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Key Issues Affecting Easements: The Characteristics of an Easement

REQUIREMENT FOR BENEFIT

One of the four essential characteristics of an easement (**Re Ellenborough Park [1956] ch 131**) is that the easement must be for the benefit of the dominant land. Thus, an easement will not extend to other land owned by the dominant owner, even if it is adjacent to the land which has the benefit of the easement.

In ***Jobson v Record and Record*** **[1998] 75 P&CR 375**, land was sold subject to a right of way "for all purposes connected with the use and enjoyment of the property hereby conveyed being used as agricultural land". The owner with the benefit of the easement wished to use the right to drive timber lorries which would pick up timber stored on the land and cut from a plantation on neighbouring land, owned by him, but not subject to the easement. The court refused this use on the basis that use as agricultural land included timber production but not the storage of timber which had been felled elsewhere. The right claimed was not for the land which had the benefit of the easement but for neighbouring land.

Pharbu Das v Linden Mews **[2002] P & CR D28** Here, the dominant land was purchased at the back of the owner's house for car parking. This did not allow him to drive through a hole in his wall and park at the back of his house. Nor could he walk out of the back of his house and then drive down the access. Contrast with ***Gore v Naheed & Anor*** **[2017] EWCA Civ 369** in which it was held that on the express wording of an easement, the dominant owner was able to access a garage on land at the back of the dominant land. Use of the garage was ancillary to the use of the land. A tenant of the garage land could not however use the right.

Parker v Roberts **[2019] EWCA Civ 121** Here the court refused to accept an easement benefitting the residential house could also benefit a proposed house which was to be built on a piece of land acquired by the dominant owner at the back of their house which was to be built on a piece of land acquired by the dominant owner at the back of their house in a different transfer.

REQUIREMENT FOR CERTAINTY

Another essential characteristic under ***Re: Ellenborough Park***, is that the easement must be "capable of forming the subject matter of a grant". In other words, the easement must be sufficiently definite that it can be described on paper or with the help of a plan. If the purported right is too vague, therefore, it cannot form the subject matter of an easement. The most obvious right to fall foul of this requirement is the proposed right to a view (***William Aldred's Case*** **[1610]**), although the same result could be achieved by way of a restrictive covenant, prohibiting building on the land or committing a nuisance (see ***Davies v Dennis*** **(2009) EWCA 1081** and also more recently ***Bath Rugby Ltd v Greenwood*** **[2020] EWHC 2662**).

Other examples of rights which are insufficiently definite to constitute an easement include a right to privacy (***Browne v Flower*** **[1911] 1 Ch 219**) and a general right to light, although the right to light through a *defined* aperture i.e. a window, is recognised as an easement and is, indeed, very common (see ***Bass v Gregory*** **[1890] 25 QBD 481**; ***Ough v King*** **[1967] 1 WLR 1547**).

How much light does a building need?

In ***Colls v Home and Colonial Stores*** **[1904] AC 179** it was accepted that the amount of light must be sufficient for the comfortable enjoyment of the occupation of land. So a business premises requires less light than a domestic residence. Equally, in ***Newham v Lawson*** **[1971] 22 P&CR 582**, a church was held to require relatively little light.

In ***Allen v Greenwood*** **[1980] Ch 119**, an injunction was granted preventing the erection of a fence on land near a greenhouse, as the retained light would be inadequate for growing plants.

CAR PARKING RIGHTS

For some years there has been a debate about whether an easement to car parking exists. The argument goes that an easement is a right that one person enjoys over another person's land, there can be no easement which constitutes exclusive possession. The earliest cases which discussed this issue, in fact, involved storage, as in ***Copeland v Greenhalf*** **[1952] Ch. 488**, where a claim for an easement of storage of trailers on a narrow stretch of agricultural land failed as it amounted to a claim of exclusive possession.

Several Commonwealth decisions enforced this argument throughout the 1960's and 1970's and then, in 1982, a first instance and, unfortunately, unreported decision in ***Newman v Jones***. This case involved parking a car on a first come, first serve basis around a block of flats. The judge decided that, as there was a genuine sharing and no guarantee to an individual space, this could constitute an easement. Therefore, here there was an easement but, if there was an allocated space in which a flat owner parked, there could not be an easement. During the following twenty years, cases suggested problems but with no definite conclusions. Then, starting with a commercial property case: ***Batchelor v Marlow*** **[2001] EWCA 1051** and following on with a case involving residential flats: ***Saeed v Plustrade Ltd and Another*** **[2002] 2 EGLR 19**, the Court of Appeal held that Newman v Jones was correct. There could be no easement to park a car in an allocated space as this constituted a claim of exclusive possession which was contrary to the whole concept of an easement.

