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Easements of Support and Slip

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Introduction

1. There are two different kinds of rights to support. Firstly, the right to support of the land which is a fundamental aspect of ownership of land¹. Secondly, easements of support which are created either by grant or prescription and which can be provided by land or land and buildings. The easement of support is therefore a right acquired over and above natural rights of support.
2. A simple definition of an easement of support may be - the right of an owner of a building not to have the support which he receives from the land or buildings of his neighbour removed without replacement. Put more legalistically, an easement of support involves an enhancement to the dominant owner's natural right of support

¹ Ownership of surface land carries prima facie a natural right of support which is a right to have the surface kept in its natural position and condition. The right is not an easement but a natural right incident to the ownership of the soil. There is no natural right of support for anything artificially constructed on land; such a right cannot exist *ex jure naturae* because the thing itself did not do so. Thus any right to the support of such an artificial burden must be acquired as an easement – see *Wilde v Minsterley* (1639) 2 Roll Abr 564, Trespass (I); *Partridge v Scott* (1838) 3 M & W 220; *Dalton v Angus & Co* (1881) 6 App Cas 740 at 792, HL, per Lord Selborne LC; and Halsbury's Laws, Real Property and Registration vol 87 (2012) para 975.

with a corresponding increase of the servient owner's obligations to refrain from interference². An easement of support may though also involve a diminution of the dominant owner's obligations to refrain from depriving the servient tenement of the support to which the servient owner would otherwise have been entitled³.

3. An easement of support can be created in two ways. It can be impliedly granted or reserved on the basis of intended use or mutual easements⁴ and it can arise by prescription. An easement by prescription will arise where a building has been supported for 20 years or more. It is a noteworthy characteristic of these easements that it is not possible to prevent the acquisition of the easement.
4. If an easement has been acquired by prescription entitling a claimant to enjoy support for his land and building from his neighbour's adjoining land or building, that right is for support for the land and building as they have been used during the period of prescription. Only if it can be shown that the nature of the use has materially altered can it be said that the easement does not benefit the claimant⁵.
5. The right acquired by way of an easement of support may be a right to have buildings supported by land, or a right to have buildings supported by other

² As in the case of the ordinary easement of support for buildings: see *Dalton v Angus & Co* (1881) 6 App Cas 740, HL and discussion of that case below

³ Halsbury's Laws of England, vol 87 (2012) 5th edition, 4(5)(ii), B 977. As in the case of an easement entitling the owner to let down the surface: see *Love v Bell* (1884) 9 App Cas 286, HL; *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-operative Co Ltd* [1906] AC 305 at 310, HL; *Consett Waterworks Co v Ritson* (1889) 22 QBD 318; revsd on appeal (1889) 22 QBD 702, CA

⁴ Morgan J in *Walby v Walby* [2012] EWHC 3089

⁵ *Woodhouse v Consolidated Property Corp Ltd* (1992) 66 P & CR 234, [1993] 1 EGLR 174, CA

buildings⁶, for the easement of support is as applicable to the support from an adjoining building as it is to the support from adjoining or subjacent land⁷. When once acquired the easement of support is similar in character to the natural right of support⁸.

The Difference between a Right of Support and an Easement of Support

6. A landowner, 'A', by constructing buildings on his land, may be putting an additional burden on the adjoining land. If an adjoining landowner were to make excavation on his land, it may be that those excavations would have no effect on A's land if there were no buildings on it, but because of the additional burden placed on the land by the buildings, the excavation may cause subsidence⁹.
7. If there was no easement of support, the adjoining owner would be under no obligation to ensure that the building erected on A's land does not fall down. However, even in the absence of an easement of support, the person carrying out the works must be careful to interfere as little as possible with the stability of the adjoining building, though he need not take any steps to shore it up.

⁶ Lemaitre v Davis (1881) 19 Ch D 281 at 290; Brown v Windsor (1830) 1 Cr & J 20

⁷ Lemaitre v Davis (1881) 19 Ch D 281; Selby v Whitbread & Co [1917] 1 KB 736 at 751 per McCardie J

⁸ Dalton v Angus & Co (1881) 6 App Cas 740 at 809, HL, per Lord Blackburn; Bonomi v Backhouse (1859) EB & E 646 at 654, Ex Ch, per Willes J (on appeal sub nom Backhouse v Bonomi (1861) 9 HL Cas 503); Greenwell v Low Beechburn Coal Co [1897] 2 QB 165 at 171.

