IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

[2015] UKUT 0059 (TCC)
Appeal Number FTC/63/2014

An easement by prescription could arise so long as the use in question accommodated the dominant tenement, irrespective of whether the servient owner could have sued the dominant owner for trespass. However, notices visible on a car park were sufficient to prevent any parking easement arising in favour of the dominant owner whose customers and licensees habitually ignored the notices. The notices did not however prevent a right of access being acquired for pedestrian access, as the notices were directed solely towards parking.

ON APPEAL FROM THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER

Property Address: Land on the North West Side of Halifax Road, Keighley
Title Nos: WYK865313, WYK900344

Before:
HIS HONOUR JUDGE CHARLES PURLE QC

Sitting as a Judge of the Upper Tribunal at Rolls Building,
Royal Courts of Justice
on 27 November 2014

BETWEEN:

(1) GARRY BENNETT **(2) LYNNE MARIE BENNETT**	**Appellants (Respondents below)**
- and -	
(1) TREVOR ANTHONY WINTERBURN **(2) ELIZABETH WINTERBURN**	**Respondents (Applicants below)**

MR. G. FETHERSTONHAUGH QC instructed by Dyne Solicitors Ltd appeared for the Appellants (Respondents below)

MS. C. SHEA instructed by DAC Beachcroft LLP appeared for the Respondents (Applicants below)

REASONS FOR DECISION

(As approved by the Judge)

JUDGE PURLE:

1 This is an appeal from the decision of the First-tier Tribunal which declared certain rights to exist over land on the North West side of Halifax Road, Keighley. There were found to be rights of way both on foot and by vehicles for the freehold owner, his licensees and customers. At the relevant time the dominant land was used as a fish and chip shop. Access was in practice enjoyed both by foot and by vehicles over adjoining land which was at the material time used as a Conservative Club with a car park attached. The contentious area relates to the car park. What was found as a fact was continuous use for more than 20 years resulting in the easements in question.

2 There are two issues before me on this appeal. The first in broad outline is whether or not the tribunal judge was correct to regard the use by third parties of the land as use accommodating the dominant tenement when no action could have been brought against the owner of the dominant tenement for trespass because the trespass was not his but that of his customers. Secondly, whether the use was peaceable or, more accurately, as of right. It is said that the owner of the servient land by notices on the land made plain his objection to the use made of the land by the fish and chip shop's customers and that that made such user contentious. There were other physical acts relied upon in the first-tier tribunal but they are not relied upon before me. What is relied upon are the notices coupled with findings made by the tribunal judge as to altercations occurring over a period of time between the adjoining owners, or their representatives. In particular, Mr. Peter Smith, who was, for a period of some nine years, an employee of the Conservative Club, and its steward, remonstrated from time to time throughout that period with the chip shop proprietor over parking by customers.

3 Amongst other rights of way that were declared was a right of way on foot purely for the purposes of accessing the dominant land from the public highway both for the freehold owners of the dominant land and their licensees or customers. Use of the land for access on foot was not referred to in the notices relied upon in this case as making the user contentious. Those notices related solely to parking. It is therefore now accepted, I having raised the point this morning, that (subject to the accommodation point just mentioned) the appeal must be dismissed so far as it relates to pedestrian access to the dominant tenement, including by third party customers and licensees. In other words, pedestrian access was not made contentious by the erection of any sign.

4 The principal sign itself read: "Private car park. For the use of club patrons only. By order of the committee". That sign was plainly visible to anyone entering the car

park from the road. The Judge found that it must have been seen by many of the people entering the disputed area to go to the fish and chip shop. He also found that there was a similar sign for a similar period down to 2007 in the window of the club which was also clearly visible, though no doubt less so because further away from the point of access from the road. The signs were largely ignored but they remained there, and their presence was known to the respondents to this appeal, who knew that parking was forbidden.

5 I turn to consider the first ground of appeal. The first ground of appeal is based upon the premise that time cannot start to run unless the servient owner could bring an action in trespass against the dominant owner. The fish and chip shop owners could not be sued in this case because their customers were not their agents. In my judgment this requirement is not made out on the authorities. The principal authority in this connection is *London Tara Hotel Limited v. Kensington Close Hotel Limited* [2012] 1 P&CR 13. That case concerned whether the use of a roadway was "as of right". The point was argued that coach drivers who were using the roadway did so for their own convenience and not so as to accommodate the dominant land. As was explained by Lewison L.J., who gave one of the two main judgments, in paragraph 90:

> "The third ground of appeal is that use of the roadway by coach drivers was not use by or on behalf of KCL such as would have enabled Tara to bring an action in trespass against KCL. This, it was argued, meant that the use did not count for the purposes of supporting a claim to have acquired a right of way by prescription. There is no trace in the authorities of a requirement that the use relied on must have been such as to enable the servient owner to sue the dominant owner in trespass. What the authorities establish is that the servient owner must have been in a position to challenge or stop the use. As Mr. Dowding pointed out, one way in which Tara could have done that would have been by erecting a gate or barrier across the roadway. That would not have required any court proceedings at all. In addition, as the judge said, … it is enough that the use in question accommodates the dominant tenement. I would reject the third ground of appeal."

