EASEMENTS
Present Problems – A Future Solution?

A paper for the Property Litigation Association Annual Conference
at Keble College, Oxford on Friday, 23rd March 2012

by
Gary Blaker
Selborne Chambers

Gary Blaker was called to the Bar in 1993. Widely regarded as a leading junior in the field of property litigation, his practice encompasses all aspects of property law together with commercial chancery litigation. He has particular expertise in landlord and tenant and real property matters. Gary has been listed in legal directories since 2002 and is recognised by the Legal 500 and Chambers and Partners as a leading junior in property litigation. Legal Experts also lists Gary as a leading property and commercial junior. Gary is now listed amongst the leading 15 juniors practising in property litigation having been promoted to the second tier in the Legal 500 2011.

Recent published comments about Gary include the following:
"Very diligent and really knows the property sector" (Chambers and Partners 2012)
"He is good on his feet and a no-fuss advocate" (Chambers and Partners 2012)

"Gary Blaker ‘stays calm and unflustered under pressure’" (Legal 500 2011)

Reported cases include – Kirby v Hoff LTL 14/2/2011 (third party costs orders); Charalambous v Welding CA LTL 15/12/09 (boundary agreements); Ezekiel v Kohali [2009] EWCA Civ 35 (knowledge of defects in title); Haycocks & anr v Neville & anr [2007] 1 EGLR 78 (use of extrinsic evidence in boundary disputes); Trans-World Investments Ltd v Dadarwalla [2008] 1 P & CR 18 (section 34(1) of the Landlord and Tenant Act 1954); Estate Acquisition and Development Ltd v Wiltshire & Anor CA The Times 12.6.06 (failure to attend possession hearing) and Wilderbrook Ltd v Oluwu CA [2006] 2 P &CR 4 (whether time is of the essence in a rent review).

Gary regularly provides seminars in chambers and at solicitors' offices. He is the Chairman of the Middle Temple Hall Committee, a Middle Temple advocacy trainer and a member of Bar Pro Bono Unit.

SELBORNE CHAMBERS

10 Essex Street
London WC2R 3AA
Telephone: 020 7420 9500
Fax: 020 7420 9555
Email: gary.blaker@selbornechambers.co.uk
Website: www.selbornechambers.co.uk
The law regarding easements is widely regarded as messy, confusing and often misunderstood. It is not widely appreciated or understood by members of the public or property practitioners. And its complexities can easily lead to “mistakes” being made by landowners and advisors.

Whilst Law Reform is now openly being discussed following the Law Commission’s paper Making Land Work: Easements, Covenants and Profits à Prendre which was published in June 2011, any changes to the law are potentially many years away. In the meantime, it is essential to have a sound understanding of the current law regarding easements.

One of the aspects I seek to emphasise in this paper is how important it is to ensure that easements are not lost or inadvertently created. Recent cases have highlighted the importance for landowners either to protect easements through registration or to make sure they keep a very close eye out for what rights are being exercised over their land. A mistake could prove costly.

In this seminar I do not seek to focus upon the express grant of easements. Instead the focus is upon the more troublesome concepts regarding the creation of easements. Thus the focus is upon the creation of easements by implication, necessity and section 62 of the Law of Property Act 1925 and also creation by prescription. Within the knotty area of prescription it should be remembered that easements can be created via this method in three separate ways: by common law in proving use since time immemorial; by the doctrine of lost modern grant, ie. use for 20 years at any period of time; and under the Prescription Act 1832 by showing 20 years’ continuous use as of right as an easement for the period running up to the commencement of the claim.

The need to protect interests has been seen recently in the Court of Appeal case of Chaudhary v Yavuz [2011] EWCA Civ 1314. The case concerned how far an informal equitable easement, which had not been protected through land registration, could be effective against the purchaser of the land over which the easement would be exercised.
Two adjoining properties numbers 35 and 37 Balaam Street, in Plaistow, East London were both comprised of a commercial use on the ground floor together with residential use above. An alleyway was situated between the two properties and this fell within the title of number 35. The alleyway contained a dilapidated wooden staircase, which led to the upper part of number 35. At that time number 37 contained an internal staircase leading to the upper part of that building.

