KEY ISSUES AFFECTING EASEMENTS
Part 2

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VEHICLE ACCESS

Section 193 Law of Property Act 1925 sets out rights of access that apply to all common land (whether or not registered under the 1965 Act), but "such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck or other vehicle". A person can claim prescriptive rights if they have lawful authority.

According to **Hanning v Top Deck Travel [1993]** a person cannot acquire a right of way for vehicular access over common land leading to his property by virtue of prescription because a person could not acquire a prescriptive right via an illegal act.

Accordingly a conveyancer acting for a purchaser of land with an alleged vehicular right of way across common land would have to:

- carry out a Commons Registration Search covering not only the property itself but any access ways to the property, and
- raise a specific enquiry with the Local Highway Authority to find out where the public highway ends, and
- must not assume that an express right of way in the Conveyance or Property Register is adequate unless the grantor owns the common land, and
- consider prescriptive right acquired before 1 January 1926.

Massey v Boulden [2002] Times, 27 November The Court of Appeal recognised the illegality of prescriptive claims across public footpaths and bridle paths under S.34 of the Road Traffic Act 1988. Moreover, it appears to be illegal to drive across open land, moorland and any other land which is not a public road or accessed by the public. A statutory easement may however be acquired.

Bakewell Management v Brandwood [2004] UKHL14 Thankfully, the House of Lords said that **Hanning v Topdeck** Travel above, and also Massey v Boulden are wrong. A prescriptive easement may be acquired after 20 years use as of right. However, an express easement is still desirable and the Land Registry may be reluctant to allow a prescriptive easement to be registered unless 40 years use can be proven. Moreover, there are still question marks over town and village greens and byelaws where the words "lawful authority" are not used.

Note: The Land Registry Practice Note 52 states that they will accept registration of vehicle access easements based on 20 years user.

Insurance is available for vehicle access across common land, if not town and village green. Do not contact the land owner as this may vitiate the insurance policy. A mortgagee will require either an express easement of main vehicle access or an insurance policy. They will not be prepared to accept a prescriptive easement.

Housden v Conservators of Wimbledon and Putney Commons [2007] EWHC 1171.

Here, the judge decided that, following the House of Lords decision of **Bakewell Management Ltd v Brandwood [2004]**, if a piece of legislation states that it is illegal to drive vehicles across a particular piece of land without referring to the ability to obtain lawful authority, then prescriptive, long use, easements could never be claimed. Moreover, even if the owners of land were minded to give an express right, as it is illegal, this would be outside their powers and void. Vehicle access would never be permitted. If, on the other hand, an Act of Parliament or statutory instrument stated that it was

illegal to drive across land without lawful authority, then a right could be claimed either through prescription, after 20 years user, or expressly.

Thus, Section 193 of the Law of Property Act 1925, states that it is illegal to drive vehicles across common land without lawful authority. After twenty years driving across the common without objection, a prescriptive easement may be obtained. On the other hand the Inclosure Act of 1857 and the Commons Act 1876, say that it is illegal to drive across Town and Village Green, and an easement may never be obtained. These provisions are now in the Commons Act 2006.

Even though it is, on the face of it, lawful to drive across common land, some of the larger commons in England and Wales have their own Acts of Parliament. In particular, in **Housden**, homeowners were driving across a small piece of Wimbledon Common in order to access the highway. They and their predecessors seem to have been doing so since the 1880's without objection. The Wimbledon and Putney Commons Act 1871 makes it illegal to drive across either Wimbledon or Putney Commons and makes no mention of lawful authority. The judge held that the homeowners had no legal right to drive across the land and, moreover, the Conservators of the Commons had no right to give them express authority.

This decision threatened to render tens of thousands of properties up and down England and Wales, where similar legislation applied, landlocked to vehicles with no prospect of obtaining an easement.

The Court of Appeal **[2008] EWCA Civ 200** partially reversed the decision. A prescriptive right cannot be claimed after twenty years but, based on the wording of the legislation, an express right may be granted by the Conservators.

It is submitted that this is not necessarily the good news it might appear to be for people claiming access rights, however. Until 1 October 2006, there was a statutory cap (maximum of 2% on market value) on how much landowners could charge to sell access easements across common land, under Section 68 of the Countryside and Rights of Way Act 2000. This cap has now been reversed. Presumably now landowners can charge on the basis of ransom strips on **Stokes v Cambridge** principles.

