The rules governing the creation of implied easements are in need of reform. Discuss (2000 words)

Many are familiar with the two principal estates that are capable of existing in land; the fee simple absolute in possession (or freehold), and the term of years absolute (or leasehold). A less well-known but no less significant legal right in land is the easement. The law governing the creation of easements, both expressly and impliedly, has developed in a somewhat haphazard way, and there is an argument that the current state of that law is not fit for purpose in today's society. This essay will consider the law specifically relating to the creation of implied easements, in order to assess whether it is indeed in need of reform.

We must begin, briefly, with the basics. An easement is a right of user over the land of another. This right can be either positive or negative, and must be attached to a specific piece of land, which is described as the "dominant tenement". The right must also be capable of being exercised over a second piece of land, the "servient tenement". The holder of the right is enabled to use the servient tenement land in a particular way, as particularised in the specific right. A right of way, frequented by a neighbour, over the farmland of another, would be an obvious example. In the eyes of the law, the holder of the right has a proprietary right over the servient land, but a strictly limited right. The easement cannot extend to enable the right holder to take part of the land or its produce (for which one must look to the profit a prendre). Alternatively, the alleged easement may in fact be approaching a claim of ownership of a freehold or leasehold estate in the property if it involves a high degree of exclusive possession or use. In Copeland v Greenhalf (1952), for example, a workman had used a strip of land belonging to another to store motor vehicles. It was held that the right was too extensive to be an easement, as the workman was claiming, in effect, "a possession of the servient tenement, if necessary to the exclusion of the owner".[1]

The characteristics of an easement were set out in Re Ellenborough Park (1955). First, there must be a dominant and servient tenement. Secondly, the servient tenement must accommodate the dominat tenement. This means it must be connected with its enjoyment and for its benefit. Thirdly, the dominant and servient owners must be different persons, and fourthly, the rights claimed must be capable of forming the subject matter of a grant.[2] This classic formulation has survived for over 50 years, and as we will see, it has regularly proved to be the case that regardless of what label a particular right is given, if it satisfies Danckwert J's criteria, it will be found to be an easement. We will consider each of the requirements in further detail in the context of the grant of easements.

The law governing the creation of easements has developed incrementally, even slowly, and the courts have shown themselves reluctant, perhaps understandably given the inherent conservatism of English property law, to expand the nature of easements. In Hill v Tupper (1863), for example, the court was reluctant to find that a right over the user of a canal bank was an easement because the claimant was effectively seeking a commercial monopoly over the canal bank. For many years, this, as well as cases such as Ackroyd v Smith (1850), were

[1] [1952] 1 All ER 809, per Upjohn J at 812-813
[2] [1955] 2 All ER 38, per Danckwerts J at 42

considered as authority for the fact that the class of easements was closed, and limited to certain well-recognised types. Danckwerts J questioned this view, however, quoting Professor Cheshire who states "that doctrine means not that an easement of a kind never heard of before cannot be created, but that a new species of ... burden cannot be brought into being and given the status and legal effect of an easement. In other words, if a right exhibits the four characteristics [described above], it is an easement which will run with the dominant against the servient tenement, even though it may be of a kind which has not figured in practice before, but if it lacks one or more of those characteristics, it may, indeed, be enforceable between the contracting parties but it cannot, like an easement, be enforceable by or against third parties".[3] Danckwerts J approved of Chesire's view, and it seems that it is more the case that the courts will look to the substance of the right in question to assess whether it is, in fact, an easement.

We come to the issue of how easements are created. There are, in essence, three ways; namely by express grant, by implied grant (which will be the focus of the remainder of this essay) and by prescription. An express grant occurs either by the use of express words, or by way of estoppel. In Crabb v Arun District Council (1976), the claimant became landlocked, having relied on an "agreement in principle" that he had a right of way of the adjacent land of another. The Court of Appeal held that the Claimant had a sufficient degree of detrimental reliance to found an estoppels claim, and granted him an easement. Finally, certain express easements may be created by statute.

By far the more complex manner in which an easement may come into being is through an implied grant. We have already seen how the courts are inclined to look to the nature of the right claimed, and measure it against Danckwert J's criteria to assess whether an easement exists. There are in fact four ways in which an easement might be granted impliedly, each of which will be considered briefly. The first is by reason of necessity. This might occur where there if no other legally enforceable right of access to a particular piece of land. It is clearly a nonsense to have a landlocked "island" of land to which the owner cannot gain access because he has no right of way over the surrounding land. The courts will often presume that it was the intention of the parties to grant an easement to the owner of the "island" of land, or the theoretical "landlocked close".[4] Authority for this can be found in two seventeenth century cases, Clarke v Cogge (1607) and Packer v Wellstead (1658). The burden of eestablishing necessity, however, is high. In Majang v Drammeh (1991), for example, it was found that there was no easement granting a right of way over land by necessity, because the servient tenement could be accessed by water! The potential inconvenience of this finding are clear.

