant's assertion that it had directed customers to park on the claimant's land in areas which the defendant referred to in her defence as areas A, B and C. The combined area allowed space for a substantial number of cars and witness evidence suggested that approximately 15 cars would be parked on these areas at any one time. For the purposes of establishing a prescriptive right to park, the defendant had to establish 20 years use from 1983 to 2003 as, after 2003, the use was permissive.

While there was no express right granted in respect of the parking of cars on the claimant's land there was a right of way which was noted against the titles held by the parties. This right of way allowed the defendant:

> ... a right of way at all times and for all purposes with and without vehicles over and along the land coloured brown on the plan, the transferor paying a reasonable portion of the costs of maintaining the same, and observing prevailing traffic direction.

The court heard and accepted witness evidence from a variety of garage customers who confirmed they witnessed the use of the adjoining land for the purposes of parking when attending the defendant's premises. It was also accepted that the parties' land was only divided as such in 1981 and no easement could arise when it was in common ownership. The defendant relied on use from 1983 and 2003,

although it was clear from the evidence that use of the land for parking had been demonstrated for a significant period prior to 1983. The judge thought that, when the land was split in 1981, the conveyancers simply gave no thought to the question of parking rights.

Shortly before the petrol station closed in June 2003, the previous owner wrote to Mr Glynn, the then owner of the garage, asking him to enter into a tenancy at will in respect of the land used for parking. Mr Glynn accepted this proposal and, after the expiry of that arrangement, the parties entered into a formal contracted out lease for a period of 24 months. The garage was transferred into the defendant's name after the death of Mr Glynn, her husband, in March 2008.

The claimant became the owner of the petrol station shortly after the death of Mr Glynn with the intention of redeveloping the property for residential use. As such, the claimant wrote to Mrs Glynn in 2009 asking her to remove the cars from the property.

In the pre-action correspondence between the parties, the defendant did not make reference to the right claimed under the doctrine of lost modern grant but, instead, stated that she had vacated the adjoining property and that any ongoing use was without her authority, seeing as her lease had expired. The defendant did, however, take issue with the claimant's installation of bollards which impaired the use of the right of way which the defendant had the benefit of. The defendant claimed damages of £300 a day as a result of such obstruction.

Judge Dight ruled in favour of the defendant, finding that a prescriptive right to park on the claimant's property arose under the doctrine of lost modern grant, as there had been more than 20 years open continuous use without consent. He held that it was obvious the garage needed parking space for customers' cars and that the land had been used for that purpose for about 40 years. However, the defendant failed in respect of her claim for an injunction and damages in relation to the interference with the right of way.

The important feature of claims brought under the Prescription Act 1832 is that the period of use must be the 20 years immediately up to the issue of court action.

Methods of claim to prescriptive easements

Establishing a legal easement by prescription can be achieved in three different ways; under common law or, more ordinarily, under the

Prescription Act 1832 or the doctrine of lost modern grant.

Common law prescription creates a rebuttable presumption that, where a right has been exercised for at least 20 years, it is presumed that the right had commenced before 1189 – this being the deemed year of legal memory. However, by showing that the right had not been exercised at all times since before 1189 or by showing that at some point the dominant and servient land had been owned by the same party, the presumption would be rebutted and the claim would fail. This method is of little practical use nowadays given the introduction of the other two methods of obtaining easements by prescription and the ease by which it can be shown that use has not been enjoyed since 1189.

A claim under the Prescription Act 1832 allows a party to claim an easement after a period of 20 years (or less commonly 40 years) continuous use without interruption. The important feature of claims brought under the Prescription Act 1832 is that the period of use must be the 20 years immediately up to the issue of court action. Section 4 of the Prescription Act 1832 states that:

> ... the period next before some suit or action and no act or other matter shall be deemed to be an interruption unless it shall have been acquiesced in for one year after the party interrupted has notice of it.

It is therefore clear that where objection to the use has been raised by the servient owner, or where steps have been taken to formalise consent for the use, the party claiming the right must issue proceedings within one year to avoid the right under the Act expiring pursuant to s4.

The requirement for the period of use to lead continuously up to the date of proceedings precludes claims where use has ceased for a substantial time while the parties are in dispute and/or negotiating. In this situation, parties claiming such prescriptive rights have to seek shelter under the doctrine of modern lost grant.

One of the primary strengths of a claim under lost modern grant is that the 20-year period of non-permissive use does not have to run to the date of the claim.

The doctrine of modern lost grant is often described as a judge-made fiction as, where a period of 20 years continuous use can be demonstrated, the court is willing to presume that a grant was created which evidenced such an easement but that the grant was subsequently lost. It is now settled law that the presumption cannot be rebutted even by evidence that no such grant was ever made (*Tehidy Mineral Ltd v Norman* [1971]).