6 It was suggested that Lewison L.J. went further than he needed to have gone and further than Lord Neuberger M.R. went in the same case. Lord Neuberger M.R. said this in paragraph 46:

> "It seems to me important for present purposes that the evidence established that, when they used the roadway, the coach drivers were doing so in order to enable guests of the KC Hotel to be conveniently and safely delivered to, or collected from, the hotel. The fact that it was also beneficial to a coach driver or his employer to deliver or collect in this way does not alter the fact that the hotel benefited from the arrangement. As the judge said, 'It is sufficient that the use accommodates, or benefits, the dominant land, in the sense of being closely connected with the normal enjoyment of the dominant land'."

That ground is materially indistinguishable from the ground that I have just read from Lewison L.J.'s judgment. The Master of the Rolls went on in paragraph 47 also to observe that on the facts the dominant owners were parties to the use of the roadway by coaches. It does not seem to me, however, that that was essential to his decision or takes anything away from his approval of the basis upon which the judge decided the case in the cited passage. Aikens L.J. agreed with both judgments. It seems to

me therefore that that is authority binding on me that it is not necessary that the servient owner could have sued the dominant owner in trespass, and that all that is needed is accommodation of the dominant tenant. The tribunal judge found that condition was satisfied and that conclusion was well open to him on the facts.

7 I was also referred to a decision the other way, *Central Midlands Estates Limited v. Leicester Dyers Limited* [2003] P&CR DG1. In that case the Deputy High Court Judge, Mr. Robert Englehart QC, on the particular facts before him concluded: "Such parking as there was at the material time could not properly be characterised as user as of right". The reason for that was that he attributed the occasional parking of cars on the particular piece of land in question to the personal convenience of individual employees or delivery men. It was not the only ground for his decision, and was a decision on its own facts. It cannot and does not detract from the Court of Appeal's determination in the Tara Hotel case. Accordingly, the first ground of appeal fails.

8 It follows therefore that the respondents to this appeal are entitled to maintain the rights of pedestrian access which they have established. The only question now relates to parking, both of chip shop customers and of suppliers.

9 As I have mentioned, there was a visible sign on the site at all material times. It is said on behalf of the appellants to this appeal that the sign, which was addressed to the world at large (including the respondents and any licensees, customers or former customers of the fish and chip shop), made plain that any parking on the car park by anyone other than a patron of the Conservative Club was objected to and was therefore to be equated with *vi* or force for the purpose of that part of the Latin maxim represented by the word *vi*. That was rejected by the tribunal judge.

10 The tribunal judge referred in paragraph 37 to *Smith v. Brudenell-Bruce* [2002] 2 P&CR4, a decision of Pumfrey J. That case requires looking at with some care. It concerned a cottage known as Keeper's Cottage and a right of way was claimed over a track either under the Prescription Act or by lost modern grant. The claim succeeded on lost modern grant grounds. The judge analysed the previous authorities including in particular the decision of the Court of Appeal in *Newnham v. Willison* (1987) 56 P&CR8. In that case, *Newnham v. Willison*, proceedings had been brought on June 27th 1984 and the question arose whether, having regard to the provisions of s.4 of the Prescription Act 1832, that user had been interrupted more than one year before action was brought. Lord Justice Kerr, having analysed the authorities, said:

> "In my view, what these authorities show is that there may be 'vi' - a forceful exercise of the user - in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious. If he then overcomes the objections, and in particular if he overcomes them in a physical way, expressed by the word 'vi' or 'force' such as by removing an obstruction, then that is sufficient evidence to show that on the one hand the owner of the servient land was objecting to the use, so that the user was no longer as of right, and on the other hand that the person who claims the right was aware that he was not exercising it as of right but in the face of objections by the servient owner."

