

## NOTICES

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### *Introduction*

1. Notices will fall into either of two categories: permissive, or prohibitory. If user *as of right* must be user which is not resisted by the landowner (*nec vi*), and user which is not by permission of the landowner (*nec precario*), then in theory notices which makes it clear to reasonable members of the public that user is resisted, or that user is by permission, ought to preclude user as of right.
2. In *Beresford*<sup>1</sup> Lord Walker said at paragraph 72

*...a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."*

Lord Walker's opinion suggests that both types of notice can be effective; it is less easy, however, for the public to defeat the purpose of a permissive sign, by simply ignoring it. The practical consequence of such notices being ignored by the public is returned to further below.

### *Prohibitory Notices*

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<sup>1</sup> *R(Beresford) v Sunderland City Council* [2004] 1 AC 889.

3. The efficacy of a prohibitory notice was considered by the High Court in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council*<sup>2</sup>, which cited the decision of the Court of Appeal in *Newnham v Willison*<sup>3</sup>. In that case the Court of Appeal (Kerr LJ) referred to Megarry and Wade *The Law of Real Property* (5th ed), and held:

*Then the authors deal with forcible user, saying that it extends not only to user by violence, as where a claimant to a right of way breaks open a locked gate, but also to user which is contentious or allowed only under protest ...*

*If there is to be a state of 'perpetual warfare' between the parties, there can obviously be no user as of right; and if the servient owner chooses to resist not by physical but by legal force ... the claimant's user will not help a claim by prescription ...*

*In my view what these authorities show is that there may be vi — a forceful exercise of the user — in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use which he claims has become contentious.*

4. In *Smith v Brudenell-Bruce*<sup>4</sup> the High Court held:

*It seems to me that a user ceases to be user as of right if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection wither by physical obstruction or by legal action. A user is contentious when the servient owner is doing everything consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.*

These words were the subject of further consideration by, in particular, the high court in *R (Oxfordshire and Buckinghamshire Mental Health Foundation Trust) v Oxfordshire County Council*, discussed below.

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<sup>2</sup> [2003] 4 PLR 95

<sup>3</sup> (1988) 56 P&CR 8

<sup>4</sup> (2002) 2 P&CR 51, at 59

5. In *Oxfordshire* the Court of Appeal<sup>5</sup> evidently proceeded on the basis<sup>6</sup> that a prohibitory notice, bearing appropriate words – in that case *...private property, access prohibited except with the express consent of Oxford City Council* - would be sufficient to preclude user as of right. The court did not – because it was not necessary in that case - go on to consider how the situation would be viewed if local inhabitants had continued to use the land in defiance of the signs.
6. In *R (Lewis) v Redcar and Cleveland BC*<sup>7</sup>, the court at first instance cited *Cheltenham Builders* and held that a sign which bore the words

*Cleveland Golf Club Warning*  
*It is dangerous to trespass on the golf course*

was insufficient to preclude user as of right. Although such a notice could, the court held, amount to both a hazard warning **and** a prohibition, the words employed on the sign in question did not tell local inhabitants **not** to continue to trespass: *...rather it would be an indication that since the defendant was acquiescing in their trespassory use of the land for recreational purposes, it was thought prudent to warn them that if they continued so to use the land then they did so at their own risk, and the defendant could not be liable if they were hit by a golf ball.*<sup>8</sup>

7. The apparent effect of those words was also considered by the court at paragraph 23 of the judgment:

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<sup>5</sup> [2006] Ch. 43

<sup>6</sup> See paragraphs 7, 93 and 99 of the judgment of Carnwath LJ (with which Blackburne J and Peter Gibson LJ agreed).

<sup>7</sup> [2008] EWHC 1813 (Admin).

<sup>8</sup> See paragraph 19 of Sullivan J's judgment.

*...there was no evidence before Mr Chapman that the erection of the notices in 1998 had any practical effect whatsoever, much less that it had, even temporarily, 'seen off' the use of the land by local people for recreational purposes. The witness who gave evidence about the notices, Mr Fletcher, said that they had been painted out on the night that they were erected. They were re-painted and re-erected three times and then the club gave up. In these circumstances, given the ambiguity and the wording of the notices (to put their possible meaning at its highest from the point of view of the defendant), no landowner in the position of the defendant could reasonably have concluded that by erecting those notices in 1998 it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users..*

8. The decision of the High Court in *R (Oxfordshire and Buckinghamshire Mental Health Foundation Trust) v Oxfordshire County Council* (HHJ Waksman Q.C.)<sup>9</sup>, which has not been appealed, may be regarded as the most detailed judicial analysis to date of the principles which relate to prohibitory notices.

9. At paragraph 22 of its judgment the court derived the following principles:

*(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;*

*(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;*

*(3) The nature and content of the notice, and its effect, must be examined in context;*

*(4) The notice should be read in a common sense and not legalistic way;*

*(5) If it is suggested that the owner should have done something more than*

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<sup>9</sup> [2010] EWHC 530 (Admin).

