Sign of the times

Lucy McCormick analyses two recent Court of Appeal cases that emphasise the importance of signage on private property

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'Putting up an appropriate sign is an inexpensive (and relatively polite) way to prevent others acquiring rights over land.'

In a landmark easement decision, the Court of Appeal has recently given judgment in *Winterburn v Bennett* [2016]. The court held that a sign on land indicating that a certain activity is prohibited is sufficient to render that activity 'contentious', and thus prevent an easement from prescription from arising. It will now be significantly easier for landowners to protect their rights.

Context

The case arose in the context of a parking dispute. On the one side were the Winterburns, who had operated a fish and chip shop since 1988. On the other were the Bennetts, who owned the neighbouring property, a former Conservative Club with a substantial car park. The suppliers delivering to the fish and chip shop had been accustomed to use the Conservative Club car park up to nine times a week for loading and unloading. Similarly, customers commonly used the car park when picking up their orders.

Importantly, at all times until 2007 there was a sign attached to the wall of the building on one side of the entranceway to the car park. It had been erected on behalf of the Conservative Club and read: 'Private car park. For the use of Club patrons only. By order of the Committee'. It was clearly visible to anyone entering the disputed land. During the same period, there was a similar sign in the window of the Conservative Club premises. In addition, there had been a handful of occasions in which the Conservative Club steward had made contact to insist that the Winterburns and their suppliers and customers had no right to park there, but no real attempt was made to restrict use of the car park to Conservative Club patrons only.

However, in 2010, the club was sold to the Bennetts and, in 2012, the Bennetts let the club to a tenant who prevented access. The Winterburns took legal action to protect what they considered to be an easement to use the car park, acquired through prescription.

The claim was initially brought in the First-tier Tribunal (Property Chamber), where the Winterburns were successful, but the Upper Tribunal (Tax and Chancery Chamber) allowed an appeal against that decision. There was then a second appeal to the Court of Appeal.

The issue

The issue was whether the signs were sufficient to prevent the Winterburns acquiring a right to use the disputed land as a car park for themselves and their suppliers and customers, or whether the owners of the car park had acquiesced in such use so as to entitle the Winterburns to such a right, notwithstanding the presence of the signs.

The Winterburns based their claim to a right to park cars and other vehicles belonging to themselves, their suppliers and customers on acquisition by prescription by 'lost modern grant'. This required the Winterburns to show 20 years' uninterrupted use 'as of right', that is to say without force, without secrecy and without permission (*nec vi*, *nec clam*, *nec precario*).

In the present case, it is the element 'without force' that was in issue. In this context, the phrase means that the use was not contentious, or allowed only under protest. Were the signs enough to constitute protest?

The argument made on behalf of the Winterburns was that the protest must be 'proportionate'. If, as here, the signs were being ignored, it was incumbent on the owner of the land to take such further steps as were practicable. That might be by erecting a chain across the entrance to the car park, or objecting orally, or writing letters of objection, or threatening or commencing legal proceedings. It was said that if one level of protest was insufficient to stop the unlawful parking, a more potent step should be taken, leading ultimately to the commencement of legal proceedings. It was argued that the Bennetts and their predecessors had 'conspicuously abstained from doing any of these'.

Giving the leading judgment, David Richards LJ found as follows:

> ... there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be 'as of right'. Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.
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> The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order 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 the land.

Significance

The decision is a significant one because it emphasises that putting up an appropriate sign is an inexpensive (and relatively polite) way to prevent others acquiring rights over land.

The decision clarifies the preceding authorities, as the case of *Smith v Brudenell-Bruce* [2002] had been interpreted by some as requiring a landowner to do 'everything consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user' – a high bar. It is now clear that while such conduct would succeed in making the use contentious, it is not a minimum threshold.

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Another signage decision: *English Heritage v Taylor*

A few days earlier, the Court of Appeal had handed down another decision on signage, *English Heritage v Taylor* [2016]. *The Daily Telegraph* reported the case as 'Historic sites could be littered with "irritating" warning signs after pensioner fell in moat'. As ever, the reality is more nuanced.

