



Easements, Covenants and Profits Consultation paper

The Institute of Legal Executives (ILEX) is the professional and regulatory body for Legal Executives lawyers and currently has a membership of 24,000 students and practitioners.

Legal Executive Lawyers are employed within solicitors' firms to conduct specialist legal work. Amongst other things, Legal Executives lawyers undertake the following work:

- Advice and representation to clients accused of serious or petty crime;
- Advice and representation to families with matrimonial problems;
- Handling various legal aspects of a property transfer;
- Assist in the formation of a company;
- Be involved in actions in the High Court and county courts;
- Draft wills;
- Undertake the administration of oaths.

Under the *Tribunal, Court and Enforcement Act 2007*, Legal Executive lawyers will be eligible for appointment as Deputy District Judges and in 2010 District Judges.

CHARACTERISTICS OF EASEMENTS

Easements in Gross being Recognised as interests in Land

1. For the reasons given in the consultation paper, ILEX agrees with the Law Commission's provisional view that easements in gross should not be capable of being recognised as interest in land notwithstanding that they may provide appropriate solutions in certain circumstances.

Easements Must 'accommodate and serve' the Land

2. ILEX agrees with the Law Commission provisional proposal that the basic requirements that an easement accommodate and serve the servient land and have a nexus with the dominant land should be retained.
3. That said, however, this basic requirement could be extended. The nature of an easement as a right arising by way of grant, prescription, necessity or statute does not necessarily provide a wide enough scope for contemporary rights which have developed more recently. For example, it may be that a right of way, a right of access to conduct repairs, a right of use or the more contemporary forms of emblements would in themselves serve the servient land so as to give it something which without the grant would affect its use and marketability. It may be that after a millennium of land law development that we should look at prescribed easements for every transfer of part which could sit along side more specific easements relevant to the particular characteristics of the land. Particularly, one would think of rights of access in this regard together with rights relating to drainage or such like. By introducing an element of codification and standardisation to the drafting of such "usual" easements more certainty could be created.

Easements and Conclusive Use

4. ILEX agrees with the general proposition that easements and possessory interests in land must be mutually exclusive. This would also be consistent with the above proposal that easements must 'accommodate and serve' the land.

The Right Must Not Be A Lease Or Tenancy

5. Subject to the comments to some of the proposals below, ILEX is of the view that the proper approach is to ask whether it purports to confer a right with the essential characteristics of an easement.

The Dominant and Servient Tenements Must Be Owned By Different Persons

6. ILEX appreciates the rationale for making the right attributable to the land itself, rather than the owner of the land. Traditionally, the law

states that a person cannot grant himself an easement because he, by way of ownership, would already enjoy the rights granted in any event. As the paper rights quotes, 'a man cannot have an easement over his own land'¹. This has always been a logical legal axiom.

7. ILEX accepts there are certain more complex characteristics involving land ownership which lend themselves to the potential need to grant one's self an easement. ILEX is of the view, however, this does have potential to lead to the ludicrous situation where it would be logical to conclude that one registered title owned by A could sue another registered estate owned by A where the exercise of a lawful easement is interrupted unlawfully, notwithstanding that the reality of this happening may be remote.
8. The proposal would also open an interesting direction of debate. A more logical legal way of achieving what we believe the objective to be would be that where a landowner takes ownership of adjoining registered titles which have a set of granted retain and restrictive rights, rather than the rights being extinguished by common ownership, they could be dealt with in a different way. For example, instead of being extinguished and then needing to be regranted when the ownership of the two titles shifts to different individuals, they could be suspended behind the law, without giving rise to an interruption of use. In other words, rather than giving rise to a direction which points uncomfortably towards the potential for land actions against oneself (which may be necessary to comply with certain aspects of insurance or mortgage requirements, for example), simply continue with the common ownership approach, but rather than extinction of the rights, they could be held or suspended (for the sake of argument on trust) for a future owner who does not take legal ownership of both titles, and re-activate in law upon the transfer to a third party. Such a scheme could be designed to ensure that such a mechanism would expressly not be treated as an interruption to destroy the original right enjoyed.

CREATION OF EASEMENTS:

9. An easement which is expressly reserved in terms of a conveyance should not be interpreted in cases of ambiguity in favour of the person making the reservation

ILEX agrees with the above proposition.

