

Roading Law As it Applies to Unformed Roads

A reading of “Roading Law As it Applies to Unformed Roads” makes it abundantly clear that an unformed road is as good as any other road – that is the whole purpose of the commentary¹.

There should not be any confusion concerning the use of the term “occupier” in the commentary if the normal rules of statutory interpretation are applied correctly and regard is had to the dictionary definition of the words “occupier” and “possess” as used in the text.

First, reference should be made to the dictionary definition of each of these terms

“Occupier” at p834 of the Concise Oxford Dictionary, 5th Ed (revised) 1974 reads:

“Occupier, Person in (esp. temporary or subordinate) possession esp. of land.”

At page 949 “possess” says “Hold as property, own;”

Within the meaning of the term “occupier” as understood in common language, a person in actual occupation of an unformed road, is in temporary and subordinate possession of it. “Possess” is a somewhat stronger term implying the holding of property as an owner. At p19 of “Roading Law as it Applies to Unformed Roads” under the heading “Does occupation confer ownership?” relevant law and practice are discussed to produce a firm conclusion:

¹ In this respect page 9 is particularly explicit.

“The law, however, is very clear. There is no possibility of the occupier acquiring any rights of ownership or possession through occupancy, use, or care of any unformed road”.

Turning to the principles of statutory interpretation applicable to the word “occupier”, the suggestion made by Mr Mason is that:

“the term ‘occupier’ has extensive application in our statutes, and relates to possession of land to the exclusion of others, with trespass rights².”

We find however, that the law does not support his proposition. *Craies on Statute Law* 7th.ed, 1971 says at p164:

In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts. “It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act, which is not incorporated or referred to, such an interpretation is given to it for the purposes of that Act alone.” *Macbeth v Chislett* [1910] A.C. 220, 223 (Lord Loreburn L.C.), 224 (Lord Shaw). It had been contended that the meaning given to “seamen” in the repealed Merchant Shipping Act 1854 was to be imported into the Employers and Workmen Act 1875 and the Employers’ Liability Act 1880.

The law has been settled for 100 years on the authority of the House of Lords. It is not possible to arbitrarily take a meaning from one statute and apply it to another statute or situation. Words apply generally only if used in their normal meaning.

² The author of “Roading Law as it Applies to Unformed Roads” as a young lawyer assisted in the drafting of the first New Zealand statute to deal with adverse occupation of land transfer title, The Land Transfer Amendment Act 1963. Neither at that time, nor subsequently, has he encountered the generality of the proposition advanced by Mr Mason.

In the context of an occupier in the possession of land owned by another person, or statutory body, rights can arise if the occupier can demonstrate an intention to occupy, with the objective of destroying the title of the documentary owner. When this intention is evidenced the type of occupation is called adverse possession. Adverse possession can never be applied to a road, being expressly excluded by s172 of the Land Act 1948. The author of the commentary was careful to use the word “occupier” (i.e. in the ordinary dictionary sense) as applying to the physical situation on the ground when a road is actually occupied by the adjoining owner.

Although an adjoining owner may not occupy a road in the sense of adversely possessing it, a road may be occupied, and most unformed roads are so occupied. To make any other assertion is to deny reality.

Mr Mason seems troubled with the right of frontagers and says that “our Courts have held that adjoining occupiers are no more than frontagers”. The leading case, *Fuller v Macleod* (1981) 1NZLR CA 390 (noted at pages 3, 6, 17, 53 and by implication at p54 of “Roading Law as it Applies to Unformed Roads”) does not, however, decide that. *Fuller* decides that a frontager’s common law rights of access to the highway were applicable in New Zealand subject to any statutory limitations.

The decision is clearly restricted to that point of law. Some of the judges in *Fuller* have provided very useful commentaries on the general law on roads and these have been referred to in a subsequent decision of the Court of Appeal, *Man O’War Station Ltd v Auckland City Council* (2000) 2 NZLR 267. Where relevant to unformed roads that case has been noted in “Roading Law as it Applies to Unformed Roads” as indicated above.

The common law rights of frontagers as expressed in Fuller do not directly provide assistance in clarifying the rights of the public on unformed roads and the case is not therefore included in the substantive discussion in “Roading Law as it Applies to Unformed Roads.”

Under the heading “Exchange for other forms of public access” at p48 of the roading commentary, the author states “There are formidable if not insurmountable difficulties in exchanging unformed road for a new unformed road in the same vicinity”. Mr Mason says however “Hayes claims that it is not legally possible to create new unformed public roads, in situations where exchange of a road is desired for alternative access”. The author did not state that and took great care not to state that. The author goes on at p49 to note some of the difficulties, reflecting on more than 50 years of experience in dealing with these issues.

In conclusion, the use of the term “occupier” in relation to unformed roads is entirely appropriate in fact, language and law. “Occupation” as a legal term does not necessarily imply lawful occupation. All prescriptive rights begin life as a trespass i.e. one person unlawfully enters on the land of another and continues to occupy or use that land. The occupier of a road cannot, however, by occupation acquire any legal rights. The law applying to frontagers does not clarify the rights of the public over unformed roads and applies in a narrow compass.

Unformed roads are as good as any other road and like other roads may be managed by the territorial local authorities. The history of roading law is the history of the management of roads (see for example Appendix A of “Roading Law as it Applies to Unformed Roads” setting out roading

management law as if applied as long ago as 1905 when the unformed roading network had been largely set out).

Different classes of roads are managed in different ways. Unformed roads should be managed in a balanced way which reflects the needs of society today. Roding law as a vital part of our land law has developed continuously and has never been frozen in the past.