Self-test questions

1. Ali wishes to know if the right to park his car on the driveway of a neighbouring house is capable of being an easement. Advise Ali.

Answer: In order to know whether the right to park a car on a driveway can be an easement, we must consider the nature of easements. The leading case is *Re Ellenborough Park* [1955] 3 All ER 667. In this case, the Court of Appeal set out four main requirements which must be met for a right to constitute an easement.

The first requirement is that there must be a dominant and a servient tenement. This is met in our example: the dominant tenement is Ali's land, as it has the benefit of the right, whilst the servient tenement is the neighbouring house.

The second requirement is that an easement must accommodate the dominant tenement. The two tenements are next door to each other, so they are close enough for Ali's house to benefit from the right to park (*Bailey v. Stephens* (1862) 12 CB (NS) 91). The right is one which could benefit any owner of the land, and it would not be likely to be of personal use to Ali if he sold the dominant tenement. Therefore, this requirement is met.

The third requirement is that the dominant and servient owners must be different persons; you cannot have an easement over your own land. This is appears to be the case here.

Fourthly, the right must be capable of forming the subject matter of a grant. This has a number of elements. Firstly, the right must have been granted by someone with the power to do so, and to a person who can benefit from the easement. This appears to be the case here. Secondly, the right must be sufficiently definite to be an easement; vague rights such as the right to a view or to privacy are not easements (*Browne v. Flower* [1911] 1 Ch 219, *William Aldred's case* (1610) 9 Co Rep 57b). Lastly, the right has to be in the nature of an easement, that is, analogous to rights recognised as an easement in the past.

It is this last requirement that may cause Ali some difficulty. This right is not a new right, as easements of parking have been recognized in the past (*Hair v. Gillman* (2000) 80 P & CR 108), and the right does not require the servient owner to spend money, which is not permitted for easements. However, it is possible that the use of the servient tenement may be too excessive. An easement may not amount to exclusive possession of the servient tenement; it must allow the servient owner to make use of the land as well. Rights of parking which take up substantially the whole of the servient tenement have been held not to be easements: *Copeland v. Greenhalf* [1952] Ch 488 and *Batchelor v. Marlow* (2001) 32 P & CR 36. However, the test in *Batchelor v. Marlow* – whether the right to park cars would render the servient owner's use of the land 'illusory' - was criticised in the House of Lords case *Moncrieff v. Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620. This was an appeal from a Scottish case, and is therefore of persuasive authority only.

In *Virdi v Chana* [2008] EWHC 2901 (Ch), Judge Purle QC held that, despite the criticisms of *Batchelor v Marlow* in *Moncrieff v Jameson*, it was not overruled, and remains a binding precedent. However, the right to park one car on a strip of land partly in the Claimant's ownership was upheld, as the strip of land had no other viable use, so the defendant was not preventing the claimant from using it.

The question is one of fact and degree; does Ali's car take up too much of the servient tenement to enable it to be an easement? If it amounts to exclusive possession of the land, it will have to be granted as a lease or a licence instead. If the driveway is large, and there is room for the owner of the land to pass by the car and still use the land, Ali may have an easement of parking. Alternatively, Ali may argue that the servient owner can still use the airspace above the land, or the ground beneath it, and thus the use of the land is

not illusory – see *Moncrieff v Jamieson*. Also, if the driveway would have no other realistic use, this may be sufficient – *Virdi v Chana*.

See: 12.2.6.3 and 12.3.2.

2. What is the difference between the public right of passage along the highway and an easement of way?

Answer: A right of passage along the highway is a public right, available to everyone, whether they are landowners or not. In other words, a public right of passage does not accommodate any dominant tenement. It can be used to access any piece of land that it convenient.

An easement of way, on the other hand, must be for the benefit of a particular piece of land, the dominant tenement. It can generally be used only to access that tenement, not other nearby pieces of land, even if owned by the dominant owner: *Das v. Linden Mews* [2002] 2 EGLR 76, although use to reach land which is ancillary to the right to access the dominant tenement will be permitted: *Gore v. Naheed & Ahmed* [2017] EWCA Civ 369.

See: Table 12.1 and 12.3.1.

3. Betty has just moved into a house that has no access to the road for motor vehicles. Is she able to claim an easement of necessity over her neighbour's land?

Answer: Easements are implied into transfers of land by necessity only if the land is unusable without the easement. If Betty's house is accessible from the public highway on foot, it is most unlikely that a way of necessity will be implied: *Pearson v. Spencer* (1861) 1 B & S 571.

See 12.4.3.2.