In 2005 the owner of number 37 applied for planning permission to build a second floor to that property. The owner of number 37 needed to obtain access to the newly built second residential floor and he agreed to construct a metal staircase in the alley way on number 35’s land. It would be attached to the flank wall of number 37. There was a mutual benefit as the landing was to be built at first floor level which would afford access to both 35 and 37. A further benefit for the owner of number 37 was that they could remove the internal staircase and thus free up more space at ground floor level for commercial purposes.

All these arrangements were informal and oral with no record being made of them. In 2006 when the owner of number 37 heard that number 35 was going to be sold, he got solicitors to draft a deed for the grant of an easement which he hoped the owner would execute. He even took it to his home and left it with the owner’s wife. But it was never signed. At this time, the owner of 37 should have taken other steps to protect his interests. He could have registered a unilateral notice under section 34 of the Land Registration Act 2002. If he had done this before the sale had taken place then the purchaser would have taken the land subject to rights to which the notice related.

Number 35 was sold to Mr Yavuz in December 2006 and the sale incorporated the Standard Conditions of Sale 4th edition and was sold “subject to the incumbrances on the Property”. The word incumbrances was defined as “the entries in the Property and Charges registers of the title except financial charges and subject to covenants, conditions, restrictions, reservations and terms of the lease”. In this case there were no relevant entries.
Mr Yavuz first complained about a trespass on his land in February 2007 but he waited until April 2009 until a time when no one was present in the flats at number 37 to cut away the staircase from number 37 and remove the balcony against the side of 37. This meant the flats had no access and this led to the Claimant bringing proceedings for injunctive relief, together with claims for declarations and damages.

At first instance the trial judge held that an equitable easement had been created and this was effective under the doctrine of proprietary estoppel. He held that the right was binding against Mr Yavuz on two bases. The first was that the Claimant had been in actual occupation of part of number 35 and thus an overriding interest was in existence and secondly the easement would have been binding by way of a constructive trust.

Under section 28 of the LRA 2002 if a registrable disposition of a registered estate is made for valuable consideration, when the disposition is completed it has the effect of postponing to the interest under the disposition, any interest which affected the estate immediately before the disposition, if that interest is not protected at the date of disposal. The exception, would be any interest belonging to a person in actual occupation of the land and also if it could be said the rights against the owner of number 35 could properly be analysed as rights created by proprietary estoppel.

The matter came before the Court of Appeal and Lloyd LJ looked at whether the owner of number 37 had been in actual occupation of number 35 at the date of the disposition. The court considered it to be "counter-intuitive at the very least" to say that the owner of number 37 claiming an easement over part of number 35’s land could be said to be in actual occupation of that land. Merely using the staircase to get to the flats could not be described as being “actual occupation”. The staircase could not be considered to be a “chattel” occupying a space as it was a fixture and had become part of the land.

As to the issue whether there was a constructive trust in existence, the court adopted a far more restrictive view than the trial judge. As between the purchaser and the vendor, the court agreed with the trial judge that, as he had the opportunity to inspect the property and see the staircase, he could have
no recourse against the vendor. As between the purchaser and the owner of the neighbouring property, the situation was different. The court distinguished the present case from cases where specific third party rights had been referred to prior to sale. The court appeared to have strong policy considerations. It felt that if it upheld the trial judge’s conclusions then this could have wider implications. They felt that many, if not most, contracts for the sale of land, incorporate the Standard Conditions of Sale and thus the contracts are expressed to be subject to the incumbrances on the property. Such incumbrances will be protected by actual occupation if falling within schedule 3 paragraph 2, or by legal easement if it falls within the limited terms of schedule 3, paragraph 3, but otherwise the court felt that it would have to be protected by registration.

15 As is so often the case in property law, the court wanted to see clarity and develop a system based upon certainty. It was unhappy with the idea that there could be disputes arising out of whether a potential purchaser’s conscience could be bound by a potential right, as a result of it having been discoverable upon inspection, but which could have been protected by registration as an entry on the register. The mere fact that the staircase was capable of inspection before the purchase and that the purchaser would have seen a landing serving number 37 was quite irrelevant. The interest had not been protected through registration and the easement did not survive.

