

## Chapter 19: Prescription for easements (and profits)

### Assessment question

**1** Last month Finnegan, owner of Blackacre and Whiteacre, two neighbouring farms, sold and conveyed Blackacre to Milligan. The conveyance contained no provision relating to easements and profits.

Advise Milligan regarding the following:

- (a) The only direct access to Blackacre is a narrow footpath insufficiently wide to accommodate motor traffic. Milligan wishes to make use of the private driveway which runs from Blackacre through Whiteacre and leads into the adjoining public highway.
- (b) Some drains run from Blackacre under Whiteacre. Milligan wishes to make use of those drains.
- (c) Cyrus, the owner of Redacre, an adjoining farm, claims that he can continue to graze his sheep on a hillside forming part of Blackacre where sheep from Redacre have been grazed 'as long as anyone can remember'.

**2** In 1997, Louise acquired the freehold to Grand House. Grand House adjoins West Field, the freehold to which was then owned by Nellie. Over the years Nellie has leased West Field to Olive for short periods.

On acquiring Grand House, Louise immediately leased it to Terry for 70 years. Soon after taking the lease, Terry started to pasture the five sheep he owned in West Field, and to take a short cut across West Field to get to the nearest station. He continued both of these activities until September 2019, without any objection from Nellie or Olive.

In September 2019, Gurinder acquired the freehold to West Field from Nellie, and immediately ordered Terry not to make any further use of West Field. Initially Terry complied with this demand, but now both he and Louise are threatening legal action.

It is now January 2020.

Advise Gurinder.

### Specimen answer

For reasons which will emerge, there is no need to treat the claims of Louise and Terry separately. Louise will claim that a prescriptive easement of way and a prescriptive profit of pasture have been acquired over West Field, and that those rights are 'appurtenant' to the freehold in Grand House. Terry will claim that, as current Tenant of Grand House, he is automatically entitled to the benefit of those rights appurtenant to Grand House.

There are two stages to the establishing of a claim for a prescriptive easement or profit. Firstly, the dominant owner must show that certain general rules common to all three forms of Prescription are satisfied. Secondly, he/she must show that the 'user as of right' satisfies the rules specific to one of the three forms of prescription.

#### **The General Rules**

Louise and Terry will firstly have to show that there has been continuous user as of right, i.e. open user without permission from the servient owner and without force or dispute in any form. For user to be 'open' it must be such as would indicate to a reasonable servient owner that a right was being exercised (*Lloyds Bank v Dalton*). The grazing was obviously 'open', as presumably was the crossing the field to get to the station, unless Terry only used the short cut at night-time, which is highly unlikely.

We are told that user was 'without any objection', so there is no question of 'forcible user'. Gurinder's only hope under the 'user as of right' heading would be to prove that Nellie gave express permission to Terry for his

activities. An oral permission would be sufficient, but it must be stressed that mere acquiescence in the prescriber's activities, which seems to be the case here, does not equal permission.

Louise and Terry must also satisfy the general rule that user be 'by or on behalf of a fee simple against a fee simple'. A prescriptive easement is always in fee simple, and is (theoretically) a grant from the servient freeholder to the dominant freeholder.

The application of this rule has two aspects. Firstly, any prescriptive user by a lessee such as Terry is deemed to be as agent for his landlord. Thus Terry could not have prescribed against land owned by Louise, but any prescriptive right which he establishes against a third party, such as Nellie, is appurtenant to her freehold, though he gets the benefit for the 70 years of his lease. Secondly, user as of right to be prescriptive must usually commence against a freeholder in physical possession. Thus if the commencement of the grazing and the 'short cutting' was during one of the 'short periods' when Nellie had let the field to Olive, Gurinder may be able to defeat the claims for prescriptive rights.

### **The Forms of Prescription**

Assuming that Gurinder is unable to defeat the prescriptive rights under the general rules just discussed, Terry and Louise will invoke the Prescription Act 1832 for the (alleged) right of way, and lost modern grant for the profit of grazing. (Any claim under the third form of prescription, common law, is bound to fail as user obviously commenced, long after 1189.) Under the Prescription Act 1832, Louise and Terry will have to show user as of right for twenty years 'next before action'. Accordingly, their claim will succeed despite the fact that for about seven months Terry complied with the demand not to exercise his 'rights'. Provided Louise and Terry issue their writ before the break in user has lasted one year, they should win.

Section 4 of the 1832 Act requires the user to be 'next before action', i.e. (normally) immediately preceding the issue of the writ in the case in which the easement is disputed. But it then provides that an 'interruption' of user for less than 12 months shall not count as an interruption to defeat the claim.

Louise and Terry will not be able to rely on the 1832 Act for their claim to a prescriptive profit. This is simply because section 1 of the Act lays down a minimum period of 30 years user for profits. Louise and Terry (like the farmers in *Tehidy Minerals v Norman*) will thus have to fall back on the 'last resort' form of prescription, 'lost modern grant'.

To succeed under this heading they will have to show strong evidence of at least 20 years user as of right. If they can do so (and it seems they can) the court will, by way of legal fiction, presume that a deed was executed 'in modern times' but that deed has been mislaid... In lost modern grant cases, nobody really believes that a deed existed. Yet recent cases rule that the presumption of lost grant cannot be rebutted by factual proof (however convincing) that there was no deed. The presumption can only be rebutted by showing that the grant was throughout 'the relevant time' impossible as a matter of law.

The 'relevant time' begins when user as of right commenced, and ends 20 years before user as of right ceased. If, throughout that time, the granting of a valid profit would have been legally impossible because (say) the land was requisitioned or because Nellie was under some special legal disability, like the vicar in *Oakley v Boston*, then Gurinder would defeat the claim to a profit. But it should be stressed that cases where the alleged servient owner can show legal impossibility are rare.