ACQUIRING AN EASEMENT

Express easements

These should usually be obvious, and to be legal created by deed and equivalent to a legal estate in duration: S.1(2)(a) LPA 1925. There should be notices on the register. The Land Registration Act 2002 has provision that express easement, will not be legal unless a notice appears on the register. If not legal, they will not override.

Implied easements

These are more insidious. If legal (i.e. implied in a conveyance) they would historically be overriding. but see the Land Registration Act 2002 where they need to be patent or used within the previous year. They will be overriding in Schedules 1 and 3 of the LRA 2002.

Necessity

The classic example of an easement of necessity arises in the case of landlocking. The purchaser who cannot gain access to his land, as it is surrounded by land retained by the vendor, is entitled to a right of way over the land retained by the vendor.

An easement by necessity will not be implied unless the easement is essential. No easement will be allowed if there are alternative rights of way, however inconvenient they may be. In **Titchmarsh v Royston Water Co [1899]81 LT 673** an easement of necessity was refused as the claimant was not completely landlocked – he did have access to the highway for himself and his vehicles, albeit down a 20 foot embankment!

An important case on necessity is **Nickerson v Barraclough [1981] Ch 426.** The House of Lords limited the implication, stating that it was one of presumed intention of the parties and was not based on public policy considerations. Thus, where the original grant had made it clear that there would be no rights of way implied – an easement of necessity could not be claimed. The property remained landlocked.

Common Intention

Easements may also be implied in favour of a grantee of land where it is necessary in order to give effect to the common intent of the parties. See **Liverpool City Council v Irwin [1977] AC 239**, a tenant living on the ninth floor of a 15-storey block of flats had an easement to use the stairs and lifts. This easement was implied in the absence of any express agreement. It must have been intended by the parties that the tenant would be able to reach the ninth floor flat!

The rule in Wheeldon v Burrows

The rule is based upon the maxim "a grantor may not derogate from his grant", that is he cannot grant land to another upon such terms that the grantee receives less than he was promised. Note – Mutual easements arise on a division of land: see **Swansborough v Coventry [1909].** Moreover, the Standard Conditions of Sale provide the right to call for an express easement. Contrast **Holaw v Stockton Estates [2001].** If no easement appears on the transfer, the right is lost through merger.

There are three requirements:

(1) the quasi-easement must be "continuous and apparent"; and/or

(2) it must be "necessary to the reasonable enjoyment of the property granted"; and

(3) it must have been, at the time of the grant, used by the grantor for the benefit of the part of the land granted.

Continuous and apparent

The requirement of continuity does not mean what a layman may take it to mean. An easement is continuous if it is exercised passively, i.e. with no need for positive exertion on the part of the dominant owner. Thus, strictly, a right of way cannot be continuous – it requires the owner to walk along it. A right to light, or to ventilation, or to drainage may have the required continuity. However, having said this it should be noted that the requirement of continuity has often been overlooked, and as we shall see, easements of rights of way have often been created under **Wheeldon v Burrows.**

Apparent

An easement is apparent if it is in some way obvious. Thus in **Ward v Kirkland [1967]**, (above) the right to enter a neighbour's land to maintain a wall was not apparent and did not pass under **Wheeldon v Burrows.** On the other hand, an easement of a right of way evidenced by a worn track was recognised as being created in **Hansford v Jago [1921] 1 Ch 322.**

Necessary to reasonable enjoyment

It appears, although it has never been settled, that this requirement is an alternative to being continuous and apparent – both requirements probably need not be met.

It should be noted that the requirement of being "necessary to the reasonable enjoyment of the property" is not as strict as "necessity" discussed above. However, if there is no such requirement – an easement will not be created under this head. In **Goldberg v Edwards [1950] 1 Ch 247** for instance, a right to use a corridor, granted by a landlord to a tenant, was not necessary to the reasonable enjoyment of the land as the tenant had an alternative right of way to her flat. The right claimed was merely one of convenience.

Unity of seisin

It must also be stressed that the rule can only apply where the quasi-dominant and servient tenements were originally owned and occupied by the same person. This is called unity of seisin.