This was subsequently followed in two further cases: ***Central Midland Estates v Leicester Dyers*** **[2004] 1WLUK 338** and ***Montrose Court v Shamash*** **[2006] EWCA 251**. In the latter case an easement was held to genuinely exist as there were fewer car parking spaces around the 19th Century block of flats than there were long leaseholders, and occupiers were genuinely required to share. However, again it was recognised that a right to an allocated space could not constitute an easement. Why this distinction is important is that if a right to park in an allocated space cannot constitute an easement and is not demised, then it cannot amount to a property right. It will merely amount to a licence. This, as in ***Saeed v Plustrade Ltd*** above, will bind the original landlord/developer but will not be binding against a purchaser of the reversion.

Moreover, historically, car parking in relation to leaseholds which may have a major impact on value, would be granted in the schedule of rights and not demised, i.e. a purported easement would be created. As the majority of car parking rights give allocated spaces, this would render the lease defective.

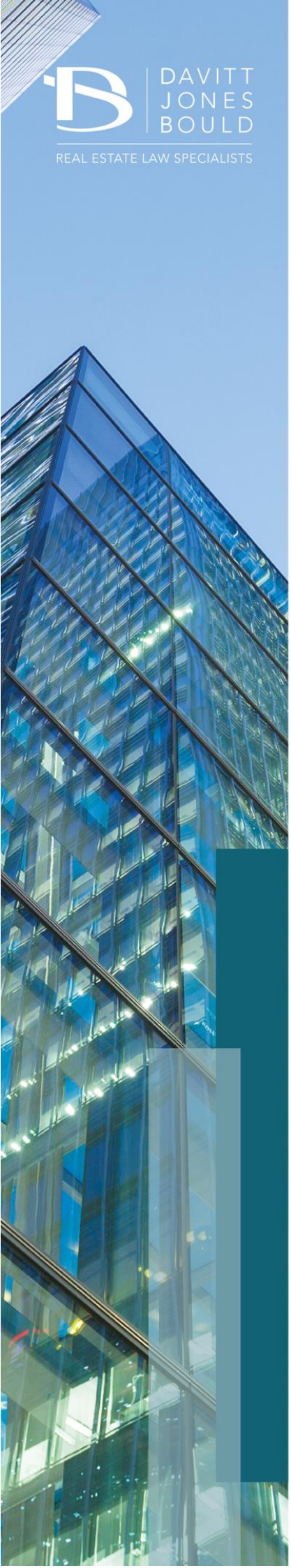
Kettel and others v Bloomfold Ltd **[2012] EWHC 1422 (Ch)**: car parking in the same space all the time amounts to exclusive possession and the right should have been demised and cannot be an easement (see ***Batchelor v Marlow*** **[2003] 1 WLR 764**). Parking in whichever space becomes available without an absolute right can constitute an easement, however. In ***Kettel and ors***, the landlord gave the tenant exclusive rights to park, but the tenant could be moved on management grounds. This was held to be an easement as there was no exclusive possession. In ***Winterburn v Bennett*** **[2016] EWCA Civ 482** the Court of Appeal recognised that an easement to park a car in one of several spaces could exist. In this case the claimant owned a fish and chip shop adjacent to the entrance of a car park and over a period of time had left vehicles in the car park. They claimed a prescriptive easement. The Court of Appeal stated that such an easement must be exercised without force, secrecy or permission.

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 ***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 anor*** **[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.

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. By contrast, in ***Stanning v Baldwin*** **[2019],** 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.

EXTINGUISHING EASEMENTS

If the servient owner can show that the dominant owner, by his conduct, intended to abandon his right to an easement, the easement may be extinguished by implied release. Whether there was an intention to abandon is question of fact to be decided in each case. This can lead to rather fine distinctions. In ***Moore v Rawson*** **[1824]** the owner of a building which enjoyed an easement of light, rebuilt it without any window to receive the benefit of the easement. It was held that this was a clear intention to release the right. Likewise in ***Liggins v Inge*** **[1831]** it was stated that if a water mill was pulled down by the owner, with no intention to rebuild – then any right the mill owner had to a free flow of water would be extinguished. However, "Abandonment of an easement or of a profit á prendre can only …….be treated as having taken place where the person entitled to it has demonstrated a fixed intention never any anytime thereafter to assert the right himself or to attempt to transmit it to anyone else" (***Tehidy Minerals Ltd v Norman*** **[1971] 2QB528**). Thus, a right to graze livestock on a common (a profit) was held not be abandoned merely because the commoners had made temporary arrangements to regulate their rights: non-user by itself does not amount to a release.

In ***Benn v Hardinge*** **[1992] 66 P & CR 646** the Court of Appeal held that failure to use a right of way for almost 175 years did not amount to abandonment. In the same way, in ***CDC 2020 v Ferreira*** **[2005] EWCA 611**, an easement which was originally to garages was resurrected 30 years after the garages had been knocked down.

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