7

EASEMENTS

7.1 DEFINITION AND EXAMPLES

An easement[38] is a right enjoyed by one landowner (the "dominant tenement/land") over a neighbour's land (the "servient tenement/land").

An easement, unlike a lease, does not give the holder a right of occupation or possession of the property (i.e. a right to anything tangible from the other land), only the limited right/benefit to *enjoy* the easement. The owner of the servient land, thus, retains full dominion over his land, subject only to the limitation imposed by the easement.

There may also be an *implied reservation* in favour of the *landowner*, entitling the *seller* to an easement over the land being sold, e.g. a right of access to otherwise landlocked land, or an easement of support.

Some general examples of easements include:

- **right of way:** e.g. a right to walk across the courtyard in the block of flats where one lives;
- **right to light:** to particular windows or other opening in a building such as a skylight; however, there is no general right to light; and, in any event, the amount of light allowed is only that which is required for the *ordinary* use of the premises (*Colls v Home and Colonial Stores Ltd.* [1904] AC 179);
- **right to support:** e.g. the right to enjoy the continuing support of a house that is provided by a neighbouring wall;
- **right to water – in a defined channel:** e.g. a pipe or stream;
- **right to air – again, in a defined channel:** e.g. rights in respect of ventilation ducts;
- **right to storage:** e.g. to keep a dustbin in the landowner's garden, or right to park one's car on the landowner's territory;
- **right to use certain facilities:** e.g. to use a toilet or letter box.

[38] Derived from the Old French *aisement*, meaning "convenience or accommodation".

7.2 POSITIVE AND NEGATIVE EASEMENTS

An easement can be "positive" or "affirmative"; or it can be "negative".

- A ***positive*** **easement** is a right to *do something positive* on the servient land, but not a right to demand anything from the owner of that land. It is enjoyed for a specific purpose, e.g. a right of way; a right to share a party wall; a right to extract water; right of access for the purpose of facilitating repair to a building; a right to run utilities across land; or even the right to use an airfield or a letter box on another's land.

- A ***negative*** **easement** is a privilege whereby the servient owner may be obliged to *refrain from* certain uses, or actions, on the servient land, for the benefit of the dominant owner, e.g. not to build above a given height, so as to obstruct the access of light to a house on the dominant land, or not to restrict the passage of air to a building on the dominant land. Alternatively, it may be seen as a right to receive something (such as light or support) from another person's land, *without obstruction or interference* from such other person. It is "negative" in the sense that the right is enjoyed without any action by the dominant owner.

English law limits the recognition of negative easements to: (i) a right to light; (ii) a right to a free flow of air through a defined aperture; (iii) a right not to have support undermined; and (iv) a right to prevent the diversion of water running in an artificial channel. Any other right that restricts the use of one parcel of land for the benefit of another is only recognised in the form of a restrictive covenant.

7.3 ESSENTIAL REQUIREMENTS OF EASEMENTS

The essential requirements for an easement to be valid may be summarised as follows:

(a) **There must be an identifiable dominant land** (the land that has the benefit of the right) **and servient land** (the land with the burden, i.e. the land that is subject to the right or privilege). The requirement of a dominant tenement has been described as going to the *heart of the nature of an easement*[39]. It has been said 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 or interest in a piece of land.*[40] It is therefore essential that there is dominant land to which the easement is attached. Should an attempt be made to create an easement which is not so attached (a so-called "easement in gross"), it will be ineffective, for "*it is trite law that there can be no easement in gross*".[41]

(b) **The easement must accommodate and serve the dominant land and there must be a nexus between the right enjoyed and the dominant land, i.e. it must do more than benefit the *owner* of that land, as a *personal* right.** The right must be of some practical importance to the benefited land. It must be "reasonably necessary for the better enjoyment" of that land. Where the right claimed tends to confer an advantage, *not on the land itself*, but on some trade or business which is being run by the owner upon his land, it would not amount to an easement (e.g. the right to put

[39] C Sara, *Boundaries and Easements* (4th ed 2008) para 10.06.

[40] *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, 483, by Winn.

[41] *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31, 36, by Peter Gibson LJ. By way of contrast, it is possible for a profit to exist as a profit in gross.

pleasure boats on the canal which *bordered* the dominant land was held to benefit the *business* being carried out upon the land, rather than the land itself; the owner of the right could not, therefore, prevent other people from putting boats for hire on the canal – *Hill v Tupper* (1863) 2 H & C 121). It follows that the servient land must be in reasonably close proximity, though not necessarily adjacent, to the dominant land, so as to enable the dominant land to derive benefit from the easement.

Because an easement benefits and binds the land itself, it will, therefore, continue despite any change of ownership of either dominant or servient land.

