House of Commons Library

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Land law: frequently asked questions (England & Wales)

Summary

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Summary

The focus of land law is the use and supply of land. Land law impacts on many aspects of our day-to-day living. For example, land law determines who owns the land, how it may be used, and how others might gain access to the land. Beyond owing an interest in the land, there can also be less obvious third-party interests, for instance: covenants, easements, minor and overriding interests. In respect of any one property, these different interests can co-exist and interact.

Land law can be a difficult subject, often statutory provisions overlay ancient principles of common law and uses. The fact that land law has its own, rather archaic, vocabulary does not help.

This Commons briefing paper gives an overview of some commonly raised issues about land law, including:

- how to trace ownership of registered and unregistered land,
- how to resolve boundary disputes,
- how to enforce or discharge a restrictive covenant on freehold land,
- and private rights of way.

This paper also signposts to sources of further information and relevant case law. However, it is not designed to give legal advice or to provide the answer to the specific circumstances of disputes, or potential disputes.

Anyone with a specific question about an issue related to matters covered by this paper will need to consider seeking legal advice from a suitably qualified professional. Another Library briefing paper might help, Legal help: where to go and how to pay.

This Commons briefing paper covers land law with respect to England and Wales; Scotland has its own land law. Scotland and Northern Ireland also have their own land registries.

1 What is the difference between registered and unregistered land?

1.1 Recording land ownership

There are two parallel systems for recording ownership of land in England and Wales: registered and unregistered.

HM Land Registry[1] records property ownership in the Land Registry, which is the official ownership list for property in England and Wales. Northern Ireland and Scotland have their own land registries. Whilst the legal ownership of land is increasingly recorded by registration at the Land Registry, not all land is registered. Currently, an estimated 87.4% of land is registered in England and Wales (13,216,226 hectares).[2] Much of the land owned by the Crown, the aristocracy, and the Church has not been registered.

Compulsory registration

Since 1990 it has been compulsory when buying unregistered property or land to apply to have the land registered within 2 months of a sale completing. The Land Registration Act 2002 (LRA 2002) extended the range of transactions subject to compulsory first registration and encourages voluntary registration. The overriding objective of the LRA 2002 is that:

> *"[...] the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land online, with the absolute minimum of additional inquiries and inspections".*

Other transactions which result in a change of ownership and therefore trigger a requirement to register, include:

- gifts of land; or
- assents[3] by personal representatives.

[1] **HM Land Registry** is a non-ministerial government department established in 1862. The Land Registration Act 2002 empowers HM Land Registry to deal with "the business of registration" and is its primary governing statue. The Infrastructure Act 2015 enables HM Land Registry to compile a national register of local land charges. Income from fees covers the Land Registry's costs under normal operating conditions. The head of HM Land Registry is the **Chief Land Registrar**, appointed by the Secretary of State for Business, Energy and Industrial Strategy (BEIS).

[2] HM Land Registry, "Annual Report and accounts 2019/20. Transforming in uncertainty" p.5, 16 July 2020

[3] "**Assents**" – this means when property is transferred to someone, after the death of the previous owner, under the terms of their will or intestacy

Land or property must also be registered for the first time if it's being mortgaged.

Voluntary registration

The LRA 2002 does not compel the registration of all remaining unregistered land. However, even where there is no 'trigger', a legal owner may be persuaded to register their property for the first time because of the various benefits that derive from registration, including:

- proof of ownership,
- protection against land fraud,
- and making it easier to change, sell or give the property away in the future.[4]

The owner can either elect to register the property themselves or instruct a solicitor or conveyancer to do it on their behalf. Detailed information on how to register a property for the first time is provided on the Gov.uk website.[5]

1.2 Registered land, what does it mean?

Registration is the official recording of property ownership. HM Land Registry maintains a register of all registered land, which is indexed on a map. Each property has its own unique number and individual register.

Each individual register includes three sections, namely:

- Proprietor Register, which contains ownership information.
- Property Register, which contains a description of the property linked to a map.
- Charges Register, which contains details of any mortgages or burdens affecting the property.
- The following searches and downloads can be made at the Land Registry:
- Title summary, this is a new basic search providing a short summary of the following information: who owns a property, what they paid for it, and if there is a mortgage on it.
- A title register search, where it is possible to find out who owns the property, price paid or value (if sold since April 2000) and any rights of way or restrictions on the land noted on the register.
- A title plan search, defining the property.

[4] HM Land Registry, "Practice Guide 1: First Registrations", 2 March 2020
[5] Ibid

- A flood risk indicator, showing the probability of flood for the individual registered property. Further information is provided on the gov.uk website.[6]

A property's individual register will show the legal owner of the property and any other information which affects the property, including **third party interests**. Restrictive (or negative) covenants[7] are either recorded in the "Charges Register" or else in a separate document held by the Land Registry, in which case that document will be referenced in the Charges Register as containing covenants.

Collectively, all this information is known as "title information". For a fee, the Land Registry will supply an official copy of the register for a specific property that is registered with them.

1.3 Unregistered land, what does it mean?

As outlined above, not all property is registered. There are various reasons for this but the main one is that there simply hasn't been a transaction (such as a sale or mortgage) on that property since registration became compulsory in its area.

A seller of unregistered land must prove their ownership. The unregistered land system relies on the existence of written documents (often referred to as the "deeds") to prove to a buyer a period of unchallenged ownership, which will substantiate the seller's title.

In effect, this means providing a chain of documentation (sometimes known as an 'abstract' or 'epitome' of title) starting with a good 'root of title', such as an original conveyance or mortgage deed, and including all dealings with the legal (and equitable/beneficial) interests in the land all the way down to the current owner (over a minimum period of 15 years). The new buyer of the property/land will be required to register it for the first time, information is provided on the Gov.uk website.

The obvious problem with the unregistered land system is its reliance on paper title deeds.[8] If they are lost (either in part or in whole), damaged or forged, it may be difficult for the seller to prove ownership (i.e. title).

[6] Section 2 of this briefing paper provides information about how to search the registers
[7] Section 5 of this briefing paper provides information about covenants
[8] **Paper deeds**, documents used to convey the land and property from a seller to a buyer

2 How to trace ownership of land?

Steps involved in tracing ownership will vary according to whether the property or piece of land is registered or unregistered. A search of the Land Registry's index map will reveal whether a specific property or piece of land is registered or unregistered.

2.1 If the property is registered

Any member of the public can search the Land Registry online (a fee is payable) or can ask professional advisers to search. Information on how to begin an online search is available on the Gov.UK website.[9] **The Commons Library cannot undertake Land Registry searches on behalf of constituents**.

If the property or land is registered, then a title register search should reveal who legally owns the property, the price paid or value at the time of the transaction (if sold/dealt with since April 2000) and any rights of way or restrictions on the land noted on the register. The register is unlikely to show any beneficial (i.e. "equitable") ownership, although sometimes entries in the register might suggest the existence of beneficial owners.[10]

In cases where the legal owner of a property has died leaving a will, the deceased's executors (or administrators under an intestacy) should register their details with the Land Registry. They should appear on the register as holding the property/land on trust for the named beneficiaries.

