

U-TURN ON RIGHTS OF WAY

In an article published in *Solicitors Journal* on *** it was noted that it had been established since 1993 that vehicular rights of access over common land could not arise by prescription. Shortly before that article the Court of Appeal, in the case *Brandwood and others v Bakewell Management Ltd* [2003] 1 EGLR 17 (*Brandwood*), had re-addressed the authorities and unanimously upheld earlier decisions. We noted that,

“It now seems clear that, absent the intervention of the House of Lords, adjoining landowners must pay for access once thought to have been enjoyed as of right. Further, whilst Parliament has intervened in an attempt to ameliorate the landowner’s plight serious issues arise as to the adequacy of the legislation”.

Brandwood has now indeed made its way to the House of Lords ([2004] UKHL 14). The effect of the unanimous decision is clear: *Hanning v Top Deck Travel Ltd* (1993) 68 P & CR 14 (*Hanning*) is overruled, as are cases decided in reliance on it, including in particular *Massey v Boulden* [2003] 1 EGLR 24 (*Massey*). The decision will be widely welcomed as, following *Massey*, there was considerable doubt whether vehicular rights of way could be, or had become, established by prescription at all.

This article addresses two consequential questions. First, it will look at the effect of *Brandwood*, and in particular at whether there is anything left of the principle that illegal use cannot result in the acquisition of rights by prescription. Secondly, we consider the practical effect of the decision for those who are considering or have already made an application for a statutory easement under s.68 of the Countryside and Rights of Way Act 2000 (“CROW”).

Illegality as a bar to prescriptive rights.

In *Hanning* the claimants owned common land which the defendants had used for a substantial period in order to obtain vehicular access to their farm. By section 193(4) of the Law of Property Act 1925 it is an offence for any person to drive upon any common land without lawful authority. The Court of Appeal held that since driving over the common was a crime, it could not found a prescriptive claim to a right of way.

A similar approach was later applied to village greens in *Massey*. In that case the illegality was created by section 34(1) of the Road Traffic Act 1988, which provides in part:

“if without lawful authority a person drives a mechanically propelled vehicle on to or upon any common land, moorland or land of any other description, not being land forming part of a road...he is guilty of an offence.”

The fact that driving along the land was a criminal offence was held to prevent it giving rise to a vehicular right of way by prescription.

The principle that acts involving illegality cannot establish prescriptive rights appeared to have an impeccable pedigree, starting with *Neaverson v Peterborough Rural District Council* [1902] 1 Ch 557, where Sir Richard Henn Collins said at 573:

“...it is essential to consider who, if a grant is to be presumed, are to be the supposed grantors and grantee...I agree that the Court is endowed with great power of imagination for the purpose of supporting ancient user. But, in inferring a legal origin for such user, it cannot infer one which would involve illegality.”

A similar formulation is found in the words of Lord Maugham in *George Legge & Son Ltd v Wenlock Corporation* [1938] AC 204, 222:

“there is...no case in the books in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrongdoer. Such a contention is indeed untenable.”

Other numerous decisions prior to *Hanning*, but to the same effect, are collected in the opinion of Lord Scott in *Brandwood*.

So how did the House of Lords escape from this apparently Andean range of authorities? The starting point was to examine the basis on which the law recognises rights over land acquired by long user at common law or under the Prescription Act 1832. Such user, once it has continued peaceably, openly and without permission from the landowner for the necessary period is deemed to be enjoyed by virtue of a notional grant from the landowner. Therefore, provided the user would not have been illegal if the landowner had consented to it, and hence been capable of being the subject of a grant of permission without breaking the law, it could be used to establish a prescriptive right. Since in both *Hanning* and *Massey* the user would have been lawful if the landowner had given consent, it could be relied on. As Lord Scott said,

“A statutory prohibition forbidding some particular use of land that is expressed in terms that allows the landowner to authorise the prohibited use and exempts from criminality use of the land with that authority is an unusual type of prohibition. It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant by the landowner of the

right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee.”

