# RIGHTS OF WAY: NOT FOR TURNING?

*In an e-news article earlier this year, Malcolm Warner considered the construction of a right of way granted for use 'at all times and for all purposes' by placing it in the context of what the grant says and the time it was made; in this article,* ***Michael Selway*** *considers the construction of a right of way granted for use by vehicles with regard to whether such right might include an entitlement for vehicles to drive over verges at the sides of the way in order to turn on or off the way.*

1. I was recently involved in the trial of a case in which the facts were along the following lines. There had been an express grant of a right of way, for use by vehicles, along a track and through a gateway at the side of the track into a field. The track was surfaced with tarmacadam, and there were un-tarmaced areas to the sides of the track. The track gave a user of the right of way a sufficient turning circle to turn through the gateway with smaller vehicles, but not with larger vehicles, which had to drive over the un-tarmaced area on the opposite side of the track to the gateway in order to turn through the gateway.

2. A dispute arose as to whether or not the dominant owner was entitled to drive over the un-tarmaced area in order to turn through the gateway with larger vehicles: he claimed that the right of way included the right to do so; the servient owner said this was not the case and that only smaller vehicles had used and been intended to use the track and gateway in this way before such use with larger vehicles had taken place after the grant.

3. There would not have been sufficient time for the expressly granted right of way to have been widened by prescription to include such right and there was no pleading under Section 62 of the Law of Property Act 1925 or the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 (although query whether these might have succeeded in another case).

4. As such, the issue was a matter of construction of the express grant of the right of way; in essence, this meant the grant itself had to be construed against the physical features on the ground and other admissible surrounding circumstances at the time it was made.

5. As with all such matters of construction, each case will turn on its own facts; however, there is some guidance that might be applied in this regard when dealing with vehicles driving over verges at the sides of the way in order to turn on or off the same.

6. Before looking at such guidance, however, it is worth noting the related issue of 'swing space' (or 'elbow room'): that is, where there is a right of way for use by vehicles along a track, whether there is an entitlement for the bodies of the vehicles - especially larger vehicles - to swing out over the edge of the track when driving along it.

7. It is clear that there is no automatic entitlement to 'swing space' ancillary to a right of way; in *Minor v Groves* (1997) 80 P&CR 136, at p. 143, the Court of Appeal said that:

*I know of no principle of law which precludes the owner of land from building right up to the boundary of his land. If this land abuts on a right of way, building right up to the edge of his land does not interfere with the right of way. It is of course true that if he leaves the land unbuilt on, it may be that vehicles properly using the right of way may from time to time be able to deviate onto the adjoining land and temporarily trespass upon the land by driving over it, or commit a technical trespass by permitting part of the superstructure of the vehicles to intrude into the airspace over the adjoining land. But they have no right to do so. In the case of dispute, in my judgment, the dominant owner has no cause for complaint if he is restricted in his user of the way to the exact width of the way.*

8. However, as a matter of construction in a particular case, a right of way might include an entitlement to 'swing space'; in *Oliver v Symons* [2012] EWCA Civ 267; [2012] 2 EGLR 9, at paras. [41]-[42], the Court of Appeal said that:

*41. ... That is not to say that it could never be the case that a purposive interpretation of an express grant, having regard to the purpose for which the right was granted, could justify a construction extending the width of a track beyond its physical dimensions. But, in my view, before the court could consider this possibility there would need to be cogent evidence that a narrower construction, concentrating on the physical features of the land, would not achieve the objective which the parties must have intended. In this case there is evidence that some agricultural machinery can use the track without difficulty.*

*42. Further, there is no evidence, for example, that the construction of the judge renders the right of way any less efficacious than it was when originally granted, or that it means that vehicles which then habitually used the track can no longer do so. It seems to me that evidence*

*of that kind would be the minimum required before the submissions of the appellants could hope to gain any traction.*

9. It is also worth noting some other related issues, mentioned in *Gale on Easements* (19th Edition), at paras. 9-108 to 9-117, including that - at least, subject to any matters of construction affecting the same - a right of way (i) does carry a right to have the way unobstructed vertically to such height as is reasonable, but (ii) may not carry a right to have visibility splays at the junction between the way and a highway.

10. Returning to the guidance that might be applied when construing grants of rights of way with regard to vehicles driving over verges at the sides of the way in order to turn on or off the same: in *Oliver v Symons*, at paras. [43]-[44], the Court of Appeal dealt with an argument about this - referring to it as 'verge space' - and said as follows:

    *43. ... The argument was that it is inevitable that there will be some situations where the wheels will swing onto the grass verge, and that this must have been the case at the time of grant. I would accept that if this could be established in fact, there would be a powerful case for saying that the parties must have intended that the right should, at the points where the swing was inevitable, include the track made by the wheels of the vehicles.*

    *44. However, it seems to me that there are two difficulties with this submission. The first is that if the vehicles regularly widened the track in this way, one would expect to see that reflected in the worn track itself, which identifies the contours of the right of way. In other words, the physical features on the ground would already have allowed for swings of this nature. But even if it is said that the vehicles are used too infrequently to mark out the track in that way, there would need to be evidence before the court that this was a practical problem, identifying precisely at what points on the track the difficulties arose and how much verge would be required. That may justify a widening of the right of way at those points. There was no such evidence before the judge...*

11. In *Oliver v Symons*, as there was none of the requisite evidence, the finding that the right of way in that case did not include 'verge space' was upheld.

12. In the case in which I was involved, there were various factors affecting the construction of the right of way, including the wording of the grant, the plan attached to it, the physical features on the ground and so on; however, the judge accepted that there was evidence that before the grant was made larger vehicles had to drive and actually had driven on the un-tarmaced area in order to turn into and out of the gateway, and this was crucial in his ultimate decision that the right of way included an entitlement to do so.

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