2.2 If the property is unregistered

Lack of registration does not mean that a property or piece of land is not owned. Owners of unregistered land will have a bundle of paper deeds, which form a record of previous sales, mortgages and other dealings with the land. However, ascertaining who owns the land is more difficult and may involve some investigatory work. For example, the enquirer could:

[9] "Search for Property Information from HM Land Registry", Gov.uk

[10] See, for example, *Land Registration Act 2002*, s 43(1)(c); *Land Registration Rules 2003*, SI 2003/1417, r 93(c).

- Ask neighbouring or adjoining landowners if they know who the owner(s) might be.
- Ask any local resident who has lived in the area a long time if they have any ideas about who might own it, they may have local knowledge.
- Ask in in the local post office, public house or shop.
- Check adjoining registered properties with the Land Registry for possible clues (a fee would be charged for each property). For example, the registered property may refer to a deed or document which affected not only that registered title but also 'other land'. The 'other land' may have included the unregistered property and the deed/document will refer to the parties to the deed, which may give a clue as to the owner on a specific date.
- Search county or local authority records for clues.
- Check with the local authority to see if any planning applications have been submitted over the years. (Legally, applicants must sign a certificate to confirm they are the owner or a certificate to confirm they have served notice on the owner who they must name).
- Check the local electoral register.

If these suggestions do not lead to the answer, the advice and assistance of a professional adviser such as a lawyer might be needed. Internet searches reveal organisations advertising services to find the owner of unregistered land – at a cost. The Library has no knowledge about the effectiveness of these organisations and is not recommending them in any way.

In cases where the legal owner of an unregistered property or land has died leaving a will, the executors may have to prepare documents for the first registration of the land, and this may take time. Where there is no will, administrators acting under "letters of administration would perform this function.[11]

2.3 If it is "bona vacantia" property

In cases where there is no legal owner, the property may have become bona vacantia and have reverted to the Crown.

In a nutshell, bona vacantia property is ownerless assets (literally, vacant goods). Bona vacantia may include:

- The estate of a person who dies intestate and has no relatives to inherit the estate.

[11] HM Land Registry, "What to do when a landowner dies", 13 February 2018, [online] (access 18 January 2021)

- Assets that were beneficially owned by a company that has been dissolved.
- In certain circumstances, assets that were the subject of a failed trust (for example, on the dissolution of a club).

Depending on where they are located, assets that are bona vacantia pass to the Crown, the Duchy of Lancaster or the Duchy of Cornwall. The Treasury solicitor deals with bona vacantia that pass to the Crown. The Bona Vacantia division (BVD) of the Government Legal Department is responsible for this function. Bona vacantia in the Duchies of Lancaster and Cornwall are dealt with by Farrer & Co. solicitors.

To ascertain whether a property or piece of land has become bona vacantia property, would require contacting the Government Legal Department (Bona Vacantia Division). Neither the Treasury solicitor nor the Crown Estate offer a search facility against land that may be deemed subject to "escheat".[12] The Crown Estate will only deal with an enquiry if it is clearly ascertained that a specified property or piece of land has been subject to escheat.

A separate Library briefing paper provides further information on "Tracing ownership of property or land" (CBO 8567), including bona vacantia property, in England and Wales only; Scotland has its own land law. Northern Ireland and Scotland also have their own land registries.

[12] **Escheat** is the process under common law by which freehold land in England and Wales, which has become ownerless, reverts to the Crown as the ultimate owner of all land. The Crown Estate deals with escheat where the land is within England and Wales but outside Cornwall and the County Palatine of Lancaster (where the respective Duchy authorities deal with escheat. Examples of where freehold land becomes subject to escheat include, when: (i) The Treasury Solicitor disclaims freehold land which has belonged to a dissolved company. (ii) A company liquidator disclaims freehold land which belonged to a company being wound up. (iii) A trustee in bankruptcy or the Official Receiver disclaims freehold land which belonged to an individual. (iv) A foreign company which owned freehold land in England or Wales is dissolved.

3 Boundary disputes

3.1 What is a boundary dispute?

A boundary dispute could have various aspects. The most common is a dispute about the location of the boundary between two neighbouring properties, including the ownership of a boundary fence or hedge. As the Land Registry points out,

> *"[…] the process of agreeing the boundary line with a neighbour, whether it is for the purpose of entering into a boundary agreement or for the purpose of having a determined boundary, can itself generate forceful differences of opinion, perhaps where none had previously existed. In some circumstances this could lead to a dispute about the boundary".*[13]

According to the Royal Institute of Chartered Surveyors (RICS), disputes about boundaries (and related neighbour disputes) have been increasing steadily in England and Wales during the Covid-19 pandemic.[14]

3.2 Seeking professional help

The Commons Library cannot help to resolve disputes.

The resolution of a boundary dispute depends on the precise circumstances of the case. It is impossible to cover all the circumstances which could arise, and particular facts may make even the general statements set out here inapplicable to the dispute (or applicable in a different way). Legal principles not covered here might apply, depending on the facts. Therefore, the best advice is to seek professional guidance from a legal adviser or a surveyor.

The Land Registry has published online useful information on "Your property boundaries". The RICS has also published an online professional guidance note for England and Wales, "Boundaries: procedures for boundary identification, demarcation and dispute resolution"(4th edition, 2021).

[13] HM Land Registry, "Your property boundaries" 3rd edition

[14] RICS website, "Boundaries: procedures for boundary identification, demarcation and dispute resolution", undated

3.3 How to resolve a boundary dispute

The boundaries shown in Land Registry records are usually "general boundaries".[15] The records do not usually show exact boundaries, which can be difficult to work out. General boundaries are sufficient for the majority of titles. However, there are occasions where an owner might require something more precise (e.g. when there is a boundary dispute). There are two main ways to achieve this:

- entering into a boundary agreement or
- having a determined boundary.
- Further detailed information is provided below.

Boundary agreement

The best way to resolve a boundary dispute is by agreement. The Land Registry has published online information[16] on how landowners can clarify a boundary by entering into a formal boundary agreement and, in respect of registered land, apply for it to be noted on the individual registers.

In a nutshell, two or more sets of owners may come to an agreement about the boundary between their properties. The agreement can deal with the position of the legal boundary and the maintenance of a boundary feature (such as a wall, fence or hedge). An example given by the Land Registry is where neighbours may agree that the legal boundary between their properties is in the middle of a hedge (and that each will keep their side of the hedge below a certain height). Or there may be a post and rail fence and a brick wall running close together between two properties and the owners agree which of the two possible boundary features marks the legal boundary.

Usually, a boundary agreement does not involve the transfer of land, so falls outside the scope of section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989, which is concerned with "a contract for the sale or other disposition of an interest in land". Therefore, a boundary agreement does not need to be in writing in order to be enforceable.[17] This is also the case where only "trivial transfers of land [are] consciously involved"[18] and the "de minimis principle" applies.[19] That said, to avoid any future disputes, it is advisable to have a written agreement (with a detailed plan) signed by the parties.