And then this passage is cited by Pumfrey J.:

"When one applies these authorities to the facts of the present case it seems to me that unfortunately for Mr. Newnham, it is quite impossible to conclude that there had been no interruption prior to June 27th 1983. Interruption for one day less than one year before June 27th 1984 would not matter. But clearly there was much more than that. There was admitted contentious interruption from the end of August when the fence was erected. But going backwards in time, there was equally clearly interruption and objection back to June 27th 1983. At that point we have reached the end of the critical last year of the period before the action was brought. So one has to ask oneself: was there any interruption; was there any contentiousness; was there anything that had to be overcome by what in law is described in this context as force, so as to extend the period of interruption backwards beyond the one year permissible before action? In my view, on the evidence there can only be one answer to that. One only has to look at the terms of the correspondence beginning with the letter of June 23rd 1983 from Mr. Westbrooks [Mr. Newnham's predecessor in title] solicitors to Mr. Willison, demanding the removal of the obstructions.

That letter, written with the best intentions and entirely correctly, clearly shows that there was then an increase in a state of already existing contentiousness. From about March 1983 or thereabouts, and then increasingly so thereafter, the Willisons were making it perfectly clear, first to Mr. Westbrook and then to Mr. Newnham, that they were objecting to the way in which the turn from the drive to the track was being used."

There, at least in Pumfrey J.'s judgment, the citation from Kerr L.J. runs out or ends.

11 However, it is useful just to read on in the report itself because what Kerr L.J. went on to say was this:

"The correspondence in that regard speaks for itself. All could have been cured on behalf of Mr. Newnham if only he had been advised to bring his action by about March 1984. But unfortunately for him the action was only instituted over a year after there had been a series of acts which in law clearly constituted interruption which when added together amounted to a period of more than a year before the action was brought."

On that footing the appeal was allowed. Mr. Justice Eason agreed and recorded a concession by Mr. Nichol, counsel appearing before him for the appellants, that:

"If the proceedings had been brought in the County Court by the end of 1983 or early 1984, on the judge's findings of fact he would have established a prescriptive easement to use the corner as he desired to use it for heavy vehicles."

He also went on to say that he shared Kerr L.J.'s view that the letter, once written, by which he must be referring to the letter of June 1983, created a contentious situation.

12 The last observation might suggest that only the letter of June 1983 created a state of contention, though clearly in Kerr L.J.'s judgment all the actions going back to March 1983 amounted to a contentious situation. That is of some importance because when one goes back to Pumfrey J.'s judgment in paragraph 12, he says this:

> "The passage which I have quoted from the judgment of Kerr L.J., with whom Eason J. agreed, tends to combine questions associated with the contentiousness of the user with matters affecting interruption. But both judges agreed that had Mr. Newnham brought his action within the year of the solicitor's letter he would not have been in any difficulty."

13 With respect, I do not read Kerr's L.J.'s judgment as requiring the action to be brought within 12 months of the solicitor's letter, which would suggest that the matter was not contentious before then, but within 12 months of March 1983, when the matter was equally contentious without solicitors being on the scene. It seems to me that this misunderstanding may have led Pumfrey J. into error. He concluded by saying:

> "It seems to me a user ceases to be user 'as of right' if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when the servient owner is doing everything consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."

In my judgment, whilst I have no doubt that user is contentious in those circumstances, that passage should not be read as embodying a minimum test which needs to be satisfied before user becomes contentious. It is not the law, in my judgment, that the servient owner has to do *everything* consistent with his means and proportionality to contest and endeavour to interrupt the user. In my judgment, in a straightforward case, such as the present, a sign which unambiguously states that the car park is for use for club patrons only leaves the reader in no doubt that parking by others is objected to and that any user, contrary to the sign, is contentious and therefore not peaceable but *vi* or "by force", as that expression is used in this area of law. The fact that the club might without much difficulty have taken other steps such as fixing stickers to cars, closing the gates from time to time, or writing a formal letter of complaint to the fish and chip shop owners, is in my judgment neither here nor there.

14 In *Betterment Properties (Weymouth) Limited v Taylor* [2012] EWCA Civ 250, the Court of Appeal considered the sufficiency of notices in a similar context. (The case went to the Supreme Court, but on another point having no bearing on the present point.) The case concerned the registration of the land as a town or village green to which user as of right was also a relevant test. There is no difference in principle between user as of right in that context and in the present context. Patten L.J., having considered the authorities, including Morgan J.'s apparent adoption (with immaterial differences) of what Patten L.J. described as the useful general test of Pumfrey J. in *Smith v. Brudenell-Bruce*, had this to say about notices in paragraph 48: :

> "The test formulated by Morgan J. in paragraph 121 of his judgment specifies two alternative approaches to the question of notice. If the landowner erects suitably worded signs and they are seen by would-be peaceable users of the land then it follows that the user will be contentious and not as of right. That is the easy case. The alternative is an objective test based on knowledge being attributable to a reasonable user of the land from what the landowner

did in order to make his opposition known. If the steps taken to manifest that opposition are sufficient to bring it to the attention of any reasonable user of the land then it is irrelevant that the particular users may not have been aware of it. The steps to be taken do not have to be fail safe in that regard. But they must be proportionate to the user which the landowner wishes to prevent."

