Actionable Interference

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General principle - It is important to bear in mind that an easement does not confer an absolute right to exercise the easement in relation to every part of the servient tenement. There is not automatically a cause of action because there has been an interference with part of the easement. This can be shown simply. The erection of a building two feet into a way which is forty feet wide was held not to be actionable (Clifford v Hoare (1874) LR 9 CP 362).

1. **Formulation** - the general principle has been stated a number of times in the authorities. The following dicta of Mummery LJ in West v Sharp (1999) 79 PCR 327 at page 332 is a clear enunciation of that principle:-

"Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him."

2. **Reasonable use** An important aspect of this issue is what is meant by reasonable use of an easement. This is illustrated by the following decisions concerning rights of way will illustrate this.

2.1 Pettey v Parsons [1914] 2 Ch. 653 - the issue was whether the owner of the private road was entitled to instal an unlocked gate across the entrance with a post placed on the road one side and a fence installed along the other side on the owner's land. The Court of Appeal held that it would not be substantial interference with the right of way to have a gate at the entrance which was open during business hours and not locked when closed outside business hours. Had the right been a public rather than a private right of way then the post and gate would have been an actionable obstruction. To instal a series of gates of unlocked gates along a stretch of way may be actionable particularly if it creates traffic congestion (Siggery v Bell [2007] EWHC 2167 (Ch)).

2.2 Celsteel Limited v Alton House Holdings Limited [1985] 1 WLR 204 - this is the first instance decision of Scott J. whose decision on this aspect was not affected by the appeal in the case. A number of issues arose as to whether proposed changes would be a substantial interference with a right of way granted to a lessee to gain access to and from a parking space.

(i) **New traffic flow** - The judge viewed the site and found that a new traffic flow system would enable all users to use the driveways conveniently and safely so that there was no actionable interference (page 213G/H) In doing so he applied Saint v Jenner [1973] Ch. 275 in which the installation of speed bumps was held not to be actionable interference but the subsequent deterioration of the ramps due to lack of repair held to be actionable.

(ii)**Vehicles and materials left on drive whilst filling station being constructed** – accepted by judge as being inconvenient and annoying but not actionable. "When neighbouring building works are in progress, inhabitants of a crowded metropolis are bound to suffer some interference with their normal

enjoyment of their property rights. A degree of give and take is necessary..” (page 213H/214A applying Andreae v Selfridge [1938] Ch. 1)

(iii) **Reduction of width of way** – the way was reduced from 9 metres to 4.14 along the length of the way with the loss of the ability to reverse easily into garage with larger car. Scott J. held that if a right of way permits alternative methods of user then the preclusion of one method will be an actionable interference. It is not enough that after interference reasonable means of access are still possible (page 217 D). The question is whether insistence on using alternative method is reasonable. If it is then the interference will be actionable (page 217F/G). The narrowing of the way was significant as it would “materially and permanently detract from the quality of the rear driveway” bearing in mind what was granted (page 218D/E).

2.3 B & Q plc v Liverpool & Lancashire Properties Limited [2001] 1 EGLR 92 - the landlord proposed to extend a unit on to area which comprised common parking area for a retail park and the means of access to a unit. The effect of the extension would be to reduce the area by 26% and to reduce a turning circle from 28.5m to 21m. Blackburn J. held that this was an actionable interference and applied three propositions:-

(i) the test of an actionable interference is not whether what the grantee is left with is reasonable but whether his insistence upon being able to continue the use of the whole of what he contracted for is reasonable. The test is one of convenience and not necessity;

(ii) it is not open to the grantor to deprive the grantee of his preferred modus operandi and then argue that someone else would prefer to do things differently unless the grantee’s preference is unreasonable or perverse;

(iii) if the grantee has contracted for the "relative luxury" of an ample right then he is not to be deprived of that right in the absence of an express reservation to build upon it and not enough that non-ample right would be all that was reasonably required.

Blackburne J then relied on these propositions to provide an overall test. So long as what is being insisted upon by the grantee is not unreasonable the question is "can the right of way be substantially and practically exercised as conveniently as before."

In this case the judge was assisted in reaching his decision by expert evidence from traffic experts including a series of computer-simulated vehicle track assessments involving an articulated lorry and a van.

2.4 <u>Zieleniewski v Scheyd</u> [2012] EWCA Civ 247 – this was a dispute as to whether the erection of wall and fence constituted actionable interference. The land on which the wall and fence was erected was subject to prescriptive right for way for agricultural purposes only. The Claimant's complaint was that he could no longer take conventional balers along the way as opposed to round balers. The Court of Appeal accepted this and in consequence held there was a substantial interference. At para. 12 Briggs J. noted that the use of a prescriptive right of way was not limited to vehicles in current use at time of acquisition of the right but equally the user can continue to use old-fashioned vehicles rather than more modern ones.

3 <u>Motive</u>- the circumstances of the individual case will need to be considered to determine whether what is complained about constitutes an actionable interference. For example, in Owers v Bailey **(**[2006] All E R (D) 106 (Sep)) it involved the placing of a tractor on the way and the erection of a gate across the same way. The judge referred to Pettey v Parsons supra in which a gate was allowed but in this case

took account of the motives of the defendant and whether the conduct was of a "neighbourly " character (para. 64 and 65). He found the conduct to be clearly actionable contrary to the decision in Pettey v Parsons. The defendant was held liable in damages for the difference between the market value of the claimant's property disregarding the dispute and the sale price achieved for that property.

4. Trivial interference- with a case involving a right to light there may be special rules which apply that result in trivial interferences being actionable as was in fact the case in the Tamares case. There will only be no actionable interference if "the amount of light remaining is sufficient for the comfortable enjoyment of his property by the dominant owner according to the ordinary notions of mankind." (Millett J. in Car-Saunders v Dick McNeil associates Limited [1986] 1 WLR 922 at 928). However, in determining such a point it is not at present possible to take account of the use of artificial light even if normally used during the day (Midtown Limited v City of London Real Property Company [2005] EWHC 33 at paras. 55-64) and account has to be taken of the Sheffield Masonic Hall principle (Sheffield Masonic Hall Co. Ltd. v Sheffield Corporation [1932] Ch. 17). With rooms having windows on both sides of a building this principle requires a hypothetical exercise to be carried out taking into account the possibility of other buildings being constructed which will affect the light to the building.

5. Swing and verge space – there has been an on-going debate in the authorities as to whether a user of a right of way can overhang the adjoining land when going along the way so that there is a corridor of space extending horizontally beyond each side of the track (swing space) or go on to the verge when, for example, swinging (verge space). In the most recent judicial statement by the Court of Appeal in Oliver v Symons [2012] EWCA Civ 267 did not accept that normally there can be

swing space but confirmed the statement by Millett LJ in Minor v Groves (2000) P & CR 136 at 143 that the adjoining land owner is entitled to build right up to the boundary with the track. There is no scope for leeway as there is no obligation to allow some degree of tolerance (para. 40). It may be possible to establish such a right from the purposive construction of an express grant but this would require cogent evidence that to limit the right of way to the physical limits of the track would not achieve the intended objective. As regards verge space the Court of Appeal accepted that if it were inevitable at points that the user must swing on to the verge then that area will be included in the right of way. Such a widening of the way must be justified.