16 There has however been criticism of this decision. It maintains the principle of the certainty of land registration but it does appear harsh. It does not take into account the principles of criminal damage, tortious interference or perhaps more importantly whether an easement of necessity existed. The occupants of number 37 were left with no access to their flats unless the owner of the building either built a new staircase or reached some form of accommodation with the owner of 35.

Staircases - the second round. Check whether your rights are still protected

17 The issue of staircases, fire escapes and the due diligence that is required in ensuring that old rights are protected was revisited in the case of *Magrath v Parkside Homes Limited* [2011] EWHC 143 (Ch). In this case the easement
had been registered but it still did not prevent the right from being extinguished. This case dealt with the arcane provisions of the rule against perpetuities.

18 In 1947 neighbouring owners of properties in Marylebone had granted by deed mutual rights of fire escape. One of the properties was a residential house and the other was a hotel. At the time of grant there were mutual ancillary rights to renew the staircase over which any fire escape may exist or “hereafter exist hereunder” and also to alter the staircase and erect a new one. Unlike in *Chaudhary* the deed was registered at the Land Registry.

19 At the date of the grant the escape consisted of a ladder and metal catwalk at the first floor level. This catwalk provided access to the two properties, but in 1966 the hotel was extended and the catwalk was blocked off. The hotel owner created a new catwalk at mezzanine level and this provided access to the hotel’s flat roof and also the neighbouring house. The neighbours maintained a dialogue and ensured that a workable fire escape route was maintained.

20 The house was purchased by a solicitor, Mr Magrath in 2002 and he spent the next two years redeveloping the interior and added a new floor and flat roof with access onto a terrace at the mezzanine level. In 2004 a party wall agreement was negotiated between agents for the parties and it expressly stated that it was not to affect or extinguish any of the parties’ property rights. Unfortunately relations between the neighbours then deteriorated. The hotel had sought to impose, “*unreasonable requirements on Mr Magrath*” and it led Mr Magrath to bring proceedings on the basis that the right to a fire escape had been extinguished. He brought a summary judgment application, which was heard by HHJ Mackie QC.

21 Magrath’s argument was that the 1947 easement was void and unenforceable. The grant of a right to renew, erect and use a new staircase that did not exist in 1947 fell foul of the rule against perpetuities. It was not limited in time to a life plus 21 years.
The court agreed with this. It considered that the 1947 staircase no longer existed and thus access could not be given pursuant to the 1947 grant. The mezzanine catwalk did not exist in 1947 and the hotel’s redevelopment plans involved removing the existing catwalk and rebuilding it in a different position.

The court reaffirmed the view that the rule against perpetuities applies to grants of easements. In following the Court of Appeal in Adam v Shrewsbury [2006] 1 P & CR 474 the court held that “where the grant is not immediate but is of an easement to arise in the future, it will be void unless it is limited to take effect only within the perpetuity period”.

The difficulty is in determining whether the grant is of an immediate right or a right to arise in the future. The Court of Appeal in Adam considered that the principle would apply as much to a right of way over a road that has yet to be built as it would to drainage through pipes which have yet to be laid down. In this case the right of way was over a fire escape which “may exist or hereafter exist hereunder”. It was either inevitable or possible that the easement would vest after the perpetuity period had expired and thus the right as expressed was void because of the rule against perpetuities.

This case arose because it was dealing with a grant taking effect before the Perpetuities Act 1964 changed the law. The rule for easements taking effect on or after 16 July 1964 is that the parties “wait and see” if the easement takes effect during the relevant perpetuity period (often 80 years), and if it does then it is not void. If it does not then the right will be void. For easements taking effect on or after 6 April 2010 the situation is also different in that the perpetuities rule has been abolished.

