



**PROPERTY  
LITIGATION  
ASSOCIATION**

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### **Out of time**

#### **The Message:**

A warning to check old rights of way are still valid.

#### **The Case:**

Magrath v Parkside Hotels Limited [3 February 2011] highlights that a right of way, granted many years ago, may have been invalidated by arcane legal rules.

The case concerned a dispute about the continued existence and extent of a fire escape easement entered into between neighbouring owners in Marylebone in 1947. By the relevant deed, a Mr Jacobs, who owned a house, and Shalimar Catering Co Ltd, who owned a neighbouring hotel, granted each other a mutual right of fire escape over each other's properties. There were also mutual ancillary rights to renew the staircases over which any fire escape right may exist or "hereafter exist hereunder" and to alter existing staircases and erect new ones. The deed was duly registered on the relevant title to Jacobs' land at the Land Registry.

In 1947, there was a ladder and a single metal catwalk at first floor level at the rear of the hotel, which extended to the rear of Jacobs' house, providing access between the two properties. This catwalk was probably used as the escape route. In 1966, the hotel was extended as a result of which the party wall between the two properties was raised, so that the original catwalk was blocked off.

A new catwalk was created by the owners of the hotel at mezzanine level giving access to the hotel's flat roof and to the neighbouring house. Subsequently, successful discussions took place between the owners of the hotel and the house to ensure that a workable escape route was maintained.

In 2002, Mr Magrath, a solicitor, was registered as the owner of the house. Relations deteriorated between Magrath and Parkside Hotels Limited, who had become the hotel owners, after Parkside's agents wrote an unfortunate letter seeking to impose unreasonable requirements on Magrath in relation to provision and maintenance of an escape route. This in time led to proceedings by which Magrath denied the existence of any right to fire escape at all.

Magrath's application was for summary judgment, seeking a declaration that the 1947 easement was void and unenforceable. This was because the purported grant in the easement of a right to

renew, erect and use new staircases creating new access points, which did not exist in 1947, fell foul of the "rule against perpetuities", because it was not limited to take effect within the common law perpetuity period (generally, "a life or lives in being plus 21 years").

The High Court decided in favour of Magrath. There were no 1947 staircases remaining capable of giving access from the hotel to the house. The catwalk at mezzanine level did not exist in 1947. The rule against perpetuities can apply to the grant of an easement. According to the common law rule, where the grant is not immediate, but is of an easement which arises at an uncertain date in the future, it is void unless it is limited to take effect only within the common law perpetuity period. It was not limited in that way here.

Examples of where problems may arise include a right of way over a road which has yet to be constructed, a right to drainage through pipes to be constructed in the future, as well as the present case of a right to erect new staircases of a scale and in places undreamed of in 1947.

Concerns about the perpetuities rule lessen for easements taking effect on or after 16 July 1964 – in that situation, the parties "wait and see" if the easement takes effect within the relevant perpetuities period and if it does, it is not void. The perpetuities rule has been abolished for easements taking effect on or after 6 April 2010. However, potential problems remain, in particular, for easements taking effect before 16 July 1964.