

## Construing the true extent of access rights to be granted for use of land

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**Property Disputes analysis: How did the court construe a derogation from grant in the unreported case of *Carnegie v Nolan*? Zoë Barton, barrister at Wilberforce Chambers, discusses the court's approach and the importance of express language used in a designation.**

*Carnegie v Nolan* 19 March 2018 (unreported)

### What are the practical implications of this case?

The case provides a useful illustration of:

- the importance of language in construing the true extent of any access rights granted
- the approach to the construal of documents in non-derogation cases, which requires identification of an irreducible minimum of rights granted

As regards to the former, seeking to establish a right more extensive than that which is consistent with the express language will not be overcome by resort to concepts such as necessity. Further, when drafting, remember that there is judicial reluctance to recognise as an easement any right that would give effective ownership or control of the land in question. This is consistent with the discussion of the 'deprivation of ownership' by Lord Scott in *Moncrieff v Jamieson* [[2007](#)] UKHL 42, [[2008](#)] 4 All ER 752.

As regards to the latter, while consistent with the language used, the defendant's attempt to rely on a literal reading of the grant failed. This shows that courts will look at the substantive purpose of the transaction when deciding whether or not there has been a derogation.

Clients would therefore be well advised, when drafting such instruments, to define the precise rights to which they relate and the scope of them. Grantees should ensure that all such rights are specifically identified, while grantors wishing to preserve the possibility of re-designating such rights should ensure that, even where the wording makes the prospect of this clear, the importance of the irreducible minimum of rights granted should not be overlooked—it is not permissible to take with one hand that which has been given with the other, and a 'substitution' so materially different from the original grant will not satisfy the courts.

### What was the background?

The claimant bought two parcels of land at auction, Tower Court and West Court, which were surrounded by land owned by the defendant. In consideration of the sum of £60,000 paid by the claimant, the defendant granted a right of way over an 'access way' together with a right to the claimant 'to park five motor vehicles at the parking area', being an area that the defendant may designate from time to time and a right 'to pass...over and along the access route with or without machinery or tools for the purpose of accessing [Tower Court] to carry out gardening, common maintenance or other construction works'. The defendant subsequently sought to restrict the claimant's use of his land.

The issues which needed to be determined were whether:

- the defendant's purported re-designation of the 'parking area' 378m away was valid
- the claimant was entitled to erect scaffolding on the defendant's land to carry out repairs to Tower Court and to West Court
- the claimant was entitled to access the defendant's land in order to carry out maintenance work on the roof of Tower Court

## What did the court decide?

The claimant succeeded on the first and third issues, but failed on the second.

On the parking issue, despite the express reservation of the right to designate the 'parking area' from time to time, the judge held that the re-designation amounted to a derogation from grant. Relying on the principles in *Platt v London Underground Ltd* [2001] 2 EGLR 121, [2001] All ER (D) 257 (Feb), the judge considered:

'It is implicit by way of principles of non-derogation and treating the deed as a whole that any re-designation should have substantially the same convenience as the existing designation.'

As the original parking area had been situated directly next to Tower Court and there was public parking available nearer to Tower Court than the re-designated area, the re-designation 'effectively [made] the grant pretty well worthless'. It was therefore held to be invalid.

On the scaffolding issue, the claimant sought to rely on the terms of the grant, the doctrine of necessity, the rule in *Wheeldon v Burrows* [1874–80] All ER Rep 669, and section 62 of the Law of Property Act 1925. On the facts, the claimant failed to make out their case. Further, while the reasoning on these points is cursory, it appears that the judge was concerned that a consequence of erecting the scaffolding would be, in effect, to give the claimant exclusive possession of the land for the period of its erection. Although he did not decide the point, the judge said that the exclusive possession problem made the granting of this right 'a matter of some difficulty'. This did not appear to concern the judge when considering the 'parking area'.

Finally, on maintenance in general, the judge held that there was an implied easement upon sale of part of the land, that the land retained was subject to a right of access for the purpose of maintaining land sold and that the defendant's interference amounted to derogation.

*Interviewed by Stephanie Boyer.*

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