15 On the face of it, the present case falls within the first category (said to be “the easy case”) so far as the owners of the dominant tenant are concerned, because there is no doubt that the owners of the dominant tenant knew of the notices. It may well be that not all of the fish and chip shop customers spotted the notice but the notice was clearly visible as the tribunal judge found and was unambiguous. There was also another notice, less readily visible from a distance, in the club window.

16 The Court of Appeal in the *Taylor* case went on to say that the judge was right to reject the submission that the landowners should have taken legal proceedings in order to make their position known, and found that it was enough that the landowners had, as regards members of the public who did not see the signs, taken all reasonable steps to bring their objection to their attention by the erection of notices. Fences and hedges which buttressed the notices had also as a matter of fact been maintained during part of the relevant time, but the Court of Appeal's reasoning was largely to the effect that notices in an appropriate case are sufficient to prevent the user being as of right.

17 Why then did the tribunal judge in this case regard the notices as insufficient to prevent the parking from being as of right? He said this:

> "The club signs were, in my judgment, inadequate to render user contentious. They predated the arrival of the applicants and were not specifically directed at them but at the world at large. They were completely passive. I reject Mr. Walker's submission that they should be regarded in the light of a letter of objection being written and sent day after day. They were utterly ignored by those who even noticed them. The club was aware that they were utterly ignored and took no additional steps to protest the user by the applicants, save as described below, when it might easily have closed the car park altogether when it was not itself open (there being no evidence of any other rights of way over the car park) and policed its use to some degree while it was open.”

18 As to that passage, it seems to me that it is irrelevant that the signs predated the arrival of the applicants and were not specifically directed at them. They were directed as the judge found to the world at large and that includes the applicants below (the respondents before me). I do not understand what is meant by the signs being completely passive. That is in the nature of a sign. The erection of a sign which is there from day to day makes it unnecessary to write letters unless the conclusion can be reached that the signs become redundant. It is not suggested that these signs became redundant. Accordingly, it seems to me that this passage is an unsatisfactory basis for finding that user was as of right, and cannot stand. The reasoning in paragraph 37 onwards also seems to start from the wrong premise that the approach of Pumfrey J. represents a minimum standard in law that is necessary in every case, including the case of a sign which is not removed or

vandalised but which remains visible for all to see on a daily basis, if the users bothered to read it.

19 There was also the evidence of Mr. Peter Smith, to which reference has already been made. The judge below heard oral evidence both of Mr. Smith and other witnesses, in particular Mr. Winterburn, who was the fish and chip chop proprietor. He preferred Mr. Smith's evidence on all points, and accepted that there were confrontations on a regular basis over the whole of the period during which Mr. Smith was acting as club steward, from March 1999 to November 2008. He found also that Mr. Smith's complaints when made were emphatic. The nature of his complaint was that the car park belonged to the club, that the chip shop customers had no right to park on it and that they ought not to do so in such a way as to cause an obstruction to club patrons: see paragraph 32. Later on, in paragraph 38, that was taken to mean that the objection was not to parking as such but to the customers parking inconsiderately so as to block access to the club. The tribunal judge found in paragraph 38 that Mr. Smith was saying the customers had no right to be there but implicitly, based on Mr. Smith's evidence, that apart from blocking access there was no problem. I am prepared to accept the finding that he may well have said that there was no problem apart from the blocking of access. It was for the tribunal judge to find the facts and he had the advantage of hearing and seeing the witnesses.

20 The tribunal judge went on to say, by way of apparent criticism, that the club could have escalated the matter by solicitor's letter, or by court proceedings but took none of those steps choosing (on one occasion only) to suggest that the applicants below might like to contribute to the club's Christmas party, a request which they ignored. So he was really saying that the onus was upon the club, despite the continued erection of the signs, to do something else.

