

## **Avoiding problems with easements on sales of part**

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At a recent seminar I was asked by a surveyor if easements were important. For a lawyer the answer is simple – extremely. They are part of the nitty gritty of everyday life in the property world as one of the means by which relationships between different properties and their occupants are governed.

Importance - To ensure that such a relationship is correct it is important that the required easements are properly created and formulated and that no unwanted easements are created. One type of transaction which brings this task to the fore is when there is a sale off of part of a property. With such a transaction there is a need to consider both the easements to be granted for the benefit of the part being sold and those to be reserved for the benefit of the retained part. This is especially important when dealing with land that is to be, or may in the future be, developed. Ensuring that there is available all the rights required to carry out any future development, including service rights, is critical.

Relevant Factors - When doing so it has to be borne in mind that

- (i) the rules relating to grants are more relaxed than those relating to reservations; and
- (ii) the standard conditions incorporated into the contract may unless varied or excluded have an impact on the easements granted or reserved

Task - With such a transaction it is important to

- (a) establish what easements are required to be granted and reserved;
- (b) assess what easements are not required;
- (c) determine which are to be expressly granted or reserved;
- (d) if there is a standard condition to be included in the contract which will operate by creating easements evaluate the extent to which reliance will be placed on the standard conditions and modify or exclude as appropriate;
- (e) consider whether there should be included in the contract a condition excluding the operation of section 62 LPA 1925 and/or the first rule of *Wheeldon v Burrows* (1879) 12 Ch. 31 and/or implication generally or a provision limited to excluding a particular right such as a right of light.

Implied grants – one of the reasons for the need to assess the intended easements is that unless excluded by a contrary intention easements will probably be impliedly granted for the benefit of the part sold off. Commonly this is as a result of the application of either the first rule in *Wheeldon v Burrows* or section 62 LPA 1925.

The danger is that unless controlled arguments over implied grants can cause uncertainty and result in disputes.

The Court of Appeal in *Millman v Ellis* (1995) 71 P & CR 158 has helpfully summarised the four conditions that need to be met to trigger the operation of the first rule in *Wheeldon v Burrows* which are:-

- (i) continuous and apparent use prior to transaction;
- (ii) the right is necessary for the reasonable and convenient enjoyment of the property sold ;
- (iii) implication of right not inconsistent with the words of an express right;
- (iv) nothing in the contract or circumstances which excluded the implication of such a right.

In *Millman v Ellis* an express right of way granted for the benefit of land sold off was held by virtue of the operation of the *Wheeldon v Burrows* rule to be extended by implied grant over additional land at the access point with the public highway notwithstanding the evidence of the vendor that he had retained such land for parking.

Section 62 LPA 1925 – as well as *Wheeldon v Burrows* reliance is commonly placed on this section to convert to an easements any advantage appertaining or reputed to appertain to the land conveyed enjoyed with or appurtenant to the land (as occurred in *Hair v Gillman* [2000] 3 EGLR 74 in respect of parking; in *Hansford v Jago* [1921] 1 Ch. 322 regarding a way; and in *P & S Platt Ltd. v Crouch* [2003] EWCA Civ 1100 as regards mooring and advertisements). As with the operation of the first rule in *Wheeldon v Burrows* unless controlled it can result in uncertainty and disputes.

Implied reservations - in contrast implied reservations only occur in exceptional circumstances (re *Webb's Lease* [1951] Ch. 808) unless the contract contains a relevant condition (see below). The second rule of *Wheeldon v Burrows* is that a vendor on a sale of part is obliged to expressly reserve any easement required for the benefit of the part retained. This avoids the danger of the vendor derogating from grant. There are exceptions but there is considerable uncertainty as to how many and in what circumstances. One is easements of necessity which are rare. Another class of exception is reciprocal rights such as rights of support. It is safest to assume that there will be no implied reservations and ensure that all that are required are expressly reserved. It means that the vendor is at a distinct disadvantage.

Standard conditions – which set of standard conditions is incorporated in the relevant contract on a sale off and then which edition of that set is very material to the issue of the easements that may be granted and reserved as a result of the completion of that sale. It is common (but not the invariable practice – see below) to include a standard condition such as condition 3.3 Standard Commercial Property Conditions (“SCPC”) (2<sup>nd</sup> Edition) which seeks to achieve two objectives as regards such easements.

