Neutral Citation Number: [2007] EWHC 1171 (Ch)

Claim No: CH2006/APP/0810

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE ADJUDICATOR FOR HM LAND REGISTRY

29 March 2007

B e f o r e :

HIS HONOUR JUDGE ROGER KAYE QC
(Sitting as a High Court Judge)

Between:

MICHAEL RICHARD HOUSDEN
ELIZABETH HOUSDEN **Appellants**

and –

THE CONSERVATORS OF WIMBLEDON AND PUTNEY COMMONS **Respondent**

Appearances:
Mr T C Dutton instructed by Russell-Cooke appeared for the Appellants
Mr Guy Fetherstonhaugh QC instructed by Gregsons appeared for the Respondent
Hearing date: 29 March 2007

Judge Kaye QC:

Introduction

1. This is an appeal against the order of Mr Edward Cousins, the Adjudicator to Her Majesty's Land Registry, brought under s 111 of the Land Registration Act 2002 with permission of the Adjudicator.

2. The Adjudicator's order, dated 11 July 2006, was to dismiss the application of the appellants, Mr and Mrs Housden, made on 12 September 2003, to register the benefit of a private right of way (with or without vehicles) over an access way ("the Access Way") leading to their house at 8, Southside Common, Wimbledon, London SW19 4TL ("No. 8"). The appellants are the registered proprietors of this property at HM Land Registry with title absolute under title number SY 75957.

3. The Access Way leads from the public road (Southside Common) to the appellants' house at No 8 across a small strip or verge of land which, it is accepted, forms part of Wimbledon Common. Hence the respondents to the application, and to the appeal, were and are the Conservators ("the Conservators") of Wimbledon and Putney Commons ("the Commons").

4. The claim to the right of way was based upon prescription under s 2 of the Prescription Act 1832 ("the 1832 Act").

5. The Conservators objected to the application and resist the appeal on a pure point of law. They argue that under and on the true construction of the terms of the Wimbledon and Putney Commons Act 1871 ("the 1871 Act"), under which the Commons became vested in the Conservators, they have no power to grant the right of way claimed. Accordingly, the appellants can not acquire a prescriptive right since there has been and is no capable grantor of the right they claim.

6. The 1871 Act has been amended a number of times but the references hereafter to the 1871 Act are to that Act as amended.

The Background

7. The background facts as found by the Adjudicator are not in dispute.

8. The 1871 Act received the Royal Assent on 16 August 1871. It was passed, according to the long title, "*for vesting the Management of Wimbledon Common (including Wimbledon Green and Putney Heath) and Putney Lower Common in the County of Surrey in a body of Conservators, with a view to the preservation thereof*". This Act vested about 1,000 acres, according to the Preamble, of "*open spaces of large extent, uninclosed and unbuilt on*" in the Conservators whose duty (according to the same Preamble) was "*to keep the commons for ever open and uninclosed and unbuilt on … and to preserve the same for public and local use, for purposes of exercise and recreation, and other purposes*".

9. The Commons became vested in the Conservators on and from the passing of the 1871 Act (s 32) subject to all then existing and subsisting rights (ss 108-109). "[T]*he commons*" were defined by s 4 of the 1871 Act as "*the open spaces known as Wimbledon Common with Wimbledon Green and Putney Heath included and Putney Lower Common*" and, in turn, further extensively described by lengthy description and references to plans which were deposited under the Act showing the extent of roads and the "*respective areas of the commons*" (ss 3, 6, 32 and the Third Schedule).

10. No 8 itself was formerly part of a larger plot of land. Access to this plot was gained over one of the access ways from the Commons, but not over the claimed Access Way. This was not then (in 1871) in existence.

11. Indeed, No 8 itself was not in existence in 1871. The larger plot was acquired on 28 November 1882. The Adjudicator found that the house on No 8 together with the Access Way was built some time between 1883 and 1893 since which time access to and egress from No 8 has been enjoyed over the Access Way by the appellants and their predecessors in title. Thus the appellants and their predecessors have enjoyed such access and egress in excess of 40 years but only after the Commons had become vested in the Conservators under the 1871 Act.

