A matter of authority but not of principle -- acquisition by lessees of easements by long enjoyment

China Field Ltd and Sun Honest Development Ltd v Appeal Tribunal (Buildings)
Court of Final Appeal of the Hong Kong Special Administrative Region
Final Appeal Number 3 of 2009 (Civil); [2009] 5 HKC 231
30th October 2009

Land; easements; prescription; lost modern grant; leasehold interest

Introduction

Lord Millett, sitting as a judge of Hong Kong's Court of Final Appeal, has examined and dissected two long-standing rules of English law concerning the acquisition of rights of way and other easements by long enjoyment and found them to be devoid of principle. His lordship declared that these rules were not part of the common law of Hong Kong and suggested that, were they now to be considered by the highest court of the United Kingdom, they would not be upheld as part of the common law of England.

Both of the rules limit the scope of the law of lost modern grant, the doctrine by virtue of which a fiction of an actual grant of an easement is presumed by the court. One of the rules is that the doctrine does not apply as between lessees holding under a common landlord. The other is that the doctrine does not apply as between lessees holding under different landlords. The effect of these rules is that easements can be acquired by long usage only by and against freeholders. This is of acute importance in Hong Kong where virtually all land is leasehold.

Lord Millett, in the course of delivering the principal judgment of the court,[1] also criticized the more general rule, from which the above rules are derived, that in order to acquire an easement by any form of prescription the user must be by or on behalf of the owner in fee simple against an owner in fee simple. His lordship described this rule as counter-intuitive and contrary to the policy of the law. Lord Millett drew upon half-a-century of academic criticism of the authorities which form the basis of these rules and subjected the judgments in those authorities to withering analysis.

Facts

The second appellant, Sun Honest Development, wished to redevelop land owned by it under long lease from the government of Hong Kong. A lane ran between the existing buildings on the land and neighbouring buildings, held by others also on long lease from the government. The width of the lane was half on Sun Honest's land and half on the land of the neighbours. The lane gave access to some of the buildings to vehicles and

[1] Bokhary, Chan and Ribeiro PPJ and Mortimer NPJ agreed with Lord Millett NPJ's judgment.

pedestrians and had been so used since about 1958 although there had never been a formal grant of a right to use the lane. Sun Honest submitted plans to the Building Authority for approval to replace the existing low-rise buildings with a 40-storey building. Under the Buildings Ordinance prior permission to carry out building works was required from the Authority which could refuse permission to carry out such works on certain grounds. One of those grounds was that the plans were for buildings which exceeded the permissible plot ratio. This is the multiplier which, when applied to the area of the site, determines the maximum permitted gross floor area of a planned building and is laid down in regulations made under the ordinance. Consequently the area of the site dictated the size of the new building.

The Building Authority rejected Sun Honest Development's plans on the ground that the proposed buildings exceeded the permissible plot ratio. In calculating that ratio the Authority had deducted from the area of the site that part of the lane which fell within the boundaries of the site. The justification for doing so was that under the regulations a street or service lane was to be left out of account if it was subject to a public or private right of way. The Authority considered the lane to be subject to a right of way in favour of occupants of the neighbouring buildings which right had been acquired by application of the doctrine of lost modern grant.

The developer appealed to the Buildings Appeal Tribunal, arguing that the deduction was wrongful in that the doctrine could not apply since the land in question was leasehold and that both the dominant and servient tenements were held from a common landlord, namely the government. The tribunal refused the appeal, holding that the doctrine did apply to leaseholds and that the occupiers of the neighbouring buildings had acquired a right of way over the lane by long usage. On judicial review, the Court of First Instance of the High Court upheld the tribunal's decision.[2] An appeal to the Court of Appeal brought the same result.[3] The developer then appealed to the Court of Final Appeal.

Issues and decision

The issue on final appeal concerning the right of way was therefore whether the rule of English law that the doctrine of lost modern grant does not apply as between leaseholders holding under a common landlord, sometimes referred to as "the rule in *Kilgour v Gaddes*", represented or should continue to represent the law of Hong Kong. Consideration of this, however, inevitably led to consideration of the more general and prior rule that an easement can be acquired by prescription only by the owner of the freehold against the owner of the freehold.

