# LLB ANSWERED

## SAMPLE NOTES FROM OUR LLB *CORE GUIDE*:

## *Land Law*

## *Easements chapter*

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# 8 EASEMENTS

## KEY CONCEPTS

### REQUIREMENTS FOR AN EASEMENT

Criteria established by ***Re Ellenborough Park***:

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|---|---|
| The dominant and servient tenements must **exist** | The easement must **accommodate** the dominant tenement |
| There must be prior **diversity of occupation** | The easement must be **capable of lying in grant** |

### ACQUIRING AN EASEMENT

An easement can be acquired:

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|---|---|---|---|
| **EXPRESSLY** | **IMPLIEDLY – BY:** | | **BY PRESCRIPTION** |
| | **NECESSITY** | **COMMON INTENTION** | |
| | ***WHEELDON V BURROWS*** | **SECTION 62 LPA 1925** | |

### RESTRICTING THE USE OF AN EASEMENT

Where the use of an easement has **changed or become excessive** its use can be restricted.

### EXTINGUISHING AN EASEMENT

An easement may be extinguished by:

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| **EXPRESS AGREEMENT** | **IMPLIED RELEASE** |

# WHAT IS AN EASEMENT?

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| **EASEMENT** | An easement is a **right** benefiting one piece of land (**the "dominant" tenement**) that is enjoyed over another landowner's land (**the "servient" tenement**). An easement is not an estate in land (***Baker v Craggs*****).**<br><br>An easement may be **positive**, in that it allows the owner of the dominant land to do something on the servient land, such as use a road. An easement could also be **negative**, in that it limits what the owner of the servient land may do on the servient land. Negative easements are less common. |

# REQUIREMENTS FOR AN EASEMENT

The requirements for an easement were established in the case of ***Re Ellenborough Park***:

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| **1)** | There must exist **dominant** (i.e. land benefited by the easement) **and servient** (i.e. land burdened by the easement) **tenements** (***London & Blenheim Estates v Ladbroke***). |
| **2)** | **The easement must <u>accommodate the dominant tenement</u>, i.e. benefit the dominant tenement** by improving it or making its use more convenient in some way connected with the normal use of the property (***Re Ellenborough Park***). |

- The dominant and servient tenements must be sufficiently <u>proximate</u>, i.e. nearby, even if the properties are not direct neighbours (***Bailey v Stephens***).
- The advantage/benefit cannot be purely personal; it must have a <u>proprietary</u> element (***Hill v Tupper***).
- The benefit can be to a business, as it was in ***Moody v Steggles*** where a business owner had an advertising billboard on the side of the property.
- In ***Polo Woods v Shelton Agar*** it was made clear that the easement does not have to be necessary – it can just <u>enhance</u> the utility of the property. The grant of recreational rights can amount to an easement where adjacent land is accommodated ***Regency Villas v Diamond Resorts***.
- ***Platt v Crouch*** – in this case, the right to moor boats was capable of being an easement for the benefit of the hotel on the dominant land.
- ***London Blenheim Estates v Ladbroke Retail Parks ltd*** – the dominant and servient tenements must be in existence.

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| **3)** | **<u>Prior diversity of occupation</u>, i.e. tenements must be occupied by different people.** In other words, "*a man cannot have an easement over his own land*" (***Roe v Siddons***). |

- In ***Wright v Macadam*** it was held that diversity exists if the <u>occupiers</u> are diverse, meaning that a landlord can give an easement to his tenant, for example.

