Property Law Assessment 2, Question 2

Chuck decides to go into property development. He finds for sale a row of three derelict empty cottages close to the Thames Estuary at Feversham Creek, and a strip of land between them and the Creek. He thinks property values here are about to rise dramatically. The whole area is owned by the Mockingbird Estate. Chuck successfully negotiates purchase of the cottages, and of the strip by the Creek. In the conveyance, both Chuck and Mockingbird covenant not to use their land in the area for industrial purposes.

Chuck is now ready to start work on the cottages, but has these concerns:

(a) *Chuck wants the buyers of each plot to be able to enforce the industrial purposes covenants against Mockingbird and against each other.*

Purchasers from covenantors are in fact bound by restrictive covenants. This is a restrictive covenant in that it restricts the purchasers use of the land – Chuck cannot use his land for industrial purposes and neither can Mockingbird – they have been limited. This rule was set down in the case of Tulk v Moxhay[1], which showed the idea that it would be inequitable if the covenantor could purchase the land with the restrictions one day and sell it free of all covenants the next. In this way, when Chuck sells his land in the 3 plots, each should have on the charges register the restrictive covenant not to use the land for industrial purposes.

The neighbouring land, so all three plots and Mockingbird Estates, will be able to enforce the covenant against each other as any neighbouring land which benefits can enforce the burdening covenant.

(b) *The land registry entries for the three cottages show that the owners of the end ones have easements to draw water from a pump in the garden of the middle one. Chuck is worried that all this will depress the price he can get for the middle cottage.*

An easement is usually the right to do something on the servient land, and in this case a right to draw water from the servient land. However there are 4 conditions which must be satisfied in order for this to be a valid easement, which were laid out in the case Re Ellenborough Park[2]. These are that; (1) there must be a dominant and servient tenement; (2) the easement must accommodate the dominant tenement; (3) the dominant and servient

[1] Tulk v Moxhay (1848) 41 ER 1143
[2] Re Ellenborough Park [1956] Ch 131 at p163

owners must be different persons; and (4) the right must be capable of being a grant. In this case however, the dominant and servient owners are the same person – Chuck, and therefore this right could not be an easement – it would be foolish to have an easement over ones own land. For that reason, at first glance it seems that Chuck has no need to be worried about the easements to draw water from the pump of the middle house as these easements do not meet the Re Ellensborough Park requirements. Furthermore it may not automatically revive if they are later sold off.

However, it could perhaps be noted that Chuck does not in fact intend on keeping the three properties as one piece of land for himself and that he will eventually sell it off as three separate plots, thus making the dominant and servient owners different people. It has been stated that "these tests scarcely answer the question as to whether a particular right will be accepted"[3], and so therefore it would seem logical to accept these easements as being valid as when they will effectively come into force and be used, the dominant and servient owners will in fact be different people. Consequently, it may well be a matter for the Courts discretion, who could decide that the easement is valid, which would mean that Chuck would have to put up with this when selling. Although the rules on common ownership are quite clear the intention of the party may make a difference because it is not Chuck who will be living in and using the three properties, far from it in fact.

Lengthy non use or abandonment may also cause the termination of the easement, and as the cottages are empty and derelict this may be an important issue. There are however no guidelines as to what constitutes a long enough period of non use, and even centuries on non use may not be enough, as it depends what the easement was for – it may be quite acceptable that it not be used for a long period of time. The Privy Council stated in James v Stevenson[4] "it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it"[5]. The case would more than likely be decided on the facts by the courts, however on the decisions of the case law surrounding this area, it seems unlikely that abandonment of the easement will be given.

(c) *And though nothing is said on the land register, Mockingbird's employees have also for a long time used the well to pump water for cattle. Chuck is worried that all this will depress the price he can get for the middle cottage.*

T*here are various ways in which easements can be created, and one of these is prescription, or in other words long use.* T*here are* 3 *methods of prescription, but they are all based on*

[3] Property Law – Roger J Smith, 4th Ed, p490
[4] James v Stevenson [1893] AC 162
[5] James v Stevenson [1893] AC 162, p168

the idea that after 20 years use of a certain right, it will be recognised as an equitable easement. The 3 types of prescription are; (1) Common Law Prescription which means use of 20 years will make an easement, but only if the right could have existed in 1189 (the origin of legal memory[6]) and it is not necessary to prove this; (2) Lost Modern Grant whereby the courts presume that after 20 years use a grant had been made and then been lost; and (3)Prescription Act 1832 which means after 20 years use there will be an easement and it does not have to relate back to 1189 (but has limitations). Therefore, if Mockingbird's employees, or the owners of the land before them etc have exercised the right for 20 years or more, and it was capable of being a grant in 1189 (for example the water pump would have had to existed in 1189) then an easement would exist under common law prescription, or if the pump hadn't existed since 1189, but Mockingbird's employees had used the pump for 20 years then it would be an easement under the Prescription Act 1832 (but only if Mockingbird's employees had used it for 20 years, under s2 of the Act it must only be the last 20 years user).

