

# News flash

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## Massey & Drew -v- Boulden

**The Court of Appeal's decision in Massey & Drew -v- Boulden causes real problems for those claiming vehicular access to property by virtue of prescription. The decision will be reconsidered by the House of Lords. In the meantime, practitioners should be aware of the Regulations made under the Countryside and Rights of Way Act 2000 which grant property owners the opportunity to purchase a right of way. The deadline for applying to purchase a right of way expires on 4 July 2003.**

In Massey & Drew, the claimants owned a house adjoining a village green owned by the defendant. The claimants and their predecessors had enjoyed vehicular access to a parking space on their property by way of a track running across the village green for over 40 years. The track crossed a public footpath also running across the village green.


The claimants claimed that, by prescription, they had acquired an easement giving them a right to vehicular access to their property over the track running across the village green.

The Court of Appeal disagreed. Section 34 Road Traffic Act 1988 (which has been in force since 1930 in previous Acts) makes it a criminal offence to drive a motor vehicle without lawful authority:-

- “(a) on or upon any common land, moorland or land of any other description not being land forming part of a road; or
- (b) on any road being a footpath or bridleway”

### **Court of Appeal's decision**

The Court of Appeal concluded that the words of sub-section (a) extend to land of *any* description (i.e. the subsection is not to be construed *eiusdem generis*). Further, it is not possible to acquire a right of prescription by acts which involve the commission of a criminal offence.

The Court of Appeal also concluded that a 'road' meant either a public highway or a road to which the public had access for vehicular use. Finally, driving *across* the footpath (rather than along it) amounted to driving *on* it contrary to sub-section (b). 

▶ Accordingly, the claimants and their predecessors had committed a criminal offence by driving over the track. This prevented them from acquiring an easement of vehicular access by prescription.

Other cases (Hanning -v- Top Deck Travel (1993) 68 P&CR 14 and Bakewell Management Ltd -v- Roland Brandwood [2003] EWCA Civ. 23) have reached the same conclusion in connection with a similar offence created by section 194(4) Law of Property Act 1925 relating only to common land.

As the Court of Appeal observed:-

“... the somewhat striking consequence of so construing the section is that prescriptive rights of vehicular access can never be acquired save over ‘land forming part of a road’, i.e. over a public highway or over a road to which the public already has de facto access...”

It remains to be seen how the House of Lords approaches this conundrum. Given the case law on section 194(4) Law of Property Act 1925 (see above) it may prove difficult to disentangle.

#### **Possible relief**

Some relief may be afforded to property owners caught by these decisions in the Countryside and Rights of Way Act 2000 and the Vehicular Access Across Common and Other Land (England) Regulations 2002. The legislation was apparently intended to provide a remedy for this problem by giving property owners the right to purchase a right of vehicular access from the owner of the land across which their access runs at a fixed tariff of 2% of the value of their premises. This decreases to 0.5% if the premises have been in existence since 30 November 1930 and 0.25% if they have been in existence since 31 December 1905.

It may still be possible to acquire a right after 4 July 2003 but it will be necessary to wait for the user to cease, e.g. by obstruction of the access route.

#### **Regulations doubt**

Some doubt hangs over the Regulations following the observations of Sedley LJ in Massey & Boulden where he doubted whether a private right could be acquired over publicly dedicated land such as a village green.

Practitioners may also wish to consider the availability of title insurance. Perhaps not surprisingly, insurers may be reluctant to grant cover in circumstances where (as is likely) there is no evidence of vehicular access for 20 years prior to the relevant legislation of 1925 and 1930.

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**Robin Simon LLP specialises in the defence of professional negligence claims against solicitors and others. It is based in three offices in London, Leeds and Manchester giving national coverage for such claims. If you have any questions about this note or on any allied subject please contact:**

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