- However, subsequent case law has cast doubt on how essential the diversity of occupation requirement is: under the rule in ***Wheeldon v Burrows*** it is possible to create a "quasi-easement" benefiting one piece of land over another piece of land where both pieces of land are owned by the same person (this can include rights of way – ***Wood v Waddington***) *(see below).*

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| **4)** | **The right is capable of lying in grant, i.e. of being the subject matter of a deed**. The grantor and grantee must occupy the dominant and servient tenements and be *sui juris* legal personalities. |

The right must be capable of reasonably exact description, e.g. it can be pointed to on a plan. In ***Aldred*'s case** it was held that the promise of "a good view" was too vague to be the basis for an easement. In ***Phillips v Pears*** it was held that any easement must be in the general nature of rights recognised as easements in order to lie in grant. Examples of rights capable of lying in grant:

- Right of way (***Borman v Griffith***);
- Right of light;
- Right of storage (***Wright v Macadam***);
- Right of signage (***Moody v Steggles***);
- Right of structural support;
- Right to water in a defined channel;
- Right to air in a defined channel (***Wong v Beaumont***); and
- Right to use a golf course, swimming pool and tennis court (***Regency Villas v Diamond Resorts***).

**NOTE**: the courts will not recognise new negative easements – the list is closed (***Hunter v Canary Wharf***). However, the list of categories of positive easements is not closed (***Regency Villas***).

## ADDITIONAL CRITERIA FOR EASEMENTS:

In addition to the four criteria above, an easement must **not**:

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| **5)** | **require expenditure by the servient tenement owner.** |

- **However**, note the decision in ***Rance v Elvin***, which concerned a right to allow water through pre-existing pipes where the servient tenement owner was legally obliged to pay the water meter in full for both owners – the court held that this was allowed because the dominant tenement owner was liable under a quasi-contract to reimburse him.

- As with expenditure, an easement generally cannot impose a **positive** obligation ***(William Old International v Arya)***.

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| **6)** | **amount to exclusive possession** (***Grigsby v Melville***). |

- In ***Grigsby*** the right to store items in a cellar was not an easement. An easement to park one's car will be allowed where there is a choice of parking spaces (***Hair v Gillman***) or where the servient owner is not deprived of possession and control over the spaces (***Moncrieff v Jamieson***). See also ***Batchelor v Marlow*** and ***Kettel & Ors v Bloomfold Ltd***.

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| **7)** | **depend on permission by the servient tenement owner** (***Green v Ashco Horticultural***). |

# ACQUIRING AN EASEMENT

An easement can either be granted **expressly** or **impliedly** or acquired by **prescription**.

## EXPRESS ACQUISITION

Whether an easement is legal or equitable is determined by the document in which it is included, e.g. a 10-year legal lease.

In order to be legal, an expressly granted easement must be:

- created for the duration of the freehold or leasehold;
- acquired by deed (**s. 52 LPA 1925**; **s. 1 LP(MP)A 1989**); and
- registered (**s. 27(2)(d) LRA 2002**).

If the above formalities are not fulfilled, the easement will still take effect as an equitable easement as long as there is a contract for the future grant of an easement, or the grantor only has an equitable estate. A valid contract is necessary (**s. 2 LP(MP)A 1989**).

**NOTE:** the formalities for granting an express easement do not apply to easements acquired impliedly or by prescription.

## IMPLIED ACQUISITION

An implied easement can be acquired in any one of the following ways:

**1) NECESSITY**:

To acquire an easement by necessity, it must be impossible to use the land without the easement (***Manjang v Drammeh***). It is not sufficient for the easement to simply be advantageous. In ***Walby v Walby***, the court distinguished true necessity from mere necessity for the purposes of reasonable enjoyment: the land must be useless without an implied easement.

**Examples**:

- a right of way needed to access a plot of land could be impliedly acquired by necessity, but a right to run sewerage pipes under neighbouring land could not be (***Pryce v McGuiness***).

- if one can park a car nearby and access one's land by a short walk then an alternative right of way is not necessary (***Re MRA Engineering***).