⁹ See Ray v Fairway Motors (1968) 20 P & CR 275

8. In Phipps v Pears¹⁰ Lord Denning analysed the nature of a right of support and the difference with an easement of support and defined the latter in the following way:

"There are two kinds of easements known to the law: positive easements, such as a right of way, which give the owner of land a right himself to do something on or to his neighbour's land: and negative easements, such as a right of light, which gives him a right to stop his neighbour doing something on his (the neighbour's) own land. The right of support does not fall neatly into either category. It seems in some way to partake of the nature of a positive easement rather than a negative easement. The one building, by its weight, exerts a thrust, not only downwards, but also sideways on to the adjoining building or the adjoining land, and is thus doing something to the neighbour's land, exerting a thrust on it, see Dalton v. Angus."

9. It is common now for a sale of a flat and sometimes terraced houses to contain a grant of an easement of support and these are usually set out in general terms along the following lines:

"The right to subjacent and lateral support and protection from the other parts of the building and from the site and roof thereof"

¹⁰ [1965] Ch 82-3, quoted in Rees v Skerritt [2001] EWCA Civ 760 para 19

The wording of that grant reflects to some extent the definition provided by Lord Denning in Phipps v Pears and, in particular, the right to subjacent and lateral support for a building from the neighbours land.

Repair

10. It has been reiterated on many occasions that an easement of support does not include an obligation on the servient owner to keep the supporting building in repair¹¹. This was held to be the case because ordinarily the dominant owner has not paid anything for the privilege of being supported by his neighbour's building, and therefore it would not be reasonable to require the servient owner to do anything positive to protect his neighbour's property.
11. This principle has obvious problems. The owner of a house or a flat may be at the mercy of his neighbours. If the neighbouring is left to decay, a loss of support may result from problems such as dry rot and penetrating damp and even, ultimately, the adjoining building starting to fall down due to the neglect.
12. The Party Wall etc Act 1996 resolves this problem to some extent in relation to boundary walls. It does so by providing a comprehensive system for dealing with development or repair of boundary walls. It followed the London Buildings Act

¹¹ See Boundaries and Easements, Sara, 19.10, p382. Jones v Pritchard [1908] 1 Ch 630, Bond v Nottingham [1980] CH 429

(now repealed) in applying the same principles to all walls which are on the line of the junction between the adjoining properties. The Act provides, in essence, a system whereby an owner who suffers damage or potential damage as a result of disrepair of a boundary wall should seek to deal with the problem by taking positive steps to repair and then seek compensation from the adjoining owner. However, the alternative solution is to bring an action in nuisance which was the underlying cause of action in Holbeck Hall.

Holbeck Hall Hotel Ltd and another v Scarborough Borough Council¹²

13. In Holbeck Hall the claimants were the freehold owners of a hotel which stood on a cliff overlooking the sea. The land between the hotel grounds and the sea was owned and occupied by the defendant local authority. Due to erosion, the cliff was inherently unstable, and in 1982 a slip occurred on the authority's land below the hotel. Outside engineers, called in by the authority, failed to identify the slip surface. However, they recommended various remedial measures depending on whether the slip surface was deep or shallow, and suggested that it might be prudent to carry out further investigations to locate the slip plane before remedial measures were designed.

¹² [2000] 2 All ER 705

14. After a further slip in 1986, the authority's chief engineer expressed the fear that the slip could ultimately affect part of the hotel's land if left unchecked. In 1993 there was a massive slip, far greater in magnitude than the two previous slips, consisting of a single, movement of land on both sides of the boundary. As a result, the ground under the hotel's seaward wing collapsed, and the rest of the hotel had to be demolished for safety reasons. One fact on which all the expert witnesses in this case were agreed was that the first stage of the 1993 collapse at Holbeck was a textbook example of a rotational slip¹³.