10. That said, however, it should also not be interpreted in favour of the other person. Because of the nature of an easement being a right affecting land, it would make sense to interpret it solely in relation to the land itself to draw a conclusion which serves both the servient and dominant tenements in a way consistent with the characteristics of the land. For example, if person lives on land which has a right of way

¹ Roe v Siddons (1886) 22 QBD 224, 236.

across three different titles to ensure access is granted to certain fields for certain stock to graze and the land subsequently is developed for residential purposes only, any subsequent dispute would surely only be determined in respect of the land itself, irrespective of the intentions, since any intention which gives rise to a situation inconsistent with the needs of the land at the time of the grant would surely be unreasonable (which is the assumption that such a balanced interpretive approach based solely on the lay of the land could be formulated).

11. In other words, interpretation should be concerned only with the needs of the land at the time of the grant, and not on the pretext of an artificial preference whose history is steeped in discriminative legal divisions preferring the landed gentry.

Short Term Easements by Reference to a Prescribed form of words

12. ILEX agrees that it should be possible to create short-term easements by the above method.

What easements should be dealt with as short-term easements?

13. A common sense approach to this question is essential, since such a system would need to take account of a wide variety of factors in relation to different types of easement and different types and uses of land.
14. Research in relation to these different aspects, the law as it is, case law, the historical context and an understanding of the current socio-economic and domestic needs for land and its use would ideally need to be examined in order to ensure a remit of such easements capable of dealing with the vast majority of common needs, which such a study would inevitably reveal. For example, access would be one of the most basic primary and necessary easements any land would need.
15. And such access must surely only be based on the necessity of it as required for the use of the land, anything else would be absurd, as it would not serve the interest of the lawful use of the land, but rather the emotive requirements of a person. It would be necessary to ensure a conclusive list of easements would be covered and any other easement would be free to be granted, prescribed, or otherwise under the established rules, leaving the scope for ambiguity and conflict refined to more personal situations and complex circumstances. However, one would envisage such short form easements to relate to only residential domestic property since the need of the land can more or less be pre-determined, and as needs change, so new easements can be created by use of the current law. We suggest short form easements should consist of:
 - direct access whether by vehicle, right, need, or otherwise where there is no public access to the property or such access is

insufficient alone for the use of the property to be reasonably enjoyed by the owner.

- utility rights in relation to gas, water, electricity, drainage, etc,
- maintenance rights in relation to the servient property where the servient owner would have to otherwise trespass to effect reasonable repairs or works to the servient land

16. Here we are looking to identify the particular easement by categorisation of the servient land's need for it. There is however, an argument that such a prescriptive approach could impact on the existing rights of many landowners, and so some consideration ought to be given to the economic effect such a system may have. For example, there will be much land which currently lacks established appropriate easements through a combination of bad drafting of documents or other reasons. This can be a useful bargaining tool in a free market, and so the short form may impact on the consideration afforded to the particular grant which one would envisage is beyond a prescribed quantum. However, if ensuring that the extent would be based solely on the need, this may give rise to problems with valuation, and so it would be wise to look at this point in a little detail.
17. In relation to the ability to vary the short form, ILEX believes think that it should be prescribed wholly and that no variation should be allowed. If the parties wish to negotiate amongst themselves for different terms, they would be free to do so within the scope of the existing law and be free to draft such an easement themselves, preferably with the aid of legal advisors. Perhaps, there could be an option to opt out of the short form scheme, but this could be limited to appropriate circumstances such as may be pertinent
18. ILEX agrees with the proposition that in determining whether an easement should be implied, it should not be material whether the easement would take effect by grant or reservation (*para 4.53*)
19. ILEX agrees with paragraph *4.104 and 4.105*
20. For the purposes pf paragraph *4.149*, ILEX makes the following observations in the order of the questions:
 - (1) Yes
 - (2) option (b) is preferred
 - (3) No. The necessity aspect is appropriate for the short form prescribed easements, but we believe since the scope of short form easements should relate solely to a set of assumed reasonable necessities, we cannot then change the rule itself to such a narrow view, since this would impact on those easements which are not short-form. We do not believe that the law should interfere with individuals choices on how they use or

enjoy their land, at least where such choices are lawful beyond the remit outlined for the short-form easements.

