

Chapter 22

Question 1: Do you think a right to use a swimming pool could exist as an easement?

In order for a right to use a swimming pool to be classified as an easement it must satisfy the content requirements that we examine in section 2.

First there must be a dominant and servient tenement. The right must thus be attached to a dominant tenement and be exercisable over another piece of land, the servient tenement. Secondly the dominant and servient land must be in the occupation of different owners. Thirdly, the right to use the swimming pool must accommodate the dominant tenement in the sense of benefiting the use of the dominant land by its owner or occupier. The leading case of *Re Ellenborough Park* discusses what is meant by accommodation. The question is not purely whether the value of the dominant tenement is increased but whether or not the right to use the swimming pool will enhance the normal enjoyment of the dominant land. It may well be that a right to use a swimming pool would do so where the dominant land is a residential property, particularly if it is at the luxury end of the market. However, it was suggested in *Re Ellenborough Park* that a mere right of recreation, which could include a right to use a swimming pool, cannot be an easement. This aversion to rights of recreation has been tempered by changing influences on our daily life in recent decades and now may not exclude the possibility of a right to use a swimming pool see *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*. The need for accommodation also calls for physical proximity between the dominant and servient land, thus a right to use a swimming pool some miles away from the dominant land will not qualify. Lastly, the right must be capable of forming the subject matter of a grant. The right must thus be adequately defined, it must not place a positive burden on the servient owner nor ouster him or her from their use of the servient land. A right to use a swimming pool to the exclusion of the servient owner will thus not qualify as an easement. It is more likely to be a lease if granted for a certain period of time. Furthermore the servient owner will be under no inherent obligation to maintain the pool, although he or she may do so by a separate covenant.

It is thus conceivable, depending on the particular facts of a case, that a right to use a swimming pool may be classified as an easement. An example might be a right to use a swimming pool attached to a house or flat within a gated community which provides communal facilities such as a swimming pool.

Question 2: Why has the right to park caused such difficulty in being recognised as an easement?

The requirement that an easement must not amount to a claim to joint or exclusive occupation by ousting the servient owner from enjoyment of the servient land has presented difficulties in accepting a right to park as an easement. We consider this question and a number of cases on the right to park in paragraph 4.4 of section 2. A claim of a right to park necessarily excludes the servient owner from using the space when the right is being actively exercised. It has been suggested that the degree of exclusion must be examined to see whether a particular right to park is so exclusionary that it cannot be an easement but might be a route to assert full ownership through adverse possession. Recently this approach has been doubted. The House of Lords in *Moncrieff v Jamieson* have advocated a test that looks to the extent of control that is retained by the servient owner over the servient land. The Law Commission in their recent report has suggested that the ouster principle is unhelpful and that a claim to an easement should not be rejected solely because the servient owner is left with no reasonable use of the servient land.

Question 3: What conceptual challenges do negative easements present?

Negative easements prevent a servient owner from using his or her land as they wish rather than allowing the dominant owner to exercise some right over the servient land. Thus there may not be any patent physical evidence of the right on the servient land which presents a particular difficulty where a negative easement is claimed by prescription. There is thus a reluctance to accept new classes of negative easements beyond the presently accepted examples of rights to light and air and rights of support and protection. The same degree of control can be more appropriately asserted by utilising restrictive covenants.

Question 4: An easement can be impliedly granted either by looking at the future use of the dominant land or by looking at how the grantor has used the land in the past. In what circumstances can an easement be impliedly reserved?

We examine the basis for implied grant, including implied reservations, in paragraph 2 of Section 3. A reservation, where a right is reserved in favour of a seller who disposes of the servient land, may only be implied on the grounds of necessity and intention where implication looks to the future use of the land. Implication based upon necessity and intention is considered further in paragraphs 2.1 and 2.2 of section 3 respectively.

Question 5: Does it matter whether easements of necessity are based upon public policy or intention?

The case of *Nickerson v Barraclough* decided that easements of necessity were not founded upon public policy but upon the intention of the parties and the underlying rationale of non-derogation from grant. Accordingly, an easement of necessity will not be implied where the parties have demonstrated a contrary intention or where there is no agreement upon which the parties' intention can be derived, for instance where title to land is acquired by adverse possession. Furthermore, the assessment of necessity at the date of the disposal of the servient or dominant tenement flows from the pivotal role of the parties' intention.

Although intention is the current dominant influence upon the implication of easements, the clear public advantage in ensuring the effective use of our limited land resources lurks in the background. Indeed the Law Commission has recommended that the implication of easements should be based upon utility rather than intention.

We explore easements of necessity in section 3.2.1.

Question 6: *Wheeldon v Burrows* and section 62 look deceptively similar, but how do they differ?

The Rule in *Wheeldon v Burrows* is considered in section 3.2.3 and section 62 is examined in section 3.2.4. The distinctions between these two means by which an easement may be impliedly granted are summarised in the latter section. They are:

- Section 62 usually operates where there is diversity of occupation, most commonly in the landlord and tenant context, where a tenant is granted a right to use a facility situated upon the landlord's servient land and there is a subsequent renewal of the tenancy or the purchase of the landlord's reversion by the tenant. *Wheeldon v Burrows* operates where there has been common ownership and occupation of the dominant and servient land where a right, often termed a quasi easement, has been exercised over the servient land for the benefit of the dominant land. However, this distinction is not clear cut. There are a number of Court of Appeal decisions in which diversity appurtenance is sufficiently demonstrated because the exercise of the easement over the claimed servient land is 'continuous and apparent' – see e.g. *Wood v Waddington*.
- Section 62 only operates where there is a conveyance by deed whereas *Wheeldon v Burrows* may operate where there has been a disposal which operates only in equity.
- The nature of the rights that may be created under each rule also differs. Section 62 is wider, it may relate to any right that is capable of existing as an easement, whereas *Wheeldon v Burrows* can only lead to the implied grant of rights which are 'continuous and apparent' and reasonably necessary to the enjoyment of the dominant land.

Question 7: Should prescription be abolished?

Prescription by which the grant of an easement may be presumed as a result of long use is the subject of Section 3.3. There is no doubt that the concept of presumed grant is irrational. It has been described as 'a revolting fiction'. Furthermore, the three sources upon which a grant may be presumed are confused and illogical. Thus there have long been calls for reform. Nevertheless, the concept of acquisition through long use, particularly of

positive easements, is of clear utility as well as providing a means by which the factual and legal position may be reconciled. The Law Commission is thus suggesting that prescription should be reformed but not abolished.

Question 8: In what circumstances will an implied or presumed easement vanish upon the sale of the servient land?

The Land Registration Act 2002 seeks to address the conundrum that an implied or presumed easement could not be defeated by a purchaser of the servient land even though it might be difficult for that purchaser to discover its existence because such rights did not need to be recorded on the register; they were overriding. Easements created by implied or presumed grant before 13 October 2003 will continue to bind a purchaser of the servient land as overriding interests. However, implied or presumed easements created after 13 October 2003 will only bind a purchaser of the servient land if certain conditions are met – see Schedule 3 para 3 LRA 2002. These conditions focus upon the actual or constructive knowledge of the purchaser because the right would be discoverable by a reasonable careful inspection subject however to a proviso that the right will not be defeated on these grounds if it has been exercised by the dominant owner within one year of the disposal of the servient land. An implied or presumed grant may thus vanish upon a disposal of the servient land if it fails to satisfy these conditions.

These defences that a purchaser of the servient land may rise against an implied or presumed grant are considered in section 4.