One of the primary strengths of a claim under lost modern grant is that the 20-year period of non-permissive use does not have to run to the date of the claim. Therefore, where the servient owner has taken steps to defeat a prescriptive right or a number of years have passed during which the land has been enjoyed with consent, a claim under lost modern grant can still exist.

Issues arising as a result of claims to prescriptive easements

In order to claim a prescriptive right to an easement, consideration must be given to a number of factors, the most contentious of which are often whether or not the use is 'as of right' and whether the extent of the right is capable of being considered an easement.

Nec vi, nec clam, nec precario

The rule in relation to the demonstration of use 'as of right' is well established and it was confirmed by Lord Davey in *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] that use must be nec vi, nec clam, nec precario, which translates as neither by force, not secretly, nor by permission.

This rule is vital when considering the nature of the use for a prescriptive claim to an easement. Case law has shown that, where the servient owner makes forceful written objection to the user, it may be proved that any subsequent use by the dominant owner is contentious and therefore is not 'as of right' as it is not *nec vi* – despite there being no physical steps taken by the servient owner (*Smith v Brudenell-Bruce* [2002]).

Rights exercised in secret or by stealth will similarly fail the test under the *nec clam* requirement. In order to demonstrate the acquiescence of the servient owner (which is key to a prescriptive claim), it is important to evidence that the owner must have had actual knowledge, or the means of such knowledge, as to the use. In the present case, the daytime use of the land to openly park cars would clearly be nec clam. In the case of *Liverpool Corp v Coghill* [1918] demonstrates a contrasting situation where a claim to an easement failed as the use was carried out at night without the servient owner's knowledge.

The final part of the test requires the use to be *nec precario*, that is to say that it must be without consent or permission. It is important to distinguish between acquiescence and true permission as only the latter will be sufficient to defeat a prescriptive claim. Consent requires a positive action by the servient owner such as the granting of a tenancy at will or lease. As demonstrated in the present case, it is for this reason that the period of non-permissive use was accepted to end in 2003 upon the grant of a tenancy at will for use of the land for the purposes of car parking.

Lord Justice Thesiger summarised the rule as follows (*Sturges v Bridgman* [1879]):

> ... a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licences.

Extent of right claimed

In the present case, the servient owner argued that the right which was being claimed was so extensive that it could not be considered an easement in any event.

The Court of Appeal held in *Batchelor v Marlow* [2001] that an exclusive right to park during business hours could not amount to an easement as the servient owner would not have reasonable use of their own land. The interpretation of the court here as to 'reasonable use' seems to approve the earlier decision of *Copeland v Greenhalf* [1952], in which Judge Upjohn stated that a claim to an easement to deposit vehicles on a strip of land amounted to 'virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner' and therefore could not be viewed as an easement.

Batchelor placed great weight on the extent of the use and Lord Justice Tuckey cited a quote from Judge Paul Baker QC as the relevant test when considering whether the right asserted was too extravagant (*Blenheim Estates v Ladbroke Retail Park Ltd* [1992]):

> If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it could not be an easement.

This test, known as the 'ouster principle', was used by Lord Justice Tuckey in his reasoning that the right claimed left the servient owner with such a reduced use of their own land that their ownership became nothing more than illusory. The right was not capable of being an easement.

The Scottish case of *Moncrieff v Jamieson* [2007] disagreed with the ouster principle as formulated and Lord Scott said that use of land for parking would not negate the servient owner's ability to reasonably use the land otherwise, such as by building over or under the parking area or installing advertising hoardings on the walls. Furthermore, Lord Scott did not see any reason why the servient owner could not be permitted to grant an express easement over his own land to any extent that he wished and, therefore, could not see any reason to deny prescriptive easements of the same extent.

Lord Scott argued that a more suitable test was 'whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.' Lord Neuberger agreed and while it was not necessary to decide the point in the Moncrieff case, the obiter comments of Lord's Scott and Neuberger provided a strong, but not binding, basis upon which future decisions have been made despite the Batchelor decision remaining good law.

One such decision is the case of *Virdi v Chana* [2008], which offers a somewhat brazen demonstration of the court having little actual regard to the ouster principle. Judge Purle QC carefully distinguished Batchelor and decided that, despite a parcel of land wholly used to park a car, the right was capable of being an easement under the ouster principle as the servient owner was still able to make reasonable use of the land. Reasonable use here included the somewhat obscure option of altering the land surface for 'aesthetic reasons'. It therefore seems to be the position that, until Batchelor is overruled, the courts will continue to find ways to give effect to the Moncrieff test while displaying the outward appearance of conformity with the Court of Appeal and the ouster principle.

Decision

The court ruled that the defendant had used the land for 20 years without permission and had thereby obtained a right to park on the land under the doctrine of lost modern grant. Judge Dight was referred to an analysis of *Angus & Co v Dalton* [1877] in which the doctrine could be effected:

> ... where there has been upwards of 20 years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription... the law will adopt a legal fiction that such grant was made, in spite of any direct evidence that no such grant was in fact made.

