

1. Ali wishes to know if the right to park his car on the driveway of a neighbouring house is capable of being an easement. Advise Ali.

In order to know whether the right to park a car on a driveway can be an easement, we must consider the nature of easements. The leading case is *Re Ellenborough Park* [1955] 3 All ER 667. In this case, the Court of Appeal set out four main requirements which must be met for a right to constitute an easement.

The first requirement is that there must be a dominant and a servient tenement. This is met in our example: the dominant tenement is Ali's land, as it has the benefit of the right, whilst the servient tenement is the neighbouring house.

The second requirement is that an easement must accommodate the dominant tenement. The two tenements are next door to each other, so they are close enough for Ali's house to benefit from the right to park (*Bailey v. Stephens* (1862) 12 CB (NS) 91). The right is one which could benefit any owner of the land, and it would not be likely to be of personal use to Ali if he sold the dominant tenement. Therefore, this requirement is met.

The third requirement is that the dominant and servient owners must be different persons; you cannot have an easement over your own land. This appears to be the case here.

Fourthly, the right must be capable of forming the subject matter of a grant. This has a number of elements. Firstly, the right must have been granted by someone with the power to do so, and to a person who can benefit from the easement. This appears to be the case here. Secondly, the right must be sufficiently definite to be an easement; vague rights such as the right to a view or to privacy are not easements (*Browne v. Flower* [1911] 1 Ch 219, *William Aldred's case* (1610) 9 Co Rep 57b). Lastly, the right has to be in the nature of an easement, that is, analogous to rights recognised as an easement in the past.

It is this last requirement that may cause Ali some difficulty. This right is not a new right, as easements of parking have been recognized in the past (*Hair v. Gillman* (2000) 80 P & CR 108), and the right does not require the servient owner to spend money, which is not permitted for easements. However, it is possible that the use of the servient tenement may be too excessive. An easement may not amount to exclusive possession of the servient tenement; it must allow the servient owner to make use of the land as well. Rights of parking which take up substantially the whole of the servient tenement have been held not to be easements: *Copeland v. Greenhalf* [1952] Ch 488 and *Batchelor v. Marlow* (2001) 32 P & CR 36.

The question is one of fact and degree; does Ali's car take up too much of the servient tenement to enable it to be an easement? If it amounts to exclusive possession of the land, it will have to be granted as a lease or a licence instead. If the driveway is large, and there is room for the owner of the land to pass by the car and still use the land, Ali may have an easement of parking.

See: 11.2, and especially 11.2.6.3

2. What is the difference between the public right of passage along the highway and an easement of way?

A right of passage along the highway is a public right, available to everyone, whether they are landowners or not. In other words, a public right of passage does not accommodate any dominant tenement. It can be used to access any piece of land that is convenient.

An easement of way, on the other hand, must be for the benefit of a particular piece of land, the dominant tenement. It can be used only to access that tenement, not other nearby pieces of land, even if owned by the dominant owner: *Das v. Linden Mews* [2002] 2 EGLR 76.

See: Table 11.1 and 11.3.1

3. Betty has just moved into a house that has no access to the road for motor vehicles. Is she able to claim an easement of necessity over her neighbour's land?

Easements are implied into transfers of land by necessity only if the land is unusable without the easement. If Betty's house is accessible from the public highway on foot, it is most unlikely that a way of necessity will be implied: *Pearson v. Spencer* (1861) 1 B & S 571.

In *Sweet v. Sommer* [2004] EWHC 1504 (Ch), Hart J was prepared to accept that it was a necessity in modern times for a house in the countryside to have access for vehicles rather than just by way of a public footpath, but the case was decided on other grounds on appeal. Betty is therefore unlikely to have an easement of way by necessity.

4. Carol has a lease of a small flat on the second floor. She is a keen cyclist and her landlord, David, has always allowed her to store her bicycle in his garden shed. Carol's lease was renewed last month. This week, she received a note from David saying that there is no longer room in his shed for her cycle, so she must remove it. What can Carol do?

Carol needs to show that she has an easement of storage. To establish this, she must show firstly that such a right can be an easement, and secondly how the easement has been granted to her.

The case of *Re Ellenborough Park* [1955] 3 All ER 667 sets out the requirements for an easement. The first three seem to be met here, as there are two tenements (the flat and David's part of the house) which are occupied by two different people. It is commonplace for tenants to have easements over their landlord's property. The easement clearly accommodates the dominant tenement (Carol's flat) as any owner

of the flat would benefit from storage of items in a shed rather than on the second floor.

The only difficulty may be that the right may be too excessive if it takes up too much of the room in the shed; an easement must allow the servient owner (David) to use the shed as well. This is a matter of fact and degree, but easements of storage have been permitted: *Wright v. Macadam* [1949] 2 KB 744.

The second consideration is how the easement was acquired. Clearly, there was no express grant of an easement by David to Carol. However, there may have been an implied grant here. The most likely mechanism is the statutory grant of easements under LPA 1925 s.62. This section operates to turn quasi-easements into easements on a transfer of the land and also to turn licences into easements.

