Falcon Chambers

How much is too much?
When is use of a right of way excessive?

The issue

> "Alteration of property use and increase in traffic over rights of way are common causes of neighbour disputes … [A typical issue is] would the increased intensity of use exceed what is reasonably tolerable and amount to an actionable nuisance?"

Thompson v Bee [2009] EWCA Civ 1212 per Mummery LJ @ [1].

Easements and excessive use

Easements can be complicated things. So let's take a simple example: an expressly granted right of way. Imagine that the right is granted: (a) at all times; (b) for all purposes; (c) with and without animals and vehicles. Now you might be forgiven for thinking that such a right has no limits. Surely it can be used whenever, however, for any purpose, and to whatever extent the owner of the dominant land wants?

Alas, matters are not that straightforward. Even a seemingly unrestricted right of way, granted in the widest possible terms, has its limits: see *Jelbert v Davis* [1968] 1 WLR 589, CA.

In *Jelbert v Davis* agricultural land had the benefit of an express right of way for all purposes. The owner wanted to use the land as a park for 200 caravans. The Court of Appeal held that, although use by caravans was permissible, the right could not be exercised in a fashion that would cause substantial interference with the use of the route by others. Use of that nature would be excessive and unjustified.

Other decisions in relation to the allegedly excessive use of rights of way have followed.

In *Rosling v Pinegar* (1987) 54 P&CR 124 a house, which had a right of way over an access which was shared with 25 other properties, was opened to the public. The extra traffic so

generated was held to be excessive. The court granted an injunction specifying the numbers of people permitted to use the way and the dates when the public could access the house.

In *White v Richards* (1993) 68 P&CR 105 land with a right of way over a dirt track was used by heavy lorries 14-16 times a day, resulting in damage to the surface and denying the claimants the free run of their own access. This too was excessive, and a declaration was made.

In *Thompson v Bee* itself a garth (a piece of land like a paddock or yard) had a right of way over a 10' wide track. The owner planned to build 3 houses on the garth, to be accessed via the track. The Court of Appeal held that the likely volume of traffic would cause a nuisance to others entitled to use the track and would be excessive.

Conversely, in *Stanning v Baldwin* [2019] EWHC 1350 (Ch) the court rejected a claim that the proposed development of the dominant land, which would see the track in question serve 9 houses in future rather than the 6 which then used it, would be excessive. The additional 3 houses would increase the use of the track but not objectionably.

Bucknell v Alchemy Estates

As the cases demonstrate, the assessment of, and answer to, any complaint of excessive use is always fact and context sensitive, and the evidence in any given case will be critical. This is well illustrated by the latest decision in the field, *Bucknell v Alchemy Estates (Holywell) Ltd* [2023] EWHC 683 (Ch).

The issue in *Bucknell v Alchemy Estates* was whether the construction and intended occupation of 2 houses on the dominant land (a farmyard) would result in the excessive use of a shared driveway. At an early stage in the litigation the court had decided, on an interim basis, that there was a serious issue to be tried that the use of the driveway would indeed be excessive, and it had granted an injunction to restrain the use of the driveway in conjunction with the execution of the development: [2021] EWHC 1544 (Ch).

However, at trial the result went the other way. In the light of the very detailed evidence adduced, the trial judge found in favour of the owner of the farmyard.

In particular, the judge concluded that the use of the driveway by construction traffic, for the limited period of the build, would not occasion an unreasonable interference with the use of the access by others. There would have been 126 movements over 314 working days; this was not excessive.

Similarly, the judge considered that the use of the driveway by the traffic to be generated by the intended 2 houses was also acceptable. It would not be of a level which would interfere unreasonably with use and enjoyment of the way by others.

Conclusion

The decision in *Bucknell v Alchemy Estates* shows that it is not every change in the intensity of the use of a right of way that will be objectionable, even where the dominant land is to be significantly redeveloped and the associated use will include construction traffic.

What is more, as the judge remarked, "*as the world becomes more sophisticated, so too does expert evidence*". The decision underscores the fact that cases concerning disputes about excessive use will increasingly turn on layers of complex (and expensive) evidence.

Learning points

What can we draw from the cases culminating in *Bucknell v Alchemy*? I suggest the following:

- Every right has its limits – but identifying what those limits are and whether, in practice, they have been or will be exceeded is far from easy.

- Little or no guidance can reliably be derived from decisions in other cases because every case involves an evaluation of its own facts and circumstances.

- Engineering expert evidence may be required to demonstrate that the route is (or is not) capable of accepting the loads to be imposed on it, especially by construction traffic.

- Unless, perhaps, there is evidence that construction traffic will damage the surface of the route (bearing in mind that the dominant owner may be entitled to improve the access to

suit its altered purposes), the mere fact that some extra wear and tear may result is unlikely of itself to lead to a conclusion of excessive use.

- The court will likely have regard not only to the nature and effect of use by construction traffic but also to the duration of such use. Although construction traffic may be heavier and noisier than ordinary domestic traffic, it may last only for a limited period.

- Traffic management expert evidence may also be needed to compare and contrast the 'before' and the 'after', including the volume and patterns of both present and anticipated traffic, and to assess the extent of any impact on amenity.

- Although the court can, in principle, impose limits on the weight and dimensions of vehicles, and on their speed, it will not readily do so unless persuaded that there is a particular need to do that in order to keep any use appropriate to the route in question.

Conclusion

Cases about alleged excessive use, which involve balancing the competing interests of neighbours, provide fertile territory for disagreement and are anything but easy to resolve. Moreover, their outcome – namely, where to draw the line – is likely to be very hard to predict with confidence, especially before the all-important detailed evidence is amassed.

To compound matters, one person's reasonable view (e.g. that the proposed use of a right of way will wreak unreasonable interference, swamping others with traffic etc.) may well not be shared by another reasonable person. Further, ultimately the evaluation by the trial judge will necessarily reflect that individual's perceptions, and an appeal court will interfere only if the decision reached is outside the bounds of reasonableness. This means that any first instance judge has a considerable degree of latitude in their determination of what is, or is not, acceptable, in the light of the likely mass of evidence.

To return to the question at the start of this article, the answer can only be: "It all depends".

Of course, no one ever said that the law relating to easements is simple to apply, and it would be dangerous to think otherwise. Indeed, those considering doing battle would do well to heed the warning words of Mummery LJ in *Thompson v Bee* @ [44]:

> "As this case shows litigation of the neighbour kind is sometimes uncertain in outcome, often punishing in costs and, win or lose, is always, for those who are still neighbours …, far from the Swiftean ideal of 'sweetness and light'."

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