Hardwicke

Fencing Easement?

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An easement is a right benefiting one piece of land (known as the dominant tenement) enjoyed over another piece of land, owned by someone else (the servient tenement). Ordinarily, an easement allows the owner or occupier of the dominant tenement to do some act on the servient tenement, for example to pass along a road or to run services over it. Such an easement is a "positive" easement. Less commonly the easement to which the servient tenement is subject will limit what the owner or occupier of the servient tenement may do on that land. For example, the servient owner might be restricted in what it can build on the land, because it might otherwise interfere with the dominant tenement's right of light. This is a "negative" easement – it does not involve the dominant owner going onto or making use of the servient tenement, or from obstructing or interfering with the servient tenement, but it involves a restriction on the use to which the servient tenement can be put.

Easements do not ordinarily impose on the servient owner obligations to repair. Even in the case of a positive easement, such as a right of way, the servient owner is not obliged to keep the road or path or other land subject to the right of way, in good repair. If they do carry out repairs, unless there is an express agreement to such effect, they will not be entitled to a contribution from the owner of the dominant tenement towards the costs.

Further, whether positive or negative, an easement is more than a personal permission or licence. It is a proprietary right which enures for the benefit of the dominant tenement and, if properly registered, the burden will bind successors in title of the servient tenement (s.187, Law of Property Act 1925).

In contrast, a positive covenant normally imposes an obligation on the covenantor to do some positive act in relation to land, or requires expenditure of money – for example, an obligation to carry out repair or maintenance, or to erect and maintain structures. The burden of a positive covenant does not normally bind successors in title of freehold land. So, a covenant to repair, or contribute to the cost of repair, is a positive covenant the burden of which will not run with the land. Whilst the original covenantor remains contractually bound by a positive covenant, once it has sold its interest in the land the covenant will not be enforceable.

There is one unusual exception to these principles, however, namely a "fencing easement". A fencing easement is a binding obligation on a landowner to maintain a fence or hedge around land, for the benefit of adjoining land (*Lawrence v Jenkins* (1873) L.R. 8 Q.B. 274). However, as considered above, a fencing easement is not a true easement, because a true easement does not require the servient owner to expend money. An obligation to fence land is really more like a positive covenant that can bind successors in title - contrary to the usual principles relating to enforcement of positive covenants. It is an anomalous right, sometimes referred to as a 'spurious easement' or a 'quasi-easement' (per *Willmer LJ in Jones v Price* [1965] 2 Q.B. 618).

In *Jones v Price* the plaintiff claimed damages for cattle trespass. By way of defence, the defendant alleged that the plaintiff had an obligation to maintain a boundary hedge. The Court of Appeal found that the right to require the owner of adjoining land to keep a boundary hedge in repair was a right which could arise by prescription and was commonly established by proof of immemorial user or by the doctrine of lost modern grant.

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In *Egerton v Harding* [1975] Q.B. 62 the plaintiff's cottage and the defendants' farm adjoined common land over which they both enjoyed grazing rights. The rights were not exercised by the plaintiff, but the defendants had grazed cattle since 1968. In 1971 the defendant's cattle trespassed onto the plaintiff's garden, and she sued for damages. By way of counterclaim, the defendants alleged that the plaintiff had an obligation to maintain the hedge, and had failed to do so. The judge found that a custom to fence against the common land had been proved and that owners of land adjoining the common were under a liability to fence against cattle lawfully on the common. On appeal, the Court of Appeal found that a duty to fence against another's land could originate in prescription or lost modern grant (in which case the right has the nature of an easement) or in custom. The distinction between binding fencing obligations which arise as private rights and those which arise through local custom is often blurred, and in many cases the precise legal categorisation is unimportant. The main differences are in the nature of easements (rights binding upon land) and customary rights (which apply to everyone within the affected area). Once an immemorial usage of fencing against the common was established, as a matter of obligation, that was enough to prove the duty to fence.

Thus, fencing easements have been established by proof that over many years, the owner of (putative) servient land has consistently repaired a fence, when asked to do so by the (putative) dominant owner, and therefore inferentially in performance of a binding obligation. The fact that a fencing easement can apparently be established through the doctrine of lost modern grant suggested that it might be possible to create a fencing easement by an express grant. However, neither of the modern Court of Appeal cases that upheld an obligation to fence (*Crow v Wood* [1971] 1 QB 77 and *Egerton v Harding* [1975] Q.B. 62) involved an express creation of fencing obligations.