15. The Court of Appeal held that the owner of the servient tenement was under a duty to take positive steps to provide support for a neighbour's land. There was no difference in principle between the danger caused by loss of such support and any other hazard or nuisance on a defendant's land, such as the encroachment of some noxious thing, which affected the claimant's use and enjoyment of land.

Encroachment was merely one form of nuisance, and interference causing physical damage to the neighbour's land and building as a result of activities on the defendant's land was another. Thus where the question was not whether the defendant had created the nuisance but whether he had adopted or continued it, there was no reason why different principles should apply to one kind of nuisance rather than another. In each case, liability only arose if there was negligence, and

¹³ A slide type landslide is a down-slope movement of material that occurs along a distinctive surface. If this slip surface is curved the slide is said to be rotational – British Geological Society Website

the duty to abate the nuisance arose from the defendant's knowledge of the hazard that would affect his neighbour.

16. Moreover, where a defect on the defendant's land created a potential hazard to the claimant's land, the duty to prevent such a hazard arose only if the defect was patent rather than latent, i.e. if the defect could be observed. In such a case, it was no answer for the landowner to say that he had not observed it if a responsible servant had done so, or if, as a reasonable landowner, he or the person to whom he had entrusted the responsibility of looking after the land should have seen it. However, in the case of a latent defect the landowner or occupier would not be liable merely because he would have discovered that defect on further investigation. Furthermore, where the court was required to determine the scope of a measured duty of care arising in a non-feasance case, similar considerations arose as in a case where the court had to determine whether it was fair, just and reasonable to impose a duty or the extent of that duty.

17. In Holbeck Hall, the local authority had not foreseen a danger of anything like the magnitude that had occurred in 1993, and it was not just and reasonable to impose liability for damage which was greater in extent than anything that was foreseen or foreseeable (without further geological investigation), especially since the defect and danger had existed as much on the claimants' land as on the authority's. In those circumstances, the authority's duty was limited to an obligation to take care to avoid

damage which it ought to have foreseen without further geological investigation. It might also have been limited by other factors, so that it was not necessarily incumbent on a person in the authority's position to carry out extensive and expensive remedial work to prevent damage which it ought to have foreseen. The scope of its duty might therefore be limited to warning the claimants of such risk as it was aware of, or ought to have foreseen, and sharing such information as it had acquired relating to it. On either approach, it had not been established that the authority had been liable for any loss, and accordingly the appeal was allowed.

18. It is understood that the Court of Appeal has now definitively stated the law in relation to easements of slip in Holbeck Hall¹⁴. It established that a servient owner owes a duty of care towards the neighbouring owner to prevent danger to his property, but that danger was limited to reasonable steps to counter patent risks. Thus making clear that the law relating to the withdrawal of the natural right of support from adjoining land is part of the general law of nuisance. The principle of Sedleigh-Denfield v O'Callaghan¹⁵ is that when you know or should have known of the possibility of something encroaching from your land onto your neighbour's, you have a duty to do what you reasonably can to prevent it. Holbeck Hall extends this principle not only to the risk of noxious substances escaping, or even something

¹⁴ See Boundaries and Easements, Colin Sara, 4th Edition, 2008, 19.02, pp373-374

¹⁵ [1940] AC 880

natural escaping, such as the potentially falling tump in Leakey v National Trust¹⁶, but also to the loss of support of the adjoining land.

19. This is an important development in the law in that it establishes the general principle that acts or omissions committed on your own land which result in damage to your neighbour's land can give rise to an action in nuisance, whether the damage is due to natural causes or not. In essence, where the actions of a neighbouring owner cause a withdrawal of support and subsidence the problem is simply one of causation, but problems have arisen as a result of the old case of Popplewell v Hodkinson¹⁷. The case is problematic because it was decided in that case that there is nothing to stop a person drawing water on his own land "if for any reason it becomes necessary or convenient to do so". This creates difficulties because, as illustrated in Jordeson v Sutton Southcoates and Drypool Gas Co¹⁸ in which builders drained an underground of running silt causing subsidence, the issue is what actually constitutes the drawing of water. In a judgment requiring some agility it was held by Lindley MR that pumping out running silt amounted to pumping wet silt rather than pumping out water with silt in it and so Popplewell was distinguished (as have a number of other cases distinguished Popplewell on similar or related bases¹⁹).

