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ISSUES AFFECTING EASEMENTS PART 2: CREATION OF EASEMENTS AND LAND REGISTRY REQUIREMENTS

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ABOUT RICHARD SNAPE

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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 **S.29 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]***.

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],*** 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.

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: S.62 Law of Property Act 1925

S.62(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. This, unless there are words to the contrary, when V, the owner of Blackacre, who has an easement over his neighbour's land, Whiteacre, conveys Blackacre to P, no express words are necessary to convey easement to P. S.62 implies that the conveyance includes the easement.

As well as passing existing easements automatically on a conveyance, S.62 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". A person cannot have a precarious right over his own land, and thus, for S.62 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 licence over his landlord's land purchases the freehold: see ***Sovmots Investments Ltd v Secretary of State for the Environment [1979] AC 144.*** In spite of this, in ***Wood v Waddington [2015] EWCA 538***, the Court of Appeal accepted that S.62 could create easements out of privileges where the claimed right was continuous and apparent prior to the conveyance even if there was no diversity of occupation. Here, there was evidence of two potholed tracks which made the privilege continuous and apparent and easements were created.

A landlord is always well advised to exclude the application of S.62 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***, a permission to store coal was converted into an easement on renewal of lease. In the case of ***Goldberg v Edwards [1950]***, 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 S.62; likewise an easement was successfully claimed in ***Ward v Kirkland [1967]*** using S.62.

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. The contract is merged with the conveyance on completion and contractual rights would be lost. Note, however, many contracts exclude the doctrine of merger and this would give rise to an easement.

PRESUMED GRANT/PRESCRIPTIVE RIGHTS

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.

The prescriptive period is calculated in three different ways, i.e.

1. common law, since time immemorial which is calculated as the year 1189;
2. the **Prescription Act 1832.** This gives a right to a claimed easements after 20 year user but an indefeasible easement must be based on 40 years user. Either way the user must be next before some suit or action and if there is an interruption in use for a year the claim is lost.

   Note: Rights to light are an exception and can be based on 20 years user unless enjoyed with written agreements.

   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 Court 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.

3. Lost Modern Grant. This is a legal fiction whereby if 20 years user as of right can be shown then there is a presumed grant in the past. The only thing which can defeat this claim is an illegal act.

***Hughes v Incumbence of the Benefice of Frampton on Severn, Arlingham, Saul, Fretherne and Framilode [2021] UKUT 184*.** Here a church was claiming a prescriptive right of access against a neighbouring homeowner. The access had been used for many years to allow visitors to the church to park in a neighbouring car park. It had not been used, however, since 2016. There could not be a claim under the Prescription Act 1832 but lost modern grant was still successfully claimed.

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" without lawful authority.

Note: Quad bikes also now come within the legislation.

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.

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. Restricted byways now also come within the legislation. It is also an offence, without lawful authority, to drive more than 15 yards from the highway and if within 15 yards it must be fore the purpose of parking on open land.

Bakewell Management v Brandwood [2004] UKHL 2014 Thankfully, the House of Lords said that ***Hanning v Topdeck Travel***, 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 landowner 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 vehicles on a village green so as to interfere with recreational use or cause damage.

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. **S.75 of the Wimbledon and Putney Commons Act 1871** says that no part of the common could be sold. It was held that this did not envisage that an express easement could not be created and therefore a prescriptive easement was also possible.

TW Logistics v Essex County Council [2021] UKSC 4

Here a privately-owned port was registered as a village green as there had been no problems in the past with both the owners and locals sharing use of the land. It is illegal to drive vehicles on a village green but this would not prevent registration. In any case if the driving of the vehicles did not impact upon the use of the land by the locals it would not be an illegal act.

The **Commons Act 1876** states that it is an office if vehicle access will interrupt or cause damage to a town or village green. There may also be a public nuisance. It was held that the locals could live harmoniously with TW Logistics. Possible breaches of Health and Safety at Work legislation were irrelevant to the claim.

See all ***Stanning v Baldwin*** above where a house accessed across Gerrard's Cross common was replaced by four cottages and underground parking for 9 cars. This was not actionable.

Remember that the Supreme Court have held in ***R (Lancashire County Council v Secretary of State and R (NHS) v Surrey County Council [2018] UKSC 58*** that if land is held through statute, it cannot be a village green.

NOTE: **S.57 British Transport Commission Act 1949** prevents vehicle access to across the entrance to a dock, station or depot of British Transport Commission land or a successor body. No easement by prescription can ever be created. This applies even if the land ceases to be BTC or a successor land.

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 (S.54(2) LPA 1925), easements 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.

