



## **Parking as an easement or as a basis for adverse possession – where are we now?**

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### **What is an easement?**

1. An easement is a right over the land of another (the servient land), which has certain limiting characteristics<sup>1</sup>:
  - (1) It is a right which is appurtenant to other land of the proprietor of the easement (called the dominant land), which it must accommodate. Hence an easement cannot exist on its own, it must benefit land.
  - (2) It is a proprietary right (not a personal right) such that it binds successors in title of the servient land and passes to purchasers of the dominant land.
  - (3) An easement is a right of some use of the servient land. This contrasts with a right to go onto and take something from the servient land (such as game or turf) which is a 'profit' and can exist free of any dominant land (described as a right in gross).
  - (4) It is not such a right as entitles the owner of the easement to the exclusive use of the servient land.
2. An easement is not an estate in land. An easement is an interest in land, it is an incorporeal right recognised by English Law.
3. There are different types of easement that fall into three categories:
  - (1) Positive easements: the right to do something on the servient land, e.g. a right of way.
  - (2) Negative easements: a right to receive something from the servient land such as support or water.
  - (3) A right to do something on the dominant land that would, without the easement right, amount to a private nuisance to the servient land, e.g. a right to make noise.

### **How can an easement be acquired?**

4. Easements can be created by:
  - (1) Statute,
  - (2) By Grant, either by an express grant or by implication in to a grant (implied by the necessity of the case / non-derogation from grant / Wheeldon v Burrows – continuous and apparent rights)

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<sup>1</sup> Gale On Easements 19<sup>th</sup> Edition paragraph 1-01 et seq. Re Ellenborough Park [1956] Ch 131, 170.

- (3) Prescription – where the law presumes an initial grant conferring a legal origin for the subsequent user. 20 years use will infer a lost modern grant even if there is evidence that there was no such grant<sup>2</sup>. The Prescription Act 1832 section 2, provides for a 20 year prescription period ‘next before action’, or if the right has been enjoyed for 40 years then prima facie it can only be defeated by proof of consent in writing.

## Easement rights and possession of the land

5. An easement cuts into and diminishes the natural rights of ownership of the servient owner.
6. A possessory right cannot be an easement. So a grant of rights that amount to the exclusive use of land is the grant of an estate in the land and cannot be an easement. In *Reilly v Booth*<sup>3</sup> the owners of a house fronting on to a street conveyed stable blocks to the rear of the house “together with the exclusive use of the ... gateway”. The covered passage or gateway led from the street through the house to the premises at the rear. The Court of Appeal affirmed the decision of Kekewich J that W was entitled not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes. It was held that such a right amounted to the ownership of the space within the gateway. Lopes LJ<sup>4</sup> explained: “The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land”. It was not an easement it was property that passed.
7. It can be difficult to find the dividing line between exclusive use (giving an estate in the land) and an easement right to park or to store items.
8. A similar theoretical problem can arise in relation to an easement right to receive water through a pipe under the field. The servient owner in effect is deprived of possession of the area of the land occupied by the pipe, yet the right is still a valid easement.

## An easement right to park

9. In *Copeland v Greenhalf*<sup>5</sup> the party claiming an easement asserted that for 50 years he and his father before him had, with the knowledge of the owner of the land and her predecessors in title, continuously stored along a roadway strip of land (except for a space left for access to the owner’s orchard) customers’ vehicles awaiting and undergoing repair, and awaiting collection after repair.

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<sup>2</sup> *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 552 CA; explaining *Angus v Dalton* (1877) 3 QBD 85 HL.

<sup>3</sup> (1890) 44 Ch.D 12.

<sup>4</sup> (1890) 44 Ch.D 12, 26. And Cotton LJ p.22.

