EASEMENTS:

RIGHTS OF WAY & PARKING:

Defining an Easement

1. An easement is a right benefiting land exercisable over other land. It closely resembles the Roman law principle of servitude (the Scots law equivalent). In essence it 'eases' the use of one land and constitutes a restriction on the use of the other 'servient' land.

Identifying an Easement[1]

2. The criteria for identifying an easement was approved in *Re Ellenborough Park*[2]*;*

(i) Dominant/servient tenement.

Dominant tenement - property benefiting from the easement
Servient tenement - property which bears the easement. In the case of a right of way it will be the land over which the right runs.

(ii) Easement must accommodate the dominant tenement.

"I think that it is an essential element of any easement that it is annexed to land and that no person can possess an easement otherwise than in respect of and in amplification of his enjoyment of some estate"[3]

(iii) Dominant and Servient owners must be different persons.

(iv) Right cannot amount to an easement unless it is capable of forming the subject matter of an easement.

Creation of an Easement

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[1] Cheshire's *Modern Real Property*, approved *Re Ellenborough Park* [1956] Ch 131
[2] 1956] Ch 131
[3] per Winn LJ in *Beckett Ltd v Lyons* [1967] Ch. 449

3. Legal easements may be created by an express grant, by deed. If the grant is not made by deed the easement will only be equitable and will not be capable of overriding a registered disposition. Under the 1925 Act both legal and equitable easements were overriding[4]. Only legal easements are now capable of being overriding interests under the new regime[5]. An easement is only a legal easement if it is expressly granted by deed and was granted in perpetuity (fee simple) or for a term of years (lease).Where the easement is expressly granted or reserved by a deed out of registered land it must be registered. If it is not registered it will not operate at law and will not give priority against other unprotected interests[6].
4. Where both the dominant and servient properties are registered the benefit of the easement expressly granted must be noted on the dominant title and the burden of the easement must be noted on the servient title[7].

5. In order to protect an equitable easement it is necessary to enter a unilateral or agreed notice in the register of the servient tenement

6. Easements may be created by prescription under the Prescription Act 1832. An uninterrupted period of 20 years of continuous use will give rise to an easement under the statutory provisions. If an uninterrupted period cannot be demonstrated then the claim will fail.

> *"the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rests upon acquiescence."*[8]

[4] *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 512
[5] Land Registration Act 2002
[6] Land Registration Act 2002 s27(1), s29(1) and s30(1)
[7] Land Registration Act 2002 s38; Sched 2, para 7(2)
[8] Dalton v Angus (1881) 6 App. Cas. 773

7. Doctrine of lost modern grant is the presumption or inference of a grant to which it was claimed the long uninterrupted use of the right claimed could give rise. The grantor must be the freehold owner, and again the element of acquiescence is a requirement, see Williams v Lane [9].

What is the Extent of the Dominant Tenement?

8. This point has been considered in a large number of cases over the years: *Harris v Flower*[10], *Bracewell v Appleby*[11], *Graham v Philcox*[12], *National Trust v White*[13], *Jobson v Record*[14], *Peacock v Custins* [15], *Das v Linden Mews Ltd*[16].

9. In *Massey v Boulden*[17], the Court of Appeal considered whether, if a right of way had been acquired, it could be used only for the purpose of accessing a specific piece of land. The facts were that for a prescriptive period exceeding 20 years, the way had been used to access a residential property. For a period just some 2 months short of 20 years, the residential property had been occupied together with two rooms upon an adjoining property. If it were necessary to consider the 2 rooms as a separate dominant tenement, no right had been acquired by prescription for such a dominant tenement as the relevant period of user was just short of 20 years. The Court of Appeal accepted a submission that the critical question was whether the use made of the two rooms was more than merely ancillary to the use made of the original residential property. On the facts, it was held that the use of the two rooms was merely ancillary to the original residential property.

[9] [2006] EWCA Civ 1738
[10] (1904) 74 L.J. Ch. 127
[11] [1975] Ch 408
[12] [1984] QB 747
[13] [1987] 1 WLR 907
[14] (1997) 75 P&CR 375
[15] [2001] 2 All ER 827
[16] [2003] 2 P&CR 58
[17] [2003] 1 WLR 1792

10. The difficult task of reconciling the earlier decisions was attempted by the Deputy Judge in *Macepark (Whittlebury) Ltd v Sargant*[18]. He summarised the law as follows:

(a) An easement must be used for the benefit of the dominant land.

(b) It must not "in substance" be used for the benefit of non-dominant land.

(c) Under the "ancillary" doctrine, use is not "in substance" use for the benefit of the non-dominant land if (1) there is no benefit to the non-dominant land or if (2) the extent of the use for the benefit of the non-dominant land is insubstantial, i.e. it can still be said that in substance the access is used for the benefit of the dominant land and not for the benefit of both the dominant and the non-dominant land.

(d) "Benefit" in this context includes use of an access in such a way that a profit may be made out of the use of the non-dominant land, e.g. as a result of an arrangement with the owner of the dominant land.

(e) The application of these principles can involve potentially difficult quesitons of fact and degree.

11. It was also held in *Macepark* that the principles applied in the same way whether or not the non-dominant land was in the same ownership as the dominant land (and see *Alvis v Harrison* (1990) 62 P&CR 10). On the facts in *Macepark,* it was held that the dominant owner could not use the right of way for the benefit of land other than the dominant land.