The answer of the Court of Final Appeal was that the more general rule was based on *obiter dicta* in a line of authority that was deeply flawed, being based on the false premise that lost modern grant is a form of common law prescription. The dicta "cannot stand against a powerful tide of logical and academic criticism" and the rule should not

[2] [2008] 5 HKC 163
[3] [2008] 3 HKC 184

be adopted in Hong Kong, Lord Millett said. This condemnation of the greater rule also deprived the rule in *Kilgour v Gaddes* of logical foundation. The court was of the opinion that the latter rule was not, and may never have been, part of Hong Kong law; not only was it inapplicable to local circumstances but the reasoning in the cases that led to the rule was flawed. There was no reason in principle that a right of way or other easement should not be acquired by long enjoyment on the part of a lessee of the dominant tenement against servient land held under lease from the same landlord, provided that no prejudice is caused to the reversion of the common landlord. Furthermore, Lord Millett added, "I doubt whether either of the two rules of law under discussion would be upheld in England were they to be examined by the House of Lords".

Analysis

Although it was forming during the nineteenth century, the idea that a leaseholder could neither acquire nor give an easement by operation of the doctrine of lost modern grant did not crystallize until the early twentieth century. In 1902 Channell J described lost modern grant as 'a most useful doctrine' that could be applied between lessees where there was difficulty in applying the statutes of prescription and limitation owing to the freeholder not being bound.[4] The courts in Ireland, a jurisdiction in which the landholding system was predominantly leasehold, had determined that a tenant of one landlord could acquire an easement by long user from the tenant of another landlord and also from the tenant of the same landlord.[5] Then in February 1904 *Kilgour v Gaddes* was decided by the Court of Appeal.[6]

Gaddes and Kilgour were both fixed-term tenants of the same landlord in Longtown, Cumberland. Gaddes used to go onto Kilgour's land to fetch water from a pump there. Kilgour sued for trespass; Gaddes claimed a right under section 2 of the Prescription Act 1832 to use the pump arising from 40 years' user. Collins MR said that such a right could not be acquired by one tenant against another but must be acquired by the owner of the fee of the one tenement against the owner of the fee of the other tenement. This is the wider basis for the decision, described by Lord Millett as "the fee simple rule". There was also a narrower basis for the decision, that where two tenements are held by tenants from the same landlord, prescription does not apply because possession of the tenant of the land demised to him is the possession of the landlord and acquisition of an easement by a tenant would be a violation of first principles of the law of easements which require that there be two tenements in separate possession, one dominant and the other servient. This reasoning was adopted from earlier decisions.[7] Nevertheless (and despite the fact that it is not the only rule enunciated in the case), this became known as the rule in *Kilgour v Gaddes*: where estates in fee simple are both in common ownership, tenants cannot prescribe one against the other for easements under any circumstances because

[4] *East Stonehouse UDC v Willoughby Brothers Ltd* [1902] 2 KB 318
[5] *Beggan v McDonald* 2 LR Ir 560; *Hanna v Pollock* [1900] 2 IR 664.
[6] [1904] 1 KB 457
[7] *Gayford v Moffatt* LR 4 Ch 133 (Lord Cairns); *Timmons v Hewitt* 22 LR Ir 627 (Palles CB)

there must be separate dominant and servient tenements. Lord Millett called it 'the common landlord rule'.

What led Collins MR to the view that only the fee simple owner could prescribe for an easement was the notion that prescription presumes that a grant has been made of a permanent right at some time in the past. Being a permanent right, the owner of the fee simple will be bound by it; and to be bound by it, he must have been in a position to contest the use and have not done so. If it were his tenant, rather than the fee simple owner himself, who allowed the use, the latter could not prevent the use and might not even know about it.

But the presumption of a permanent right arises only in the case of common law presumption, that is to say user since time immemorial, taken to be the year of the accession of King Richard I, 1189. It does not arise in the case of statutory prescription, that is to say under the 1832 Act which reduces the period of user which must be shown to 20, or in certain cases 40, years. Nor does it apply to lost modern grant which is a doctrine invented and developed by judges by which the court deduces from prolonged user in more recent times that there must have been a grant. Since *Kilgour v Gaddes* was a case of statutory prescription, what led Collins MR to think that the presumption of a permanent right applied to the case before him and extended also to cases of lost modern grant?

The cause was dicta of Lindley LJ in *Wheaton v Maple & Co*, a case about obstruction of the plaintiff's right to light by a Crown lessee of neighbouring land. The right was claimed under section 3 of the Prescription Act 1832. The Court of Appeal held that the section did not bind the Crown as reversioner. The court thought this vital because, as Lindley LJ observed: "The whole theory of prescription at common law is against presuming a grant or covenant not to interrupt by or with anyone but the owner in fee". That was true of prescription at common law based on user since time immemorial. If the use is presumed to have continued since 1189, the owner of the fee simple must surely be aware of and bound by it.[8] But it is not true of the shorter period of use necessary to find a presumed grant under the statute or under the theory of lost modern grant.

