KEY ISSUES AFFECTING EASEMENTS PART 1

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CHARACTERISTICS OF AN EASEMENT

An easement cannot **exist** unless the essentials laid down at law are present.

Danckwerts J laid down the following **four** essential characteristics of an easement in the leading case **Re Ellenborough Park [1956] ch 131.**

The Four essentials of an easement are:

(1) There must be a dominant and servient tenement.

(2) The easement must accommodate the dominant tenement.

(3) The dominant and servient tenements must be owned or occupied by different persons.

(4) The right claimed must be capable of forming the subject matter of a grant.

On the requirement for benefit see **Jobson v Record and Record [1998] 75 P&CR 375.** Land was sold subject to a right of way "for all purposes connected with these and enjoyment of the property hereby conveyed being used as agricultural land".

The dominant owner wished to use the right to drive timber lorries which would pick up timber stored on the land and cut from a plantation on neighbouring land, owned by him, but not subject to the easement. The court refused this use:-

(a) use as agricultural land included timber production but not the storage of timber which had been felled elsewhere;

and

(b) the right claimed was not for the land which had the benefit of the easement but for neighbouring land.

Likewise in **Peacock v Custins [2001] 13EG 152**, there could be no use of a right over the dominant in order to cultivate adjacent land.

Pharbu Das v Linden Mews [2002] P & CR D28.

Here, the dominant land was purchased at the back of the owner's house for car parking. This did not allow him to drive through a hole in his wall and park at the back of his house. Nor could he walk out of the back of his house and then drive down the access.

In **Gore v Naheed & Anor [2017] EWCA Civ 369** it was held that on the express wording of a easement, the dominant owner was able to access a garage on land at the back of the dominant land. Use of the garage was ancillary to the use of the land. A tenant of the garage land could not however use the right.

Parker v Roberts [2019] EWCA Civ 121 here the court refused to accept an easement benefitting the residential house could also benefit a proposed house which was to be built on a piece of land acquired by the dominant owner at the back of their house in a different transfer.

Contrast **Britel Ltd v Nightfreight [1998] 4 All ER 432 -** Access to the dominant land in order to carry out construction works in relation to neighbouring land was permitted.

Re Ellenborough Park concerned used of communal gardens which could constitute an easement although the court stated there could be no easement to wander at will. In **Regency Villas Title Ltd**

v Diamond Resorts Ltd [2018] UKSC 57 the appellants owned a mansion and estate and the respondents owned villas on timeshares in the estate. In 1981 they were granted the right to use the gardens, outdoor swimming pool, golf course, squash and tennis courts and ground and basement floors of the mansion. The swimming pool was subsequently filled in and the respondents claimed that they had an easement and this constituted a nuisance. The Court of Appeal decided that in this day and age it would be right to accept the existence of an easement for recreational and sporting activities.

There is also the question of the extent of the easement.

This case has now been confirmed by the Supreme Court.

West v Sharp [1999] 78 P&CR D371

Here an original right of way was 40ft wide, the servient owner reduced it to 13ft and closed down completely for 36 hours for tree cutting. The total closure was held insubstantial and although the reduction in width was an interference with the easement, there were no damages and the interference was too insubstantial to give rise to an injunction.

Lea v Ward [2017] EWHC 2231 (Ch)

The court held that the dominant owner was entitled to use the whole of a driveway, the width of which was interpreted by reference to maps and internet searches. A neighbouring developer intended to build upon the driveway. This was an actionable interference. However, as the driveway could still be used damages were nominal. An injunction would be granted but only if a satisfactory alternative access could not be found.

In **Minor v Groves [2000] 80 P&CR 136** it was stressed that a right of way does not necessarily cover the whole width of a path where a part had traditionally been used for placing rubbish bins and milk bottles.

Particular problems relate to the fourth characteristic. The easement must be capable of forming the subject matter of a grant. This involves various problems,

The right must be sufficiently definite

A right which is uncertain or vague cannot qualify as an easement. Thus it was decided as early as **William Aldred's Case [1610]** that there could be no easement of a prospect or view (though the result could be achieved by way of a restrictive covenant, prohibiting building on the land – by a neighbour in such a way as to obstruct a view).