**2) COMMON INTENTION:**

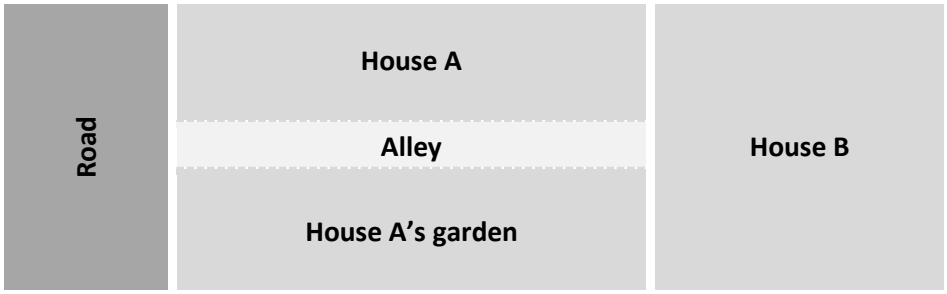
Where both parties intend the property to be used in a specific way (***Wong v Beaumont***). In ***Davis v Bramwell*** it was held that this common intention should be definite and particular, and the easement must be necessary to give effect to this common intention.
In ***Strafford v Lee***, **Nourse J** emphasised that common intention and necessity are distinct: easements must be either necessary to use the land at all, or necessary to give effect to a common intention.

**3) UNDER THE RULE IN *WHEELDON V BURROWS***

**NOTE**: this only applies to grants.

Where a person transfers part of his land to another, this transfer impliedly includes the grant of all rights in the nature of the easements that the seller enjoyed prior to the transfer. The rule in ***Wheeldon v Burrows*** applies to the simultaneous transfer of dominant and servient tenements.

For example, imagine that Tom owns two houses ("House A" and "House B") on the same piece of land and often walks through an alley by House A to get to House B. If Tom then sold or leased House B to Abdul (but kept House A), Abdul would enjoy an easement to walk through the alley past House A to get to House B, just as Tom had done.




**Requirements for the rule in *Wheeldon v Burrows* to apply:**

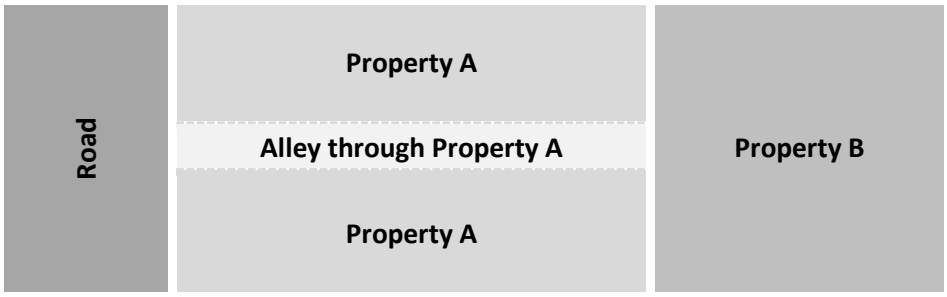
- Continuous and apparent use of the easement, i.e. the use must be obvious (for example, a worn pathway was sufficient in ***Sovmots v Secretary of State for the Environment***).
- The right must be in use immediately prior to the transfer (***Alford v Hannaford***).
- The easement must be necessary for the reasonable enjoyment of the property. This is not as strict as for an easement of necessity but must be more than simply beneficial. For example, in ***Wheeler v JJ Saunders*** a pig farm was not deemed to need two rights of way, even though one was rutted.
- The action must cover the easement that is claimed (***Hillman v Rogers***).

**4) SECTION 62 LPA 1925:**

This can be used to convert "quasi-easements" (easements where the two tenements are owned by the same person) on sale of one of the tenements into full easements – unless it has been expressly excluded (**s. 62(4)**). It is likely that prior diversity of ownership is not required (***Platt v Crouch***).
The difference between the rule in ***Wheeldon v Burrows*** and **s. 62 LPA** is that to apply the rule in ***Wheeldon v Burrows***, the owner must be selling off a part of his one piece of land, whereas to use **s. 62** the owner must be selling off one of two separate pieces of land.