21 I proceed on the basis that blocked access for club members was the trigger for Mr. Smith's complaints, but, as was clearly found in paragraph 32, the basis for the complaints rested upon the car park being the club's and that the fish and chip shop customers had no right to park on it at all, and ought not in any event to cause an obstruction to club patrons. None of that overrode or in some way cancelled the notices, and must not be looked at in isolation. I can not regard these complaints as some sort of acquiescence. They were complaints, not an approval. Moreover, if some acquiescence is to be derived from what Mr. Smith said or did, implicitly or otherwise, it is difficult to see how that would not cross the boundary from mere acquiescence into permission, in which case the user could not be as of right.

22 In my judgment, the judge erred in concluding that more needed to be done in this case than maintain the notices visibly in place. Moreover, if Mr. Smith's actions in some way changed the position, the position only changed from 1998, which was less than 20 years before the application was made, and so would not suffice for prescription.

23 It follows from these observations, subject to one point, that the appeal should be allowed as regards access by vehicles. I do not draw a distinction between fish and chip shop customers and delivery vehicles, no such distinction having being raised in argument, though it was mentioned this morning by Miss Shea.

24 The one point to which this conclusion is subject is the decision of the House of Lords in *Beresford v. Sunderland City Council* [2004] 1 AC 889. That case was also concerned with user as of right for the purpose of registration of a town or village

green and explored the boundaries between acquiescence (which is the foundation of prescription) and permission (its antithesis). Lord Walker in that case said this at paragraph 72:

> "It has often been pointed out that 'as of right' does not mean 'of right'. It has sometimes been suggested that its meaning is closer to 'as if of right' ... This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely, a landowner who puts up a notice stating 'Private Land - Keep Out' is in a less strong position, if his noticed is ignored by the public than a landowner whose notice is in friendlier terms: 'The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time'."

I do not see that as in any way detracting from the subsequent decision of the Court of Appeal in *Taylor,* or laying down a general proposition that notices are not sufficient to establish contention. Every case must turn on its own facts and the point which Lord Walker commented upon may not have been fully argued. What the case in fact concerned was the requirement for overt acts justifying an implied licence and the inherent contradiction in this context of equating acquiescence with permission. It has no material bearing on any issue I have to decide.

25 For those reasons, and to the extent I have indicated, this appeal is allowed. There was a third point taken on ouster, upon which permission to appeal was not given, but which the appellants initially sought to reopen. The point vanished because I understood there to be agreement between the parties on the point. If that requires any amendment to the order I will invite the parties' counsel to give their attention to it and invite them also to submit a draft order giving effect to my decision. I will now hear from counsel in case there are any further queries or applications.

LATER:

26 There are two sets of costs I have to consider: below and in this Upper Tribunal. It is of course tempting, as I am invited by Mr. Fetherstonhaugh to do, to deal with them all globally, but that does not seem to me to be right because there are different considerations relating to each stage.

27 In the events which have happened the original applicants below succeeded on establishing two prescriptive rights but have now failed on the other two. I was under the impression when hearing the appeal that the most important rights by far were parking rights. On that they have lost and that has certainly had the majority of attention conferred upon it. It seems from what I have seen of the evidence below that that was the case also in the first tier tribunal.

28 The approach as to who has won and who has lost can sometimes be impressionistic and I must not be over-swayed by what has happened simply before me. It does however seem to me that the applicants in the first tier tribunal lost more than they won and in those circumstances it seems to me that there ought to be a costs order of some sort in favour of the Bennetts, if I can call them that, and I shall order that they should have 40% of their costs in the first tier tribunal. I would have given them more but there was some time wasted on chasing issues about chains, barriers and stickers which, frankly, were a waste of time, as we now know. 40% seems to me to strike the right balance.

29 So far as the appeal is concerned, the appellants have substantially been successful but not wholly so and I accept Mr. Fetherstonhaugh's submission that the appropriate order is that they should have two thirds of their costs of the appeal.

MISS SHEA: I am terribly sorry to interrupt. I just want to make sure I have understood your order about the costs below. You referred to the Bennetts getting 40% of their costs. Did you mean the servient owners or the fish and chip shop owners?

JUDGE PURLE: I mean the servient owners.
MISS SHEA: Below?
JUDGE PURLE: Yes.

MISS SHEA: I am sorry, my Lord.

JUDGE PURLE: That is the appellants before me, yes.

MISS SHEA: Yes.

JUDGE PURLE: They are the servient owners, are they not?

MISS SHEA: Yes, they are.

JUDGE PURLE: You are paying them in other words.

MISS SHEA: Yes, I understand that.

JUDGE PURLE: Not you personally, the Winterburns will pay them. The Winterburns will also pay two thirds of the costs of the appeal.

HIS HONOUR JUDGE CHARLES PURLE QC
(sitting as a Judge of the Upper Tribunal)

Release date: 06 February 2015