Proposal that the current law relating to the prescriptive acquisition of easements is abolished with prospective effect

21. For the reasons given in the consultation paper, ILEX agrees with this proposal.
22. ILEX agrees with the proposed prescribed conditions outlined in *paragraph 4.221* relating to continuing qualified use of an easement by prescription.
23. In respect of *paragraph 4.231*, why limit to registered titles, as long as the notice process is there, it can apply to unregistered land.

Should registration of a prescriptive easement be automatic or subject to the servient owner's veto?

24. ILEX is of the opinion that it should be automatic, since the nature of the easement in question relates to acquisition arising out of user of right.
25. ILEX does not agree with the proposal in *paragraph 4.245*. One of the functions of prescription is to ensure that the easement can only be obtained from the person capable of granting it, any relaxation of this principle would be a dangerous step towards actions which have potential to exclude the only party relevant, the owner of the land.
26. In terms of *paragraph 4.247*, ILEX is of the view that there can be no justification for treating adverse possessors differently. An owner of land is an owner of land. If the ownership and occupation are lawful, then the law should treat the owner of the land the same irrespective of which route to lawful ownership was taken.

Issue of capacity of both Servient and Dominant Owner

27. The issue of capacity is one which raises an interesting point. One would naturally think that where easements that cannot be obtained by grant because the grantor is incapacitated, then it makes sense to prevent acquisition by prescription. However, surely if the reason for the incapacity of the grantor is one which is attributable to disease, mental state, or being a minor, then an assumption can be made that for certain types of easement at least only an unreasonable person would not give the grant, whether capable or not. As a result, one cannot say that in all cases prescription should not be available in such circumstances, for to do so would be unreasonable, and reason is a bedrock upon which the law should look to settle.

EXTINGUISHMENT OF EASEMENTS

Abandonment

28. ILEX does not agree with this proposition for the following reasons:

The mere registration of an easement on the official register should not exclude the easement from the rules relating to abandonment. This would potentially give rise to a situation where not only would the register be cluttered with unenforceable easements, but the dominant land's value may be affected. As long as the proper evidence of abandonment is provided to the registry then such easements should be capable of extinguishment (*paragraph 5.30*).

29. In terms of *paragraph 5.31*, ILEX agrees in the context of our response to 5.30 above.

30. ILEX agrees with the proposals in *paragraphs 5.51 and 5.63*.

31. In terms of *paragraph 5.71*, ILEX agrees with this proposal, but with emphasis on need.

32. As regards *paragraph 5.86*, ILEX agrees with this proposal for the following reasons:

The purpose of an easement in a lease is to serve the need of the leasehold property or land. Since the freehold land over which the easement is granted has no need for the easement; extinguishment would be logical. An easement in a lease should be by definition a grant for a term.

PROFITS

33. ILEX is of the view that anything that simplifies the system and makes it more transparent is good for the consumer and the profession.

34. As such, ILEX agrees with the proposals contained in *paragraph 16.31 and 16.31*.

35. Further, ILEX agrees with the proposals in *paragraph 16.32 (1) to (3)*.

36. In terms of *paragraph 16.32(4)*, practitioner feedback gives examples of profits not entered on the register either by mistake or because it was not registerable (because it may have been acquired by prescription).

37. In general, terms, ILEX cannot see the justification of excluding profits acquired by prescription but just not registered. This view is based on case examples provide by legal executive lawyers who have clients claiming, by prescription, fishing and mussel bed rights. If a proposal

to exclude profits by prescription is to be implemented, there needs to be a period when persons who believe they have a registerable profit should be able to register either in the land registry or in the land charges registry against titles that are not registered, so that they are when that title becomes registerable. This would follow on from other transitional periods, for example adverse possession.

COVENANTS

38. ILEX makes the following general comments on the law relating to covenants.
39. ILEX agrees that the Law Commission has identified correctly the defects in the current of positive and negative covenants notwithstanding the introduction of commonhold. As such, ILEX accepts that there is still need for reform of the law of covenants.
40. However, the feedback from legal Executive Lawyers is that the proposals have an heir of "obligation" about them, rather than the creation of covenants. The feedback suggests that the language implies a contractual relationship. ILEX believes that the system should be improved rather than replaced.

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