A recent upper tribunal case (***Taurusbuild Ltd v McQue***) came to the surprising conclusion that where an owner of two adjoining properties mortgaged one, easements could be implied in favour of the mortgagee over the unmortaged land (under ***Wheeldon***) and that on sale of the mortgaged land the benefit of the easements could pass under **s.62**. This case may not be followed.

For example, imagine that Tom actually owns two separate but adjoining properties, and that he has always used the alley through Property A to reach Property B so that when he sells Property B to Abdul, the deed of sale crystallises the right to use the alley as an easement benefiting Property B and its inhabitant, Abdul.




## PRESCRIPTION

If the easement has been in continuous use for 20 years without interruption or protest, then it will be impliedly acquired (**s. 2 Prescription Act 1832**).

- The use must be known to the landowner (***Barney v BP Truckstops Ltd***).
- The law of prescription is based on acquiescence and not consent – the owner of the servient tenement must simply let it happen, rather than expressly permit the use (***Odey v Barber***).
- If the alleged easement was used in the required manner for the necessary period of time, there is a rebuttable evidential presumption that the easement had been enjoyed as of right (i.e. without force, without secrecy and without permission) (***Welford v Graham***).
- After twenty years of continuous use there is a judicial presumption of a lost modern grant – a common law construct allowing the court to enforce the easement as if it had in fact been granted (*see* ***Orme v Lyons***).

## RESTRICTING THE USE OF AN EASEMENT

Where the use of an easement has changed or become excessive in relation to the original right granted, its use can be restricted.

For example, in ***Jelbert v Davis*** a neighbour changed his farm into a caravan park, so his previously-existing right of way over neighbouring land was restricted – a right of way for a farmer is very different from the traffic created by a caravan park. The opposite decision was reached in ***Stanning v Baldwin*** where an access to one property acquired by prescription extended to the four properties to be built on a redevelopment. This was not a radical alteration.

# ENFORCING AN EASEMENT AGAINST SUCCESSORS-IN-TITLE

If the dominant land has not changed owners, then the original covenantee can still enforce the easement, as he retains the benefit. If the land has changed owners, the successor-in-title will get the benefit, because the benefit will automatically pass to a successor-in-title of the dominant tenement by way of **s. 62 LPA 1925**.

If the servient land has not changed owners, the original covenantor will retain the burden. If the servient land has changed owners, consider the points below.

For **registered land**, the burden passes to a subsequent covenantor if:

- it is a legal and expressly acquired easement, under **s. 27(2)(d) LRA 2002**; **or**
- it is a legal easement acquired impliedly or by prescription, and capable of being an overriding interest under **Sch. 3, Para. 2 LRA 2002**. It does not need to be registered, and will bind if it is known about, is obvious on a reasonable inspection, or is exercised within a year.
- **NOTE:** if it is an equitable easement then it should be protected by a notice on the charges register of the servient tenement (**s. 32 LRA 2002**).

For **unregistered land**, the burden passes to a subsequent covenantor if:

- it is a legal easement (regardless of how it was acquired), as legal rights bind the world.
- It is an equitable easement and has been registered as a D (iii) Land Charge at the Land Charges Department in order to bind purchasers for value.
- **NOTE:** If an easement was created pre-1926 and is still unregistered (which is unlikely) then consider the doctrine of notice (*see Registered and Unregistered Land chapter*).

