EASEMENTS

Timothy Fancourt QC

Part I: Unlawfulness and Prescription

The significance of the House of Lords decision in Bakewell Management v Brandwood [2004] 2 AC 519.

Conflicting principles of public policy:

(1) Long-established user as of right should be presumed to have a lawful origin;

(2) Unlawful conduct should not give rise to right of ownership.

Lord Scott – only unavoidably illegal conduct precludes prescription of easement.

Lord Walker – issue turns on the capacity of the assumed grantor to grant the rights claimed.

Cf. "without lawful authority" in Law of Property Act 1925, s.193(4), Road Traffic Act 1988, s.34(1).

> "The words in sub-section (4) "without lawful authority" deserve careful attention. They have been taken, in cases like the present, and like *Hanning*, to refer to an authority given by the owner of the common. They might also, if proviso (a) is applicable, refer to an authority given by some public official or public body pursuant to the Act, scheme, bye-law or

> regulation in question. But the ability of the owner of the common in question to give someone a "lawful authority" to do one or other of the things prohibited by sub-section (4), or, indeed, to do one or other of those things himself, is subject, in my opinion, to an important qualification. The owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of the commoners: see section 30 of the Commons Act 1876. To do so would be a nuisance: see para 31-27 of *Clark & Lindsell* (18th Ed). Nor could the owner of a common lawfully authorise things to be done by others on the common land which, if done, would constitute a nuisance. The reference to "lawful authority" in sub-section (4) does not therefore mean that the owner of a common can authorise to be done whatever he pleases. Authority given to too many people to camp upon the common and to light too many fires could damage the sufficiency of grass on the common for the commoners' grazing rights. If that were so, the authority would not, in my opinion, be a lawful one. Similarly, authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful. It would depend upon the facts. But, subject to that qualification, sub-section (4) allows the owner of a common to which section 193 applies to authorise the doing of an act that, if done without that authority, would be an offence under the sub-section".

Difficult question where lawfulness of conduct depends on something done by a third party.

> Neaverson v Peterborough R.D.C. [1902] 1 Ch 557
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> Rochdale Canal Proprietors v Radcliffe (1852) 18 QB 287
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> Oakley v Boston [1976] QB 270
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> Cargill v Gotts [1981] 1 WLR 441.

Apparent limitations of Brandwood principle:

(1) The servient owner must himself be able, without the concurrence of any other, to authorise what would otherwise be a criminal offence;

(2) Such authority must be able, on the facts at the date of the assumed grant, to permit user that is not otherwise unlawful.

Examples:

(1) without adopting the procedure required by the Party Walls Act and without consent or knowledge, A builds an extension to his house off B's house – after 20 years, has he acquired an easement of support?

(2) farmer A abstracts a supply of water for irrigation purposes from a stream crossing farmer B's land – after 20 years, does farmer A enjoy a right to abstract water from the stream for the benefit of his farm?

(3) an owner of a house has enjoyed for 20 years a vehicular access to his house over a private, unmade track on land belonging to his neighbour – the track crosses a bridleway – has a right of way been acquired. Does it make a difference if the owner owns a motor repair garage rather than a house?

Part II – Damages in lieu of an injunction

Per A.L. Smith LJ in Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, 322:

> "… it may be stated as a good working rule that –
> (1) if the injury to the plaintiff's rights is small
> (2) and is one which is capable of being estimated in money
> (3) and is one which van be adequately compensated by a small money payment
> (4) and the case is one in which it would be oppressive to the defendant to grant an injunction
> then damages in substitution for an injunction may be given."

But note, in context of rights of light, Lord MacNaghten in Colls v Home and Colonial Stores [1904] A.C. 179 at 193:

> "but if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must

> necessarily to some extent interfere with the light of adjoining premises".

Orthodoxy restored in Kennaway v Thompson [1981] QB 88 – a nuisance, but not an easement, case.

Is there, more generally, a trend towards a broader discretion: different approaches of the Judges in the Court of Appeal in Jaggard v Sawyer [1995] 1 WLR 269.

Per Millett LJ: "The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled?"

Followed by Peter Smith J in Midtown v City of London Ral Property Co [2005] 1 EGLR 65.

Jurisdiction to award damages in lieu based on loss of opportunity to bargain for grant of necessary rights: Wrotham Park Estates v Parkside Homes [1974] 1 WLR 798, as explained in Jaggard v Sawyer.

But is there now a prospect of recovering quasi-restitutionary damages? i.e. a share in the defendant's profits: A.G. Blake [2001] 1 A.C. 268.

> "The *Wrotham Park* case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from

> the breach. The Defendant must make a reasonable payment in respect of the benefit he has gained …
> Circumstances do arise when the just response to a breach of contract is that the wrongdoer should not be permitted to retain any profit from the breach …
>
> When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract …
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> When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract."
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> The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the it seems to me in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit". (Lord Nicholls)

This approach to damages fits more naturally with an award of damages in lieu of injunctive relief than for breach of contract.

The best recent example of an assessment of damages in lieu is Amec Developments v Jury's Hotel Management [2001] 1 EGLR 81.

> "… the basic approach to this case should be the same as that in a number of cases in which there have been infringements of easements and restrictive covenants but damages have been awarded in lieu of an injunction. That approach is to ascertain "such a sum of money as

might reasonably have been demanded by [Amec] from [Jury] as a *quid pro quo* for [permitting the encroachment]", to use (and adapt) the formulation of Brightman J in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 581D …..

It is also common ground that the way of ascertaining what that sum is, is to consider the sum, that would have been arrived at in negotiations between the parties had each been making reasonable use of their respective bargaining positions without holding out for unreasonable amounts. This requires, in turn, that the parties have regard to the cost or detriment to the claimant and the benefits to the defendant of the latter's being allowed to build over the building line."