The facts of our case are similar to those in *Wright v. Macadam* [1949] 2 KB 744. In that case, a tenant was allowed to use a coal shed situated on her landlord's premises. The lease was later renewed and no mention was made of the use of the coal shed. Afterwards, the landlord tried to claim extra rent for use of the shed. The Court of Appeal held that the renewal of the lease had been a conveyance within LPA 1925, s. 62. Therefore, the licence to use the shed for storage of coal had become an easement. The landlord could neither stop the tenant from using the shed, nor charge her extra rent.

Here, Carol was using the shed to store her bike before the lease was renewed. The renewal of the lease without revoking the licence will operate under LPA 1925 s.62 to turn the former licence into an easement. David will not be able to stop Carol from using the shed.

It should be noted that s.62(4) allows the effect of s.62 to be excluded from conveyances if the parties so agree, and this is commonly done. Therefore, Carol needs to check her lease and any contract to grant it carefully.

See: 11.2 and 11.4.3.2

5. **Eddie has a garage at the back of his garden, in which he parks his car. He accesses the garage by driving along an alleyway between the gardens of the houses in his road and the neighbouring park. Yesterday, he received a letter from the local council, saying that it owns the alleyway and that he must now pay £300 per year to drive on it. Eddie has been using the alleyway for 25 years and his predecessor in title used it for 15 years before that. Advise Eddie.**

Eddie needs to show that he has an easement of way over the alleyway. The first thing he should do is to check his register of title (or title deeds if his land is unregistered) to see if he can find any mention of such a right.

If he cannot find such a right mentioned, it is unlikely to have been granted expressly. However, Eddie may be able to show that he has acquired the right by prescription, that is, long use. If the dominant owner exercises a right in the nature of an easement for long enough, the law presumes that the servient owner must have

granted the easement at some point in the past. This presumption is based upon the acquiescence of the servient owner—that is, his or her failure to object to the actions of the dominant owner.

There must be continuous user of the right by one freehold owner against another for a period of at least 20 years. It seems that Eddie has been using the alleyway continuously for longer than this. The use must be ‘as of right’, which means not by force, not secretly, and not by permission. It appears that Eddie has been openly driving along the alleyway without any hindrance from the council, and without secrecy. He did not have permission to do so. Therefore it seems likely that he can show continuous user.

Acquiescence is presumed if the servient owner has knowledge of the acts done; power to stop the acts or sue in respect of them, and they refrain from the exercise of such power. Since the rights were exercised openly, and the alleyway is the only route to the garage, it seems likely that the council have acquiesced to Eddie’s use of their land.

There are three types of prescription: common law, lost modern grant and statutory prescription under the Prescription Act 1832. Common law prescription is rarely applicable, so the other two methods will be considered.

Under the PA 1832, s. 2, there are two different prescription periods in respect of easements other than light—for example, rights of way such as Eddie wishes to claim - the shorter period of 20 years and the longer period of 40 years.

If the easement has been actually enjoyed without interruption for 20 years, it is not defeated by proof that it commenced later than 1832, but it may be defeated in any other way possible at common law. If the easement has been enjoyed without interruption for 40 years, it is deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given in writing.

PA 1832, s. 4, prescribes that it must be the period leading up to the action by which the legality of the right is questioned—in other words, the *last* 20 or 40 years. The Act gives no rights to an easement unless, and until, an action is brought. The time also has to be ‘without interruption’, which means that there must have been no break in the use of the easement lasting for more than one year – PA 1832 s.4.

Eddie can certainly show the shorter period. He has been using the alleyway himself for 25 years. Since his use has been continuous and as of right, it appears he will have acquired an easement under the Act. If he can also show that his predecessor in title used the alleyway for 15 years, he can claim the 40 year period which will give him an easement that is ‘absolute and indefeasible’ unless granted by written permission.

Eddie may also be able to claim an easement under the doctrine of lost modern grant. By this fiction, the court presumes that, if there has been 20 years’ enjoyment of a right, a grant of that right must have been made: *Bryant v. Foot* (1867) LR 2 QB 161.

Therefore, it is very likely that Eddie will be able to prove an easement by prescription, and will not need to pay the council to drive over the alleyway, as he already has the right to do so.

See: 11.4.4

- 6. Fred has an old well on his land that has not been used for many years. Last week, due to a drought order forbidding the watering of gardens with mains water, his neighbour Gina came onto Fred's land and took water from the well. Fred's register of title does show a right to take water in favour of Gina's land, but Fred had thought it was never going to be used. Advise Fred.**

Gina has an express easement to take water from Fred's land. An easement may be brought to an end by being impliedly released, but this is not lightly presumed.

In *Benn v. Hardinge* (1993) 66 P & CR 246, a right of way was not used for 175 years because an alternative path was available. When that path was waterlogged, the owners of the easement were entitled to use the right of way again. It was not treated as abandoned. This case applies to the facts here – the alternative water supply was more convenient, but now that it is unavailable, Gina is entitled to use the easement again.