<sup>5</sup> [1952] Ch 488, 498

10. Upjohn J rejected the claim to a prescriptive right to store, deposit and repair vehicles on the side of the road. Firstly, the right was too vague. Secondly, the right exercised and claimed was too extensive to constitute an easement in law, on the ground that practically the party was claiming the whole beneficial user of that part of the strip of land over which it had been exercised. Upjohn J held that if the defendant was to resist the claim to remove the vehicles he had to establish that he had acquired title to the strip by adverse possession.
11. In *Hair v Gillman*<sup>6</sup> there was a lease of a school building. An informal permission was granted to the tenant of the school building to park on a forecourt capable of taking two or three vehicles. The tenant purchased the school building and claimed that when she acquired the school building, there was an implied grant of an easement to park on the forecourt pursuant to section 62 of the Law of Property Act 1925.
12. The Trial Judge found that the informal permission to park a car on the forecourt capable of taking two or three other cars was capable of being an easement. This conclusion was not challenged on the appeal. Chadwick LJ stated that he had no doubt that the Trial Judge's finding was correct: *"The judge examined a number of authorities concerning the extent to which a right to use land can be asserted that, of its nature, would have some exclusionary effect upon the use by the owner of that land. This was not a permission to use a defined bay. The authorities fall on one side or the other of an ill-defined line between rights in the nature of an easement and rights in the nature of an exclusive right to possess or use. But, although the line may be ill-defined, there is no doubt as to the side upon which this case falls. This was a permission to park a car on a forecourt that was capable of taking two or three other cars."*
13. Chadwick LJ held that the issue was whether the right enjoyed by virtue of the permission given to the tenant was capable of being the subject matter of the grant of an easement. The Court of Appeal held that the permission crystallised as an easement.
14. In the case of *Batchelor v Marlow*<sup>7</sup> the Defendant ran a garage and claimed an easement right by prescription to park and store six cars on the verge of the Claimant's dirt roadway from 8.30am to 6pm from Monday to Friday. There was only room to park six cars in this area. The Trial Judge found that such a right was capable of being an easement because it was limited in time and so, as a matter of degree, did not amount to such an exclusion of the Claimant as to preclude it from subsisting as an easement.
15. The Court of Appeal held that a grant under which the proprietary rights of the servient owner are usurped cannot create an easement. The essential test was one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable

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<sup>6</sup> [2000] 3 EGLR 74, 75g CA.  
<sup>7</sup> [2001] 1 EGLR 119.

use of his land whether for parking or anything else, it could not be an easement, though it might be something larger or different.

16. On the facts the Court of Appeal formulated the issue in the case as being: Does an exclusive right to park six cars for nine-and-a-half hours every day of the working week leave the Claimant without any reasonable use of his land, whether for parking or anything else?
17. The Court of Appeal accepted that the Claimant (the servient owner) could park on the land outside those hours (weekday nights and during weekends) and could resurface the ground. The Court of Appeal found that the claimed parking rights left the servient owner without any reasonable use of the land for parking or for any other purpose. The week day parking was the only time that parking was likely to be needed on the land. The owner's use of the land was curtailed altogether for intermittent periods throughout the week. The Court of Appeal held that this restriction made his ownership of the land illusory and the claimed right was not capable of being an easement<sup>8</sup>.
18. In *Moncrieff v Jamieson*<sup>9</sup> the House of Lords (Scotland) held<sup>10</sup> that a right to park can be an easement, so long as the servient owner remains in possession of his land.
19. In considering whether the owner remains in possession or has been 'ousted' Lord Scott<sup>11</sup> rejected the test for an easement in the Court of Appeal case of *Batchelor v Marlow*<sup>12</sup> that asks whether the servient owner is left with any reasonable use of his land and instead proposed to substitute a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land. Lord Scott stated that if an area of land can accommodate nine cars then he could see no reason why the owner should not grant an easement to park nine cars on the land. Lord Neuberger<sup>13</sup> shied away from making the explicit finding that a right to park in a one vehicle space can be an easement.
20. Lord Scott drew a distinction between the dominant owner's use of the land for parking and the servient owners' possession and control. Even with the parking, other uses might be building above or below the parking area or placing advertising hoardings. The use might be very limited, but that would not detract from the servient owner having possession and control of the land, in part because the dominant owner could only park on the land and do nothing else. Lord Scott accepted that if a party was claiming a right that amounted to the

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<sup>8</sup> Paragraphs 17 to 19.

<sup>9</sup> [2007] UKHL 42 (House of Lords – Scotland); [2007] 1 WLR 2620,. At Para. 45 Lord Scott considered the law in England & Wales to be the same as that in Scotland on easements / servitudes

<sup>10</sup> Lord Scott at 57.

<sup>11</sup> Paragraph 59. Lord Neuberger agreed, paragraphs 140 and 143

<sup>12</sup> [2001] 1 EGLR 119. Where the CA had held that an easement to park cars on a strip of land during business hours could not be acquired by prescription, as such use made the owner's ownership illusory. The treatment of this case in *Moncrieff* renders the judgment suspect.