> *For example, the original owners of Ellenborough Park granted purchasers of plots surrounding the park the right to use the park. The plaintiffs bought the park from the original owners and wanted to build on it. The Court of Appeal held that the owners of the surrounding plots enjoyed the right to use the park (a legal interest in land), which therefore bound the purchasers of the park and prevented them from building upon it. (Re Ellenborough Park* [1955] 3 All ER 667).

It will, however, be extinguished if the two lands come into common ownership. This is known as the "unity of seisin" rule, by which an easement (or profit) cannot exist where the dominant and servient tenements are in common ownership and possession.

(c) **The owners or occupiers of the dominant and servient tenements must be *different* persons.** A tenant (the occupier) could, therefore, have an easement over other land belonging to the landlord (the owner). In other words, "*a man cannot have an easement over his own land*" (*Re Ellenborough Park*, above). The loss of an easement is treated as "*a permanent injury to the inheritance*"[42] and extinguishment will not occur until the owner of the two tenements has "*an estate in fee simple in both of them of an equally perdurable nature*".[43] This means that unity of possession without unity of ownership (or vice versa) is not enough: "*If there is only unity of possession the right is merely suspended until the unity of possession ceases*".[44]

(d) **The easement must be capable of forming the subject matter of a grant**, whether express, implied or presumed, i.e. it must be a right that is sufficiently definite (both as to the parties and as to the subject land) as it is capable of being (although it need not be) set down in a deed. A "right to a fair view"[45] (a matter of taste) or a "right to use land for general recreational purposes" (too vague) cannot, therefore, be claimed. On the other hand, the list of potential easements is not closed and a number of new rights have been added to the list over the years; e.g. the right to use a lavatory on another's premises[46], or the right to use a private car park. These rights must not, however, amount to exclusive possession of the servient land.[47]

An easement may be acquired by *statute* (local Acts of Parliament entitling a public authority to an easement over land, e.g. easements granted to public utility or telephone companies to run lines on, or under, private property); or *expressly granted* (e.g. by deed

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[42] *Gale on Easements* (17th ed 2002) para 12-02.

[43] *Gale on Easements* (17th ed 2002) para 12-02. "Perdurable" in this context means enduring or durable. Two estates in land are equally perdurable if they are of identical duration.

[44] *Megarry and Wade, The Law of Real Property* (6th ed 2000) para 18-191, citing *Canham v Fisk* (1831) 2 Cr & J 126; and see *Thomas v Thomas* (1835) 2 CrM & R 34 at 40.

[45] *Aldred's case* (1610) 9 Co Rep 57b.

[46] *Miller v Emcer Products Ltd* [1956] Ch 304, CA.

[47] See *Copeland v Greenhalf* [1952] Ch 488 on this point.

under which the seller gives the buyer easements over that part of the land he is retaining). Easements acquired by *statute* and easements granted by *deed* will be ***legal*** easements.

However, where a conveyance of land makes no mention of the grant of an easement, certain easements may be *implied*, in any event, into the conveyance.

7.4 EXPRESS EASEMENTS

An express easement is explicitly granted or reserved in a legal instrument creating an interest in land, such as a contract, lease or deed. To be a valid interest the easement must be granted either in fee simple or for a term of years absolute (s. 1(2) LPA 1925). For unregistered land, an express easement is automatically binding and does not require registration. For registered land, the express easement must be registered against either the servient title or both the dominant and servient title (s. 27(2) LRA 2002).

When an express easement is created, it may also include a covenant to repair or maintain the way which will set out the responsibilities of each party to bear such costs. Where such a covenant is not included, the following propositions as set out in *Taylor v Whitehead* (1781) 2 Doug. KB 745 apply:

- Neither the servient nor the dominant landowner is under an obligation to construct the way;
- The dominant landowner has the right to enter the servient land and construct the way, but is under no obligation to maintain or repair it;
- The servient landowner is under no obligation to maintain or repair the way, but has the right to do so if he chooses and will bear the whole costs himself;
- The dominant landowner has the right to enter the servient land and maintain or repair it but will bear the whole costs himself. Access to the land will only be for the purpose of doing the necessary work in a reasonable manner;
- Neither party could claim any contribution from the other in respect of work carried out.

7.5 IMPLIED EASEMENTS

The following four types of easement will be implied into the deed transferring ownership to the purchaser. Easements which are implied into a deed will also be ***legal*** easements.

