**Chapter 9**

**Question 1: When does an easement ‘accommodate’ the dominant land?**

An easement is a right over the land of another. There must thus be two pieces of land held in separate ownership – the dominant land to which the easement is attached and the servient land - over which the right is enjoyed. In addition, to qualify as an easement that right must accommodate the dominant land to which it is attached and must be the subject matter of a grant – a requirement examined in the next question. Accommodation is thus a key requirement to distinguish an easement from a mere permission, or licence. It is discussed in Paragraphs 9.15-9.19.

Accommodation requires that the dominant land itself benefits in some way from the right rather than merely conferring a personal advantage on a particular owner of the dominant land. That benefit may be reflected in the increased economic value of the land but that is not a defining feature of accommodation. It is rather that the normal enjoyment and user of the dominant land is enhanced.

Most recently, the question of whether a right of recreation can accommodate the dominant land has occupied the courts – see *Regent Villas Title Ltd v Diamond Resorts (Europe) Ltd*. There had been hesitation in accepting rights of recreation for two reasons. First, was whether it could truly be said to benefit the land rather than benefit the individual dominant owner as a means of fun or engaging pursuit. Secondly, there was concern that it would be difficult to define the scope of the right and thus place an undue burden on the servient land. These two objections were overcome in this case. Looking to the earlier case of *Re Ellenborough Park*, which found accommodation to residential house of a right to use a nearby park,  the Supreme Court found accommodation where the dominant land was time share apartments and the right of recreation was to use extensive recreation facilities for the time to time provided at the resort including a golf course, swimming pool and gardens. The fact that the dominant land was time share apartments forming part of a holiday resort providing recreational facilities was an important feature.

**Question 2: What does the requirement that to qualify as an easement a right over the land of another ‘must be capable of being the subject matter of a grant’ encompass?**

The meaning and import of the requirement that an easement must be capable of being the subject matter of a grant is consider in Paragraphs 9.20-9.28.

It encompasses a number of different strands, which do not appear connected, but which do focus upon limiting the adverse impact of an easement on the servient owners ability to continue to use their own land. These strands are that:

* the right must be sufficiently certain and defined to be capable of being conferred by deed so vague rights will not qualify;
* the right should not impose a positive burden eg to repair on the servient owner although a servient owner may agree separately to undertake such an obligation.
* the right must not oust the servient owner from their own land for instance by in reality amounting to a claim for joint possession or making it really difficult for the servient owner to continue to derive continued reasonable enjoyment of their land. Rights to park have presented a particular challenge to this element which the courts have struggled to reconcile with the evident economic desirability of parking.
* new negative easements are unlikely to be recognised. We look at the nature of negative easements in the next question and will see that their object often can be achieved by a restrictive covenant to which the servient owner must agree to create. A negative easement, on the other hand, can be implied or be created by presumed grant through long user – see questions 4,5 and 6 .

**Question 3: Explain the difference between a positive easement, a negative easement, and a profit à prendre.**

The different categorises of rights that may exist over another’s land are explained in Paragraphs 9.1-9.6 at the beginning of Chapter 9. We concentrate on the two categorises of easement in Chapter. The positive easement grants a right to use the land of another. The most common form of positive easement is the right of way over the servient land.

A negative easement, by contrast, restricts what a servient owner can do on their land. Only a limited number of negative easements are recognised and as we have seen in 3 above the courts are reluctant to recognise more. The most common forms of negative easement are the right to light and to air through a defined channel - to provide the required certainty. They operate by preventing an owner for instance building to obstruct the light or air flowing from their land. Such protection could equally be afforded if the servient and dominant owner agreed that the servient owner would not build on their land – at least without the prior consent of the dominant owner. A right to support is also a common negative easement which restrict the ability of the servient owner to remove a feature from their land which would jeopardise the stability of a structure on the dominant land.

A profit a prendre also acts positively by granting the dominant owner to take some, usually produce, from the servient land. Some of the most common forms of profits are the right to graze animals, to take game or to fish.

**Question 4: Why, as a matter of policy, is it important to be able in particular circumstances to imply or presume the grant of an easement?**

In Paragraph 9.2 we touch on why easements have become important to facility the use of land and in Paragraphs 9.29-9.59 we look at how easements are acquired noting that although many easements are created expressly by deed there are a number of rules by which easements can be implied and also presumed to have been created as a result of long user.

It might be thought that there are public policy reasons for recognising methods of implying a grant of an easement. However, the rationale lies rather in the parties’ intention and in particular that the servient owner, when selling off land to form the dominant land, should not derogate from their grant. For example, in the case of *Nickerson v Barraclough* it was 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. Likewise, intention also lies at the heart of Section 62 which will only operate to elevate a previous permission, regarding the use of the servient land, to an easement on the disposal of the dominant land where no contrary intention is expressed.

The *Rule in* *Wheeldon v Burrows* also looks to intention. It applies only on the sale of the dominant land by a common owner of both the servient and dominant land to the grant what would have been classified, as a result of that common ownership, as a quasi-easement. The rule does not apply to the reservation of an easement for the benefit of dominant land retained by the seller. It thus also demonstrates the rationale that the servient owner should not derogate from their grant.

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.

Presumed grant through prescription is based upon a fictional grant as the deemed expression of the parties’ intention. The rationale for prescription is said to lie in the acquiescence of the servient owner in not stopping the trespass to their land. This rationale is more difficult to understand as is explained in Paragraphs 9.58-9.59. What is evident is that the law should recognised, as a matter of policy, what is happening on the ground even in the face of legal rules which generally demand some degree of formality in dealings with land, for example through the need for writing and registration which we consider in Chapter 4. A similar rationale lies behind adverse possession in the acquisition of title although as is noted in Paragraph 9.52.

**Question 5: How do the operation of section 62 of the LPA 1925 and the rule in *Wheeldon v Burrows* fit together?**

The *Rule in Wheeldon v Burrows* is considered in Paragraphs 9.40-9.44 and section 62 in Paragraphs 9.45-9.47 whilst their inter-relationship is examined in Paragraphs 9.48-9.49.

That inter-relationship has drawn controversy for some considerable period of time. However, prior to *Wood v Waddington*, the dominant view was that the two methods were mutually exclusive – *Wheeldon v Burrows* operating where there was no diversity of occupation of the servient and dominant land and section 62 applying when there was. *Wood v Warrington* now accepts that diversity of occupation is not always necessary for section 62 to operate. The section may also lead to the creation of an implied easement where the right has been exercised over land in common occupation if the exercise of that right is continuous and apparent. A requirement that is also evident in the operation of *Wheeldon v Burrows.*

Thus, although the two methods now seem to overlap, distinctions do remain. In particular, 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. However, section 62 is wider in the subject matter of the rights that it encompasses. It may relate to any right that is capable of existing as an easement, whereas *Wheeldon v Burro*ws 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 6: In prescription, what is the distinction between ‘user as of right’ and ‘of right’?**

The concept of ‘user as of right’ is explained in Paragraph 9.55 and its distinction with ‘user of’ or ‘by right’ is considered in Paragraph 9.56.

User as of right is sometimes described as user that is open, without force or permission of the servient owner. Thus, in essence, it shows that the dominant owner is exercising the right as if it had been granted -remember that prescription is based upon a presumed grant.

‘User of’ or ‘by right’, by contrast, indicates that the user is exercised with the permission of the servient owner so that prescription does cannot operate. That permission may be expressly given or arise from statute or some other source – see *R (Barkas) v North Yorkshire CC* and *R (on the application of Newhaven Port & Properties Ltd) v SS for the Environment, Food & Rural Affairs.*