12. Before the Adjudicator and before me it was stated on behalf of the Conservators that they had no objection to the appellants using the Access Way on the basis of a personal licence which they have no intention of withdrawing. Their position, as I have said, is that the 1871 Act effectively prevents them from granting any easement; hence, in the absence of a competent grantor, the appellants can not have acquired the claimed right of way by prescription. No point is, however, for present purposes, taken that the use might, throughout the period of enjoyment to the present day, have been permissive and not "as of right" (see, for example, *Tickle v Brown* (1836) 4 A & E 369 at 382). To be fair, Mr Dutton, on behalf of the appellants, maintained (and the Adjudicator had held) that the user had not been permissive, but both sides accept the question before me is a pure question of law. (Obviously, had the use been permissive (i.e. not "as of right") then there could have been no question of any prescriptive use, even with a competent grantor.)

The Issues

13. The issues before the Adjudicator and before me therefore are essentially the same: Can the claimed right of way be acquired by prescription under the provisions of s 2 of the 1832 Act?

14. Section 2 of the 1832 Act provides as follows so far as relevant:

> " … *no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as hereinbefore last mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as hereinbefore last mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the rights thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.*"

15. In order to be able to answer the above question it is common ground that two subsidiary questions arise and must also be answered: first, are the Conservators capable grantors under the 1871 Act and second, if not, can the appellants nevertheless acquire prescriptive rights under the 1832 Act?

16. The reasoning behind the first issue is that at common law all prescription pre-supposes a grant, hence, at least for the purposes of 20 years' user under the first part of s 2, if it was shown that there was no one capable of granting, or, to be more accurate, no one who could lawfully grant the easement claimed over the alleged servient land, then, whatever might be the position with 40 years' user, the right could not be acquired by 20 years' prescription (see Gale on Easements, 17th ed., London 2002, para. 4-51; Megarry & Wade, The Law of Real Property, 6th ed, London 2000, paras. 18-132, 18-137, 18-139).

17. Hence it was common ground that if the Conservators were capable grantors (in the sense above-mentioned), then the appellants must succeed on the first issue (and on this appeal). This was on the basis that they have acquired a prescriptive right under the first part of s 2 of the 1832 Act since they or their predecessors had exercised the right claimed for at least 20 years next before the claim was brought into question (see s 4 of the 1832 Act).

18. If the Conservators were not capable grantors (as they contended) then it was necessary to consider whether the appellants nevertheless acquired a prescriptive right based on 40 years' user under the second part of s 2.

19. The Adjudicator answered both these questions in the negative. He held that the Conservators were not capable grantors on the true construction of the 1871 Act in that they could not lawfully grant the easement or right of way claimed. That being so, he further held that the appellants could not have acquired a prescriptive right of way based on 40 years' user under s 2 of the 1832 Act. He seems to have largely based his decision on the decision of the House of Lords in *Proprietors of the Staffordshire and Worcestershire Canal Navigation v Birmingham Canal Navigations* (1866) LR 1 HL 254 at pp.267-268 per Lord Chelmsford LC, and p. 278 per Lord Westbury ("the *Staffordshire* Case").

20. The appellants appealed against this decision.

The First Question – Are the Conservators Capable or Lawful Grantors?

21. It is axiomatic that the answer to both questions depends on paying due attention to the provisions of the 1871 Act as a whole and to its apparent and stated scope and purpose.

22. The scheme of the 1871 Act is reasonably systematic: the Act first defines the Act and the Commons including references to the deposited plans (ss 1-6). Next is set out the establishment and incorporation of the Conservators and the manner in which they might be appointed and elected, casual vacancies filled, their meetings conducted and other ancillary provisions (ss 8-31).

23. Section 32 of the 1871 Act, having established and incorporated the Conservators, then vested "*the commons, with the buildings and inclosures comprised within the ambit thereof, as respectively shown on the deposited plans … and as respectively described in the third schedule to this Act, with their respective rights, members, and appurtenances*" in the Conservators "*on and from the passing*" of the Act "*for all the estate and interest therein*" then subsisting. The third schedule, as mentioned above, contains a lengthy description of the Commons. Existing rights over the Commons were preserved (ss 108-109).

