

**WHEN DOES THE CLOCK STOP TICKING?
IMPLIED CONSENT IN THE LAW OF PRESCRIPTIVE
EASEMENTS AND ADVERSE POSSESSION**

by

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1. The law of prescriptive easements particularly, but also the law relating to the acquisition of title by adverse possession is by common consent a complicated mess. When our clients purchase land it is natural for them to want a clear explanation from us as to what their rights – and those of adjoining owners – are in relation to their plot. We can rarely give straightforward answers except in the simplest of cases. That is good news for PLA members – our clients need expert assistance to answer what should be completely straightforward questions, such as:
 - (1) when I buy this land, which has no express easement, do I have rights of way over adjoining land, if so, how extensive are my rights over (say) the roadway on adjoining land? Will I be able to develop my land using the adjoining owner's roadway?
 - (2) can I stop the adjoining owner, who has no express rights over my land, from using it?
 - (3) has the adjoining owner any acquired rights over a bit of my land because my predecessor kindly let him use it some 10 (or 12) or more years ago? If so what is the nature of his right – is it a right to use or is it ownership?

2. These are examples of apparently straightforward questions we are asked on a daily basis. It must come as a constant surprise to our clients that our answers are invariably complicated, full of caveats – and most often equivocal, given that in answering the above and many similar questions, so much often depends on oral evidence from ancient witnesses – most of whom will not even have been identified when the client first asks the question.

3. It seems unlikely that these complicating features of adverse possession and easement law will change anytime soon – despite the Law Commission Report: ***Making Land Work: Easements, Covenants and Profits a Prendre*** (published June 2011) which features the idea of a statutory form of prescriptive easement. The Report's aim is to simplify the law. However delegates should rest assured that the specific problems and difficulties that I refer to below will still persist even if these new proposals are some day implemented.

Thus the report concludes, for example:

'4.162 We have recommended that the new statutory form of prescription should require a right to have been enjoyed without force, without stealth and without permission; these are substantively the same elements as are required to establish a prescriptive claim at present.'

The Report further concludes that the 20 year user requirement for prescription is *'about right'*.

4. I intend to focus one of the specific and simple questions that clients frequently ask along the lines of: 'my neighbour says that years ago my predecessor was given an express permission to (say) use this way over the neighbour's land, or (say) open out a window overlooking the adjoining owner's land. The neighbour says that permission has now terminated. Have I acquired an indefeasible right which the neighbour cannot now terminate,

or, is my use still permissive¹? (A similar question is often asked in the adverse possession context: I let my neighbour use my yard years ago, as I had no use for it, the neighbour's successor carried on that use – can the successor now claim title by adverse possession against me?)

5. Looking at the above question the uninformed would understandably think that the basic legal principles and case law involved in answering these two questions (one raising the question of prescriptive easements and the other, adverse possession) ought to be easy to explain. So although there are always going to be factual issues about the nature of the permission, particularly if it is oral:- who said what to when and whom etc (i.e. the actual meaning of the express permission) nevertheless one would think the basic approach to answering either question, once the nature of the permission is found, ought to be easy. But we know that it is not.
6. We know this because the 'implied consent' issue has troubled the higher Courts repeatedly in recent years in both the easement and adverse possession context – as we shall see in the review of case law below.
7. In order to consider the answer and the (perhaps) different approaches that the court has taken to the implied consent question, we need first to consider the different ways in which our law of *prescriptive easements* and *adverse possession* have developed. So, first, by way of reminder, a little bit of history.

(1) Adverse Possession

8. In order to start time running under the Limitation Act 1980 (or the Land Registration Act 2002) the squatter's possession must be adverse to the paper title owner's interest. So at any time when an occupier has **permission** from the landowner to occupy land, the 12 year limitation period (10 years if we are considering the LRA 2002) will not run. Naturally therefore our client faced with a claim for adverse possession who is casting around for any defences to the claim will want to scrutinise the question of whether a permission during the relevant period can be found and so stop the limitation clock running. As we all know, possession under a licence for example is not adverse².
9. Permission of the licence kind can take 2 forms: express or implied; and it is in relation to the latter that significant difficulties can arise.
10. One specific rule that applies to implied licences in the context of adverse possession (provided in sched. 1 para 8(4) of the Limitation Act 1980) must be noted. It effectively provides that where a person is occupying land in circumstances where his occupation '*is not inconsistent with the paper owner's present or future enjoyment of the land*' a licence cannot be assumed by implication of law merely by virtue of that fact. However the section also

¹ I can illustrate one of the problems with a photograph from a recent set of papers. (see Slide 1). The 1981 letter reads: '*by the construction of this window I shall not acquire or claim any rights to light*'.

