Neutral Citation Number: [2016] EWCA Civ 482

Case No: A3/2015/0680

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
HIS HONOUR JUDGE PURLE QC
FTC/63/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 May 2016

Before:

LADY JUSTICE SHARP
LORD JUSTICE DAVID RICHARDS
and
MR JUSTICE MOYLAN

- -

Between:

(1) TREVOR WINTERBURN	**Appellants**
(2) ELIZABETH WINTERBURN	
- and -	
(1) GARRY BENNETT	**Respondents**
(2) LYNNE BENNETT	

- -

Jonathan Gaunt QC and Caroline Shea QC (instructed by **DAC Beachcroft LLP**)
for the **Appellants**
Guy Fetherstonhaugh QC and Bruce Walker (instructed by **Butcher & Barlow Solicitors**)
for the **Respondents**

Hearing date: 3 March 2016

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Approved Judgment

Lord Justice David Richards:

1. This appeal raises an issue as to the steps which an owner of land must take to prevent others using the land without permission from acquiring rights over the land. The appellants claim, as a result of use over a number of years, to have acquired by prescription the right for themselves and others using their premises to park on land belonging to the respondents. The First-tier Tribunal (Property Chamber) (Mr Neil Cadwallader) held that the appellants had established their claim to parking rights, but the Upper Tribunal (Tax and Chancery Chamber) (HH Judge Purle QC) allowed an appeal against that decision. Judge Purle gave permission to appeal to this court.

2. The land in question (the disputed land) is in Keighley, West Yorkshire. It comprises part of a car park which until 2010 was owned by the Conservative Club Association (the Club). On the far side of the car park from the road, the Club had premises which housed a bar and other social facilities for members of the Club. The car park was used as a car park for the Club. The appellants own and operate a fish and chip shop which is close to the road and adjacent to the entrance to the car park. There is a relatively narrow entranceway to the car park from the road with the wall of a building on one side, until its demolition in 2007, and the appellants' premises on the other side.

3. The Club owned and used the club house and car park for many years until 2010 when they were purchased by the respondents. In May 2012 the respondents let the Club building and car park to a tenant who obstructed access to the car park from the road, preventing all access by cars and other vehicles but not pedestrian access. Later in 2012, the tenant obstructed pedestrian access also. This appeal is not concerned with pedestrian access but only with the parking of cars and other vehicles on the disputed land.

4. The appellants went into occupation of the fish and chip shop in 1987 or 1988 as tenants or licencees and have operated it as such since then. They took a 20 year lease of the property in 1992. They purchased the freehold reversion in 2007 and were registered as its freehold proprietors. The FTT found, and there was little if any dispute about this, that throughout the time that the appellants operated the fish and chip shop until 2012, suppliers had up to nine times a week pulled off the road into the disputed part of the car park and parked there for long enough to make their deliveries. Also, throughout that period, customers had during opening hours pulled off the road to park on the disputed land while they bought their fish and chips. On the whole this use of part of the car park did not interfere with the Club's operations but over a seven year period there were 12 to 15 occasions on which the Club steward asserted ownership of the disputed land, and, expressly or impliedly, asserted that the appellants and their suppliers and customers had no right to park on it, and also complained that their customers should not park in such a way as to cause an obstruction to the Club's patrons.

5. At all times until 2007 there was a sign attached to the wall of the building on one side of the entranceway to the car park. It had been erected on behalf of the Club and read: "Private car park. For the use of Club patrons only. By order of the Committee". It was attached at right angles to the wall and the FTT found that it was "clearly visible to anyone entering the disputed land, whether on foot or by vehicle. It must have been seen by many of the people so entering the disputed land to go to the shop". During the same period there was a similar sign in the window of the Club premises which, as the FTT found, was "also clearly visible, although no doubt less so from the access land because further away."

6. These signs did not deter the appellants' suppliers and customers from parking on the disputed land. As the FTT found:

> "Neither the [appellants] nor any of those utilising the access land for purposes connected with the shop took the slightest notice of those signs. Save as described below, no-one made any attempt to restrict use of the car park to Club patrons only, or to exclude the [appellants] or their visitors."

7. The FTT goes on to summarise the evidence of the Club steward to which I have earlier referred.

8. The issue on this appeal is whether the signs were sufficient to prevent the appellants acquiring a right to use the disputed land as a car park for themselves and their suppliers and customers or whether the owners of the car park had acquiesced in such use so as to entitle the appellants to such a right, notwithstanding the presence of the signs.

