



### THE *SUNNINGWELL* JUDGMENT AND THE MEANING OF "AS OF RIGHT"

#### Introduction

1. This Advice Note explains the *Sunningwell* judgment<sup>1</sup> so far as it relates to the meaning of use "as of right" in section 31 of the Highways Act 1980.
2. This Note is publicly available. It is not an authoritative interpretation of the law.

#### Background

3. When considering *Sunningwell* and, in particular, what constituted 20 years' user as of right under section 22(1) of the Commons Registration Act 1965, the House of Lords drew a comparison with section 1(1) of the Rights of Way Act 1932 - now enshrined in section 31(1) of the Highways Act 1980 - where the words "as of right" appeared. In deciding *Sunningwell*, the House of Lords considered the 1996 case of *Steed*<sup>2</sup>, which drew on three other cases: *Hue -v- Whiteley*<sup>3</sup>, *Jones -v- Bates*<sup>4</sup>, and *O'Keefe -v- the Secretary of State for the Environment*<sup>5</sup>.

4. The House of Lords held that *Steed* had been wrongly decided. They were of the view that an aside by Mr Justice Tomlin in *Hue -v- Whiteley* resulted in an additional requirement being imposed on the words "as of right" which was contrary to the principles of prescription and for which there was no authority. In passing judgement in the House of Lords, Lord Justice Hoffman suggested that Tomlin J's aside resulted in a view developed in *Jones -v- Bates* that the state of mind of the users should be considered. Lord Hoffman doubted that was what Tomlin J had intended. He said,

"I rather doubt whether, in explaining this term parenthetically as involving a belief that they were exercising a public right, Tomlin J. meant to say more than Lord Blackburn had said in *Mann v. Brodie*, 10 App.Cas. 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which...depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant."<sup>6</sup>

## The correct test

5. The House of Lords decided that the proper test for user as of right is an objective test based on evaluation of the actual user: was it without force, without stealth and without licence (*nec vi, nec clam, nec precario*). Lord Hoffman rejected any necessity for subjective examination of the state of mind of the users which the *Hue, Jones* and *O'Keefe* cases had come to be viewed as an authority for:

"My Lords, in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J. in *Hue v. Whiteley* has led the courts into imposing upon the time-honoured expression "as of right" a new and additional requirement of subjective belief for which there was no previous authority and which I consider to be contrary to the principles of English prescription. There is in my view an unbroken line of descent from the common law concept of *nec vi, nec clam, nec precario* to the term "as of right" in the Acts of 1832, 1932, and 1965."<sup>7</sup>

Lord Hoffman went on to say:

"In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use the footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the early years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored."<sup>8</sup>

## Summary

6. The House of Lords held that evidence as to the status or reputation of a way is admissible, but evidence as to the state of mind of the users is not part of the test of user as of right. If it emerges that users did not consider that they were exercising public rights that does not mean that the evidence of use is to be discounted. On the contrary, user "as of right" does not require that the public believe they are using a way as of right.

1. *R-v-Oxfordshire County Council and Another ex parte Sunningwell Parish Council* [1999] 3 WLR 160
2. *R -v- Suffolk County Council ex parte Steed* (1996)75 P&CR 102
3. *Hue -v- Whiteley* [1929] 1 Ch 440, 445
4. *Jones -v- Bates* [1938] 2 All ER 237
5. *O'Keefe -v- SSE* [1996] JPL 42
6. [1999] 3 WLR 169 (at H)
7. [1999] 3 WLR 171 (at A)
8. [1999] 3 WLR 171 (at C)