*erect the actual notice, whether in terms of a different notice or some other act, the Court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in Brudenell–Bruce (*supra*) to “consistent with his means”. That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more. As it happens, in this case, no point on means was taken by the Authority in any event so it does not arise on the facts here.*

*(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean... that is simply another way of asking the question as to what the reasonable user would have made of it;*

*(7) Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;*

*(8) There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant users.*

10. Principles (2)-(4) are consistent with, and appear to originate in, the decision of Sullivan J in the *Redcar* case. One must look at the notice through the eyes of a (reasonable) member of the public, although not the particular local inhabitants who used the land (see principles (6)-(7)), and in addition it is necessary to look at the effect which the notice had upon use by the public.

11. Consideration, under principle (5), of whether the owner should have done something more than erect the actual notice, is undertaken with the “perpetual warfare” of *Newnham v Willison* in mind. At one end of the scale is the erection of a single sign and nothing more, in response to which the local inhabitants simply continue to use the land as though the landowner had done nothing. At the other end of the scale is a state of continuing hostilities between landowner and local inhabitants: signs are erected, torn down and re-erected constantly over a period of years; fences meet a similar fate; user by local inhabitants does not cease and the landowner writes letters to those users he can identify; trespass continues and the landowner seeks the assistance of the courts.
12. It would be surprising were a court to conclude that in the latter scenario the user was 'as of right', and not contentious (vi). The former scenario may be what Lord Walker contemplated in *Beresford* when he said “a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public”.
13. The court in *R (Oxfordshire and Buckinghamshire Mental Health Foundation Trust)* doubted the correctness of a test – found in *Brudenell-Bruce* – which involved consideration of the landowner's means. As a matter of general principle, or perhaps instinct, one can see why it might be said that the wealth or poverty of the landowner should not make a difference to whether the use was not contentious and therefore was 'as of right'. But consideration of whether the landowner did continue to resist trespass, and communicate that resistance to the public, might in some circumstances require realistic assessment of whether an impecunious landowner who erected signs, wrote letters, and turned people off his land when he saw them, should also have instituted expensive court proceedings if he was to defeat the assertion of

user 'as of right'. A landowner who resorted to legal action in other circumstances but declined to do so in an instant case might be said to have taken insufficient action, whereas a landowner who had never resorted to the law, perhaps through lack of means and unfamiliarity with the courts, might not, if he consistently took other steps. If the 'means' test, or factor, is excluded entirely from this consideration, it might penalise public authority landowners in particular.

14. In principle a notice bearing appropriate words may therefore communicate, to those who see it, an intention of the landowner to exclude the public from his land. But that is not the end of the matter. There will need to be a sufficient number of notices, placed in appropriate locations, to ensure that they are readily apparent to members of the public. Depending upon the response of the local inhabitants, the notices should be maintained, and replaced if stolen or destroyed). If there is repeated trespass even in the face of such notices, the landowner may need to take further action, including possible legal proceedings ... if the trespassers can be identified.

#### *Permissive Notices*

*Beresford* remains the principal authority on what constitutes 'permission' from the landowner, what a permission notice should communicate to the public if it is to be effective.

15. Lord Rodger held at paragraph 59

*The council were, accordingly, entitled to refuse Mrs Beresford's application for registration of the area as a town or village green only if those who used the sports arena did so by the revocable will of the owners of the land, that is to say, by virtue of a licence which the owners had granted in their favour and could have withdrawn at any time. The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in*



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*the use being made of the land. Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only...*

16. It is – one hopes – now well known that a permissive notice, if it is to be effective, must convey to the public that the permission granted may with withdrawn at any time. The reason for this must be that an indefinite permission, never apparently to be withdrawn, is in practical terms the same as user *as though* of right; whereas a revocable permission does not lead to or permit use *as though* of right, because the permission could end at any time.

17. However, if correct, that analysis leads neatly to the point which Lord Scott raised, but did not necessarily explain, in *Beresford* at paragraph 43:

*.Indeed, I do not... accept that even an express permission is necessarily inconsistent with use as of right.*

Why should this be so? The answer might be explained in this way: if permission is granted at the beginning of the relevant 20 year period, but is not withdrawn during the currency of 20 years' user and any period of 'continuation' thereafter up to the date of the application, in its quality and effect that permission is no different from an open-ended permission which is not apparently liable to be withdrawn at any time. It gives rise to use *as though* 'of right', because there is no, and no suggestion of, interference by the landowner with the public's use of the land.

18. Moreover, if the public may 'ignore' a prohibitory sign and by doing so continue to use land 'as [though] of right', why may not a permissive sign be ignored? If the landowner has to take some further step in pursuance of his prohibition, where signs communicating that prohibition



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are ignored, why should the same not be true where, after the erection of permissive signs, the public continues to use the land in the same manner as they did (or would have done) when no permissive sign was in place? It is arguable, at least, that a permissive sign which expressed the permission as revocable should be backed up with some occasional further step which demonstrates the point that the permission is revocable. The closing of the land to public access, for a brief but significant period, might be such a step.<sup>10</sup> This may, or may not, have been what Lord Scott had in mind, and of course such a step may not be practicable where, as is often the case, land is accessed by virtue of existing public rights of way.

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<sup>10</sup> Clearly this action could also be interpreted as a physical interruption to the relevant period of use such that one period ended, and another began