First it will seek to exclude any right of light or air over the retained land. This is important if there is an intention or expectation that the retained land will or may be

built on. This is frequently supplemented by the express reservation of an unrestricted right to build on the retained land. By itself the standard condition will probably not operate to prevent the future acquisition of a right of light as opposed to the implication of such a right on the completion of the transaction.

The second objective is that the part retained should have reserved for its benefit the same easements as would be created had the retained part been sold to a different purchaser at the same time as the part actually sold. With a simultaneous sale easements are impliedly granted to both parts sold (as in *Allen v Taylor* (1880) 16 Ch. D. 355). As stated by Chadwick LJ in *Selby DC v Samuel Smith Old Brewery (Tadcaster) Ltd.* [2001] 1 EGLR 71 at page 75 the “condition seeks to achieve that object by putting the vendor, in relation to the adjoining land that he retains, in the position of a purchaser of that retained land under a conveyance of the retained land executed at the same time as the actual conveyance of the land transferred.”

Drawbacks with relying on such a standard condition – such a condition may provide a useful fall back argument if it is necessary to rely on implication to establish a required easement. However, there are drawbacks which must be borne in mind when deciding whether to place reliance on such a condition. These include:-

(I) Contrary intention – the condition will not automatically operate in an absolute manner. Instead the actual true intention of the vendor and the parties at the time of the actual transaction will have to be taken into account when determining the effect of the hypothetical simultaneous sales. The knowledge of the hypothetical purchaser will not be different from the knowledge of the actual parties (Peter Gibson LJ in *Selby DC v Samuel Smith Brewery (Tadcaster) Ltd* supra at page 74). In that case in which the sale off was as a result of an exercise of an option it was the circumstances at the time of the grant of the option which were material.

(II) Absence of such a condition – the Fifth Edition of the Standard Conditions of Sale (“SCS”) does not include a condition which is equivalent to condition 3.3 in the SCPC (2<sup>nd</sup> Edition). In contrast the Fourth Edition of the SCS contains such an equivalent condition. It is necessary to look not just at the set of standard conditions to be used but at the precise edition. A contract to sell a part of the vendor’s land which incorporates the Fifth Edition of SCS will not impliedly reserve easements in favour of the retained land whereas if the Fourth Edition is used it will.

(III) Uncertainty – a major disadvantage with such a condition is that the retained land is not described and the easements to be reserved are not spelt out nor is their precise scope formulated. It is undoubtedly preferable that the easements be set out expressly in the form to be included in the transfer or conveyance with the retained land being accurately described.

(IV) Loss of reserved easements – such a condition operates by enabling the vendor’s solicitor to require that such easements be expressly reserved in the transfer or conveyance completing the transaction. It will not by itself impliedly grant or reserve easements with effect from completion. In earlier sets of standard conditions such as the National Conditions of Sale (condition 5) the vendor was given an option as to whether or not to have such easements expressly reserved in the transfer or conveyance. With condition 3.3 SCPC there is no option as the reserved easements

should be included as of right. It has, however, to be included and agreed in the draft transfer or conveyance. If the sale completes without the inclusion of the reserved easements this condition will have merged with the transfer or conveyance and thus the ability to exercise the right to require the inclusion of such reservation will have been lost (*Holaw (470) Ltd. v Stockton Estates Ltd* (7<sup>th</sup> July 2000)). In such circumstances rectification of the transfer or conveyance may be a possible remedial course but the creation of third party interests may block such a path as the sub-sale did in *Holaw (470) Ltd. supra*.

#### Lessons - on a sale off of part

(1) Express grants and reservations at the contract stage provide certainty and avoid disputes.

(2) Easements may be impliedly granted by reason of the circumstances and such implication will not automatically be prevented by the inclusion of expressly granted or reserved easements.

(3) On behalf of the vendor the exclusion of rights of light and reservation of an unrestricted right to build will normally be sensible.

(4) A wider exclusion of implied easements should be considered particularly on behalf of the vendor.

(5) Care needs to be taken to ascertain which standard condition relevant to the creation of easements, if any, is incorporated in the contract bearing in mind that the 5<sup>th</sup> Edition of SCS does not have one. Then it needs to be considered whether it should be modified or excluded. To rely on such a condition is to encourage uncertainty.

(6) The standard condition may be retained as a fall back but if relied on must be enforced between contract and completion.

(7) The operation of such a standard condition is subject to the true intention of the parties (see *Selby DC v Samuel Smith Brewery (Tadcaster)* supra above).

(8) The inclusion of an express type of easement will not necessarily exclude the implication of any other easement of that type (see *Millman v Ellis* supra above).

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