NEW SQUARE Chambers

Friday 8 December 2023

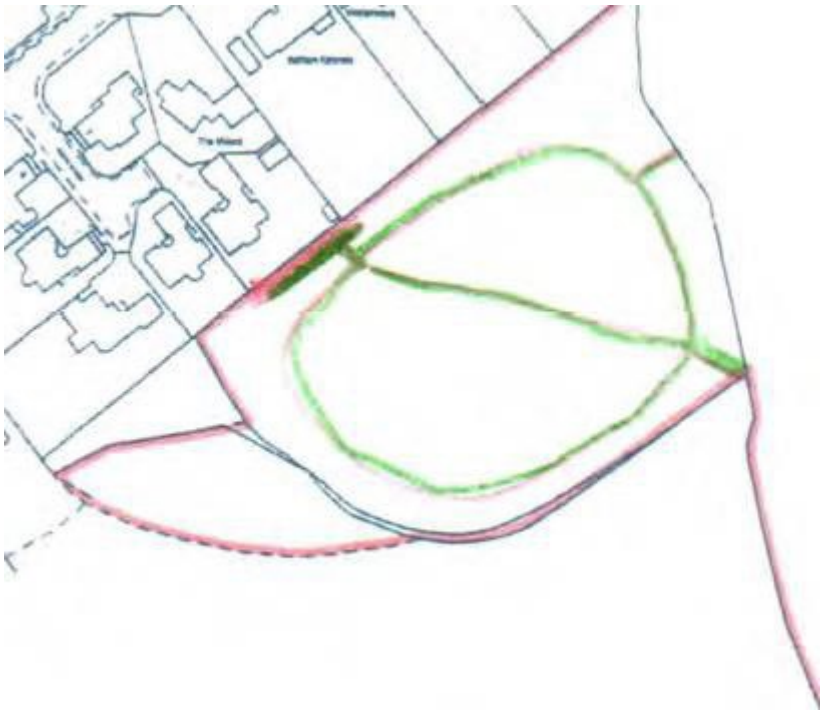
CASE NOTE: JUS SPATIANDI AFTER DEWHURST V HODGE

Raj Sahonte

1. This case involved the registration of a prescriptive right way to a residential property. The right of way sought to be registered was described in box 9 of the ST4 accompanying the AP1 application form dated 22nd May 2020 as:

   "A right of way by foot in the field immediately to the south-east of the boundary of WA452860 being part of CYM717554 as marked in green on the attached plan marked as PLAN 3".

2. There was some controversy as to which plan was attached to the AP1, this was resolved but the judge went on to consider, in case he was wrong, the rival plan, which is shown below:



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3. The right of way in contention was, therefore, the right along the green ring or loop and the three spurs attached to it. The judge found as a fact that it did not include a claim for a right over the line cutting diagonally across the ring or loop, but treated the Application as though it did. It is essential to draw attention to the fact that neither of the three spurs from the loop connected to a public right.

4. The judgement shows that the judge determined several complex factual and legal issues, despite the Applicant submitting that the Application before the court was a simple and clear-cut application of Regency Villas, and that it did not matter that the right sought was a recreational right, a Jus Spatiandi.

5. This case note will look at three decisive points which rendered this Application fatally flawed on the facts as presented by the Applicant having been subjected to cross examination.

USER BY APPLICANT

6. If Applicant had established that where he walked was the loop and to the spurs, the judge would have been prepared to find that he had walked them on a sufficiently continuous basis. However, the judge found as a fact that the Applicant had not satisfied him that when he walked, he stuck " to the line of the loop shown on his application plan, I do not find that he has shown sufficiently continuous use of the loop to give rise to a right of way.

7. The test applied by the judge after analysing the authorities carefully was that set out in Megarry and Wade 28 – 043 and approved in *Property Print Ltd v Kirri* [2009] EWHC 2958 (Ch).:

   "The claimant must show continuity of enjoyment. This is interpreted reasonably. In the case of the right-of-way, it is clearly not necessary to show ceaseless user by day and night. User whenever the circumstances require it is normally sufficient, provided the intervals are not excessive. However, merely casual or occasional user does not suffice".

8. However, as the judge found, the Applicant failed to satisfy the Court that when he walked, he stuck to the line of the loop on the application plan and further he failed to demonstrate a sufficiently continuous use of the loop to give rise to a right of way based on the test in *Kirri*.

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9. In effect, the Applicant failed at the first hurdle, he was unable to make out that he had used the way he sought as an easement. The judge found that that his use over time was not sufficiently continuous.

10. The judge did however go on to consider, as he was mandated to do and in case, he was wrong on the facts, whether the recreational user sought was in fact made out.

JUS SPATIANDI

11. The fact that the user was recreational, the Applicant submitted did not matter because of what Lord Briggs said in Regency Villas, that it is not fatal that the grant of an easement was for recreational use. What was important, as he made clear was that:

    "the requirement that an easement must be a "right of utility and benefit" is the crucial requirement. The essence of an easement is to give the dominant tenement a benefit and utility as such. Thus, an easement properly so-called, will improve the general utility of the dominant tenement. It may benefit the trade carried on upon the dominant tenement or the utility of living there".

12. The judge, therefore, from the authorities accepted that a prescriptive right of way of claimed here, over a loop could exist as a valid easement if it accommodated the dominant tenement.

13. As far as is I am aware, this is the first recorded judgement where this issue has arisen for determination on the facts since the Supreme Court ruling in Regency Villas.

14. Having looked at all the facts in play the judge decisively held that:

    "The critical question for me to decide is whether a right of way over the loop gives 2 Wood Close a benefit or utility such that it can be said to accommodate 2 Wood Close. I have concluded that it would not benefit the utility of living at 2 Wood Close. That property has its own garden providing all the usual utility of having a garden, the ability to sit or walk in the open air, to play games and to cultivate plants. Walking around the Field on the loop is not an extension of the normal use of 2 Wood Close but is something of personal benefit to a person who happens to live at 2 Wood Close."

15. Here the judge makes clear the evidence he heard, and his site visit only went one way and that the moment the Applicant traversed through his garden to get to the gate in his fencing and on to the Field he was doing so because it was a personal benefit to him given that his home adjoins the Field.

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Contentious User

16. The judge found that the Applicant's use of the Field only was not contentious or by force. It was clear that there was nothing to prevent him from entering the Field or walking in it. However, his walking from the Field into the adjoining fields to the east after the notice was put on the gate and when the new fencing was erected, made the situation like that in Winterburn v. Bennett [2016] EWCA Civ 482 where the court said at [41]:

    "There is a social cost to confrontation and, unless necessary, the law of property should not require confrontation for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over land".

17. The judge found on that footing that when the notice on the gate together with the new fencing was erected that was sufficient to render any continuing user by the Applicant to gain access to the fields to the east of the Field contentious. It was clear from the evidence that the Applicant's true ambition was to go from the Field and link into the public right of way. The Application, interestingly failed to claim such a right. On this finding, even if the Applicant had made out his right of way, he would have been left with a circular walk around the Field. The situation was worse, given the judge also ruled that the user was not sufficiently continuous and nor did it accommodate the dominant tenement, being a personal benefit only to the Applicant.

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