¹⁶ [1980] 1 QB 485

¹⁷ [1869] L.R. 4 Ex 248

¹⁸ [1899] 2 Ch 217

¹⁹ e.g. Trinidad Asphalt co. v Ambard (1899) AC 594

20. It is submitted that there is little logic to the difference between subsidence caused by the extraction of water and subsidence caused by the extraction of wet silt or for that matter brine or oozing asphalt. The law of nuisance is always a balance between the right of a landowner to exploit his land and the right of the neighbour not to be disturbed. Where the disturbance consists of actions which cause subsidence, the balance favours the neighbour whatever the nature of the action complained of. Thus following Holbeck Hall, the courts will be keen to ensure that, whatever the cause of the withdrawal of support, that no man's land is damaged by the acts or omissions of his neighbour.

Dalton v Angus²⁰

21. Dalton v Angus was a case in which two adjoining buildings which had been built independently had stood together for over twenty years. One had been converted to a coach factory more than twenty years before and the conversion had increased the lateral support provided by the soil of the adjoining house. The owner of the adjoining property demolished it and excavated the earth with the result that the stack of the factory sunk and the factory collapsed. The House of Lords held that as the conversion of the building to a coach factory had been known to the adjoining land owner and more than twenty years had passed the factory had the benefit of

²⁰ (1881) 6 App. Case 740

a prescriptive easement of support and the vertical and lateral support imposed a positive and constant burden necessary for the safety and stability of the factory.

22. Dalton v Angus is authority for the principle that where one of two buildings in common ownership and supporting each other is disposed and the other retained, or both are disposed of at the same time, each acquires, by implied grant or reservation, a right of continued support against the other. It seems also that a right of support arises also where a building is disposed of separately from vacant land adjoining. Furthermore, where the owner of land sells or leases part of it to someone who is known to be acquiring it for building purposes, the building when erected acquires by implication a right of support against the adjoining land. This implication can be negated by the circumstances.

23. Furthermore, the decision of the House of Lords in Dalton v Angus is therefore taken as establishing the rule that where 20 years of support to a building has been enjoyed, whether from adjacent land or from subjacent land and where that enjoyment has been peaceable, open and as of right, those circumstances will confer the right to have that support continued²¹. This is the case whether the right arises out of the enjoyment at common law, under the Prescription Act or under the doctrine of lost modern grant. Moreover, if the right is based on the presumption of a grant founded on enjoyment, the presumption is absolute and

²¹ Gale on Easements, 19th Edition, 10-25 and see 10-16 - 10-24

cannot be rebutted by showing that no grant has in fact been made. Finally, in the absence of any wilful fraud or concealment, the outward appearance of the building is sufficient notice to all persons concerned of the amount of support required²².

Rees v Skerrett

24. Rees v Skerrett²³ was a case in which a 100 year old terraced house had been taken down after service of a dangerous structure notice leaving a common wall with the adjoining house in place. This wall was too high and heavy to stand without support. It meant that it was unstable and the effect of the wind was to manifest and increase the instability. The judge at first instance drew a distinction between weight support and wind support but this was rejected on appeal. On appeal it was held that the defendant whose land was subject to an easement of support had withdrawn support without providing an equivalent and this constituted an actionable interference with the easement.

25. In the case the claimant had also suffered damage as a result of damp ingress from rain falling on the exposed wall and penetrating into the claimant's property. It was held that this was claimable as part of the loss arising from the withdrawal of

²² See also *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557

²³ [2001] EWCA Civ 760, [2001] 1 WLR 1541, [2001] 40 EG 163, CA

support because there is no easement for protection from the weather²⁴.

Nonetheless, the court held following Holbeck Hall²⁵ that the defendant owed a duty of care which required that the defendant should take positive steps to prevent damage to the plaintiff's property consequent upon the demolition and that he was in breach of that duty.

26. This represents, it is submitted, an interesting development in the law in this area because one of the consequences of the decision seems to be that where there is a relevant easement of support and the dominant owner interferes with that easement, he will be liable irrespective of negligence. However, where there is no cause of action for interference with an easement of support, there may be a measured duty of care which is broken if a neighbour does something which would foreseeably cause damage to a neighbouring owner or fails to take action to avoid such damage²⁶. It seems then that the duty of care in tort will apply even in a case where the owner of the land affected by the absence of support has an easement of support.

