RIGHT OF WAY BY PRESCRIPTION

A recent High Court judgment gives useful guidance as to the requirements which must be met by a plaintiff who claims an easement by prescription.

Land ('the dominant land') which does not adjoin a public highway requires a right of way to cross adjoining land ('the servient land') in order to get access from the road. Where there is no express grant from the owner of the land permitting such a right of way, the owner of the 'landlocked' property has to rely upon other means of establishing a right of way. This is where prescription comes in, which is a form of deemed grant which arises through long use.

A new easement, including a right of way not by Deed, may be acquired by prescription in three ways: (i) by reference to the Prescription Act 1832; (ii) under the doctrine of lost modern grant; or (iii) at common law.

The Prescription Act 1832

There are two periods of user laid down in the Act whereby easements may be acquired under the legislation – 20 years and 40 years.

Where a claimant seeks to rely on 20 years user, he or she must show that the right claimed, “[has] been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years …” It is not enough, therefore, to claim to an easement based on interrupted or infrequent user of land, or a user of land that extended only over part of the period of twenty years.

Where a claimant can show user for a 40 year period, the Act deems this to be absolute and indefeasible, unless it appears that it was enjoyed by some written consent or agreement expressly given for that purpose.

Common Law and the Doctrine of Lost Grant

To claim prescription at common law, one must show a continuous user as of right from “time immemorial”. The date which was fixed for this “limit of legal memory” is the year 1189, the year Richard the Lionheart died. In practice, the Courts have treated 20 years continuous or sometimes user since living memory as being sufficient to presume presumption. Nevertheless, such a presumption can be defeated by evidence of a break in the user between 1189 and 20 years before the claim is made.

The difficulties this creates for a claimant are obvious, so the Doctrine of Lost Grant was developed by the Courts to overcome the hurdle. Indeed it is upon the doctrine that the Plaintiff in this case was forced to rely.
The Doctrine of Lost Grant is based on the legal fiction that if an easement has been enjoyed for at least 20 years without any other lawful explanation, it is presumed to have its origin in a deed of grant made after 1189. This eliminates the to prove continued user since 1189.

The user of the land must be ‘continuous’ for a claim based on the doctrine to be successful. Following his examination of the case law in this area, Deeny J in the recent High Court case concluded that to satisfy this requirement of continuous use, a Plaintiff ‘must demonstrate repeated acts of enjoyment of the right of way for twenty years noticeable by any owner of the dominant tenement of full age and reason.’

He added that, while enjoyment of the land can still be intermittent and still be considered continuous, any period of intermission must be factored into to the Court’s decision-making. If the user of land is intermittent, however, it must be noticeable and visible to the owner of a servient tenement and it has to be regular and reasonably frequent.

Should you have any queries about the contents of this article, please do not hesitate to contact Alan Gibson, Associate, Cleaver Fulton Rankin on 028 9027 3141

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