Examination questions

1.(a) Carol has a lease of a small flat on the second floor. She is a keen cyclist and her landlord, David, has always allowed her to store her bicycle in his garden shed. Carol's lease was renewed last month. This week, she received a note from David saying that there is no longer room in his shed for her cycle, so she must remove it. What can Carol do?

Answer: Carol needs to show that she has an easement of storage. To establish this, she must show firstly that such a right can be an easement, and secondly how the easement has been granted to her.

The case of *Re Ellenborough Park* [1955] 3 All ER 667 sets out the requirements for an easement. The first three seem to be met here, as there are two tenements (the flat and David's part of the house) which are occupied by two different people. It is commonplace for tenants to have easements over their landlord's property. The easement clearly accommodates the dominant tenement (Carol's flat) as any owner of the flat would benefit from storage of items in a shed rather than on the second floor.

The only difficulty may be that the right may be too excessive if it takes up too much of the room in the shed; an easement must allow the servient owner (David) to use the shed as well. This is a matter of fact and degree, but easements of storage have been permitted: *Wright v. Macadam* [1949] 2 KB 744.

The second consideration is how the easement was acquired. Clearly, there was no express grant of an easement by David to Carol. However, there may have been an implied grant here. The most likely

mechanism is the statutory grant of easements under LPA 1925 s.62. This section operates to turn quasi-easements into easements on a transfer of the land and also to turn licences into easements.

The facts of our case are similar to those in *Wright v. Macadam* [1949] 2 KB 744. In that case, a tenant was allowed to use a coal shed situated on her landlord's premises. The lease was later renewed and no mention was made of the use of the coal shed. Afterwards, the landlord tried to claim extra rent for use of the shed. The Court of Appeal held that the renewal of the lease had been a conveyance within LPA 1925, s. 62. Therefore, the licence to use the shed for storage of coal had become an easement. The landlord could neither stop the tenant from using the shed, nor charge her extra rent.

Here, Carol was using the shed to store her bike before the lease was renewed. The renewal of the lease without revoking the licence will operate under LPA 1925 s.62 to turn the former licence into an easement. David will not be able to stop Carol from using the shed.

It should be noted that s.62(4) allows the effect of s.62 to be excluded from conveyances if the parties so agree, and this is commonly done. Therefore, Carol needs to check her lease and any contract to grant it carefully.

See: 12.2 and 12.4.3.2.

(b) Eddie has a garage at the back of his garden, in which he parks his car. He accesses the garage by driving along an alleyway between the gardens of the houses in his road and the neighbouring park. Yesterday, he received a letter from the local council, saying that it owns the alleyway and that he must now pay £300 per year to drive on it. Eddie has been using the alleyway for 25 years and his predecessor in title used it for 15 years before that. Advise Eddie.

Answer: Eddie needs to show that he has an easement of way over the alleyway. The first thing he should do is to check his register of title (or title deeds if his land is unregistered) to see if he can find any mention of such a right.

If he cannot find such a right mentioned, it is unlikely to have been granted expressly. However, Eddie may be able to show that he has acquired the right by prescription, that is, long use. 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. It seems that Eddie has been using the alleyway continuously for longer than this. The use must be 'as of right', which means not by force, not secretly, and not by permission. It appears that Eddie has been openly driving along the alleyway without any hindrance from the council, and without secrecy. He did not have permission to do so. Therefore it seems likely that he can show continuous user.

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. Since the rights were exercised openly, and the alleyway is the only route to the garage, it seems likely that the council have acquiesced to Eddie's use of their land.

There are three types of prescription: common law, lost modern grant and statutory prescription under the Prescription Act 1832. Common law prescription is rarely applicable, so the other two methods will be considered.

Under the PA 1832, s. 2, there are two different prescription periods in respect of easements other than light—for example, rights of way such as Eddie wishes 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 in the use of the easement lasting for more than one year – PA1832 s.4.

Eddie can certainly show the shorter period. He has been using the alleyway himself for 25 years. Since his use has been continuous and as of right, it appears he will have acquired an easement under the Act. If he can also show that his predecessor in title used the alleyway for 15 years, he can claim the 40 year period which will give him an easement that is 'absolute and indefeasible' unless granted by written permission.

Eddie 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 very likely that Eddie will be able to prove an easement by prescription, and will not need to pay the council to drive over the alleyway, as he already has the right to do so.

See: 12.4.4.

(c) Fred has an old well on his land that has not been used for many years. Last week, due to a drought order forbidding the watering of gardens with mains water, his neighbour Gina came onto Fred's land and took water from the well. Fred's register of title does show a right to take water in favour of Gina's land, but Fred had thought it was never going to be used. Advise Fred.