24. The next batch of provisions sets out the duties and powers of the Conservators, including specifying restrictions on those powers and how they might be exercised (ss 33-39, 68, 71, 80-93, 95-99). For example, the Conservators are by s 34 to keep the Commons open and "*except as otherwise in this Act expressed*" are to prevent encroachments on the Commons and similar acts. (The absent and unmentioned sections are repealed, dealing largely with rights of militia to train on the Commons.)

25. Included amongst the powers conferred on the Conservators are powers to let the buildings on Wimbledon Common (s 38), to make new roads "*as may be in their judgment necessary or proper*" (ss 39, 99), to purchase and accept grants of land adjoining Wimbledon or Putney Lower Common "*and any such land when vested in the Conservators shall be for the purposes of this Act deemed part of the commons*" (s 68), and to borrow on the security of yearly amounts raised as special levies under the 1871 Act and other revenue (s 80).

26. The Conservators are not given power to mortgage land, nor, it is to be particularly noted, is there any express provision enabling them to grant private rights of way or other easements, in contradistinction to their power to make new roads implicitly for the affording of better access for members of the public to the Commons.

27. After saving provisions (ss 108-109) there then follow Schedules including the third schedule containing a detailed description of the Commons.

28. Having regard to these provisions and the Act as a whole, including the title and preamble referred to above, the scope and purpose of the 1871 Act seems clear: to establish a corporate body, the Conservators, to vest the Commons in them, and to keep and preserve the Commons unenclosed and unbuilt upon as a place of exercise and recreation for the public save as expressly permitted by the Act. The powers conferred on the Conservators all seem to me to be powers ancillary to furthering their duties to keep the Commons as open spaces for the use and enjoyment of the public at large.

29. Two particular provisions of the 1871 Act are central to the issue in this case, namely sections 8 and 35.

30. Section 8 of the 1871 Act established the Conservators as a body corporate. It provides:

    "*There shall be a body of Conservators for carrying this Act into execution, the full number of whom shall be eight, and who are hereby incorporated by the name of the Wimbledon and Putney Commons Conservators, and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to take and hold and to dispose of (by grant, demise, or otherwise) land and other property (which body corporate is in this Act referred to as the Conservators).*"

31. Section 35 provides:

"*It shall not be lawful for the Conservators, except as in this Act expressed, to sell, lease, grant, or in any manner dispose of any part of the commons*."

32. The Adjudicator accepted Mr Housden's submission that the word "*dispose*" in ss 8 and 35 had to be given the same meaning. He held that it was apt to include the grant of an easement for the purposes of s 8 but that this apparent power was cut down or restricted ("eliminated" might be a better word) by s 35. There being no other relevant provision aside from ss 8 or 35 which expressly conferred power on the Conservators to grant easements, the result was that the Conservators had no power to grant an easement over any part of "*the commons*".

33. Hence, on the first question, the Conservators could not lawfully grant the right of way claimed. They were not capable grantors.

34. It was agreed that in 1871 the word "*land*" in s 8 of the 1871 Act would include incorporeal hereditaments and, therefore, easements. It was further agreed that the word "*land*" must be taken to include land forming part of the Commons.

35. Mr Dutton, on behalf of the appellants, did not dispute the Adjudicator's construction of s 8 that it was apt to include power to grant easements, but submitted that the restriction in s 35, in preventing the Conservators from disposing of any part of "*the commons*" intended to draw a deliberate distinction from the word "*land*".

36. It was, he submitted, intended to be a descriptive definition of the property vested in the Conservators under s 32 (and the third schedule) and not a reference to land in its legal sense. Thus the restriction on disposal was aimed at preventing a change of ownership of any part of the Commons as described. Since the grant of an easement did not involve such a change of ownership, the Conservators could grant an easement under s 8 even if they could not dispose (e.g. by way of sale) any part of the Commons. Hence, on the first issue, the Conservators were capable grantors.

37. Mr Fetherstonhaugh QC, for the Conservators, pointed out that Mr Dutton's submissions necessitated a distinction between s 8 and s 35 in the meaning of "*dispose*" in that it was apt in s 8 to include the grant of an easement but in s 35 was limited to a disposal involving change of ownership. He accepted that the word "*dispose*" must have the same meaning in both sections.