Lawfulness of use is a consideration but a tortious infringement of rights is not the sort of illegality contemplated in order to defeat a claim.

Use of the land

The judge did not accept the claimant's argument that, since they did not make common use of the land with the defendant, an easement could not arise. Judge Dight held that, even if the land was not used by the claimant, the fact that the land was available for some use by it meant that an easement could indeed arise. Provided there is parking in a defined area adjoining a dominant tenement, and the use is not so excessive as to exclude the servient owner, an easement to park can arise after 20 years use.

In relation to the extent of the use, the judge returned to the decisions in *Batchelor* and *Moncrieff*. He was satisfied that the claimant could have put the land to reasonable use (including

parking cars itself upon it) despite the use of the land by the defendant as cars were mainly only parked on the land during the day and therefore the claimant's argument in this respect failed under both the ouster principle and the Moncrieff test. In *Moncrieff,* Lord Scott named a variety of uses which land could be used for despite a high level of use by a dominant owner leading Judge Dight to comment that:

> ... if the disputed land remains available for other purposes or uses then the absence of actual use by the servient owner is not important.

User being 'as of right'

The claimant submitted that the defendant's use had not been *nec precario* and therefore failed the test. While it was clear that formal consent had been given for occupation since 2003 by the tenancy at will, and subsequent lease, the claimant sought to argue that permission to park cars on the land had been in place historically. The basis of this claim was a letter from the previous owner to the late Mr Glynn attempting to formalise what he referred briefly to as the 'current parking arrangements'. However, this was not persuasive and Judge Dight said that, had there been an express arrangement between the parties, it would have been formalised in some way prior to 2003. Therefore, it was the grant of the leases that ended the non-permissive period. The permission given does not alter a prior period of user nec precario and therefore the defendant's prescriptive rights under the doctrine of lost modern grant were not effected.

Unlawful user

The presence of a right of way over the servient land led the claimant to assert that the defendant's use of the land for parking was unlawful and that an easement cannot be acquired as there could never have been a lawful fictional grant of a right to park as it would have infringed the right of way.

This was promptly rejected by Judge Dight following the judgment in *Bakewell Management Ltd v Brandwood* [2004] in which Lord Scott stated that:

> ... it is accepted that... a right under the lost modern grant fiction, can be obtained by long use that throughout was illegal in the sense of being tortious.

Lawfulness of use is a consideration but a tortious infringement of rights is not the sort of illegality contemplated in order to defeat a claim.

It was also rejected as the only person capable of suffering the infringement of a right of way is the beneficiary – in this case the defendant. Therefore, to the extent possible, they would consent to the right to park on their own behalf.

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Key points

Lawyers acting for purchasers need to be alive to the possibility of prescriptive rights of adjoining landowners and have to ensure that proper investigation is made. In the present case, the development scope of the land was materially decreased as a result of the easement to park cars enjoyed by the neighbouring owner and a failure to consider this danger pre-purchase has left the developer claimant substantially out of pocket.

This case provides useful guidance that, even where servient land is used to a high degree, such as parking cars during daylight hours, this will not necessarily be sufficient to prove that the landowner is unable to make reasonable use of the land and defeat a claim for an easement. This continuing trend of cases shows that the courts are willing to sidestep the test laid down by Batchelor and instead seek to rely on the wider interpretation of reasonable use given in the case of *Moncrieff*.

The successful defendant was made to pay 30% of her own costs for her spurious claim for an injunction and damages for interference of the right of way by the claimant. The court held the bollards placed on the land had caused no real interference at all. This claim was unsubstantiated by evidence and wasted a considerable amount of time at trial. The decision should, therefore, serve as a reminder of the importance of reasonableness when conducting litigation. A well-advised client should be made aware of the costs dangers of pursuing a weak claim without proper evidence or consideration – particularly where it is supplementary to the material issue. ■

Angus & Co v Dalton
(1877) 3 QBD 85

Bakewell Management Ltd v Brandwood & ors
[2004] UKHL 14

Batchelor v Marlow
[2001] EWCA Civ 1051

Blenheim Estates v Ladbroke Retail Park Ltd
[1992] 1 WLR 1278

Copeland v Greenhalf
[1952] 1 Ch 488

European Urban St Pancras 2 Ltd v Glynn
[2013] PLSCS 67

Gardner v Hodgson's Kingston Brewery Co Ltd
[1903] AC 229

Liverpool Corp v Coghill
[1918] 1 Ch 307

Moncrieff v Jamieson
[2007] UKHL 42

Smith v Brudenell-Bruce
[2002] 2 P & CR 4

Sturges v Bridgman
(1879) 11 Ch D 852

Tehidy Mineral Ltd v Norman
[1971] 2 QB 528

Virdi v Chana & ors
[2008] EWHC 2901