Therefore, if any of the above are correct in this case, an equitable easement will exist and Chuck will not be able to do anything about it. However it may work to chuck's benefit if the exercise of the legal right has been for less than a period of 20 years.

(d) *Chuck wants the buyers of all the cottages to have the right to wander at will on all of the strip, and to pay the cost of maintaining it.*

There are 2 issues at hand here. First is the right to wander at will, which can be created in the form of an easement. In order for this to be a legal easement this should be created by deed at the time of each separate conveyance with each of the separate purchasers of the 3 plots, and should be registered so as to appear in the land register on each of the plots as easements are known as minor interests and are therefore registerable. This way it will bind 3rd parties. In order to create an equitable easement, under the Law of Property Act 1925 s53 the easement can be created in writing. If it is registered in either case, entry of a notice is required.

The second issue is that of paying the cost of maintaining the strip. This cannot be created as an easement because under Rance v Elvin[7], there can be no positive obligation on the servient owner in an easement. Therefore it has to be created as a covenant by deed to appear on the land charges register of each plot. However it is a positive covenant as it requires expenditure by the covenantor and will therefore not run with any land to which it is

[6] Property Law – Roger J Smith, 4th Ed, p514
[7] Rance v Elvin (1985) 50 P&CR 9

attached or bind 3rd parties. This was decided in House of Lords in the case of Rhone v Stephens[8]. In the case, it was also decided that it may actually be possible to bind a purchaser where the covenant is counterpart of rights being enjoyed by the purchaser. For example the purchaser in this case couldn't enjoy the benefit of the right to wander at will across the strip, if the strip was not maintained and kept to a good standard. There will need to be a distinct element of reciprocity between the covenant and the benefit/right, which may exist in this case, meaning that this particular positive covenant may run with the land.

(e) *Before the sale, Chuck had found that Delia intended to put in an offer for part of the strip to secure a mooring for her boat. Chuck had told her "Don't bother – let me buy it all and we'll come to some arrangement afterwards." His surveyor has now suggested he should have nothing to do with Delia.*

T*his may be a case of proprietary estoppel on the part of Delia, and there must be* 4 *things present in order to have a claim.* T*hese are*;

(1) The nature of the assumption of expectation.

The claimant (in this case it would be Delia) must believe there is an interest and that Chuck is committed to creating it. In this case when Chuck said they would come to some arrangement afterwards, Delia is likely to believe that that would be the case otherwise shoe would have put in an offer for herself

(2) Encouragement or acquiescence by the owner

The owner, Chuck must have some kind of responsibility in what the claimant believes – by telling Delia not to bother putting an offer in because they can come to some arrangement he is encouraging her to act to her detriment. This is seen in the leading case of Crabb v Arun[9], where the owner put in a gate for access which encouraged the claimant to sell off land leaving himself landlocked if the access were to be denied.

(3) Detriment

Delia must have acted to her detriment, and here she did not put in an offer for herself to secure mooring of her boat on the strip of land. This would mean that if Chuck did not make an arrangement with her, she would have lost all chance of securing a mooring for her boat therefore being in detriment. This may not count as detriment however, as usually it is some sort of expenditure on the land itself.

(4) Reliance

The detriment must result from reliance upon the assumption. In this case Delia relied on Chucks' words of "Don't bother – let me buy it all and we'll come to some arrangement afterwards", which meant she did not put in an offer of her own.

[8] Rhone v Stephens [1994] 2 AC 310
[9] Crabb v Arun District Council [1976] Ch 179

Therefore, if this was taken to be a proprietary estoppel, Delia could bring an action (because this type of estoppel can give rise to a cause of action and act as a "sword".) Chuck would consequently be unwise to have nothing more to do with Delia as she could in effect bring an action against him.