38. Rather, he submitted, the object of "*dispose*", namely "*land and other property*" in s 8 was intended to be different from the object in s 35, namely "*any part of the commons*". This showed, he submitted, that the Commons was intended to be kept inviolate, a matter underlined by the emphasis in s 35 that the restriction applied to disposals "*in any manner*". Hence under s 8 they could acquire land and could dispose of it as they thought fit, including granting easements over it, so long as such additional land was not part of the Commons. Contrast the provisions of s 68 which enabled the Conservators to acquire land adjoining the Commons which became part of it and so subject to the same restriction as in s 35. Hence the Conservators, he submitted, were not capable grantors.

39. I have some doubt whether the enabling provisions of s 8 would entitle the Conservators to acquire, for example, any land having regard to the scope and purpose of the 1871 Act and the express provisions in s 68. Any acquisition of land by the Conservators must, as it seems to me, to be for and held by them for the purposes of giving effect to the 1871 Act.

40. It is not, however, necessary for me to decide that point. In my judgment, Mr Fetherstonhaugh is otherwise correct in his submissions. Section 8 is an enabling provision. It is akin to a company's memorandum of association setting out the basic powers of the Conservators as a body corporate. Thus they might acquire and hold land and dispose of it.

41. That basis or core power is, however, cut down by s 35 which defines how the powers conferred by s 8 might be exercised. In particular s 35 prevents the Conservators from disposing "*in any manner …any part of the commons*". That, in my judgment, includes preventing them from granting any easements over any land forming part of the Commons.

42. That construction seems to me to be well in keeping with the object of the 1871 Act to preserve the Commons as an open space. As Mr Fetherstonhaugh submitted, the 1871 Act was a well-drafted scheme aimed at preserving the Commons inviolate.

43. This construction likewise fits with such restrictions as those contained in s 34 aimed at preventing encroachments on the Commons which might thereby reduce the area available for public enjoyment. It does not involve stretching the language of s 35 beyond interpreting "*any part of the commons*" as simply meaning "any land forming part of the commons".

44. Nor does this, in my view, contradict the Conservators' powers to make new roads in s 39 for such roads, as part of the Commons open to the public, would carry a right for the public to pass and re-pass over them as any part of the Commons. The provisions of s 35 of the 1871 Act were, in my judgment, not only aimed at keeping the Commons inviolate for their intended purpose but also to prevent the grant of private (as distinct from public) rights of way.

45. It follows that the Conservators could not lawfully grant a private right of way of the kind contended for and were not and never could have been capable (or to be more accurate, "lawful") grantors of a private right of way over or across any part of the Commons.

46. Accordingly in my judgment, therefore, on this first issue, the decision of the Adjudicator was correct.

The Second Question – Can the Appellants Nevertheless Acquire a Prescriptive Right Based on 40 Years' User?

47. The second issue turns on the interpretation of s 2 of the 1832 Act. It is said by both sides that there is no clear decided case on the point. The real question here, of course, is does the fact that the Conservators could not lawfully grant an easement prevent the appellants acquiring a prescriptive right based on 40 years' user under s 2 of the 1832 Act?

48. There is an obvious distinction between the first part of s 2 (20 years user) and the second part (40 years). Twenty years' user might be defeated in any "*way by which the same is now liable to be defeated*"; forty years, however, might only be defeated by a case where it should "*appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing*". Moreover, where 40 years user applies, the right acquired is deemed "*absolute and indefeasible*" (save, of course, where it is defeated by some consent or agreement as specified).

49. Less obvious is the basis for the distinction. It may be simply to avoid evidential difficulties. Thus twenty years' user can be avoided by establishing parol consent whereas forty years' user requires proof of written consent to defeat it: see *Healey v Hawkins* [1968] 1 WLR 1967, Goff J.

50. Mr Dutton nevertheless submitted, as had been argued before the Adjudicator, that, by analogy with s 3 of the 1832 Act an absolute and indefeasible right of way could be acquired by 40 years user even where it was shown that there was no capable grantor.

