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KEY ISSUES AFFECTING EASEMENTS: IMPLIED AND PRESCRIPTIVE

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RICHARD SNAPE

www.LawSureInsurance.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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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. Since October 13th, 2003, 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! In ***Wong v Beaumont Properties [1965] 1QB 673*** it was implied that a tenant could install a vent on the Landlords Land in order to remove noxious fumes whichg was necessary to operate their restaurant.

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.

Exclusion of S.62

In ***Duchess of Bedford House RTM v Campden Hill Gate (2023)***, above, a clause excluding the creation or transmission of rights which *"that might restrict or prejudicially affect the future rebuilding alteration or development"* did not exclude S.62. In ***Browning v Jack [2021]UKUT 307*** it was held that to exclude S.62 the contrary intention must be included in the conveyance and not from surrounding circumstances. There should be some such clause such as *"S.62 of the Law of Property Act 1925 does not apply to this transfer".*

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. For instance, SCPC 10.4 states that *"completion does not cancel any liability to perform obligations"*. There is a similar provision in 7.3 of the Standard Conditions of Sale.

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. There is no need for user as of right in relation to rights of light under the **Prescription Act 1832**.

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.

User must be without force, secrecy, or permission. Force does not require physical violence but merely a sign that the use is contentious. In ***Winterburn v Bennett [2016] EWCA 482*** signage that a car park was private and for use of patrons only was sufficient to make use by force and no easement existed. This was the case even though the signage was ignored.

In ***Nicholson v Hale [2024] UKUT 153*** a sign stated that the land was private and there was no public right of way. It was held that a reasonable person would understand that there was no private right of way either.

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.

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.

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 ***Merlin Real Estates Limited v Balaam (2024) County Court***, April 24th, there was access along a long track way to a manor house, six cottages and farm buildings. Over the years some buildings had been converted to residences and there was planning permission for nine more. In all, 22 houses were entitled to use the track and M. intended to build nine or ten more. B. objected as this would interfere with his farming activities. It was held on the facts that the increased use was not excessive. There was also a prescriptive right to use two metalled passing places.

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

A similar problem arises when the servient owner varies the extent of the easement. He is allowed to do so only in so far as the variation does not prevent reasonable user by the dominant owner. Thus, in ***Celsteel Ltd v Alton House Holdings Ltd [1985],*** reducing the width of a right of way by more than a half, from 9 metres to 4.14 metres amounted to an infringement of an easement. The right was required for vehicular use and, although 4.14 metres was adequate to drive a car down, it was reasonable on the facts to expect cars to be able to turn around in the same space and this was not possible with the reduction in width. See ***Attwood v Bovis Homes [2000] EGCS 54.*** Here, land was subject to drainage rights from neighbouring farmland. The farmland was acquired by B for 1,000 homes: planning permission being subject to improvement of the existing drainage. The servient owner argued that, on analogy with rights of way, the change in character of the dominant land destroyed the easement. Held: this was not so, as long as there was no substantial increase then the easement continued to exist.

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

the easement to continue to be enjoyed for the purpose of the land as developed, i.e:

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

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

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

In spite of this, many cases seem to depend on their facts in ***Thompson v Bee [2009] EWCA Civ 1212*** the 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.

WAYLEAVES

As seen in ***Re Ellenborough Park (1956)*** above, easements cannot exist unless there is a dominant tenant which is benefitted. For this reason utilities may use wayleaves which are purely contractual and not binding on purchasers. However, in ***Bate v Affinity Water [2019] EWHC 345***, a landowner asked a water company to remove a water main. The water company successfully claimed an easement. Extrinsic evidence showed a small area of land nearby with a borehole. This was the dominant land. In any event, controversially, ***Re Salvin's Indenture [1938] 2AllER 498*** the whole of a water company's undertaking both physical land and rights over land could be a dominant tenement.

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.

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