Wheeldon v Burrows can also apply where the common owner, instead of selling only one part of the land and retaining the rest for himself, makes simultaneous sales or grants to different persons by way of contemporaneous conveyances, retaining none of the land himself. Where this happens all the quasi-easements which were continuous and apparent and in use by the common owner at the time of the sales or grants pass with the respective parts of the land. The Standard Conditions of Sale have the same effect. There will be an implied grant unless the contrary is stated, with the exception of rights to light and air.

The case of **Millman v Ellis [1996] Ch 293** is an interesting application of the rule in **Wheeldon v Burrows.** It demonstrates that the rule may be applicable not only in cases where there is no mention of an easement in a conveyance, but may also be applied in cases where there is an express grant of a limited right of way. In such cases, the rule may be used to enable the purchaser to acquire greater rights over the vendor's retained land by implied grant. It will, therefore, be necessary for the conveyancer to include in the contract for sale of part of a property some condition designed to protect the vendor from implication in the purchaser's favour of an easement under the rule in **Wheeldon v Burrows** over his retained property.

In **Donovan v Rana[2014] EWCA 1999**, the Court of Appeal accepted an implied easement to run services across the servient land to a development site. This was in spite of the fact that the transfer excluded any easements which detracted from the use of the neighbouring land for development or any other purposes.

Statute: s62 Law of Property Act 1925

s62(1) provides that every conveyance of land

> *"…shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever appertaining or reputed to appertain to the land or any part thereof, or, at the time of conveyance, devised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof*."

The rights will be automatically transferred with the conveyance to the purchaser **unless** the conveyance contains express words excluding them.

As well as passing existing easements automatically on a conveyance, s62 has a second effect more relevant to our discussion of the acquisition of easements. Precarious rights (i.e. licences) may be converted, on a conveyance into easements (i.e. property rights which will bind third parties and which cannot be revoked by the original grantor). This will occur providing there was originally "diversity of ownership and occupation" as mentioned above. A person cannot have a precarious right over his own land, and thus, for s62 to create new easements, there must be some separation of ownership or occupation. The section will typically apply therefore when a tenant is allowed to go into occupation before a lease is granted and is then given licence over the landlord's land, or where a lease is renewed after a tenant is granted a licence, or if a tenant with a license over his landlord's land purchases the freehold. In these situations students should always be put on their guard as to the importance of s62. A landlord is always well advised to exclude the application of s62 on renewing a less or granting a right in favour of a sitting tenant to purchase the freehold.

A few examples will suffice to illustrate the importance of the section. In **International Teas Stores v Hobbs [1903] 2 Ch 165** the defendant owned two adjacent buildings. He let one for business purposes and gave the claimant tenants permission to use the yard of his retained premises. Subsequently the freehold was conveyed to the claimants. They now had an easement which could not, unlike a licence, be revoked. In **Wright v Macadam [1949] 2 KB 499**, see above, a permission to store coal was converted into an easement on renewal of lease. In the case of **Goldberg v Edwards [1950]** above. Here the tenant was allowed into occupation prior to the lease being granted. On the actual grant, the mere permission to use the corridor was converted into an easement. Although the tenant could not claim an implied easement under **Wheeldon v Burrows**, she succeeded under s62; likewise an easement was successfully claimed in **Ward v Kirkland [1967]** above using s62.

Wheeldon v Burrows and s62 compared

Wheeldon v Burrows only applies where there is unity of seisin immediately prior to the conveyance, whereas s62 only applies where there is diversification.

Under **Wheeldon v Burrows** the right must be continuous and apparent and/or necessary for the reasonable user of the land. There are no such requirements in s62.

s62 can apply equally to easements and profits, whereas **Wheeldon v Burrows** applies to easements only.

Only rights which are capable of being legal easements or profits can pass under s62, whereas **Wheeldon v Burrows** applies to legal and equitable easements.

s62 only operates by way of conveyances (including mortgages, leases and assents), whereas **Wheeldon v Burrows** also applies to contracts to convey land.