There is no prescribed form for a written boundary agreement, even where the land concerned is registered. In some cases, a basic plan is sufficient and in

[15] Land Registration Act 2002, s 60(1)

[16] HM Land Registry, "Practice guide 40: HM Land Registry Plans, supplement 4, boundary agreements and determined boundaries", 20 December 2010

[17] See Haycock v Neville [2007] EWCA Civ 75 at [25]; and Yeates v Line [2012] EWHC 3085 (Ch) at [29]

[18] See Joyce v Rigolli [2004] EWCA Civ 79 at [32] and [45]; and Yeates v Line [2012] EWHC 3085 (Ch) at [30]

[19] "**De minimis**" is a legal term meaning too small to be taken into consideration; immaterial. The term is taken from a Latin phrase which translates into "the law does not concern itself with trifles".

other cases a plan may not be necessary at all (it may be enough to identify the boundary in words alone). However, according to the Land Registry, the better the quality of the plan – and the more precisely it shows the position of the legal boundary – the more helpful the boundary agreement is likely to be to the parties and their successors in title. The Land Registry has published online "Guidance for preparing plans for HM Land Registry applications".

In respect of registered land, a boundary agreement can be recorded at the Land Registry. An application must be made using form AP1 for the register(s) of the relevant title(s) to be altered, attaching a copy of the boundary agreement (there is a prescribed fee). Since the registrar has power to alter the register of title for a number of purposes, one of which is to "bring the register up to date", a boundary agreement can be noted in the register.[20]

Legal advisers are usually involved in boundary agreements. Assuming a boundary agreement is appropriate, they will advise on the form the agreement should take, the degree a mortgagee needs to be involved,[21] and whether the agreement should be recorded at the Land Registry.

Determined boundary

Another option is to apply to the Land Registry to "determine" the boundary of registered land.[22] A determined boundary shows "the exact line of the boundary of a registered estate" and will bind successors in title (i.e. it will still be valid if either landowners sell their property).[23] Ideally, an application for a determined boundary should be made with the agreement of both affected parties.

The Land Registry does not determine a boundary in the sense of resolving a dispute as to where the exact line of the boundary is located. Applying for a "determined boundary" simply means a landowner applies to have the exact boundary between their property and a neighbour's property recorded on the register of title.

An application for a determined boundary might be appropriate where there is agreement between the neighbours about where a boundary exactly lies. Referring to the 2016 case of Jones v Murrell,[24] the Land Registry points out that that sometimes there will be agreement from the start, if not, the

[20] Paragraph 5 of Schedule 4 to the Land Registration Act 2002

[21] A mortgagee (the lender, typically a bank) will not generally need to be a party to a boundary agreement. **The presumption is that the agreed boundary will be taken to be the legal boundary of the mortgagor's estate from the start – and so at the time the estate was charged**. However, this presumption can be rebutted. Proper legal advice should be sought on the extent to which the mortgagee should be involved in the boundary agreement, based on the circumstances of the case.

[22] Under section 60 of the LRA 2002

[23] An application for a determined boundary is made to the Land Registry on Form DB

[24] Jones v Murrell [2016] EWHC 3036 (QB)

neighbours might jointly instruct an independent expert.[25] Once the legal boundary is identified by an expert, the neighbours could either leave it at that or go further and agree to use the expert's report (and plan) to support an application to the Land Registry for a determined boundary.

With the exact line having already been identified, HM Land Registry will make it clear in the property register of each affected title that it is a determined boundary. The position of the boundary will be marked on the title plan of each affected registered title (often with lettered points showing the extent of the boundary which is determined). In addition, a filed copy of the determined plan is retained by HM Land Registry and can be referred to in order to identify the exact line.

An application to the Land Registry to determine a boundary must be supported by evidence. If there is insufficient evidence to prove the exact line of the boundary, it will not be possible for a landowner to make the application. Evidence might include:

- certified copies of the deeds to the applicant's property from before the property was registered;[26]
- an expert's report;
- a written statement signed in front of a solicitor, a magistrate or a commissioner of oaths.

There is a procedure for disputed applications to be referred to a tribunal.[27] If there is a legitimate objection to the application and the parties cannot reach agreement, the matter will have to be referred to the Land Registration division of the Property Chamber, First-tier Tribunal. HM Land Registry makes the point that, "such proceedings can prove costly (quite possibly much more than any disputed land is worth[28]), and of course are likely to generate — or perpetuate —considerable ill-will."[29]

Land Registry guidance, "Practice note 40 on boundary agreement and determined boundaries" (December 2019), provides further detailed information.

[25] In this case, the court had to consider a boundary award made by a chartered surveyor jointly appointed by the parties to identify the position of the legal boundary. The letter of instruction recorded the parties' agreement to be bound by the expert's award. The court held that neither party could challenge the expert's award merely on the basis that it might be mistaken.

[26] A certified copy involves a solicitor signing and dating the copy, thereby certifying that it is true copy of the original

[27] HM Land Registry, "Practice guide 40: HM Land Registry Plans, supplement 4, boundary agreements and determined boundaries", 20 December 2019

[28] See the comments of Lloyd LJ in *Steward v Gallop* [2010] EWCA Civ. 823 at [2].

[29] HM Land Registry, "Practice guide 40: HM Land Registry Plans, supplement 4, boundary agreements and determined boundaries", 20 December 2019

3.4 Mediation

Finally, mediation might also help to resolve a boundary dispute. Mediation is where both parties involved in a dispute meet with a trained, impartial third person (usually a solicitor or chartered surveyor) who tries to help them reach an agreement on key issues. It is intended to be a quick and flexible process. Since mediation is a voluntary, both parties must agree to engage in the process.

If the mediation results in a formal settlement agreement, then once signed by both parties it becomes a legal document which can be enforced through the law of contract. Of course, there is no guarantee that the mediation process will work, the parties might not reach an agreement. Since the mediation process itself is not binding on the parties, the parties retain the option to take their dispute to court.

Further information is available on a government website, Resolving neighbour disputes.

A new Boundary Disputes Mediation Service (BDMS) has been launched by the Royal Institution of Chartered Surveyors (RICS) and the Property Litigation Association and supported by the Civil Justice Council (CJC). The stated aim is to provide neighbours with "a quicker, cheaper and more informal approach" to resolving disputes about boundary lines than litigation.[30] The eight-hours mediation service is not free, costs are involved (as set out on the RICS website). However, mediation may present a cheaper and less stressful option than court proceedings (much would depend on the facts of a case).

3.5 What evidence might help to determine a boundary?

The best evidence of the precise line of boundary comes from the original conveyance itself, though sometimes other evidence—such as physical features on the land, photographs, or acts of the parties or their predecessors—might be relevant. For example, there may have been undisturbed possession of land for a long period of time ("adverse possession").[31]

The courts also recognise some presumptions, which can be "rebutted" where there is evidence to the contrary. For example, the **"hedge and ditch" presumption**: where a ditch is dug along a boundary and a bank raised or hedge planted along one side of the ditch, it might be "presumed" that the

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31 Usually 12 years: section 15 Limitation Act 1980. Special procedures (and a different period) operate against owners of registered land: Land Registration Act 2002, Schedule 6.

boundary runs along the side of the ditch opposite (further from) the hedge or bank. Other evidence might contradict this presumption, such as the ditch not having been dug by/for the owner of the "hedge" side. Importantly, the "hedge and ditch" presumption does not override the title deeds if they show the boundary.

4 Other types of boundary disputes

4.1 Ownership of fences

A variety of principles might affect the ownership of a fence. The best advice is, as ever, to consult a professional. Examples of the principles which may apply include the following:

- "T-marks" shown on a plan might indicate who owns the boundary feature (the owner of the property on whose side the inward-facing "T" lies). "[A]n inward-facing T marking indicates ownership of a boundary, but not what the boundary is nor where it is located".[32] But even this is controversial and not always accepted by the courts.[33]
- The orientation of the fence might provide some help. If nothing else shows who owns a fence, it might well be that it belongs to the owner on whose side the rails and posts of the fence are placed.