The key is to look out for easements that pre date 16 July 1964 and any easement or right that is expressed to take effect at an uncertain date in the future may well be void. In particular this is likely to be of consideration in the context of developments where it is necessary to examine the rights over future roadways and rights to use services that have as yet not been created. In such situations it is necessary to check whether the right is still valid.
Creating a right inadvertently

27 In both Chaudhary and Magrath an easement that one party had previously thought was in existence was in fact found to have been extinguished. Another recent problem that has caused much comment is the situation where one party thought that an express grant of an easement had been terminated but in fact one had been created inadvertently by way of prescription.

28 The problem can arise because when licences are granted for the use of land for a specified purpose the parties often forget about the arrangement. The use then continues long after the original parties to the agreement are no longer in existence or using the land. Where does that leave the easement?

29 Before looking at the specific case it is worth recalling some of the previous judicial comment about the Prescription Act 1832.

Mr Gale said: “it certainly is to be lamented that its provisions were not more carefully framed”.

Mummery LJ said in a case in 2008:

“Professor A W B Simpson wrote: “. . . the present state of the law on the acquisition of easements and profits is a disgrace to the law….. The Act is the classic example of an incompetent attempt to reform the law, and its retention on the statute book is indefensible.[T]he Law Reform Committee … had no better view of the 1832 Act than Professor Simpson, [saying]: “The Prescription Act 1832 has no friends It has long been criticised as one of the worst drafted Acts on the Statute Book”

Most recently Lord Neuberger MR said “the law has been complicated rather than assisted by the notoriously ill-drafted Prescription Act 1832, whose survival on the statute book for over 175 years, provides some support for the adage that only the good die young”.

30 The Prescription Act retains few friends but property practitioners have to deal with it on a regular basis and the case of London Tara Hotel Limited v
Kensington Close Hotel Limited [2011] EWCA Civ 1356 highlights some of the complexities this area brings.

31 The case concerned a dispute between two neighbouring hotels situated off Kensington High Street. The owners of Kensington Close Hotel claimed to have acquired a right to use the service road which was owned by the neighbouring hotel, the Copthorne Tara.

32 The Kensington Close Hotel had been using a service road along what was known as the Tara Ring Road (“TRR”). This road went around the Tara Hotel and passed a parking area and then went through two service gates into KCH’s internal service road.

33 In 1973 the then owner of the Tara Hotel, which was a subsidiary of Aer Lingus, granted KCH a licence to use the TRR “for the purpose of ingress to and egress from the [KCH land] with or without vehicles”. This licence was for one year and thereafter was to run from year to year, unless determined for breach or by four weeks’ notice before any anniversary and in consideration of £1 a year “if demanded as an acknowledgment that the enjoyment of the said way is under this Agreement and not otherwise.”

34 The road was used on a daily basis for deliveries to the hotel and for most of the time the use of the road caused no problems. Throughout a long period there were good relations between the management of the neighbouring hotels.

35 This licence was personal to Kensington Close Limited, the company which owned and operated the Kensington Close Hotel until 1978, when it was transferred to Trust House Forte Limited. KCL was in fact dissolved in 1988.

36 The licence for the use of use of the TRR terminated in 1988 upon KCL’s dissolution but in any event the use of the TRR by KCH could not have been pursuant to the licence beyond 1978 when KCL ceased trading or in 1980 when it ceased to own the site.

37 In 2007 relations between the management of the two hotels broke down over the possible redevelopment of the two hotels and the Claimant alleged that
the Defendant had no right to use the TRR. They alleged that the use by KCH of the TRR amounted to a trespass and should cease immediately. KCH claimed that it had acquired a right of way over the TRR by prescription.

38 KCH claimed to have acquired the prescriptive right either under the Prescription Act 1832 or by lost modern grant. It alleged 20 years’ continuous use of the TRR from 1978 or 1980.

39 The difference between a claim under the Prescription Act 1832 and the doctrine of lost modern grant is that, to make out a claim under the Act, it is necessary to show the 20 year use for the period before the claim is commenced whereas for lost modern grant the 20 year period can expire at an earlier time.