²⁴ Following Phipps v Pears [1965] 1 QB 76

²⁵ [2000] QB 836 at 856D-G and see also Leakey v National Trust [1980] QB 485

²⁶ See Gale on Easements, 10-36 et seq for further discussion of this point

Actionable?

27. The removal of support is not actionable if, upon removal of that support, equivalent support is provided²⁷. It is also the case that a cause of action will not arise until injury or damage has occurred caused by the dominant tenement²⁸. Consequently, time does not run under the Statutes of Limitation until that point. In the case of successive subsidences or slips, each new instance of subsidence or slip will create a new and separate cause of action.

28. In relation to nuisance claims, where a person does some act which he is lawfully entitled to do on his own land it will constitute a nuisance if it causes physical damage to his neighbour's property, unless there is justification. Possible justifications are:

- a) that the damage is a natural result of a reasonable use by a person of his own property; or
- b) that the act was done under statutory authority and that every reasonable precaution was taken to prevent it causing damage; or
- c) that the act was done under agreement, expressed or implied, between the doer and the person affected; or
- d) that the damage was due to some act or default of the person affected; or

²⁷ *Rowbotham v Wilson* (1857) 8 E & B 123 at 157

²⁸ See *Limitation Act 1980* s2 and *Backhouse v Bonomi* (1861) 9 HLC 503

- e) to an act of God; or
- f) that the damage was caused by the act of a stranger without the actual or constructive knowledge of the occupier of the land; or
- g) that the act is justified by some right such as an easement or by prescriptive right.

29. The wrongful interference with an easement constitutes a private nuisance²⁹.

Therefore, an injury done to a person in possession of property in land by which his enjoyment of that property is adversely affected³⁰. There is though a difference between a nuisance in a case where no easement is affected and a nuisance arising from interference with an easement. In the latter case the existence of the easement must be established before any redress can be obtained, whereas in the former case the rights infringed are rights which the law attaches to the enjoyment of property³¹. Except in this respect the wrong done in both cases is the same, and the remedies which are available to the injured party are to all intents and purposes identical³².

²⁹ Lane v Capsey [1891] 3 Ch 411

³⁰ Jones v Chappell (1875) LR 20 Eq 539 at 543

³¹ For an example of failure to establish an easement as a prerequisite to suing for nuisance by disturbance of it see Paine & Co Ltd v St Neots Gas and Coke Co Ltd [1938] 4 All ER 592; affd [1939] 3 All ER 812, CA

³² Higgins v Betts [1905] 2 Ch 210. A successor in title of the servient owner who 'adopts' a substantial interference with an easement will be liable for it under the principle in Sedleigh-Denfield v O'Callaghan [1940] AC 880, [1940] 3 All ER 349, HL, as if for a nuisance: Saint v Jenner [1973] Ch 275, [1973] 1 All ER 127, CA.

Remedies/Damages

30. The damages claimable in an action for interference with an easement of support can be awarded under any of the following heads:

- a) Damages to compensate for actual financial loss resulting from the infringement;
- b) Damages representing the diminution in the value of the injured party's property resulting from the infringement;
- c) Loss of amenity (temporary or permanent), resulting from the infringement;
- d) Aggravated damages;
- e) Exemplary Damages.

31. However, a claimant cannot recover damages at law for the loss of value to his property due to the risk of future subsidence and for the cost of effecting remedial works designed to prevent anticipated future subsidence. However, in circumstances where there is sufficient proof to show that future subsidence or damage is likely, it may be that a *quia timet* mandatory injunction is obtainable if it is drawn in clear terms so that the other party knows exactly what work needs to be done³³. In fact, provided that the remedial works have not been done (in which case there would be

³³ Midland Bank plc v Bardgrove Property Services Ltd (1992) 65 p & CR 153 at 170.

no jurisdiction to grant an injunction) it is likely that damages equal to the cost of the remedial works could be awarded in equity in lieu of the injunction³⁴.

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³⁴ Hooper v Rogers [1975] 1 Ch 43