Reservation of implied easements

This can only be done by necessity or common intention, although many conditions of sale expressly give effect to **Wheeldon v Burrows,** contrast **Holaw v Stockton Estates [2001]**. Merely because the contract allows you to call for an easement in the transfer, does not mean to say that there is an easement. This must appear in the conveyance.

Presumed easements/easements by prescription

An easement by prescription is created by means of a legal fiction. If it can be shown that there has been long user as of right, which is continuous and by and against the fee simple then, in spite of the actual facts, it is **presumed** that an easement was, at some stage in the past, granted -–hence the other term for prescription – presumed grant. An easement by prescription **must always be legal** as the presumption is that the fictional grant was by deed.

There are three methods of creating an easement by prescription – common law, lost modern grant, and under the Prescription Act 1832. Before looking at all three of these we shall turn to the requirements for any easement by prescription, i.e. user as of right which is continuous and by and against the fee simple.

In **Stanning v Baldwin [2019] EWHC 1350** a drainage easement by prescription was accepted. There was no secrecy at the time the drains were laid, and although they were underground subsequent purchasers of the servient land must have known of their existence as otherwise the premises would not have had drainage.

EASEMENTS: REGISTRATION

Background

Pre 13 October 2003, and the implementation of the Land Registration Act 2002, easements expressly created by deed are legal and overriding. They take priority even though not registered. Equitable easements created pre 13 October 2003, for example not by deed, will only be overriding if openly enjoyed and exercised, i.e. obvious.

Express easements created by deed from 13 October 2003 onwards will only be legal under S.27 of the 2002 Act once there is an application for registration. If not legal they will only be equitable and no equitable easement created from this date onwards will be overriding. It is therefore essential that an application for registration is made as swiftly as possible.

Protection of easements when there is also a transfer

Here, on application to register the land, there will also be an application to register all express easements created in the grant. No separate application to register the easements need be made.

However, it is important to make the application quickly. Priority searches over the dominant land cannot be relied on to give priority over the servient land and if the latter is sold and the purchaser makes an application to register first, the easements may be lost.

A priority search of the servient land may be made using form OS2 if the applicant can show an interest in the land. This is the case even though such a search does not seem to be envisaged from form OS2.

Where the dominant land is unregistered and the servient land is registered

Here, the easement must be registered against the servient land using form AP1.

Where the dominant land is registered and the servient land is unregistered

Here, form AP1 may be used to register the easement as appurtenant to the registered estate in the dominant land. Even if this has not occurred, the easement, if by deed and equivalent to a legal estate in duration and thus legal, will be binding on any third party should there be a conveyance of the servient land. It will also be overriding on first registration under Sch 1 para 3 LRA 2002. However, as easements will only be overriding as of 13 October 2006 if the purchaser has actual notice of them, or they are obvious from a reasonably careful inspection, or they have been exercised within the past year, the Land Registry recommend that a caution against first registration is applied for.

Easements in leases

Where the lease is by deed and of more than 7 years in duration, there must be an application to register the lease. As above, as soon as there has been such an application, the easements will be protected.

If the lease is for 7 or less years in duration, there can (with exceptions) be no substantive registration of the lease. However, the lease can be noted against the landlord's title if for more than 3 years and 7 or less.

Even if the lease cannot be registered, the easements in the lease must be substantively registered wherever the servient land is registered. This must be done using form AP1 and enclosing:-

- the original lease
- a certified copy of the lease, if you wish the original to be returned
- the relevant SDLT form
- any necessary consents
- the appropriate fee

When completing form AP1 quote the title numbers of the servient titles in panel 2 and enter "registration of the easements in the lease" in panel 5.

In addition, as a registrable disposition has occurred, the Land Registry will require form DI to be lodged with details of all leases of more than 3 and 7 or less years which will then be noted.

Note: It is suggested that, in order to take easements off the register when the lease has come to an end, a power of attorney is included whereby the landlord can act as the tenant's agent and apply to cancel the easements.

Easements in leases other than by deed

Although leases of 3 or less years in duration need not be by deed to be legal easements (S.54(2) LPA 1925), leases must always be created by deed if they are to be legal. If the lease is for 3 or less years and informally created, an AP1 cannot be used to register easements. Here, forms UN1 or AN1 to register a unilateral or agreed notice must be used.

