

Rebutting Prescription-Consent or Force Needs Positive Proof

Howard Smith appeared on behalf of Mr. and Mrs Welford in the recent case of **WELFORD v GRAHAM [2017] UKUT 297 (TCC)** dealing with the burden of proof in a claim to an easement by prescription.

In summary, the Upper Tribunal decided that, once a person claiming an easement proves open use for upwards of 20 years, the court will assume that use was without consent and without force unless the person opposing the easement adduces some evidence to the contrary.

The claimants, Mr & Mrs Welford, claimed a vehicular right of way over a yard belonging to the defendants, Mr & Mrs Graham. The claim to an easement was based on prescription under the doctrine of lost modern grant (a claim under the Prescription Act 1832 was not available because the use had not been exercised for more than a year prior to the claim). The claimants applied to the Land Registry for registration of a prescriptive right of way, which was resisted by the defendants. The dispute was referred to the First Tier Tribunal, Property Chamber (Land Registration) and heard by Judge Elizabeth Cooke.

Neither the claimants nor the defendants had direct knowledge of vehicular use over the yard, but the claimants called evidence which demonstrated vehicular access over the yard from about the early 1960s until about 2012. The claimants also adduced evidence from a former owner of the yard who gave evidence that, during his 10-year ownership, he had never given permission for vehicular use.

Judge Cooke, in the First Tier Tribunal, held that a claim to a right of way by prescription must establish user as of right, ie user must be *nec vi* (without force), *nec clam* (openly), and *nec precario* (without licence or consent), and that the burden of proof was on the claimants. She concluded that the claimants had proved open use for upwards of 20 years, but they had not proved user as of right over the same period because the only evidence that user was without permission related to a period of 10 years. Since the burden of proof was on the claimants to prove user without consent for 20 years, the claim failed.

The claimants appealed to the Upper Tribunal (Morgan J). Morgan J concluded that once a person claiming a right by prescription has established open user for upwards of 20 years, the defendant has the burden of adducing some evidence to show that use was not as of right (with consent or by force). If such evidence is adduced, the court will decide the issue on the balance of probabilities. In the instant case, the defendants had not adduced any evidence to show that the user was not by consent or by force, and so the claimants had discharged the legal burden of proving user as of right for upwards of 20 years. The appeal was allowed.



Radcliffe Chambers

Howard Smith
Radcliffe Chambers
11 New Square
Lincoln's Inn
London
WC2A 3QB

