

## **Modern right of way**

### **The Message:**

Open, unforced use of a road for 20 years without the owner's consent can establish a legal right.

### **The Case:**

In *London Tara Hotel Limited v Kensington Close Hotel Limited* [1 November 2010], a London hotel was able to rely on an antiquated legal doctrine to allow it to use a road for deliveries to the hotel.

The Copthorne Tara Hotel ("CTH") and the Kensington Close Hotel ("KCH") were in dispute over whether KCH had a right to use a private service road belonging to CTH. Crucial to the outcome was a 1973 licence between the then owner of the site of the CTH and a previous owner of KCH. The licence allowed the previous owner to use the road to pass to and from KCH but, importantly, did not benefit successor owners of KCH.

From 1973 onwards, the road was used, daily, by commercial vehicles and coaches for deliveries to KCH. However, in 1980, the company benefiting from the licence ceased to own KCH and, therefore, KCH's use of the road was not pursuant to the licence.

In 2007, CTH informed KCH that it had no right of access over the road, its use of which should immediately stop. CTH sought an injunction to restrain KCH from trespassing on the road and also damages.

KCH argued that it had acquired an easement over the road by prescription based on at least 20 years' continuous use. It sought to rely on the doctrine of "lost modern grant", which enables a legal right to be founded where the 20 years' use has expired prior to the bringing of the relevant proceedings. The 20 years' use itself has to be "not by force, nor stealth, nor the licence of the owner".

The High Court found for KCH. It stated that KCH's use of the road was not by force, or contentious. As to whether CTH licensed the use (which would have stopped the easement arising), CTH argued that the use was with its implied licence. This was because the character of the use was, effectively, a continuation of the use pursuant to the 1973 licence, albeit the licence no longer applied. CTH never appreciated that the licence was personal and it might come to an end if ownership of KCH changed.

The Court considered that for a licence to be implied, there must be some positive, overt act by CTH and mere inactivity will not suffice. The fact that a carefully drafted personal licence was granted to a particular licensee in 1973 could not be seen as a positive act evidencing an implied licence from a different owner of CTH for use by a party not within the terms of the original licence. There was no other positive act on which CTH could rely. It failed to demand £1 a year payable under the licence, which would have established an implied licence and prevented the prescriptive right.

The Court also determined that the use was not by stealth. Enjoyment will not be by stealth if it is of such a character that an ordinary owner of land, diligent in the protection of his interests, would

have a reasonable opportunity of becoming aware of it. Although the changes in KCH's ownership may not have been obvious, CTH could have made enquiries of KCH's management over who owned KCH and, therefore, whether the licence continued, but it failed to do so. The right was exercised openly and continuously, for all at CTH to see. All of this, objectively, led to the inference of CTH's acquiescence such as to establish the prescriptive right.

Therefore, KCH's use, that was not by force, nor with CTH's licence, nor by stealth, was sufficient to establish a prescriptive right based on 20 years' use and commercial vehicles and coaches could use the road to access KCH.