In **Davies v Dennis (2009) EWCA 1081** there was held to be a breach of covenant against committing a nuisance when an extension was built near to a neighbouring boundary. The three storey extensions with planning permission obscured the neighbour's view of the River Thames. The Court of Appeal has now confirmed this decision.

Other examples of rights which are insufficiently definite to constitute an easement include: a right to privacy – **Browne v Flower [1911] 1 Ch 219**; a right to a general flow of air over land to a windmill – **Webb v Bird [1862]**; a general right to light; and a ius spatiandi – a right to wander at will across land.

Contrast may be made between these indefinite claims which failed and similar rights which, through being certain, qualify as easements. Thus **Bass v Gregory [1890] 25 QBD 481** recognised the right to a flow of air through a defined aperture, i.e. a ventilation shaft. A right to light through a defined aperture, for example – a window, is recognised as an easement and is, indeed, very

common. Likewise although there is no ius spatiandi, a right of way along a defined path is recognised as being the most important of all easements.

SOME SPECIFIC EASEMENTS

Rights to Light

Ough v King [1967] 1 WLR 1547 - These can only exist through a defined window.

Most of such rights are created by prescription, either through lost modern grant, or an indefeasible easement may come into existence under S.3 Prescription Act 1832.

Colls v Home and Colonial Stores [1904] AC 179, accepted that the amount of light must be sufficient for the comfortable enjoyment of and land. Thus here, a business premises required less light than a residence. There is no general 45° rule: **Theed v Debenhams [1876] 2 Ch D 165**.

In **Newham v Lawson [1971] 22 P&CR 582**, a church required relatively little light. In **Allen v Greenwood [1980] Ch 119**, an injunction was granted preventing the erection of a fence on land near a greenhouse, as the retained light would be inadequate for growing plants.

A right to light is not deprived by the change in the use of the building through which the light comes. In **Carr-Saunders v Dick McNeil [1986] 1 WLR 922**, one room had been divided into several smaller rooms, although the windows were the same. Each room was entitled to a reasonable amount of light.

The owner of land cannot, however, increase the windows thus requiring more light: **Martin v Goble (1808)**.

Note: The Rights of Light Act 1959 allows registration of a local land charge in order to prevent creation of prescriptive rights. The registration must occur within 19 years and a day of the commencement of the time period. There must be interruption of a right for a year under the Prescription Act 1932, for the claim to have to start afresh.

In **Tamares (Vincent Square) Ltd. V Fairpoint Properties (Vincent Square) Ltd. [2007] EWHC B3 (Ch)** an injunction was refused in relation to restrictive covenants which blocked rights to light. However, one third betterment value was awarded as compensation. This in spite of the fact that the Premises would normally be artificially lit.

HKRUK II v Heaney [2010] EWHC 2245 (Ch)

Normally once work is underway, an injunction will not be granted to deal with breaches. However, in the present case, a landlord went ahead with development which obstructed rights to light in complete disregard of the facts that the work would obstruct rights to light. In these circumstances, the injunction was granted.

The decision in *Heaney* is particularly controversial after *Coventry v Lawrence* above. In the County Court case of **Scott v Aimiuwu (2015)** the Judge refused to order an injunction where a residential extension encroached on the light of a neighbouring workshop and outbuildings. Damages, is based one-third of betterment value, would have been £54,000, if based on the reduced value of the neighbouring land it would have been £12,000. The Judge decided that factors such as the behaviour of the parties would be relevant and awarded £31,000.

In **Ottercroft Limited v Scandia Care Limited & Another [2016] EWCA Civ 867** the Court of Appeal awarded an injunction in relation to infringement of light by a re-built fire escape. The loss to the neighbouring café premises was only £886. An alternative fire escape would have cost an additional £12,000. In awarding the injunction the Court decided that factors such as the behaviour of the defendant and his non-compliance with an undertaking he had agreed were factors to be taken into account.

Salvage Wharf Ltd & Anor v G&S Brough Ltd [2010] Ch 11

Where rights of light prevents development work, there may be an agreement to allow the development to go ahead. Here the courts drew a distinction between two types of clause. Firstly, a clause that deals with the position as it exists at the date of the agreement. This will be effective to establish the existing legal rights of the parties but will not prevent subsequent acquisition of a right of light by prescription. Secondly, a clause which deals with what might happen in the future. This clause may prevent the acquisition of a right of light by prescription if what is authorised would interfere with the right. It is not necessarily for the clause to use the word 'light' nor to provide that the enjoyment of light is permissive.