² '*...time can never run in favour of a person who occupies...by licence of the owner of the paper title and whose licence has not been duly determined, because no right of action to recover the land has ever accrued against the owner, consequently such a person has no adverse possession however long his use or possession may have lasted*' per Slade J in **Powell v Mc Farlane** (1977)

adds that where the facts support a finding of implied permission – if it is otherwise justified on the facts, then such permission can be found so as to stop the clock running.

(2) Prescriptive Easements

11. In the case of adverse possession, the right to *recover possession* of an estate is barred by adverse possession.
12. With prescription, the right to use and enjoy an estate *in a particular way* is barred. Prescription bars the estate owner's rights to complain about trespasses and nuisances etc.
13. Both of these rules are therefore designed to limit the amount of 'history' that can be or needs to be proved to show 'title' to an estate/right. The main difference between the two is that adverse possession is the means by which the entire ownership of the estate is extinguished whereas with prescription the focus is on the acquisition of lesser rights – not thus affecting the ownership of the estate itself.
14. The other essential difference is that adverse possession works as a matter of *substantive law* – by extinguishing the claim to title of those who have not in fact enjoyed the estate in recent years (i.e. by preventing a claim being brought under the Limitation Acts). On the other hand, prescription is a rule of *evidence*. Although it starts from the premise that (as with adverse possession) long use is the evidential foundation from which the court concludes that the use began with a lawful grant made some time in the past by the then owner of the estate, the rule then shifts the evidential burden of rebutting the presumption – to the current owner of the estate. Unlike adverse possession therefore it does not bar the estate owner's claim to take free of the interest as a matter of substantive law.

Essential Differences

15. Prescription is about proving by evidence, a lawful grant – adverse possession is about providing enough evidence to prove a title – but not a lawful one.
16. Adverse possession is not about the fiction of a grant (contrast adverse possession in Scottish law) but about limitation of actions: that is, extinguishing the paper owner's right to recover the land.
17. Thus it is the difference between: acquiring title by possession as of right (prescription) and acquiring title by possession as of wrong (adverse possession). This different approach of the doctrines explains why you can acquire a title by adverse possession by force, by trick or, secretly; whereas prescriptive rights emphatically cannot be acquired in that manner.
18. These conceptual differences explain some of the ways in which these two distinct doctrines of land law have developed differently. They do not however explain some of the more obvious anomalies. For example the familiar one concerning different time periods for obtaining the respective 'rights' is illustrated by the following well known conundrum: a client adversely possesses part of an (unregistered) building for 12 years and gains title; however

he has to wait another 8 years to gain any prescriptive easement over the rest – because of the need for 20 years user. So for 8 years he owns the building without rights of access and (e.g.) support³.

19. These differences are familiar to us all. But the similarities of the doctrines of adverse possession and prescriptive easements are particularly apparent when the question of implied permission is raised. On this distinct topic, as recent cases show, there has been a convergence of the doctrines.

IMPLIED PERMISSION IN RELATION TO PRESCRIPTIVE EASEMENTS – PROBLEMS AND ISSUES

20. We are thus all familiar with the requirements of proving a prescriptive easement (whether under the Prescription Act 1832 or at common law). The use relied on must be '*nec vi nec clam nec precario*⁴': without force, secrecy or by virtue of a permission. It is the latter that I shall concentrate on: what does permission mean? What needs to be proved to show that a permission exists?
21. If acting for a client resisting a claim for a prescriptive easement the first questions we ask will often centre on the 'precario' requirement. In some cases the client will make reference to an express licence granted to the claimant of a prescriptive right, or, to a claimant's predecessor during the relevant period – and clearly if the servient owner is able to prove that the express licence still exists or, that it existed for a sufficient time during the relevant 20 year period, then the prescription clock stops. Equally if the servient owner can show that the licence has been repeatedly renewed: each renewal of the licence will have rebutted the presumption that would otherwise arise that such enjoyment was had under a claim of right to the easement⁵.
22. Rarely however is it as simple as that. The essence of a contractual or gratuitous licence is that it is personal to the grantor and grantee. The first thing we learn as land lawyers is that (subject to a few odd exceptions) land licences create personal rights only. Thus when the grantor's or grantee's land is transferred or the grantor or grantee dies, the personal permission terminates.
23. Very often in this circumstance the 'prescriptive' use – e.g. use of a right of way will continue as before when the new dominant owners take possession of their land. In what circumstances can the servient owner (seeking to resist a prescriptive claim) still successfully assert, against the successor dominant owner, that the permission is an implied permission?