(a) **Easements of necessity –** These are easements which are so essential to the enjoyment of the land at the time of the grant, that the land cannot be used without it, e.g. a right of way to a piece of land which would otherwise be totally inaccessible unless an easement to permit access is implied into the conveyance or transfer (*Nickerson v Barraclough* [1980] 2 All ER 369). The classic example is "landlocked property", so that access to a public road can only be gained by having a right of way over an adjoining piece of land. Whether the right claimed is essential for the use of the land granted or retained is a question of whether the land can be used at all without the implied grant or reservation. Claims are only successful where the land is "absolutely inaccessible or useless" without the easement (*Gale on Easements*, para 3-119, citing *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557). No easement will be allowed if there is an

alternative right of way, however inconvenient it may be (*Titchmarsh v Royston Water* (1899) 81 LT 673). The necessity must exist at the time of the disposition, subject to an exception where, at the time of the grant, the owner of the servient land knew that a necessity would arise at a later date. It is unclear what happens where the facts that gave rise to the necessity cease. There is some authority which suggests that, in such circumstances, the easement of necessity should also cease (*Holmes v Goring* (1824) 2 Bing 76, 130 ER 233; *Donaldson v Smith* [2006] All ER (D) 293); against this is considerable authority to the effect that where a grant of an easement is implied, it should not be "affected by the chance subsequent acquisition of other property" (*Maude v Thornton* [1929] IR 454, 458, per Meredith J. Also see *Proctor v Hodgson* (1855) 10 Exch 824, 156 ER 674).

(b) **Intended easements** – This second category includes more than easements of necessity, because it may apply even if the easement is not *necessary* to the enjoyment of the property, provided that the purchaser can show that both parties had *common intention* to grant it. In *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, the court considered two heads under which implied easements could exist: first, those implied because they are ancillary to rights expressly granted; and second, those implied because they are necessary to give effect to the manner in which the land retained or demised was intended to be used. Examples would be the grant of a mutual right of support on the sale of one of a pair of semi-detached houses (*Richards v Rose* (1853) 9 Exch 218); or an intended easement for a tenant to have the right to fix a ventilation duct over the landlord's retained property which was implied by the court into a lease of part of the landlord's premises – without which the property could not lawfully be used for its intended purpose as a restaurant (*Wong v Beaumont Property Trust* [1965] 1 QB 173). Even if an alternative means of access exists, an easement can still be implied by common intention, where the alternative means of access would prevent the land from being used for its intended purpose (*Liverpool City Council v Irwin* [1977] AC 239).

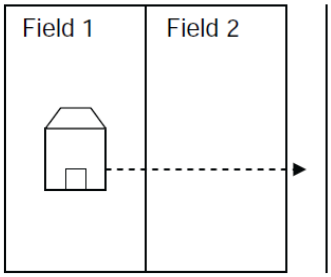
(c) **Easements under the *Wheeldon v Burrows* Rule** (*Wheeldon v Burrows* (1879) LR 12 Ch D 31) – We explained, above, that if a person owns two pieces of land and walks across one piece in order to reach another, he cannot be said to be exercising an easement. However, such a situation is considered a "quasi-easement", because it is a potential easement, in that it could develop into an actual easement if the plot comes into separate hands.

> *For example, if a landowner enjoys the uninterrupted passage of light over his garden to his windows, while he has no easement of light as such, he does have a quasi-easement of light because, if the garden were in separate ownership, he might well have such a right.*

The rule in *Wheeldon v Burrows* states that if the owner disposes of (e.g., sells or leases) *part only* of his land which is benefited (e.g. a house), but retains the land which is burdened (e.g. the garden), the purchaser may acquire as a full legal easement any quasi-easements in use, at the time of the sale, over the land retained by the seller. The quasi-easements must be ***continuous*** (i.e. in regular use) and ***apparent***, i.e. visible from a physical inspection of the land, e.g. a worn path discoverable by the purchaser on the inspection of the property could confer a right of way. It would not, therefore, cover underground pipes for the supply of water, etc., or drains, unless apparent by surface manhole chambers. They must also be ***necessary*** *to the reasonable enjoyment of the land* which is sold, and ***in use*** *at the time of sale*. The estate disposed of can be legal or equitable and the easements created will assume the same status. The transfer of the land from the common owner does not have to be for value. Further, the parties can, by express provision or by implication, exclude the effect of the rule.

The rule in *Wheeldon v Burrows*, however, applies only to implied grant of an easement, and not to implied reservation over the land sold for the benefit of the retained land, save in exceptional cases such as easements of necessity. Thus, the timing of the two dispositions is crucial when considering whether this type of implied acquisition of easements is applicable. There could be an implied grant in favour of the dominant land but not an implied reservation of an easement in favour of the servient land.

The diagram below shows a typical *Wheeldon v Burrows*-type situation, where X formerly owned both fields, and accessed the highway from a house on field 1 by walking along the path over field 2. When field 1 is sold, an easement will be implied into the disposition for the benefit of field 1.



