

Chapter 18: Creation of express and implied grants of easements

Assessment question

Last month Finn, owner of Manor Farm and White Tops, two neighbouring farms, sold and conveyed Manor Farm to Aya. The conveyance contained no provision relating to easements and profits.

Advise Aya regarding the following:

1. The only direct access to Manor Farm is a narrow footpath, insufficiently wide to accommodate motor traffic. Aya wishes to make use of the private driveway, which runs from Manor Farm through White Tops and leads into the adjoining public highway.
2. Some drains run from Manor Farm under White Tops. Aya wishes to make use of those drains.

Specimen answer

Regarding (1) and (2), Aya will have to try and rely on the (rather complex) rules for implied grant of easements. There are no less than four separate rules in which an easement can arise by implied grant.

The first rule is 'way of necessity'. This rule is relevant only to (1). It only applies if land is sold which is completely 'land-locked', i.e. there is absolutely no way in and out except over the vendor's land. This does not appear to be the case with Manor Farm, as there is the 'narrow footpath'. This path may not be adequate for farming purposes, but its existence is sufficient to prevent there being a way of necessity.

The second rule is the rule of 'intended easements'. If land is granted by a vendor or lessor to be used for a particular purpose *known to the vendor/lessor*, then there is implied into the conveyance/lease any easement over land retained by the vendor/lessor which is absolutely essential in order to carry out that 'particular purpose' (see the ventilation shaft case of *Wong v Beaumont*).

With respect to (1) Aya must argue:

- (a) that Finn knew that Aya intended to use Manor Farm as a farm; AND
- (b) that a right to use the private driveway was absolutely essential to carry on a farm business.

Aya should have no difficulty proving point (a), but point (b) is very problematic. Finn would probably successfully contend that there were possible alternatives (e.g. widening and surfacing the narrow footpath to take motor traffic) and that therefore using the driveway was not *absolutely essential*.

Another rule to consider is whether s62 LPA 1925 will operate. Following the judgment in *Wood v Waddington* (2015) it appears that if the alleged easement is 'continuous and apparent' then there is no need to consider whether there the plots of land were in separate occupation (ie prior diversity), and consequently an easement over the private driveway can be implied created under s.62.

With respect to (2), Aya will have to argue that it is absolutely essential that she use the existing drains under White Tops. But Finn is likely to respond that alternative drains could always be laid not passing under White Tops. If that is the case, then Aya has no chance under the intended easements rule.

Aya's best chance would appear to be with the third rule of implied grant, the rule in *Wheeldon v Burrows*. Under this rule, pre-existing nebulous rights known as 'quasi-easements' can be converted into easements on the conveyance of the dominant land.

A quasi-easement would exist where the owner of two plots makes use of one plot for the benefit of the other in circumstances where, had the plots been in separate ownership, the 'use' could have been granted as an easement. It seems very likely that, prior to the sale of Manor Farm, Finn made use of quasi-easements over the driveway and the drains.

If the following three conditions were satisfied, one or both of these quasi-easements would be converted into full easements in favour of Manor Farm the moment Manor Farm was conveyed to Aya.

- (i) The quasi-easement was 'continuous and apparent', i.e. regularly used, and detectable by inspection of the plots of land.
- (ii) The quasi-easement was used for the benefit of the dominant land immediately prior to its being conveyed.
- (iii) The quasi-easement was 'necessary for the reasonable enjoyment' of the dominant land.

Element (ii) is presumably satisfied with respect to both (1) and (2).

Element (i) is clearly satisfied with respect to the driveway, but whether the drains are 'apparent' will depend upon whether there was evidence *on the surface* (man-hole covers, gratings, etc) of their existence.

It is submitted that element (iii), i.e. necessary for the reasonable enjoyment of the dominant land, is satisfied with respect to both (1) and (2). While the driveway and drains are probably not 'absolutely essential', they probably do satisfy the lesser test of necessity laid down for *Wheeldon v Burrows*.

The fourth rule for implied grant, section 62 is broader in its scope since *Wood v Waddington* (2015), and Aya would simply have to show that the alleged easement is 'continuous and apparent'.