STEVENS&BOLTON

A GUIDE TO SUCCESSFUL DEVELOPMENT: EASEMENTS

The Easements which have not been properly investigated or understood have the capacity to sterilise development of land. This note explains briefly what easements are, examines why they might be important to a developer and considers what can be done about them. This is considered from the perspective of a developer who is burdened by an easement. Similar considerations will however also apply to a developer who wishes to benefit from an easement.

What are Easements?

Put simply, easements are rights benefitting one piece of land (the "dominant land") owned by one person which is enjoyed over another piece of land (the "servient land") owned by someone else. Easements can be positive or negative. A common example of a positive easement is a right of way a dominant owner might enjoy over servient land. A negative easement might be a right to receive light or support from the servient land.

All of the following characteristics must be satisfied for an easement to exist:

- There must be two clearly identifiable pieces of land.
- The owners or occupiers of the land must be different.
- The right must benefit the dominant land therefore not merely confer a personal benefit to the owner (such as a right for the benefit of his employment).
- The easement cannot be too vague or wide or oust the burdened (servient) owner from its own right to control the land.

Why is it important for the developer to be aware of Easements?

Easements can dictate what the developer is able to do with its land. Understanding the legal nature of the right is therefore imperative before a developer spends significant sums on designing its new scheme. A developer will need to be mindful of the following:

- Unless expressly granted for a particular term of years by deed, easements are often permanent, irrevocable rights and cannot be easily abandoned. Courts are reluctant to find that an easement has been abandoned. For example, if a dominant owner may not have used the right for a number of years, even decades. However, non-use without a positive intention to give it up for good is unlikely to deem the easement as having been abandoned. So, once the right attaches to the servient land, it is likely to remain enforceable until it is positively terminated.
- Easements are interests in land, so they can be conveyed and bind successors in title to the land. A developer will therefore be bound by something that it played no part in granting. Whether easements are binding on a

developer will sometimes depend on how they came into existence including whether or not the land in question is registered or unregistered. Reliance on what the Register says alone may be insufficient and further enquiries will need to be made.

- Easements are not always immediately obvious. Easements in writing need to be made by deed. However they need not be granted expressly. In some circumstances easements can arise simply by implication. For example, easements can arise by necessity if the dominant land is left landlocked after sale of part. They can also arise by statute or by common intention. As quite commonly experienced in practice, easements can also arise as a result of long use. These prescriptive rights generally arise where the dominant owner has enjoyed 20 years of use 'as of right' (i.e. without challenge, without permission and without secrecy). Claiming a prescriptive right successfully will be reliant upon adducing sufficient historic evidence to prove long use. This may not always be readily available to the developer.
- The principles that underpin easements are still evolving. In Gore v Naheed (2017), the Court of Appeal recently diluted the long accepted rule that an owner of two neighbouring plots cannot use a right of way benefitting one plot in order to access the second plot. In this case, the second plot (a garage) was held to benefit from the right over a driveway to access the first plot, the main house. This was because on the facts, the garage was being used 'ancillary to' and 'for the proper enjoyment of' the house. A developer will therefore need to understand the potential scope of an easement as it may have been extended.
- Substantial interference with an easement which acts to increase the burden on the servient land is actionable. In Lea v Ward (2017), a developer was successfully sued after interfering with a right of way by blocking Mr Lea's access with fencing. This was the case even though the interference was temporarily and an alternative route had been provided. A developer faced with an easement will therefore need to proceed with caution and consider what alternative options might be available before interfering with the right.
- Easements cannot be used excessively. They must only be used in such a way that does not exceed the original extent and purpose for which it was granted. The test is whether the proposed use by the dominant owner will substantially increase the burden on the servient land. If it does, this could give rise to a claim for trespass against the dominant owner.
- It is not always clear on the face of a document whether the right being granted is an easement or a lease or licence. In De Le Couna v Big Apple Marketing Ltd (2017), the Court recently considered whether a right to park was an easement or a lease. On the face of it, the document was called a lease but in substance it granted only rights, not spaces. The owner was also still able to control the spaces and so had not been ousted from the servient land. On holding that the right amounted to an easement, the Court found in favour of substance over form.

What can be done about Easements?

There A developer acquiring land for development should not underestimate the way in which easements can affect or benefit land. A well-advised developer would therefore be advised to take precautionary steps before committing to a project and commencing works which might become the subject of a dispute.

Injunctive proceedings

Most concerning for a developer is the threat of injunctive proceedings issued to prevent the works. At best this can cause insufferable delay and additional cost. At worst it could cripple the development altogether. The Courts are not consistent in their approach to granting injunctions although it will use its discretion in doing so. An injunction may be granted if the developer has acted in a high handed manner or where damages are not considered an adequate remedy. Whilst a Court may require the dominant owner to provide a cross-undertaking in damages (as the price of the injunction) this may not stop a Court from granting it. A developer must therefore tread very carefully before interfering with an easement and take specialist advice early on to understand the potential

risks of injunctive action.

Negotiation

Subject to any restrictions imposed by indemnity insurance and taking legal advice, a developer should consider engaging with the dominant owner at an early stage to agree a sensible way forward. This could be either to vary the easement, or extinguish it altogether. It might be possible, for example, to agree alternative routes or find ways to reduce the impact of the developer's works in such a way that any interference with the easement is minimised. Avoiding unnecessary neighbour disputes will preserve ongoing relations, but the developer may have to pay a price for this.

Declaration

If agreement with the dominant owner is not possible, it may be appropriate to seek a declaration from the Court as to the easement's enforceability, scope and meaning. This will provide the developer with certainty before deciding to proceed with the works. However, the outcome of Court action is uncertain and this can cause costly delays.

Practical points

The following practical steps are therefore worth considering by developers at an early stage:

- Carry out due diligence thoroughly. Undertake a visual inspection of the land to check for signs of any possible easements or to understand the extent of the right being claimed.
- Gather all plans, documents, deeds and photographic evidence to help identify the easement.
- Do not take the document relied on at face value. The meaning conveyed is important and there can be differing interpretations which may need further clarification.
- Do not expect an easement to have been abandoned. Make all necessary enquiries about its use and whether the dominant owner intends to still rely on it.
- If there are gaps in the information, ask previous owners to provide statutory declarations to act a credible supporting evidence.
- Understand the scope of the easement to see if the right can be accommodated into the development without interfering with it.
- Subject to the impact on any indemnity insurance policy restrictions, consider approaching the dominant owner to agree a variation to the right or terminate it altogether.
- If a developer intends to rely on easements itself, it should consider whether the rights are enforceable and if they are wide enough to be fit for purpose.
- Do not expect issues to be resolved quickly. It can take months if not years to resolve a dispute so the sooner this is addressed the better.
- Take legal and/or specialist expert advice to consider alternative options in case there is margin for a potential dispute.

TO FIND OUT MORE

For further information about any of the issues raised in this guide, please contact:

MARKUS KLEMPA
Managing Associate
+44 (0)1483 734273
markus.klempa@stevens-bolton.com

Tel: 01483 302264 Fax: 01483 302254
www.stevens-bolton.com