

Once a highway, always a highway?

May 2010

Once a highway, always a highway...

.... or so the legal maxim goes. However, Lady Justice Arden in the Court of Appeal in the recent case of *R (on the application of Wayne Smith) v Land Registry and Cambridgeshire County Council* (2010) was at pains to point out that there are a number of ways in which a highway can indeed cease to be a highway; it could be destroyed (“for example if a cliff path fell into the sea”), diverted, stopped up or extinguished under certain statutes. However, these are limited and certainly acquiring title by adverse possession, the court decided, is not one of them.

Mr Smith

Wayne Smith was a window cleaner and a respected local figure, occupying his caravan and “associated structures” on unregistered land, being an unmetalled byway in Cambridgeshire. He had done so for a 12 year period, keeping trimmed the hedges and verges on the area he occupied and not obstructing public access. Mr Smith applied to the Land Registry to register the land in his name on the basis that he had acquired title to it by adverse possession – in other words, because Mr Smith had, he said, occupied the land exclusively without the permission of the owner of the land for 12 years, the owner’s title was extinguished and he was now the true owner.

The Council

However, Cambridgeshire County Council objected to Mr Smith’s application. As the highways authority, the Council said that the land was dedicated as highway, shown on the definitive map as such and, under the Highways Act 1980, the highway was therefore vested in the Council.

Land Registry

The Land Registry rejected Mr Smith’s application for that reason and Mr Smith applied to the court to quash the Land Registry’s decision by judicial review. The court refused Mr Smith’s application.

The Court of Appeal

The Court of Appeal rejected his appeal for the following reasons.

A highway is both a public right of way to pass over the land and the physical land itself.

The physical land comprising the highway (or at least the surface – the “scrapings”) vests in the highways authority under the Highways Act.

While in principle, the existence of a private or a public right of way over land does not itself prevent a claim for adverse possession, it could only succeed if it could be shown that the public right of way over it had been extinguished.

There is no rule of law or statute saying that twelve years' occupation of the land which could give title to it will also extinguish the public right of way. Indeed such cases as there are on the point indicate the contrary.

The court declined to extend the law in this way and said that should only be done, if at all, by Parliament.

The court acknowledged that while the Highways Act only vests the surface or "scrapings" of the highway in the highways authority, it is still possible for another party, whether or not owners of adjoining land, to own the soil beneath the highway. The court did not specifically deal with the question of whether a person claiming

adverse possession could acquire title to the soil beneath. However, Lady Justice Arden said "Mr Smith, of course, claims title of the surface and all that is above and below it, but primarily we are concerned only with the surface. Unless he has obtained that by adverse possession, registration is not worthwhile." That is certainly the approach the Land Registry would be likely to take.

James Falkner
Partner
for Mills & Reeve LLP
+44(0)1603 693230
james.falkner@mills-reeve.com