Issues commonly encountered with Rights of Way

Obstruction

[18] [2003] 1 WLR 2284

12. One common problem encountered with rights of way involves the installation of gates across a right of way. Such action is usually done on the basis of increasing security. This limiting access to the right of way is permitted so long as the dominant users are able to open the gates. In reality, it is sufficient for the installer of the gate to issue sets of keys to those who have a right to use the way.

13. In Siggery v Bell[19] it was held, that if a right of way extends along a boundary and the servient owner then fences the boundary and installs a gate for the dominant owner to access the dominant land, that will constitute a unlawful interference since it is the right of the dominant owner to choose where to access the dominant land.
14. There are common law rights safe guarding against one party obstructing the right of way. For example if the servient owner built a brick wall across the right of way then the dominant owner has a course of action in nuisance.

Excessive use

15. A common problem arises where the right of way exists but the purpose and or quantity of traffic on the right of way changes. For example a right of way granted *"at all times and for all purposes"* in relation to agricultural, was found to be excessive, when the dominant land was converted into a 200 placement caravan site. The court found that the Claimant was not entitled to use the right of way to that extent since it exceeded that which was contemplated at the time of the grant. The Claimant was entitled to use the right of way for a small number of caravans that would be no more onerous than the agricultural use contemplated at the time of grant[20].

16. An express grant should be construed in a way which gives the words their ordinary meaning both as to the physical extent of the way and the uses to which it may be put. Express grants often include the wards

[19] [2007] EWHC 2167 (Ch)
[20] Jelbert v Davies [1968] 1 WLR 589

"for all purposes" which means that any use which is within the capacity of the way but is not excessive. It is however common, especially with older conveyances, for the grant not to specify the purpose of the right of way. In these cases the Court of Appeal has held that the conveyance should be construed according to its ordinary words, but its construction should be in light of the surrounding circumstances at the time of the grant[21].

Repair

17. In the absence of a covenant or other agreement, there is no obligation upon either the dominant or servient owner to maintain a right of way.

18. If a right of way deteriorates by natural decay it is the responsibility of whoever wants it repaired to repair it. No one party can be forced to carry out repairs to the right of way unless it can be held that his use of the right of way is excessive.

19. In some cases agreements are made dealing with the issue of maintenance. Such agreements simplify the position with regard to repair work; however in cases relating to freehold estates such agreements are not capable of being enforced against successors in title, because it is a positive obligation. It has however been accepted that if the dominant owner has covenanted to pay all or contribute to the cost of maintenance, he is not allowed to use the way unless he pays it[22].

20. There are common law rights safe guarding against one party digging up the right of way. If one party obstructs the right of way in this fashion then other party has a course of action in nuisance.

[21] St Edmundsbury v Clark (No.2) [1975] 1WLR 468
[22] Halsall v Brizell [1957] Ch.169

Parking

> *"I feel no hesitation in holding that a right for a landowner to park a car anywhere in a defined area nearby is capable of existing as an easement"*
>
> *Megarry VC, Newman v Jones*[23]

21. Parking rights became a phenomenon with the advance of the motor car ownership in twentieth century. An important distinction has arisen between the views expressed by Megarry (see above) and later judgements in the Court of Appeal, see Batchelor v Marlow.[24]

22. Rights to park may be found in pre-car terminology of some conveyances. The inclusion of the phrase *"to pass and repass"*, has been interpreted to imply a right to park, especially when viewed in the context of sec.62(2) of the Law of Property Act 1925. It has been argued that a right to park can be implied from the wording of sec. 62(2) of the Law of Property Act 1925.

> *"The conveyance of land having houses or other buildings thereon shall be deemed to include… all liberties, privileges, easements, rights and advantages whatsoever appertaining or reputed to appertain to the land, house or buildings conveyed."*[25]

23. Most modern developments include a parking area and it is not uncommon for there to be more flat owners cars in a development than there are spaces. In cases where spaces are not allocated to individual properties there is likely to be no right to park but simply a right to compete for the spaces.

[23] March 22, 1982 unreported
[24] (2001) 82 P& CR 459
[25] Law of Property Act 1925, sec.62(2)

"An easement may take effect subject to the rights of others with a like right, without any guarantee that there will be no competition."[26]

24. In Batchelor v Marlow, it was claimed that there was a right to park up to 6 cars upon a grass verge between working hours. Significantly, it was claimed by prescription. The Court of Appeal found that the claim for exclusive parking use rendered the land unusable by the servient owner. It is not disputed that an easement of parking can arise by express or implied grant, regarding a particular space or communal parking. The circumstances in which an exclusive right can arise by prescription are less clear.

25. It is possible for the servient owner to introduce a parking regime to enable fair competition for spaces between the dominant owners. In Montrose Holdings Ltd v Shamash[27], the servient owner introduced a parking permit and issued one to every flat owner. The permit entitled the owner to occupy one space for no more than 72hrs. The Court of Appeal held that the purpose of the parking permits and the associated regulations were to enable the flat owners to enjoy their right to park in an orderly way, and was not therefore an unlawful interference with the easement.

26. By contrast a servient owner which reduced the number of parking spaces from 13 to 4 was held to have unlawfully interfered with the 13 flat owners right to park[28]. In common with most decisions regarding easements is always a matter of fact and degree.

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[26] Newman v Jones March 22, 1982 unreported
[27] [2006] EWCA Civ 251
[28] Saeed v Plustrade Ltd (2002) EWCA Civ 2001