

IN THE MATTER OF THE WATER HOUSE, MILLFIELD LANE, CAMDEN

EXTRACT OF ADVICE

1. I am asked to advise on various matters arising out of a proposal to redevelop a property known as The Water House, Millfield Lane, Camden.

Private rights

2. On the basis...that there is evidence of uninterrupted usage as of right of the road over a continuous period of at least 20 years for all purposes connected with the use of the Water House as a dwelling, then the owner of the dominant tenement would have the right to enter onto Millfield Lane in order to carry out repairs to the road in order to make it effective for such traffic. Whilst I know of no direct authority on the matter¹ it would seem reasonable to suppose that the owner of the dominant tenement could take reasonable steps to prevent traffic - which benefited from the prescriptive right - from damaging the way or trees adjoining the way – for example by laying protective mats - so long as these mats did not impede the use of the way by others who also have a right of way and did not involve any works beyond the width of the road. The rights of the dominant owner may also be affected by the existence of rights in others to use the road – i.e. the right of way should not be used in such a way as to interfere substantially with the rights of other users.²
3. Where the proposed usage of a way is likely to cause significant damage to the way this

¹ Gale on Easements cites as an example entry onto land to install lighting referring to an Australian case - *Owners of Strataplan 58754 v Anderson* (1990) 9 B.P.R. 97,782; see also *Senhouse v Christian* (1787) 1 T.R. 560. However, in the latter case, in particular, it is not clear whether the measures were regarded as being necessary to make the way effective or for improving the way.

² See for example, *Jelbert v Davis* [1968] 1 WLR 589.

might be taken to suggest that the proposed usage is going beyond that which formed the basis of the prescriptive right. To some extent the question of whether or not usage is excessive compared to the extent of the right claimed will be judged on whether the burden on the *servient* landowner is being significantly increased by the usage. However, there would usually have to be a substantial change in the character of the dominant tenement, accompanied by the increase in the burden, for the usage to be categorised as going beyond the prescriptive right.³

4. In summary, therefore, if a prescriptive right of way exists, then it will carry with it the right to keep the road in such repair as is required for the effective use of the way. There is, so far as I am aware, no direct authority as to whether the right to repair includes the right to take reasonable measures to prevent damage occurring to the road which, if it occurred, would necessitate repair but it is reasonable to suppose that such measures would fall within steps necessary for making the exercise of the right of way effective. It seems to me that the laying of protective mats within the boundaries of the road would be permissible in order to prevent or mitigate damage to the road so long as these, and the use by heavy vehicles, did not substantially interfere with the use of the road by others who also have rights of way over it.
5. [...] based on the claimed prescriptive right of way, the owner of the Water House has the right to carry out work on the right of way in order to make it effective for that prescriptive use. This could include, in my view, the laying of protective mats and possibly the cutting of any overhanging branches that impeded reasonable use of the road. I have seen reference to the use of ground guards – do not know what these may entail but care would have to be taken to ensure that none of the measures taken substantially interferes with the lawful use of the road by other parties. Equally, there would be a right to carry out repairs to the road. Where the owner of the dominant tenement has the right to carry out work to the right of way the owners of the way would have no right to prevent that work.

Stephen Sauvain Q.C.

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³ See *McAdams Homes Ltd. v Robinson* [2004] EWCA Civ. 214.



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