RIGHTS OF WAY IN CONTEXT – “ALL TIMES AND ALL PURPOSES”

Trying to cut down those classic words – “at all times and for all purposes” – is the stuff of many a set of instructions. Commonly the right of way has existed for years not troubling anyone and then a developer buys the land next door and plans to upgrade the right of way for the development for 30 houses. Can the servient owner object?

This is a tricky area because the authorities are pretty mixed and it is sometimes difficult to discern a theme which is applicable to your facts.

The basic steps are:
1. What does the grant say
2. Place the grant in the time it was made

So read the grant carefully. The whole thing, because there may be provisions which impact on the right of way – for instance an obligation to fence and ditch alongside the right of way (which may affect access points). In Alford v Hannaford [2011] EWCA Civ 1099 there was both a grant (“with or without vehicles”) and a reservation (“with or without vehicles and animals”) where the contradistinction caused the Court to opine that driving animals was not within the grant.

Placing the grant in the time it was made brings in train the physical state of the land at the time, how its use might have impacted on the servient owner’s land and any other reasons which might cut down an ostensibly very wide grant. Thus if the track at the time was narrower than now or it passed close by a play area one might infer that only light use was in contemplation.

Two old chestnuts are both dealt with in Kain v Norfolk1:
1. The fact that at grant the land comprised fields (i.e. agricultural land) does not mean the right of way is restricted to agricultural purposes only (i.e. to the use the dominant land was being put to at the time of the grant).
2. Reference to carts and animals does not infer (again) simply an agricultural user, commonly these are illustrative of wheeled vehicles of their day and so motor cars and suchlike are permitted now.

The changing nature of user is always tricky but a useful guide is Neuberger LJ in McAdams Homes Ltd. v Robinson [2005] 1 P&CR 30:

1. Whether the dominant land had undergone a radical change in character or a change in the identity of the site as opposed to a mere change in identification of the use of the site
2. Whether the use of the dominant land as changed would result in a substantial increase or alteration in the burden on the servient land.

Only if both questions call for an affirmative answer can the servient owner object (Wood v Waddington [2015] EWCA Civ 538).

The unreported decision of HHJ Weeks QC in the Ch D in Dwr Cymru Cyf v Powell (28th July 1993) offers one of those practical guides as to the operation of the authorities which is invaluable in practice. There a right of way was granted in 1934 along the back drive of a country house virtually passing the back door. The house and outbuildings had long gone by the time of the action and now the route was being used by the successor of the grantee to take along vehicles akin to petrol

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1 [1949] Ch 163
tankers. Despite it being an express grant for vehicles the Judge found it should be construed to limit the use complained of based on the following features:

(i) Joint use
(ii) Route went to the back of the house and close to it, so frequent or heavy use would have been intrusive
(iii) The route was narrow (especially at the entrance) with sharp bends along the route as it existed in 1934
(iv) The road was of simple construction
(v) The maintenance charge was modest and consistent with modest user only

The Judge limited the vehicles that could use the way by size to exclude lorries and tankers.

The moral is not to accept without demur that a right “at all times and for all purposes” can be used in any manner the dominant owner wishes. However it must also be accepted that it can be an uphill task to establish some limitation and that requires a careful analysis of the facts and law.

Malcolm Warner
Guildhall Chambers
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