<sup>13</sup> Paragraphs 140 and 144 - 145.

entire beneficial user of a land (as was the finding of fact in *Copeland v Greenhalf*) then it would be right to reject that as an easement claim and to require the party to establish title by adverse possession<sup>14</sup>.

21. Lord Scott stated that English law required the dominant owner to exercise the easement right reasonably and without undue interferences with the servient owner's enjoyment of his own land<sup>15</sup>. Lord Hope<sup>16</sup> considered the related issue of what might amount to an abuse of the right to park vehicles. The right to park was ancillary to the right of access, as such the right to park was only available to be used for the parking of such vehicles which are intended to be used in the exercise of that right, which covers all issues as to how the right of way is to be used. Lord Hope explained that the right was not to store or warehouse vehicles on the servient land.
22. On Lord Scott's formulation of the right to park the vehicle might be parked until it was 'next needed'<sup>17</sup>. The servient owner would not be barred from parking a vehicle in the same area, and if that led to the dominant owner not being able to park in their usual spot then they could park elsewhere on the servient land in the vicinity of the dominant land.
23. Lord Neuberger<sup>18</sup> referred to the right to park as being a right to leave vehicles 'on a relatively long-term basis'. In contrast to a right to stop and load and unload.
24. In *Virdi v Chana*<sup>19</sup> an easement right was established by prescription to park in an area only capable of accommodating part of one car parking space<sup>20</sup>. The Judge held that the Court of Appeal decision in *Batchelor v Marlow* was still binding, as the House of Lords (Scotland) had not overruled the decision despite the criticism of Lord Scott and Lord Neuberger<sup>21</sup>. The Judge managed to distinguish *Batchelor v Marlow* by finding that the ownership of the servient owner was not 'illusory' because she had planted a tree and could plant shrubs in the parking area without interfering with the right to park and she could come on to the land to repair her fence or to erect signs or decorative flowerpots<sup>22</sup>. As the servient owner lived adjacent to the land her right to alter the surface for aesthetic reasons was not an illusory right.

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<sup>14</sup> Paragraph 56.

<sup>15</sup> Paragraph 45, 53 and 62.

<sup>16</sup> Paragraph 39.

<sup>17</sup> Paragraph 52.

<sup>18</sup> Paragraph 105 and 123

<sup>19</sup> [2008] EWHC 2901 (Ch). Judge Purle QC.

<sup>20</sup> The car would need to straddle the servient land and neighbouring unregistered land over which the dominant owner also had a prescriptive right to park – see paragraph 18.

<sup>21</sup> *Polo Woods Foundation v; Shelton-Agar* [2009] EWHC 1361 (Ch) Warren J at paragraph 121 and 132 held that *Batchelor v Marlow* had not been overruled in *Moncrieff* and was binding on him. A case on profits to graze horses in a field.

<sup>22</sup> In addition the servient owner could not park on her own land without trespassing on to the neighbour's unregistered land.

25. In the case of *Kettle v Bloomfold Ltd*<sup>23</sup> long lessees of flats had been granted rights including the sole use of a designated parking space for the purpose of parking a taxed car or motorbike. The freeholder wished to build on or above the parking spaces and to allocate the tenants alternative parking spaces to those designated in their leases. An issue arose as to whether the parking rights amounted to a demise of the spaces or the grant of an easement.
26. It was submitted that the grant was a demise as there was exclusive possession or because the right granted was so extensive that it deprived the freeholder of any reasonable use of the land for any other purpose and so was not capable of subsisting as an easement (and by implication must be a demise) relying on the decision of the Court of Appeal in *Batchelor v Marlow*.
27. HHJ Cooke accepted that the Court of Appeal decision in *Batchelor v Marlow* was still binding as it had not been overruled in the *Moncrieff* case. The Court applied the *Batchelor v Marlow* test to examine the terms of the parking rights to see if they were so extensive as to deprive the freeholder of any reasonable use of the land.
28. On the wording of the lease of the flats there was no demise of the car parking space<sup>24</sup>.
29. HHJ Cooke held that, following the *Viridi* case, each of the tenants having the sole right to park on their designated space did not in the circumstances of the case leave the freeholder with no reasonable use of the land and so make his ownership of the designated space as being illusory<sup>25</sup>. In particular the freeholder could
  - (1) pass on foot or by vehicle across the space freely if there was no vehicle parked on it for the time being or avoiding one that was then parked.
  - (2) authorise others to do likewise
  - (3) choose, change and repair the surface
  - (4) keep the surface clean
  - (5) remove obstructions from the surface
  - (6) lay pipes or other service media under it
  - (7) in principle build above it or provide overhead projections such as wires.
30. In testing whether these rights were illusory HHJ Cooke considered whether the rights were of importance or value to the freeholder.
31. In effect HHJ Cooke distinguished *Batchelor v Marlow* on its facts.
32. The Law Commission in '*Making Land Work: Easements, Covenants and Profits a Prender*'<sup>26</sup> proposes, for easements created after the proposals are adopted, the

