

## The Law on Easements – Dillon Eustace

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## The Law on Easements

### 1. Introduction

Prescription is the method by which the law gives legal recognition to the existence of an easement which has been enjoyed over a long period as if it had been created initially by a formal grant. An easement is an incorporeal hereditament which is essentially a minor interest in land. The ownership of an easement is a mere right which confers certain rights over the land in question, but never any exclusive right to possession. An easement allows a land owner, by virtue of its ownership of its land, to exercise rights over adjacent lands. These include rights of way, light and water. The common law recognises an easement as enforceable by or against successors in title to the parties who originally created it. The key features of an easement are as follows:

- There must be a user of the right;
- Use of the right must be continuous and not intermittent; and
- The use must be capable of forming the subject matter of a grant.

### 2. Creation of an Easement

To create an easement four essential characteristics must be present.

### 3. Dominant and servient tenement

The easement can only exist if it is annexed to a piece of land. It cannot exist independently of the land which is benefited by it. It must also be connected to the land and improve its amenity, utility or convenience. An easement essentially involves the existence of two pieces of land – that is, the dominant and servient tenements. The dominant tenement is the land benefited by the easement and the servient tenement is the land over which the easement exists.

### 4. Accommodation of dominant tenement

The easement must benefit the land of the dominant owner. Accordingly, there must be sufficient proximity between the dominant and servient tenement to allow a practical benefit to be conferred on the dominant lands. If the right confers a personal benefit only on the owner of the dominant tenement, this is not classified as an easement.

### 5. Ownership or occupation by different persons

The dominant and servient lands must be held under separate and distinct ownership. The only exception to this general rule is that an easement can exist if there is a common owner of the two tenements if the occupation of them is not common. A common example of this is where one person owns neighbouring lands and is leasing part of the lands to a tenant.

### 6. Subject matter of the grant

The right contained in an easement must be capable of forming the subject matter of a grant. This means that every easement must be created by deed and relate to categories of properties which have been regarded over the centuries as been capable of being conveyed from one person to another. Where an

easement already exists, whether by operation of law or otherwise, it is deemed to pass automatically on a conveyance under Section 6 of the Conveyancing Act 1881. A deed must define precisely the nature of the easement granted or reserved, its nature and the way in which it has been exercised. A practical example is in relation to rights of way. The road or other area over which the right of way is being exercised must ideally be clearly identified by reference to a plan or map annexed to the deed.

## **7. Methods of Acquiring Easements**

There are three methods of acquiring easements.

## **8. Prescription of common law**

To succeed in a claim to have an easement recognised the claimant must establish use from time immemorial. The courts determine the date of legal memory as 1189 and are prepared to make this assumption on production of evidence of 20 years of continuous use.

## **9. Lost modern grant**

This doctrine was developed by judges to overcome the ease with which a claim at common law could be defeated. Under this doctrine it is presumed that at some stage in the past a formal grant of the right was made by deed, which was subsequently lost. This prevents a claim from being defeated by proof that the easement could only have come into existence after 1189. The courts have refused to preserve a lost grant if the surviving donor was under disability or if it can be shown during the entire period of use that nobody could have lawfully made the grant. The doctrine can be defeated by establishing unity of possession at some stage since 1189.

## **10. Prescription Act 1832**

The Prescription Act has been effective in Ireland since January 1 1859. The aim of the act was to alleviate the difficulties caused by the other two methods of prescription detailed above. The act provides for a shorter period in the case of easements of 20 years without interruption. Claims cannot be defeated by establishing enjoyment of the easement later than 1189.

Section 3 of the act applies to easements of light. There is no requirement to establish the user as of right in relation to easements of light. Section 4 provides that the period must be without interruption. Any interruptions must be substantial and the user must have actually ceased for a period of one year. The year is not deemed to commence until the claimant is aware of the interruption and the identity of the person interrupting.

## **11. Comment**

There are several similarities encapsulated in the doctrines of adverse possession and prescription. Both endeavour to enforce property rights in favour of those who have been in occupation of the lands or who have been obtaining undisputed benefits over the lands for a prolonged period.

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