CASE COMMENTARY

KENT AND ANOR v KAVANAGH AND ANOR [2006] EWCA CIV 162

Section 62 Fills a Black Hole

Judith Bray[*]

THE FACTS

For many, the right to use a small path bordering one's house may seem hardly worth a day in court, let alone the additional costs of an appeal. This case, recently decided in the Court of Appeal, rested on such an issue. It allowed the Court of Appeal to review the law relating to the grant of an easement and in particular has served to clarify the law concerning the rule of *Wheeldon v Burrows*[1] which allows certain quasi-easements to pass on purchase of property.

The facts are relatively straightforward. Mr and Mrs Kent and Mr and Mrs Kavanagh lived next door to each other in a small terrace in Dovercourt Road SE 22. A small pathway ran between their two houses and it was accepted that the boundary of each house ran mid-way between the two properties. The width of the whole path was approximately three feet. Mr and Mrs Kent claimed rights over the half of the pathway that did not belong to them. The path was used as access to their back gardens and without the right to pass over the whole path it was of limited use to them. The value of the path had been recognised when the houses had first been built in 1907. Evidence was given of a surveyor's report dated 1909 which had referred to the path. "…I think it very important that, even in small houses such as these, the main entrance to the street should not be used by tradesmen, street hawkers, etc for the entrance of stores and fuel or for carrying out dust, refuse etc..."

The properties had been originally leased to the occupiers but both had been purchased under the Leasehold Reform Act (LRA) 1967.[2] The houses had changed hands several times since the enfranchisement under the Act but although the path had been in use at various times by different owners no

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[1] (1979) 12 Ch D 31.

[2] The Leasehold Reform Act 1967 allowed tenants under long leases at low rents to acquire the freehold or a new lease by paying for the land but not for the house. The law was based on the principle that the tenant owned the house because of the length of the lease and the landlord could only claim payment for the land.

mention was made on the conveyance of the property in January 2001 from Mrs Fishlock, the previous owner, to Mr and Mrs Kent. It was in this climate of uncertainty that the action arose before the courts.

COUNTY COURT

The case was heard at first instance at the Central London County Court where Mr and Mrs Kent claimed that an easement arose in their favour based on various grounds. These included prescription, which is based on long use, necessity, which relies on proof that property would be landlocked without access being granted and section 62 of the Law of Property Act (LPA) 1925 as well as the rule in *Wheeldon v Burrows*.

The claim for prescriptive use was based on the doctrine of 'lost modern grant'.[3] Any claim by prescription must be 'nec vi, nec clam and nec precario'[4] which means that it must not be based on violence, or only have been exercised in secrecy or with permission of the legal owner. In this case there was evidence that there had been permission granted at one stage by the predecessor in title of the Kavanaghs so this claim by the Kents was doomed to fail.

The claim for an implied grant under necessity was also unsuccessful since there was access to the property through the front door and at one stage through the garage; it may have been inconvenient but it was still access. In any event, a claim for an implied grant under necessity has always been confined to cases where there is simply no other proper access to the property.[5]

The claims under the rule in *Wheeldon v Burrows* and section 62 of LPA were both much stronger grounds but the judge at first instance preferred the common law rule to the statute and found in favour of the Kents basing his judgment on *Wheeldon v Burrows.*

THE COURT OF APPEAL

The Court of Appeal was not convinced that this ruling was correct. They were however, anxious that the effect of the LRA would not allow certain

[3] This doctrine presumes that the claimant has a prescriptive easement based on a deed or grant that has become lost over the years. This is a fiction and all the parties including the court accept this is so. Normally the claimant must show that there has been twenty years of use at any time prior to the claim. An interruption to use will not be fatal to the claim.

[4] A claim based on prescription will fail where the use is only made with violence or in secret or with the permission of the owner.

[5] See *Barry v Haseldine* [1952] Ch 832.

rights previously enjoyed by a tenant to pass into what Mr Justice Lewison referred to as a 'legal black hole.' He considered the social policy behind the LRA 1967 and the fact that under the Act the land is considered to belong to the landowner and the house to the occupying leaseholder. He commented "…One would expect, therefore, that when a leaseholder of a house acquires the freehold of that house in exercise of his rights under the Act, both the rights which he enjoyed and the rights which bound him in his capacity as leaseholder of the house would be carried through into his new status as freeholder when he acquires the land on which the house is built…"[6] He was concerned that such rights exercised by the tenant would not pass on enfranchisement under the Act because of its potential limiting effect.

The leading judgment was given by Lord Justice Chadwick who preferred to rely on s.62 LPA believing that the rule in *Wheeldon v Burrows* could not arise where the land had passed out of common ownership before enfranchisement but he nevertheless examined the rule in detail explaining why he did not believe it to apply in these circumstances. He asserted, "…Under s.62 a conveyance of land operates to convey with the land "all ways, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land…or at the time of conveyance, demised…or enjoyed with…the land". I can see no reason why those words are not apt to convey, with the freehold, rights of way over the retained land which are, at the time of the conveyance, enjoyed by the tenant in occupation of the land conveyed. For my part, I find that analysis more attractive than one which relies upon the first rule in *Wheeldon v Burrows.* It seems to me an unnecessary and artificial construct to hold the grantor, as common owner and the landlord of the land conveyed, is himself using the rights over the retained land which his tenant enjoyed under the lease."[7]

The rule in *Wheeldon v Burrows* allows certain quasi easements[8] to pass when property is sold. It is limited to those that are continuous and apparent and necessary to the reasonable enjoyment of the property granted and are in use at the time of the grant by the owner. It allows the successor in title to the vendor to enjoy rights, which would otherwise be lost unless expressly included in the conveyance. The rule is based on the presumption against derogation from the grant. In this case the issue arose as to whether such rights can pass where there is a statutory scheme for enfranchisement. Under