9. The appellants based their claim to a right to park cars and other vehicles belonging to themselves, their suppliers and customers on acquisition by prescription by "lost modern grant". This requires the appellants to show 20 years' uninterrupted user "as of right", that is to say without force, without secrecy and without permission (*nec vi, nec clam, nec precario*).

10. The purpose of the law whereby a person may acquire rights by prescription is that the legal position should reflect and recognise the fact of long use (see Law Commission Consultation Paper No.186: *Easements, Covenants and Profits à Prendre*, March 2008 para 4.178). In *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 (*Sunningwell*) Lord Hoffmann said at p.349:

> "Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment."

11. By way of explanation of the need for the long user to be without force, secrecy or permission and therefore "as of right", Lord Hoffmann said in the same case at p.350:

> "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not be reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."

12. In the present case, it is the element "without force" that is in issue. There is no doubt that the parking on the disputed land was open and known to the Club and, later, the respondents and that no permission for parking had been given.

13. The phrase "without force" carries rather more than its literal meaning. It is not enough for the person asserting the right to show that he has not used violence. He must show that his user was not contentious or allowed only under protest. This appeal is concerned with what constitutes protest on the part of the owner of the land for these purposes.

14. Mr Gaunt QC for the appellants rightly emphasised that the basis of the law of prescription is acquiescence on the part of the owner of the land. In *Dalton v Angus* (1881) 6 App Cas 740, in which the doctrine of lost modern grant was authoritatively established, Fry J, one of the judges asked to give his opinion to the House of Lords said at p.773 in a passage cited with approval by Lord Hoffmann in *Sunningwell*:

> "But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest."

15. Mr Gaunt submitted that, to counter acquiescence in the unlawful use of land, it must be resisted or suitably protested against in a proportionate manner. The circumstances must indicate that the owner objects and continues to object to the unlawful use. If reliance is placed on protests, they must be continuous and repeated.

16. In a commendably economic manner, Mr Gaunt cited from a number of the leading authorities, beginning with *Dalton v Angus*. In that case, the House of Lords was concerned to establish whether the owner of a building enjoyed a right of support from neighbouring land and, if so, how this right arose in the absence of contract or ancient user. For these purposes, the House of Lords sought the opinions of seven common law and equity judges who were present when the case was argued and whose opinions are reproduced in full at pages 742-789 of the report. It is important to note that exactly what can or cannot constitute "without force" was not the issue in the case but the requirement for

user "as of right" was in point because all the judges, and the members of the House of Lords, considered that the right of support either was an easement that could be acquired by prescription or arose in a manner analogous to the acquisition of an easement by prescription.

17. Some passages from the opinions of the judges on this issue have subsequently been cited, with approval.

18. Fry J said at p.774:

> "It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of another; 2ndly, the absence of right to do that act in the person doing it; 3rdly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases.
>
> As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer."

19. Part of this passage was cited with approval by Lord Neuberger in *R (Barkas) v North Yorkshire CC* [2014] UKSC 31, [2015] AC 195 at [18]. This passage and other passages in some of the older authorities suggest that the owner of the land must take steps by physical means or through legal proceedings to prevent the wrongful user. However, the passage cited from the opinion of Fry J ends with a reference to a right being "acquired and enjoyed by the tacit consent of the sufferer" and in a passage of the opinion of Bowen J, also cited in later cases, he said at p.786:

> "The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and

> unmistakable protests to destroy its peaceable character, and so to annul one of the conditions on which the presumption of right is raised: *Eaton v Swansea Waterworks Company*."

20. Although this was said by Bowen J in the context of rights of support where active steps to interrupt the user would normally be wholly disproportionate, it has been cited in more recent cases as demonstrating a much broader proposition. See *R (Lewis) v Redcar & Cleveland BC (No.2)* [2010] UKSC 11, [2010] 2 AC 70 at [88] – [91] per Lord Rodger of Earlsferry and *Newnham v Willison* (1987) 56 P&CR 8 at p.18 per Kerr LJ. In the latter case, Kerr LJ continued:

> "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."

21. In the light of the development of the authorities, it cannot now be said, even if it ever could, that to avoid acquiescence, the owner of the relevant property must take steps through physical means or legal proceedings actually to prevent the wrongful user.

22. The issue in the present case is whether the continuous presence of legible signs stating that the car park was private property and for use by the Club's patrons only was sufficient to render the use of the car park by the appellants and their suppliers and customers contentious.

23. The decision of this court in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250, [2012] 2 P&CR 3 (*Betterment*) establishes that the continuous presence of legible signs may be sufficient to render user contentious.