RHJ Limited v FT Patten Ltd [2008] EWCA 151

It was held by the Court of Appeal that an agreement did not have to contain an express reference to rights to light to prevent such rights being acquired under s3 of the Prescription Act 1832.

See also **CGIS City Plaza Shares v Britel Fund [2012] EWHC 1594** for a similar decision whereby the agreement was held to binding on successors in title.

Rights of Way

A prescriptive right of way, in **Mills v Silver [1991] Ch 271**, allowed the dominant owner to maintain a trackway but not to improve it by tarmacking it.

There can be no right to wander over land at will, but use of communal gardens was recognised as an easement in Re Ellenborough Park (above).

In **BRB v Glass [1965] 1Ch 538** a prescriptive easement allowed an increase in user (from 6 to 30 caravans) but not a change in the type of use. This is an exception to the normal rule that there cannot be an unreasonable intensification of use of the dominant land in **Lock v Abercaster [1939] Ch 861**, however, where a prescriptive easement for horse drawn vehicles allowed passage of farm animals.

In **White v Grand Hotel Eastbourne [1913] 1 Ch 113**, an unrestrictive right of way was held not to be limited to circumstances in existence when the easement was created. Thus, when a private home became a hotel, the easement still existed.

In **Kain v Norfolk [1949] Ch 163**, an all purposes easement still existed even though a sand and gravel pit was later opened and a substantial traffic of lorries resulted.

In **Powell v Linney (1976)**, the placing of a cattle grid on an easement of access was held reasonable, as in Saint v Jenner (1976), were sleeping policemen.

In **Bulstrade v Lambert [1953] 1 WLR 1064**, parking of vans whilst loading and unloading was not unreasonable and was held as a necessary incident of a right of way.

In **St Edmundsbury Diocesan Board of Finance v Clark [1975] 1 WLR4 68**, a right of way was interpreted in line with the circumstances prevailing when the easement was created. Thus a narrow strip of gravel land was held to be for foot access only of **Keefe v Amor [1965] 1 QB 334**.

In **Snell and Prideaux v Dutton (1992)**, a right of way was impliedly abandoned when the dominant owner acquiesced in encroachment of a building.

Rights of Storage

In **Grigsby v Melville [1972] Ch 488**, storage to the exclusion of the servient owner could not qualify as an easement. However, in **Wright v Macadam [1949] 2 KB 744**, non-exclusive use of coal cellar

did qualify as an easement in favour of a tenant. The easement had been created under S.62 LPA 1925, on renewal of the lease. In **Miller v Emcer Products Ltd [1956] Ch304**, use of a lavatory qualified as an easement.

Fencing Easements

Usually, an easement cannot involve positive expenditure on the part of the servient owner. See **Regis Properties v Redmon [1956] 2 QB 612**. However, in **Crow v Wood [1971] 1QB77**, a customary obligation to fence was recognised as an easement.

Churston Golf Club v Haddock [2019] EWCA544

Several past cases had accepted that there may be an easement to fence which arises through custom. This is an acception to the normal rule that easements cannot require positive expenditure on the part of the servient owner. In the present case the High Court had accepted that a positive covenant to maintain boundary walls and fences forever hereafter could constitute an easement. The Court of Appeal have reversed this decision. It could not be an easement as it referred to the right being a positive covenant. The Courts left open the question as to whether there may be a general easement to fence.

Drainage

In **Palmer v Bowman [2000] 1WLR842**. It was held that there was no easement for a general flow of drainage water from higher land to lower land. This arose automatically through home ownership. There was therefore no right to enter neighbouring land and improve drains. The neighbouring land owner could not wilfully damage the drains on their land but had no obligation to repair them.