Answer: Gina has an express easement to take water from Fred's land. An easement may be brought to an end by being impliedly released, but this is not lightly presumed.

In *Benn v. Hardinge (1993) 66 P & CR 246,* a right of way was not used for 175 years because an alternative path was available. When that path was waterlogged, the owners of the easement were entitled to use the right of way again. It was not treated as abandoned. This case applies to the facts here – the alternative water supply was more convenient, but now that it is unavailable, Gina is entitled to use the easement again.

See 12.7.

2. Is the law on acquisition of easements in need of reform?

Answer: An easement is one of the rights listed in Law of Property Act 1925 (LPA 1925), s. 1(2)(a), as being capable of being a legal interest in land, provided that it is granted 'for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute'.. An express grant of a legal easement must be made by deed (LPA 1925, s. 52(1)) and completed by registration.

However, it is possible for an easement to be acquired other than by express grant. Easements may be implied into a grant or reservation of land, or may be gained by long use.

Firstly, there may be a grant or reservation 'of necessity' which traditionally applies to 'landlocked closes'. 'Necessity' is construed very strictly. Even if the remaining access to the land is very impractical, there will be no reservation of a way of necessity— see, for example, *Titchmarsh v. Royston Water Co.* (1900) 81 LT 673, in which the roadway was 20 ft below the level of the land, but no other way of necessity was implied by the court.

There may be a grant or reservation by 'common intention'. In a modern example, *Donovan v. Rana* [2014] EWCA 99, A plot of land was sold at auction with the intention that a house would be built on it. A right to pass 'for all purposes connected with the use and enjoyment of the land but not for any other purpose' was expressly granted over the vendor's neighbouring land. The vendors claimed damages when their land was dug up to allow the running of utilities to the house. An easement of way to allow the running of services and utilities was implied into the transfer.

There are two other types of implied easements that apply to grants (but not reservations) the first of which is the rule in *Wheeldon v. Burrows* (1879) 12 Ch D31. It provides that 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 *Borman v. Griffith* [1930] 1 Ch 493, for example, the claimant held a house, The Gardens, under an equitable lease for seven years. He used a driveway that ran across his landlord's property, although there was a separate access way to the back door of The Gardens. Maugham J held that the claimant was entitled to use the driveway, because it was plainly visible and was necessary for the reasonable enjoyment of the property. The right to use the driveway had not been excluded by the contract, so an easement of way over it was implied.

Secondly, LPA s.62(2) provides that '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, watercourses, 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.'

This section has been interpreted to turn licences into easements where there is a subsequent legal transfer of the property, including the renewal of a lease. For example, in *International Tea Stores v. Hobbs* [1903] 2 Ch 165 a tenant was allowed to use an access path over his landlord's property. The landlord later conveyed the freehold to the tenant. It was held that an easement to use the path had been implied into the conveyance by the predecessor to LPA1925, s. 62.

It is difficult to see the necessity for there to be four different ways of implying an easement. They are confusing, overlapping and can be seen as a trap for the unwary conveyancer, as they can usually be avoided by express words in the conveyance. The Law Commission in their report LC237 – easements and profits, recommended that rules on implying easements should apply equally whether the easement was held to have been implied or reserved. It was decided that the three types of implied easement were confusing and that there should be one test for implying an easement into a transfer, namely that the right was 'necessary for the reasonable use 'of the quasi-dominant land. The Law Commission recommended that s.62 should no longer operate to transform precarious benefits into legal easements or profits (para 3.64). It was noted that s.62 as it presently operates *'is a trap for the unwary, as well as being uncertain in its effect and in the extent to which it overlaps with Wheeldon v Burrows.'* Also, it has become standard practice to exclude s.62 from conveyances.

Likewise, there are three ways of gaining an easement by long use. If the dominant owner exercises the 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 to the continuous user by the dominant owner. This may be at common law (though this is in practice obsolete), under the doctrine of 'lost modern grant' and under the Prescription Act 1832. The latter two methods overlap, and the Prescription Act was recently criticized by Lord Neuberger MR in *London Tara Hotel Ltd v. Kensington Close Hotel Ltd.*

The Law Commission in their report LC237 – easements and profits, recommended the abolition of all existing methods of prescription and their replacement by a new statutory scheme (para 3.113):

3.123 We recommend that:

> *(1) an easement will arise by prescription on completion of 20 years' continuous qualifying use;*
> *(2) qualifying use shall be use without force, without stealth and without permission; and*
> *(3) qualifying use shall not be use which is contrary to the criminal law, unless such use can be rendered lawful by the dispensation of the servient owner.*

It is therefore clear that there is a substantial body of opinion in favour of reform, that the present system is far from clear, and is indefensible.