However, these are just examples; other factors may affect a case.

4.2 Overhanging trees

A Government website[34] provides advice on "Rights to trim hedges and trees". Essentially common law relating to nuisance and trespass (case law built up by precedent) ordinarily allows for a neighbour to cut any overhanging branches from a neighbour's tree or hedge which are encroaching on their property as long as no legal protection for that tree or hedge is in place (e.g. a Tree Preservation Order, or a requirement for the owner/tenant to keep the hedge). A Library briefing paper, "Dealing with nuisance trees and hedges" (CBP 2999) provides full details and links to government guidance. It also explains the common law aspects and covers dangerous trees.

[32] HM Land Registry, "Practice guide 40: HM Land Registry Plans, supplement 4, boundary agreements and determined boundaries", 20 December 2019

[33] *Avon Estates Ltd v Evans [2013] EWHC 1635 (Ch) at [31]*, *compared with Seeckts v Derwent [2004] EWCA Civ 393* at [27] to [28]. In *Chandler v Lanfear* [2013] EWCA Civ 1497 at [16], the Court of Appeal accepted the common practice of using T-marks to identify ownership was a relevant factor in construing a conveyance by reference to a plan incorporating T-marks, but thought it wrong to say their use raised any presumption of law.

[34] Gov.UK, "Resolving neighbour disputes", undated

In brief, a tree belongs to the person in whose garden it grows. If the branches of a neighbouring tree spread into another property, they still belong to the tree-owner.

If overgrown tree branches are breaking through and causing damage to the constituent's property, they can cut any overhanging branches back up to the limit of their property, their garden fence, say. However, they should stop there. The constituent is not allowed to go into a neighbour's garden without permission to cut a tree back. Nor can they lean over into the neighbour's garden to cut back the "offending branch" – this might be construed as trespassing. If a branch is cut back beyond the limit of the property, into the very trunk itself, the constituent could be liable for criminal damage and/or trespass (much would depend on the level of damage caused and the exact circumstances).

The cut branches and any fruit or flowers attached to the branches remain the property of the tree owner, but they shouldn't be simply thrown back over the neighbour's fence. That could be deemed to be fly tipping of garden waste. Instead, the neighbour should be advised that the cut branches will be burnt or taken to a recycling centre – assuming the neighbour doesn't want them returned.

It is important to note that if a tree has a **preservation order** on it then its branches cannot be cut or pared back. The relevant local council will have a list of preservation orders.

If an overgrown tree in a neighbouring garden represents a threat to people or to property, then this should be raised with the landowner. If cutting back the tree is a large and potentially hazardous task, possibly involving a tree surgeon, neighbours might wish to consider sharing the cost in order to resolve the matter. If there is disagreement about the tree's condition, the matter might be raised with the local council. If the roots of the tree are damaging drains, the water company might be asked to assess possible/potential damage. The tree-owner may be liable for the cost of repair if damage has been done (much would depend on the circumstances).

5 My land has the burden of a covenant what can I do?

Various third party interests can affect a piece of land including, restrictions, notices, mortgages, covenants and easements. The enforceability of covenants and easements is an issue often raised by constituents.

This section deals only with covenants on freehold land.[35] Some constituents are aggrieved that their land is burdened by a covenant which governs what can and cannot or must and must not be done on their land.[36] Easements are considered in section 6 of this paper (see below).

5.1 What is a covenant?

A covenant is a contractual promise

Freehold covenants are a type of contractual promise concerning land extracted by a covenantee from a covenantor. Covenants are different from easements because they cannot exist as legal interests in land. Covenants are contractual rights, although restrictive covenants (see below) have a hybrid status in that they can be made to bind a purchaser of land.

Often, a covenant is imposed by landowners when selling a parcel of land, in order to maintain some control for the benefit of their retained land.[37] However, a covenant can be created at any time by separate deed (known as a Deed of Covenant), signed by the covenantor (though not necessarily by the covenantee). The deed is then protected by an entry of a notice on the register of title in respect of registered land.

A covenant can be either positive or negative (often referred to as a restrictive covenant). The covenantor either promises to do something (a positive covenant), or to not do something (a negative covenant) on their land. The land that benefits from this promise becomes the dominant tenement, whereas the land which is burdened by the promise becomes the servient tenement.

[35] The rules relating to covenants in leases differ in terms of when and how they can be enforced and the consequences of breach

[36] For registered land covenants are either set out in the Charges Register of the Official Copies or else in a separate document held by the land Registry, in which case that document will be referred to in the Charges Register as containing covenants.

[37] Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (7 June 2011) HC 1067 (Law Com No 327). This report contains a useful description of covenants and the law.

A **positive covenant** imposes an obligation to do something, to carry out some positive action in relation to the land. Examples of positive covenants include those requiring:

- Expenditure of money
- Works of repair or maintenance
- Erection of buildings or boundary fences
- Payment of money in the event of planning consent being granted

A **negative (or restrictive) covenant** restricts the use and enjoyment of the land in question for the benefit of another's land. Examples of negative covenants include those that:

- Limit possible uses of the land (e.g. restrict it to residential purposes only).
- Prohibit certain trades or businesses.
- Restrict the number or type of buildings that can be erected on a plot of land.
- Require observance of a building line.
- Restrict the height of new buildings.

In addition, a covenant not to apply for planning permission without plans etc being first approved by an adjoining owner has been held by the courts to be a negative (restrictive) covenant.[38]

5.2 Who is bound by the covenant?

Since a covenant (positive and negative) is essentially a contract it will always be enforceable as between the original parties. The situation is different in respect of successors in title (i.e. future owners of the land).

Positive covenants

A positive covenant will not bind successors in title

The burden (the obligation to observe a covenant) does not generally bind successors in title of freehold land where a covenant is positive in nature, but it may do so if the covenant is negative. As a word of warning, covenants can often be expressed in ambiguous terms, so the meaning and effect of a covenant must be carefully considered (for example, to establish whether it is genuinely restrictive in nature).[39]

With a **positive covenant**, the general rule is that the **burden does not "run with the land" at common law or in equity**. In other words, the positive

[38] *89 Holland Park (Management) Ltd v Hicks* [2013] EWHC 391 (Ch) [2013] All ER (D) 05 (Mar)
[39] *Tulk v Moxhay [1848] EWHC Ch J34*

covenant will not bind successors in title. Instead, the original covenantor will remain contractually bound by the positive covenant.

Although the burden of a positive covenant does not run with the land, there are various "workarounds" which a seller can use to ensure a similar outcome. The workarounds commonly used are as follows:

- Compulsorily renewed covenants. The seller of land who is bound by a positive covenant (i.e. has agreed to do something) acquires from the buyer a new covenant in favour of the covenantee (i.e. the person with the benefit of the covenant). This approach results in a new covenant directly enforceable by the covenantee.[40] The process is repeated on each subsequent sale. The main disadvantage is that if the property frequently changes ownership, it can create a long paper trail.