³ Interestingly this point was touched on by the Law Commission in their report – but no legislative changes are proposed to deal with the point. The anomaly will therefore remain.

⁴ Precarious means: 'That which depends not on right but the will of another person' per Farwell J: ***Burrows v Lang*** [1901] 2 Ch 502 @ 510.

⁵ ***Monmouthshire Canal Co v Harford*** (1834) 1 CM & R 614

24. This is a question that has bedevilled the courts recently, both in the prescriptive easement and the adverse possession context. (It is at the heart of the dispute in the photograph – slide 1).

Basic Points about Permissions

25. First: some basic points:
- (1) It is a question of fact as to whether a licence can be shown.
 - (2) Permission can be express, implied or inferred.
 - (3) There is *'no reason in principle why in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances'* (per Lord Rodger in **R (Beresford) v Sunderland City Council** [2004] 1 AC 889 @ 908.
 - (4) There is a *'real difference'* between permission on the one hand and mere non-objection and acquiescence on the other⁶ - **acquiescence** being the foundation of the law of prescription, it is thus the antithesis of permission. So if one acquiesces, rights are acquired, if one permits, rights are not acquired.
26. How then does the Court go about deciding whether in any particular factual scenario the servient owner can show that an implied or inferred permission exists, rather than acquiescence?
27. So far as giving of implied permission is concerned, one is looking at the ordinary contractual tests for the implication of a consensual arrangement – so it must be a necessary implication from all the circumstances. Greater difficulties do arise however when one is considering the requirements necessary for inferring that a grant of permission has been made.

Test for Implied (or Inferred) Grant of Permission.

28. The approach of the court and the difficulties involved in determining whether an implied or inferred licence can rescue the servient owner are illustrated by the recent case: **London Tara Hotel Limited v Kensington Close Hotel Limited** [2010] EWHC 2749 (Ch). (The case has just been heard in the CA – judgment awaited).

Tara – the facts⁷

29. The dispute between two hotels involved the right of one (KCH) to use a private service road of the other (Tara). Tara sought to restrain use by KCH of the service road which was on its (Tara's) land. The road had been used by KCH's predecessor, KCL, under a 1973 licence which was from year to year at a cost of £1 per annum – but, (unknown to Tara) in 1980, KCL ceased to be owner, and a connected company, KCH, took over ownership and continued using the road as before. The transmission of ownership and use of the way was seamless and it was not suggested by KCH that Tara was told or ought to have known that ownership had changed hands. Little thought was given by either party in the years after 1980 as to the legal nature of KCH's right. Indeed neither party had particular reason to do so as the arrangement was an entirely co-operative and mutual one. Indeed it was a

⁶ Briggs J in **Hicks Developments Ltd v Chaplin** [2007] EWHC 141 (Ch)

⁷ They are necessarily simplified –see the full judgment for all of the details.

tacit commercial relationship – because e.g. coaches were regularly used on the way to drive the overbooked guests of one hotel to the other – and vice versa under a collaborative commercial arrangement.

30. Understandably, at trial the parties agreed that the 1973 licence must have terminated in 1980 upon the change of ownership. However, what Tara (amongst other things) sought to argue was that:

(a) the prescription clock did not start ticking in favour of the new owner's use after 1980 until Tara had actual notice of the conveyance (a date agreed to be in 1996) rather than (as KCH naturally alleged) at the date of the conveyance (1980); and,

(b) that in any event KCH had tacit permission post 1980 to use the road (thus preventing the prescription clock running at all).

31. So far as issue (a) above is concerned the judge found that it was the date of the conveyance that was the relevant date, not the date that notice of it came to Tara's attention.

