Advanced topics – Chapter 15
Answering a question on implied and prescriptive easements

Remember, there was an express easement of way over the land tinted lilac on the filed plan (see figure 15.2). We posed the question:

What if Joseph Smith had not expressly granted an easement here? Might an easement have come into being in any other way?

If an easement is not expressly granted, it may still have come into being either as an implied grant, or by prescription (long use). For the grant of an easement to be implied, the dominant and servient tenements must have once been in common ownership (i.e. owned by the same person). There is evidence in this scenario that this was the case – see 15.2.3. It appears that both tenements were owned by Joseph Smith until 1952, when part of the land (in our scenario the quasi-dominant tenement) was sold.

There are four methods of implying the grant of an easement: necessity; common intention; the rule in *Wheeldon v. Burrows* and Law of Property Act 1925, s. 62. Do any of them apply here?

Taking necessity first, we know that necessity is construed very strictly by the courts. If there is any way at all to access the land, no easement will be implied. Anne's Cottage does seem to be landlocked – there is no part of it which touches the highway, and no public footpath marked on the plan. However, there is a tidal river running though it, over which the public have rights of navigation. However, the foreshore is not part of the land. So the owner of Anne's Cottage may have no access to the river, although there is an implied licence for navigation if the foreshore is owned by the Crown. If the owner of Anne's Cottage can use the river to access the land, an easement of necessity may be denied!

Common intention is wider than necessity. It is arguable that since the land was sold with a house on it, reasonable access down the path must have been intended by the parties. However, such rights are not lightly presumed, and cases tend to be on specific rights envisaged by the parties – such as the ventilation for a restaurant in *Wong v. Beaumont Properties* [1964] 2 All ER 119. However, there was a reservation of an easement of way in much less pressing circumstances in *Peckham v. Ellison* [2000] 79 P & CR 276, and since it is generally easier to argue for an implied grant than an implied reservation, it may be that a court would imply the grant of an easement by common intention. In *Donovan v Rana* [2015] EWCA Civ 99, the Court of Appeal held that the test was whether the intended use of the land made such an easement necessary. On that basis, it could be argued that land with a house on it would require land access to a highway.
However, the third possibility, *Wheeldon v. Burrows,* is more likely. In that case, it was stated:

> in a grant of land, there may be implied in favour of the grantee those rights in the nature of easements which are continuous and apparent, and necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the grantor for the benefit of the part granted.

In this case, the pathway is an obvious way to reach the cottage which must have been used by Joseph Smith to access it when he was the owner of both pieces of land. The easement is continuous and apparent (evidence of a worn track is enough - *Hansford v. Jago* [1921] 1 Ch 322) and necessary to the reasonable enjoyment of the part granted. Therefore, this would seem to be an obvious case for the application of *Wheeldon v. Burrows,* unless the parties deliberately excluded the rule when transferring the land.

LPA 1925 s.62 may also apply. This section operates to turn quasi-easements into easements on a transfer of the land and also to turn licences into easements. This is not a classic scenario for the application, as the two pieces of land were probably not in separate occupation before the transfer (although they may have been, we do not know for sure). Older cases held that 'prior diversity of occupation' was a requirement for s.62: e.g. *Long v. Gowlett* [1923] 2 Ch 177.

However where, as here, the easement claimed is continuous and apparent, and necessary to the reasonable enjoyment of the property granted, prior diversity of occupation is not required: *Platt v. Crouch* [2003] EWCA 1110. It is therefore quite possible for an easement to be implied here under s.62, as long as the section was not excluded from the transaction.

In conclusion, then, it is likely that an easement to use the pathway will be implied under the rule in *Wheeldon v Burrows*, and/or LPA 1925 s.62.

Turning to the question of an easement by prescription, this is likely if there has been long use (over 20 years) of the pathway by the successive owners of Anne's Cottage. If the dominant owner exercises a right in the nature of an easement for long enough, the law presumes that the servient owner must have granted the easement at some point in the past. This presumption is based upon the acquiescence of the servient owner—that is, his or her failure to object to the actions of the dominant owner.

There must be continuous user of the right by one freehold owner against another for a period of at least 20 years. The use must be 'as of right', which means not by force, not secretly, and not by permission.

Acquiescence is presumed if the servient owner has knowledge of the acts done; power to stop the acts or sue in respect of them, and they refrain from the exercise of such power.

If the owners of the cottage have been driving over the track ever since Joseph Smith sold it, it is very likely that an easement by prescription will have arisen. This may either be under the Prescription Act 1832 or the doctrine of lost modern grant.

Under the PA 1932, s. 2, there are two different prescription periods in respect of easements other than light—for example, rights of way such as the owners of Anne's Cottage wish to claim - the shorter period of 20 years and the longer period of 40 years.

If the easement has been actually enjoyed without interruption for 20 years, it is not defeated by proof that it commenced later than 1189, but it may be defeated in any other way possible at common law. If the easement has been enjoyed without interruption for 40 years, it is deemed

absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given in writing.

PA 1932, s. 4, prescribes that it must be the period leading up to the action by which the legality of the right is questioned—in other words, the *last* 20 or 40 years. The Act gives no rights to an easement unless, and until, an action is brought. The time also has to be 'without interruption', which means that there must have been no break on the use of the easement lasting for more than one year – PA1832 s.4.

It seems likely that, if successive owners of Anne's Cottage have used the track since 1952, the longer period will be satisfied. The owners may also be able to claim an easement under the doctrine of lost modern grant. By this fiction, the court presumes that, if there has been 20 years' enjoyment of a right, a grant of that right must have been made: *Bryant v. Foot* (1867) LR 2 QB 161.

Therefore, it is likely that an easement of way by prescription exists.