The second means by which an easement may be implied is in circumstances in which the parties have, or appear to have, a common intention that this should be the case (one can see how closely linked this is to the first situation discussed above). This would occ ur where a disposition of the land in question does not contain a provision granting or reserving an

[3] Chesire, *Chesire's Modern Real Property*, 7th Edition, quoted at [1955] 2 All ER 38, per Danckwerts J at 42 -43
[4] See, for example, Stroud, D.A. (1940), 56 *Law Quarterly Review* 93

easement, but such a grant or reservation is required to carry out the common intention. It is of note that the burden of establishing common intention is considerably higher in relation to the grant of an easement as opposed to the reservation of one. Linked to this is the issue of non-derogation from a grant of an easement. This means that where one party is deemed to have granted an easement, he is under an implied obligation not to derogate from that grant, or indeed to devalue it in any way. In a very recent case, Carter and another v Cole and another (2009), the buyer of a property had granted the seller a right of way over the private access land that led to the main road, which was to be exercisable by lorries accessing that main road. The buyer then carried out certain works that resulted in the use of the right of way became unsafe (the line of vision at the junction with the main road was reduced). This was held, by the Court of Appeal no less, to be a derogation from the grant, as it effectively rendered the easement less valuable. A somewhat inconsistent approach was adopted in the High Court the same year, in William Old International Limited v Arya (2009), where it was found that the principle of non-derogation from grant was essentially negative, meaning that the grantor did not have to take positive steps (in this case, the positive step would have been entering into a deed of grant). Positive steps were not considered to fall within the presumed intention of the parties.

A seminal case in the context of implied easements was Wheeldon v Burrows (1879), which applies on a disposition of part. According to the principles in this case, the disponee of part benefits from an implied "quasi-easement" over the retained land that are continuous (that is, it does not require human action to perform) or apparent (that is, an inspection of the servient tenement would reveal it), are necessary for the reasonable enjoyment of the part disposed of (the dominant tenement), and have been used for the benefit of the dominant land. As Gray and Gray point out, the preponderant view in the authorities is that both conditions must be satisfied.[5] This was restated with approval by the House of Lords a century later in Sovmots Investments v Secretary of State (1979), and is based on the principles of non-derogation from grant that have already been discussed. Of course, there is also an element of presumed intention in this principle, meaning that if it was demonstrably not the intention of the parties to grant an easement, the rule in Wheeldon v Burrows will not operate.

The final means by which an easement may be implied is a matter of statute. Section 62 of the **Law of Property Act 1925** applies to both registered and unregistered land, and seeks to avoid the need to itemise all of what is conveyed with the land in dispositions. The section deems words to be included into the conveyance that any easement pertaining to the land in question will also be conveyed. It is arguable, of course, that this should properly be described as a means of expressly granting an easement (the section is a deeming provision, and the operative words are therefore deemed to be included in the conveyance), but it is more akin to an implied grant. The section deems words to be incorporated into all conveyances to include all easements whatsoever (amongst other things) which appertain or

[5] Gray, K. And Gray, S.F. (2005) *Elements of Land Law*, 4th Edition (Oxford: OUP), p683

reputedly appertain to the land or any part of it, or at the time of the conveyance, are occupied or enjoyed with the land or any part of it. [6]

The interesting aspect of this provision is that quasi-easements are conveyed to become true easements. Indeed, the courts have displayed a willingness to upgrade mere licenses to easements as a result of section 62. This was demonstrated in Wright v Macadam (1949) and far more recently in Hair v Gillman (2000). However, the operation of section 62 is limited to the extent that it cannot confer a better title on the grantee than the grantor possessed (which stands to reason). Further, it will not operate if the intention of the parties can be demonstrated to be contrary to this.

Where does this lead to in terms of the state of the law in relation to implying easements? It is clear that while the underlying principles may be consistent, their application may, and indeed does, lead to unpredictable results. Disputes are likely to be only "around the corner" in circumstances where the future use of the servient tenement is limited to an extent by the implication of an easement, particularly on a conveyance. Does this mean the law should be reformed? Quite simply, no. Parties are fully capable of taking action to avoid implied grants of easements, for example taking the simple expedient of setting out the agreed easements in the contractual document, be that a lease, or a conveyance. It is also a simple matter of appropriate drafting to exclude the operation of section 62 of the LPA 1925. Taking these actions will remove the lack of certainty traditionally found with implied grants of easements.

[6] LPA 1925, section 62(2)

BIBLIOGRAPHY

Statutes

Law of Property Act 1925

Cases

Ackroyd v Smith [1843-1860] All ER Rep 512
Carter and another v Cole and another [2009] EWCA Civ 410
Clarke v Cogge (1607) Cro Jac 170
Copeland v Greenhalf [1952] All ER 809
Crabb v Arun District Council [1976] Ch 179
Hair v Gillman [2000] 3 EGLR 74
Hill v Tupper (1863) 159 ER 51
Manjang v Drammeh (1991) P&CR 194
Wheeldon v Burrows (1879) 12 Ch 31
Packer v Wellstead (1658) 2 Sid 39
Re Ellenborough Park [1955] 2 All ER 38
Sovmots Investments v Secretary of State [1979] AC 144
William Old International Limited v Arya [2009] EWHC 599 (Ch)
Wright v Macadam (1949) 2 KB 744

Secondary sources

Chesire, G.C. (1950) *Chesire's Modern Real Property*, 7th Edition (Cambridge)
Gray, K. And Gray, S.F. (2003) *Land Law*, 3rd Edition (London: LexisNexis)
Gray, K. And Gray, S.F. (2005) *Elements of Land Law*, 4th Edition (Oxford: OUP)
Stroud, D.A. (1940), 56 *Law Quarterly Review* 93