32. It is in relation to (b) that the case is probably of most interest. The Judge (Roth J) referred to the familiar 'holy triumvirate' of recent cases concerning the acquisition of prescriptive easement rights:

R v Oxfordshire CC CC ex p Sunningwell [2000] 1 AC 335; ***R (Beresford) v Sunderland CC*** [2004] 1 AC 889; ***R (Lewis) v Redcar BC (No 2)*** [2010] 2 WLR 653⁸.

33. The Judge reminded himself first, that in the ***Sunningwell*** case Lord Hoffman had referred to the fact that the '*whole law of prescription and the whole law that governs the presumption or inference of a grant rests on acquiescence...acquiescence and nothing else is the principle upon which these expedients (i.e. the prescription doctrine) rests*'. He next referred to Lord Hoffman's statement in ***Sunningwell*** that: '*the English doctrine of prescription depends on acquiescence by the servient owner, an inquiry into the state of mind of the user of the right of way is irrelevant*'. Finally and crucially Roth J echoed Lord Walker's clearly stated view in ***Beresford*** that: '*...the licence or permission of the servient owner to use his land requires some unequivocal, overt act to that effect on his part if it is to preclude such use being 'as of right'; mere tolerance of the use without objection is not sufficient...*'

.....

'...implied permission could defeat a claim to user as of right...I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting title by the occasional closure of the land to all-comers.'

34. It was principally on this basis that the Judge found in ***Tara*** that a prescriptive right was made out in KCH's favour. Tara had never enforced the £1 licence fee arrangement after the licence expired on the transfer of the dominant

⁸ All 3 cases concerned the registration of village greens under statute – but the terms of the statute incorporate concepts drawn directly from the law on prescription.

title, nor had it raised objection to KCH's use. This of course was unsurprising, given that presumably Tara – if it had given thought to the matter at the time – would have assumed that a licence existed, but that it was simply not bothered about collecting the token fee.

Potential Problems raised by the *Tara* Decision

35. *Tara* has been heard in the Court of Appeal – judgment awaited. Whilst perhaps an understandable decision on its facts – which may mean the appeal will not succeed, it seems to me that the case does expose some of the possibly overlooked difficulties in the test for implied (or inferred) consent as laid down authoritatively in the *Beresford*, *Sunningwell* and *Redcar* cases. These three village green cases were miles away, factually, from the situation in, and commercially co-operative context of, *Tara* and it is possible that this influenced the way in which statements in *Beresford* regarding implied or inferred permission were made.
36. The 'hardening' attitude of the Courts as regards attempts by servient owners to allege implied permission is apparent from the *Beresford* and *Tara* cases and is reflected in another recent case (*J Alston & Sons Ltd v BOCM Pauls Limited* [2008] EWHC 3310 (Ch) – an adverse possession claim). These cases show that in effect permission albeit implied, must be actual permission. Furthermore such permission must be found as a matter of fact.
37. But is this right or fair, and, where does it leave the idea of an inferred permission? First of all, the courts in all the above cases have presented the question of implied permission by reference to a straightforward dichotomy between 'some positive, overt act' and 'mere inactivity':
'...the fundamental theme running through...*Beresford* (is) that for a licence to be implied there must be some positive, overt act by the servient owner; mere inactivity will not do.' (per Roth J in *Tara* at para 72). Thus the judge in *Tara* concluded that because the only positive overt act was a licence which expired as a matter of law in 1980, the claim to an implied licence stopping the prescription clock from running, failed.
38. Yet as a formulation, this test perhaps ignores reality in the *Tara* and in a host of other commercial and domestic contexts. The parties in *Tara* never gave any thought to the consensual and mutually beneficial nature of their arrangements after 1980 when the licence expired. Not in the least surprising, I would suggest. Furthermore the necessary corollary of the judge's findings is that, until the 20 years had elapsed, the coach drivers of KCH who drove overbooked customers etc to and from Tara under the agreed arrangement were trespassers, not implied invitees of Tara.
39. It is a reasonable to ask, one would have thought: what if someone had told these drivers (or the KCH management at the time) during the 20 year period they were acquiring these rights that they (the drivers) were trespassers? How would they have responded? The answer surely is that they, and KCH, would have been astounded to learn that they were not Tara's implied invitees in the circumstances.

