

Landowners beware!

Outdated licences may leave you exposed to prescriptive rights claims

What are prescriptive rights? In short, where a landowner can prove at least 20 years uninterrupted access over neighbouring land, then the landowner will obtain a right of way over that land, for the benefit of his land. The use of the access must be (i) open, ie not concealed, (ii) enjoyed without force and (iii) without permission.

Delivering judgment in the recent case of *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011], the Master of the Rolls said of the Prescription Act, 1832, that "its survival on the statute book for over 175 years provides some support for the adage that only the good die young". This thorny issue is still routinely coming before the courts and remains a problem.

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Agreements between neighbouring landowners (often farmers), permitting access over each others' land for mutual benefit and convenience, are commonplace. Such arrangements often work perfectly well in practice and typically are very longstanding. In the majority of cases, a landowner will simply grant permission for that use by means of a licence.

This will only bind the parties to it and last for as long as the document provides. The case of *London Tara Hotel* is a cautionary tale of what can happen when landowners rest on their laurels and allow historic licences to lapse.

The facts of *London Tara Hotel*:

In 1973 Tara Hotel granted a licence to Kensington Close Limited, as owners of the neighbouring KC Hotel, to use a roadway between their respective hotels, in exchange for an annual payment of £1. This sum was never demanded and in the intervening years, the KC Hotel changed hands several times. The use of the roadway by the subsequent owners of the KC Hotel nevertheless continued until 2006, when the issue of whether they had obtained a prescriptive right over the roadway came into dispute. The appeal court

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unanimously upheld the first instance decision, that the KC Hotel was entitled to the benefit of a prescriptive right over the roadway.

A few practical points:

1. Landowners should take care to define the terms of use permitted by the licences they grant. Where a licence is drafted restrictively, but over time a wider use is tolerated, a prescriptive right may arise.
2. Where a licence is expressed to be personal between the parties, any subsequent owner will not be bound and the continued use of the access by them can give rise to prescriptive rights. That the grantor is unaware of the change of ownership will not stop the clock on prescriptive rights running. Failure to advise of the change of ownership will not be enough to make a licence binding against a subsequent owner. Indeed, the knowledge of the parties is an irrelevant consideration for the purposes of establishing use "as of right".
3. The courts expect a landowner to "diligently protect his own interests". Collecting sums due under a licence regularly and checking the ownership of the grantee's land periodically, should bring issues to light.
4. Deliberate concealment of a change in ownership, however, for the purposes of asserting a right in prescription, may, in some circumstances, make the use surreptitious, and not capable of establishing a right.
5. The scope of a prescriptive right, if proved, will routinely be quite broad. Without evidence to the contrary, the right acquired is "a right of way for all purposes according to the ordinary and reasonable use to which the land might be applied at the time of the supposed grant." *Williams v James* (1867).

Landowners are advised to review, at regular intervals, the use of their land by third parties and the terms of any licences they, or their predecessors, may have granted.

Should you wish to discuss anything arising out of this article, please contact Tamsin Hyland on 01865 781 185, or email tamsin.hyland@henmansllp.co.uk.



The horse box: helmets and horse riding

The law on the wearing of protective headgear for horse-riders has been relatively slow to develop when compared, for example, to the requirement for cyclists to wear helmets and for passengers to wear seatbelts in cars.

By 1991 it was compulsory for all passengers to wear seatbelts, and accordingly, there are several instances in which passenger claimants whose injuries were partially caused by their own failure to wear a seat belt have seen their damages reduced.

In *Smith v Finch* [2009] a claimant cyclist, who, contrary to guidance in the Highway Code, had elected not to wear a helmet, suffered severe head injuries when he was struck by the defendant's motorbike. The court held that whilst the claimant could be criticised for his decision not to wear a helmet, there should be no reduction in damages for contributory negligence as the impact of the collision was so severe that he would have suffered the same injury in any event. What is clear from this decision is the potential for a finding of contributory negligence in different circumstances, against a claimant electing not to wear protective headgear, contrary to recommended guidance and general practice.

The Horses (Protective Headgear for Young Riders) Act 1990, makes it a criminal offence to cause or permit anyone under the age of 14 to ride a horse on a road without protective headgear. That headgear must meet the safety standards provided in the Horses (Protective Headgear for Young Riders) Regulations 1992. This requirement does not, however, extend to horse riders above the age of 14. As for cyclists, Rule 49 of the Highway Code does recommend

that horse riders wear protective headgear, but there is no mandatory requirement.

The recent case of *Bodey v Hall* [2011] dealt with a passenger on a horse-drawn trap, rather than on horseback. The claimant, who was thrown whilst travelling as a groom, was not wearing a helmet at the time. The trial judge commented specifically on the issue of whether she ought to be criticised for not wearing a helmet. The court did not go as far as to make a finding of contributory negligence, and so reduce her damages. Key to its decision was the fact that there are no obligations or published guidance that drivers or grooms (as opposed to riders) ought to wear protective headgear. Further, there was inconclusive evidence of it being general practice amongst those driving horses always to wear a helmet.

The safety implications of riding without a hat mean that most, if not all, riders will always wear a properly-fitted hat. Whether a rider involved in an accident, who failed to do so, would be held by a court to have contributed to their injuries remains to be seen. Each case would no doubt be judged on its facts, but given the above recent decisions, recommended guidance and the body of evidence that it is now common practice to do so, there is a good prospect that they would be.

If you would like to discuss any issues arising from this article please contact Esther Stirling on esther.stirling@henmansllp.co.uk.

Article written by Thomas Hallett, solicitor.

Equine events

Following our recent debate on the Use of the Whip in Horseracing, Henmans Rural invite you to join us at two events in the New Year.

Both events will take place at our offices, where there is ample free parking, and refreshments will be provided. Places are limited so please email seminars@henmansllp.co.uk or contact Lucy Habgood on 01865 781000 to reserve your place.

1 March 2012, 6.30pm - 9.30pm:

Cheltenham preview evening, with a panel of experts. There will be a charge of £15.

12 June 2012, 6.00pm - 9.00pm:

Equine seminar 'Buying and selling horses - avoiding and handling claims'.

There is no charge for attending.

Meet the team

Rupert Burchett joined the agricultural team at Henmans upon qualification as a solicitor in August 2011. He assists the team in advising farmers and landowners on a full range of agricultural and property matters.

Rupert has a keen interest in rural affairs and country pursuits, and lives in Oxfordshire with his new wife. He is Joint Master and huntsman of one of the local packs, and is normally to be found at weekends jogging about in the North Oxfordshire countryside with his hounds.

To contact Rupert please email him on rupert.burchett@henmansllp.co.uk or telephone on 01865 781 142.