What Lindley LJ had to say about the last was: "I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements" (meaning, one supposes, common easements such as rights of way and to water rather than a right to light). But, as Delaney demonstrated in a seminal article[9] published more than 50 years ago and Lord Millett has now confirmed, there were in fact such authorities. So the observation was mistaken as well as not germane to the decision. Lindley LJ added: "I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right." The meaning of this is obscure. The right claimed, a right to light, was hardly novel and what the court was being asked to do was to

[8] There is also the problem that in 1189 lessees were not recognized as having an interest in land: Kiralfy (1948) 13 *Conv.* (NS) 104 at 107

[9] VTH Delaney, *'Lessees and the Doctrine of Last Grant'* (1958) 74 LQR 82

recognize from a period of long use that there must have been an actual grant, the usual fiction in cases of prescription; it was therefore not a matter of introducing another fiction but of applying or extending an existing one. Presumably what Lindley LJ meant was that he was not prepared to pretend that there had been a grant by a tenant rather than by the owner of the fee.

In resisting the extension of prescription, including lost modern grant, to leaseholders Lindley LJ was in exalted company. The origin of the suggestion that lessees may not prescribe for an easement is dicta in the judgment of Parke B in a case before the Court of Exchequer decided soon after the introduction of the 1832 Act, *Bright v Walker*.[10] This concerned a disputed right of way over land held by Walker on lease from the Bishop of Worcester. Bright was lessee from the bishop of neighbouring meadows at which he operated a wharf on the River Severn; for more than 20 years he and his predecessors had used a route over Walker's land to reach a public road. The question was whether a right of way had arisen by prescription under the new Act: there was no claim in lost modern grant. However, Parke B suggested that the Act had altered the law not just of common law prescription but also of lost modern grant. Before the Act, he said, 20 years' possession would have been evidence to support a claim based on a non-existing grant from one termor (fixed-term tenant) to another, but since the passing of the Act, such a right was not given by enjoyment for 20 years – in other words, the Act changed the law of lost modern grant as well as that of common law prescription (use since time immemorial) and as a result a grant must be proved in fact and would not be assumed from mere long enjoyment.

This obiter dictum was quite wrong for it misconceived the purpose of the Prescription Act 1832. The Act was an ameliorating statute, intended to facilitate proof of length of enjoyment sufficient to satisfy the requirements of prescription at common law. Instead of requiring proof of use since time immemorial, which was virtually impossible to supply, the courts would be able to accept proof of 20 (or, in certain cases, 40) years. The Act did not touch on the alternative method of acquiring an easement by long usage, lost modern grant. This was confirmed by the House of Lords some 47 years after *Bright v Walker* had been decided.[11]

Despite these flaws in its foundations, the law as stated in *Kilgour v Gaddes* quickly built an edifice. It was confirmed and followed without demur, and by the 1920s was described as well settled.[12] In the second half of the twentieth century the irrationality of the law came to be exposed by writers: if a lessor could obtain, or accept, an easement for the term of his lease by actual express grant, why could he not also do so by presumed express grant?[13] If the owner of the freehold could grant or be granted an easement, why could not the owner of a 999-year lease? But when the Court of Appeal came to consider

[10] (1834) 1 Cr M & R 211
[11] *Angus v Dalton* (1881) 6 App Cas 740 at 814 (Lord Blackburn); see too Cockburn CJ at (1887) 3 QBD 85, 119
[12] Eg in *Derry v Saunders* [1919] 1 KB 223, CA; and by PO Lawrence J in *Cory v Davies* [1923] 2 Ch 95
[13] Delaney, *'Lessees and the Doctrine of Last Grant'* (1958) 74 LQR 82; Megarry and Wade, *The Law of Real Property* (7th ed, 2008), para 28-040 and prior editions.

the question again in the early 1990s, Fox LJ accepted that, although the law was not ideal and there appeared to be no case which directly decided that there could be no lost modern grant by or to a person who owned a lesser estate than the fee, the dicta were to the contrary and were very strong and long-standing. Lost modern grant was a form of prescription at common law. The law was settled.[14]

The Law Commission's comments on this aspect of the law in its 2008 consultation paper on land obligations were brief and diffident. The law was complex and somewhat rigid, the paper said. The commission suggested that the law should be sufficiently flexible to accommodate the possibility of prescriptive acquisition in relation to leasehold estates; under a more nuanced scheme, the easement acquired would be limited to the duration of the leasehold.[15]