51. Section 3 contains wording similar to s 2 in that it is provided that a right to light enjoyed for 20 years is absolute and indefeasible unless the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. Thus under s 3 it has been held by high authority that there is no requirement for the presumption or fiction of a grant having been obtained from a competent grantor: see *Tapling v Jones* (1865) 11 HLC 290 at p. 304 (Lord Westbury LC), and at p. 318 (Lord

Chelmsford). At first instance it has also been held that such a right might be acquired as against a corporation even though the corporation had no power to grant the right: see *Jordeson v Sutton, Southcoates and Drypool Gas Co* [1898] 2 Ch 614 at p. 626, North J (decision affd [1899] 2 Ch 217) where *Tapling v Jones* was cited; see also *Dalton v Angus & Co* (1881) LR 6 App Cas 740 at p. 800 per Lord Selborne LC.

52. In *Tapling v Jones* Lord Westbury stated (at p. 304) as follows (Lord Chelmsford making similar observations at p. 318):

"*Upon this section* [that is s 3] *it is material to observe, with reference to the present appeal, that the right to what is called an ancient light now depends upon positive enactment. It is a matter juris positivi, and does not require, and therefore ought not to be rested on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor.*"

53. In *Dalton v Angus & Co* Lord Selborne LC observed at p. 360:

"*It is undoubtedly true that under [s 2 of the 1832 Act], there is an important difference between a forty years' and a twenty years' user. Forty years user has the same effect which (under [s 3]) twenty years' user has as to light; it makes the right absolute and indefeasible, unless it is shewn to have been enjoyed by consent or agreement in writing.*"

54. Thus it was submitted that 40 years user can not, under s 2, be defeated by proof that the grantor was not capable of, or had no power to, grant the right.

55. Support, it was said, comes from a first instance decision of Hall V-C in *Lemaitre v Davis* (1881) 19 Ch D 281 at p. 281 where it was held that there could be prescription against an ecclesiastical corporation even though the corporation was restrained from alienation.

56. Support too was gained by Mr Dutton from text-book writers, such as Gale (*op. cit*) suggesting there was no need to presume a grant where the 40 year period was established under s 2 (see paras. 4-61, 4-63). The learned editors pointed out too in the current supplement that although this point was raised in argument before the House in the recent case of *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519 at 522, it was not considered in their Lordships' speeches. The current editor of Megarry & Wade (*op. cit.*) shares the view of the editors of Gale (para. 18-160) but both works acknowledge that the position is not certain (Gale, para. 4-64; Megarry & Wade, para. 18-160).

57. To the contrary was the case of *Proprietors of the Staffordshire and Worcestershire Canal Navigation v Birmingham Canal Navigations* (1866) LR 1 HL 254 at pp.267-268 (Lord Chelmsford LC), p. 278 (Lord Westbury).

58. This case, it is to be noted, was decided the year following *Tapling v Jones* and included the same panel (Lords Chelmsford, Westbury, and Cranworth). It concerned the question whether a right to water could be obtained by 40 years user under s 2. The Respondent Canal Company however had no power to grant easements under the relevant statute. Based on *Tapling v Jones* the Appellants in that case argued that the right sought was absolute and indefeasible and that the incapacity of the grantor did not matter. The Respondents argued that since they could not have granted the right in the first place, the Appellants could not have obtained the right by prescription.

59. At page 267 Lord Chelmsford observed that "*if the Respondents could not have granted the use of the water to the Appellants, the Act [of 1832] is wholly inapplicable*". After considering the provisions of the relevant Canal Company Act of 1768 his Lordship added:

"*To impose such a servitude upon the water in their canal as that contended for by the Appellants would have been ultra vires of the Respondents, and consequently length of user could never confer an*

indefeasible claim upon the Appellants under the Prescription Act, as no grant of the use of the water could have been lawfully made by the Respondents."

60. It appears from the speech of Lord Cranworth that he, too, considered on the true construction of the 1768 Act that the Respondents would have been in breach of statutory duty in granting any easement (p. 273).

61. Lord Westbury considered the user did not, on the facts of the case amount to an easement within s 2 of the 1832 Act but he also added this:

"*But if the Prescription Act had at all been applicable it would be incumbent on the Appellant to prove that the right founded on the claim by user might, at the beginning of, or during that user, have been lawfully granted to them by the Respondents' company. No such proposition can be maintained. Had any grant been made at any time by the Respondents' company of the right, now alleged by the Appellants to have been acquired against them by user, such grant would have been ultra vires and void, as amounting to a contract by the Respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy improvements.*"

62. Faced with that authority the Adjudicator held that the appellants in the instant case could not have acquired a right of way over the Access Way by prescription under s 2 of the1832 Act.