English Heritage v Taylor
[2016] EWCA Civ 448
Smith v Brudenell-Bruce
[2002] 2 P&CR 4
Winterburn & anor v Bennett & anor
[2016] EWCA Civ 482

The case concerned a pensioner who was visiting Carisbrooke Castle in the Isle of Wight. He set off down an informal pathway but fell into the moat, suffering a serious head injury. The Court of Appeal found that there should have been a sign warning of the drop, but reiterated that there was no need to warn of obvious dangers. It upheld the finding below in relation to contributory negligence, on the basis that the claimant was 50% to blame for his own injuries in descending the informal pathway when it should have been obvious to him that he might fall (albeit not that he would fall into the moat).

The key to unpicking the case is the topography of the site. Normally, one would expect a sheer drop into a moat to be obvious. However, the judgment makes clear that anyone at the top of the slope contemplating taking the informal pathway would, due to the angle, not have been able to see the drop nor have any particular reason to suppose one was there.

Giving the leading judgment, the Master of the Rolls (MR) was wary of how the decision might be seen. He acknowledged English Heritage's argument that:

> ... if we dismiss this appeal, organisations like English Heritage will be under pressure to adopt an unduly defensive approach to their guardianship of historic sites which are part of our precious heritage and this will lead to an unwelcome proliferation of unsightly warning signs.

He also noted their further point that an adverse decision would 'fuel the popular conception that this country is in the grip of a compensation culture'.

However, he emphasised that the finding was a 'straightforward' application of the usual legal principles. The duty on the landowner is only to take such care 'as in all the circumstances is reasonable' to see that the visitor is 'reasonably' safe in using the premises for the purpose for which they are invited or permitted by the occupier to be there. The court will consider all the circumstances, including how obvious the danger is and even, in an appropriate case, 'aesthetic matters'. In this particular case, the finding of breach was made on a 'very specific basis, namely the failure to provide a sign warning of a sheer drop which was not obvious'.

On a practical point, it is often easy for an owner or occupier to become so familiar with their land that potential dangers no longer strike one as such.

While, strictly speaking, a personal injury case rather than a property matter, *English Heritage* is a decision of which all those advising landowners should be aware. The primary lesson is clear: if an occupier is in doubt as to whether a danger is obvious, it would be well advised to take reasonable measures to reduce or eliminate the danger. The most proportionate way to do so will often be to erect signage. Fortunately – or unfortunately! – most landowners will not have the same question of balancing practical and aesthetic considerations as is necessary at a national landmark.

On a practical point, it is often easy for an owner or occupier to become so familiar with their land that potential dangers no longer strike one as such. No doubt those responsible for Carisbrooke Castle, knowing that there was a steep drop into the moat, felt that it should be as obvious to first-time visitors as it was to them, despite that not being the case from certain angles. As such it can often be useful to have a health and safety consultant, or even just a friend, walk around the property as another pair of eyes to flag up potential issues.

From a more tactical perspective, the decision also illustrates the role that a site visit can play in 'appeal-proofing' a judgment. In *English Heritage*, the first instance judge had visited the site, but the Court of Appeal tribunal had not. This made the latter reluctant to disturb the first instance judge's finding 'as to whether it was obvious to a person standing on the platform that there was a sheer drop from the grass pathway to the moat'. Indeed, the MR described English Heritage's attempt to persuade the court to reverse the original finding of fact as 'hopeless'. Practitioners advising a client with limited resources, who does not wish a dispute to proceed beyond a first instance decision, may well wish to seek a site visit as part of the trial to reduce the likelihood of the matter going to appeal.

Conclusion for practitioners

From both *Winterburn* and *English Heritage*, the message for landowners and their advisers is clear: if in doubt, put up a sign. ■

In brief

- In *Winterburn v Bennett* [2016], the Court of Appeal found that a sign on land indicating that a certain activity is prohibited is sufficient to render that activity 'contentious', and thus prevent an easement from prescription from arising.
- The same month, the Court of Appeal handed down judgment in *English Heritage v Taylor* [2016], in which it was held that English Heritage was negligent in not erecting a sign warning of the risk of falling into a moat. In the unusual circumstances of the case, the risk was not an 'obvious danger' and so should have been signed.
- Both decisions emphasise that signage is an important part of the armoury of landowners. They, and their advisers, should regularly review whether appropriate signage might protect them from claims.