



COLLAS CRILL EXPLAINS... ACQUIRING RIGHTS OVER A NEIGHBOUR'S LANDS

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This is part of a series of guides in which we examine areas of law that frequently arise in practice. Further guides will be released weekly; [click here](#) to subscribe to receive Collas Crill news and insights by email.

This week's guide outlines how to establish a right of way over a neighbour's land by prescription and offers case study examples to show how this might play out in practice.

Easements

An easement is a legal right for a person to use another's land in a certain way, for example, where a landowner grants a neighbour a right of way over a roadway on their property.

In the majority of cases, an easement is created by a deed and 'runs with the land' (ie the right passes from owner to owner). These are known as 'legal easements'. Easements may also be acquired by prolonged use by a method referred to as 'prescription'.

What is prescription?

If a landowner has used a neighbour's land, 'not by force, nor stealth, nor licence' and for a long period of time, the neighbour has effectively lost their right to object to that use and has consented to the nature of that use being made lawful.

A claim to register a right of way is often made on the basis that a right of way has been continually used for a period of time over 20 years or on the basis (or sometimes false notion) that the right is the result of a historic grant.

Prescriptive rights are similar to adverse possession, but in this case relates to a right to use another person's property in a particular way rather than claiming ownership of the land.

Step-by-step guide to establishing a right of way by prescription

The conditions necessary to establish a prescriptive right of way are as follows:

- The right must have been exercised by the property owner for at least 20 years without interruption. The right of way must have been used regularly and there must be no long gaps of non-use.
- There must have been no force or secrecy whilst exercising the right by the property owner claiming the right. Further, the neighbour must not have given the property owner a licence so to do, ie permission.

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- The right must have been used in the same way for the whole of that period, ie a right of way on horseback should have been exercised on horseback.
- The right of way must be such that it could have been created lawfully, eg a right of way for the purpose of dumping rubbish would be unlawful.

The burden of proof

It is for the party claiming to have acquired the right of way by prescription to prove that the use was 'as of right'.

Recording a right by prescription

There is generally no need to register a prescriptive easement at the Land Registry as most are automatically binding on the owner of the burdened property. However it is considered good practice to do so wherever possible.

Signs of the times – avoiding the creation of prescriptive rights over land

Many developers and landowners are taken completely by surprise to find out that third parties have acquired rights over their land and that these rights may restrict the landowner's use of the land, even where planning permission is in place.

It is therefore common for landowners to erect signs and secure boundaries in an attempt to prevent the acquisition of such rights by demonstrating that any use by third parties is prohibited. Such notices, to be effective, will need to be clear visible warning signs that the land in question is private, erected in prominent positions and they will need to ensure that the wording of the objection specifically covers all types of unauthorised use of the land.

In the case of *Winterburn v Bennett* [2016] EWCA Civ 482, the owners of a fish and chip shop claimed a right by prescription to use the neighbouring owner's car park. Their suppliers and customers also used the car park over a period of time. However, the neighbour had put up signs saying that their car park was private and only to be used by its customers. It was determined by The Court of Appeal that the signs were sufficient to prevent the fish and chip shop owner's claim because the use was not 'without force'. No further steps were required to be taken by the owner of the car park, such as writing letters, confronting users verbally or instigating legal proceedings.

Termination of a prescriptive right

A prescriptive right of way can be terminated in any of the following ways:

- By abandonment, ie where the property owner's actions show a clear intention to terminate their use of the right of way permanently.
- If the property owner acquires the neighbour's property, ie two properties that adjoin each other, owned by different persons, where one has the benefit of a right and the other has the burden of that right.
- Where the property owner agrees with the neighbour to release the property owner's use of the right of way permanently.

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A successful case of prescription

Park Next Door Limited was located next to a car park which it did not own. The car park is surrounded by iron railings and gates which for the most part were left unlocked.

The iron railings were later removed and replaced with a brick wall which contained gaps allowing pedestrian access.

Park Next Door Limited claimed;

- to have made use of the car park for over 20 years exclusively for itself, its staff and customers without interruption;
- that there was no force or secrecy exercising the right as the car park was used at all times of the day and night with no apparent objection. Park Next Door Limited did not have a licence to make use of the car park;
- that the car park remained used as a car park for vehicular and pedestrian access to Park Next Door Limited's premises for the duration of the 20 year period; and
- that the use of the car park by Park Next Door Limited was not unlawful.

Park Next Door Limited therefore issued an application to HM Land Registry to register its right to continue to make use of the car park despite not being the legal owner.

Park Next Door Limited was successful with its application as it had managed to prove points 1-4 above and therefore continued to make use of the car park 'as of right'.

Five years later, Park Next Door Limited decides to sell its property to Carry On Parking Limited and so Carry On Parking Limited now has the benefit of the right acquired by prescription as the right passes from owner to owner.

The key difference between this scenario, which was successful, and the *Winterburn v Bennett [2016]* case was that there was no signage or proactive effort made to prevent Park Next Door Limited from making use of the land and acquiring the right by prescription.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

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