40 Although the judge found that there were few areas of factual dispute he heard from 34 witnesses. None of the principal witnesses had realised that the original licence agreement was personal to the original owners of KCH and that it would not apply if they ceased to run the hotel or own the land. In fact there was little reason to pay any attention to the precise legal nature of the arrangement as there was a mutual understanding between the management of the two hotels. They had a good relationship and, when overbooked, guests would be offered to stay at the other hotel.

41 This case afforded Roth J the opportunity to carry out a thorough review of the law relating to rights being acquired by prescription. In particular he looked at three relatively recent cases, two in the House of Lords and one in the Supreme Court where in relation to village green registration the law regarding acquisition of prescriptive rights was examined in considerable detail.

42 The three cases are R v Oxfordshire CC ex p Sunningwell [2000] 1AC 335; R (Beresford) v Sunderland CC [2004] 1 AC 889; R (Lewis) v Redcar BC (No 2) [2010] 2 WLR 653. In Sunningwell, Lord Hoffman explained that the doctrine of acquisition by prescription rests on a fiction of an assumed grant of the right. He said:
“It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner. The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right”.

It has been said that the words nec vi, nec clam, nec precario mean the same as “as of right”. Recently, Lord Walker said in Beresford that user “as of right” means something closer to “as if of right”. In order to show that use of the land is permissive the owner of the servient land must do something more than merely stand by and allow the use of the land to continue.

It is necessary to look at the conduct of the parties and the type of issues that should be considered including what the servient landowner did and said during the relevant time period and in particular whether a charge was made for entry onto the land or whether the owner occasionally closed off access to the land. If the landowner takes an “acquiescent approach” then he runs the risk of a court finding that rather than a licence existing that can be terminable, a right created by prescription has actually been formed.

In Redcar the members of the Cleveland Golf Club had been exceptionally courteous towards local dog walkers and residents. They had allowed them to use the land that had formed part of the golf course. After 20 years’ continuous use the residents applied for village green registration. The local residents succeeded. The case is important for the private law property lawyer because the Supreme Court held that open use of land, in the way that someone who had the right to do so would exercise, is “as of right” if it is nec vi, nec clam and nec precario. If the user expressly indicates that it is not asserting a right then the use will not be “as of right”.

In London Tara the court was clear that the right was not being used by force and so it had to go on and look at whether it was being used with permission or by stealth.

On the question of precario, the court decided that if a licence is granted and then expires and the right continues to be exercised after expiration because
the servient owner thinks the licence continues to apply, this is not precario. In such a case the right, if it continued for 20 years, could establish a prescriptive right.

48 The court essentially told servient owners to watch out and keep an eye on the land. First, they should watch out to see if the licence period has expired and secondly they should check whether the original parties to the licence are still in existence. Mere passive acquiescence is not the answer as this can lead to an unwitting creation of a prescriptive easement.

49 It was argued that this creates a hard situation for landowners but the court disagreed. Roth J said London Tara could have asked KCH for a payment of £1 in order to preserve the permissive nature of the use and this would have created an implied licence. It could have asked KCH once every 20 years about the identity of the company owning the land and running the hotel. In this case, London Tara in all likelihood simply did not appreciate that the licence was personal and the company exercising the right of way had changed.

50 The court imposed an onerous obligation on the servient owner. And indeed it would seem that when there was a more informal arrangement regarding agricultural land the Court of Appeal found that the use was permissive even after the agreement had ended. In *Jones v Price and Morgan* (1992) 64 P &CR 404, a farmer had been given oral permission to drive sheep along a track. When the permission was not expressly renewed the farmer alleged a prescriptive right. The judge and Court of Appeal found that the use was permissive as it had continued on a common understanding. Roth J distinguished the London Tara case on the basis that the original licence had come to an end.

51 Roth J also examined the question whether the right was being exercised by stealth. Clearly, it was not being used in a secretive manner, for example, when no one from the London Tara Hotel was looking. Instead what was meant by *clam* was whether the identity of the user of the land was known to the owner of the servient land. In this case, the judge found that it was not *clam* as a change of ownership was something that London Tara should have
had in its contemplation. In the circumstances the court found that the Kensington Close Hotel had acquired an easement by way of lost modern grant from about 1980 until 2000.