(d) **Easements under s. 62 LPA 1925**[48] **–** The opening words of the section read as follows:

> *"A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."*

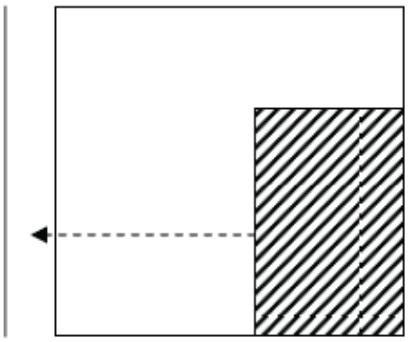
In other words, this section provides that all existing appurtenant benefits (including easements) will pass, automatically, with a conveyance (including even a contract to grant a lease), e.g. buildings, fences, hedges, ditches, as well as any rights or privileges existing for the benefit of the estate, *without any express mention of them being made in the conveyance*.

Section 62 has been held to have two further effects. First, on the conveyance to a tenant of the freehold in the land that was subject to the lease, any property rights which are annexed to the leasehold estate are "upgraded". By being written into the conveyance of the freehold, they become freehold easements or profits appurtenant to it. In fact, s. 62 has been interpreted so as to allow even the creation of new legal easements in favour of a purchaser. It would thus cover even *concealed* pipes and drains.

Second, other arrangements which are not easements or profits (but could be) are transformed by their incorporation into the conveyance into interests appurtenant to the estate sold. An example is illustrated in the diagram below. X owns the freehold, and Y holds a lease of the shaded area. While Y held the lease, Y had X's permission, but no legal right of way, to walk across the yard to the road. Y then buys the freehold

[48] Section 62 LPA 1925 is discussed in some texts as an aspect of the express creation of easements rather than as a form of implication.

of the shaded area. Section 62 writes into the conveyance all the rights, privileges and advantages that were enjoyed with the land, including the right to pass on foot across the yard; that right is now incorporated into the deed, and so it becomes an easement.



Section 62 overlaps to some extent with the rule in *Wheeldon v Burrows* because it can transform into an easement a quasi-easement, such as the one represented in the diagram above. However, the courts have held that for a s. 62 easement to apply (which is wider in scope than the *Wheeldon v Burrows* easement and is not restricted by the three requirements of the rule), the two properties must have *already* been in separate occupation *before* the date of the relevant conveyance, and the landowner *later* gives a permissive right to the occupier of the dominant land (e.g. the landowner grants a right, orally, to a tenant to store coal in a coal shed on land retained by the landowner, and *then* decides to formalise the arrangement by drawing up a lease (*Wright v Macadam* [1949] 2 KB 744)). However, there are some exceptions to the requirement that the properties be owned by different parties. In *Wood & Another v Waddington* [2015] EWCA Civ 538, the court found that s. 62 could operate to grant easements where there had been common occupation if there was sufficient evidence that the exercise of the rights had been *continuous and apparent*. It should also be noted that while s. 62 operates only where there is a conveyance, *Wheeldon v Burrows* will operate where there is only a contract, or where the quasi-easement was being enjoyed at the time of the contract but not of the conveyance.

7.6 PRESUMED GRANTS (ACQUISITION BY PRESCRIPTION)

Where there is no express or implied easement, an easement may be *presumed* by the law, after use for a sufficiently long period of time, e.g. 20+ years ("prescription").

(a) Basic rules of prescription

Three basic rules apply to all the methods of prescription:

(i) **"As of right"** – The claimant must establish that, throughout the period of use, he has enjoyed the right he claims "as of right" – this means the use must be (i) without force; (ii) without secrecy; and (iii) without permission (even if he mistakenly believes that the right was granted to him!). The right claimed, e.g. right of way, must not have been exercised by force, even if the grantor of the right has blocked access to the way. Climbing over a fence or gate would constitute using force. Furthermore, the right may not be exercised secretly, meaning that the landlord must have had the ability to discover and prevent the user of his property (not necessarily that the user intended their use to be

secret). Finally, the right must not simply be enjoyed by permission. Otherwise, it will be a mere licence and not an easement "as of right", and will be generally revocable at the will of the licensor.

(ii) **"The fiction of grant" –** The right must be granted by one fee simple owner to another fee simple owner. A tenant of dominant land could not, therefore, acquire rights by prescription against his own landlord. Another rule is that a landowner without the capacity to grant an easement cannot suffer prescription. The idea is that only a freeholder has the ability to grant an easement for the equivalent of a fee simple. Accordingly, a leaseholder cannot prescribe for the benefit of his or her lease. Long use by a leaseholder may found a claim for an easement appurtenant not to his or her lease but to the freehold of the land.

(iii) **The use must be continuous –** i.e. the use of the right must be regular and not infrequent. Also, the right exercised should not generally be varied (i.e. changed in a major manner or intensified) during the period for prescription, e.g. a prescriptive right of way to a piece of land with one house on it will not extend to other houses subsequently constructed on the dominant land; the dominant owner of a private right of passage does not have the right to lay pipes under that right of way.