# EXTINGUISHING AN EASEMENT

An easement can be extinguished by:

- **express agreement**; or
- **implied release**

Implied release applies where the easement has been abandoned, i.e. there has been a lack of use coupled with an act demonstrating intention to abandon. For example:

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| ***Swan v Sinclair*** | A right of way left unused for 50 years, during which time it had become blocked by fences, was held to be abandoned.<br>*Contrast with **Benn v Hardinge** below.* |
| ***Benn v Hardinge*** | A right of way left unused for 100 years, during which time the route had merely become overgrown, was **not** abandoned. |

# ANSWERING A PROBLEM QUESTION ON EASEMENTS

*The steps structure below outlines how to work through substantive issues to do with easements in a logical manner – it is worth reading in order to simply understand the topic in more detail and to help you prepare a detailed answer to a problem question.*

**STEP 1:** **Introduction – relevant definitions and issue spotting:**

Begin by defining an easement and stating that the issue is whether the easements are enforceable.

*You might find it helpful to do a quick diagram in your plan. This will prevent you getting any terms confused, e.g.*

| **Servient tenement (burdened land):** | | **Dominant tenement (benefited land):** | |
|---|---|---|---|
| Original covenantor: | Mr A | Original covenantee: | Ms C |
| Successor-in-title covenantor: | Ms B | Successor-in-title covenantor: | Mr D |

**STEP 2:** **Is the right capable of being an easement?**

Go through the four criteria established in ***Re Ellenborough Park***:

**1)** The dominant and servient tenements **exist**;

**2)** The easement **accommodates** the dominant tenement;

**3)** There is prior **diversity of occupation**; and

**4)** The easement is **capable of lying in grant**.

Also consider the additional criteria. **The easement must not**:

**5)** **require expenditure** by the owner of the servient tenement;

**6)** **amount to exclusive possession**; and

**7)** **depend upon permission** by the owner of the servient tenement.

**REMEMBER: all** criteria must be met.

**STEP 3:** **Has it been acquired as an easement?**

An easement can either be granted **expressly** or **impliedly or** acquired by **prescription**.

| STEP 4: | Has the use of the right changed or become excessive? |
|---|---|

If so, the use can be restricted to the extent that the right was used at the time that the easement was granted.

| STEP 5: | Is it a legal or equitable easement? |
|---|---|

For an expressly granted easement to be legal, it must comply with the necessary formalities. If it does not, it may still take effect as an equitable easement.

| STEP 6: | Can the easement be enforced by or against successors-in-title? |
|---|---|

Consider the passing of both the benefit and the burden of the easement. Have the owners of the dominant and/or servient land changed?

**REMEMBER**: the rules for the passing of the burden on the servient land are different for registered and unregistered land.

| STEP 7: | Has the easement been extinguished? |
|---|---|

Has there been an express agreement?

Could the easement have been extinguished by implied release?

| STEP 8: | Conclusion and remedies: |
|---|---|

Is the particular right capable of being an easement, and if so, has it been validly acquired and have the requisite formalities been complied with?

If so, and there are no other issues, it can be enforced by the original or successor covenantee against the original or successor covenantor of the servient land. An injunction or damages may be granted.

## ANSWERING AN ESSAY QUESTION ON EASEMENTS:

**EXAMPLE QUESTION:** *Does the current law on easements strike the right balance between certainty and fairness?*

*The steps below provide a framework to answer this question. You should use each step as an opportunity to expand on particular points and to discuss them in detail, within the context of your overall answer to the question. Note that the structure below is only one suggested way of answering this question – you should feel free to adapt it as you see fit.*

**STEP 1:** **Introduction:**

There are numerous ways to structure your answer. You could:

- address the law and cases in chronological order;
- break the law into separate parts/issues; or
- look for common themes/groupings.

Organising your answer in one of these ways can help you to cover everything and make concise points relevant to your answer. This may help you achieve a higher grade.

For clarity, you should include a "**route map**" in your introduction. State what you intend to argue and in brief terms how you intend to reach this conclusion. This guides the reader through the points you are going to make, clearly setting out your structure and argument from the beginning.