52 The case received considerable comment and it was noted by Guy Fetherstonhaugh QC that the less formal the licence the better. In the London Tara situation the formal licence lulled London Tara into a false sense of security, believing that the licence had merely continued. Whereas in the Jones case, the court was far more willing to say that the agreement was entirely informal and permissive.

53 The case came before a strong Court of Appeal (The Master of the Rolls, Lord Justice Aikens and Lord Justice Lewison). The judgment in November 2011 upheld Roth J.

54 The Master of the Rolls examined each issue in turn and began by looking at whether KCH had used the TRR “as if of right”. The court equated the phrase “as of right” with the Latin nec vi nec clam nec precario. The Master of the Rolls referred to Lords Rodger and Walker in Beresford noting that knowing about the use and bearing it in silence would not be sufficient to found an argument based upon precario/permission.

55 In order to succeed on the appeal, London Tara would have to have shown that the use of the TRR was by force, stealth or with permission (vi, clam, precario). There was certainly no issue about there being any force used. The court appeared to be initially attracted by the argument that, as Tara assumed nothing had changed in 1980, the use by way of licence impliedly continued and the use was with permission. The court ultimately rejected this approach. Once the licence ended the use could no longer be precario. The court suggested that in order for a landowner who has granted a personal right to pass over his land, to protect himself, all he needs to do is check every eighteen years that the licensee remains the owner of the dominant land. The court did not view this as onerous, in fact they deemed it part of ordinary diligent behaviour. Perhaps this is easy to express in theory but in practice it might be more difficult.
The court also rejected the idea that the identity of the user of the road was secret/clam. In this case when there was a change of ownership of the KC Hotel there was no secret about or any attempt to keep the change of ownership quiet. Thus, London Tara could have made the necessary checks and discovered the true owner of the hotel and worked out that the licence must have come to an end. Lewison LJ considered that the ordinary owner of the land when faced with use of the roadway which was outside the terms of the original licence would have made inquiries about what was going on. If those inquiries had been made at any time after 1980 London Tara would have discovered the true position. It could then have demanded payment for the use of the roadway.

It should also be noted that the Court of Appeal decision in London Tara has been the subject of some criticism and it does not sit particularly easily with another Court of Appeal decision in 2011, in Llewellyn (deceased) v Lorey [2011] EWCA Civ 37. In this case the claim for prescription failed, mainly because the servient land was the subject of a tenancy and the freehold owner did not know and was not in a position to know of the use. The freeholder did not live in the area and there was no evidence that he had been told about the use of the route. Lloyd LJ considered that unless the freeholder could have intervened despite the presence of a tenancy it could not have been said to have acquiesced and thus the use did not qualify for the purposes of the Prescription Act or the doctrine of lost modern grant.

Notwithstanding Llewellyn, in practical terms it will be necessary to advise clients that they should be alert to this issue. Clients with long standing licence agreements in place should check whether those licences are still in force. Upon a purchase, when reviewing the title deeds, it would be advisable for the purchaser’s solicitor to carry out a check to identify the parties using any easement over the property.

What can go wrong one a right of way has been identified?

It may be the case that a right of way or other easement is identified but over time the use of the easement changes. One such issue that has recently been considered is what happens when the use becomes excessive or unlawful?
In *Maioriello & ors v Ashdale Land and Property Company Limited* [2011] EWCA Civ 1618, the court had to consider whether a landowner whose land was subject to a right of way could block the party with the benefit of the dominant tenement, if this was the only way to prevent other people unlawfully using the right of way.

Ashdale owned an access road over land in Surrey. Ashdale sold off plots of the land to various owners and in 1995 sold the site to Maioriello with the benefit of a right of way over the access road. The right of way was to access adjoining land for agricultural purposes only. The land was transferred to Mr Maioriello’s son in 2003 and he transferred part with a right of way, which was not limited to agricultural purposes only. That owner then sold off plots of her land also with rights of way over Mr Maioriello’s retained land. One of those purchasers was a Mr Cash.