Lord Millett in the present case recognized no such inhibitions. The fee simple rule was counter-intuitive, his lordship said, because it was difficult to see why it should be impossible to presume a lost grant of an easement by or to a lessee for the term of his lease when such a grant might be made expressly. The grant could not prejudice the reversion to the servient land, he explained, for the right granted would expire with the term of the grantor's lease and user during the currency of the lease would not bind the reversion unless the reversioner knew of and acquiesced in it. Moreover, the rule was contrary to the policy of the law that long-established *de facto* enjoyment should not be disturbed.[16]

The fee simple rule was based on authority rather than principle, Lord Millett explained, and the authorities were deeply flawed. Statements of the rule in the leading cases were obiter dicta and based on the false premise that lost modern grant was merely a form of common law prescription. Whilst in both common law prescription and lost modern grant long enjoyment gives rise to a presumption of lawful origin and the origin consists of a presumed grant by the owner of the servient tenement, the grant is not the same in the two instances. In common law prescription the grant is presumed to have been made before 1189 and thus almost invariably before the commencement of any lease of the tenements, whilst in lost modern grant it is presumed to have been made recently, quite possibly during the currency of the term of a subsisting lease.[17]

As for the common landlord rule, Lord Millett observed that this was based on the principle that the possession of a tenant is considered to be that of his landlord. But, explained his lordship, it was only the fee simple rule, requiring that any easement be granted by freeholder to freeholder, which prevented the presumed grant from being by the lessee of the servient tenement to the lessee of the dominant tenement thereby avoiding infringement of the fundamental principle that a man cannot have a servitude over his own land. Whilst it was true that a tenant was able to exercise rights over the

[14] *Simmons v Dobson* [1991] 1 WLR 720 at 724, CA. This prompted more academic discussion: Harpum, [1992] CLJ 220; Sparkes, (1992) 56 *Conv* 167.
[15] Law Com CP 186, *Easements, Covenants and Profits a Prendre*, paras 4.238 – 4.245.
[16] *China Field Ltd v Appeal Tribunal (Buildings)*, para 54
[17] *China Field Ltd v Appeal Tribunal (Buildings)*, paras 64 and 65

servient tenement only because he was in possession of the dominant tenement and his possession was with the consent of the landlord, the tenant did not derive rights over the servient tenement from his landlord under his lease as part of the demised premises, nor did he acquire them with the landlord's consent. The tenant derived his rights instead from a separate, fictitious grant presumed from long user of land not comprised in his lease and did so without his landlord's consent.[18]

Once those fallacies had been exposed, Lord Millett concluded, there was no reason in principle that a right of way or other easement should not be acquired by long enjoyment on the part of a lessee of a dominant tenement against servient land held under a lease from the same landlord, provided that no prejudice was caused to the reversion in the landlord. If the supposed grant were presumed to have been made by a lessee of the servient land, the right granted could not endure for a term longer than that of his lease and so could not bind the reversion. Once the fee simple rule was abandoned, the common landlord rule had no logical foundation.[19]

Conclusion

The main interest in this case for English readers lies in the assertion in Lord Millett's concluding remarks that "I doubt whether either of the two rules under discussion would be upheld in England were they to be examined by the House of Lords".[20] Such an assertion by a recently-retired Lord of Appeal in Ordinary, unanimously supported by distinguished senior judges three of them former Queen's Counsel, commands attention in any circumstances; when it is accompanied by such a strong critique of the basis for those rules, it becomes even more convincing. The reasoning of the Court of Final Appeal is, it is respectfully suggested, compelling and is welcome vindication of the views of Delaney, even if half-a-century late.

The main interest in the case for Hong Kong is that it confirms the views of lower courts that the doctrine of lost modern grant supplies a basis for the acquisition of rights of way and other easements by and against lessees through long enjoyment. The need for such a basis is evident in any society, but is more pressing in one which has been and is undergoing rapid development.[21] There is also some pleasure in this decision in the proof which it provides that there is life in the common law in Hong Kong a dozen years after the territory's reversion to China.[22]

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[18] *China Field Ltd v Appeal Tribunal (Buildings)*, para 68
[19] *China Field Ltd v Appeal Tribunal (Buildings)*, paras 71 and 72
[20] *China Field Ltd v Appeal Tribunal (Buildings)*, para 86. Of course such an examination is now literally impossible, the judicial House of Lords having been replaced by the Supreme Court, but we know what Lord Millett meant.
[21] The need is explored and the development explained by the present author in 'Rights of Way and Long User: The English Restriction and the Irish Rule' (2008) 38 HKLJ 51.
[22] The author would like to thank an anonymous referee for helpful comments upon a draft of this note.