- Establishing a continuous chain of indemnity. On each sale of the land an indemnity covenant is obtained in favour of the seller. The indemnity covenant is directly enforceable by the seller against his/her successor and can be relied on if the covenantee seeks to enforce against the original maker of the promise. The main disadvantage with this approach is that the chain of personal covenants is easily broken. Even where the chain is complete, enforcement is indirect and (notionally at least) involves damages passing down the 'chain'.

- An estate rentcharge with a right of entry. If the positive covenant is not performed, the rentcharge owner may enter the land, carry out the works and recover the costs from the defaulting landowner or occupier. In practice, this method is rarely used.

Negative/restrictive covenants

Negative covenants can bind successors in title

In contrast, a **negative (restrictive) covenant** is capable of "running" with the land. This means that subsequent owners and occupiers of the burdened land must abide by the restriction. Importantly, the negative covenant may be enforceable by one party's successors in title against the other party's successors in title, as well as between the original contracting parties.

The circumstances in which a negative (restrictive) covenant is enforceable against successors in title are governed by a complex set of rules and principles. Essentially, both the benefit and the burden must "run with the land" at common law and in equity. In other words, if the benefit of the covenant runs in common law, but the burden only runs in equity (or vice versa) the covenant will not be enforceable.

[40] The obligation to obtain a new covenant is usually protected by entering a r**estriction on title** so that registration will not occur before the covenantee is satisfied that the new covenant is in place

At **common law**, for the **benefit** of a restrictive covenant to run with the land, certain requirements must be met:

- The covenant must "touch and concern" the land of the covenantee. This means that the covenant must be capable of benefiting any owner of the land and not just be a personal benefit to the current owner.
- The covenantee must own the legal estate in the land to be benefited when the covenant is made.
- The successor of the covenantee must be the legal owner of the land which benefits.
- The original parties must have intended that the covenant should run with the covenantee's land (this should be clear from the wording of the covenant).

It is important to note that under the rule in Halsall v Brizell (1957), (also known as the "doctrine of mutual benefit and burden"), a person cannot continue to take the benefit of a covenant without subscribing to the obligations under it. For example, if a deed of covenant grants the owner of a property the right to use a private road but requires a contribution towards its maintenance, then the owner cannot exercise the right to use the road without making this contribution.

It was established in the case of Tulk v Moxhay [1848] that the **burden** of a negative covenant can run in equity provided the following conditions are met:

- The covenant must be negative (i.e. restrictive). This means that it must prevent an action rather than compel an action to be performed.
- There must be a benefited and a burdened land and the two must be "reasonably close together" (i.e. in close enough proximity for the benefited land to be genuinely adversely affected by a breach).
- The negative covenant must "actually" benefit the benefiting land. In the case of Re Gadd's Land Transfer [1966] it was established that a benefit must be, "something affecting either the value of the land or the method of its occupation or enjoyment".
- The original parties must have intended for the burden to run with the land. Unless the wording of the Deed of Covenant contains an express term to the contrary it will be assumed that the burden was intended to run. This is confirmed by section 79(1) of the Law of Property Act 1925.
- The purchaser of the burdened land must have had **notice** of the restrictive covenant before buying the land:

    – In respect of registered land, a restrictive covenant must be protected by the entry of a notice in the register to be binding.

    – In respect of unregistered land, if the covenant was created after 1 January 1926 then to be binding it must have been registered as a

Class D(ii) Land Charge. If the covenant is registered in this way then the purchaser is deemed to be aware of it even if he did not actually search the Land Charges register prior to his purchase (section 98 Law of Property Act 1925).

— For covenants relating to unregistered land created before 1 January 1926 a purchaser of burdened land will be bound unless he is an "arm's length purchaser for value" (i.e. he is not 'connected' to the seller and pays more than a nominal sum for the land) and he has no notice of the covenant. This can either be expressed notice, implied, or imputed.

The law on enforcing a negative or restrictive covenant is extremely complex requiring proper legal advice based on a full appraisal of the facts. Ultimately, it is the responsibility of the beneficiary of a restrictive covenant to ensure the covenant is properly adhered to, otherwise it might become obsolete. In the event of dispute, the Upper Tribunal (Lands Chamber) and, ultimately, the court might become involved in enforcing a restrictive covenant.

The Ministry of Justice is in the process of preparing a draft Law of Property Bill in response to recommendations made in the Law Commission's report, Making Land Work: Easements, Covenants and Profits á Prendre.[41] A key aim is to make it easier to create long term arrangements for the enforcement of freehold positive and negative covenants against successors in title.

5.3 Consequences of breaching a negative (restrictive) covenant

If a landowner who is bound by a restrictive covenant refuses to comply with their obligations, the court can award one of the following two remedies:

- it can award damages to the injured party; or
- it can order an injunction to prevent the breach from continuing.

Usually, damages can only be awarded where a payment of money is sufficient to compensate the injured party. The compensation should be calculated on the basis of the loss of the covenantee's "bargaining position". In effect, the court must determine what the covenantor might reasonably have paid the covenantee to secure release of the covenant (and what the covenantee might reasonably have accepted).

Where the loss to the covenantee cannot be easily measured in financial terms or where only a large sum would be sufficient compensation then the

[41] Law Commission, Making Land Work: Easements, Covenants and Profits á Prendre, (Law Com No 327) 7 June 2011

court may award an injunction. This is an order against the covenantor to bring the breach to an end. Many factors are considered by the court in exercising its discretion whether to grant an injunction, including the period of any delay by the person seeking the injunction (the claimant).

The court may be less likely to grant an injunction requiring someone to do something (a "mandatory injunction") rather than an injunction requiring a party *not* to do something (a "prohibitory injunction"). So, for example, a court may be less likely to grant an injunction to pull down a costly structure built in breach of a covenant than to order a defendant not to build it in the first place. For anyone seeking to enforce a negative covenant, the best advice, once more, is to seek proper legal advice about the particular circumstances of a threatened breach, and to do so quickly.

The Law Commission has recommended considerable simplification of the law relating to future restrictive covenants (and future freehold covenants generally).[42]

5.4 Indemnity insurance for breach of a negative (restrictive) covenant

If a still binding negative (restrictive) covenant has been breached (or there is an intention to breach it), and it is not possible or practical for it to be removed or modified, then it may be possible to obtain indemnity insurance.

In the case of a breach of covenant, indemnity insurance would mean that the insured would be compensated against loss should the beneficiary attempt to enforce the covenant. The type of loss envisaged includes, loss of value to his property, the costs of remedial works or the cost of legal action.

5.5 Can a negative (restrictive) covenant be removed or modified?

An application can be made to the Upper Tribunal (Lands Chamber) to remove or modify a covenant.[43] To be successful, the applicant must show that one or more of the following criteria apply:[44]

- A change in the character of the neighbourhood or property, or other material circumstances, means **the covenant is obsolete**. For example,

[42] Ibid paras 5.69 to 5.70

[43] Section 84(1), Law of Property Act 1925

[44] The grounds listed are an approximation – detailed advice should be taken as to whether the circumstances satisfy the precise grounds, see the Law of Property Act 1925, s 84(1)

a covenant not to build on the land may have been imposed when the land surrounding the benefiting land was open countryside but may now be thought obsolete if the area around the land has been developed.

- The continuance of the covenant would **impede the use of the burdened land for reasonable purposes** without there being a positive benefit resulting.

