

## Relying on Long-Term Prescriptive Use: A Hidden Risk

Russell-Cooke LLP and Barrister Tim Dutton recently acted for the appellants in *Housden v Conservators of Wimbledon etc. Commons* [2008] EWCA Civ 200 in which the Court of Appeal considered rights of prescription over common land. The Conservators were set up by the Wimbledon and Putney Commons Act 1871 (1871 Act) to manage the Commons. The appellants' home is bounded on one side by a highway which itself bounds part of the Commons. To get from the highway to their home they have to cross a thin verge that forms part of the Commons.

The appellants applied to have a right of way registered over this verge. Their house has been on the site since the 1880's and this is the only way into their property. Their application was based on long use. Two issues were before the Court: (1) is an easement based on 40 years' use founded on consent? (2) if so, does the 1871 Act disable the Conservators from granting easements such as rights of way?

At common law, easements are based on consent (real or implied). Therefore, owners of land subject to easements must be legally capable of giving consent when the alleged right arises. The Court considered whether the 40-year user period in Section 2 of the Prescription Act 1832 (1832 Act) created a new species of easement based solely on time. The Court reluctantly found it was bound by a previous decision of the House of Lords. Accordingly, the 40-year long user period was based on consent and could not by itself establish an easement over land owned by a body with no power voluntarily to grant such rights. The Court, however, found for the appellants on the 1871 Act point. The Conservators were not statute-barred from granting easements and the 40-year use was effective. The case reminds us of the importance of considering the legal basis of access to property.

It cannot be assumed that 40 years of use renders the access right unchallengeable without closer consideration of the capacity of the landowner. The Law Commission is currently reviewing the law on easements and it is hoped that the 1832 Act will be simplified to enable long-user to be sufficient without further enquiry.

For further information, please contact:

**David Stockley**

Solicitor

020 7440 4810

[David.Stockley@russellcooke.co.uk](mailto:David.Stockley@russellcooke.co.uk)

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