Nevertheless, the principle that illegal use will not result in the acquisition of prescriptive rights remains in force. Thus for instance a use carried on in breach of planning control or requirement to obtain a statutory permit will still fall within the principle: see *Glamorgan County Council v Carter* [1963] 1 WLR 1, *Cargill v Gotts* [1981] 1 WLR 441. Practitioners will still have to continue to ensure that appropriate enquiries are made on any sale of land where a prescriptive easement is relied on as to whether difficulties of this type may arise. The standard forms of inquiries do not address this issue directly, and it is suggested that specific questions directed to whether the use has been carried on in contravention of any statutory prohibition may still be appropriate.

Effect on applications under CROW, s. 68

Section 68 of CROW was enacted in response to *Hanning*. It was Parliament's way of mitigating the hardship caused to those adversely affected by the Court of Appeal's decision. Section 68 confers on persons who would, but for the illegality of the user, have been able to establish prescriptive rights through the courts the right to acquire a statutory easement on the payment of prescribed compensation. The overruling of *Hanning* renders section 68 effectively redundant, as Lord Scott recognises in *Brandwood*. There is simply no need to pay for something that one is already entitled to as a matter of law.

Potential claimants who have not yet made an application under CROW will now almost certainly follow the usual courses open to those who claim prescriptive rights, whether under Land Registry procedures or by court declaration. However many will have already commenced CROW applications. Two obvious

questions arise. First, what are the options for parties to existing CROW applications and secondly, can those who have already paid the statutory compensation get their money back?

As to the first problem, the most advisable course of action will depend on the particular circumstances of each case including the nature of the disputed issues, the costs incurred to date and the amount of statutory compensation payable. It seems likely that there will be at least a class of applicant who will be well advised to continue under the CROW route. Applications opposed on grounds that there has been no user “as of right” for the requisite period of time may already be well advanced in the Lands Tribunal. Merely withdrawing such application and thereafter issuing fresh court proceedings for a declaration has adverse cost implications since under the regulations an applicant who discontinues is liable for the landowner’s reasonable costs. The dispute will remain “live” and the costs will merely be duplicated in any subsequent court action. A cost benefit analysis might well dictate that the Lands Tribunal is the best forum for resolution of the dispute. A CROW application may also be advantageous where the right of way has not been used for several years since the early to mid nineties and the land owner seeks to argue that any prescriptive right has consequently been abandoned.

On the other hand, an applicant seeking to establish a prescriptive vehicular right which crosses a footpath, bridleway or restricted byway should consider the unreported Lands Tribunal decision of *Burns v Kirby* (31 October 2003), where it was held that section 68 does not apply where the user relied upon constitutes an offence under section 34(1)(b) of the Road Traffic Act 1988, namely driving on a road of those descriptions. Whilst this decision can be criticised (indeed the Court of Appeal gave permission to appeal before the case was settled), landowners may seek to use this argument to oppose a CROW application and this is a factor to be taken into account.

Applicants who have already paid statutory compensation may face an uphill battle to get their money back by way of a claim in restitution. The grounds for any such claim would most likely be mistake of law (following *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, HL) and possibly also failure of consideration. However, it may be difficult for an applicant to contend that he was in fact acting under a mistake as to the law. It has been well known for some time that *Brandwood* was the subject of an appeal and the reality is that many litigants will have made a conscious decision to follow the CROW route despite the pending appeal. Indeed, some would have had little option but to make a CROW application in light of the time limits prescribed by the regulations. In many cases payment will have been made as part of an overall settlement and it will be extremely difficult to set aside a genuine compromise in the absence of vitiating factors. Even if a restitutionary cause of action can be established, the claimant will still have to run the gauntlet of restitutionary defences, such as change of position. The potential complexities of such litigation may, in many cases, make action difficult to justify in light of the relatively low amounts of statutory compensation paid.

As we have sought to demonstrate, *Brandwood* raises difficult questions as to the relationship between prescriptive claims and applications under CROW. However their Lordships did not address any of the potential difficulties highlighted above. The “about turn”, whilst clear and unambiguous, is unlikely to be the end of this particular story.

Stephen Bickford-Smith

Camilla Lamont

Landmark Chambers.