(b) Forms of prescription

There are several forms of prescription, all of which will give the acquirer a legal easement, even though there has, in fact, been no grant by deed:

(i) **Common law prescription –** Where the interest has been enjoyed, as of right, "since time immemorial" (i.e. for at least 20 years, in practice), provided it was capable of existing since the year 1189, the easement will be established at common law. It follows that a right to light could not be claimed as an easement where the building on the dominant land did not exist in 1189. This makes prescription at common law of limited practical use.

(ii) **Lost modern grant –** Only those claimants unable to obtain an easement under the general common law rules can have recourse to this fiction, which is based on the assumption that, if the claimant can show **open** and **uninterrupted** use of the easement for the last 20 years or longer, he must have done so by virtue of a grant of an easement which has since been lost. The usual common law rules apply, e.g. the use must have been by and against a fee simple owner for the whole of the period. However, the presumption that the grant deed was lost cannot be rebutted by evidence to the contrary, provided that at least 20 years' use can be shown. Thus, if there were 25 years' continuous use, followed by a five-year gap, before commencing proceedings, the court would only look at the last 20 years immediately before the claim form was issued, meaning that the claimant would only be able to show 15 years' use, under the Prescription Act 1832. He would, however, be entitled to the easement, based on the fiction of the lost modern grant. However, if it can be shown that there was nobody who could lawfully have made the grant throughout the entire 20 year period then no easement is created.

(iii) **Prescription Act 1832 –** This Act creates two different prescription periods for easements: a "short period" (if the use can be shown to have existed for at

least 20 years, immediately before the issue of the claim form), and a "long period" (where there are 40 years of continuous use).

The difference is that a claim based on the *short period* can be defeated in any other way that would defeat common law prescription, such as by showing that the use is not as of right, or that the claim being claimed lacks the characteristics of an easement, e.g. if permission has been given.

By contrast, the benefit of proving use for the *longer period* is that the right claimed will be deemed absolute, unless it was enjoyed by some consent expressly given in writing. This is the statutory form of prescription and does not depend on the common law rules or on the fiction that the easement was actually granted at some time in the past (and long use is regarded merely as evidence of that grant). Therefore, if permission was given orally[49], an easement could still be obtained under the Act, provided 40 years of continuous use can be shown.

Various deductions must be made from the short period (and to a lesser extent from the long period), where the owner of the servient land is under a legal disability (e.g. infant/mental health patient/periods of ownership as a tenant for life), as he cannot be said to have truly acquiesced to the grant.

7.7 RIGHT TO LIGHT

A right to light is an easement that gives a landowner the right to receive light through defined apertures in buildings on their land. It enables the dominant owner to prevent the obstruction of light by the servient owner. However, a right to light does not give a right to the maximum light ever received through the window; and therefore it is not the case that any obstruction of the light, however trivial, is an infringement of the right. The dominant owner is entitled to sufficient light for the comfortable use and enjoyment of his or her property, taking into account both the current use and potential future uses. If the servient owner obstructs the light, and the amount of light received falls below this level of sufficiency, then the obstruction will constitute a nuisance.

The Prescription Act 1832 contains distinct regimes for the prescriptive acquisition of rights to light and for easements generally. The 1832 Act provides for the creation of a right to light where light has been enjoyed for the period of 20 years without interruption before a claim to the easement is made. Only the interruption of the light for a period of one year or more, or the written consent or agreement of the servient owner to the use of the light will prevent the right being acquired; otherwise, the right will be deemed "absolute and indefeasible". Unlike the two other methods of prescription, there is no need for the use to be "as of right" (in other words, as if a lawful easement existed); one effect of this is that, unlike any other easement, it is possible for a tenant to acquire a right to light by prescription against his or her own landlord.

For an easement to arise under the 1832 Act the 20 years' use must be prior to some "suit or action". This is in contrast to prescription arising under lost modern grant where the 20 year period of use can be at any time; on completion of the 20 year period, a right is brought into being. A suit or action could be, for example, a claim in nuisance brought by the dominant owner. Section 2 of the Prescription Act 1832 states that the use must be

[49] If the permission or consent is given in writing, an easement under the Prescription Act 1832 can never arise.

continuous, or "without interruption". To be effective, an interruption must continue for at least a year. This has a technical meaning – non-use for less than one year does not count as an "interruption". This leads to the well-known but strange result that prescriptive use for 19 years and one day will almost certainly guarantee the user an easement, on the basis that the servient owner is unable to prevent the use by interruption, provided that the "suit or action" to claim the easement is brought on the twentieth anniversary of the commencement of the use. Where light is obstructed for one year or more, and the obstruction is then removed, the 20 year period for prescription can start again. In practice, home extensions or new buildings erected close to a neighbouring property are common examples of right to light disputes. The right may enable landowners to prevent construction that would interfere with their rights or, in some circumstances, to have a building demolished. Where a development has taken place, but a court does not order its demolition, the court may award substantial damages.