24. *Betterment* was a commons registration case in which the owner of 46 acres of former grazing land, crossed by two public footpaths, which had been registered as a town or village green, applied to rectify the register by removal of the land from the register. The land had been registered as a green following an application by a member of the public on the basis that inhabitants of the area had used the land for activities such as playing games, dog walking and playing with children as of right for not less than 20 years. Registration was opposed by the landowner on the grounds that such user had not been "as of right". The evidence established that until about 1984 the owner had repeatedly erected and re-erected clearly visible signs, stating that the land was private or that the public were to keep out or that their presence would be a trespass, making it plain that the public were not entitled to go on to the land other than by using the footpaths. The signs had been repeatedly vandalised and removed by some members of the public, with the result that they had not been seen by other members of the public. From time to time members of the family that owned the land and their employees had also challenged or warned off members of the public from the land. Morgan J acceded to the application for rectification, holding that the user had remained

contentious until at least 1984, and his decision was unanimously upheld by the Court of Appeal. Patten LJ gave the leading judgment, and Carnwath and Sullivan LJJ agreed with his judgment as regards the question of user as of right.

25. At [30] Patten LJ said:

> "The issue for the inquiry and for Morgan J was whether the Curtis family had taken sufficient steps so as to effectively indicate that any use by local inhabitants of the registered land beyond the footpaths was not acquiesced in. At the inquiry this turned on the presence or visibility of the signs."

26. Morgan J found as a fact that signs were erected and re-erected with reference to the total area of land that the Curtis family owned over a period of years. The signs were clearly visible and would have brought home to a person using the registered land that it was governed by the signs. The signs would have made it clear that members of the public were not entitled to leave the footpaths.

27. At [38] Patten LJ said:

> "If the landowner displays his opposition to the use of his land by erecting a suitably-worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in."

28. At [48] Patten LJ said:

> "If the landowner erects suitably worded signs and they are seen by would-be peaceable users of the land then it follows that their user will be contentious and not as of right. That is the easy case."

However, the signs had frequently been vandalised or removed and there were members of the public who used the land without knowledge of the signs. That was the more difficult case to which a significant part of the judgment of Patten LJ is addressed. As to that, Patten LJ said at [52]:

> "I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowners's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances

> of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly positioned to give reasonable notice of the landowner's objection to the continued use of his land."

29. As to challenges by members of the Curtis family or their employees, Patten LJ said at [56]:

> "… the occasions on which a member of the Curtis family or one of their employees actually challenged someone using the land were too infrequent to be treated as sufficient in themselves to make the local inhabitants' user of the land contentious."

30. Patten LJ set out his conclusions on the issue which arose on the facts of that case at [60] – [64]. I should set out some of those paragraphs:

> "60. It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?
>
> 61. …
>
> 62. …
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> 63. It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger in *Redcar (No. 2)*) that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land

> then the landowner has, I believe, done all that is required to make users of his land contentious.
>
> 64. It follows from this that the Curtis family were not required to take other steps such as advertising their opposition in order to rebut any presumption of acquiescence. In my view, the judge was correct to hold that there was not user as of right for the requisite twenty years."

31. Although *Betterment* was a commons registration case, it is common ground that the same principles apply to the law of prescription. The present case does not feature the factual difficulties involved in *Betterment* that a significant number of members of the public using the land probably did not see the signs which were erected and re-erected by the owners. In the present case, there were two signs clearly visible to all users of the car park and clearly informing all users that it was a private car park for the use of Club patrons only. The signs were never vandalised or, until 2007, removed and no occasion arose for their replacement. In those circumstances, applying the judgment of Patten LJ, the answer would appear to be clear that the signs were by themselves sufficient to make contentious the parking of cars and other vehicles by the appellants, their suppliers and customers.

32. Mr Gaunt relied on the decision at first instance of Pumfrey J in *Smith v Brudenell-Bruce* [2002] 2 P&CR 4. The claimant had purchased a cottage on an estate belonging to the defendants. The conveyance granted an express right of way over a track connecting the cottage to the public highway. The track continued from the cottage across the defendants' land to a forest. The claimant used the track to gain access both on foot and in vehicles to the forest and his use was tolerated by the defendants, without giving consent, from 1975 to 1998. By reason of a letter sent by the defendants to the claimant in October 1998, the use of the track to the forests ceased to be as of right. On these facts, the judge held that the claimant had used the track as of right for the period from 1975 to 1998 and that his user could not be explained by reference to some general tolerance of pedestrian use of the track by members of the public. The claimant had openly used the track to the knowledge of the defendants for a period of over 20 years without any form of protest. On its facts, the decision was plainly correct and, it may be thought, straightforward.

