



# All right now

**Genevieve Loveland, Peter Selwyn, and Sarah Harte** discuss the drafting of rights of way, the new Electronic Communications Code, and the ‘registration gap’



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**T**he Court of Appeal case of *Gore v Naheed* [2017] EWCA Civ 369 is a useful reminder to consider carefully the wording of an easement granting a right of way. Generally, a right of way in favour of one property (plot A) cannot be used to gain access to adjoining land (plot B), whether plot B is accessed through plot A or directly from the land subject to the right of way.

In *Gore*, a house benefitted from a right of way over an adjoining driveway. The owner of the house had obtained title to land forming part of the driveway by adverse possession and constructed a garage on that part of the driveway. The question was whether the garage benefitted from a right of way over the rest of the driveway. The Court of Appeal upheld the High Court’s decision that it did.

The right of way for the benefit of the house was granted ‘for all purposes connected with the use and occupation of the [house] but not further or otherwise’. Lord Justice Patten agreed with the High Court judge’s finding that, in fact, the use of the garage was ancillary to the use and enjoyment of the house and therefore fell within the scope of the original grant. He did not accept

that parking within the garage by a resident of the house should be treated as use of the garage in its own right, although he conceded this would be different if the garage was let or used separately from the house.

This case highlights the importance of giving due consideration to the wording of a right of way. Practitioners should ensure that:

- When drafting a right of way, the extent of the land with the benefit is clear: is it land retained by the seller, does it include a larger development site, and should it include neighbouring land used for ancillary purposes?
- When reviewing title where a site does not directly abut a public highway, the extent of any rights of way are sufficient, particularly when a site is being acquired as part of a site assembly exercise for development.

## She’s electric

The new Electronic Communications Code (ECC) is not in force yet – but as there is no clear idea of when this will be the case, clients should be considering taking action now, if vacant possession is required of sites free of electronic

communications apparatus. The key reason for this, to focus on one aspect of the ECC, is the lengthy new termination process.

The existing code contains two termination procedures: paragraph 20 (often called the 'rolling redevelopment break') and paragraph 21 (where a contractual right to require the removal of apparatus has arisen, usually on expiry of a lease). Following service of a notice under either procedure, an operator has a very short 28-day period to serve a counter-notice – if it does not serve a counter-notice, a landowner can require removal of the apparatus. Even after service of a counter-notice (often served by operators as a precautionary measure), court orders requiring removal are often relatively easy to obtain because operators must demonstrate the intention to secure rights against a landowner to prevent the issue of an order.

The contrast with the new regime, in terms of timescales, is striking. There are two separate procedures for termination and then removal of apparatus, rather than one composite procedure. A landowner must give an 18-month termination notice (or longer, if the relevant agreement provides for this), relying on a series of grounds (persistent breach, redevelopment, and/or lack of code rights, for example). The operator will then have three months to serve a counter-notice. As with the current code, a court will then decide whether to terminate or renew, based on the grounds cited – much like the lease renewal procedure under the Landlord and Tenant Act 1954. Following this, a landowner must (if termination is ordered by the court) give an operator a further period of reasonable notice to remove any apparatus. The total lead-in time for new developments is therefore likely to be around two years.

The ECC contains transitional provisions. Essentially, 'subsisting' leases will benefit from shorter notice periods – depending on a number of factors – but 'subsisting' is not defined. This raises the possibility that a new agreement could fall within the ECC simply because no action has been taken to terminate an expired lease under which the tenant is holding over (and which may not then be considered 'subsisting' in light of the expiry of the contractual term). Given the lack of clarity, well-advised landowners will be taking action to terminate existing telecoms leases now where redevelopment is envisaged, before the ECC is in effect.

### If I could turn back time

The decision in *Baker v Craggs* [2016] EWHC 3250 (Ch) at the end of last year reminded us again of the perils of the 'registration gap'. Here, the court held that the Land Registry was right to register a buyer's title subject to a right of way which was only granted after completion of the sale, when the buyer's original application to register the transfer was cancelled and the buyer lost its priority.

The registration gap is the lapse of time between the date of the transfer and the date of registration at the Land Registry. On a disposal of registered land, the legal estate vests in the buyer at the point of completion of registration. The seller therefore remains the legal owner until that point, which gives rise to priority problems and property management issues.

Protective steps might include:

- When acting for a buyer, apply to the Land Registry as soon as possible following completion, and proactively monitor progress.
- To ensure the buyer has priority over subsequent transactions, a Land Registry priority search must be submitted before completion. To avoid the Land Registry rejecting an application, check the accuracy of plans and signatures before completion, seek to minimise requisitions, and deal with any requisitions raised promptly and always well before the Land Registry's deadline.
- When acting for a seller, include provision in the sale contract to ensure the buyer gets itself registered. An obligation on the buyer to submit its application for registration promptly following completion, within the priority period, and to deal with any requisitions raised is helpful and now widely accepted as common practice.
- Provide in the sale contract for the buyer to serve notices and deal with management issues as the seller's agent during the registration gap. Alternatively, a buyer may prefer that a seller is contractually compelled to serve required notices.
- Take care to serve notices on the correct party. If acting for a tenant where there has been a recent change of owner, the best approach would be to serve notice on the seller/landlord (as registered owner) with a copy sent to the buyer/landlord. The same rule applies to notices served by the landlord or tenant under the statutory renewal provisions of the Landlord and Tenant Act 1954. **SJ**



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