Duty to Disclose Unregistered Interests

The 1925 Act made no distinction between those interests which are overriding on first registration and those that were overriding on a disposition of registered land. The Act makes this distinction so that the existing concept of overriding interests is not brought forward into the Act. Schedule 1 lists the interests which are overriding on first registration and are therefore binding on the proprietor even though there is no entry in the register. Schedule 3 lists the interests which are binding on persons who acquire an interest in registered land notwithstanding that there is no entry in the register. A person applying for first registration of title or to register a dealing with registered land must disclose such details of known interests falling within the appropriate Schedule as are specified in rules.

This is a new duty. The objective is to ensure that the applicant for registration discloses any interests which are overriding in nature so that they can be entered into register. The registrar will only wish to enter in the register such rights as are clear and undisputed. The duty depends on actual knowledge and will not relate to short leases or local land charges. Any person affected will be notified of the overriding interest and will be able to object. All affected titles will be varied. Rules will provide guidance as to when the buyer has to provide information, and in relation to which interests it is required.

Problems

The DI forms, to register such an overriding interest are flawed. Only easements, customary rights and short leases must be notified and leases with one year or less to run need not be so notified. No right is being lost by a failure to notify.

The obligation depends on actual knowledge of the buyer and not the seller. The Land Registry are now saying that enquiry forms need not be varied to deal with this duty.

Only burdensome easements need be notified, not beneficial ones, which must be registered using a UN1 or AN1 notice.

Easements need not be notified if obvious or trivial, this includes light and support. Moreover, drains need not be included if it is not known where they go to.

EASEMENTS AND PROFITS À PRENDRE

Paragraph 3 provides that the priority of a legal easement or *profit… prendre* is protected without the need for registration. Under the previous system, equitable easements over unregistered land also have overriding status even if they have not been protected, as they should be, by registration under the Land Charges Act 1972. The position of those easements was therefore improved on first registration of title and this situation will not continue under the Act. See **Thatcher v Douglas.**

Thatcher v Douglas [1996], unreported accepted that the equitable easements which are openly exercised and enjoyed (i.e. obvious) will bind a third party purchaser of land regardless of the lack of registration. They will constitute overriding interests under s70(1)(a)LRA 1925. This is in line with the previous decision in **Celsteel v Alton House Holdings Ltd [1986] 1 WLR 512.** Legal easements will always be overriding. This may cause difficulties in relation to prescriptive easements which will always be legal. These provisions are not retrospective.

VARIATION OF EASEMENTS

Once an easement has been established, questions remain about the amount of user which is permitted. Moreover, either the dominant or servient owner may wish to vary the extent of the easement.

It appears that for gifts of way created otherwise than by prescription, alteration of the dominant tenement does not extinguish any easement. Thus in **Graham v Philcox [1984] QB 747** the dominant owner acquired neighbouring property which he then incorporated in his own land. He was still able to claim an easement over the servient land even though the amount of user had been increased. However, if the change to the dominant tenement is such as to impose an excessive burden on the servient land greater than that which might have been reasonably contemplated at the date of grant, the increased user will not be permitted. In **Jelbert v Davis [1968] 1WLR 589**, the dominant tenement was converted from agricultural land into a caravan site. The consequent massive increase in traffic over the servient land was prevented by means of an injunction.

The Court of Appeal held in **White v Richards [1993] 68 P & CR 105** that a right "at all times hereafter to pass and repass on foot and with or without motor vehicles" over a dirt track 2.7 metres wide and 250 metres long did not entitle the dominant tenement owner to take up to 14 juggernaut lorries daily over the track. Notwithstanding that a right of way is granted in wide terms, it may be limited by the physical characteristics of the path over which it subsists.

In **Davill v Pull [2009] EWCA 1309**, a right of way for all reasonable and useful purposes was sufficiently general to allow access to newbuild houses on the dominant land, even though the latter had been described as garden land.

A similar problem arises when the servient owner varies the extent of the easement. He is allowed to do so only in so far as the variation does not prevent reasonable user by the dominant owner. Thus, in **Celsteel Ltd v Alton House Holdings Ltd [1985],** reducing the width of a right of way by more than a half, from 9 metres to 4.14 metres amounted to an infringement of an easement. The right was required for vehicular use and, although 4.14 metres was adequate to drive a car down, it was reasonable on the facts to expect cars to be able to turn around in the same space and this was not possible with the reduction in width.