The physical obstruction is straightforward as if the servient owner has the necessary planning permissions and the dominant owner has not yet acquired a right to light, then if a building or a permanent wall may be erected prior to the expiry of nineteen years and day from the creation of the window, the structure, once erected will prevent the right to light from being acquired by the dominant owner.

The Rights of Light Act 1959 made it possible to interrupt the enjoyment of light without the need for a physical obstruction, such as a wall, by introducing a form of notional interruption. The owner of land over which light passes to a building can, on obtaining a certificate from the Lands Chamber, apply to the local authority, or from the 12th of April 2015, to the Land Registry, for the registration in the Local Land Charges Register of a light obstruction notice. Where successfully applied for, the notice has effect until the expiry of one year beginning with the date of registration. Once the notice is in place, then for the purposes of determining whether a person is entitled to a prescriptive right to light (under any method of prescription) the access of light to the building subject to the notice shall be treated as if it has been obstructed, to the same extent as if it had been physically obstructed. A light obstruction notice when registered will, from the date of registration, amount to an interruption if no action is taken by the dominant owner. The owner of the dominant land will have a year in which to challenge the light obstruction notice registration in court.

7.8 LEGAL AND EQUITABLE EASEMENTS

Unlike a restrictive covenant, which is always enforced in equity, an easement can exist as either a legal or an equitable interest in land.

Only easements created by *statute*, *deed* or *prescription*, and held on terms "equivalent to a fee simple absolute in possession" (i.e. effectively forever) or "term of years absolute" (i.e. for a fixed period), including *implied* easements, qualify as **legal easements**. ***All other easements will be equitable***.

> *Thus, an easement granted "for 10 years" would be a legal easement, while an easement "for life" would not be legal – because it is not for a period equivalent to a legal estate.*
>
> *Moreover, if legal formalities are not satisfied, there may still be a contract to grant an easement, under the rules of equity, which will be enforced by the remedy of specific performance. Thus, an agreement in writing to give a right of way, not specifically stated to be a deed, and for which consideration has been given, may still take effect as an equitable easement.*

7.9 ENFORCEMENT AGAINST THIRD PARTIES

7.9.1 Legal Easements

(a) Unregistered Land

Legal easements "run with the land" and cannot be registered as a land charge, i.e. they are binding on all subsequent purchasers of the servient land, regardless of notice.

(b) Registered Land

(i) First registration

Legal easements in existence at the date of the ***first registration*** of the title will rank as "overriding interests", under Schedule 1 LRA 2002, and will thus bind any purchaser of registered land automatically, even if they do not appear on the Land Register and even if the proprietor has no notice of their existence.

Express easements will usually be recorded in the title deeds and will be noted on the Register when the deeds are presented for first registration.

(ii) Dealings with the land following first registration

By contrast, an easement created by *express* grant ***following registration (i.e. over land which is already registered)*** will not be an overriding interest and must therefore be protected by notice on the affected (servient) title to bind a subsequent purchaser. The *benefit* of the easement must also be registered on the title of the dominant land. If the easement is not registered, it will only subsist as an equitable easement. The burden of an easement is registered on the charges register of the burdened land, whilst the benefit appears on the property register of the benefitting land.

Where legal easements are created over registered land by *implied* or *presumed* grant, they will only be protected as overriding interests if: (a) the buyer of the registered title had actual knowledge of the existence of the easement; (b) the easement was obvious on a reasonably careful inspection of the land. However, even if the purchaser did *not* have actual knowledge of the existence of the easement or the easement was *not* obvious on a reasonably careful inspection of the land, he will still be bound by the easement, if the claimant can prove that the easement has been in use for the 12 month-period prior to the sale.

7.9.2 Equitable Easements

Equitable easements (e.g. easements which were created by deed, but the necessary formalities were not complied with) must generally be registered[50] to be enforceable against a third party who acquires the servient land for value in money or money's worth. Otherwise, a bona fide purchaser for value of a legal estate will take possession free of the interest, unless he has actual or constructive notice of the existence of the easement.

[50] Either on the Register of Title in the Land Registry (if registered land), or as a Class D(iii) land charge under the Land Charges Act 1972 (if the land is unregistered).

