Cumbernauld & Kilsyth District Council v Dollar Land (Cumbernauld) Ltd

Creation of public rights of way – use as of right by the public for the prescriptive period ·
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Case Report: 1993 SC (HL) 44

Key points: Creation of right of way - right of way over an elevated footpath in New Town - whether acquired by prescriptive use - whether public use due to proprietor's tolerance and no right of way created.

The facts: A pedestrian walkway in Cumbernauld belonged to the District Council and had been used by the public with the Council's encouragement for over 20 years and was considered a right of way; it suffered from vandalism and although it could be closed by doors, the Council never did this, notwithstanding the cost to them of repairing vandal damage. Dollar Land subsequently became owners of the walkway and locked the doors at night to prevent vandalism; the Council raised an Action for Declarator that a right of way existed over the walkway.

Legal arguments: Dollar Land argued that: (1) a right of way could be established if the use of a route by right was such as to negate permission by the owner, and (2) the person raising a right of way Action must prove that the public's use was as of right as opposed to being by the tolerance of the owner of the ground. Dollar Land further argued that: (3) if the use of a right of way was not damaging to the owner's interest, then the use must be ascribed to the owner's tolerance; in this case, the use of the walkway had been encouraged by the Council while they were the owners, so it could not be said to be have been against their interest and, accordingly, could not be regarded as use as of right; and (4) for use to be as of right, there must be conflict between the interest of the users and the interest of the owner. Dollar Land were able to produce legal authority in support of their arguments (1) and (2), but not for arguments (3) and (4).

Decision: At the first hearing, the Council were successful in obtaining the Declarator which they sought. Dollar Land then appealed to the House of Lords, which held that the proposition that there must be a conflict of interest between the proprietor and the user was "wholly unsustainable in law" and that "this hopeless appeal……must be dismissed".

Comments: This case re-affirms the principle that, where use can reasonably be regarded as the assertion of a public right, the owner cannot stand by and do nothing and then argue that his inaction be ascribed to his tolerance; if that is his argument, he must do something positive to alert the public to his attitude.

Cases referred to:

(1) Mackintosh v Moir (1871) 9 M 574

(2) Macpherson v Scottish Rights of Way & Recreation Society Ltd (1887) 14 R 875 and (1888) 15 R (HL) 68

(3) Marquis of Bute v McKirdy & McMillan 1937 SC 93

(4) Richardson v Cromarty Petroleum Co Ltd 1982 SLT 237