7 - INTERESTS IN LAND - EASEMENTS

Definition

An easement confers the right to use the land of another in some way, or to prevent it being used in a certain way. Examples are a right of way and a right of light.

A legal easement is not merely a right in personam but in rem; it permanently binds the land over which it is exercisable and permanently avails the land which it benefits.

Characteristics of an Easement

The following 4 essential must be present in order for an easement to exist Re Ellenborough Park [1956] Ch 131:

- there must be a dominant and servient tenement; i.e. one plot of land must have the benefit of the right and another plot must have the burden, it cannot exist independently of the ownership of land, an easement must be appurtenant (attached) to a dominant tenement and will pass on a transfer of the land - S.187 LPA 1925.

- the right must accommodate the dominant land i.e. it must be of benefit to the land and not for example a personal right granted to its owner Hill v Tupper (1863) 2 H&C 121

- the dominant and servient tenements must not be both owned and occupied by the same person, note quasi-easements under Wheeldon v Burrows [1879] 12 Ch D 31; London v Blenheim Estates Ltd v Ladbroke Retail Parks Ltd (1993)

- the right claimed must be capable of forming the subject matter of a grant i.e. of being granted by deed and therefore

(i) There must be both a capable grantor and grantee.

(ii) The right must be within the nature of rights capable of being easements.

(iii) The right must be sufficiently definite;

_Copeland v Greenhalf_

[1952] Ch 488,

_Bryant v Lefever_

(1879) 4 CPD 172,

_Cable v Bryant_
although the creation of new positive easements is likely to continue it is unlikely new negative easements will be created;

(iv) Generally the easement must not involve the servient owner in expenditure; Crow v Wood [1971] 1 QB 77, [1970] 3 All ER 425

(v) An intermittent consensual privilege cannot amount to an easement nor can a claim for exclusive or joint possession of the servient tenement exist as an easement. Copeland v Greenhalf (1952), Miller v Emcer Products Ltd [1965] Ch 304, [1956] 1 All ER 237 Grigsby v Melville [1974] 1 WLR 80, Batchelor v Marlow [2003] 1 WLR 764 CA

Legal and Equitable Easements

Easements are either legal or equitable.

A legal easement must be equivalent to a fee simple or a term of years S.(2) LPA 1925 and is usually created by deed S.52(1) LPA although may be created by prescription or by statute.

An equitable easement will arise if there has been a failure to observe the formalities necessary to create a legal easement or if an easement is granted that is not equivalent to a fee simple or term of years e.g. for life.

Where land is registered then by virtue of the Land Registration Act 2002:

Equitable easements must be registered to be binding.

Only a legal easement will be overriding on a first registration or disposition. This reverses Celsteel Ltd v Alton House Holdings Ltd [1985] 1 WLR 204 where it was held that an openly exercised equitable easement may amount to an overriding interest by virtue of rule 258 of the Land Registration Rules 1925).
Easements on First Registration

Legal easements should in any event be registered, as there is a duty under s 71 and rules 28 and 57 to disclose unregistered interests and the registrar will register such interest on their being disclosed. Where an easement is expressly granted or reserved in a transfer or lease of over 7 years it will be extracted from the document and entered on the register. However if they are not then on first registration they will be overriding.

Easements on a Disposition

However it would appear that a legal easements are less well protected on disposition of registered land than on first registration due to the restrictions on the overriding status of the right on disposition.

Under s 27(2)(d) an easement that is expressly granted or reserved out of a registered estate will not be legal unless it is registered. Therefore it will be equitable and so not binding unless registered.

If a legal easement is not expressly granted but acquired by reason of the doctrine in Wheeldon v Burrows or s 62 Law of Property Act 1925 or Prescription then it will only override a registered disposition where:

A legal easement or profit which at the time of the disposition is not within the actual knowledge of the person to whom the disposition was made and would not have become obvious on a reasonably careful inspection of the land. The exception does not apply if the easement has been exercised in the period of one year ending with the day of the disposition.

Therefore an easement is only overriding if the purchaser knows about it and it is obvious and it has been exercised in the last year.

There is an issue here. There may be some legal easements that have overriding status on first registration or are acquired between first registration and subsequent disposition but which are not known to the purchaser, obvious and been exercised in the last year. Such easements will cease to be effective on a disposition. See Kenny, P "Vanishing Easements in Registered Land" [2003] Conv 87 p304.

Creation or Acquisition of Easements

Easements may be acquired expressly, by implication or by prescription.

EXPRESSION

a) By Statute

- an act of parliament may expressly grant an easement, for example in favour of a utility such as the laying of an electricity cable. A specific recent example is Section 68 of the Countryside and
Rights of Way Act 2000 and the Vehicular Access Across Common and Other Land (England) Regulations 2002 (SI 2002/1711). This enables property owners to apply for a statutory easement which, provided that certain conditions are met, cannot be opposed by owners of commons. The regulations also establish a reasonable scale of compensation to be paid by the owner of the property to the landowner. Easements created since the regulations were introduced will secure access for both the current and future owners of the property.

b) By Grant

- this usually arises where an owner of land sells a part of it and grants to the purchaser an easement over the land that he or she retains e.g. for services. *Mills v Silver* [1991] Ch 271. *White v Richards* (1993) *Macepark (Whittlebury) Ltd v Sargent* [2003] 1 WLR 2284

c) By Reservation

- this also usually arises where an owner of land sells off a part but in doing so reserves certain rights in his or her own favour over the land sold e.g. a right to light. Such a reservation acts as a re-grant whereby the purchaser is deemed to have granted the easement to the vendor. This means that an ambiguity in the definition of the easement will be construed against the purchaser. *St. Edmundsbury and Ipswich Diocesan Board of Finance v Clarke* (No.2)(1975)

Express grants or reservations are normally by deed although equitable ones may be created where an agreement is signed but the parties omit to execute a deed afterwards. For an agreement to be valid and support an equitable easement it must now comply with S.2 LP(MP)A 1989 if after 27th September 1989. If before S.40 LPA 1925 will apply.