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<sup>23</sup> [2012] EWHC 4122(Ch) [2012] All ER (D) 04 (July). HHJ Cooke. Paragraphs 12 and 13.

<sup>24</sup> Paragraphs 18 – 20.

<sup>25</sup> Paragraph 22- 23.

<sup>26</sup> Paper No. 327, paragraphs 3.188 – 3.210.

abolition of the ouster principle and instead a requirement that an easement must not grant exclusive possession. This in effect is the test proposed by Lord Scott in the *Moncrieff* case. An easement that stops short of granting exclusive possession, even if it deprives the owner of all reasonable use of it, would be valid<sup>27</sup>.

### **Adverse possession**

33. The marking out and regular use of parking bays as parking spaces on a road over which others had a right of way was held in *Simpson v Fergus*<sup>28</sup> not to amount to possession so as to maintain an action in trespass. It would follow that such use would not ground the acquisition of title by adverse possession.
34. This conflicts with the decision in *Hilton v James Smith & Sons (Norwood) Ltd*<sup>29</sup> where a tenant was given liberty to use a defined part of a driveway as a parking area. Ormrod LJ regarded the tenant as being in possession of the area, entitled to sue in trespass and to place posts around the area.
35. In *Pilford v Greenmanor Ltd*<sup>30</sup> The Claimants owned land used for residential and business purposes. The Defendant company owned adjoining land to the south including an open area of land.
36. Since 1975 the Claimants and their visitors had walked over the Defendant's open land to gain access to the Claimant's land. In addition since 1975 the Claimants had driven across and parked on the open land in the area that later became the compound.
37. The Claimants in the early 1980s until 2002 maintained a compound on part of the Defendant's land. The south side of the compound land was formed by a fence erected and maintained by the Claimants on the Defendant's open land. From the time that the fence was erected, until 2002, the Claimants and their visitors gained pedestrian access to the compound land by passing across the open land, through an unlocked gate in the fence. Once in the compound the Claimants accessed their own land by climbing over the boundary wall using a concrete step which the Claimants had erected in the compound. In 2002 the Claimants removed the fence and replaced part of the boundary wall with gates wide enough to allow vehicular access, and they covered part of the open land with tarmac. From 2002 the Claimants drove across the open land directly onto the compound land, although they had also continued to park at times on the open land.
38. The Claimants issued proceedings seeking declarations that they had acquired ownership of the compound land by adverse possession, and that the compound land had the benefit of a pedestrian right of way across the open land to their land, and the right to drive onto the open land in order to park there and to pass

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<sup>27</sup> Gale, paragraph 9-126.

<sup>28</sup> (2000) 79 P&CR 398

<sup>29</sup> [1979] 2 EGLR 44, 46g.

<sup>30</sup> [2012] EWCA Civ 756

from their parked cars to the compound land on foot, as well as a vehicular right of way onto the property itself.

