



### **Important property briefing: A wake up call for land owners**

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#### **Practice point**

#### **THE COURT OF APPEAL'S JUDGMENT IN TARA -V- KENSINGTON CLOSE (NOVEMBER 2011) IS AN IMPORTANT WARNING THAT INACTIVITY BY A LAND OWNER CAN GIVE AWAY PERMANENT RIGHTS OVER VALUABLE LAND**

#### **Summary**

A personal licence can be a dangerous arrangement as it will come to an end when there is a change of ownership. The Court of Appeal have upheld an earlier decision that Land owners who grant personal licences must be vigilant or else new owners might acquire permanent rights with serious consequences.

#### **Background**

Two major London hotels have been locked in a dispute over a number of years concerning access rights. The use of a Ring Road around the London Tara Hotel (Tara) in Kensington is shared with Tara's neighbour, the Kensington Close Hotel (KCH). Both are substantial hotels (about 700 plus bedrooms each).

Use of the Ring Road (owned by Tara) is important for KCH to enable its servicing and for coaches delivering guests to the hotel to turn around. If Tara's claim was successful KCH would need to service itself without the Ring Road.

On the other hand Tara were anxious to avoid giving away permanent rights over a substantial part of its site. This could be detrimental to the prospects of future development and also to the running of the Tara.

In 2007 Tara issued a claim against KCH that it had no rights to use the Ring Road but in 2010 Tara's claim was rejected by the High Court. KCH's rights over the Ring Road for commercial vehicles and coaches were upheld. Tara then appealed on four grounds:-

- There should be no rights for KCH if the use had been with permission. Tara argued that it and its predecessors thought KCH were using the Ring Road under a licence and so with permission whether or not the licence had actually come to an end;
- In any event, Tara also argued that any use was with tacit permission or a "common understanding" that KCH's use was with consent;
- Tara also argued that the coach drivers were free agents and so there should not be any established rights for coach use by KCH; and
- Any rights should not include construction traffic.

### Fragile Licence

The Court of Appeal examined whether the KCH had used the Ring Road "as of right" for twenty years without permission, secrecy or force, the three essential elements of a claim for prescription.

In 1973 KCH's predecessors entered into a licence to use the Ring Road terminable on notice for a licence fee of £1 per year "as acknowledgment that the use of the roadway was under the licence". However, the licence was made personal to the parties so when the ownership of the KCH changed hands in 1980 the licence came to an end.

Tara argued that a reasonable owner would not know that the ownership of the KCH had changed and so would not have appreciated that the permission had lapsed and that time for any prescription claim had started to run.

The first two grounds of appeal were dismissed. The fact that the licence was personal and therefore a fragile instrument was a risk Tara had taken when negotiating its terms. L.J. Neuberger (the Master of the Rolls) explained that he thought the result of prescriptive rights being acquired was not particularly unjust or surprising.

The Master of the Rolls' view was that an owner should check every eighteen years or so that the licensee remains the owner of the putative dominant land and that this was not an onerous task.

Further, the ability to demand the licence fee of £1 was significant as was the fact that the actual use of the road was different to the use allowed under the licence (for example, no coaches were permitted under the licence).

L.J. Lewison came to a similar view:-

"If the use had been carried on exactly in accordance with the licence the question might have been a difficult one to answer. But in this case the use went beyond the scope of the permission..." "If [Tara] had made enquiries ... over the period of twenty years it would have discovered the true position. And whenever Tara might have made the enquiries it would have been able to demand the annual payment, which would have put the permissive nature of the use beyond doubt. In my judgment that was enough to put Tara on enquiry."

The Master of the Rolls also made clear that there was no question of any secrecy because the change of ownership was known about or easily ascertainable even if this was not appreciated by Tara's senior management. The situation might be different if:-

"If it could have been shown that [the previous owner] had deliberately concealed the change of ownership of the Kensington Close Hotel from Tara or if it could have been shown that [they] had misled Tara about the change of ownership"

But this was not the case.

Regarding Tara's argument that there was a tacit permission or arrangement between the hotels, the

Court of Appeal decided Tara could not bring this ground of appeal as it was not contended for at trial. This criticism of raising an argument too late was particularly relevant because the conduct of both hotels' employees could only have been examined at the full trial.

In any event, the Master of the Rolls was of the view that acquiescence or toleration is not sufficient. For a licence to be implied there must be some positive, overt act by the servient owner - mere inactivity would not do.

### **Coaches - Free Agents?**

Regarding the argument that coach drivers were free agents so that such use would not give KCH established rights, the Master of the Rolls rejected this argument:-

"Those people who managed the Kensington Close Hotel plainly knew that coach drivers dropping off and picking up hotel guests frequently used the roadway ... Kensington Close Hotel and its predecessors were, as it were, parties to the use of the roadway by coaches. This is not a case therefore where the owners of the putative dominant land had no knowledge of, or interest in, the use of the way."

Should the right include Construction Vehicles?

The Master of the Rolls found again that Tara had failed to raise this argument at trial that the use of the road, if rights were upheld, did not extend to certain types of vehicles. It was too late to raise this ground at appeal because the witnesses had given evidence and there was no cross examination relating to construction vehicles.

Further, Tara accepted that there could be no objection to vehicles required for substantial repair work e.g. "repairs and refurbishments of lifts, air conditioning and the like." The Master of the Rolls decided that it was artificial and unrealistic to conclude that the right does not extend to vehicles which need access for what may be classified as more extensive works.

L.J. Lewison added:-

"What if a lift at the Kensington Close Hotel needed to be renewed at the end of its life; and a crane was needed to lift one dinghy up under the roof? Or what if Kensington Close Hotel decided to refurbish all of the bathrooms and lorries brought loads of sanitary fittings?"

The Court of Appeal also found that it would be at least very hard, and probably not sensibly possible, either as a matter of language or a matter of practicality, to identify what types of vehicles should be excluded. The relevant law was summarised:-

"Where a [prescriptive] right of way ... is proved", then "unless something appears to be 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".

All of Tara's grounds of appeal were dismissed with Tara to pay KCH's costs. Tara's application for permission to appeal to the Supreme Court was also refused by the Court of Appeal.

**Payne Hicks Beach acted for KCH in the High Court proceedings and in the Court of Appeal.**

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