[6] Para 70.
[7] Para 45.
[8] Quasi-easements are those rights, which a landowner may exercise over his own land which cannot take effect as a legal easement, but which may become full legal easements if part of the land is sold and the vendor retains part for himself. The purchaser may be able to claim an easement over the part retained by the vendor if he had enjoyed such a right as a quasi –easement.

section 8(1) LRA 1967[9] the landlord is merely required under statute to sell the land to the tenant and Lord Justice Chadwick construed the section to mean that the landlord does not have to transfer further rights which would pass where the land was being sold by the freehold owner to another freehold owner or to an existing tenant outside the Act. He stated that "..There is no basis upon which to impute to an involuntary transferor an intention to grant any larger or further rights than those the statute expressly requires…"[10] He rejected the argument that the rule could apply to cases of enfranchisement under the Act. He also considered whether a tenant could claim an easement under *Wheeldon v Burrows* against another tenant where both had derived their title from a common landlord. He concluded that rights could not arise in this case because the landlord had not consented to the rights and further it had not been shown that the right was being exercised at the time of the conveyance. In his view it was significant that the previous claimant had chosen to use the shortcut through the garage.

So finally the claim rested on section 62 LPA 1925, which has the effect of passing certain rights which have not been specifically mentioned in the conveyance.[11] This section has the profound effect in conveyancing of sometimes creating easements where previously they had not existed. In one case a mere licence to use a shed for storage became a legal easement when the tenant renewed her lease[12] and a licence to use a landlord's property for access became a legal easement when the tenant later purchased the lease.[13] The section is less specific than the rule in *Wheeldon v Burrows* about the conditions for such a right to arise. In this case it was crucial that the claimants did not have to show that it was a right that was reasonably necessary for the enjoyment of the property. There had been evidence that use had been made of the garage for access and it was tempting to suggest that the

[9] s.8(1) Leasehold Reform Act 1967 where a tenant of a house has under this Part of this Act a right to acquire the freehold, and to give to the landlord written notice of his desire to have the freehold, then except as provided by this Part of this Act the landlord shall be bound to make to the tenant, and the tenant to accept, (at the price and on the conditions so provided) a grant of the house and the premises for an estate in fee simple absolute, subject to the tenancy and to the tenant's incumbrances, but otherwise free of incumbrances.

[10] Para 36.

[11] This section passes to the transferee all '.. fixtures, commons, hedges, ditches, fences, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof…'

[12] *Wright v Macadam* [1949] 2 KB 744. A tenant of a flat had been granted a licence to store coal in her landlord's coal shed. When her lease was renewed there was no express reference to the licence and the landlord demanded payment. The court held that the licence had become a legal easement.

[13] *International Tea Stores Company v Hobbs* [1903] 2 Ch 165.

route along the path was not necessary when the owners of the property have been perfectly content to use the route through the garage. The key feature of section 62 is the prior diversity of occupation which of course existed in this case.[14] Normally this would be a landlord tenant relationship where the tenant then purchases the freehold or renews the tenancy and claims rights will pass on the transfer.[15] In this case the Kents claimed that section 62 operated in their favour when the land was first purchased; when both properties were in the hands of tenants anxious to claim their statutory right to purchase the freehold. The reason why this claim was much more convincing than that of *Wheeldon v Burrows* was that the rights would pass because they had been enjoyed previously under the lease and would become crystallised as rights on conveyance. The LRA did not affect these rights in the same way as any rights under *Wheeldon v Burrows*. Lord Justice Chadwick summed up the position as follows "…The effect, therefore, is that – after enfranchisement of both plots A and B –the former tenants of those plots (as owners of the freehold) continue to enjoy the same rights over each others' plots as they did while they were each tenants of those plots. If they were entitled to reciprocal easements under the former leases, those easements are (in effect) enfranchised. They subsist for the benefit of (and as a burden on) the respective freehold interests. And it is immaterial which of the two plots was the first to be enfranchised…"[16] When the head leases were initially granted by the first landlord there was careful reference to the fact that each of the neighbouring properties owned the land up to the mid point of the path but no mention was made of rights over the remaining eighteen inches.

COMMENT

There is little that an occupier can do with eighteen inches of path without rights over the other half of the path. The court accepted that their predecessors in title must have had rights over the whole of the path. There had been arguments for Mr and Mrs Kavanagh that they owned the whole path but if this were the case why did the head lease only convey to them rights up to the midway point? The Court of Appeal upheld the claim of Mr and Mrs Kent to an easement over half the path based on section 62.

This was a sensible decision, which passed to the claimants a right to use what would appear to a stranger a narrow and insubstantial path. To them, however the amenity afforded to the home was something valuable and substantial. As an important postscript Mr Justice Lewison commented "…I

[14] The need to satisfy this condition for the operation of s.62 was highlighted in *Sovmots Investment Ltd v Secretary of State for the Environment* [1979] AC 144.
[15] See *Wright v Macadam* (supra) and *International Tea Stores Co v Hobbs* (supra).
[16] Para 58.

would add that this case demonstrates how important it is for any conveyancer concerned with enfranchisement to consider carefully the rights and obligations to be contained in the conveyance executed to give effect to the tenant's right to enfranchise; and to ensure that the correct rights are both granted and reserved…"[17] A moral indeed for everyone involved in conveyancing to observe! It is also interesting to note that once again section 62 has come to the rescue where the conveyancers have failed.

[17] Para 78