In 2009 a number of travellers moved onto adjoining land and began to live there in caravans. They gained access by passing along the access road and they deposited hardcore on the land and lorries, cars and vans would be driven along the access road. The local authority issued an enforcement notice ordering that the use of the land should cease.

Mr Cash purchased his land for the purpose of setting up a traveller site. He also moved hardcore onto his land and started to build a site for eight caravans. The council served a stop notice on him.

Ashdale commenced proceedings for an injunction restraining use along the road for anything other than agricultural purposes. The local authority also obtained orders under planning legislation. All of the injunctions were ignored.

Ashdale decided that as committal proceedings were impractical they would take matters into their own hands and they placed four large concrete blocks at the end of the access road where it adjoined Mr Cash’s land. Ashdale sought a declaration that it was entitled to obstruct all access to the site from the road and argued that this was the only effective way it could control the use of the land and prevent unlawful activity.
At trial Mr Cash submitted to an injunction for any purpose other than agricultural use. He was not prepared to submit to a wider injunction. The trial judge accepted the submission that the only way to control the use of the land was to prevent all activity.

Mr Cash appealed to the Court of Appeal. In the leading judgment, Etherton LJ held that the trial judge had essentially negated Mr Cash’s legal right to an agricultural easement. The declaration gave Ashdale and its successors in title the right to obstruct all access over the access road.

The court did not question the trial judge’s judgment in relation to the order made against the travellers. It was only concerned with the declaration and order against Mr Cash. The court took an interesting look at cases where it had been suggested that in order to stop an excessive user it is permissible also to stop the lawful use. The court referred to a case in the Court of Appeal in Trinidad and Tobago *Bernard v Jennings* [1968] 13 WIR 501. In that case the court held that it was acceptable to block a right of way by placing barbed wire and logs along a path. The appellants had a right of way by foot but the landowner wanted to prevent cars from using the right of way. This judgment was doubted by the authors of Gale on Easements and the court agreed with that view. A distinction is drawn between cases where the good use and excessive use cannot be severed, ie. where a drain is being used for foul water where only clean water use was authorised, and cases where the uses can be severed.

In the Maioriello case the land in question was capable of being used for agricultural purposes and the court was keen to ensure that Mr Cash was able to use his land for that purpose. His property interest remained intact and subject to practical considerations, to try to prevent the travellers from returning to the land, he was permitted to exercise that right.

Abandonment of an easement

It is worth remembering that it is exceptionally difficult to abandon an easement. Long forgotten rights of way might still be valid. It is quite possible to purchase land and find that a neighbour will start using an easement which
the predecessor in title had thought was abandoned. Non use of an easement is not enough and there would generally need to be an equivocal act of abandonment.

In cases where rights have been acquired by prescription, it has been suggested that there would need to be non use for at least 20 years. In fact there is no defined period and each case will very much depend upon its own particular circumstances. Lord Malins VC in *Cook v Bath* (1868) LR 6 Eq 177 suggested that 30 years’ non use without anything more was insufficient to extinguish a right of way. In a more recent case *Benn v Hardinge* (1992) 66 P & CR 246 the court held that 175 years’ non use was insufficient when dealing with a right of way which had been implied from an enclosure award.

Even more recently in *CDC2020 PLC v Ferreira* [2005] EWCA Civ 611, the court found that a right of way still existed even where it was originally connected with the use of three garages that had been demolished. It had been argued that the right of way had been abandoned by way of non-use and the original demolition of the garages, which were subsequently rebuilt. In *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738, the claimants used an access route from the 1950s until 1976 when building works meant that it became difficult to walk along the route. Despite the route no longer being used and it becoming overgrown with vegetation, the Court of Appeal held that it had not been abandoned.

Reform

It becomes clear from even a cursory study of some recent cases that this area of law remains confused. Many of the decisions appear contradictory and it becomes difficult to advise with any clear consistency. This is the view of the Law Commission, which published its report entitled *Making Land Work: Easements, Covenants and Profits à Prendre* on 8 June 2011. The Law Commission had published a Consultation Paper in 2008 (Law Com Consultation Paper No 186) and it received 89 responses. It then worked with the Land Registry and Lands Chamber of the Upper Tribunal in preparing this
The Law Commission recommends a simplification of the way easements are created, in particular in relation to those created by implication and prescription.