Other Problem Areas

William Old International Ltd v Arya [2009] EWHC 599 (Ch)

In this case, the claimant had the benefit of an easement giving free and uninterrupted passage of services through pipes and cables laid or to be laid through the defendants' land, together with associated rights of entry to lay new services and to obtain new supplies of utility services to the building. This easement was insufficient for the requisitioning of an electricity supply to be provided by EDF Energy Networks plc. EDF was not obliged to make a connection if the person requiring it does not own the land through which cables are required to be laid. In such circumstances, the supplier may (but is not obliged to) make a connection if the person requiring it procures the grant of an easement to the supplier over the relevant land. Alternatively, if the owner of that land refuses to grant an easement, the supplier can invoke a statutory procedure to obtain a wayleave from the Secretary of State.

As the claimant did not own the land through which cables were to be laid, the claimant sought to force the defendants to grant an easement to EDF by virtue of the terms of the original grant. The court rejected the claimant's arguments (1) that a right to compel the grant of an easement to EDF was an ancillary aspect of the original grant binding on the defendants; or (2) that the failure to execute such a grant constituted a derogation from the original grant by the defendants.

Comment

An express easement is granted together with all ancillary and incidental rights reasonably necessary to make the grant effective. (See **Pwllbach Colliery Co Ltd v Woodman [1915] AC 634**). However, for an ancillary right to exist, the right must itself be capable of existing as an easement. The right

claimed in this case to compel the grant of an easement to an electricity supplier could not itself exist as an easement and could not therefore exist as an ancillary right.

Was there a derogation from the original tenant? The court confirms that the doctrine of derogation from grant is an essentially negative doctrine, requiring a defendant not to do anything which substantially deprives the claimant from enjoyment of the benefit granted. Implying a requirement that the defendants grant a right to EDF was plainly outside the essentially restrictive nature of the doctrine. This case shows the obvious need to plan carefully for utility connections in advance of development by ensuring the acquisition of sufficient land and/or rights over land.

Metropolitan Housing v RMC FH Co Ltd [2017] EWHC 2609 (Ch) a lease prevented the tenant from creating any easements over the land or any neighbouring land which would encroach upon the landlords' right to light. The tenant's surrending the lease would amount to such an encroachment although on the fact there is no clear evidence of sufficient encroachment by allowing building on a neighbouring piece of land.

CAR PARKING RIGHTS

Moncrieff v Jamieson [2007] UKHL42

For some years there has been a debate about whether an easement to car parking exists. The argument goes that an easement is a right that one person enjoys over another person's land, there can be no easement which constitutes exclusive possession. The earliest cases which discussed this issue, in fact, involved storage, as in **Copeland v Greenhalf [1952] Ch. 488**, where a claim for an easement of storage of trailers on a narrow stretch of agricultural land failed as it amounted to a claim of exclusive possession. If exclusive possession is being claimed as a property right then this would have to arise as an estate in land.

Several Commonwealth decisions enforced this argument throughout the 1960's and 1970's and then, in 1982, a first instance and, unfortunately, unreported decision in **Newman v Jones**. This case involved parking a car on a first come, first serve basis around a block of flats. The judge decided that, as there was a genuine sharing and no guarantee to an individual space, this could constitute an easement. Therefore, here there was an easement but, if there was an allocated space in which a flat owner parked, there could not be an easement.

During the following twenty years, cases suggested problems but with no definite conclusions. Then, starting with a commercial property case: **Batchelor v Marlow** in 2001 and following on with a case involving residential flats: **Saeed v Plustrade Ltd and Another [2002]**, the Court of Appeal held that **Newman v Jones** was correct. There could be no easement to park a car in an allocated space as this constituted a claim of exclusive possession which was contrary to the whole concept of an easement. This was subsequently followed in two further cases: **Central Midland Estates v Leicester Dyers [2004]** and **Montrose Court v Shamash [2006].** In the latter case an easement was held to genuinely exist as there were fewer car parking spaces around the 19th Century block of flats than there were long leaseholders, and occupiers were genuinely required to share. However, again it was recognised that a right to an allocated space could not constitute an easement.

Why this distinction is important is that if a right to park in an allocated space cannot constitute an easement and is not demised, then it cannot amount to a property right. It will merely amount to a licence. This, as in **Saeed v Plustrade Ltd** above, will bind the original landlord/developer but will not be binding against a purchaser of the reversion. Moreover, historically, car parking in relation to leaseholds which may have a major impact on value, would be granted in the schedule of rights and not demised, i.e. a purported easement would be created. As the majority of car parking rights give allocated spaces, this would render the lease defective.

