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EASEMENTS
(back to basics)

What is an easement?

- Right over the land of another.
- Two parcels of land:
 - Servient tenement (ST)
 - Dominant tenement (DT)
- Limiting characteristics:
 - Right must be appurtenant to other land of the proprietor of the right, which it must accommodate (the easement cannot exist on its own).
 - It is proprietary, not personal (it will bind successors of the ST and enure for the benefit of successors of the DT).
 - A right to take something from the land (e.g. game or timber) is a “profit”; it is not an easement.
 - It does not confer exclusive use to the ST; the owner of the ST can use it as he likes subject to limitations imposed upon by the easement.
 - There are rights that cannot exist as easements, e.g. right to a view, privacy or protection from the weather. These may be protected in other ways e.g. restrictive covenants or through the law of nuisance.

Easements - characteristics

- Essential characteristics (*Re Ellenborough Park* [1956] Ch. 131):
 - There must be a DT and ST; need to identify each tenement.
 - An easement must accommodate the DT; it must serve the tenement and be reasonably necessary for the better enjoyment of that tenement. If the right merely confers advantages on the owner and renders his ownership more valuable, that is a personal right (enforceable between the contracting parties) not an easement.
 - DT and ST owners must be different person; owner and occupier of land cannot subject it to an easement in favour of other land also owned and occupied by himself.
 - A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant; the exercise of the right cannot be conditional upon the consent of the ST owner – (a) is the wording too wide and vague? (b) does the right substantially deprive the owner of proprietorship or legal possession? (c) is the right purely one of recreation possession no quality of utility or benefit?

Easements: the positive and the negative

- Easements can be sub-divided into:
 - Positive: the right to do something or make use of some installation on the servient land:
 - Right of way
 - Right to nail fruit trees on a neighbour's wall
 - Right to place over neighbour's land clothes on a line
 - Right to use the kitchen of a neighbour's house for washing
 - Right to use lavatory
 - Negative: the right to receive something from the servient land:
 - Right to receive light for a building
 - Right of support of buildings from land
 - Right to receive air by a defined channel

Incidents of easements

- The grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment (*Jones v Pritchard* [1908] 1 Ch. 630). For example:
 - A grant of a right of way over a road for all purposes includes a right to halt vehicles on the way while being loaded or unloaded.
 - A right of drainage entitles the owner of the DT to go upon the ST to repair the drain.
 - A wayleave right to place electric lines above ground carried with it the right to place on the servient land towers to support the lines.
 - A right to graze sheep did not carry with it a right to bring additional feed onto the land but it did carry the right to enter to attend the welfare of the sheep, with vehicles (having regard to the size of the ST) but such entry to be exercised reasonably and with minimum interference with the rights of the ST owner.

Easements - creation

- By or under a particular statute:
 - LTA 1954, Pt.2 – on making an order for the grant of a new lease, the tenancy will include rights enjoyed by the tenant in connection with the premises included in the new tenancy, except as otherwise agreed between the parties or determined by the court. The rights can include easements.
 - Access to Neighbouring Land Act 1992 – court empowered to make an access order permitting access onto land for the purpose of carrying out certain works to adjoining or adjacent land.
- Granted or reserved out of by terms of conveyance:
 - Express (register against ST under LRA 2002).
 - Imported into words of conveyance by s62 LPA 1925.
 - Implication founded on presumed intention/necessity (exceptional).
 - Ownership of land becomes divided and continuous or apparent easements pass in accordance with rule in *Wheeldon v Burrows*. (Where a landowner sells off part of his land and retains part, the conveyance will impliedly grant all the continuous and apparent easements over the retained land necessary for the enjoyment of the land sold.)
- Prescription or lost modern grant

Easements – prescriptively acquired

- Common law – proof of enjoyment for so long as anyone can remember raises a presumption that such enjoyment has existed for the period of legal memory; since 1189. Rebuttable if shown that enjoyment is of more recent date than the time of legal memory.
- Fiction of lost modern grant – presumption of grant lost in modern times – enjoyment of 20yrs, not defeated by proof not enjoyed prior to that period.
- Prescription Act 1832 – nec vi (peaceable, without force), nec clam (open, not secret), nec precario (not precarious, not based on licence of owner of ST). Summary:
 - Use needs to be visible, but owner does not need to be aware of how the acquirer is actually making the use, or of the character or extent of the use.
 - Need for land owner to take reasonable steps to inquire about who is using his land and in what way and to what extent.
 - If use nec vi, nec clam, nec precario – adverse rights will arise in due course, unless the ST owner take steps to stop the use or permit it.
 - Must be overt act of permission; making use defer to his own use, acquiescence or encouragement insufficient.
 - But user must either agree or in fact act on the basis that use thereafter is pursuant to the permission.
 - If permission does not work, owner will have to protest vigorously against or obstruct further use.
- Periods: rights of way (s2) – (principal period) 20yrs; right to light (s3) – 20yrs.
- Interruption (s.4) – must be period immediately prior to action, otherwise right under Act remain inchoate. Can be prevented by an act of interruption submitted to or acquiesced in for 1 yr which owner of DT had notice of. So 19yrs + interruption, bring after 20yrs so long as before 1 yr period of interruption.