Implication and necessity

74 The Law Commission reviewed the various ways easements can be created by way of implication or necessity. It highlighted how difficult it can be for the court to imply an easement of necessity. The Commission suggests that it should be immaterial whether the easement would take effect by grant or by reservation.

75 The test recommended by the Commission is as follows:

An easement should be implied as a term of a disposition where it is necessary for the reasonable use of the land at that date bearing in mind:

(1) The use of the land at the time of the grant;

(2) The presence on the servient land of any relevant physical features;

(3) Any intention for the future use of the land, known to both parties at the time of the grant;

(4) So far as relevant, the available routes for the easement sought; and

(5) The potential interference with the servient land or inconvenience to the servient owner.

Section 62

76 The Law Commission decided to deal with section 62 of the LPA 1925 on a separate basis. It has concerns about the section noting it as a “trap for the unwary” and being “uncertain”. It recommended that it should no longer operate to transform precarious benefits (ie those with permission) into legal easements upon a conveyance of land.
Prescription

77 The Commission recommended that easements by prescription will be capable of being created via a statutory mechanism. The new system would not be based upon legal fictions and would have the same time period for all types of easement. There would be no special rules for rights to light.

78 The scheme would depend upon the quality and use of the servient land and not upon the state of mind of the servient owner. Once use can be proved for the qualifying period then that would give rise to a prescriptive easement. The requirement of acquiescence would be avoided as far as possible. In the Law Commission’s view the three elements that use is carried out without force, stealth and without permission would be sufficient.

79 The recommendations are that an easement will arise by prescription upon completion of 20 years’ continuous qualifying use. That use must satisfy the 3 criteria (force, stealth, permission) and qualifying use must not be contrary to the criminal law, unless it can be rendered lawful by the dispensation of the servient owner.

80 Litigation would no longer be a necessary part of the process of obtaining an easement by prescription. If the party claiming the easement can show 20 years’ continuous use then he/she has an easement.

81 The new scheme will apply equally to registered and unregistered land. Where the dominant land is registered the dominant owner should in his own interest apply for the easement to be registered once it comes into being.

82 The Law Commission also dealt with some of the more minor but troubling issues relating to the law of prescription. It recommended no extension to the principle that qualifying use must be against a freeholder. If a claim is litigated then the servient owner could use as a defence that it did not have capacity to grant an easement over its land, did not have knowledge of the use and could not reasonably have discovered it.
There would have to be transitional arrangements in place to deal with claims that have not yet been completed when the new statutory regime comes into force. The recommendation is that the new regime will apply to use that commenced before the implementation of reform save that the Prescription Act 1832 shall continue in force for one year post the implementation of reform. This would give those who could make a claim under the Act, one year within which to do so.

**Exclusive possession and parking**

The Law Commission has examined the problem of easements that confer a right to extensive or exclusive use of servient land. The trouble is that exclusive possession for a term is sufficient to create a lease. It should be remembered that an easement is an interest in land and not an estate. The right to park is probably the most frequently encountered “problem area”. As it stands, an easement must not confer exclusive possession of the servient land; nor must it prevent the owner from making reasonable use of the land. The proposal is that the law should remain that if the dominant owner is granted exclusive possession then that cannot be an easement. However, an easement that stops short of exclusive possession, even if it deprives the owner of much of the use of the land, or indeed all reasonable use, would still be valid. Thus, an exclusive right to park would be a valid easement.

**Extinguishment by abandonment**

The Law Commission noted with concern how difficult it is to establish that an easement has been abandoned. It noted the contrast between the 20 years’ use it takes to obtain an easement by prescription, whereas abandonment may well be impossible to establish. In a parallel with the law of prescription, the recommendation is that where an easement has not been used for a continuous period of 20 years, there should be a rebuttable presumption that it has been abandoned.

Gary Blaker

March 2012