63. Mr Dutton repeated the submissions made to the Adjudicator.

64. He further argued that the second part of s 2 cannot have been intended to be governed by the opening words since otherwise there was little if any distinction between 20 and 40 years' user (aside from the requirement that all that was required to defeat 40 years user was evidence of a written grant). He also criticised the *Staffordshire* case. He submitted that the quoted extracts from the speeches of Lords Chelmsford and Westbury were obiter dicta (on the basis that the decision could also have rested on the other ground) and that the reasoning seemed to have more to do with s 2 of the 1832 Act not being held to prevent or interfere with the performance of statutory duties rather than based on any clear interpretation of s 2 itself. He also pointed out that it had not been followed in *Jordeson v Sutton, Southcoates and Drypool Gas Co* (above), a s 3 case and its effect described as "doubtful" by the editors of Gale (*op. cit.* para. 4-51).

65. Mr Fetherstonhaugh QC submitted that the Adjudicator was right. He points out that whilst s 2 of the 1832 Act applies to all easements (save light), s 3 has its own special provisions. The reason, he submits is that the sort of rights covered by s 2 (particularly as here a right of way) involves an active or positive act: the going on someone else's land. Section 3, on the other involves a passive right. One may merely erect a building with windows that passively receive light from a neighbour's land.

66. Further he points to the distinction between s 2 and s 3 in that the latter is not preceded by the words "*no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement*" [etc]. On the face of it he submits that s 3 applies whether or not the claim could have been lawfully made at common law etc. This makes perfect sense of *Tapling v Jones.* Moreover the reference at the commencement of the second part of s 2 ("*where such way or other matter as hereinbefore last mentioned*") is a reference back ultimately to the commencement of the section as referring to a "way" to which a claim could lawfully be made, hence the opening words governed the latter (40 years' user) as well as the former.

67. Finally, he submits that the *Staffordshire* case can not be ignored or distinguished in the manner submitted by Mr Dutton.

68. I have summarised very briefly the submissions of counsel and hope I have not done them or their clients an injustice in the process.

69. I am not entirely convinced by Mr Fetherstonhaugh's first distinction between ss 2 and 3 of the 1832 Act (the active/passive distinction). He may be right, but in my judgment Mr Fetherstonhaugh is right in his submission that Adjudicator reached the correct conclusion for all the other reasons he gives.

70. In my judgment the answer to the question posed at the outset of this part (does the fact that the Conservators could not lawfully grant an easement prevent the appellants acquiring a prescriptive right based on 40 years' user under s 2 of the 1832 Act) is "Yes", for the following reasons.

71. First, the *Staffordshire* case cannot be ignored. It is binding on me. Nor do I consider the *dicta* can be distinguished in the manner suggested by Mr Dutton. *Tapling v Jones* was cited to their Lordships in the *Staffordshire* case (see p. 260). It is at least implicit in the reasoning in this latter case that their Lordships considered that the Appellants could acquire no prescriptive right for at least two reasons, first, because the 1768 Act would have rendered the grant of a right to water unlawful and hence no claim could have been lawfully made at common law, and second, because the right claimed was not capable of subsisting as an easement under s 2. I am concerned with the former, but not the latter.

72. Second, both *Tapling v Jones* and the *Staffordshire* case were cited in *Jordeson*. In that case the plaintiff owned a number of cottages adjacent to a plot of land on which the defendant company was building a gas works pursuant to a statute permitting them to acquire land and build gas works on it. The plaintiff alleged that the defendant's negligent operations had caused support (a right he had acquired by prescription) to be withdrawn from his cottages causing subsidence. North J held that the statute did not empower the defendant to build in a manner which caused injury to its neighbour's property. It was submitted on behalf of the defendant company (based on *Staffordshire* and other cases) that the plaintiff could not have acquired a prescriptive right of support because the defendant could not have lawfully granted such a right.