For example, you might write something like this:

> *This essay consists of three main parts: first, detailing the uncertainties surrounding the content of easements; second, the creation of easements; and finally, the extinguishment of easements. I will argue that the various safeguards surrounding the implication of easements means that the law on easements does currently strike an appropriate balance between certainty and fairness. The number of cases where a tenement holder is unfairly treated or prohibited from enjoying their land through fear of uncertainty in the law is minimal.*

You could begin your essay by recognising that the tension between **certainty** and **fairness** is vital to the debate on easements. On one hand, the law should try to accommodate the needs of homeowners who want to make sure that permissions they extend to their neighbours cannot be exploited by the tenant or freeholder who replaces them. On the other hand, the law should make some accommodation for the needs of purchasers who buy properties on the assumption that they have the right to use a passage for access only to find that this was a permission extended out of kindness to the previous occupier rather than a proprietary right. You could explain that the possibility of easements being implied has caused some controversy as it opens up the possibility that landowners might burden their property unwittingly.

**STEP 2:** **Content of easements:**

You should argue that the balance is (or is not) about right and support your argument with specific examples. For example, you could use the following points to support your argument:

- The difference between the right to a view (***Aldred's Case***) and the right to light, the latter of which is protected by statue, namely the ***Prescription Act 1832*** is questionable.
- It can be argued that there is confusion around the circumstances where an easement might appear to grant exclusive possession. It was held that parking could be an easement in ***Moncrieff v Jamieson***, but not when it granted the exclusive right to park cars between certain hours in ***Bachelor v Marlow***. ***Hair v Gillman*** is authority for the proposition that parking a car where more can fit and not in a defined space could be an easement, yet the Court of Appeal in ***Saeed v Plustrade*** deliberately left the question open. The case law is uncertain in this area.
- Is the "reasonable use" test for exclusive possession too vague? Explain why, or why not.

**STEP 3:** **Creation of easements:**

As above, support your argument with specific examples. You could argue the following:

- The majority of easements will be expressly granted or reserved so there are arguably no problems with legal certainty.
- There is no real issue with common intention because if all the law does is realise the parties' specific intention (***Chaffe v Kingsley***), then it is hard to argue that this is unfair or not ascertainable. The need for definite and particular intention (***Davis v Bramwell***) reduces the possibility that a party will be held to an intention they did not actually have.
- Implied creation through necessity presents problems. Why should a landowner have his property bound due to another's ignorance of the law, especially since the servient tenement could be bound without the consent of the landowner for generations?
- However, there is a safeguard in that "necessity" means strict necessity, rather than just necessity for reasonable use (***Walby v Walby***) or convenience (***Re Dodd***). In ***Manjang v Drammeh***, the possibility to access the property by boat meant the contested easement (a right of way) was not necessary. Contrast with ***Wong v Beaumont***.
- The rule in ***Wheeldon v Burrows*** presents problems. When one is walking about one's own land, one does not foresee that one could be creating easements that will bind one's property to its detriment. However, the safeguards of prior and consistent use of the easement can be argued to mitigate this potential unfairness/uncertainty. It is also possible to expressly exclude the application of the rule in the transfer of property.
- **Section 62 LPA 1925** presents similar issues. Would a seller expect the buyer of his property to access it in the same way that the seller did?
- Prescription is hard to make out –long time frames and complex hurdles are involved.

**STEP 4:** **Extinguishment of easements:**

- If one is caught by the rule in ***Wheeldon v Burrows*** and one's tenant gained an easement over one's land, once the lease expires it is possible to extinguish the easement via the rule regarding the unity of possession and title.
- You could argue that neighbours should be able to agree on easements without recourse to the law. They could agree to abandon any easement and instead sign a contractual licence, which only creates a personal rather than proprietary right.

**STEP 5:** **Conclusion:**

Summarise your argument: to what extent do you agree with the statement and why?

**FURTHER READING**

**Barnsley, D. G.**, 1999. "Equitable easements – sixty years on" *Law Quarterly Review*, 115, pp.89-118.

**Law Commission**, 2011. *Making land work: easements, covenants and profits à prendre*. No. 327.