Although cases such as **Saeed v Plustrade Ltd** seem to have taken time to filtrate through to practice, over the past few years it has become increasingly common to demise car parking spaces in leasehold flat developments with the qualification that the developer commences the development in that manner. It is very difficult to change the developer's mind mid-way through! The service charge must also be changed as the tenant would normally be responsible for maintenance of their demise. In anything but the smallest development, a landlord would be advised to be responsible for maintenance of car parking spaces and should then be able to collect the cost via service charge.

If a development is already underway then a landlord is unlikely to accept an argument to demise car parking if existing tenants only have purported easements. Moreover, deeds of variation may not be possible in anything but the smallest developments. In this situation a landlord may be prepared to accept a deed of covenant whereby any purchaser of the reversion is bound by the car parking rights contractually. This should be supported by a restriction at the Land Registry whereby such a purchaser cannot become the new registered proprietor without the written consent of the tenant, who will give their consent if a deed of covenant is entered into.

Slowly then, things were settling down and the argument that car parking rights in allocated spaces should be demised was holding sway. Then came the House of Lords decision of **Moncrieff v Jamieson** in late 2007. This is a Scottish case from the Outer Hebrides involving the law of servitude. It is not a direct precedent in England and Wales, however, the House of Lords allowed a right to park on an allocated space as a servitude. Moreover, two of the judges, including Lord Neuberger, doubted whether the previous Court of Appeal cases from England were correct. It seems that there may be such a thing as an easement to park in an allocated space after all.

Conclusion

I have already seen **Moncrieff** quoted by developers' solicitors as a reason for not demising car parking. It might also be noted that leaseholds, and flats in particular, contain several rights which would be defined to constitute exclusive possession, which should possibly be demised. Examples include for example, exclusive use of a balcony, storage and perhaps, most significant of all in terms of the effect on valuing a roof terrace, all of which potentially could be withdrawn by a reversioner.

Note: In **Virdi v Chana [2008] EWHC 280**, the High Court refused to follow Moncrieff as they felt bound by the English Court of Appeal decisions.

Kettel and others v Bloomfold Ltd [2012] EWHC 1422 (Ch) - car parking in the same space all the time amounts to exclusive possession and the right should have been demised and cannot be an easement: see **Batchelor v Marlow [2003] 1 WLR 76*4***. Parking in whichever space becomes available without an absolute right can constitute an easement. Here, the landlord gave the tenant exclusive rights to park but the tenant could be moved on management grounds. This was held to be an easement as there was no exclusive possession.

In Winterburn v Bennett [2016] EWCA Civ 482 the Court of Appeal recognised that an easement to park a car in one of several spaces could exist. In this case the claimant owned a fish and chip shop adjacent to the entrance of a car park and over a period of time had left vehicles in the car park. They claimed a prescriptive easement. The Court of Appeal stated that such an easement must be exercised without force, secrecy or permission.

In **De Le Cuona V Big Apple Marketing (12 April 2017, Chancery Division, unreported)**, here although there was an exclusive right to park, the beneficiary could not prevent others crossing the land when not in use, the freeholder reserved the right to temporarily move the beneficiary and put advertising boards on a side fence. There was no exclusive possession and this could be an easement.

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".

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 cannot 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, and
- by compulsion from the owner of the common land under Section 68 of the Countryside and Rights of Way Act 2000 which allows the user of a roadway or access land to acquire a right of way by compulsion from the owner of the roadway or access land and the right of way will become a statutory easement.

The user of the roadway will have to show twenty years usage of a village green or common land as an access way. The owners of the roadway granting access will be entitled to compensation assessed under a statutory formula. Compensation will be 0.25% of market value if the premises were in existence on 31 December 1905, 0.5% if 30 November 1930, and 2% otherwise. Disputes as to compensation will go to the Lands Tribunal and any right of way will be restricted for the current use and any material change in use or redevelopment of the property will invalidate the rights of way.

Section 51 of the Commons Act 2006 has now repealed Section 68 Countryside and Rights of Way Act. As of October 1 2006 a statutory easement will no longer be able to be purchased.

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] UKHL 14 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 has produced Practice Note 52 whereby they will accept registration of vehicle access easements based on 20 years user.

Non self issue insurance is now 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.

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.