**IMPLIED**

a) Necessity

. An easement giving access across retained land will be implied if the retained land encircles an area of land that is sold.

*Corporation of London v Riggs*

(1880),

*Nickerson v Barraclough*

[1980] 1 Ch 426

*Stafford v Lee*

(1993) 65 P & CR 172 CA

*Well Barn Shoot Ltd & another v Shackleton & another*
b) Common Intention

An easement will be implied if it is to give effect to the common intention of the parties e.g. right of support of a semi-detached house.

*Pwllbach Colliery Co. Ltd. v Woodman*

(1915),

*Re Webb’s Lease*

(1951),

*Wong v Beaumont Property Trust Ltd*


*Stafford v Lee*

(1993) 65 P & CR 172 CA

c) S.62 Law of Property Act 1925

The statute implies easements where there has been "some diversity of ownership or occupation of the quasi-dominant and servient tenements prior to the conveyance". Provided the purchase is by deed these rights will be automatically transferred with the conveyance to the purchaser unless express words in the conveyance excluded them. *Wright v Macadam* [1949] 2 KB 173

If A leases a part of his land to B and grants B permission to cross the land A has retained then if A sells the freehold to B at a later date the right to cross the retained land will be included by virtue of S.62. The effect of s 62 may be excluded. It is also important to note that A need not sell the land to B. Having obtained the permission B may vacate the land and A may sell it to X. The permission will still be converted into an easement unless the effect of s 62 is excluded. This demonstrates that the right is attached to the land and not the person.

Note:

I) There must be a conveyance (an agreement for a lease is not enough). *Goldberg v Edwards, Borman v Griffith* [1930] 1 Ch 493

ii) There must be diversity of occupation of the two tenements at the time of the conveyance. The conveyance will be in favour of the person in occupation of the dominant tenement usually by virtue of a lease.
iii) The right or privilege must appertain or be enjoyed with the land at the time of the conveyance.

iv) The right must be capable of being an easement and must be more than just a permission - *Green v Ashco Horticulturalist Ltd* [1966] 1 WLR 889

d) Quasi-Easements & Rule in *Wheeldon v Burrows*

- If A has perpetually used a right of way from his house across his own land then if A sells his house but retains the land across which the right of way existed then the purchaser will be able to use the right of way and a quasi-easement will have been created under the Rule in *Wheeldon v Burrows*.

There are 4 requirements:

- the use must have been "continuous";

- it must be apparent e.g. a pathway;

- it must be necessary to the reasonable enjoyment of the property, in deciding this the courts will consider the inconvenience caused to the servient owner - *Goldberg v Edwards* (1950)

- it was actually enjoyed prior to the conveyance, because an easement cannot exist over a person's own land it is commonly called a quasi easement, however upon severance of the land the use enjoyed by the common owner becomes an easement under the Rule.

**PRESCRIPTION**

This is acquisition of an easement through long user. It only applies to freehold land.

An easement may be acquired by prescription provided the following conditions exist:

- continuous use, there may be periods of interruption provided these are not excessive;

- the use must be against a fee simple owner of the servient tenement;

- the user must be as of right: without secrecy, without force, without permission (nec vi, nec clam, nec precario)

- it must be as an easement.

There are three methods of acquiring an easement by prescription:

a) At common law
- the use must have existed since time immemorial i.e. since 1189 (date of legal memory established by the Statute of Westminster I 1275 c.39) although it is usually sufficient to prove that it has existed since living memory.

_Diment v Foot_


b) Lost Modern Grant

- a fiction. It is presumed to have been made in modern times but the grant has been lost. Generally a period of 20 years will be sufficient to show the existence of the right. _Bridle v Ruby_ [1988] 3 WLR 191; _Mills v Silver_ [1991] Ch 271.

c) Prescription Act 1832

- The Act alters the rules of common law and lost modern grant as follows:

1. If it can be shown that an easement has been enjoyed for 20 years (30 years if it is a profit) this will avoid the need for the claimant to prove at common law that the easement existed since 1189. However it will still be necessary to prove:

   i) continuous user;

   ii) use as of right. S.2

   In calculating the period of 20 years a time during which the servient owner was:

   - an infant;

   - a patient under the Mental Health Act 1983 or earlier legislation;

   - a tenant for life;

   must be deducted. S.7

2. If it can be shown that an easement has been enjoyed for 40 years (60 years if it is a profit) then this will give the claimant an absolute and indefeasible right by virtue of the act and without reference to the common law or lost modern grant. However it will still be necessary to prove:

   i) continuous user;

   ii) use as of right - written or oral consent **during** the 40/60 year period will defeat the claim and written consent before the period will also defeat the claim although oral will not. S.2
In calculating the 40 years the time when the land was held:

- by a tenant for life; or

- by a tenant under a lease of more than three years

must be deducted. S.8

The period relied upon must be "next before some suit or action". This means the periods must be calculated back from the time that the easement is tested in court. Therefore the period must be up to the date of the action and any break before the action will make the period ineffective. *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528 S.4

The period relied upon must be without interruption. A claim may be defeated if there has been an interruption of the easement and the dominant owner has acquiesced in that interruption for the period of one year. *Davies v Du Paver* [1953] 1 QB 184. The self help remedy of removal of any obstruction is known as abatement.