- The **beneficiary** under the covenant has, **expressly or impliedly agreed to its removal or modification**. Agreement might be implied from actions of the beneficiary which (in the absence of any other reasonable explanation) suggest that he intended for the covenant to be removed or modified.

- The proposed **modification or discharge would not actually damage the beneficiary.**

Where a covenant is modified or removed, the Tribunal may award compensation to the beneficiary. The compensation would reflect actual loss of value to the beneficiary's land.

It is important to note that even if one of the grounds is made out, the making of an order is discretionary. Various statutory exclusions apply, and applicants should be aware that where the Tribunal awards compensation to beneficiaries,[45] no modification or discharge will take effect until this compensation has been paid.[46]

Information on how to "Apply or appeal to the Upper Tribunal (Lands Chamber)" is available on the GOV.UK website.

Instead of an application to the Tribunal, a covenant may simply be removed by a deed granted by the beneficiary for the benefit of the burdened land. Additionally, if a breach of negative (restrictive) covenant has continued for a long period without any objection being raised, the covenant may be treated as having been abandoned under the principle of estoppel.[47] In the case of Hepworth v Pickles (1900), the breach had continued for 24 years before an attempt was made to enforce the covenant. A period of 20 years is now generally considered acceptable by the courts.

[45] Law of Property Act 1925, s 84(1).

[46] Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, rule 39

[47] **Proprietary estoppel** is a means by which property interests can be affected or created, to make the assertion of strict rights unconscionable. The estoppel gives rise to "an equity" in favour of the person who is entitled to assert the estoppel.

6 Private right of way disputes

In addition to covenants, easements are standard features of land ownership. They are another mechanism for passing rights and obligations, for example, a right of way over another's land. A landowner might also have an easement for the benefit of services and utilities that run over their neighbour's land.

A private right: the right enjoyed by the owner of one piece of land over the land of another

People are sometimes unsure about what rights they may have in connection with a private right of way. A private right of way is a type of easement. A right of way may be granted to allow an individual to cross one property in order to reach another property, or to allow for a more convenient point of access.[48] Like other easements, a right of way runs and stays with the land and is not in any way personal. This type of easement usually restricts the right of access to a small number of people.

If a landowner has the benefit of a legal right of way over another's property and is physically prevented from using it (for example, by a newly erected gate) this may constitute an interference with, or obstruction of, their right of way. If so, they might benefit from proper legal advice as to what options are available to them to resolve the issue.

Further information is set out below.

6.1 Who has access over my land?

An easement may create the right to cross or otherwise use another person's land for a specified purpose. For example, the purpose might be to lay water pipes or access an otherwise inaccessible property. The easement could refer to the entire property or just a part of it. The main characteristics of an easement are as follows:

- There must be two adjoining properties; one of which has the benefit of the right (this is a positive easement), and one which has the burden of the right (this is a negative easement).
- The owners of the two properties must be different from each other.

[48] A **private right of way** is very different to a **public right of way** – sometimes referred to as "the right to roam". A landowner may give permission for a public right of way over his private land, or the right of way may have been created from the local community having traditionally used a certain path for many years. Public "right to roam" easements permit any member of the general public to cross the land. They cannot be restricted without permission

- The right must be recorded by deed and in the case of registered land, should be recorded in the Title Register for each property affected.

An easement creating a private right of way can arise in a variety of ways, namely by:

- **Express grant**. This is where a "Deed of Grant" is agreed between the two parties, stipulating the terms of the easement. In other words, an express easement is expressed to be so by deed (section 1(2) Law of Property Act 1925) and in the case of registered land is referred to in the Title Register for both affected properties. This type of easement usually occurs when an individual sells part of their property but wants to keep some rights over the sold land. That may include a right of way or the ability to maintain utility infrastructure (e.g. water pipers etc.).

- **Prescription**. Easements by prescription may come into effect when an individual has been openly using land in a certain way for a continuous period of at least 20 years, without the owner's express consent.[49] If they can prove that this is the case, an easement for continued use may be granted by the court. However, if the landowner acts to defend his property rights at any time before the above period has expired then the prescriptive right will cease, and any attempt to re-establish it will have to begin again.

- **Implied easements** (sometimes referred to as "easements of necessity"). Implied easements are not created by deed but are implied by law. An easement of necessity only comes into existence once the court makes an order for the same. Usually the easement is required because a landowner cannot obtain entrance to his land without crossing an adjacent parcel of land (i.e. his property is landlocked). In such circumstances, an application must be made to the court for the easement on the grounds that it is necessary for the enjoyment of the property. A similar right might exist, for example, where a gable wall requires repair but cannot be reached except by accessing the adjoining property. In deciding whether to grant the easement, the court will consider what the original parties intended and how the property is being used.

  An implied right of way is often more limited in scope than an express right would have been (e.g. there might be an implied right of way by foot only, rather than a vehicular right of way). Once the need for an

[49] Easements by prescription may arise either under the common law, under the Prescription Act 1832, or by lost modern grant

easement of necessity no longer exists (e.g. because an access path is made or because a legal easement is created by deed) it will automatically fall away.

Private easements and rights of way should be used only by those entitled to use them and for their intended purpose (e.g. for general access or to man utility infrastructure).

6.2 Creation of a private right of way easement by estoppel

In certain circumstances, the court may create an "easement by estoppel" to prevent an unfair outcome where a seller has misrepresented that he would expressly grant an easement to the buyer but in fact did not do so. If the purchaser bought the property and relied in good faith on the creation of such an easement as part of his decision to buy, then the court may make an order for the easement.

Of course, much would depend on the unique circumstances of the case. For example, a buyer may have told the seller that they wish to build a garage on part of the land being sold and the seller may have agreed that they could access the garage by sharing their drive. If the buyer relied on this agreement when deciding to purchase the property, and subsequently no easement was granted by deed to give this right, the buyer may be entitled to an easement by estoppel.

6.3 Interference with a private right of way easement

The law governing what constitutes interference with an easement is based predominantly on common law precedent, derived from case law. In respect of a private right of way, any obstruction must be substantial to be actionable. There can be no substantial interference if, despite the obstruction, the right of way can still be "practically and substantially exercised as conveniently" as it was before. [50]

In various cases the court has considered what amounts to substantial interference.[51] In a 2014 case, [52] the Court of Appeal decided that on the proper construction of an express grant of an easement creating the private

[50] See the cases of Hutton v Hamboro (1860) 2F. & F.218 and Colls v Home and Colonial Stores Ltd [1904] UKHL 1

[51] See the cases of B&Q plc v Liverpool & Lancashire Properties Ltd [2000] EWHC 463 (Ch)

[52] Emmett v Sisson (Rev 1) [2014] EWCA civ.64

right of way, the dominant land enjoyed a right of access at any point or points along the entire length of the right of way. Although this right was extensive the court thought it was neither "unreasonable nor perverse" of the dominant owner to insist on keeping this right of access. The servient owner (i.e. the landowner with the burden of the easement) had proposed to build a wall allowing for a vehicular entrance at a given point. The court held that this would amount to an actionable interference with the right of way.

The sudden appearance of a gate does not necessarily amount to an interference with a right of way. Much would depend on whether the gate in fact substantially interferes with the use of the easement granted. For example, one gate without a lock is unlikely to be regarded as a substantial interference but a gate with a lock[53] or several gates over a short route may be regarded as such.[54]

It should be clear that in any case where it is alleged there has been interference with an easement creating a private right of way, the court will take into consideration all relevant circumstances. The best advice for the parties involved in a dispute is to seek proper legal advice.