39. In relation to the compound the trial judge concluded that what the Claimants had done was to go further than the exercising of an easement, and that there had been a sufficient degree of exclusive physical custody and control, combined with an intention to have done so, such as to have gained adverse possession. The judge also found that the claimants' land had the benefit of easements over the open land: (1) a right to park up to three vehicles on the open land, (2) a vehicular right of way over the open land for the purpose of exercising the right to park; and (3) a pedestrian right of way over the open land both to gain access on foot and to and from cars parked on the open land.
40. The Defendants did not appeal the findings made for easement rights.
41. The Court of Appeal applied the test for possession referred to in the statement of Lord Browne-Wilkinson in *JA Pye (Oxford) Ltd v Graham*<sup>31</sup> that: ". . . there are two elements necessary for legal possession (1) a sufficient degree of physical custody and control (factual possession); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess)"
42. The Court of Appeal held that in the circumstances of the case, bearing in mind the nature of the land enclosed within the compound land, the nature of the enclosure itself, and the use made of the compound land by the claimants and their visitors, there had been ample material on which the judge had been entitled, and right, to reach his conclusion on adverse possession that the Claimants had established for a period of twelve years prior to 2002 sufficient control or exclusivity of use or possession over the compound land to support a finding of adverse possession. It had not been necessary for the Claimants to have established that the compound land was enclosed in such a way and to such an extent that no one could have gained access save with the permission of the Claimants. There was no such legal requirement for adverse possession. The Claimants only had to show that their acts were sufficient to have amounted to physical custody and control bearing in mind the nature of the land<sup>32</sup>. The Claimants had not had to keep the gate locked in order to establish a claim for adverse possession.
43. The Claimants' right to drive on to and park on the Defendant's open land adjacent to the Claimants' land did not entitle the Claimants to use the Defendant's open land to gain vehicular access directly to the compound land and then on to the Claimants' land<sup>33</sup>.

## **Interaction of easements and the Land Registration Act 2002**

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<sup>31</sup> [2003] 1 AC 419, paragraph 40.

<sup>32</sup> Paragraphs 26, 27, 41 and 42.

<sup>33</sup> Paragraph 35. However an injunction to restrain the Claimants was refused due to delay in the Defendants applying and expenditure by the Claimants. An order was made for damages in lieu of the injunction.



44. In Chaudhary v Yavuz<sup>34</sup> the Claimant had an informal agreement with his neighbour for a right of way to gain access to his residential premises over an alleyway belonging to the neighbour and up a metal staircase built by the Claimant on part of the neighbour's alleyway. The neighbour used this new staircase on his land to gain access to his own first floor residential premises. The Claimant redeveloped his premises so that the only access to his first floor residential premises was by the staircase. The neighbour sold his premises including the alleyway to the Defendant, who sought to bar the Claimant's use of the alleyway and staircase.
45. The Court of Appeal held that under the Land Registration Act 2002 the only easement right that was overriding was a legal easement<sup>35</sup>. The informal arrangement with the neighbour was an equitable easement, which did not attract priority over the registered disposition of the sale to the Defendant.
46. The general words in the contract of sale to the Defendant under Standard Condition 3.1.2 that that property was sold subject to the incumbrances that were discoverable by inspection of the property did not make the Claimant's informal easement right binding on the Defendant. In the absence of any express reference in the contract to the rights asserted by the Claimant and an express provision requiring the purchaser to take the property subject to those rights, it was not sufficient, for the finding of a constructive trust, that the structure giving rise to the claimed rights had been apparent on inspection of the land to be bought. Applying the test in Lloyd v Dugdale<sup>36</sup> there had been nothing in the contract which had allowed the court to conclude that, by the contract, the Defendant had undertaken a new obligation, not otherwise existing, to give effect to the relevant incumbrance or prior interest, therefore the Defendant was not bound in conscience to give effect to the Claimant's asserted rights so as to create a constructive trust.
47. The Claimant could only obtain priority if his use of the alleyway and staircase amounted to 'actual occupation' under LRA 2002 Schedule 3 paragraph 2: '*an interest belonging at the time of the disposition to a person in actual occupation*'. There was no actual occupation of any part of the metal structure by anyone which could have given the Claimant's rights the status of an overriding interest. Occupation had to be, or be referable to, personal physical activity by one or more individuals. The only such activity had been that of the Claimant's tenants and their visitors, as well as those of the Defendant, coming to and fro on the staircase and the landing. That constituted use, not occupation.
48. The Claimant could have protected his informal equitable easement by registering a Unilateral Notice. The sale contract provided that the Defendant purchased the property subject to the entries on the property and charges register.

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<sup>34</sup> [2011] EWCA Civ 1314. Followed in Groveholt Ltd v Hughes [2012] EWHC 3351 (Ch), David Richards J. Paragraph 17.

<sup>35</sup> Schedule 3 paragraph 3.

<sup>36</sup> [2001] All ER (D) 306 (Nov).

N.B. While every effort is made to ensure the accuracy of the information given in these notes, they are not intended to be relied upon as legal advice and no liability will be accepted in relation to such reliance.

## **Summary**

49. The likely position is that an easement right can arise for the sole and exclusive use of a designated single parking space. Protection of priority by registration of a Unilateral Notice is advisable for any equitable easement.

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8<sup>th</sup> March 2013