Easements - interference

- Action for nuisance, not trespass.
- *B&Q Plc v Liverpool & Lancashire Properties Ltd* [2001] 81 P. & C.R. 20 (right of way):
 - the test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence upon being able to continue the use of the whole of what he contracted for is reasonable;
 - it is not open to the grantor to deprive the grantee of his preferred *modus operandi* and then argue that someone else would prefer to do things differently, unless the grantee's preference is unreasonable or perverse;
 - if the grantee has contracted for the "relative luxury" of an ample right, he is not to be deprived of that right, in the absence of an express reservation of a right to build upon it, merely because it is a relative luxury and the reduced, non-ample right would be all that was reasonably required;
 - the test is one of convenience and not of necessity or reasonable necessity; providing that which the grantee is insisting upon is not unreasonable, the question is "Can the right of way be substantially and practically exercised as conveniently as before?";
 - the fact that an interference with an easement is infrequent and, when it occurs, is relatively fleeting, does not mean that the interference cannot be actionable.

Interference with Easements – remedy (1)

- Injunction
 - Interim: discretionary power to do what is “just and convenient”.
 - Guidelines: *American Cyanamid Co Ltd v Ethicon Ltd* [1975] A.C. 396
 - Is there a serious issue to be tried?
 - Are damages an adequate remedy (usually not the position in cases of easements)?
 - If doubt as to adequacy of damages, where does the balance of convenience, or balance of justice, lie? (conduct of parties, delay)

Interference with Easements – remedy (2)

- Final injunction: damages in lieu?
- Court has power to award damages in addition to or substitution of an injunction Chancery Amendment Act (Lord Cairns' Act) 1858
- *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch. 287 “good working rule” —
 - If the injury to the plaintiff's legal rights is small,
 - And is one which is capable of being estimated in money,
 - And is one which can be adequately compensated by a small money payment,
 - And the case is one in which it would be oppressive to the defendant to grant an injunction:—then damages in substitution for an injunction may be given.

Interference with Easements – remedy (3)

- The “good working rule”: *Lawrence v Fen Tigers Limited* [2014] UKSC 13 :
- the prima facie position in a nuisance case is that an injunction should be granted, so that the legal burden is on the defendant to show why it should not;
- when a judge is called on to decide whether to award damages in lieu of an injunction, there should not be any inclination either way (subject to the legal burden already discussed);
- a defendant who wishes to argue that the court should award damages rather than an injunction should make it clear that he wishes to do so well in advance of the hearing, not least because the claimant may wish to adduce documentary or oral evidence on that issue which he would not otherwise consider relevant;
- the decision in *Shelfer* is now out of date and the approach that requires all four *Shelfer* boxes to be ticked before damages can be awarded is wrong, as is the view that damages can only be awarded in exceptional circumstances;
- questions of public interest are a relevant factor;
- the grant of planning permission is not to be regarded as raising a presumption against an injunction but may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction.

Interference with Easements – remedy (4)

- Damages in lieu – the “negotiating basis”
- *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No.2)* EWHC 212 (Ch):
 - the overall principle is that the court must attempt to find what would be a “fair” result of a hypothetical negotiation between the parties;
 - the context, including the nature and seriousness of the breach, must be kept in mind;
 - the right to prevent a development gives the owner of the right a significant bargaining position;
 - the owner of the right with such a bargaining position will normally be expected to receive some part of the likely profit from the development;
 - if there is no evidence of the likely size of the profit, the court can do its best by awarding a suitable multiple of the damages for loss of amenity;
 - if there is evidence of the likely size of the profit, the court should normally award a sum which takes into account a fair percentage of the profit;
 - the size of the award should not in any event be so large that the development would not have taken place had such a sum been payable;
 - after arriving at a figure which takes into consideration all the above and any other relevant factors, the court needs to consider whether the “deal feels right”.

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