40. But of course we know that it is illegitimate and irrelevant to consider what was in the mind of the dominant owner because as Roth J correctly pointed out:

*'Lord Hoffman accordingly held (in **Sunningwell**) that as the English doctrine of prescription depends on acquiescence by the servient landowner, an inquiry into the state of mind of the user of the right of way is irrelevant.'* (para 47).

Tacit Permission inferred from Conduct?

41. It seems that Roth J's formulation – which I repeat seems to follow the conventional approach adopted in the 'holy triumvirate' of cases above – seems to ignore - in referring to an 'either/or' dichotomy of 'some overt act' or 'mere inactivity' - the possibility of a tacit permission to be inferred from the conduct of the parties. We know that inferred permission is still (theoretically at least) a possibility, because Lord Rodger said so in **Beresford** (see the quote at para 26(3) above).
42. Further, there is some CA authority to support the notion that it is still open to the court to find a tacit inferred permission, though it is possibly of dubious status.
43. **Batsford v Taylor** [2005] EWCA Civ 489 was an adverse possession case. Note that it post-dates **Sunningwell** and **Beresford**. Briefly, a notice to quit was served on a tenant but for reasons of expediency the landlord decided not to pursue possession proceedings and resolved not to take possession whilst the three brother tenants lived there. On the death of the last brother, his son and daughter claimed he had acquired title by adverse possession. The landlord claimed implied licence.
44. The test adopted by the CA in **Batsford** was one which had been laid down by Etherton J in **London Borough of Lambeth v Rumbelow** (2001) in which, as regards an implied licence in an adverse possession context, he emphasised that some 'overt act or demonstrable circumstances' was required from which an inference could be drawn that permission was in fact given – but he also accepted that it was irrelevant whether or not this was actually apparent to the users. (In other words 'demonstrable circumstances' might mean something significantly wider and more nebulous than the 'overt acts' of for example – demanding a nominal licence fee or openly denying access one day a year).
45. In applying the Etherton J **Rumbelow** test the CA found in **Batsford** that:
'although it may not be possible to point to some overt act by the estate from which permission can be inferred, the matters relied on...certainly constitute demonstrable circumstances from which the inference can be made....It is plain that from July 1985...the estate...reluctantly accepted the status quo. Further it is clear that a reasonable person (who must be assumed to have knowledge of the material facts) would have appreciated that Mr Taylor's occupation was with permission of the estate' (per Nourse LJ at para 25).

Different Tests

46. This all seems sensible in the context of the facts of these cases. But there is a clear difference between the tests that the higher courts have been applying. Thus in **Batsford** and other cases the test for implied licence apparently laid down is:
- (1) look for an overt act of the land owner (or, in the easement context, the servient owner) or, some demonstrable circumstance from which the inference can be drawn (but ignore the question of whether the users (dominant owners) were aware of those matters)
- Then:
- (2) consider if a reasonable person would have realised that the user was with the permission of the dominant owner.
47. But in **Beresford** it seems that Lord Walker impliedly disapproved of this formulation of the test when he stated: *'In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim for user as of right...I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner....'*
48. In other words following the **Beresford** case the test for a licence is that there must be a communication in writing, or, by spoken words or overt and unequivocal conduct, that was intended to be understood and was understood as a permission to do something that would otherwise be an act of trespass⁹. In the **Beresford** world, nothing less will do.
49. The **Beresford** formulation thus appears to ignore 'demonstrable circumstances' judged from an objective standpoint. In practice the **Beresford** test appears effectively to exclude the possibility of tacit permission – even in the sort of situation presented in **Tara** – which might be described as a paradigm example of where it ought to be found to apply. (We will have to wait to see what the CA think.) Certainly in my view the less relaxed view of when an implied licence can be found – evident in **Beresford** is apt to create significant difficulties for the servient owner in many ordinary commercial and domestic situations where the issue arises.
50. A final observation on the **Beresford** case is that it is one in an entirely different context from an 'ordinary' residential or commercial situation. **Beresford** is a case where on any basis the circumstances claimed by the council to give rise to an implied licence were of the weakest kind.

⁹ See **Jourdan: Adverse Possession** (2010) para 35-20 onwards for comprehensive discussion of the two formulations.

The State of Mind of the Servient Owner – Issues?

