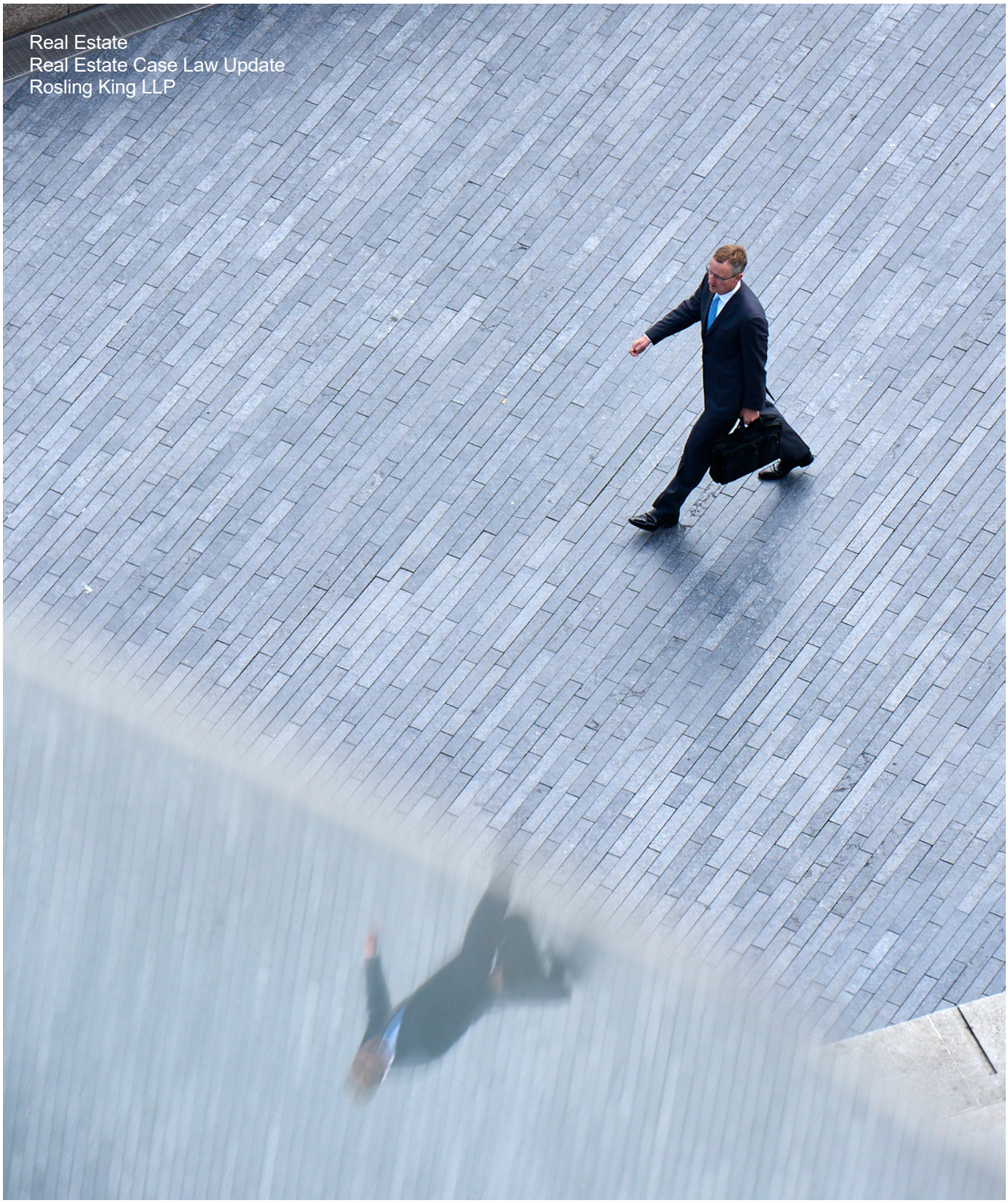
R K



Mr & Mrs Pezaro (the "Claimants") owned two neighbouring properties, 149 and 151 New Street (the "Servient Properties"). The Servient Properties were built as part of a terrace that initially comprised of four properties owned by a Mr William Bartlett; 145, 147, 149 and 151 New Street. 145 New Street had been demolished and 147 New Street was sold by way of Conveyance dated 6th April 1960 in which a right of way was granted to the owner and any successors in title of 147 New Street over the Servient Properties, allowing access at all times, on foot, over the rear strip of the Servient Properties.