See **Attwood v Bovis Homes [2000] EGCS 54**

Here, land was subject to drainage rights from neighbouring farmland. The farmland was acquired by B for 1,000 homes: planning permission being subject to improvement of the existing drainage. The servient owner argued that, on analogy with rights of way, the change in character of the dominant land destroyed the easement. Held: this was not so, as long as there was no substantial increase then the easement continued to exist.

In **McAdams Homes Ltd v Robinson and another - [2004] All ER (D) 467 (Feb)**, the Court of Appeal looked at previous conflicting cases. It was held that two factors need to be established in order for the easement to continue to be enjoyed for the purpose of the land as developed, i.e:

(a) whether the development of the dominant land represented a radical change in character or a change in the identity of the land as opposed to a mere change or intensification in the use of the site; and

(b) whether use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land.

It was also held that in this context there will be little difference between an easement arising by prescription and an implied easement.

In spite of this, many cases seem to depend on their facts in Thompson v Bee [2009] EWCA Civ 1212 the Courts held that an access way could not be used for access to three houses. It was held that the use of the words 'all purposes' in a grant does not authorise an unreasonable interference in use by the servient owner.

In **Stanning v Baldwin [2019]** see above - a coachhouse had planning permission to be demolished and replaced by four cottages with underground car parking. This was held not to be an unreasonable increase in use and did not give rise to a radical change in the servient land.

Obtaining an Injunction

The Supreme Court have held in the case of **Coventry v Lawrence [2014] UKSC 13** that Shelfer does not give rise to an inflexible principle. The starting point is that an injunction should be awarded and it is up to the defendant to prove that this is unreasonable. If the requirements of Shelfer are met then in the absence of other relevant circumstances an injunction will probably not be available but even this is not definite. In the present case the Courts awarded an injunction to prevent noise nuisance caused by a nearby motor rally circuit. The circuit had planning permission but this did not overrule an unlawful act. Moreover, there was no defence that the applicant had come to the nuisance even though they had built the house after the planning permission had been obtained. There was a possibility, although not on the facts, of obtaining a prescriptive right to commit a nuisance.

EXTINGUISHING EASEMENTS

Release

Release may be express or implied:

Express

At common law the owner of the dominant tenement has to execute a deed; however, a release in writing supported by consideration would be effective in equity under the doctrine in **Walsh v Lonsdale [1883]**.

An oral release may be effective in equity under the doctrine of estoppel, if the servient owner acts in reliance upon it to his detriment.

Implied

If the servient owner can show that the dominant owner, by his conduct, intended to abandon his right to an easement, the easement is extinguished by implied release. Whether there was an intention to abandon is question of fact to be decided in each case. This can lead to rather fine distinctions. In **Moore v Rawson [1824]** the owner of a building which enjoyed an easement of light, rebuilt it without any window to receive the benefit of the easement. It was held that this was a clear intention to release the right.

Likewise in **Liggins v Inge [1831]** it was stated that if a water mill was pulled down by the owner, with no intention to rebuild – then any right the mill owner had to a free flow of water would be extinguished. However, *"Abandonment of an easement or of a* profit á prendre *can only …….be treated as having taken place where the person entitled to it has demonstrated a fixed intention never any anytime thereafter to assert the right himself or to attempt to transmit it to anyone else"* – **Tehidy Minerals Ltd v Norman [1971].** Thus, in the present case, a right to graze livestock on a common (a profit) was held not be abandoned merely because the commoners had made temporary arrangements to regulate their rights.

Non-user by itself does not amount to a release

In **Benn v Hardinge [1992] 66 P & CR 646** the Court of Appeal held that failure to use a right of way for almost 175 years did not amount to abandonment. Non-use of it is not enough. There must be clear intention to abandon. On the facts, their Lordships were not prepared to infer abandonment, notwithstanding the long period of non-user.

CDC 2020 v Ferreira [2005]. An easement which was originally to garages was resurrected 30 years after the garages had been knocked down.

Unity of ownership and possession

If the dominant and servient tenements come into the ownership and possession of the same person, any easement is extinguished.