7.9.3 Extinguishment of Easements

An easement may be extinguished:

- by an *express release*, usually by deed (but not by unilateral revocation);
- by an implied and clear intention on the part of the dominant owner not to resume his right, i.e. *abandonment*[51];
- by *expiration* of a period of time, or purpose, stipulated in the original grant;
- by an *alteration* in the dominant land, in such a way that the easement is unnecessary, as when the dominant land is a building that is destroyed;
- by *losing* it to another by prescription; or
- by *statute*, as when a statutory authority uses its powers to extinguish a right of way (effectively by expropriation).

In a case of *merger* of the dominant and servient lands into common ownership and possession, the traditional view used to be that a merger of a lease, on determination, with the freehold means that any beneficial easements granted by the lease would automatically end. However, the Court of Appeal in *Wall v Collins* [2007] EWCA Civ 444 held that an easement that benefits a lease survives the termination of the leasehold estate by merger with the freehold, as a result of the acquisition of the freehold by the tenant. Although an easement has to be appurtenant to a dominant tenement, it does not necessarily have to attach to any particular interest for the time being. So when a lease is determined on merger, the tenant does not automatically lose any rights which were granted to them or to previous tenants for the benefit of the leasehold property; these easements may continue to exist and to be exercisable by the occupier of the reversionary estate[52] for the period for which they were granted. The Land Registry will not automatically enter the benefit of such easements in the registered title to the reversionary estate (if registered). However, the landowner may make an application to register the benefit of such easements in the registered title to the reversionary estate, either at the time of merger or subsequently.

7.9.4 Access by Landowner to Adjoining Property to Carry Out Works Where No Easement Exists

7.9.4.1 Access to Neighbouring Land Act 1992

Where a landowner has no easement to enter a neighbour's garden/land to carry out "basic preservation works" (e.g. to coat the garden fence, to repair a drain, to cut back a hedge in danger of becoming damaged or dangerous, to fill in or clear a ditch), a limited right of access may be implied by statute. The Access to Neighbouring Land Act 1992 enables someone who needs to carry out works which are "reasonably necessary for the preservation of the whole or part of the dominant land", but does not have the consent of some other person to that entry, to obtain access to neighbouring property (adjoining or adjacent land), where such works cannot be carried out, or would be substantially more difficult to carry out, without access to the servient land. A landowner must seek an order

[51] In *Waterlow v Bacon* (1866) LR 2 Eq 514, the dominant owner agreed to release his easement of light, as a result of which the servient owner spent money constructing a building which obstructed the dominant owner's light. The court held that the dominant owner was estopped from denying the release.

[52] A reversionary estate is created when an easement is conveyed to an occupier but the future rights are reserved for the owner or their heirs.

from the court forcing the other person to give them access before entering the neighbouring property. Going onto the neighbours' land without their permission will amount to trespassing. The court will not grant an access order if it is satisfied that the neighbour or any other person would suffer interference with, or disturbance of, their use or enjoyment of the servient land, or the neighbour or any other person in occupation of the servient land would suffer hardship, to such a degree by reason of the entry that it would be unreasonable to make the order.

Until this Act was passed, adjoining landowners had virtually no right to go onto their neighbour's land, under any circumstances, unless it was contained in the title deeds. The Act allows a County Court to grant an "access order", which requires the uncooperative neighbour to allow the applicant access to their land, so that the necessary work can be done.

An access order will specify the works which may be carried out by entering the servient land; the particular area of the servient land that may be entered; and the date on which, or period during which, the servient land may be entered.

An access order may also impose such terms and conditions as the court considers reasonably necessary to avoid or restrict any loss or inconvenience; require the payment of a fee to the owner or occupier of the servient land for access; require the applicant to pay other costs, such as the costs incurred by the owner or occupier of the servient land for dealing with the court application.

An access order is registrable under the Land Charges Act 1972 in unregistered conveyancing, and as a notice in registered conveyancing (but not as an overriding interest) and will be enforceable against successors in title to the servient land or any person who acquires an interest therein.

7.9.4.2 Party Wall Etc. Act 1996

The Access to Neighbouring Land Act 1992 also applies to party walls. However, the Party Wall Etc. Act 1996 goes even further and gives a building owner rights to enter an adjoining building, even without an access order, to carry out certain works, which involves one of the following categories:

- building a free standing wall or a wall of a building up to or astride the boundary with a neighbouring property (section 1 of the Act)
- work on an existing party wall or party structure (see paragraph 3 below) or building against such a party wall or party structure (section 2 of the Act)
- excavating near a neighbouring building (section 6 of the Act)

Exercising the rights are subject to certain requirements, such as not to cause any unnecessary inconvenience or compensate for any loss or damage caused by relevant works.

Notice in writing, at least *two months for an existing party wall*, and *one month for a planned new wall*, must be given to the adjoining owner before carrying out the works, even where these will not extend beyond the centre line of the party wall. The adjoining owner can agree, within 14 days, or serve a counter notice setting out what additional or modified

work he would like to be carried out. Where there is a disagreement, the Act provides for the resolution of disputes.