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.

WAYLEAVES

A wayleave agreement is an agreement under which a property owner gives a service provider a right to install a pipe or cable on the owner's land. Utility companies will often produce a relatively short document for the property owner to sign to grant the wayleave. These agreements are often drafted in favour of the utility companies and can have the effect of severely restricting a property owner's ability to deal with their property.

Note: Wayleaves for communication equipment is particularly complicated and time does not permit detail. In particular, compensation provisions under the Electronic Communications Code are very different.

Before entering into an agreement produced by a utility company for signing, consideration should

be given to various factors, such as:

- whether the document is a wayleave or an easement;
- whether the wayleave will bind future owners of the property;
- whether it will restrict potential development of the property and therefore value;
- what compensation or other payments should be made by the company in consideration of the grant of the wayleave.

Wayleave v Easement

A wayleave is a terminable licence which does not automatically bind future owners of the property. It gives the power companies rights to install and retain their apparatus (such as underground cables or overhead lines) with annual payments being made to the property owner. A wayleave will normally contain provision for termination at the expiry of a notice period (commonly 6 or 12 months).

An easement is an interest in land capable of being registered at HMRC. As with a wayleave, it grants rights for the power companies to retain their apparatus either for an indefinite period or a specified number of years. Whilst an easement can last indefinitely it may be terminable, and it may incorporate terms requiring the apparatus to be relocated or compensation paid where development of the property is inhibited.

Voluntary wayleaves

Power companies will normally try to agree a grant of a wayleave agreement directly with the property owner before evoking their powers under the legislation. These are often referred to as voluntary wayleaves. An industry agreed annual fee payable to the property owner according to the type and amount of apparatus installed. The annual fee is based on a scale (relevant to agricultural land values) agreed with the National Farmers' Union and the Country Land and Business

Association. It may be appropriate for higher amounts to be paid in respect of development land, residential, commercial or industrial property.

Utilities' rights to require 'necessary wayleaves'

Under legislation, utilities can serve notice on the property owner requiring a wayleave to be granted within 21 days. If the property owner fails to grant the wayleave within the 21-day period or agrees to grant the wayleave subject to terms and conditions to which the utility objects, then the utility can apply to the Secretary of State ("SoS") for the grant of a "necessary wayleave". An application for a wayleave in relation to a private dwelling (or land where there is planning permission permitting development for private dwelling) is invalid and will not be considered by the SoS.

Before granting a necessary wayleave, the SoS must give the property owner or other occupier of the land an opportunity of being heard by a person appointed by the SoS. The SoS has discretion to grant a necessary wayleave subject to such terms and conditions as he thinks fit. The SoS must be satisfied that it is necessary or expedient for the wayleave to be granted to the utility. In exercising this discretion, the SoS must balance the interests of the utility with those of the property owner. If it is decided that the necessary wayleave is to be granted, the SoS can impose conditions to ameliorate the effect on the property owner.

Any necessary wayleave that is granted will bind any future owner or occupier of the property and will continue in force (unless previously terminated in accordance with a term in the wayleave) for such period as may be specified in the wayleave.

Compensation

The occupier and owner of the land may recover compensation in respect of the grant of a necessary wayleave. Compensation is also recoverable if any damage or disturbance is caused to land or objects or in the exercise of any right conferred by the necessary wayleave. The fundamental principle of compensation that has emerged from case law is equivalence. A property owner is entitled to compensation for all the loss (that is not too remote) that flows from the grant of the necessary wayleave. This will include direct loss due to the siting of the apparatus on the property and indirect loss due to the depreciation in value of the property as a consequence of the grant of the wayleave. It may also in some cases include loss of profits.

Removal of equipment

Statute also deals with removal of supply equipment that was installed pursuant to an existing wayleave. Where an existing wayleave (1) determines by expiration of time or (2) terminates in accordance with a term contained in the wayleave or (3) terminates by reason of a change

in the ownership or occupation of the land after the granting of the existing wayleave so it ceases to be binding on the new owner or occupier of the land, then the property owner may give notice requiring the utility to remove the equipment. The utility must comply with the notice within the notice period (the notice period varies depending upon which circumstance the property owner relies on in serving the notice) unless it makes an application for the grant of a 'necessary wayleave'

within 3 months after the property owner's notice. If the utility applies for a 'necessary wayleave' the process detailed above applies.

Rights of entry

As of right, utilities can also authorise a person to enter into land at any reasonable time to survey it for the purposes of ascertaining whether the land would be suitable to use for the power companies‟ authorised purposes. At least 14 days-notice of intended entry must be given to the occupier and/or property owner.