Cue *Churston Golf Club Limited v Haddock* [2019] EWCA Civ 544. The conveyance of golf club land sold to the council on 20th December 1972 contained a covenant (clause 2) between the council as purchaser and the trustees who were also parties to the deed) in the following terms:

"The purchaser hereby covenants with the trustees that the purchaser and all those deriving title under it will maintain and forever hereafter keep in good repair at its own expense substantial and sufficient stock-proof boundary fences walls or hedges along all such parts of the land hereby conveyed as are marked T inwards on the plan annexed hereto."

The parties to the appeal were lessees of their respective parcels of land from the trustees and the council. In 2015 H issued proceedings against both the council and the golf club alleging that his farming operations had been adversely affected by their failure to maintain an effective fence or hedge along the boundary between the two parcels of land in accordance with the terms of clause 2. He sought a declaration that both the council and the golf club were obliged to erect and maintain such a fence or hedge and damages for the loss of use of his land as pasture for cattle raising. Prior to the trial he took an express assignment of the benefit of the clause 2 covenant so as to avoid any argument as to whether the benefit of it had passed to him under s.78, LPA 1925. The claim against the council was settled shortly before trial leaving the golf club as the only defendant. In the County Court the judge held that clause 2 created a fencing easement which was binding on the golf club as successor in title.

The golf club's appeal in the High Court was dismissed, the judge holding that a conveyance was capable of creating an easement of fencing by express grant where it was the parties' objective intention

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to do so. Thus, clause 2 created a fencing easement and not merely a covenant to fence, so that its burden fell on and was enforceable against the golf club as lessee of the servient tenement.

The golf club sought permission to make a second appeal on two grounds: (1) clause 2 created a covenant to fence rather than an easement of fencing, and (2) it was not permissible to create such an easement by express grant. Permission was granted on the second ground, on the basis that it raised a point of law of some general importance. The Court of Appeal then granted permission on the first ground because the issue of construction was so obviously bound up with the second ground as to create a compelling reason for granting permission to appeal on that ground also.

The appeal therefore required the Court of Appeal to consider two issues: (1) whether the provisions of clause 2 fell to be construed simply as a covenant to fence or rather, as H contended, as the creation of an easement of fencing in favour of H's property as the dominant tenement; and (2) if the latter whether, as the courts below had held, it is possible to create such an easement by express grant as opposed to custom or prescription. This would be the first time that this second point would be directly considered by the Court of Appeal, but it would only arise if the courts below were correct in their construction of clause 2.

The Court of Appeal overruled the High Court. Patten LJ stated that the 1972 conveyance was professionally drafted and the words used should therefore be given their conventional meaning (*Arnold v Britton* [2015] AC 1619). The wording of clause 2 is quite normal in a fencing covenant: because the original covenantor's liability would not terminate on a subsequent sale, they would take a covenant in similar terms from a subsequent purchaser. The terms of clause 2 were not unusual and did not convert a clause expressed to be a covenant into some form of easement. Had the draftsman intended to create an easement, one would have been included as an express grant by way of exception to the land conveyed. There was thus no justification for construing clause 2 other than as a positive covenant to fence, which was incapable of binding successors in title without a chain of indemnity covenants.

Given this conclusion, it was not necessary for the Court of Appeal to decide whether a fencing easement can be created by express grant. The matter was thus left unresolved, as "any further consideration of this issue is best reserved to a case in which the point is essential to the outcome of the appeal" (Patten LJ at para.36).

It thus appears clear, following *Churston Golf Club Limited v Haddock*, that a so-called "fencing easement" is simply an instance of the law fixing a landowner with an obligation to keep their land fenced for the benefit of adjoining landowners or users. Such obligations are not 'true' easements, but simply impose an obligation on the servient owner which can be enforced by the dominant owner. It would seem that in most cases a covenant in terms similar to clause 2 will create a positive covenant rather than a fencing easement. In the absence of a chain of indemnity covenants, it will be unenforceable against a successor in title of the covenantor's land. Unhelpfully, the question whether a fencing easement can be created by express grant remains unresolved.

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