The initial owner of 147 New Bridge, Mr Ayres, had built an outhouse at the rear of his property to house his dogs in the area referred to as being part of the right of way. He also constructed a permanent fence to stop surface runoff into the neighbouring 149 New Bridge Street when he was washing the areas for his dogs. The right of way was not in use.

An agreement was made between the Claimants and Mr Ayres in 2004 in which planning permission would be sought for the garden areas of the three neighbouring properties, 147, 149 and 151. Mr Ayres retained a small garden space. During these discussions, the right of way was not mentioned. The parties asserted that the intention was to remove the gardens and they believed that this would extinguish the right of way. Planning permission, on a second attempt, was obtained and the garden areas were sold to Brookeswood Developments Limited for development. Nothing was done to remove the benefit of or extinguish the right of way.

At the end of 2009, the Claimants approached Mr Ayres to seek his approval of their intention to build a fourth house at the side of 151 New Street. They had plans drawn up by a Mr Paul Jenkins who raised the issue of the right of way. He stated that this was in favour of 147 and incorrect to build over it. The Claimants approached Mr Ayres again, offering to pay legal fees to have right of way removed. Mr Ayres agreed to this proposal.

The initial planning permission was refused. The Claimants applied again, and the planning permission was granted on 17th June 2011. Subsequent to this, the Claimants contacted Mr Ayres once more to have the right of way removed from the registers, however, they discovered that Mr Ayres had sold the property to a Mr Alan Bradshaw. On contacting Mr Bradshaw, he notified the Claimants that 147 New Street had been sold to a Mr & Mrs Bourne in May 2011 (the "Defendants"). The Claimants approached the Defendants with the same proposal, however, this was not well received. The Defendants stated that the property had been re-worked to make use of the right of way.

The Claimants sought a determination that the right of way no longer existed on the grounds of proprietary estoppel. They stated that they were acting in reliance on the agreement made with Mr Ayres.

Master Teverson in the High Court examined s116 of the Land Registration Act 2002 (the "Act"). This section states that an equity by estoppel "has the effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)". He then looked to the rules regarding the effect of dispositions on priority as set out in s29 of the Act which stated that the interest will be protected if it is registered

or if there is a notice (s29(2)(a)(ii)).

The Claimants argued that they were in actual occupation as required by schedule 3 paragraph 2 of the Act and, therefore, that this was a sufficient trigger for the Defendants to make enquiries at the time of purchase.

Master Teverson considered this argument. The right of way was blocked by a fence and two gates. The Claimants no longer lived in the Property but had an agent who maintained control and occupation on their behalf. In his judgment, Master Teverson considered that of Lord Oliver in Abbey National Building Society v Cann [1990] UKHL 2 who said "It is, perhaps, dangerous to suggest any test for what is essentially a question of fact, for "occupation" is a concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied". Master Teverson stated that "in the case of an easement over the Claimant's own land, the court should be cautious before finding that it is in the actual occupation of the servient owner. The servient tenement is not part of the land that will be inspected or viewed before purchase". He continues in his judgment to state that whilst there may have been an obstruction, in the form of the fence, unless the obstruction is permanent, such as a building in which the servient owner is dwelling, the court should not treat the servient owner as being in actual occupation of the easement. Furthermore, he ascertained that standard enquiries should be sufficient for the Defendants.

The Claimants asserted that the Planning Application notice outside 147 New Street should have provided sufficient notice to the Defendants. When purchasing 147 New Street, the Defendants had been provided with the Seller's Property Information Form which stated that building works were proposed but "unsubstantiated". The Defendants looked up the Planning ~Application and saw it had been refused. They were unaware that Planning Applications could be made more than once.

Master Teverson dismissed the claim on the basis that the Claimants' informal agreement was not binding on the Defendants. The Claimants did not meet the threshold, under Schedule 3 paragraph two of the Act, of actual occupation. He also stated that the planning permission notice and the fencing did not amount to actual occupation. He ordered that the easement in respect of the right of way remained on the registers of title.

The case highlights the importance of documenting correctly any agreements made in relation to properties between land owners.

For further information, please contact Ann Ebberson or the Partner with whom you usually deal.