6.4 Remedies for interference with a private right of way

The remedies for interference with a private right of way easement are:

- Declarations
- Injunctions
- Damages
- Abatement
- The court can order the first three remedies singularly or in any combination. The last remedy, abatement, does not require a court order but should be used cautiously.

Declarations

The court can make a declaration confirming the existence of the easement and defining its scope. The benefit of a declaration is that it creates certainty;

[53] In the case of Bradley and another v Heslin and another [2014] EWHC 3267 (Ch), the court considered that it would not amount to substantial interference for gates to be closed daily from 11 pm to 7.30 am and, in addition, on days when the servient owner was absent from home or when there was a greater risk of intrusion from revellers. In the case of Geoghegan v Henry (1922) 2 IR 1, the court held that a lock on an outer door preventing postal deliveries did amount to a substantial interference.

[54] In the case of Kingsgate Development Projects Ltd v Jordan and another [2017] EWHC 343 (TCC), the High Court found that substantial interference occurred with a private right of way by the erection of a third gate so there were three gates in less than 100 metres. The court also distinguished electric gates that were operated by the press of a button from electric gates that required a code or fob.

both parties can be confident in the future use of the easement. As a discretionary remedy, declarations are seen to be a useful way of confirming the rights and duties of the respective parties to the easement, thereby avoiding the need to impose an injunction on the transgressing party. It is important to note that as well as a positive declaration, it is also possible for the court to make a negative declaration that a proposed action will not amount to an interference.[55]

A declaration by the court is binding on the parties to the proceedings and, importantly, their successors in title (i.e. future owners). This is in marked contrast to injunctions, which only bind the parties. If necessary, the court will make an order to join in other parties if it thinks they will be affected by its decision.

If a party ignores or fails to comply with the declaration, the injured party must go back to court to seek an injunction to enforce the declaration. Sometimes, as a precaution, a party will ask the court's permission to apply for an interim injunction if the declaration is ignored.

A record of the declaration must be kept with the deeds relating to the property. In addition, the declaration may require an application to the Land Registry to rectify the registered titles of the dominant and servient land. In a case where an easement is acquired by prescription, an application to register the easement may be made to the Land Registry.

Injunctions

An injunction may be awarded at the discretion of the court.[56] It is an effective remedy, prohibiting any further interference with the easement (i.e. private right of way) or preventing trespass if no easement is found to exist. Breaching an injunction could lead to contempt of court proceedings. However, an injunction is only binding on the parties to the proceedings and not to their successors in title (i.e. future owners). In practice, an injunction will not normally be granted where damages would be an adequate remedy for the claimant.

An application for an injunction may be barred, under the **doctrine of laches (delay)**, if it is not made in a timely manner. Delay alone is not enough to prevent the application, the consequence of the delay must be that it would be "unfair" for the court to grant the injunction, usually because the defendant has changed their position because of the delay.

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[55] See the case of Well Barn Shoot Ltd v Shackleton [2003] EWCA Civ.02, where the Court of Appeal upheld the grant of a negative declaration that a proposed development would not cause substantial interference with the claimant's shooting rights

[56] There are three types of **Injunction**: (i) **mandatory**, which orders the defendant to do something; (ii) **prohibitory,** which orders the defendant to refrain from doing something; and **Quia timet**, which orders the defendant to act to prevent future harm occurring. In addition, an injunction may be **interim** (interlocutory) or **final** (perpetual), and can be awarded unconditionally or subject to such conditions as the court thinks right (section 37, Senior Courts Act 1981)

Damages

Generally, where an easement has been interfered with, or wrongly asserted, damages may arise from:

- direct damage to the claimant's property (e.g. the destruction of pipes, wall or hedge),
- loss due to the claimant's inability to use their land or to exercise their rights over the land, and/or
- consequential loss flowing directly from the interference of the easement (provided it was reasonably foreseeable).

This is not an exhaustive list and with any award for damages the court must take into consideration the unique circumstances of the case.

The court has the discretion to award damages in lieu of an injunction. However, this discretion should not be exercised to deprive a claimant of his/her right to an injunction "except under very exceptional circumstances".[57]

Abatement

Abatement is a remedy that allows the claimant to end the nuisance

Under the common law principle of abatement, a party with the benefit of an easement is entitled to enter onto another's land to put an end to an interference. However, abatement can only be used where a cause of action exists. In the case of easements, this cause of action lies in nuisance. So, for example, abatement may be used to remove an obstruction that is blocking a private right of way.

Abatement comprises of both:

- A right to enter onto the servient land in certain circumstances.
- A remedy of putting right the interference.
- However, there are important limitations on the use of abatement, including:
- Abatement is only appropriate in simple cases or where an immediate remedy is needed.
- The party abating the interference must act in a reasonable manner. This means that if there is more than one way to abate the interference, the least "mischievous" method should be used.
- Unless it is an emergency, or there is no need to enter onto someone else's land, the party abating the interference should give notice to the party casing the interference.
- The party abating the interference must not cause any unnecessary damage.

[57] See the case of Shelfer v City of London Electric Lighting Company (CA) [1895] 1 Ch 287 and the more recent case of Regan v Paul Properties Ltd and others [2006] EWCA Civ. 1319

- The abatement must be exercised promptly.
- A claimant cannot resort to abatement if a court has already refused an application for a mandatory injunction (i.e. a mandatory injunction orders the defendant to do something).
- Importantly, the fact that a party successfully pursues the remedy of abatement does not preclude them from seeking the other remedies of damages and/or a declaration in court. If the interference with the easement recommences, an injunction may also be sought.[58]

6.5 Can rights be lost if an easement is not enforced?

As already mentioned, an easement is a right over someone else's land (such as a right of way). Rights of easements can, if forgotten about, lapse through disuse. The 2010 Court of Appeal case of Lester & Anr and Woodgate & Anr [59] established that where the facts support it, an easement, even one specifically granted, may be considered to have lapsed.

In brief, this case involved neighbours, one of whom had been granted an easement in 1980 permitting access to a pathway that ran along a strip of land owned by the other. The easement replaced an earlier right of way which had been granted. By 1999, the strip of land was being used as a car parking area and the owner had removed and resurfaced most of the pathway. The neighbour did not object to the works. Subsequently, both properties were sold and the new owners of the land which had the benefit of the easement sought an injunction to have their access reinstated and to prevent car parking.

The court found against the claimants on the basis that the previous owner of the property (who had benefitted from the easement) had done nothing to prevent the owner of the land in question from breaching the terms of the easement over a long period of time. The court held that it would be unfair (under the legal principle of "estoppel") for a later owner to rely on a right which their predecessor in title had failed to enforce. As a result, the easement contained in the deeds to the property was no longer enforceable.

In any case it would be necessary to consider the specific circumstances involved.

[58] See the case of Burton v Winters [1993] 1 WLR 1077

[59] Lester & Anr and Woodgate & Anr, [2010] EWCA Civ. 199

7 Flooding

7.1 Flooded property situated on lower ground

The owner of a property which lies at a lower level than that of a neighbouring property generally has no legal right to bring a claim against its higher neighbour for any flooding caused by the natural occurrence of water running onto the lower land. This reflects the long-accepted view that the natural incidence of water on land is a "common enemy". A typical situation would be where rainwater automatically travels downhill towards a property due to the topography of the area.