51. As we can see from above, Roth J in **Tara**, following another of the ‘holy triumvirate’ cases: **Sunningwell**, confirmed that the state of mind of the user was irrelevant so far as the existence of an implied licence was concerned; rather it was the acquiescence of the servient owner that was critical.
52. It might be thought that the fact that the servient owner in **Tara** believed the use to be by permission would be enough to displace a finding of acquiescence in the grant of a proprietary right. But following the **Tara** line – that an overt act of unequivocal permission is required - this was irrelevant. Thus one has the slightly odd situation that searching for an ‘overt act of unequivocal permission’ to prevent the user being as of right is never going to occur if the servient owner already believes that a licence exists - especially where a real, written licence did once exist.
53. It could therefore be said that this focus on overt acts of unequivocal permission by the servient owner produces unpredictable results.
54. It is perhaps also of small note that in Scotland (whose law of prescriptive easements is very similar to our own) the position is different: the Courts have long accepted that tacit permission *is* sufficient¹⁰ - and they have done so by reference to an examination of what the state of mind of both the servient and dominant owners were – something which seems almost essential if one is trying to infer the existence of a licence by tacit permission.

Behaviour of Servient Owner as Key – But not His State of Mind?

55. Further the approach that prevailed in **Tara** can be contrasted with the approach taken in the CA in another recent case which may have escaped your notice: **Llewellyn v Lorey** [2011] EWCA Civ 37. It is a case which was decided in the CA largely on facts. The prescriptive claim (commercial use of a way for disposal of waste) failed. It failed largely because the servient owner did not know and was not in a position to know of the use and was thus unable to prevent it. The judgments show that the focus in that case was correctly about the state of mind of the servient owner. The inquiry concerned the question of acquiescence. The focus was thus less on whether the use was objectively without force, secretly or by permission; instead it was all about the state of mind of the servient owner.
56. Yet of course **Tara** tells us that the state of mind of the servient owner – in the sense of whether he did or did not believe that KCH’s use of the way was permissive – is irrelevant.
57. It seems therefore that the need to analyse the law in terms of acquiescence means that much can turn on the way the court views (subjectively) the behaviour of the servient owner.

¹⁰ **McGregor v Crieff Co-operative Society Ltd** (1915 SC (HL) 93).

58. On the other hand perhaps the **Tara** and **Llewellyn** cases are simply examples of the Court reaching the 'right' result by manipulating the acquiescence touchstone. Certainly in my view no one could argue with the end result in either case, on their particular facts.

Conclusions

59. We can conclude as follows:
- It is harder now for the servient owner (or paper title holder in the adverse possession context) to stop the prescription/limitation clock running by reference to an implied or inferred licence
 - Although there is yet no definitive authority, the favoured view must be that the test is one of looking at overt conduct of the servient owner only – such that nothing short of acts such as charging for or occasionally blocking use of the way will do from which a licence is necessarily implied
 - The focus is on the state of mind of the servient owner – what the dominant owner does or does not believe is irrelevant
 - It is very unclear whether tacit permission has any role to play now in the implied or inferred licence context – because the evidence must unequivocally point to the implication of a licence
 - But, it is currently open to the servient owner to at least argue for the **Batsford** type test to apply: overt acts or demonstrable circumstances – the latter judged objectively from the standpoint of the reasonable landowner.

Unilateral Licences

60. Finally, and tangentially, where are we now with unilateral licences? In other words what is the effect of the servient owner, aware of the dangers of the ticking prescription clock unilaterally telling the dominant owner that his use is by permission only?
61. In the adverse possession context it would seem that this is still an effective way to prevent the limitation clock running¹¹ and the same is true in the prescription context¹². Whilst the rule has been the subject of academic criticism¹³ it seems that it is still open to the servient owner to grant a unilateral permission during the prescription period. Provided it is not 'denounced' by the dominant owner it will remain effective to stop the prescription clock, because: '*acting on leave volunteered is as much acceptance of it as if it had been asked for in the first place*'¹⁴.
62. Perhaps the unilateral licence is the remaining and slender piece of comfort for servient owners seeking to resist prescriptive easement claims on the basis that use is by permission.

¹¹ **BP Properties v Buckler** (1987) 55 P & CR 337

¹² **Odey v Barber** [2008] Ch 175

¹³ see 1994 (Conv) 196 per Prof H Wallace for criticism

¹⁴ **O'Mara v Gascoigne** (1996) 9 BPR 16,349