Covid-19 and claimed rights of way: lessons from *R (on the application of Roxlena Ltd) v Cumbria County Council & Peter Lamb* [2019] EWCA Civ 1639

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A claim of a public right of way under section 31(1) of the Highways Act 1980 requires use by the public as of right and without interruption for 20 years. Similarly, a claimed private right of way by prescription under the Prescription Act 1832 requires 20 years' uninterrupted use. To make good a prescriptive claim, whether under the 1832 Act, by the doctrine of lost modern grant or at common law, the use must be of such a character, degree and frequency as to indicate an assertion of a continuous right. The issue we discuss is whether an interruption to use as a result of Covid-19 would count for either of these two purposes.

As the pandemic caused by Covid-19 has engulfed British life, various measures have been put in place to enforce social distancing. Under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, during the emergency period (being 26 March until 25 September 2020, subject to review by the Secretary of State), no person may leave the place where they are living without reasonable excuse. "A reasonable excuse" includes the need to take exercise either alone or with other members of the household. Both prior to and since the legislation was enacted, the Prime Minister, public officials and police forces have repeatedly discouraged the public from leaving their homes. In one high-profile example, Derbyshire Police used drone footage and social media to discourage walking in the Peak District. One recently retired Justice of the Supreme Court described the force's conduct as "disgraceful".

If the current (or future) legislation and/or encouragement to stay at home results in the use of ways being interrupted for a period of time, might landowners be able to defeat subsequent claims for public or private rights of way?

Public rights of way

Until recently, and owing to the Planning Inspectorate's Advice Note 15, the general consensus perhaps in the public rights of way context was that the answer to the question just posed was no.

To prevent the spread of foot and mouth disease during the 2001 outbreak, many local authorities restricted access to land under the Foot and Mouth Disease Order 1983 (as amended). The position of the Planning Inspectorate and DEFRA, reflected in paragraph 9 of the Advice Note, is that temporary cessation of the use of ways solely because of the implementation of measures under the 1983 Order would not be classified as an "interruption" for the purposes of section 31(1) of the Highways Act 1980. The same Advice Note also suggests that temporary cessation of the use of ways because of movement restrictions imposed pursuant to the Plant Health (Great Britain) Order 1993 would likewise not constitute an "interruption".

However, the recent *Roxlena* litigation casts serious doubt on this approach.

The genesis of the litigation is a footpaths application to Cumbria County Council, first made in 2011 and as yet undetermined. The landowner has doggedly resisted the application throughout. One of its points is that there has not been 20 years' uninterrupted use, owing to movement restrictions imposed in 2001 pursuant to the Foot and Mouth Disease (Amendment)(England) Order 2001. The High Court and the Court of Appeal concluded that the County Council could reasonably take at face value the user evidence forms of 40 people claiming uninterrupted use, at least for the purposes of the test of whether it is reasonable to allege that the rights of way subsist at the order making stage, adding that the evidence might or might not withstand questioning at the subsequent, confirmation, stage. However, Mr Justice Kerr was clear about the Advice Note:

"I do not agree with the proposition in the Advice Note…that an interruption which is more than *de minimis* but caused by measures taken against foot and mouth disease, is incapable in law of amounting to an interruption in use of a footpath or other way. I see no basis for that proposition. Use or non-use is a question of fact; the cause of any non-use is not the issue."

In response, the Open Spaces Society urged the Planning Inspectorate to amend the Advice Note. The Planning Inspectorate said it had no intention of doing so.

The Court of Appeal then expressly recorded that Kerr J did not accept the view stated in the Advice Note, and it certainly did not quarrel with that lack of acceptance.

Private rights of way

In the context of private rights of way, it will be a question of fact whether there has been use of the servient tenement notwithstanding the existence of legislation or public statements restricting or discouraging the public from leaving their homes. It will be for a court or tribunal to determine a conflict of evidence about use during any period where there are interruptions to movement in outdoor or rural spaces.

However, a landowner seeking to resist a claim for a private right of way by prescription will have the difficulty that mere non-use for a short period is unlikely to defeat the claim. In *Coventry (t/a RDC Promotions) v Lawrence* [2014] AC 822, inactivity for two out of 20 years did not defeat the prescriptive right claimed. It is a question of degree whether the activity over the 20 year period, taken as a whole, should make the servient owner aware that a continuous right to enjoyment is being asserted.

Conclusion

In the public rights of way context, *Roxlena* has disturbed the general consensus. It could now be said that use or non-use is simply a question of fact and that the cause of any non-use is not the issue. If there is a more than *de minimis* interruption to use of a way, because of Covid-19 and steps to curtail it, the landowner may therefore be able to rely upon the interruption to defeat a subsequent right of way application.

In the private rights of way context, by contrast, and on the premise that the Covid-19 pandemic will pass within a few months, it seems unlikely that the landowner will be able to rely upon a pandemic-related interruption to defeat a prescriptive claim.

Stephen Whale and Evie Barden have a particular interest and expertise in rural cases. Both are active members of the Agricultural Law Association.

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