The case of Home Brewery Co. v William Davies & Co. (1987) has established that the owner of the lower land has no duty to receive water from the higher land, they can take "reasonable" action to prevent this water from entering their land, for example, by erecting a wall. However, before taking any steps, landowners should seek proper guidance from the relevant local authority.

7.2 Nuisance flooding

The situation might be different if a landowner had done something on their land which has caused a neighbour's land to flood. Liability for flooding between neighbours may arise if a person's use of land is considered 'non-natural'. For example, in the case of Hurdman v North Eastern Railway Co. [1878], the defendant had piled rubble against a wall causing rainwater to percolate through the claimant's house. The court held that the rubble was "artificial work", and that rainwater would not have percolated "but for" the rubble. On that basis the claim succeeded.

Liability can also arise if water has accumulated on land and the owner of that land deliberately disperses it onto neighbouring land. In the case of Whalley v Lancashire and Yorkshire Railway Co. [1884], rainwater had collected against the defendant's embankment to the extent that the embankment was endangered. The defendant cut trenches in the embankment to allow water through and caused flooding to the claimant's land. The court held that the defendant had no right to protect their property from flooding by transferring the problem to the claimant.

7.3 Flooding caused by a natural hazard on your neighbour's land

It used to be the case that there was no right to bring a legal claim in respect of flooding caused to a property by a natural hazard on neighbouring land. However, in the case of Leakey v National Trust [1979], the Court of Appeal held that the National Trust, as the owner of a conical hill adjacent to residential properties, was liable for the damage caused by a land slip. Specifically, the court said:

> "[...] there was a duty on a landowner who knew or ought to have known of, in this case, a risk of encroachment into another's land, to do what was reasonable in all the circumstances to prevent or minimise the risk of the known or foreseeable damage...".

The case of John Green v Lord Somerleyton [2003] illustrates the court's application of the "Leakey principles" to flooding claims. In this case the Court of Appeal held that the principles applied to naturally flowing water and that the defendant would be liable if flooding was caused by their failure to do what was 'reasonable' in all the circumstances. Most legal commentators suggest that liability for natural hazards is more likely to be imposed where the hazard in question and risks associated with it are obvious and where the neighbour could have easily taken preventative action at little expense.

The law on flood damage is complex and proper legal advice should be sought based on all relevant circumstances and land documentation.

8 Glossary

Abatement

A self-help remedy allowing a dominant tenement owner to enforce an easement. Abatement is a general and limited common law principle, a party is entitled to enter onto another's land to put an end to an interference. Abatement comprises of both: (i) a *right* to enter onto the servient land in certain circumstances; and (ii) a *remedy* of putting right the interference. Abatement can only be used where a cause of action exists; in the case of easements, this lies in nuisance.

Absolute interest

An interest that is neither conditional nor determinable.

Adverse possession

The acquisition of title by dispossessing the original owner for the requisite period.

Assignment

The transfer of an interest in land.

Beneficial interest

A beneficial interest in property is an equitable interest.

The ownership of land in England and Wales is dealt with in two ways: the legal ownership and the beneficial ownership. The legal ownership is separate from the beneficial ownership and the legal owner(s) will not necessarily be the same as the beneficial owner(s). The legal owner is said to hold the beneficial interest in the property on trust for the beneficial owner.

The beneficial owner of the land will have the right to the income from the property or a share in it, and a right to the proceeds of sale or part of the proceeds.

"Bona vacantia" property

In cases where there is no legal owner, property may become bona vacantia and revert to the Crown. Bona vacantia property is ownerless assets (literally, vacant goods), and may include: (i) the estate of a person who dies intestate and has no relatives; (ii) assets that were beneficially owned by a company that has been dissolved; and (iii) in certain circumstances, assets that were the subject of a failed trust (e.g. on the dissolution of a club). Depending on

where the relevant property is situated, responsibility for dealing with bona vacantia lies with the Crown or the Duchies of Lancaster or Cornwall.

The Crown has a statutory power to disclaim, its title to property that has become bona vacantia. Disclaimed property is treated as if it never passed to the Crown as bona vacantia. Depending on the type of property disclaimed, the disclaimed property may escheat directly to the **Crown Estate,** which is a different part of the Crown to that which deals with bona vacantia. (See **Escheat** below).

Conveyance

A formal legal document transferring property or title.

Covenant

An agreement or promise to do or provide something, or to refrain from doing or providing something, which is meant to be binding on the party giving the covenant (who may be referred as the covenantor). In some circumstances, the covenant must be made in a deed for it to be binding. Some types of covenant may also be enforceable by, or against, persons who were not a party to the original arrangement.

Covenantee

The person to whom the promise in a covenant is made.

Covenantor

The person making the promise in a covenant.

Declarations

A discretionary remedy for interference with an easement. A declaration by the court confirming the existence, and defining the extent of, the easement. Declarations are a useful way of confirming the rights and duties of the respective parties. It is also possible to obtain a negative declaration that a proposed action will not amount to an interference.

Deed

A deed is a legal written document which is executed with the necessary formality (that is, more than a simple signature), and by which an interest, right or property passes or is confirmed, or an obligation binding on some person is created or confirmed. A deed is generally enforceable.

Determined boundary

An application can be made to the Land Registry to "determine" the boundary of registered land. A determined boundary shows the exact line of the boundary of a registered estate and will bind successors in title.

Dominant tenement

The land to which the benefit of a right, such as an easement is attached.

Easement

A right enjoyed over land (the servient tenement) for the benefit of another piece of land (the dominant tenement).

Escheat

Escheat is the common law process by which freehold land that has been disclaimed by the Crown or by a liquidator reverts to the Crown Estate as the ultimate owner of the land. Escheat ensures that freehold land is never without an owner.

Estate

An interest in land that allows its owner exclusive possession of the land for a prescribed period.

Freehold estate

An estate in land which provides the holder of the estate with rights of ownership. There are several different types of freehold estate. The most common is "fee simple", which is effectively absolute ownership of the land.

Injunction

An injunction is an order of the court that requires a party either to do a specified act or to refrain from doing a specified act. The remedy of an injunction is discretionary and may be granted as an interim or final remedy.

Notice on the Register

With respect to registered land, an entry on the Title Register protects the priority of the interest to which it refers.

Prescription

Acquisition of an easement by long use.

Profit à prendre

The right to take something from another's land (the servient land) that is both: capable of ownership; and a product of nature. For example, the removal of minerals, timber, and turf. It also includes the killing of wildlife living on the land, such as rights of hunting and fishing.

Proprietary estoppel

An equitable doctrine enabling a claimant to enforce an informal representation or assurance relating to land that the claimant has relied

upon to his/her detriment, because it would be unconscionable for the person who made the representation or assurance to be allowed to enforce his strict legal rights.

Quasi-easement

An interest in land that would amount to an easement, but for the fact that a dominant and servient tenements are owned by the same person.

Servient tenement

The land which is subject to a right, such as an easement.

Title deeds

Title deeds are paper documents showing the chain of ownership for land and property. For example, they can include conveyances, contracts for sale, wills, mortgages, and leases.

Waiver

The abandonment of a legal right.

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