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KEY ISSUES AFFECTING EASEMENTS:

THE CHARACTERISTICS OF AN EASEMENT

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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.

Note: Statutory bodies may not require a dominant and servient piece of land.

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 was 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 confirmed this decision.

See also ***Bath Rugby Ltd v Greenwood [2020] EWHC 2662***. This is another case involving local residents trying to stop the development of the Recreation Ground in Bath. The land was subject to 1922 restrictive covenants preventing a nuisance or annoyance on the land. The covenants were stated to be for the benefit of the covenantee, their successors in title and assignees. Although the covenant predated the **Law of Property Act 1925** and was not automatically annexed to the land through statute (see below), use of the word 'title' gave rise to an express annexation. The other

issue was trying to identify the benefited land. The Court decided that on its facts the benefited land would be the neighbouring Bathwick estate and the covenants were enforceable. The Court of Appeal passed judgment on the case in December 2021***. [2021] EWCA 1927***, they held that there was no clear annexation of the covenant to the land. The beneficiaries were stated to be the inhabitants of the Bathwick estate. The High Court stated that it must be inferred that the beneficiaries would be adjoining owners of land within the Bathwick estate. The Court of Appeal held that this could not be inferred and the benefitted land was not clearly identified. The covenants were not therefore binding.

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 AREAS

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 the occupation of 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, if 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 **S.3 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 a 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] Ch 304***, 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 exception 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 Court left open the question as to whether there may be a general easement to fence.

CAR PARKING RIGHTS

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 [2001] EWCA 1051*** and following on with a case involving residential flats: ***Saeed v Plustrade Ltd and Another [2002] 2 EGLR 19***, 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] 1WLUK 338*** *and* ***Montrose Court v Shamash [2006] EWCA 251.*** 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 [2007] UKHL42***. This is a Scottish case from The Shetlands 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.

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 764***. 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.

This has recently been confirmed in the case of ***Campden Hill Gate v Duchess of Bedford House RTM Limited [2022] EWHC 2489.*** There could not be an easement to park in a specific space but there could be if parking was permitted in a general area. On the facts, however, no car parking rights had been created.

INTENSIFICATION OF USE

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 rights 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. Fou8ndSee ***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 Court of Appeal 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 coach house 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.

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] 2QB528.*** 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] EWCA 611. 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.

S.203 of Housing and Planning Act 2016

Local authorities can also use **S.203 of the Housing and Planning Act 2016** to discharge easements and also restrictive covenants. For this to apply there must be:

a) planning consent for building or maintenance work;

b) the land has become vested or acquired by a specific authority or appropriated for planning purposes;

c) the authority could have compulsorily acquired the land;

d) the building or maintenance work is for a purpose related to the appropriation or acquisition of the land.