33. In a section of his judgment headed "The Law" at paragraphs 9-12 Pumfrey J cited from the opinion of Fry J in *Dalton v Angus* and from *Eaton v Swansea Waterworks Co* (1851) 17 QBD 267 and *Newnham v Willison*. In conclusion, the judge said at [12]:

> "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 a 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 interpret the user."

34. As will be apparent, this statement was not necessary for the decision in the case but Mr Gaunt submits that, while it overstates the position in two respects, it is otherwise a correct statement of the law. Mr Gaunt says that the test is overstated in that, first, it is not necessary for the servient owner to say that he will erect a physical obstruction or commence legal proceedings and, secondly, the reference to "consistent with his means" is misplaced.

35. In *Betterment* at first instance, Morgan J restated this passage from the judgment of Pumfrey J in terms applicable to a town or village green, which the parties in that case had accepted as a useful general test. Having so stated it, Morgan J held that the erection and re-erection of signs along the footpath was a sufficient protest by the landowner to make the user of the land by members of the public contentious. In the Court of Appeal, Patten LJ quoted the passage from the judgment of Pumfrey J, followed by the observation that "this requires to be unpacked a little". He then addressed its application and relevance in a case where a significant number of users of the property had not or may well not have seen the signs. As earlier mentioned, the Court of Appeal agreed with the conclusion of Morgan J, and Patten LJ was of the view that, in a case such as the present, where all users of the land saw and were aware of the signs, it was easy to conclude that the user by them was contentious.

36. For my part, I do not think that the *obiter* statement of Pumfrey J provides much assistance. While relying on it in general terms, Mr Gaunt felt constrained to submit that it was overstated in the two ways indicated above. In my judgment, the authorities do not support the proposition that a servient owner must be prepared to back his objection either by physical obstruction or by legal action or the proposition that the servient owner is required to do everything, proportionately to the user, to contest and to endeavour to interrupt the user. As it seems to me, the decision of this court in *Betterment* is inconsistent with these propositions. The court there accepted that the erection and re-erection of signs was all that the owner needed to do to bring to the attention of those using the land that they were not entitled to do so.

37. Mr Gaunt put his case in a number of ways. First he said that there must, quoting Bowen J, be "continuous and unmistakeable protest" by the servient owner. The circumstances must indicate that the owner objects and continues to object to the parking. I agree that the circumstances must indicate to persons using the land that the owner objects and continues to object to the parking. As Patten LJ put in *Betterment* at [30] the issue is whether the owner has taken sufficient steps so as to effectively indicate that the unlawful user is not acquiesced in. On the facts of the present case, the presence of the signs in my judgment clearly indicated the owner's continuing objection to unauthorised parking. Mr Gaunt submitted that the protest needs to be proportionate to the user. Again I would accept that but in my view the continuous presence of the signs asserting that it was private property for use by the Club's patrons only was a proportionate protest. Mr Gaunt submitted that, in the face of parking by those not entitled to do so, there should have

been additional signs ordering such parking to cease. I can see no reason why such further signs should be required. Any reasonable person, whether in the position of the owner of the land or those unlawfully parking on it, would understand the meaning and effect of the signs to be that persons other than the Club's patrons were not allowed to park on the car park and should not do so. Nor, in my judgment, does it matter that the signs were in place before the appellants went into occupation of the fish and chip shop. It surely cannot make a difference that the signs were erected a week before they went into occupation or a week after they went into occupation, or that the appellants would be in a weaker legal position if the signs had been erected only after they or their suppliers and customers started to park unlawfully in the car park.

38. Mr Gaunt submitted that where, as was obvious in the present case, the signs were being ignored, it was incumbent on the owner of the land to take such further steps as were practicable. He accepted that if a sign was all that could practically be done, then a sign would be sufficient. But where, as here, the owner knew that the appellants (and their suppliers and customers) were unlawfully using the land, the owner must communicate directly with the appellants. He submitted that a stiff letter from the secretary of the Club or its solicitors every year would have been sufficient.

39. In his skeleton argument, Mr Gaunt submitted that there was a power in the owner of the car park to stop the user "by the simple expedient of erecting a chain across the entrance to the car park, or objecting orally, or writing letters of objection, or threatening or commencing legal proceedings, but the owner conspicuously abstained from doing any of these." In the course of his oral submissions, Mr Gaunt suggested that, if one level of protest was insufficient to stop the unlawful parking, a more potent step should be taken, leading ultimately to the commencement and the prosecution of legal proceedings.

40. In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.

41. The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I

do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land.

42. For the reasons given in this judgment, I would dismiss the appeal.

Mr Justice Moylan:

43. I agree.

Lady Justice Sharp:

44. I also agree.