The Act applies to both existing and new walls, but exactly what constitutes a "wall" is not defined by the Act. This means that whether or not a boundary is a "wall" will be a matter of fact. Traditional walls built of brick, concrete or stone are probably going to be accepted as walls, but more flimsy structures such as wooden fencing, post and wire fencing and the like will probably not be covered by the Act. Certainly, hedges and other living structures will not; this does not mean that the latter cannot be covered by some other means, e.g. title deeds, long usage between properties or by agreement.

7.9.4.3 Profit à Prendre

Profits are not clearly defined in statutory law. A "profit à prendre" is similar to an easement, as they fall within the status of "an easement, right, or privilege" in s. (2)(a) LPA 1925. A profit allows the dominant owner to enter the servient land in order to take natural resources such as produce, fish or meat from the land. The thing taken must be capable of ownership, so a right to use land in some way, or to take water from a natural feature, cannot be a profit. Hunting and fishing rights are obvious examples, as are grazing rights.

A profit à prendre may be 'appurtenant' or 'in gross'. A profit à prendre appurtenant is where the benefit of the right is attached to a particular piece of land, in the same way as an easement. It cannot be registered with its own title, and the person with the benefit of the profit must also own a dominant tenement which must be accommodated by the servient tenement. In this case, only the owner for the time being of the dominant tenement will be able to enforce the right.

A profit à prendre in gross is a freestanding right not attached to the ownership of any particular piece of land. The owner of the profit may not own any land at all and may dispose of the profit independently from any land they do own.

Profits may either be "several" (also called "sole") or "in common". A several profit excludes other people, including the servient owner, so if a several fishing right is granted to X by Y over Y's land, Y can no longer fish there. Profits in common do not exclude other people or the servient owner.

Because different profits à prendre in gross may be granted over the same land to take different resources, or to take the same resource at different times, there may be more than one profit à prendre in gross affecting the same land.

Profits may be created expressly by agreement between the property owner and the profit owner, incorporated in the deed or instrument conveying the property, by statute, by prescription at common law, or under the doctrine of lost modern grant. The Law Reform Committee in 1966[53] took the view that the acquisition of a profit is normally a transaction of a more commercial character than the acquisition of an easement and it is not unreasonable that the purchaser should be required to prove the bargain upon which he relies.

[53] Acquisition of Easements and Profits by Prescription: Fourteenth Report (1966) Law Reform Committee, Cmnd 3100, para 98.

A profit à prendre appurtenant over registered land may be protected in the Charger Register of the affected land and in the Property Register of the estate which enjoys the benefit of the profit, like an easement.

A profit à prendre in gross may be substantively registered with its own title. Alternatively, a profit à prendre in gross over registered land may be the subject of notice in the charges register of the affected land, without being registered with its own title or, if the affected land is not registered, the subject of a caution against first registration.

Under s. 27(2)(d) LRA 2002, profits in gross granted out of a registered estate on or after the 13th of October 2003 must be registered in order to operate at law. Before the LRA 2002, profits were not capable of registration separately from land. A profit is an interest which overrides first registration. A profit à prendre which is not registered (under the Commons Act 2006) will nevertheless override registered disposition, if, at the time of disposition, it is within the actual knowledge of the person to whom the disposition is made, or it would have been obvious on a reasonably careful inspection of the land over which the easement is exercisable, or it has been exercised in the period of one year ending with the day of the disposition.

For a profit à prendre to be registrable under its own title, it must:

- exist in its own right and not be annexed to the ownership of other land (that is, it must exist 'in gross');
- be held in fee simple or for a term of years with more than seven years unexpired;
- be granted by deed, statute, acquired by prescription at common law or acquired under the doctrine of lost modern grant; and
- be in respect of something which is capable of ownership (so, for example, it cannot be in respect of water).

The grantee will be registered as proprietor of the profit title and notice will be entered in the charges register of the title to the affected land. If the profit à prendre in gross is for a term of seven years or less, it cannot be registered with its own title. Instead, an application should be made for notice of the right to be entered in the charges register of the title to the affected land.

The owner of a profit à prendre in gross may transfer his rights in the usual way subject to any rule of law, express provision in the grant of the profit à prendre in gross or entry in the register to the contrary.

A profit à prendre in gross may be extinguished by:

- statute
- express release (by deed)
- abandonment, which requires both non-use and an intention to abandon
- unity of ownership and possession of the profit and the estate out of which it was granted
- exhaustion of the subject matter of the profit.

An application to close a registered profit à prendre in gross title should be made to the Land Registry with evidence to satisfy that the profit has been extinguished.