73. North J dismissed this argument. It is important to note the reasons. He said at pp. 625-626:

> "*But to this argument there are many answers. First, as to the support. Such support of land by the land adjoining has existed in nature from all time, and has existed as a legal right at any rate from the time when the land supporting and the land supported became vested in different owners, which we know was the case here before the Companies Act of 1867 was passed. The defendant company did not acquire that part of the site of the new gasholder which adjoins the plaintiff's land until 1877; and nothing turns upon what they have done or permitted since that date. At that time the owner of the plaintiff's land had already a right to have his land supported by the land now belonging to the company, who only acquired the land subject to this burthen of support already existing. Then, as to the houses. It has never been suggested in this case that their existence makes any difference, or that what has occurred would not equally have happened if there had been no houses on the land, though no doubt that circumstance would have affected the amount of damages. But when the defendants' works were commenced the houses had been standing more than thirty years, and prima facie had gained by prescription a right to support, founded upon an implied grant. This grant must be assumed to have been made at any rate as far back as the commencement of the enjoyment – namely, at the time when the houses were erected; and there is no evidence or ground for believing that the owner at that time of the land, the defendants subsequently acquired, was in any way incapacitated from granting a full right to the support which the houses have ever since enjoyed, or was subject to any such disability as that to which the defendant company allege that they have been subject since their purchase.*"

74. Thus the question of the defendant gas company's capacity never arose. The Court of Appeal affirmed his decision but on rather different grounds from this aspect. Accordingly I do not find the case of much assistance for present purposes.

75. Third, as to *Lemaitre*, whilst *Dalton v Angus & Co* was cited, the *Staffordshire* case was not. Again, therefore, that case I find of little assistance.

76. Fourth, whether or not the opening words of s 2 of the 1832 Act govern the entire section so as to apply to both 20 and 40 years' user, absent an Act of Parliament which renders it unlawful for the servient owner to grant easements, the question whether a servient owner who lacks capacity for some other reason having regard to the authorities cited to me is not strictly necessary for me to determine.

77. But I am persuaded that Mr Fetherstonhaugh is right when he submits that the opening words of s 2 are intended to cover the entire section and, as I have said, that seems to me at least implicit in the reasoning in *Staffordshire*. Hence, since it was not lawful for the Conservators to grant the easement, no claim could have been lawfully made to one at common law. The opening words of s 2 are not in s 3 hence the cases on s 3 (and especially *Tapling v Jones*) have to be looked at in that light.

78. Sixth, moreover, *Bakewell Management Ltd v Brandwood* (above) is not as silent as might be thought. Lord Scott of Foscote in considering the manner in which the law of prescription developed pointed out (at p. 538, para. 28):

"*The rules of prescription developed by English law for the acquisition of easements by long de facto enjoyment were based on the establishing of a fiction, namely, that the long de facto enjoyment was attributable to the grant of the easement by a past owner of the servient land but that the grant had been lost*."

79. His Lordship then referred to the exposition of the history of the law of prescription given by Lord Hoffman in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 at pp. 349G-351F. Lord Scott then quoted the whole of s 2 of the 1832 Act in the same paragraph as he had made the statement quoted above without drawing or alluding to any distinction, for these purposes, between the two periods of user.

80. Moreover, Lord Hoffman, in the *Sunningwell* case in the passage cited, whilst he does only quote the first part of s 2 (20 years' user), does point out that the entire history of the developed law of prescription began with the presumption that enjoyment was pursuant to a right having a lawful origin (p. 350A). That cannot be this case for the reasons already given: the Conservators could not have made a lawful grant.

81. Thus on construction of the 1832 Act and the 1871 Act and on analysis of the authorities including at the very least, on the basis of the *Staffordshire* case, the position may be summarised thus: where the capacity or power of the alleged servient owner is shown to derive from a statute which would render it unlawful for the owner to grant an easement of the nature claimed then that will at least prevent a right being acquired by prescription under the second part of s 2 of the 1832 Act. The basis seems to be a presumption, assumption or acknowledgment that the fictional basis of the long user, a presumed grant, could not have been lawfully granted by reason of a parliamentary statute. As I have held in relation to the first issue, s 35 of the 1871 Act expressly provided that "*It shall not be lawful for the Conservators*" except as provided, to grant easements.

Conclusion

82. Accordingly the appeal will be dismissed.